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STRICT LIABILITY'S CRIMINOGENIC EFFECT

Paul H Robinson[1]

It is easy to understand the apparent appeal of strict liability to policymakers and legal reformers seeking to reduce crime: if the criminal law can do away with its traditional culpability requirement, it can increase the likelihood of conviction and punishment of those who engage in prohibited conduct or bring about prohibited harm or evil. And such an increase in punishment rate can enhance the crime-control effectiveness of a system built upon general deterrence or incapacitation of the dangerous. Similar arguments support the use of criminal liability for regulatory offenses. Greater punishment rates suggest greater compliance.

But this analysis fails to appreciate the crime-control costs of strict liability. By explicitly providing for punishment in the absence of moral blameworthiness, the law undermines its moral credibility with the community and thereby provokes subversion and resistance instead of the cooperation and acquiescence it needs for effective crime control. More importantly, the system's lost moral credibility undermines the law's ability to harness the powerful forces of stigmatization, social influence, and internalized norms. Given the serious limitations inherent in the real-world application of general deterrence and preventive detention programs, the most effective crime-control strategy is to build the criminal law's reputation for being just, which means avoiding the use of strict liability.

Essay Headings

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Strict Liability and the Criminalization of Regulatory Violations as Undercutting Criminal Law's Moral Credibility and Thereby Its Crime-Control Effectiveness
Empirical Evidence That Loss of Moral Credibility Undermines Crime-Control Effectiveness
Empirical Evidence That Use of Strict Liability Undermine Moral Credibility
Conclusion

If one sees the criminal justice system as being in the business of doing justice – giving deserved punishment in proportion to an offender's moral blameworthiness – then obviously strict liability is inappropriate. Such "retributivists" would see criminal law's culpability requirements as a central element in assessing moral blame.

But if one is a crime-control utilitarian, strict liability may seem to have its appeal. It can increase the likelihood of conviction and punishment of those who engage in prohibited conduct or bring about prohibited harm or evil, thereby increasing the crime-control effectiveness of a system of general deterrence or incapacitation of the dangerous. Similar arguments support the use of criminal liability for regulatory offenses. Greater punishment rates suggest greater compliance.

Setting aside for a moment the increasing evidence that doctrine manipulation to enhance general-deterrent effect simply does not work in practice,[2] and setting aside the increasing evidence that trying to use the criminal justice system as a means of preventive detention is a self-defeating

[1] Colin S. Diver Professor of Law, University of Pennsylvania.
[2] See Paul H. Robinson, Distributive Principles of Criminal Law: Who Should Be Punished How Much? chs. 3 and 4 (Oxford 2008) [hereinafter Distributive Principles].

program,[3] it is argued here that devoted crime-control utilitarian ought to reject strict liability because its use undermines the criminal law's moral credibility with the community and thereby provokes subversion and resistance instead of the cooperation and acquiescence it needs for effective crime control. More importantly, the system's lost moral credibility undermines the law's ability to harness the powerful forces of stigmatization, social influence, and internalized norms. The most effective crime-control strategy is to build the criminal law's reputation for being just, which means avoiding the use of strict liability.

The primary arguments in support of strict liability are these: First, the imposition of strict liability will cause people to be more careful in their conduct and thereby more effectively prevent criminal risk-taking. Second, the use of strict liability is not really unjust because it is normally limited to those instances in which there is probably negligence per se. And finally, even if there is some measure of injustice in its use, the amount is minor, even trivial, because strict liability typically gives rise to only civil-like penalties.

Strict Liability Deters Inattentiveness

As to the first argument – that the use of strict liability will cause people to be more careful – let us assume for the sake of argument, as noted above, that this deterrent effect on future conduct really does exist, that having statutes that impose strict liability actually will translate into people on the street acting more carefully. What is left unclear is whether strict liability is more effective in this regard than a standard of culpable negligence would be. The negligence standard requires an actor to do all that he or she reasonably can be expected to do to be attentive and careful. What can the use of strict liability add to that? Strict liability might be able to encourage people to be even more careful than the circumstances reasonably would require. But this seems a questionable goal. Some risks ought to be taken, and it may be harmful to society to have actors unreasonably preoccupied with all potential risks.

