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The Utility of Desert

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ARTICLES

THE UTILITY OF DESERT

*Paul H. Robinson and John M. Darley**

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Criminal punishment can be justified on two broad grounds. The first is utilitarian (sometimes called "consequentialist"): Punishment for a past offense is justified by the future benefits it provides. Characteristically, the future benefit is to avoid, or at least to reduce, future crimes. The other ground of justification is anchored in the past: Punishment that gives an offender what he or she deserves for a past crime is a valuable end in itself and needs no further justification (such as a showing of a future benefit). This is typically referred to as the "retributivist" or "just deserts" view. The arguments of these two positions are generally considered irreconcilable: Consequentialist grounds are justified on the basis of utility, desert grounds on the basis of fulfilling a deontological moral mandate. In this Article, we argue that, while the underlying rationales of the two views may be irreconcilable, their practical applications, properly done, suggest similar distributions of liability and punishment. More specifically, while we argue that society ought to assign criminal punishments on essentially just desert grounds, our arguments are based on purely utilitarian considerations. We argue that, because it promotes forces that lead to a law-abiding society, a criminal law based on the community's perceptions of just desert is, from a utilitarian perspective, the more effective strategy for reducing crime. While much empirical work remains before we fully understand the dynamics of the forces that we cite as suggesting this conclusion, we can say, at very least, that utilitarians must include in their policy calculations the likelihood of a significant cost to crime control in any deviations from a desert distribution.

The debate over the justification for punishing criminals has been deeply confused, and the confusion has a long and honorable history. In the late eighteenth century, Jeremy Bentham argued that "general prevention ought to be the chief end of punishment, as it is its real

justification."[1] From this, Bentham went on to develop the classic formulation of the deterrence rationale for punishment. Thus, tautologically to him (but not tautologically to utilitarians who think rehabilitation could minimize crime, for example) an offender's punishment ought to be set not according to the amount deserved, but rather according to the amount needed to deter future instances of the offense. "If the apparent magnitude, or rather value of [the] pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it."[2] Immanuel Kant, a contemporary of Bentham, summarized an opposing "just deserts" rationale. "[P]unishment can never be administered merely as a means for promoting another good . . . ."[3] Punishment ought to be "pronounced over all criminals proportionate to their internal wickedness . . . ."[4] Of course, the history of justifications goes back further; Kant was giving a particular formulation of the Aristotelian view that criminals should be given punishments and penalties, not rehabilitation.[5] Plato weighed in with a justification for punishment that foreshadows the modern rehabilitation justification, arguing that punishment ought not be inflicted for vengeance, but rather to make the offender a better person.[6] The debate between the desert justification and the various utilitarian justifications such as deterrence, incapacitation, and rehabilitation has continued to divide criminal law thinkers to this day.[7] Perhaps more importantly, it has divided practitioners. In the history of incarceration in this country we have seen repeated confusions in what we might call the "public philosophy of punishment," the reasons claimed for the justification of criminal sanctions by policy-makers and legislators.

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[1] JEREMY BENTHAM, *Principles of Penal Law*, *in* 1 THE WORKS OF JEREMY BENTHAM 396 (John Bowring ed., 1962).

[2] *Id.*

[3] IMMANUEL KANT, THE SCIENCE OF RIGHT (W. Hastie trans.), *reprinted in* GREAT BOOKS OF THE WESTERN WORLD: KANT 397, 446 (Robert M. Hutchins ed., 1952).

[4] *Id.* at 447.

[5] ARISTOTLE, NICOMACHEAN ETHICS (W.D. Ross trans.), *reprinted in* GREAT BOOKS OF THE WESTERN WORLD: ARISTOTLE II 335, 359, 383 (Robert M. Hutchins ed., 1952).

[6] PLATO, THE LAWS 241 (A.E. Taylor trans., 1960). Rothman reminds of us of an historical fact that it is extraordinarily hard to remember given our modern perceptions of penitentiaries as grim, grey places of brutal convict violence: a rehabilitationist philosophy motivated the development of the modern penitentiary, a place in which the convict would be incarcerated until private contemplation showed him the error of his ways, until, in other words, he became "penitent" for his wrongs and could be discharged a better man. DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 79-108 (1971).

[7] For a discussion of the rationales-of-punishment debate and its historical roots, see Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 AM. J. JURIS. 97 (1994); *see also* JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE (1985).

Recently, the confusion has seemed to accelerate; the last decades have seen a rapid oscillation among these rationales for the distribution of criminal liability. The rehabilitationist approach, popular in the 1960s, has lost credibility. Deterrence, grounded in a theory of rational conduct, has ceased to command much confidence among thoughtful criminologists, for a number of reasons that we shall show. Incapacitation, currently popular in the form of "three strikes and you're out" laws, can also be expected to run into difficulties for reasons we shall explain. Part I of this article details the limitations of the standard utilitarian theories. Those limitations mean that policy-makers and legislators, not just academics, should be interested in examining our claim that the greatest utility in controlling crime is found in doing justice.

As we signalled, we argue for a just desert allocation of liability, although a particular and unusual form of desert-based liability: one based upon the community's shared principles of justice rather than on those developed by moral philosophers. Our arguments for this system are, as far as we know, unique: The major claim for our desert-based liability assignment system lies in its advantages in promoting future law-abiding behavior. We give, in other words, a utilitarian justification for the only non-utilitarian system for allocating punishment.

The desert-based liability system that we advocate is one that normally assigns liability and punishment according to the principles of justice that the community intuitively uses to assign liability and blame. We ought to mark here that this is a sufficiently heretical variation on desert theory that it is likely that those who argue for a more standard desert theory, Kantians and others working from philosophical perspectives, will find it repugnant, first because it derives liability assignments from community sentiments rather than a reasoned logical system, and second because our arguments for a desert-based system are blatantly utilitarian.

Our goal then is to persuade those who determine rules of criminal liability and punishment—criminal law theorists, code drafters, legislators, and judges—that a criminal law that assigns punishment in ways that closely reflects the community's intuitions about appropriate condemnation and punishment has a number of hitherto unrecognized advantages over alternative systems. Specifically, a distributive theory that tracks the community's perceived principles of justice has a greater power to gain compliance with society's rules of lawful conduct. Therefore, we suggest, those who base criminal liability on the traditional utilitarian considerations—whether deterrence-based, rehabilitationist, or incapacitationist—run the considerable risk of causing a net drop in the law's effectiveness in controlling crime.

Here is a brief summary of our argument as detailed in Part II of this Article: The real power to gain compliance with society's rules of prescribed conduct lies not in the threat or reality of official criminal sanction, but in the power 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 those social networks, and the internalized representations of those norms and moral precepts cause people to obey the law.

Next, the core of our argument, set out in Part III: 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 these norms and moral principles. It can contribute to and harness the compliance-producing power of interpersonal relationships and personal morality.

The criminal law can have a second effect in gaining compliance with its commands. If it earns a reputation as a reliable statement of what the community, given sufficient information and time to reflect, would perceive 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 characteristic of ours, an apparently harmless action can have destructive consequences. When the action is criminalized by the legal system, one would want the citizen to "respect the law" in such an instance even though he or she does not immediately intuit why that action is banned. Such deference will be facilitated if citizens are disposed to believe that the law is an accurate guide to appropriate prudential and moral behavior.

The extent of the criminal law's effectiveness in both these respects—in facilitating and communicating societal consensus on what is and is not condemnable, and in gaining compliance in borderline cases through deference to its moral authority—we argue is to a great extent dependent on the degree of moral credibility that the criminal law has achieved in the minds of the citizens governed by it. Thus, we assert, the 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 the community's principles of appropriate liability and punishment.

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. In Parts IV, V, and VI, we discuss how past reforms have hurt the criminal law's moral credibility, and we propose reforms by which its moral credibility might be enhanced.

We begin the argument for our position by criticizing all of the alternatives. That is, before we detail the case for enhancing the criminal law's moral credibility, we comment on the other utilitarian theories for distributing criminal liability and the difficulties that each face. Our conclusion is not that these standard utilitarian mechanisms for controlling crime have no effect in reducing crime, but rather that they have only a limited benefit that is outweighed by their cost in undercutting the law's crime control power by reducing its moral credibility. Remember that sentences based upon desert do provide the opportunity for rehabilitation, incapacitation, and deterrence. In arguing for a desert distribution, then, we need show only that the *additional crime control benefit* that the standard utilitarian analysis claims by *deviating from a desert distribution* is outweighed by the additional cost that such deviation incurs as it inevitably undercuts the criminal law's moral credibility. The optimum distributive principle, we argue, is one that rehabilitates, incapacitates, and deters, but only through the use of liability and punishment that tracks the community's principles of perceived desert.

I. Limitations of the Standard Utilitarian Theories for Distributing Criminal Liability

A. Deterrence

Social scientists have increasingly suspected that the threat of official punishment by the criminal justice system is of modest effect in limiting crime. One reason for its limited effect is the low risk of punishment an offender faces for the contemplated offense. Consider the many ways that an offender can routinely escape punishment for an offense.

An astounding number of serious offenses are never reported to police (*e.g.*, 21% of rapes, 40% of burglaries), either out of embarrassment or fear of reprisal or from a belief that the police are impotent or unwilling to do anything.[8] Of the offenses reported, clearance rates (the rate at which police identify and arrest a suspect for reported

[8] Phillip J. Cook, *Punishment and Crime: A Critique of Current Findings Concerning the Preventative Effects of Punishment*, 41 Law & Contemp. Probs. 164, 172 (1977). *Compare* Table 1, Personal and household crimes, 1990, 1990 Criminal Victimization in the United States 16 (1992), *with* Table 3.122, Estimated number and rate of offenses known to police, 1990, 1992 Sourcebook of Criminal Justice Statistics 357 (1993).

offenses) have been steadily dropping for decades. The homicide clearance rate nationwide, which was 93% in 1955, has steadily declined to a current 67%. Rape has declined from 79% to 52%. Burglary went from a not very high 32% to a sad 13%.[10] And, of course, getting arrested is a far cry from punishment. The overall conviction rate of those arrested for the most serious offenses—homicide, rape, robbery, burglary, aggravated assault—is 30%.[11] Further, less than half of those convicted of a felony are sentenced to prison.[12]

The cumulative effect of the many escape hatches leaves a deterrent threat that looks like this: Homicide offers a 44.7% chance of being caught, convicted, and imprisoned for that offense. A person contemplating a rape faces a 12% chance of going to prison for that offense. Robbery presents a 3.8% chance. Assault, burglary, larceny, and motor vehicle theft are each a 100-to-1 shot.[13] To put it mildly,

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[9] The chart statistics are drawn from the following sources:

Column (a): Table 1, Personal and household crimes, 1990, 1990 CRIMINAL VICTIMIZATION IN THE UNITED STATES 16 (1992).

Column (b): Table 3.122, Estimated number and rate of offenses known to police, 1990, 1992 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 357 (1993).

Column (c): Table 4.2, Number and rate of arrests, 1990, 1991 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 424 (1992).

Column (d): Federal figures from Table 5.15, Defendants convicted in U.S. District Courts, 1990, 1992 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 486 (1993); State figures from Table 5.49, Felony convictions in state courts, 1990, *id.* at 528.

Column (e): Federal figures from Table 5.19, Offenders sentenced to prison in U.S. District Courts, 1990, *id.* at 490; State figures from Table 5.52, Felony sentences imposed by state courts, 1990 (figures determined by converting percentage incarcerated back to totals through Table 5.49), *id.* at 529.

[10] *Compare* 1955 statistics from: Table 15, Offenses known, cleared by arrest, and persons charged - 1955, 27 UNIFORM CRIME REPORTS FOR THE UNITED STATES 48 (1956) with 1991 statistics from: Table 4.19, Offenses known to police and percent cleared by arrest, 1991, 1992 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 450 (1993); *see also infra* note 13.

[11] *See supra* note 9 and accompanying text; Table 4.5, Arrests, by offense charged, 1992 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 429 (1993); Table 5.15, Defendants convicted in U.S. District Courts, *id.* at 486; Table 5.50, Most serious offense of felony offenders convicted in State courts, *id.* at 528.

[12] *See supra* note 9 and accompanying text; Table 5.52, Felony sentences imposed by State courts, 1992 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 529 (1993) (this figure does not include the many offenders who, before or after conviction, may spend several months in local jails). Of those actually sentenced to prison, the median time served ranges from 5.5 years for murder to 2.2 years for kidnapping to 1.4 years for arson. Table 6.125, First releases from prisons in 35 states, 1988, 1991 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 693 (1992). Even these short terms of imprisonment seriously overestimate the typical length of time served because these figures include only those offenders who are sentenced to prison. In reality more violent offenders are sentenced to jail than to prison, and for property offenses twice as many criminals are sentenced to jail. *See* Table 5.57, Sentences received in 14 States, 1988, 1991 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 549 (1992).

[13] *See supra* text accompanying note 9, col. (d). Note that the calculation gives the chance of being caught and convicted for that offense. No doubt many offenders will be caught and con-

our potential offender may not be entirely cowed by these threats. Table 1 summarizes the relevant statistics.

Even these risks of punishment, however, may tend to overstate the effectiveness of the deterrent threat. As one review remarked,

> From an empirical perspective, the existing literature seeking to estimate the expected utility model of criminal choice calls the model into question. . . . A number of laboratory and survey studies . . . of criminal choice provide possible explanations of the poor predictive performance of expected utility models . . . . These studies have found that probabilities used in decision making tend to be subjective rather than objective.[14]

As this suggests, if the task of the criminal justice system is the Bentham-Beccaria notion of deterrence,[15] then it is not the abstract "objective" probabilities that we want to examine, but the representations of these probabilities contained in the heads of potential offenders, and the disutilities that these persons place on the possible prison sentence. We want, in other words, to consider psychological theories of deterrence. A psychological theory of deterrence is a specific case of a "subjective expected utility theory," in which both the estimates of the probabilities of events and the utilities of those events are estimated for the individual about whom the predictions of actions are being made.

The result is worse from the point of view of those who wish to rely on deterrence to prevent crime. Many, if not most, offenders may be unrealistically optimistic about the precautions they take to avoid being caught, or the simple likelihood of being caught, and thus may underestimate that probability.[16] At the same time, just as people notoriously place high discounts on rewards that exist far in the future, so also do they on punishments.[17] The punishment of the prison term

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victed of a lesser offense. But of course this effect exaggerates the success of the system in capturing and convicting for lesser offenses.

[14] Pamela Lattimore & Ann Witte, *Models of Decision Making Under Uncertainty: The Criminal Choice*, *in* THE REASONING CRIMINAL: RATIONAL CHOICE PERSPECTIVES ON OFFENDING 129, 131 (Derek Cornish & Ronald Clarke eds., 1986) [hereinafter THE REASONING CRIMINAL].

[15] *See supra* note 7.

[16] Floyd Feeney's interviews with robbers suggest that first-time robbers feel a good deal of fear and apprehension, while more experienced robbers were much less tentative and fearful while committing robberies. Floyd Feeney, *Robbers as Decision-Makers*, *in* THE REASONING CRIMINAL, *supra* note 14, at 53, 65-66.

[17] In general, people discount future events a great deal. The research method to determine this involves offering a person a choice of, say, $100 now or $200 after some delay and asking them to set the delay length so that they would be indifferent between the two choices. The typical delay time was around 31 days. One way of putting this result is that people were demanding a very high annual interest rate, far higher than available at banks, for keeping their money invested for that 31 days. George Anslie & Nick Haslam, *Hyperbolic Discounting*, *in* CHOICE OVER TIME 69 (G. Loewenstein & J. Elster eds., 1992). For pain, the case is less clear. If a future pain, such as an unavoidable electric shock, is certain, people often choose to get it

TABLE 1[9]

Type of offense	(a) Number Committed	(b) Number Reported (% of col. a)	(c) Number Arrests (% of col. a)	(d) Number Convictions (% of col. a)	(e) Prison Sentence (% of col. a)	(f) (Months) Sentence Imposed	(g) 1989 Time Served
Total	26,122,820	14,475,630 **55.4%**	2,313,247 **8.9%**	379,292 **1.5%**	279,909 **1.1%**	Fed=61.4 State=91.0	Fed=36.23 State=35.9
Murder and Non-Negligent Manslaughter	NA	23,440 ——	18,298 **78.1%**	Fed=133 State=10,895 **47%**	Fed=124 State=10,350 **44.7%**	Fed=134.7 State=233.0	Fed=53.3 State=83.0 6.9 years
Rape	130,260	102,560 **78.7%**	30,966 **23.8%**	Fed=149 State=18,024 **14.0%**	Fed=120 State=15,500 **12.0%**	Fed=78.9 State=128.0	Fed=NA State=55.0 4.6 years
Robbery	1,149,710	639,270 **55.6%**	136,300 **11.9%**	Fed=1,337 State=47,446 **4.2%**	Fed=1,313 State=42,701 **3.8%**	Fed=100.7 State=97.0	Fed=58.6 State=41.0 3.4 years
Assault	4,728,810	1,054,860 **22.3%**	376,917 **8.0%**	Fed=455 State=53,861 **1.1%**	Fed=282 State=38,780 **0.8%**	Fed=34.8 State=52.0	Fed=41.9 State=23.0 1.9 years
Burglary	5,147,740	3,073,900 **59.7%**	341,192 **6.6%**	Fed=99 St.=109,250 **2.1%**	Fed=83 State=82,313 **1.6%**	Fed=34.4 State=61.0	Fed=26.0 State=22.0 1.8 years
Larceny-Theft	12,975,320	7,945,700 **61.2%**	1,241,236 **9.6%**	Fed=2,709 St.=113,094 **0.9%**	Fed=940 State=73,511 **0.6%**	Fed=18.8 State=33.0	Fed=16.3 State=14.0 1.2 years
Motor-Vehicle Theft	1,967,540	1,635,900 **83.1%**	168,338 **8.6%**	Fed=275 State=21,065 **1.1%**	Fed=200 State=13,692 **0.7%**	Fed=27.6 State=33.0	Fed=21.3 State=13.0 1.1 years

in our criminal justice system is well understood to exist far in the future, if it exists at all. Further, newspaper articles frequently report on prisons as "revolving doors"; thus, possibilities of early discharge may be exaggerated in the potential offender's mind. Still further, time in prison may not be as hateful for a person living poorly in the present, thus diminishing its deterrent value.[18]

Finally, recent work tends to suggest that the threat of prison is less than one might expect in other ways. For instance, research on the recollection of painful experiences suggests that the duration of the experience is less important than the peak of the pain felt during it, and that the level of discomfort felt at the *end* of the experience is overweighed in recollection. Kahneman points out what that might mean for recidivism:

> [T]he well being of prison inmates is likely to improve in the course of their sentence, as they gain seniority and survival skills. . . . Suppose . . . that prisoners apply a Peak and End rule in retrospective evaluations of their prison experience. The result would be a global evaluation that becomes steadily less aversive with time in prison, implying a negative correlation between sentence length and the deterrence of individual recidivism. This is surely not a socially desirable outcome.[19]

It surely also suggests that lengthy prison terms are not a particularly useful method of increasing deterrence effects on those who experience them.

All of these effects, factored into a perceptual deterrence theory, make the effects of prison term as deterrent less potent than they are in the objective calculations described above.[20] Consider the implica-

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over with quickly, probably to avoid anticipatory dread and anxiety. *See* George Loewenstein, *Anticipation and the Valuation of Delayed Consumption*, 97 ECON. J. 667 (1987). But, of course, as we have shown, prison terms are by no means certain, or even likely. Elster and Loewenstein suggest a relationship between probability and dread that probably fits the present case. "At very low probability levels, below a threshold of conceivability, . . . dread will be nil. Beyond this threshold, we would expect a sudden jump and then low marginal sensitivity over a wide range of probabilities beyond that point . . . ." Jon Elster & George Loewenstein, *Utility from Memory and Anticipation*, *in* CHOICE OVER TIME, *supra*, at 213-34.

[18] Feeney quotes one robber as saying,"I don't really have any fear of prisons or things like that. I always sort of felt like I was going back someday . . . ." Feeney, *supra* note 16, at 59.

[19] Daniel Kahneman, *New Challenges to the Rationality Assumption*, 150 J. INST. & THEORETICAL ECON. 18, 33-34 (1994).

[20] A review of the empirical evidence on perceptual deterrence theories confirms what this suggests. The theories predict an inverse relationship between perceived severity and certainty of punishment and crime. But the earlier empirical studies of the theory, which were done using cross-sectional survey study methods, generally found that perceived certainty of punishment deterred crime but the perceived severity did not. In a cross-sectional design, a respondent is asked, for example, about his or her perceptions of the severity and certainty of punishment and arrest record at the same time. These perceptions, reported after experiencing arrest, are assumed to be identical with those held before the arrests, obviously a questionable assumption. Longitudinal, or panel study methods, measure respondent perceptions at time one, and determine respondent arrest records at time two, a better design from the point of view of establishing

tions of this for designing a deterrence-based system that might actually have a significant effect. The logic of a deterrence-based system drives toward the adoption of a fixed "quantum" of punishment for an offense, set according to the stake that society has in lowering the rate of that offense. Inexorably, then, as the probability of arrest or conviction is reduced, and the time of the onset of the already problematic prison term is pushed into the distant and discountable future, one can achieve the fixed quantum of punishment only by increasing the magnitude of the prison sentence or the severity of the conditions under which it is served.

Refer to our earlier figures to see why longer prison terms can have only a limited effect in deterring crime: If a robber faces a 3.8% chance of going to prison, why should it matter to him whether the likely sentence is 2 years or 10 years? The impact of this difference in prison terms on the total disutility score is trivial.[21] If we wished to make it non-trivial, look what we would have to do. If, for instance, we thought that a real threat of a four year sentence was needed to deter burglary, and noticed that only 1.6% of those committing burglary eventually went to prison for their offense, would we wish to impose a 250 year sentence, to keep the quantum of anticipated punishment around that of the 4 year sentence? No. As a practical matter, the community is likely to be morally offended by the suggestion. As one reviewer has remarked, observing the current high levels of crime that are not being deterred by threat of punishment:

> If we cannot live with this, we must lower our ethical standard as the amount of pain we are willing to inflict on others if necessary, and we must considerably tighten police control. . . . If we want to change this,

causality. Later studies, using more sophisticated panel study methods, generally found no evidence of a deterrence effect for either perceived severity or certainty of punishment. Daniel Nagin & Raymond Paternoster, *The Preventive Effects of the Perceived Risk of Arrest: Testing an Expanded Conception of Deterrence*, 29 CRIMINOLOGY 561, 570-72 (1991). None of this is encouraging for those arguing for a deterrence-based system of crime prevention.

The analysis can be made to get worse from the perspective of one wishing to rely on deterrence. Lately in social science there has been increasing skepticism about the validity of the subjective expected utility model that forms the core of perceptual deterrence models. Decision models are being substituted that more closely follow empirical evidence about people's actual representations of events, outcomes, and probabilities. Prospect theory is one contender to replace subjective expected utility theory, and Lattimore and Witte develop a version of Kahneman and Tversky's prospect theory for application to the prediction of criminal behavior. Lattimore & Witte, *supra* note 14, at 137-44. In summary, it does not lead to any more optimistic views on criminal sanction as a successful deterrent of criminal acts. It does not, in other words, rescue a deterrence theory of crime prevention.

[21] Assume that we think that 10 years is a reasonable deterrent sentence for a robbery, as long as it is certain and swift and served in full. In other words, we wanted a deterrence value of 10 for robbery. The simple deterrence value of a 10 year sentence with a 3.8% chance of going to jail, then, is 0.38, of a 2 year sentence, 0.076. Neither deters. *See supra* note 9 and accompanying text.

> there is a terrible price to pay: a police state operating a brutal criminal justice system.[22]

Realistically and happily, we are not going to pay this price; as a concomitant of that, the deterrence approach to preventing criminality is gravely weakened.

B. Rehabilitation

The rehabilitationist approach to sentencing has lost credibility, based on the findings of numerous studies indicating that criminal rehabilitation programs, as practiced, do not produce impressive, or often even detectable reductions in recidivism of those who have participated in the programs. As Cook comments, a number of true experiments on rehabilitation were conducted, and "[t]he failure of these studies to demonstrate efficacy in reducing recidivism rates has been a major impetus in the current trend away from indeterminant sentencing and the 'rehabilitative ideal.'"[23] Further, "[i]t is safe to conclude that correctional rehabilitation programs, taken collectively, have had a small effect on crime rates in the past, and that a number of notable programs failed completely."[24]

C. Incapacitation

Incapacitation, particularly of repeat offenders, is currently attracting a good deal of popular and legislative attention. Part of the reason for its popularity, we suspect, lies in its apparent realism. An incapacitation-based sentencing system implicitly gives up on rehabilitative possibilities and on the possibilities of deterring the specific criminals to which it is applied. It prevents crime in only one way: by preventing the specific criminal from committing crimes during the duration of his sentence. (Actually, it does not even do that; it prevents the commission of crimes outside, but not inside, the prison.)

The attractiveness of incapacitation stems from the belief that an enormous number of crimes are committed by a relatively small group of repeat offenders.[25] If one locks these offenders away, then crime rates will be greatly decreased. However, several assumptions intervene between the fact of repeat criminality and the postulated success of incapacitation, and these assumptions need to be examined. The possibility exists that we are entering a period of unexamined enthusi-

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[22] Hans F. M. Crombag, *When Law and Psychology Meet*, *in* CRIMINAL BEHAVIOR AND THE JUSTICE SYSTEM: PSYCHOLOGICAL PERSPECTIVES 1, 11 (Hermann Wegener et al. eds., 1989).

[23] Cook, *supra* note 8, at 166.