One might argue that, however, that in a few instances the potential harm is sufficiently serious that the law ought to do everything within its power to avoid a violation, and strict liability provides that special "super-punch." However, the culpable negligence standard already takes into account the seriousness of the risks, and it already demands greater vigilance to avoid greater risks. As the potential harm becomes greater, an actor's ability to avoid negligence liability for his or her inattentiveness disappears. Further, this special-rule-for-serious-arms argument is inconsistent with the current use of strict liability, which is most common in minor offenses and less common in more serious offenses.

Application of Strict Liability Is Commonly Limited to Cases of Negligence Per Se

As to the second argument – that strict liability does not necessarily mean unjust punishment because its use is typically limited to cases where there is negligence per se – it is true that strict liability is used sparingly in some modern codes.[4] The Model Penal Code reads in a culpability requirement even to a silent statute,[5] with two exceptions: first, culpability's not read in for "violations," which are typically only quasi-criminal offenses, having only a fine, forfeiture, or other civil penalty,[6] and, second, culpability is not read in for offenses defined outside of the criminal code (as

[3] See id. at ch. 6; Robinson, Punishing Dangerousness: Cloaking Preventive Detention As Criminal Justice, 114 Harvard Law Review 1429-1455 (2001).
[4] For a general discussion, see Robinson and Cahill, Criminal Law, 2nd ed., § 4.3.3.
[5] Model Penal Code § 2.02(3).
[6] See Model Penal Code § 1.04(5).

long as there is a clear legislative purpose to impose strict liability).[7] Again, offenses outside the code tend to be of limited seriousness, with only minor penalties attached, or at least this was the situation when three-quarters of the states codified their criminal law in the 1960s and 1970s.

However, the Model Code's read-in-culpability rule does not limit the legislature's ability to *expressly* provide for strict liability even for a serious offense defined that is contained within the Code. For example, the Model Penal Code provides strict liability as to the age of the victim when an offense punishes sexual conduct with a partner under ten years old.[8]

But even when strict liability is used in more serious offenses, it is argued, it typically is limited to instances where an actor is in reality at least negligent.[9] For example, it seems unlikely that an actor would not be at least negligent as to whether a sexual partner is under the age of ten. On the other hand, it might happen that, "under the circumstances known to [the actor]," a reasonable person "in the actor's situation" might well make a mistake as to a sexual partner being under ten years old. And, in such a case, the Model Penal Code will impose significant liability in the absence of even culpable negligence. Perhaps more importantly, in the more than half century since the promulgation of the Model Penal Code, states have shown a portion a tendency to increasingly introduce the use of strict liability for nontrivial offenses.

Even at the time they adopted a Model-Penal-Code-based codification, many states imposed strict liability for serious of offenses. For example many adopted felony-murder rules that held the perpetrator and accomplices liable for any death caused in the course of a felony, without regard to the absence of culpability as to causing the death. Admittedly, many accomplices will be culpably negligent as to contributing to such a death; they should have been aware that, by engaging in a felony where one of them planned to have a gun, for example, a death might result. Yet, under many states felony-murder rule formulations, murder liability will be imposed even if under the facts of the case no one could have guessed that there was any chance that anyone could be killed.[10]

One might argue that we can rely upon the discretion of prosecutors to forego prosecution in such cases of non-negligence, but others would claim that such an expectation is unrealistic. What is more important, such an argument concedes that the law itself fails to make the distinctions necessary for a just result, adopting a position inconsistent with the legality principle, under which law, rather than prosecutorial discretion, or to define the conditions of criminal punishment.[11]

The advocates of strict liability that rely upon the negligence *per se* argument may respond by pointing to the significant burden placed on prosecutors when they must prove negligence, and may also cite the dangers to society that may arise if such prosecutions are less successful. Moreover, they may cite the additional cost of prosecutions if strict liability were not permitted. One response to this argument, adopted in many countries other than the United States, is to require negligence rather than permitting strict liability but shifting the burden of persuasion to the defendant.[12] In other words, these countries exchange the *irrebuttable* presumption of negligence embodied in strict liability for a *rebuttable* presumption. Unfortunately, by constitutionalizing the requirement that the state must

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[7] Model Penal Code § 2.05(1):

> The requirements of culpability prescribed by Sections 2.01 and 2.02 do not apply to:
>
> (a) offenses which constitute violations, unless the requirement involved is included in the definition of the offense or the Court determines that its application is consistent with effective enforcement of the law defining the offense; or
>
> (b) offenses defined by statutes other than the Code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.

[8] Model Penal Code § 213.6(1).

[9] For further discussion of this point in the case law, see Robinson and Cahill, Criminal Law, 2nd ed., § 4.2.2.

[10] For discussion of the felony-murder rule, see id. at § 15.3.

[11] For discussion of the legality principle, see id. at § 2.4.

[12] In Canada, for example, "strict liability" allows the defendant to rebut the presumption of culpability, while "absolute liability" does not. See Regina v. City of Sault Ste. Marie, 85 D.L.R.3d 161 (S. Ct. 1978); Eric Colvin, Principles of Criminal Law 22 (1986).

carry the burden of persuasion on all offense elements, the Supreme Court has foreclosed this reform option.[13]

Strict Liability Commonly Results in Only Civil-Like Penalties

Even if the previous arguments in support of strict liability are unpersuasive, it can still be argued that there is little to be concerned about because strict liability typically results in only civil-like penalties. The argument finds support in some modern codes, which typically limit the available penalties when strict liability is imposed. The Model Penal Code provides:

> Notwithstanding any other provision of existing law and unless a subsequent statute otherwise provides, when absolute liability is imposed with respect to any material element of an offense defined by a statute other than the Code and a conviction is based upon such liability, the offense constitutes a violation.[14]

No term of imprisonment is authorized for a violation.[15]

There are two difficulties with the minor-penalties argument, however. First, as noted previously with the example of statutory rape, the Model Code provisions do not altogether bar serious penalties for strict liability. The Code provision quoted above makes all strict liability provisions automatically violations only if the offense is "defined by a statute other than the Code."

Even if strict liability were limited to minor offenses, the minor penalties argument is problematic. If strict liability is to be justified on the grounds that only minor, civil-like penalties, such as fines are imposed, one may reasonably ask: Why not just use civil liability? One might counter that criminal procedures are faster and have other enforcement advantages. But if special procedures are needed, the legislature has the authority to alter the procedures for civil actions or create special procedures for this special group of civil violations.

The real reason that the criminal process is preferred here is its potential to impose the stigma associated with criminal liability, a stigma that civil liability cannot trigger. But this practice creates an existential problem. Regular use of criminal law's stigmatization in cases without culpability will have the effect of diluting and eventually destroying the very stigmatizing effect that is sought. Once people come to understand that the condemnation of criminal liability is in fact being imposed on blameless offenders, the connection in their minds between criminal conviction and moral condemnation will be increasingly weakened – and in all cases, not just those where strict liability has been used somewhere in the process. And the unfortunate truth is that criminal law's use of strict liability has increased enormously over the past decades. The criminal law today is dramatically different from that immediately following the promulgation of the Model Penal Code in 1962.

Criminalization of Regulatory Violations

One area in which this growth is most dramatic is in the criminalization of regulatory violations. Governmental regulation has shown an increasing, and disturbing, tendency to criminalize actions other than those the community would conceive of as morally condemnable conduct.[16] The trend

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[13] For further discussion of this issue, see Robinson and Cahill, Criminal Law, 2nd ed., § 2.9.
[14] Model Penal Code § 2.05(2)(a).
[15] See Model Penal Code Art. 6.
[16] For a general discussion, see Robinson and Cahill, Law Without Justice: Why Criminal Law Doesn't Give People What They Deserve 190-191 (Oxford 2006).

toward criminalization has led to an astounding 300,000 or so federal "crimes,"[17] extending criminalization beyond even the domain of traditional *malum prohibitum* offenses to criminalize conduct that is "harmful" only in the sense that it causes inconvenience to bureaucrats. The practice is not unlike the deterrence-based rules that commonly call for punishments well beyond an offender's moral desert for the sake of discouraging what is seen as improper or undesirable conduct. Regulatory crimes differ, however, in that not only the *amount* of punishment but the very *imposition* of criminal punishment — as opposed to some available civil sanction, such as a fine — seems questionable.

Just as the imposition of *criminal* liability where a violation is morally blameless will dilute the moral condemnation of criminal conviction, so too does the imposition of criminal liability upon a mere regulatory violation. Each time the system seeks to stigmatize where condemnation is not deserved, it reduces incrementally the system's ability to stigmatize even in cases where it is deserved, thereby damaging the very characteristic of criminal law that it attempts to exploit when extending regulatory sanctions beyond civil liability to include criminal punishment. Such criminal punishment of nonserious offenses undermines the criminal law's moral credibility, thereby undermining the crime-control power that derives from harnessing the powerful forces of social influence.[18]Thus, any crime-control advantage gained from using criminal law to punish blameless violations is purchased at a serious cost.