[24] *Id.* Cook goes on to point out that if one or more specific rehabilitation programs can be shown to work, then rehabilitation deserves consideration in that specific instance.

[25] A Rand Corporation study was highly influential in establishing this fact and making the case for an incapacitation-based system. For this study, see PETER W. GREENWOOD, SELECTIVE INCAPACITATION (1982).

asm for incapacitation that will lead to an uncritical adoption of sentencing programs based on it, followed by its rejection, if it produces less than its proponents claim for it.

The central task of an incapacitationist system is to identify those offenders who are likely to commit repeated offenses in the future. By assigning long sentences to those offenders, an incapacitation-based system will have its differential success rate over other sentencing systems. In other words, the system depends on predicting "dangerousness," with dangerousness defined as a high likelihood of committing future crimes, defined, in other words, as recidivism.

Those who have reviewed the empirical status of the prediction of dangerousness do not claim the accuracy rates that would provide confidence in an incapacitation-based system. Schmidt and Witte report a careful and statistically sophisticated study, the conclusions of which are not encouraging for an incapacitation strategy. First, they demonstrate that the accuracy of the prediction of recidivism is highly dependent on the statistical system that one uses to model it.[26] Second, their best model predicts recidivism in a way that is too inaccurate, in their view, to be used in assigning people to such important fates as prison or freedom.[27] That is, the predictions are not entirely inaccurate, but they are too inaccurate for the purposes to which we wish to put them.[28] Specifically, the system falsely identified 47% of those predicted to recidivate; that is, 47% of those predicted to recidivate did not in fact do so in their study.[29] As they remark:

> Our predictions for individuals were reasonable. However, they suffered from a high false positive rate. We were not able to accurately identify a group of career criminals that might be selectively incapacitated. Our false negative rate was lower (28%) and in that sense we were able to identify a group that usefully might be considered for fewer restrictions on their freedom. . . .
>
> A policy of selective incapacitation would be far easier to market if there were some "objective" scientific evidence of one's power to identify a particularly crime-prone group of individuals. We have been able

[26] PETER SCHMIDT & ANN WITTE, PREDICTING RECIDIVISM USING SURVIVAL MODELS 158 (1988).

[27] The model does meet one set of criteria for success, suggested by David Farrington, *Predicting Individual Crime Rates*, 9 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 53 (1987). He suggests that a successful predictive system should have less than a 50% false positive rate and less than a 50% false negative rate. What this means is that, of each 100 people predicted to recidivate, at least 50 should do so, and of each 100 people predicted to not commit further crimes, at least 50 should not do so. The reader will notice that this set of criteria do not seem highly rigorous, and yet it has proved in practice quite hard for recidivism prediction systems to reach it.

[28] SCHMIDT & WITTE, *supra* note 26, at 160.

[29] A false positive rate of 47% and a false negative rate of 28% are better than those obtained in other studies of a similar sort. Schmidt & Witte review the rates from other studies. *See* SCHMIDT & WITTE, *supra* note 26, at 142.

> to identify such a group only with a level of error that we feel is unacceptable. . . .
>
> We find the false positive rates too high to use current methods as models for selecting individuals for harsher treatment than they would receive otherwise.[30]

Other studies have suggested that available models are less successful, showing false positive rates of nearly 80%.[31]

It is reasonable to suppose that predictor systems could improve by reducing their error rates, but there are real limits to any prediction of a particular person's future behavior. This means that, in an incapacitation-based system, some people will receive long sentences because they are falsely predicted to be repeat offenders, and others will receive short sentences because they are not predicted to be dangerous but will prove to be repeat offenders on release. With the first sort of error, we will confine for lengthy sentences many people who do not in fact require such treatment, crowding the prison system and increasing its already substantial cost. However, the fact that many of those incarcerated would have committed no crimes were they out of prison cannot become visible because they are in prison. With the second sort of error, we will fail to confine some who will offend again on discharge, and that fact will become highly, publicly visible. Among those who look to incapacitation as a panacea for what they see as crime out of control, this is likely to lead to a dynamic in which, seeking to avoid letting out of prison those who offend again, we increasingly move to assign incapacitative sentences to those for whom the prediction of dangerousness is weaker and weaker, a fact that arouses concerns for justice in many who think about the issue.

Consider also the ethical issues in an incapacitation strategy. Taking a position similar in some respects to our own, Morris and Miller suggest that an increase in penalties based on predictions of future recidivism is moral only if it does not increase the punishment beyond what would be assigned from a just desert perspective.[32] Gottfredson and Gottfredson are willing to use predictive equations to select those for deinstitutional treatments, but not for selecting those who should receive longer sentences.[33] Consider also what variables are likely to appear in the prediction of dangerousness equations. Certainly race will appear there; certainly also gender, as crimes are disproportionately committed by men, not women. Age also is a remarkably strong predictor of crimes. All of these predictors

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30 *Id.* at 149.

31 John Monahan, *Violence Prediction: The Last 20 and the Next 20 Years, in* 23 CRIM. JUST. & BEHAV. 107 (1996).

32 Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 1, 35 (1985).

33 Stephen D. Gottfredson & Don M. Gottfredson, *Accuracy of Predictive Models, in* 2 CRIMINAL CAREERS AND "CAREER CRIMINALS" 212, 280 (A. Blumstein et al. eds., 1986).

emerge as significant.[34] What these predictors will lead to, if they are used, is a remarkably strong tendency to incarcerate, for a long sentence, a young, African-American male who commits one crime.

There is an obvious ethical dilemma here; these are attributes that the individual was born with, and many would object to using them as indicators that a person should be sentenced to a longer prison term. The report of the National Panel on Research on Criminal Careers comments that "[c]haracteristics such as race, ethnicity and religion are especially unacceptable as candidate predictors because they have no relationship to blameworthiness . . . and their use affronts basic social values . . . ."[35]

A different sort of objection is found in the failure of the terms of incarceration to match their rationale. The conditions of prison life can be quite harsh; to go to prison in the United States in 1996 can mean exposure to a debased, mind-numbing environment, including significant possibilities of forcible rape, contracting AIDS, and contracting a virulent strain of tuberculosis. The conditions of confinement upon commitment under the criminal justice system are conditions of punishment. Yet, the justification for confinement under an incapacitation strategy is not punishment but prevention, akin to the system of preventive detention that we use for those with infectious diseases or mental illness that is likely to lead to violent behavior. Systems of preventative detention are morally ambiguous, but certainly we are most comfortable with them when they involve detention conditions that are not punitive in nature, involve "treatment" efforts that attempt to remove the elements in the individual that cause the presumed dangerousness, and continually reassess the dangerousness of the individual who is incarcerated. This is not a good description of the workings of the prison system in the United States. Indeed, the current trend toward increased use of a dangerousness rationale is accompanied by a trend to increase the harshness of prison life and to abolish periodic review.

To us, the most severe criticism of an incapacitation-based sentencing system is that it requires a distribution of liability very different from what the community regards as just punishment for the

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[34] SCHMIDT & WITTE, *supra* note 26, ch. 8.

[35] Joseph G. Weis, *Issues in the Measurement of Criminal Careers*, *in* 2 CRIMINAL CAREERS AND "CAREER CRIMINALS", *supra* note 33, at 8-12. There is certainly a desire on the part of the community to protect itself from crime, and a willingness to consider incapacitation as one of the least objectionable options for preventing crime. This has led one of us to suggest that an incapacitation system should exist, but that such a system should be located within the civil rather than the criminal commitment system. The system there will be more familiar with the assessment of the continuing dangerousness of the individual and more able to provide detention conditions that are non-punitive in nature. *See* Paul H. Robinson, *Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 706-14 (1993).

offense committed. First, it assigns sentences of very different lengths to two individuals who have committed exactly the same crime, where one is predicted to be a repeat offender and the other is not. Further, the predicted repeat offender is being punished for an action that he has not yet done, or perhaps even thought of: the future offense. If he is one of the 47% of those predicted from the current best predictor system to commit another offense who would not, the "false positives," he is being punished for an offense that he never would have committed. Finally, an incapacitation strategy assigns liabilities based on considerations that do not figure into the community's perceptions of the appropriate sentences for the crime committed, such as the strong predictors of race, gender, and age. This brings us to what will become our familiar argument: an incapacitation-based sentencing system undercuts the moral credibility of the criminal law and thus the system's ability to produce voluntary compliance with its mandates.

D. *Summary*

To summarize our arguments about the standard utilitarian-based punishment systems: Rehabilitation-based systems, formerly popular, rarely worked and are now rarely under active consideration as a sentencing strategy. Incapacitation-based systems, currently generating a great deal of interest, have a number of difficulties that are likely, at best, to make them less attractive than they seem and, at worst, to cause intolerable injustice on a broad scale. A system centered on deterrence also has a number of difficulties, most prominently the remarkably low detection and conviction rates on many crimes and conflict with the upper limits on sentences that people consider just. This suggests that a system that would truly deter would be regarded as excessively draconian by the community. The evidence suggests that the fear of arrest and incarceration in prison is not effective in causing people to obey the law. This confronts us with the question: Why, then, do people obey the law? Perhaps if we understood better the dynamics of these forces, we might discover ways in which law-abiding behavior could be enhanced.

II. Why Do People Obey the Law?

Given the weak deterrent threat facing people, why do the vast majority of those free in society still act in a way consistent with the law? Social scientists have a preliminary answer: More than because of the threat of legal punishment, people obey the law (1) because they fear the disapproval of their social group if they violate the law, and (2) because they generally see themselves as moral beings who want to do the right thing as they perceive it. In social science, these two factors are referred to as (1) compliance produced by normative

social influence, and (2) behavior produced by internalized moral standards and rules.

These informal sources of behavioral control function in a variety of ways. The normative pressures from other people, generally experienced as an external force by the actor, function like the more formal deterrence mechanisms were thought to function. People obey the social norms of their groups because those groups have rewards to give for doing so and sanctions for failing to do so. Three classes of "informal sanctions" are usually identified and can be incurred when one's group judges that one has transgressed: "commitment costs," in which past accomplishments are in jeopardy; "attachment costs," involving the loss of valued relationships with others; and "stigma," discreditation in the eyes of others.[36] These sanctions may follow arrest for a crime, but if the harm-doing act becomes known or suspected within one's community, even if one is not arrested, informal sanctioning processes may occur.[37] The social costs to the offender may extend beyond the offender's friends and family. If one is thought to have committed a crime, one may lose one's job, ability to borrow money, ability to command trust from others, and possible business partners.[38]

People's own moral rules and action proscriptions are generally experienced as internal forces; people recognize that they come from the moral rules that they have adopted. Phenomenologically, we all have experienced this sense of obligation to act in a certain way, to avoid harm to another, or to fulfill some commitment we have made.

These two barriers to deviant behavior—social sanctions and internal moral sanctions—are analytically and often experientially separable, but in the longer term they converge. Children are trained by a powerful socialization process into internalizing the beliefs represented in the social norms of the culture to which they belong. People come to hold the moral standards of the cultures in which they are

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[36] Exactly what loss counts in what category is not perfectly resolvable; loss of marriage prospects is often listed as a commitment cost, while loss of an existing relationship with a significant other is an attachment cost. Stigma may be feared because it causes others to be unwilling to enter attachments with the stigmatized individual, hire that individual, and so on. The point is that a good many informal sanctions may be risked when one transgresses, and the initial application of some sanctions may lead to further ones.

[37] Anonymity, often thought to be a cause of crime in cities, works by severing the informal social sanctions from the individual.

[38] Nagin & Paternoster, *supra* note 20, at 562; Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 LAW & SOC'Y REV. 545, 565-66 (1986). For an examination of the effect of criminal conviction on an offender's future earning potential, see John Lott, Jr., *An Attempt at Measuring the Total Monetary Penalty from Drug Convictions: The Importance of an Individual's Reputation*, 21 J. LEGAL STUD. 159 (1992); John Lott, Jr., *Do We Punish High Income Criminals Too Heavily?*, 30 ECON. INQUIRY 583 (1992).

raised; internal moral standards and external norms generally label the same actions right or wrong.

What is the evidence concerning crime prevention due to fear of social sanction or fulfillment of moral obligation? It is scattered but supportive. Since many of the studies that provide evidence for the operation of social sanctions also report evidence about the role of internalized moral control in inhibiting criminal acts, we review evidence for both forces simultaneously.[39]

Harold Grasmick and his associates have done the most sustained work documenting the role of the informal determinants of law-abidingness. Their research consistently finds that fear of social disapproval and moral commitment to the law both inhibit the commission of illegal activity.[40] They comment that their "findings highlight the importance of internal control in producing conformity to the law."[41] Other researchers reach similar conclusions. Paternoster and Iovanni conclude that "the greatest effects on delinquent involvement are those from informal forces of social control."[42] Meir and Johnson conclude: "despite contemporary predisposition toward the importance of legal sanction, our findings are . . . consistent with the accumulated literature concerning the primacy of interpersonal influence" over legal sanction.[43] Tom Tyler's review of existing studies con-

[39] In a study measuring the frequency of property and drug offenses committed by juveniles, it was found that offense frequency was predicted by whether the actor perceived that his friends would approve of the delinquent actions, and negatively predicted by possession of a set of conventional moral beliefs that delinquent acts are wrong. Nagin & Paternoster, *supra* note 20, at 574. (Some evidence was also found for an effect of certainty of arrest on delinquent acts.) Commitment but not attachment or stigma costs were measured in this study.