Strict Liability and the Criminalization of Regulatory Violations as Undercutting Criminal Law's Moral Credibility and Thereby Its Crime-Control Effectiveness

What is the empirical evidence in support of the claim that moral credibility undermines crime-control effectiveness and of the claim that the use of strict liability and the criminalization of regulatory violations undermines the criminal law's moral credibility? I have written extensively about these issues elsewhere but let me sketch here if you highlights.[19]

Empirical Evidence That Loss of Moral Credibility Undermines Crime-Control Effectiveness

What is the evidence to support the claim that loss of moral credibility undermines the criminal law's crime-control effectiveness? History certainly suggests such a dynamic, at least for dramatic levels of disrespect for the criminal law. The early Soviet criminal justice system was notoriously arbitrary and corrupt with little or no moral credibility among the general population. Any compliance it gained was through the coercion of brutality and extensive police power. When those power centers weakened with the collapse of the Soviet Union, the crime rate increased dramatically. It was only the coercive influence of the state's threat that had given the system effect, and once that was gone, so too went its control.

But previous empirical studies have hinted and more recent studies have confirmed that this same relationship between the criminal justice system's moral credibility and its ability to gain deference and compliance applies not just to extreme cases but to all – that there is a general relationship between the system's moral credibility and its ability to gain compliance.[20] Even a marginal decrease in the former will produce a marginal decrease in the latter. This suggests that any system can improve its ability to gain deference and compliance by improving its reputation for doing justice and avoiding injustice.

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[17] See 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).

[18] For a general discussion, see Paul H Robinson, Intuitions of Justice and Utility of Desert, chs. 8, 9, and 11 (Oxford 2013) [hereinafter IJUD]; Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U. L. Rev. 453 (1997); Paul H. Robinson et al., the Disutility of Injustice, 85 N.Y.U. L. Rev. 1940 (2010).

[19] See IJUD, Part II.

[20] For a general discussion, see Robinson, Democratizing Criminal Law, Northwestern University Law Review (forthcoming 2017).

Why should this be so? Why should undermining the criminal law's moral credibility have the effect of undermining its crime-control effectiveness? Let me suggest several mechanisms by which this can occur.

The forces of social influence and internalized norms are potentially enormous. A criminal law that has earned moral credibility with the people can harness these powerful social and normative forces through a variety of mechanisms. First, a criminal law with moral credibility can harness the power of stigmatization. Many people will avoid breaking the law if doing so will stigmatize them and thereby endanger their personal and social relationships. And the power of stigmatization is cheap – it does not have the cost of imprisonment, for example – and exists even if the threat of official sanction is not present – it is enough that friends or acquaintances might learn of the misconduct. A criminal law that regularly punishes conduct that is seen as blameless or at least not deserving the condemnation of criminal liability will be unable to harness the power of stigmatization.

Second, a system that has earned moral credibility with the people also can help avoid vigilantism. People will be less likely to take matters into their own hands if they have confidence that the system is trying hard to do justice. And, as I detail elsewhere, the danger of vigilantism goes beyond those rare souls willing to "go into the streets"; it includes "shadow vigilantes" – normally law-abiding citizens and officials who see the system's failures of justice as justifying their distorting of the criminal justice process to force justice from a system apparently reluctant to do it.[21]

Third, a reputation for moral credibility can avoid provoking the kind of resistance and subversion that we see in criminal justice systems with poor reputations. Such resistance and subversion can appear among any of the participants in the system. Do victims report offenses? Do potential witnesses come forward to help police and investigators? Do prosecutors and judges follow the legal rules, or do they feel free to make up their own? In systems with trial juries, do the jurors follow their legal instructions or do they make up their own rules? Do offenders acquiesce in their liability and punishment, or do they focus instead on thinking an injustice has been done to them?

Finally, the most powerful force that comes from a criminal justice system with moral credibility is its power to shape and reinforce societal norms, and to cause people to internalize those norms. If the criminal law has earned a reputation for doing justice, then when the law criminalizes some new form of conduct or makes some conduct a more serious offense than it had previously been, the community takes this legal action as reliable evidence that the conduct really is more condemnable.[22]

The forces of social influence and internalized norms are potentially enormous. But if the criminal law conflicts with people's judgments of justice, that conflict will undermine law's moral credibility and thereby undermine criminal law's ability to harness these forces.

Let me show the results of just one recent study about this dynamic between the system's moral credibility and its ability to gain compliance. Subjects were tested to determine their views on a variety of issues related to whether they would defer to the demands of the criminal law, or help investigators, or report an offense, or take criminalization to mean that the conduct really was more morally condemnable, and so on – setting a baseline for each of the specific mechanisms of potential influence described above. The subjects were then told of a variety of real-world cases in which the criminal justice system had done serious injustice or failed to do justice, not by accident but as the result of legal liability rules formally adopted with the knowledge that they would produce results of which the community would disapprove. After this disillusioning information, the subjects were tested again and their views on the measures of deference and compliance had all weakened.

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[21] Robinson and Robinson, *The Vigilante Echo: How Failures of Justice Inspire Lawlessness* (Univ. Wisc. Press 2017).

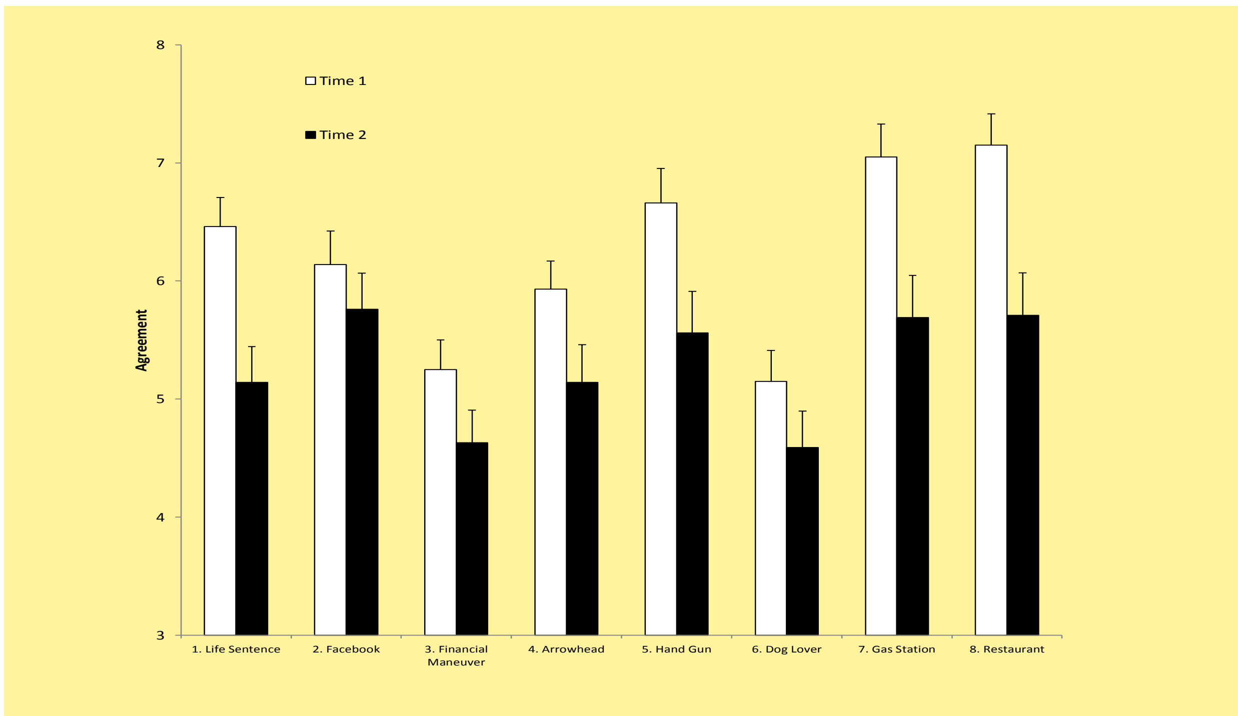
[22] For a more detailed discussion of these mechanisms, see IJUD, at 152-163.

Here are the results.[23] (The first column lists not the full text of the questions used but just a short-hand identification of it.)

Table 8. Study 2a Pre- and Post-Stimulation Averages

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

The graphic below gives a visual display of this same information. The white bars show the subjects' responses before the disillusionment, and the black bars after.



[23] IJUD, at 180.