[40] Harold Grasmick & Donald Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325 (1980).

[41] Harold Grasmick & Robert Bursik, *Conscience, Significant Others, and Rational Choice*, 24 LAW & SOC'Y REV. 837, 854 (1990). They came to this conclusion based on the repeated discovery that those who reported that certain actions were immoral, wrong, bad, or seen by others about whom they cared as wrong, were less likely to engage in those actions.

[42] Raymond Paternoster & Lee Ann Iovanni, *The Deterrent Effect of Perceived Severity: A Reexamination*, 64 SOCIAL FORCES 751, 769 (1986). They came to this conclusion based on the correlation between an individual reporting that certain actions would be disapproved of by others who were significant to that individual, for instance friends or peers, and the individual's comparatively low rate of committing those actions. One is less likely to commit actions of which those around him will disapprove.

[43] Robert Meir & Weldon Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 AM. SOC. REV. 292, 302 (1977). Here the authors are commenting both on their review of the related literature and their own findings. Characteristically, these studies have some assessment of a person's judgment that certain actions are right or wrong, moral or immoral, of concerns about what sanctions that people in his social networks would inflict on him if he did those actions, and of concerns about what sanctions such as arrest, conviction, and jail term the legal system would inflict on him if he did those actions. The power of each of these classes of variables to predict whether he actually commits the actions is tested. The first two sets of variables to predict criminal actions are characteristically demonstrated in this research, and their predictive power is often higher than that of the fear of legal sanctions.

cludes, "Testing the ability of each of the attitudinal factors . . . to predict variance in compliance . . . the most important incremental contribution is made by personal morality . . . ."[44]

III. Criminal Law's Influence on the Social Forces of Compliance

The evidence reviewed suggests that the influences of social group sanctions and internalized norms are the most powerful determinants of conduct, more significant than the threat of deterrent legal sanctions. But, we argue, the law is not irrelevant to the operation of these powerful forces. Criminal law in particular can influence the norms that are held by the social group and that are internalized by the individual. Criminal law's influence comes from being a societal mechanism by which the force of social norms is realized and by which the force of internal moral principles is strengthened. That is, the law has no independent force, the way social group norms and internalized norms do. It has power to the extent that it can amplify and sustain these two power sources; it has power to the extent that it influences what the social group thinks and what its members internalize.

A. *The Criminal Law's Ability to Facilitate the Creation of Shared Norms*

Our first claim is that the criminal law influences the powerful social forces of normative behavior control through its central role in the creation of shared norms. The norms at issue here are of a limited sort, of course. Criminal law ought to and does have little interest in norms that influence everyday matters of style, dress, speech, manners, etc. Cutting in line, being rude, or wearing revealing clothing may be annoying to some people, but it generally is not and ought not be criminal. Even if such violations of norms were frowned upon by most people, the conduct ought not be criminal because it fails to reach the level of seriousness that deserves the condemnation of criminal liability, which is typically and properly limited to the violation of

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This is not inconsistent with finding that the fear of criminal sanctions has some deterrent effect in some of the studies.

[44] Tom R. Tyler, Why People Obey the Law 60 (1990). In a subset of studies that Tyler reviews, respondents reported on whether they considered certain actions moral or immoral, on other reasons for committing or not committing those actions, and on the frequency with which they committed those actions. Consistently, "personal morality," the degree to which the individual regarded those actions as right or wrong, predicted the frequency with which those actions were engaged in, and predicted this frequency more strongly than did the other possible predictors.

norms against violence and dishonesty.[45] As Gottfriedson and Hirshi have remarked, the criminal law is about force and fraud.[46]

1. The Educative Function of Criminal Law Adjudication and Legislative Debate.—As to norms against force and fraud, social science suggests that the criminal law builds and maintains societal norms in several related ways. First, criminal law enforcement and adjudication activities send daily messages to all who read or hear about them. Every time criminal liability is imposed, it reminds us of the norm prohibiting the offender's conduct and confirms its condemnable nature.[47] The public condemnation expressed in reaction to the offense supports and encourages the efforts of those who have resisted temptation and continued to remain law-abiding. Having avoided breaking that law, people can regard themselves favorably, which in turn reinforces their moral commitment to the norm expressed in the offense.

Further, every adjudication offers an opportunity to confirm the exact nature of the norm or to signal a shift or refinement of it. Thus, an endangerment or manslaughter prosecution of a polluter points out that some instances of polluting can violate the norm against endangering others. The publicity surrounding an adjudication can teach all people about the consequences of certain kinds of polluting and, therefore, that it ought to be avoided. Kai Erikson's studies point out the role of criminal law in marking the limits between allowable, although perhaps regrettable, conduct and criminal conduct: The prosecution of a deviant brands the deviant as a criminal and casts a bright light on the exact location of a boundary that previously might have been obscure to the community.[48]

Further, people are likely to attend to the comparative liabilities that are assigned by sentencing provisions of legal systems; people intuit that more morally serious offenses should command greater penalties. As Cook remarks, "The legislated (and actual) severity of penalty for a particular offense may influence the public's feeling for the seriousness or moral repugnance of this offense."[49] In the long run, for those crimes in which "moral inhibition" plays an important

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[45] There are some exceptions, however. Eating human flesh and bestiality, for example, remain criminal because the norms against such conduct remain strongly and widely felt.

[46] MICHAEL R. GOTTFRIEDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 4 (1990).

[47] At the same time, regular non-enforcement or a declination to prosecute or to convict tends to undermine the norm prohibiting the conduct. Thus, adultery may remain on the books but a policy of not prosecuting it takes away the criminal law's support of any norm against such conduct that may have existed.

[48] KAI ERIKSON, THE WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE (1966).

[49] COOK, *supra* note 8, at 177.

role, announcing high severity of punishment may be an important communication; more important than ensuring high probability of punishment, which we have argued is generally not possible.

The criminal adjudication process is not the only forum for public discussion and announcement. Legislative proposals for criminalization or decriminalization, or increased or decreased punishment, also provide an occasion for public debate that can help build norms, with the conclusion of the debate announced by legislative action or inaction. The public discussion about the problem of hate speech and proposals to criminalize it, for example, help strengthen the shared public understanding that such conduct is condemnable. When one seeks to criminalize an act, the debate should say why that act endangers others, or otherwise fits the case of those things we are willing to criminalize. In our complex, interdependent society, this can be usefully instructive. If lawmakers argue that an act should not be criminalized, or should be decriminalized, then they should be able to say why it does not resemble the sorts of things that are now criminalized.

2. *The Relationship Between Criminal Law and Community Norms.*—Notice that we said that laws can *contribute* to the formation and change of community norms and individuals' moral reasoning; laws cannot themselves compel community acceptance. Passing a law cannot itself create a norm, and not passing a law against certain conduct cannot make that conduct morally acceptable to the community. The passage and subsequent failure of National Prohibition shows the law's limited ability to change norms even when the change is supported by a significant portion of the public.[50] Some would argue that the continuing controversy over our "war on drugs" raises a similar issue.[51] The law is, rather, a vehicle by which the community debates, tests, and ultimately settles upon and expresses its norms. The passage of criminal legislation more often reflects a critical level of support for an incipient norm. The act of criminalization sometimes nurtures the norm, as does faithful enforcement and prosecution, and over time the community view may mature into a strong consensus. The criminal law is not an independent player in that process, but it is a contributing mechanism by which the norm-nurturing process moves forward.

We have seen the process at work recently in enhancing prohibitory norms against sexual harassment, hate speech, drunk driving, and domestic violence. It has also been at work in diluting existing norms

[50] In December of 1933, the repeal of the Eighteenth Amendment was completed by the adoption of the Twenty-First Amendment. It was, "[i]n hindsight . . . the legal outcome of a foolish, unpopular reform." DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 3 (1979).

[51] *See, e.g.*, Anthony Lewis, *Prohibition Folly*, N.Y. TIMES, Feb. 12, 1996, at A13.

against homosexual conduct, fornication, and adultery. While it is difficult to untangle how much the criminal law reform followed and how much it led these shifts, it seems difficult to imagine that these changes could have occurred without the recognition and confirmation that comes through changes in criminal law legislation, enforcement, and adjudication.

Perhaps more than any other society, ours relies on the criminal law for norm-nurturing. Our greater cultural diversity means that we cannot expect a stable pre-existing consensus on the contours of condemnable conduct that is found in more homogeneous societies. We require more public debate and discussion to reconcile conflicting views and more public education on the refinements and consensuses that result. Unlike many other societies, we share no religion or other arbiter of morality that might perform this role. Our criminal law is, for us, the place we express our shared beliefs of what is truly condemnable.

B. The Criminal Law's Compliance Power as a Moral Authority in Unanalyzed Cases

The discussion above describes the criminal law's role as a forum and communicator in the process by which moral norms are reinforced, established, or diluted. The criminal law also has a second effect in shaping conduct, specifically in gaining compliance with its demands. If it has developed a reputation as a reliable statement of existing norms, people will be willing to defer to its moral authority in cases where there exists some ambiguity as to the wrongfulness of the contemplated conduct.

1. Evidence of the Criminal Law's Power as a Moral Authority.—There is evidence, largely collected and analyzed by Tyler, that people are inclined to accept the law as a source of moral authority that they themselves should take seriously. This is referred to in social science as informational influence—influence produced by the information transmitted by a specific institution, in which one accepts the validity of the definition of right and wrong behavior conveyed by that institution, internalizes that definition, and expects other people to have internalized it as well. Tyler reviews the literature that relates a person's belief that a law reflects a valid moral rule to obedience to that law, and finds them to be quite strongly related.[52] He notes: "This high level of normative commitment to obeying the law offers an important basis for the effective exercise of authority by legal officials. People clearly have a strong predisposition toward following the

[52] TYLER, *supra* note 44, at 37.

law. If authorities can tap into such feelings, their decisions will be more widely followed."[53]

Tyler reviews a number of studies that suggest that the level of commitment to obey the law is proportional to what Tyler calls the law's perceived "legitimacy," by which he means a community's perceptions that, first, the law instantiates their moral beliefs, and, second, that the law came into being via fair procedures conducted by the appropriate authorities.[54] Tyler reasons that, if one regards the law as a legitimate source of rules, if it has what we have called "moral credibility," then one should be more likely to regard the law's judgments about right and wrong actions as an appropriate input to one's own moral thinking; in turn, one should be more likely to obey the law. Further, one should be more likely to support the authorities that promulgated the law. To test this contention he reviews a number of studies that examine individual differences in perceptions of the law's legitimacy and relate those differences to differences in support for legal authorities and felt obligations to obey the law.

> Six studies . . . address the question of whether feelings of [the law's] legitimacy lead to behavioral compliance with the law and legal authorities, regardless of whether those feelings are expressed as support for the authorities or as an obligation to obey . . . . These studies suggest that those who view authority as legitimate are more likely to comply with legal authority, whether the legitimacy is expressed as obligation or as support . . . .[55]

Also as one would expect, those who perceive the political authority that governs them to be less legitimate are more likely to engage in acts of social or political protest, some of which are illegal. More research on this issue is obviously needed, but we conclude that the current research supports our claim of a connection between perceptions of the law's moral credibility and obedience to the law.

2. *Actions That Are Not Obviously Harmful.*—Notice that, as a matter of common sense, the law's moral credibility is not needed to tell a person that murder, rape, or robbery is wrong. The criminal law's influence as a moral authority has effect primarily at the border-

[53] *Id.* at 60. In another study, Grasmick and Green conclude: "[E]ach of the three independent variables [of deterrence by threat of legal punishment, social disapproval, and personal moral commitment] makes a significant independent contribution to the explained variance [i.e., the rate of criminal behavior]." Grasmick & Green, *supra* note 40, at 326.

[54] *See* TYLER, *supra* note 44, at 64-68; studies listed in Tables 3.1, 3.2, and 3.3, *id.* at 32-37.

[55] *Id.* at 31. Tyler suggests that the law gains legitimacy in two ways, only one of which we emphasize in our argument. First, and the element we emphasize, the law gains legitimacy because it is seen as being in accord with the moral rules of the community. Second, it gains legitimacy because it is the product of processes such as legislation and judicial debate, which are the processes that society has agreed are the appropriate ones to enact such laws. In other words, the laws are the products of legitimate authority. We agree that procedural fairness is an important additional element producing moral credibility for the law.

line of criminal activity, where there may be some ambiguity as to whether the conduct really is wrong.