This is actually a quite surprising result, if you think about it. When adult subjects are being tested in a study like this, they come to the study with an already-formed opinion about the moral reliability of the criminal justice system. There is a limited amount that a researcher can do in the context of a study to shift that pre-existing view. But despite the fact that we can only marginally shift subjects' views of the system, we nonetheless see a corresponding shift in the willingness of subjects to defer to the criminal justice system.

A follow-up study used a different methodology. Instead of the "within-subjects design" used in the former study, it used a "between-subjects design." That is, instead of asking the same subjects their views after being "disillusioned" about the criminal justice system, this study used separate groups. The researchers asked all subjects the same questions but did not disillusion some subjects, mildly disillusioned other subjects, and more seriously disillusioned a third group. The study found that the extent of the disillusionment determined the extent to which the subjects would defer to the criminal justice system.[24]

Results of between-subjects study

Item	Study 2a baseline No disillusionment	Study 2b Low disillusionment	Study 2b High disillusionment
1. Life sentence means heinous	6.46[a]	6.59[a]	5.35[b]
2. Posting condemnable	6.14[a]	5.38[b]	5.59[b]
3. Financial move condemnable	5.25[a]	5.16[a]	4.34[b]
4. Report arrowhead	5.93[a]	5.65[a]	4.95[b]
5. Turn in hand gun	6.66[a]	5.40[b]	4.32[c]
6. Report dogs violation	5.15[a]	4.75[a,b]	4.43[b]
7. Return to gas station	7.05[a]	6.63[a]	5.63[b]
8. Return to restaurant	7.15[a]	6.47[b]	5.84[c]

Where two cells on a row DO NOT share the same letter, they are statistically different.

Another study did not collect new data but sought to determine whether the same dynamic was present in some of the large datasets of survey data previously collected by others. As the table below demonstrates,[25] the moral credibility measure in the study explains more of the variance in the “willingness to defer” measure than any of the other measures. In fact, it is the only predictor that is statistically significant.

[24] IJUD, at 182.

[25] Paul Robinson, Geoff Goodwin, and Michael Reisig, The Disutility of Injustice, 85 New York University Law Review 1940-2022 (2010).

Table 8
OLS Regression Model

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

What the studies show is that there is a continuous relationship between a system's moral credibility and its ability to gain deference and compliance. A marginal decrease in credibility produces a marginal decrease in deference and compliance. This is an important conclusion because it gives every society, no matter how bad its criminal justice system's reputation, good practical reasons to improve the moral credibility of its criminal justice system. Even those systems with better reputations can improve their crime-control effectiveness by further improving their reputation for justness.

To summarize, legal rules that deviate from the community's judgments of justice are not cost-free, as has generally been assumed in the past, but rather carry a hidden cost to effective crime-control. To be most effective, the criminal law should try to build a reputation as a reliable moral authority that above all else does justice and avoids injustice. In that way, it can harness the powerful forces of social and normative influence to gain deference and compliance.

These findings represent an important change to the classic punishment-theory debate, which has always seen two irreconcilability opposed camps. On one side are the retributivists, who urge distributing punishment in a way that does justice because they see justice as a value in itself, and therefore needs no practical justification. On the other side are the utilitarians, who would distribute punishment so as to avoid future crime. They believe that punishment can only be justified by its future crime reduction and, therefore, typically urge the distribution of punishment to optimize general deterrence or the incapacitation of dangerous offenders.

These opposing camps would each propose a distribution of punishment to a different set of people and in different amounts, because each looks to different criteria. The retributivists, wanting to do justice, would look to an offender's moral blameworthiness. The utilitarians, who want to reduce crime, would look to what would most effectively deter and incapacitate potential offenders.

Historically, these two camps have been seen as diametrically opposed and unavoidably in conflict. The two goals – of doing justice or fighting crime – commonly conflict and, when they do, one must pick between them. But the empirical desert studies suggest that the picture is actually quite different. It may be that the best way to fight crime is to do justice.

The superiority of empirical desert as an effective crime control strategy comes in part from the fact that an empirical desert distribution of liability and punishment necessarily carries with it some general deterrent effect and some ability to incapacitate dangerous offenders. Thus, the only way in which those alternative distributive principles can do better than empirical desert is by deviating from it – that is, by doing injustice or by failing to do justice. But it is exactly these deviations from desert that undermine the system's moral credibility and, thereby, its crime-control effectiveness. Thus, any

instance of greater deterrent or incapacitation effect purchased by an injustice or a failure of justice can be offset by the damage it does in reducing the system's moral credibility. An empirical desert distribution, on the other hand, can gain the crime-control benefits of moral credibility while maintaining the general deterrent and incapacitation benefits inherent in such a distribution.