How does this ambiguity arise? Historically, scholars have distinguished between two kinds of "crimes": crimes that are *mala in se* and those that are *malum prohibitum*; crimes that are wrong in themselves and actions that are crimes because they are prohibited by law. This distinction gained use because of the possibilities of remote consequences that arise in modern, complexly interdependent societies. We all may take actions that are harmful in ways that may not be immediately obvious. The harm may be to specific others or to society as a whole or to society's institutions. If these harms are reasonably predictable from certain kinds of conduct, and of sufficient magnitude, then it is appropriate to criminalize the conduct. Driving faster than the speed limit, driving while intoxicated, or insider trading are all examples of this class of conduct.

To be maximally effective, the legal system must publicize why these kinds of conduct lead to outcomes that are sufficiently damaging to be criminalized. But realistically, the legal system cannot constantly generate public understanding of why each specific prohibited act is wrong, and its ability to discourage the conduct shifts to its general reputation for being a reliable judge of what is sufficiently objectionable to merit the condemnation of criminal conviction. If the law has a good reputation, people are more likely to defer to its judgement. If it has a bad reputation, people are more likely to discount its prohibition as one more example of a criminal law focused on something other than imposing liability for wrongs that deserve condemnation.

C. Summary

Internalized moral rules and social norms that are enforced by community sanctions are important sources of compliance with the moral prohibitions of the community. Criminal law rules can contribute to normative forces; they can shape, alter, and guide those forces, but only if the community accepts the law as a legitimate source of moral authority. If the law has this acceptance, debates over legislative proposals or publicity about criminal prosecutions can educate the public about what actions are sufficiently serious to deserve criminal condemnation. If the law has moral authority, it can be a reliable guide in shaping conduct for those cases in which the moral justifications for its prohibitions are not immediately obvious. In an increasingly complex and interdependent society, there may be many cases of this sort, conduct that on analysis proves to be harmful, but is not immediately apparently so. Public conviction and condemnation of an inside trader, for example, can help spread the word that the conduct really is condemnable. Public conviction and condemnation of one

who kills another while driving drunk can and probably has helped to spread the word that driving while drunk is morally reprehensible because of its potential to kill.

But the criminal law can only hope to shape moral thinking or to have people follow its rules in ambiguous cases if it has earned a reputation as an institution whose focus is morally condemnable conduct and is seen as giving reliable statements of what is and is not truly condemnable. A criminal law that is seen as having a different criterion for criminalization—such as criminalization whenever the greater penalties of criminal law can provide useful deterrents—is not likely to gain such a reputation. How the law gains—and loses—its reputation as a reliable moral guide is the topic with which we deal next.

IV. The Determinants of Criminal Law's Moral Credibility

Our central point is this: The criminal law's power in nurturing and communicating societal norms and its power to have people defer to it in unanalyzed cases is directly proportional to criminal law's moral credibility. If criminalization or conviction (or decriminalization or refusal to convict) is to have an effect in the norm-nurturing process, it will be because the criminal law has a reputation for criminalizing and punishing only that which deserves moral condemnation, and for decriminalizing and not punishing that which does not. If, instead, the criminal law's reputation is one simply of a collection of rules, which do not necessarily reflect the community's perceptions of moral blameworthiness, then there would be little reason to expect the criminal law to be relevant to the societal debate over what is and is not condemnable and little reason to defer to it as a moral authority. What then are the requirements for a criminal law system to gain this credibility? How can this credibility be lost?

A. *A Central Concern for Doing Justice*

Enhancing the criminal law's moral credibility requires, more than anything, that the criminal law make clear to the public that its overriding concern is doing justice. Therefore, the most important reforms for establishing the criminal law's moral credibility may be those that concern the rules by which criminal liability and punishment are distributed. The criminal law must earn a reputation for (1) punishing those who deserve it under rules perceived as just, (2) protecting from punishment those who do not deserve it, and (3) where punishment is deserved, imposing the amount of punishment deserved, no more, no less. Thus, for example, the criminal law ought to maintain a viable insanity defense that excuses those who are perceived as not responsible for their offense, ought to avoid the use of

strict liability (imposing liability in the absence of a culpable state of mind), and ought to limit the use of non-exculpatory defenses.[56] In other words, it ought to adopt rules that distribute liability and punishment according to desert, even if a non-desert distribution appears in the short-run to offer the possibility of reducing crime.

The point is that every deviation from a desert distribution can incrementally undercut the criminal law's moral credibility, which in turn can undercut its ability to help in the creation and internalization of norms and its power to gain compliance by its moral authority. Thus, contrary to the apparent assumptions of past utilitarian debates,[57] such deviations from desert are not cost free, and their cost must be included in the calculation when determining which distribution of liability will most effectively reduce crime.

The law's moral credibility also may depend upon procedural and institutional reforms, as one of us has suggested elsewhere.[58] Some of these include less use of the exclusionary rule to exclude reliable evidence, less plea bargaining for reasons unrelated to genuine factual disputes, less restriction on police power where affected citizens want more, and insistence that non-incarcerative sanctions have sufficient punitive bite to inflict the amount of punishment deserved. Such reforms also would include increased protection of inmates against prison violence, decreased use of dangerousness as a criterion in setting prison terms, and more vigorous police training, discipline, and leadership to bring greater respect and restraint by police in dealing with citizens.

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[56] It is not feasible to eliminate some non-exculpatory defenses, such as diplomatic immunity, but others can be narrowed if not eliminated. The length of statutes of limitation can be increased to avoid barriers that frustrate prosecutions that the society remains interested in. *See* PAUL H. ROBINSON, 2 CRIMINAL LAW DEFENSES 465-66 (1984). The entrapment defense can be eliminated or, at least, limited to cases of overwhelming coercion. *See* Christopher D. Moore, Comment, *The Elusive Foundation of the Entrapment Defense*, 89 NW. U. L. REV. 1151, 1187-88 (1995).

[57] Consider Shavell's assertion: "Whether or not a party will actually commit an act . . . depends on his perception of the possibility that he will suffer a sanction, either monetary or nonmonetary. A party will commit an act if, and only if, the expected sanction would be less than the expected private benefits. If he decides not to commit an act, he will be said to be deterred." Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1235 (1985). Certainly if one believes, as Shavell does, that only the threatened sanction affects a person's decision whether to commit an offense, then the extent to which the distribution of sanctions deviates from that perceived as deserved is irrelevant to the calculations. But one may also discount the importance of a distribution of perceived desert if one thinks that the effects of deviation are minor. For the discussion of the danger of any deviation, see *infra* Part VI.

[58] Paul H. Robinson, *Moral Credibility and Crime*, THE ATLANTIC MONTHLY, Mar. 1995, at 72.

B. *The Detrimental Effect of Blurring the Criminal-Civil Distinction*

The single most important structural reform may be a resharpening of the criminal-civil distinction, which has grown increasingly muddled over the past two decades. Civil law has been "criminalized" with the increased use of punitive damages.[59] But, of greater concern to us, is the "civilization" of the criminal law; the tendency to criminalize actions that are not those that the community would conceive of as condemnable conduct. As Jack Coffee has noted, there is a strong trend toward the criminalization of regulatory offenses, leading to the astounding number of some 300,000 federal "crimes."[60] The problem with this, from our point of view, is that current law has extended criminalization beyond even the domain of traditional *malum prohibitum* offenses, to criminalize conduct that is "harmful" only in the sense that it causes inconvenience for bureaucrats. Thus, most federal regulations are now routinely converted to federal crimes to give the regulators greater leverage in enforcement. Of similar effect is the increased use of strict liability and vicarious liability,[61] common features of civil law but out of place in a criminal system.

Examples of concrete cases will make our point clear. As is well known, individuals and organizations are required to provide large amounts of information to federal, state, and local governments. Providing false information is sometimes a criminalized regulatory offense. If false information knowingly is supplied to evade pollution regulations, taxes, or safety precautions, then the community will agree that this is conduct worthy of criminalization. However, if erroneous information is provided unwittingly or if such information has little bearing on matters of importance, then the community is not likely to see the action as criminal. Or consider a case in which an employer inadvertently fails to put all required information in a federally-required report (as opposed to knowingly putting false information in the report). This may arguably hurt society in some sense, but it is hard to see how; and even if it does, the degree of the injury is so infinitesimal that no one—even those who have full information about the need for the reporting requirement—would think that the failure

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[59] Punitive damages at civil law may well have been created for a different reason than to mimic criminal liability, and might properly be maintained for this different reason, even in a system that returned to a sharp criminal-civil distinction. Specifically, one might speculate that in cases of intentional wrongdoing, which is where punitive damages typically are imposed, the harm of the violation to the victim is actually greater than where the harm is caused negligently. Note, for example, that the sting of discrimination often lies in its intentionality. The victim of the discrimination suffers more when the motive is clear than where the actions might be accidental. The introduction of punitive damages in cases of intentional torts may well have been out of recognition of this great harm.

[60] John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991).

[61] *See id.* at 210-15.

rises to the level of harm that deserves the moral condemnation traditionally associated with criminal conviction. If an adult-appearing twenty-year-old, with high-quality forged ID papers, buys an alcoholic beverage from a harassed bartender, the community has trouble seeing the action as criminal, although a strict liability statute holds the bartender liable and a vicarious liability statute holds the absent bar owner criminally liable.

The law, we suggest, cannot have moral credibility outside of a system with a clear criminal-civil distinction for several reasons. Much of civil law is governed by principles unrelated to desert. While there is some disagreement on the issue, one might well justify, for example, a tort system that uses forms of strict liability or vicarious liability. Even if fairness were adopted as the primary distributive principle for tort liability, no one would claim that tort liability ought to be limited to cases where moral condemnation is appropriate. A mixed criminal-civil system, then, will inevitably have some cases where the result is driven by moral desert and others where it is not. It would be difficult, if not impossible, for such a system to build a reputation with the public as a system devoted exclusively to judging moral blameworthiness. Every instance of liability based upon non-desert criteria would undercut the system's moral credibility, and the "criminal" label could not be used as a clear signal that moral condemnation is deserved. In the cases where the criminal system wishes to wave the red flag of moral condemnation, it would have only an ambiguous pink flag at its disposal. The separation of the two systems, into criminal and civil, enables for the criminal law to focus exclusively on desert and, perhaps more importantly, to make clear to the public that it is so focused. It allows the "criminal" label to be a red flag.[62]

To our minds, the current trend toward blurring the distinction is particularly foolish because it can provide little or no long term gain, even with respect to the very cases brought within the expansion. First, cases of regulatory offenses, strict liability, and vicarious liability are just the cases where the likelihood of a prison sentence is remote;[63] the sentences typically are fines and restitution, the sanctions that are available at civil law. Thus, by criminalizing these offenses, we do not effectively access more severe sanctions.

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[62] *See* Paul H. Robinson, *The Criminal Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693 (1993); Paul H. Robinson, *The Criminal-Civil Distribution and the Utility of Desert (Symposium on the Intersection of Crime and Tort)*, 76 B.U. L. REV. 201 (1996).

[63] The majority of regulatory offenses are misdemeanors, for which a serious prison term is not authorized. Even for the most egregious forms of these offenses, where danger to life or property is created, the likelihood of an incarcerative sentence is not high. In 1989, the number of convicted federal regulatory violators sentenced to prison was: 37 agricultural, 22 antitrust, 2 labor, 24 food and drug. Table 5.17, Sentences imposed in cases terminated in U.S. District Courts, 1992 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 488 (1993).

But, of course, access to more severe sanctions is not the reason that many have argued for the extension of the criminal sanction to these cases. More severe sanctions could be provided within the civil system. The arguments for such criminal expansion often focus upon the possibility for the moral stigmatization that criminal liability brings that civil liability does not.[64] Obviously, given our previous discussion, we agree that stigmatization can have a substantial effect in shaping the conduct of potential offenders. But this attempted use of stigmatization is likely to be ineffective because it offends rather than educates the moral code of the community. Passing a statute that criminalizes new conduct does not itself cause that conduct to be perceived as immoral. As the previous discussion suggests, law does not create norms but only acts as a participant in the process by which consensuses are built. Making a regulatory violation a "crime" is not in itself likely to do much to cause people to attach stigma to liability for the violation. Making 300,000 regulatory violations "crimes" makes it even less likely that people will take the resulting liability as evidence that moral condemnation is deserved.[65] Similarly, criminalizing actions that are offenses only from a strict or vicarious liability perspective fails to bring the stigmatization of criminality to bear on those violations. Far from being an independent and respected source of moral authority, a collection of laws of this sort becomes a pettifogging caricature.

More important to us, the expansion of criminal law to punish these various violations is not only ineffective but destructive. The more criminal law's stigmatizing effect is sought to be applied to non-condemnable conduct, the less stigmatizing effect there exists to apply. With each additional non-blameworthy use, the meaning of "criminal liability" becomes incrementally less tied to blameworthiness and incrementally less able to evoke condemnation. As each strict liability case, or vicarious liability case, or case of innocent or trivial conduct is criminalized—such as the woman charged with a criminal offense for picking an eagle feather from the floor of a cage

64 *See* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 424-34 (1981); Brent Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, 8 MELB. U. L. REV. 107 (1971); Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, (1973). *But see* Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395 (1991).

65 We understand that it is sometimes appropriate to apply greater sanctions to regulatory violations. Serious deterrent sanctions can and ought to be imposed but they can as easily and effectively be imposed under an administrative system that is distinct from criminal law and that carries a non-criminal label, perhaps "violation," as many European countries do. Note the similarity to the situation regarding preventive detention—it may be that dangerous people need to be detained, but it is best that the criminal system not be the device for doing it, for to do so carries with it a false claim that these people deserve punishment, which they do not, and this false claim in turn hurts the criminal law's moral credibility.

and using it in a piece of art work that she then sold[66]—more and more people will conclude that the criminal law is being used not to reflect community notions of desert but rather as a tool of a powerful government to intervene destructively in the lives of ordinary people. Expanding the criminal law beyond the bounds of perceived desert initially weakens the stigmatizing effect that that expansion seeks to enlist. Finally, it destroys the stigmatizing effect; criminal penalties for non-condemnable conduct cause the public to sympathize with the person charged, and to despise the legal system that brings the charge. And it is the credibility of the criminal law in general that may be destroyed. Criminal conviction for a violation that the community sees as non-condemnable conduct affects not just the meaning of liability imposed for those offenses but the condemnatory message for all criminal convictions. More on this in Section D, "The Generalization of Disrespect."

C. The Problem of Moral Divisions Within the Community

Our thinking predicts a set of circumstances in which the law's moral credibility will be at risk regardless of the criminalization policy that it chooses. When a society contains groups with a strong and deeply felt moral disagreement, as ours does at this time on the morality of abortion, for example, the situation is destructive of the law's moral credibility and thus its power to gain compliance. More critically, one side will feel that the law is immoral, either because it criminalizes an innocent act, or because it fails to criminalize a morally abhorrent act—in this case fails to criminalize what is seen as a particular kind of murder. Our thinking predicts the destructive consequences that this conflict has. Specifically, it suggests that the "losing" side, at this moment those who wish abortion to be criminal, will lose respect for the legislative process, for the courts that enforce the laws, and eventually, for the legitimacy of the entire criminal law system.[67]

When one thinks that the law does not prohibit murder, one is inclined to "take the law into one's own hands," and we have seen anti-abortion people do this. Note the sequence of steps in what we might call the radicalization of the "pro-life" individual. Perhaps it begins with picketing the abortion clinic and then moves toward more coercive forms of picketing that are arguably legal violations of the rights of others. For some, it moves toward spraying noxious sub-

66 *They Swooped*, THE ECONOMIST, Aug. 19, 1995, at 27.

67 Perspective also predicts that a more diverse society, with its less total agreement on norms, will have more crime, all other things being equal. If this is true, the dramatic difference in crime rates between the United States and Japan, for example, has little to do with criminal justice policies and more to do with the extent of community consensus on norms for condemnable conduct.

stances into the clinics at night—a line has been crossed to committing an undeniable and more substantial legal offense. The next step is setting fire to the abortion clinic, perhaps at night so "no one will get hurt," but certainly this is an act of arson and possibly life-risking. Then death threats and finally the murder of a doctor or nurse who does abortions.

A similar destructive tension exists in Britain at this time. Those who are convinced that animals deserve more humane treatment are outraged at what one is allowed to do to animals under Common Market laws. They protest, seeking to block animal-transporting lorries before they cross the channel. As a recent article comments, for the activists, "[t]he issue is radicalizing . . . . It begins as a protest against abuse of animals. But if the law permits outrages, can it claim moral legitimacy? And if the police protect atrocities, are they not complicit?"[68] Again notice the radicalizing dynamic at work here. The people in question begin as classically law-abiding citizens, typically middle class, middle aged, conservative individuals, but some become willing to commit illegal acts because they regard those acts as morally required. What we have called the process of radicalization occurs most easily and dramatically when there is a group of individuals who are morally opposed to the content of some aspect of the criminal law, but also can occur for a single individual who opposes a law.

D. *The Generalization of Disrespect*

One might discount the danger of such moral disagreements on the ground that people who disapprove of a particular law—be it Prohibition or giving a right to an abortion—can distinguish this "bad" law from the remainder of the system. But we think the possibility for such compartmentalization of disrespect is limited; more likely is what we might call "the generalization of disrespect." Consider the psychological processes that are begun when, for instance, a constitutional amendment prohibiting the use of alcohol is put in place. Examine the situation from the perspective of a person whose cultural traditions have a place for alcohol consumption on certain occasions, and whose individual opinion supports such use.

A law that criminalizes an activity, such as drinking, that I consider not immoral, may initially seem to me to be an isolated and aberrant one, and only the moral validity of that specific law will be denied by me. However, I cannot deny that it was a criminalization action taken by the same authorities that produced the entire criminal code, and I must now be willing to entertain doubts about the moral correctness of the criminalizing of the other activities that those authorities have chosen to sanction. By a process that is easily under-

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[68] *Also a part of Creation*, THE ECONOMIST, Aug. 19, 1995, at 21.

stood psychologically, if not logically, when the police apprehend me for violation of the drinking laws, I have a revelatory experience canceling the equation of all police actions with the apprehension of wrong-doers, and if the court system convicts, the hypocrisy that I feel that this court manifests is a candidate for generalization to other courts. If I become aware of another instance of the code violating my moral sensibilities, then all these generalizations, and others, are likely to occur. There is a natural process of spreading generalization of disrespect that the reader can intuit here.

The potential for the generalization of disrespect is even greater where the disapproval does not concern a particular controversial law. Where the system generates objectionable case results because of a highly publicized and controversial position, as with Prohibition or the right to an abortion, there is at least the potential to limit the system's discredit to the controversial law. But it is much more frequently the case that the cause of an objectionable result is not so apparent, and in these cases the compartmentalization of disrespect is essentially impossible. The criminal law may conflict with community views in an endless number of ways in its definition of offenses or general principles of liability. An objectionable definition of rape or a counterintuitive rule governing offense culpability requirements, accomplice liability, or causal accountability for a harmful result, or any of a wide range of the general rules relied upon in most cases, can generate an objectionable result. Yet, the specific source of the perceived error will not be apparent to the observer, just the improper result. Without a segregable and visible "bad" law to blame, the observer can do little other than be suspicious of the entire enterprise.[69]

What are the consequences of a generalized discontent with the criminal law and the criminal justice system? Johannes Andenaes remarks that "a certain degree of respect for the formal law is probably essential for the smooth functioning of society. Where it is lacking, law enforcement agencies play a role similar to that of an occupying

[69] We would suggest that the dimensions along which generalizations of disrespect occur for legal codes and criminal justice institutions is an urgent topic for psychological research to address. One available example is Jeffrey Kaplan, *Absolute Rescue: Absolutism, Defensive Action and the Resort to Force*, J. TERROR. & POLIT. VIOL. 128 (1993). He uses interview and archival techniques to trace the evolution among the pro-life constituency of a deviant subgroup that has come to accept the use of illegal violent tactics, including killing of abortion workers, to further their aims. To give an example from his work that connects with our argument, it is often the encounter of the pro-lifer with some specific evidence that convinces him of the immorality of abortion—perhaps the sight of an aborted fetus. When that evidence is presented by the prolifer to the public, and the legal authorities, and they do not react by outlawing abortion, the moral judgment of the legal authorities is destroyed. Further, encountering the police as the demonstrators were arrested in clinic demonstrations produced more radicalization. "If indifference was the first step in the disillusionment of rescuers with American society, the experience of violence at the hands of those that the civics texts of the 1950's and 1960's held to be the guardians of order was the next great shock." *Id.* at 132.

army in foreign territory . . . ."[70] World War II helped create a popular view that violently opposing the rules imposed by an occupying army is not only not immoral; it is highly moral. A set of laws that is not seen as just is likely to be seen as unjust. When a criminal law offends the moral intuitions of the governed community, the power of the entire criminal code to gain compliance from the community is risked. That there exists such unavoidable sources of injury to the criminal law's moral credibility means that it is that much more important that the criminal law be formulated to maximize its moral credibility in all those respects that are within the control of law makers.

E. Persuasion v. Contempt

The previous discussion in Parts III and IV enable us to clarify a potential ambiguity in our claims. We claim that sometimes the law can convince persons that they should respect and obey the provisions of the criminal code, and internalize those prohibitions as part of their own moral code. But at other times, a conflict between the legal code and individual moral intuitions can lead people to persevere in their own judgements and move toward contempt for the legal code. In this subpart, we specify the conditions under which one or the other outcome will occur, when the code will be persuasive, and when it well be rejected. The psychological literature on persuasion and attitude change provides a basis for doing so.

Social science research suggests that two factors are particularly relevant: the credibility of the source that is attempting to persuade the individual who is the target of the message and the certainty or strength with which the target holds his or her own opinion. Intuition, as well as research, makes clear that the two factors interact as follows: the higher the credibility of the source, the more likely the source's message is to persuade the target;[71] the more strongly or cer-

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[70] JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 34 (1974).

[71] The credibility of a source of communication is generally thought to be a joint function of the source's expertise on the communication topic and the source's trustworthiness as a communicator. One reviewer concludes, "Few areas of research in social psychology have produced results as consistent as the findings that sources high in expertise and/or trustworthiness are more persuasive than those low in these qualities." Glen Hass, *Effects of Source Characteristics on Cognitive Responses and Persuasion, in* COGNITIVE RESPONSES IN PERSUASION 141 (Richard Petty et al., eds. 1981). In a major recent review of the attitude literature, the review authors reach the same conclusion: "[S]ubjects typically exhibited greater agreement with the beliefs and attitudes recommended in persuasive messages when the source of these messages were portrayed as higher in expertise [and] trustworthiness." ALICE EAGLY & SHELLY CHAIKEN, THE PSYCHOLOGY OF ATTITUDES 429-30 (1993). McGuire, another leading figure in attitude research, suggests that both expertise and trustworthiness must be jointly present for persuasion to take place. William McGuire, *Attitudes and Attitude Change, in* HANDBOOK OF SOCIAL PSYCHOLOGY 233 (Gardiner Lindzey & Elliot Aronson, eds., 3d ed. 1985).

tainly held the original opinion, the less likely the target is to be persuaded to change his or her opinion.[72]

The application of these factors to the present case is fairly direct. The source of the message is the legal code and the intentions and motivations of the drafters who stand behind it.[73] The message is, in essence, that this or that action ought to be criminalized, is wrong, and deserves the specified level of punishment. When will the legal code, as source, be regarded as credible? Much of our argument up to now has been directed to answering this question. We conclude that the legal code is credible to the extent that it has what we have called moral credibility. For the present discussion, we note two components of this credibility. First, the law's credibility is a function of the trustworthiness of its judgement. The code gains trustworthiness by assigning punishment in accord with the principles of justice of the person it is attempting to convince. Second, the law's credibility is a function of its perceived expertise, relevant in this instance when the code asserts that some conduct that is not obviously harmful should be treated as such because the conduct has less apparent but real harmful consequences. The law is saying, in essence, "Trust those of us who drafted the code. We have thought this through. This action is sufficiently harmful or evil that it deserves to be criminalized."

The other factor that influences whether the law will persuade or will draw contempt is the strength of the original opinion on the issue. When are individuals relatively certain of their opinions in the domain of criminal law? People are likely to be certain about the criminality of actions such as killing, arson, and theft—those offenses that historically have been referred to as *malum in se*, "actions that are wrong in and of themselves." Different people may have somewhat different mappings here; as we noted in our section on cultural descensus—abortion and animal cruelty are held to be wrong with great certainty

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[72] Eagly & Chaiken, *supra* note 71, reviews the theories that link attitude strength with resistance to change, and the evidence that supports those theories. Theoretically, people are motivationally linked to their strongly held attitudes. They have strong convictions about their rightness and often have publicly committed themselves to this view. Further, strongly held attitudes are generally connected to the values and beliefs that people hold, as well as other attitudes. To change that attitude would require the change in linked values, beliefs, and other attitudes. For both of these theoretical reasons, then, strongly held attitudes can be expected to be resistant to change. Eagly & Chaiken concludes, "we believe that few researchers would disagree with the idea that [the strength of] people's prior attitudes represent an important source of the resistance to attitude change." *Id.* at 589.

[73] McGuire's analysis indirectly supports our extension of the concept of trustworthiness from individuals to institutions and gives a sense of where, among institutions, the trustworthiness of the judicial system might be found: "[I]nstitutional as well as individual sources differ in trustworthiness: Science, medicine, and academic groups tend to elicit a high degree of confidence; the military, police and judiciary somewhat less; followed by business and media leaders, with political officeholders and labor union officials trusted still less." McGuire, *supra* note 71, at 63.

by some. People in general can be expected to be less certain on the actions historically referred to as *malum prohibitum* and may have quite differential certainties produced by past personal histories. A parent whose child has been killed by a drunk driver is likely to hold, with a high degree of certainty, that drunk driving is a serious wrong.

Thus, the social science literature suggests five generalizations, most of which reaffirm conclusions developed in earlier sections. First, the credibility of the legal code depends on it being perceived as a trustworthy guide to assigning liabilities according to the community's perception of which actions are moral, which are immoral, and how severely the immoral actions should be punished. Second, the higher the credibility of the code (that is, the greater its reputation for assigning liabilities according to perceived desert), the more persuasive it will be in convincing people of the correctness of its judgement, and thus, the more they will be inclined to behave in compliance with the code and internalize its judgements as morally appropriate. Third, since people are likely to be relatively less certain about *malum prohibitum* offenses, the code will be more likely to convince people with regard to those offenses. Fourth, when a legal code condemns an action that a person is certain is not morally condemnable, or fails to condemn an action that a person is certain is morally condemnable, its credibility is, at minimum, put at risk, normally lowered, perhaps eventually destroyed, by the spreading processes of radicalization that we have suggested. Fifth, when the criminal law, asserting its expertise, criminalizes an act that is not obviously harmful, if people later discover that the act does not lead to the consequences that they generally regard as properly criminal, the law loses credibility, although not as decisively as in the fourth conclusion above.

Suppose that code drafters wish to adopt a specific proposal that is known to be in conflict with the moral intuitions of the community or a section of the community. They face a difficult but not impossible task; they must convince the community that the community's intuitions are wrong and that justice would be better served by distributing liabilities according to the new principle. From our point of view, they must engage in this persuasive task directly and forcibly and assess the success of their efforts. If they do not succeed in convincing the community, they then risk lowered credibility if they nonetheless adopt the proposal. When, as sometimes happens, the code provisions are adopted without this sort of educational debate, the potential for community contempt for the code has been established, and that potentiality is likely to become an actuality when the first publicized prosecution for violation of the new provision takes place.

F. Summary

We have every reason to think that, more than any other body of law, criminal law plays a central role in the creation of new norms, and that the criminal law can have a direct effect in gaining compliance when it is seen as a moral authority. And both of these sources of influence by the criminal law—in building and maintaining norms and in gaining compliance through moral authority—depend upon the criminal law's moral credibility with the community. The criminal law's moral credibility with the community, we argue, requires a distribution of liability that follows the community's perceptions of principles of deserved punishment and requires a separate and distinct criminal justice system, a system which can demonstrate its exclusive focus on blameworthiness and can effectively convey the special condemnation of criminal conviction. This credibility is risked when the legal system criminalizes actions that the community regards as not criminal or does not criminalize actions that the community regards as serious moral violations that deserve criminal condemnation. A society that contains groups in deep disagreement about what should count as a criminal offense is a society in which the moral authority of the criminal law is in tension and at risk.

V. Determining Community Perceptions of Desert

A. Code Drafting to Community Standards

We have argued for a criminal law based upon principles of desert, specifically, principles of desert as shared by the community. We need to say more about how such a distribution of liability would be determined. We need to distinguish our view of such a law-drafting system from some of the caricatures of it that could be advanced. Basing the criminal law on community standards does not mean resolving individual cases as the public or press see them in the heat of the moment. We know that the public and the press can lose perspective when buffeted by the biases and prejudices inspired by the facts of any particular case. The tendency of people to be more sympathetic to defendants more like themselves is well documented.[74] Nor does our position support legislators' hastily passing laws driven by public reactions to some recent court case that outrages public opinion.

We envision code-drafting being done by commissions of lawyers, criminal law experts, and social scientists. They would seek community input by means of research studies in which respondents make judgments of cases that elicit their principles for the just distribution of liability. Community judgments on the minimal requirements for

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[74] *See, e.g.*, Jeffrey T. Frederick, The Psychology of the American Jury 166-67 (1987).

criminalization of conduct, on the justification of conduct that otherwise would be criminal, on the conditions under which wrongful conduct should be excused, and on the grading of offenses would, at a minimum, have claims on the code drafters' attentions. The code drafters would incorporate such shared community intuitions into the code, unless they had well-worked-out reasons not to do so. If they had such reasons, they would make clear what they were, and attempt to educate the community on their validity. The commission's deliberations would be public, and the maximum attention of the community would be sought.

The output of the commission, of course, would be submitted to the legislature, which is the institution to which our constitutional system grants standing to make laws. Many if not most of the commission's recommendations would be non-controversial, especially because they will generally track community views. But where there is disagreement among the community, the commission will have no consensus to report, and it will be in these instances of disagreements that it will be left primarily to the legislature itself to sort out the position that the law will take. Given our general account, we cannot deny the problems inherent in such cases, although we suspect that their existence is rare. Some benefits may arise when the general public sees genuine moral disagreement on one or two of these issues, but these are the truly difficult cases, in which the potential for the radicalization of some segment of the community is present.

We stress the importance of the moral intuitions of the community as a valued beginning for code drafting, followed by a process of code drafting done in public with an eye to educating and involving the community. The establishment of public understanding of the criminal law provides the best chance of a code gaining the respect of the community, and surviving the occasional case of deep community disagreement.

We do not underestimate how complex a task it is to determine liability rules that will capture such shared community intuitions of justice. But, as we show in our recent book, *Justice, Liability, and Blame: Community Views and the Criminal Law*, it is a feasible undertaking given the state of current social science methodology,[75] and it is also an important undertaking. Over the long term, it is by this means that the system will earn its moral credibility with the community.

[75] PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 217-28 (1995).

B. *The Content of a Community-Based Code*

Based on our preliminary research, a community-based criminal code would retain most of the foundational principles on which current criminal law doctrine is based: a focus on a person's level of culpability, the extent of the harm attempted or risked, the degree to which that harm actually came about, and the presence of any justifying or excusing conditions.

There seems a strong consensus, for example, that the degree of an offender's liability should follow to a considerable degree the person's level of culpability toward the conduct constituting the offense. However, for most offenses other than homicide, current codes set a minimum level of culpability, frequently recklessness, and assign a constant degree of liability once that minimum level is reached. The respondents in our research studies generally imposed higher degrees of liability as the culpability level of the offender increased above the minimum required for liability. A person who commits a crime purposefully, rather than recklessly, receives a stiffer prison sentence from our respondents, and this seems reasonable to us.[76]

Our respondents also recognized and granted validity to many of the excusing conditions that are recognized in criminal law. Specifically, they judged that the effects of mental dysfunction could exculpate a person, and they based their judgments of whether to grant an insanity defense on the degree of cognitive and control dysfunction, as do most legal codes.[77] Our respondents similarly recognized and gave validity to the broad notion of justification defenses—defenses that approve of and therefore exculpate a person for normally unlawful conduct in certain circumstances, such as self-defense or citizen's arrest to prevent commission of a crime.[78]

But our research suggests that a community-based code would differ from current codes in some important respects. Systematic disagreements between the criminal law and our community of respondents were not uncommon. Our respondents disagreed with the Model Penal Code's treatment of various kinds of rape. For instance, where forcible rape has occurred, the Code gives a mitigation to the rapist if the victim had been "a voluntary social companion" of the rapist who had "previously permitted him sexual liberties" or if the victim is the rapist's spouse.[79] Our respondents do not.[80]

Similarly, our respondents do not agree with the Model Penal Code's assertion that a substantial step toward committing a crime

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[76] *Id.* at 169-70.

[77] *Id.* ch. 5.

[78] *Id.* ch. 3.

[79] MODEL PENAL CODE § 213.1(1), .1(1)(d)(ii).

[80] ROBINSON & DARLEY, *supra* note 75, at 160-69.

alone ought to be sufficient grounds for punishment. And, even for very advanced attempts, they disagree with the Code's grading attempts the same as the completed offense.[81]

Our book gives a more complete characterization of the code that would emerge if one took community intuitions as a basis for criminal sentencing practices. Here we have only described enough to give the reader some sense of what the law would look like and to dispel any notions that it would be excessively savage, excessively lenient, or in marked deviation from the general outlines of existing criminal laws.

C. Apparent Deviations from Deserved Punishment: Amount, Method, and Forgiveness

Would the liability and sentencing practices we recommend ever deviate from strict reliance on just desert? Our preferred answer is "no," but this need not mean that considerations of rehabilitation or incapacitation need never enter into decisions about the fate of specific criminals. While the amount of punishment to be imposed must match the amount required by community perceptions of desert, the method of inflicting that punishment is generally irrelevant to the goal of desert.[82] Thus, once judges ensure that the total amount of punishment is the amount deserved, they are free to select a sanctioning method that will maximize rehabilitation or incapacitation (or deterrence or any other worthwhile crime reduction strategy) without fear that their selection of method may endanger the criminal law's moral credibility. To do this, the judge need only take account of the "punishment bite" of each sanctioning method used and ensure that the total "bite" of all sanctions add up to the amount deserved, not noticeably more or less.[83] We have recently published research on public perceptions of the punitive bite of alternative sanctioning methods that can serve as a guide to judges in constructing sentences.[84] It shows that non-incarcerative sentences frequently can be used to inflict the punishment deserved, even for many non-minor offenses.

A second possibility exists, which we do not favor. In some cases, in which the possibility of rehabilitation of the criminal is thought to be high (preferably documentably high), the sentencing system may decide to assign a rehabilitative course of treatment to the criminal

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[81] *Id.* Study 1.

[82] *See* Paul H. Robinson, *Desert, Crime Control, Disparity, and Units of Punishment*, *in* PENAL THEORY AND PRACTICE: TRADITION AND INNOVATION IN CRIMINAL JUSTICE 93 (Antony Duff et al. eds., 1994). *But see* Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

[83] *Id.* at 593.

[84] Robert Harlow et al., *The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions*, 11 J. QUANTITATIVE CRIMINOLOGY 71 (1995).

that does not meet the just desert criterion. What the system is doing here is essentially deciding to forgive the individual (by forgoing the deserved punishment for the crime) because it is thought that this increases the possibility of making that person less likely to commit crimes in the future.

Because it deviates from a desert-based system, we do not favor this option. However, it at least begins with recognizing the desert-based considerations and deviates from them openly, giving reasons for doing so. That is, it acknowledges that there is something to be *forgiven*; it acknowledges the offender's blameworthiness. This might well be a tenable system if it were limited to cases in which research suggested that shared community notions might support such a show of forgiveness while nonetheless agreeing that the offender was blameworthy. For example, research might show that a genuine feeling of great remorse, evidenced by acts of restitution performed before arrest, was one of several preconditions to forgiveness. If that were so, one could limit the damaging effect on such a forgiveness program by limiting it to such cases.

D. Desert and Dangerousness

A desert-based system such as we advocate would not disguise lengthy incarceration based on predictions of dangerousness as legitimate punishment. However, it could include more severe sentences for second-time offenders. Andrew von Hirsch has developed an account of why repeat offenses may justify higher sentences under a desert theory.[85] Community intuitions may mirror his reasoning. Thus, the system might give a "first offense discount" in many, even most cases, on the theory that the absence of any prior offense suggests that this conduct may be an aberration and may not truly reflect the offender's free choice, but rather a response to the pressures of the peculiar situation—a kind of mini-mitigation for coercion, extreme emotional disturbance, or the like. Alternatively one could conceive of the harsher sentence for a second-time offender as giving an extra slap on the wrist to an offender who has previously been reprimanded and nonetheless committed another violation, thumbing his nose at the society's law, as it were. We will be more inclined to support an increase in sentence for a second-time offender only after research suggests that the public has these intuitions.

Obviously, a reliance upon these theories might seem to generate a distribution of liability that keeps more dangerous offenders (that is, repeat offenders) in jail longer. It might well have that effect, but the likelihood of future criminality would be only a useful coincidence; it

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[85] *See* Andrew von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591 (1981).

would play no role in the distribution of liability. Note also that these two desert-based theories would not operate for all dangerous offenders but only for some; each would apply only to a specific set of cases that logically followed from the rationale. Finally, note that the amount of adjustment in sentence, even for cases where both theories are relied upon, would be rather modest; neither the first-offense discount nor the nose-thumbing penalty concerns factors that are of central concern in determining desert. They certainly would not support the kinds of dramatic increases for apparent dangerousness that we see in current practice.[86]

We should note that we do not think that a society must stand defenseless in the face of dangerous offenders. Our point is simply that it is bad policy to pretend that incarceration based upon a prediction of future criminality can be justified as "punishment," because to do so undercuts the law's moral credibility in assigning deserved punishment for past offenses. Society does and should detain people who are shown to be dangerous. Sometimes that showing, that prediction, is based on an assessment of mental state, sometimes it is based on criminal records. However, we ought to be open about what we are doing, and we ought to structure that incarceration to match the rationale. Specifically, incarceration based upon a claim of dangerousness ought to be under conditions consistent with its non-punitive purpose, much like the conditions of confinement of a person with a contagious disease that we confine for our protection. This does not describe current prisons. Even more importantly, such confinement ought to be subject to regular reviews to confirm the confinee's continuing dangerousness, a practice abandoned under the current "three strikes and you're out" legislation that provides for life imprisonment without possibility of parole.[87]

A recent program in the State of Washington, which civilly commits sexual predators if they are judged to remain dangerous after the expiration of their prison term, follows the course we suggest, and we

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[86] It has been argued that people, often in their function as jurors, use the prison system as a means of locking up dangerous people, and that this suggests that people may conceive of dangerousness as contributing to an actor's blameworthiness and as grounds for deserved punishment. We agree that people under the current system often imprison (or impose the death penalty) on defendants who they think are dangerous. It does not follow, however, that people are ignorant of or indifferent to the difference between imprisonment as punishment for a past crime and incarceration to prevent a future crime. That the distinction is widely recognized is shown by the nearly universal practice of having a separate civil commitment system, distinct from criminal commitment. People are willing to use criminal commitment to protect society against defendants perceived as dangerous because the current system—with its limitations on the use of civil commitment—gives them no alternative means of protection. If they were given the choice, we think lay persons would elect civil commitment rather than criminal if they thought a defendant was dangerous but did not deserve punishment. The issue can be resolved by empirical research.

[87] *See* Robinson, *supra* note 35, at 714-16.

note that it is much maligned. Obviously, it is difficult to generate a method of holding sexual predators in custody that does not have punitive elements, and those making the predictions of dangerousness may be swayed by considerations of what would happen if they predicted non-dangerousness for a predator who then offended again. Still, the proposal almost certainly makes the situation better for those incapacitated for "dangerousness" than when they are instead sentenced to long terms or life terms of punitive confinement in prisons, with no right of review for dangerousness. We suspect that some of the criticism of this admittedly imperfect system of preventive detention comes from people who do not realize how rampant is the use of dangerousness in current practice as the primary justification for lengthy prison sentences.[88]

VI. Attempts at Justifying Deviations from Desert

In the previous section we considered some possible deviations from a liability and punishment system based on just desert, and showed how those deviations are more apparent than real: Greater use of non-incarcerative sanctions is not necessarily inconsistent with a distribution of punishment according to perceived desert; and forgiveness of some offenders is not necessarily detrimental to the criminal law's moral credibility. In this section we consider some deviations from just desert that may seem attractive but that we regard as undesirable.

Some utilitarians apparently believe that only the threat of sanction or lack thereof determines whether a person will commit an offense.[89] But other utilitarians might agree with our claim that personal morality and interpersonal relations have effect and that the operation of these forces can be influenced by altering community perceptions of the criminal law's moral credibility. They nonetheless may be tempted by a system that intentionally and regularly deviates from a distribution of criminal liability according to perceived desert.[90] They might argue that the crime-control value of one or another deviation from desert outweighs the incremental loss in the criminal law's moral credibility.[91]

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[88] Notice how a consistent focus on just desert and blameworthiness clarifies issues. If one does not focus on the proper proportionality between blameworthiness and punishment, then it is not apparent that the current sentencing practices are as disproportionate as they are, and that they create sentences that the community would perceive as unjust.

[89] *See, e.g.*, Shavell, *supra* note 57.

[90] To do this, they would have to overcome the objections to the utilitarian approaches that we describe in Part I of this article.

[91] For a discussion of how such a hybrid distributive principle might operate, see Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 Nw. U. L. Rev. 19 (1987).

Such a system of selective deviations would be an improvement over our current state in which little regard is paid to the effect of deviations from desert. Nonetheless, we suggest that the utilitarian be cautious here. If we had perfect data on the dynamics of the forces at work and their relative effects, the cost-benefit analysis would be clear. We do not, of course, and are not likely to have even a crude understanding of the dynamics in our lifetimes. We can only speculate about the relative effects. Let us explain why we think we should err on the side of caution in deviating from the principles of perceived desert.

A. *The Problem of Attributions to the Criminal Justice System: Reputation and Motive*

How will deviations from desert affect the criminal justice system's reputation for doing justice? The general principle that we shall appeal to here is referred to psychologically as an attributional principle. Those studying persons perception have realized that the task that perceivers take on, when they are examining the actions of others, is to determine the dispositions of the other, the abilities the other possesses, the personality, and the immediate or long-term intentions. Dispositional perception of this sort is referred to as "attributional perception."[92] One not only makes attributions to individuals, but to institutions set up by persons; we all can make sense of the question of whether a legal system is "fair." The specific attributional problem here is one of making sense of the cumulative meaning of actions that seem to deviate from the announced purposes of that institution. What conclusions are drawn, what attributions are made, if the system seems to operate by a set of rules (punishment according to just desert) or claims to operate by the set of rules but occasionally deviates from those rules? What conditions determine when those who observe the system conclude that the system does not, in fact, live by the set of rules that it professes? When, in other words, does it lose its "reputation"?

One attributional rule involves whether the deviations are repeated. All of us are aware that there are many reasons that a system could occasionally come to a wrong outcome; rare deviations do not signify. However, repeated ones do signify, especially when the deviations seem to point to the same underlying cause; regular deviations that fall in a regular explanatory pattern, even if they are minor, could

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[92] The seminal publications on attribution theory are: Edward Jones & Keith Davis, *From Acts to Dispositions*, *in* 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 219-66 (L. Berkowitz ed., 1965) and Harold Kelley, *Attribution Theory in Social Psychology*, *in* 15 NEBRASKA SYMPOSIUM ON MOTIVATION 192-238 (D. Levine ed., 1967).

do much to hurt the system's reputation.[93] This would be true even if the number and extent of the deviations were small in comparison to the system's overall output of decisions.[94]

This reflects the fact that a large part of preserving the reputation of a person or an organization is to cause others to see that the person or organization is genuinely motivated to "play by the rules" that it espouses. An error can be forgiven if it is seen as "out of character." This is true of personal reputations; we suggest that it is also true of the reputations of larger entities.[95] People know that they cannot know what all aspects of the criminal justice system are doing at all times. Their 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. The criminal law's reputation may depend on its public commitment to never intentionally deviating from the principles of perceived desert, while conceding that inadvertent deviations are unavoidable. To admit a policy that intentionally authorizes failures in administering liability and punishment according to desert is to render the system suspect in all its workings.

B. The Advantages of a Morally Credible System

Not only is it easy to underestimate the detriment of intentional deviation from desert, it also is easy to underestimate the benefit of maintaining the system's moral credibility. Unlike the threat of legal punishment, the sources of compliance discussed here are not dependent on the effectiveness of the system in arresting, convicting, and punishing offenders. The real sources of compliance power—a person's family or friends and the person's own conscience—can know of an offender's violation even if the authorities do not or cannot prove it. Thus, harnessing the compliance powers of social group and personal morality can reduce current crime levels even if policing and prosecuting functions cannot be made more effective.

Note as well that these sources of compliance power do not have the staggering costs of increased enforcement, adjudication, and imprisonment that would be required if reduced crime were to be achieved through deterrence (or incapacitation or rehabilitation). Again, their power comes not from catching and punishing every

[93] Harold Kelley, *Causal Schemata and the Attribution Process*, *in* ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR 151-74 (Edward E. Jones et al. eds., 1971).

[94] In the case of sentences handed out by the criminal justice system, this process is exacerbated by mass media reports that focus on what they see as system failures. Lay persons tend not to see the larger picture and rarely are able to put mass media reports in perspective. (The more cynical observation is that news is more "newsworthy" when it exaggerates the significance and extent of a failure of justice.).

[95] *See* BERNARD WEINER, JUDGMENTS OF RESPONSIBILITY: A FOUNDATION FOR THE THEORY OF SOCIAL CONDUCT 212-14 (1995).

criminal but rather from the system's moral power in obviously trying to do justice. That educational and symbolic function can be served in the adjudication of whatever cases are brought to the system, even if many are not. Nor does crime reduction through these mechanisms require the increased intrusions of privacy that more effective crime investigation would require or the increased errors in adjudication that easier prosecution rules would require. In other words, harnessing the social and personal forces of compliance offers the possibility of better compliance at lower cost.

We have argued that a criminal law based on community principles of perceived desert can enhance the law's compliance power and that a criminal law that is seen systematically to deviate from those principles reduces that power. Here we should point out that our account of the role of criminal law assigns it a less powerful role in producing law-abiding behavior than do the traditional theories. One reason for the attractiveness of deterrence theory, for instance, lies in its claims of having great power to autonomously produce compliance. (We have shown the moral and empirical fallaciousness of that possibility earlier in Part II.) We make no such claim for the legal code; its role is secondary and contributive rather than primary and determinative of law-abiding behavior. This seems to us to be an accurate representation of the true state of affairs, and if adopted, might have the useful function of removing from public debate some of the unrealistically high expectations about what can be accomplished by the manipulation of criminal liability and punishment.

VII. Summary and Conclusion

The evidence is reasonably clear that the power of interpersonal relationships and internalized norms to prevent crime is dramatically greater than that of official sanctions. The ability of the law to harness these forces is less clear. Studies suggest that increasing the law's moral credibility can enhance its compliance power, but the studies are preliminary and many important questions remain unanswered. Will research confirm our speculations about the mechanisms by which a morally credible criminal law can increase compliance? Will research confirm our speculations about the practices that most undercut the system's moral credibility and those that would most enhance it?

It will take some time for social scientists to answer these questions, but we need not wait for those answers before we make some changes in what we do. Most importantly, it is clear that a utilitarian calculus in determining the rules for the distribution of criminal liability and punishment must take account of real-world costs that come from deviating from the community's principles of deserved punishment. The costs and benefits of moral credibility may be more diffi-

cult to measure than those of the factors typically taken into account by utilitarian calculations in the past, but if they are more powerful in their effect than the other factors, to ignore them risks rendering the calculation meaningless.

While we do not know with any certainty the degree of importance of the criminal law's moral credibility, we can be reasonably sure that it has some. Thus, a corollary to the above is that we ought not tolerate any deviation from desert, or any other measure that may undercut moral credibility, without a clear and significant benefit. And even then, we counsel a close examination of long-term as well as short-term effects. This suggests a number of reforms, which we have mentioned.

Where have we left the long-running debate between desert and utilitarian justifications for punishment? We have used essentially utilitarian reasoning to argue for a desert-based system of criminal law. More specifically, we have argued that people obey the law not so much because they are fearful of being apprehended by the criminal justice system, but because they care about what their social group thinks of them and because they regard obedience as morally appropriate. Criminal laws based on community standards of deserved punishment enhance this obedience. We conclude that desert distribution of liability happens to be the distribution that has the greatest utility, in the sense of avoiding crime. Thus, utility theorists ought to support liabilities assigned according to such a desert-based system.

If our arguments are accepted, we have, in some sense, united two groups of criminal justice philosophers that have characteristically been thought to be at hopeless odds. Desert-based punishment proponents assert that what matters in liability and sentencing is doing justice; utilitarians require an analysis of the consequences of a liability assignment system to justify it, characteristically a showing of how the system is maximally effective in avoiding crimes in the future. We suggest that while these two sides do not agree on the reasons for imposing punishment, if they agree with our analysis, they can, incredibly enough, agree on how punishment should be distributed.

We have, perhaps, united utilitarians and just desert thinkers, but we may have united them in opposition to our recommendations. Liability and punishment should be distributed according to a desert-based distribution system, but the advocate for desert-based punishment systems may not be greatly pleased by this. Our desert-based system is importantly different from the standard one. In the standard desert-based system, what a criminal actually deserves is derived from some underlying systematization of moral principles; in our analysis, desert is not derived from any philosophically-based, coherently-reasoned systematization, but rather is patterned on the principles the community uses in assessing blameworthiness.

Has the utilitarian won the battle if our recommendations are accepted? In one sense, yes; we have used utilitarian arguments to justify our desert-based liability and sentencing scheme. However, the results of that analysis install the kind of liability distribution system that the utilitarians have argued against for decades. Worse, from their point of view, they cannot reject our arguments on principle, as they have rejected desert arguments in the past. If future investigations support the power we claim for the law's moral credibility, there is a powerful utilitarian argument for the adoption of a desert-based criminal law.

If our recommendations are adopted, the utilitarian criminal justice system is in some ways constrained in its distribution of liability, but it is freed from another constraint. During the past decades of the standard utilitarian approach, some criminal justice systems and institutions have had their charters set to a strictly utilitarian purpose, which seemed to exclude considerations of desert.[96] Our thesis suggests that 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. Thus, our thesis not only allows these systems and institutions to take account of desert but in fact demands it.

The central point that we seek to make is this—there is practical value, not just "philosophical" value, in maintaining the criminal law's focus on moral blameworthiness. What we have in the past taken to be instances of injustice imposed by the criminal justice system on some individual, when the just desert principle is violated, we ought to understand now as instances of injustice imposed on us all, since each such instance erodes the criminal law's moral credibility and, thus, its power to protect us all.

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[96] *See, e.g.*, Alaska Const. art. I, § 12; State v. Chaney, 477 P.2d 441 (Alaska 1970); G.A. Res 152, U.N. GAOR, 46th Sess. Supp. No. 49, at 12, U.N. Doc. A/152 (1992) (establishing UN Commission on Crime Prevention).