It is important to note, however, that the practical crime-control power of doing justice is found in distributing criminal liability and punishment according to rules rooted in the community's judgments of justice – "empirical desert" – rather than philosophers' notions of justice – "deontological desert." For it is the effect of empirical desert in building the criminal law's moral credibility with the community that has the beneficial crime-control effect, and that can be achieved only by having criminal law track the community's notion of justice, not the philosophers' notion. And empirical desert is not true justice in a transcendent deontological sense.

On the other hand, the evidence suggests that, as a practical matter, empirical desert is in most respects a close approximation of deontological desert and, given the practical problems with trying to produce a criminal law based upon deontological desert, empirical desert may be the best and perhaps the only practical means of adopting a reliable approximation of deontological desert.[26]

Empirical Evidence That Use of Strict Liability Undermine the Moral Credibility

One might conclude that the criminal law's conflict with the community's shared judgments of justice does undermine its crime-control effectiveness, yet also argue that community views are entirely accepting of the use of strict liability, perhaps for some of the reasons discussed at the beginning of this essay. Yet the empirical evidence is clear that this is not the case. The use of strict liability seriously conflicts with community views.

Consider some of the politically popular criminal law doctrines common in the United States: the use of "strict liability" offenses that do not require that the offender had a culpable state of mind toward the conduct and circumstances of the offense, the criminalization of regulatory violations, and the "felony murder rule," which provides that anyone causing a death in the course of felony, even in the absence of culpability with regard to causing the death, is liable for murder, the most serious form of homicide, typically reserved for intentional killings.

It may be no surprise that people assume that such criminal law doctrines reflect community views, given that we are living in a democracy. But that assumption turns out to be wrong. Consider a recent study that tested laypersons' judgments of justice on the six illustrative doctrines that included two strict liability cases, two felony-murder cases, and a criminalization of regulatory violation case. Subjects were given a dozen "milestone scenarios" that previous testing had shown represented the full spectrum of relative blameworthiness. These scenarios presented cases from something as trivial as mistakenly taking another person's umbrella at a restaurant to intentionally killing another person in an ambush. Subjects were also given a dozen scenarios, each based on a real-world case, that involve one of the six crime-control doctrines. Those "crime-control scenarios" are summarized on the table below.[27] The strict liability, regulatory offense, and felony-murder cases are shaded.

[26] For more detailed discussion of the issue, see IJUD at 172-174; Robinson, The Role of Moral Philosophers in the Competition Between Philosophical and Empirical Desert, 48 William and Mary Law Review 1831 (2007).
[27] From IJUD at 123.

Scenario	Case Name	Offense	Crime-Control Doctrine	Actual Court Sentence
L. Accidental teacher shooting	*Brazill*	Murder	Adult Prosecution of Juveniles	28 years w/o parole
K. Drowning children to save them from hell	*Yates*	Murder	Narrowing Insanity Defense	life
J. Accomplice killing during burglary	*Moore*	*Felony murder, burglary*	*Felony Murder*	*life at hard labor w/o parole*
I. Killing officer believed to be alien	*Clark*	Murder	Narrowing Insanity Defense	life
H. Cocaine overdose	*Heacock*	*Felony murder, unlawful distribution of*	*Felony Murder*	*40 years*
G. Cocaine in trunk	*Harmelin*	Complicity in unlawful distribution of	Drug Offense Penalties	life w/o parole
F. Air conditioner	*Rummel*	Petty fraud	Three Strikes	life w/o parole
E. Sex with female reasonably	*Haas*	*Statutory rape*	*Strict Liability*	*40 to 60 years*
D. Underage sex by mentally	*Garnett*	*Statutory rape*	*Strict Liability*	*5 years*
C. Marijuana unloading	*Papa*	Unlawful possession of	Drug Offense	8 years
B. Shooting of TV	*Almond*	Unlawfully discharging	Three Strikes	15 years w/o
A. Incorrect lobster container	*Blandford*	*Violation of importation regulations*	*Criminalizing Regulatory Violations*	*15 years to life*

Subjects were asked to rank order all two dozen cases and to give an appropriate sentence to each. The results are summarized on the table below.[28] The cases of interest to us are again shaded.

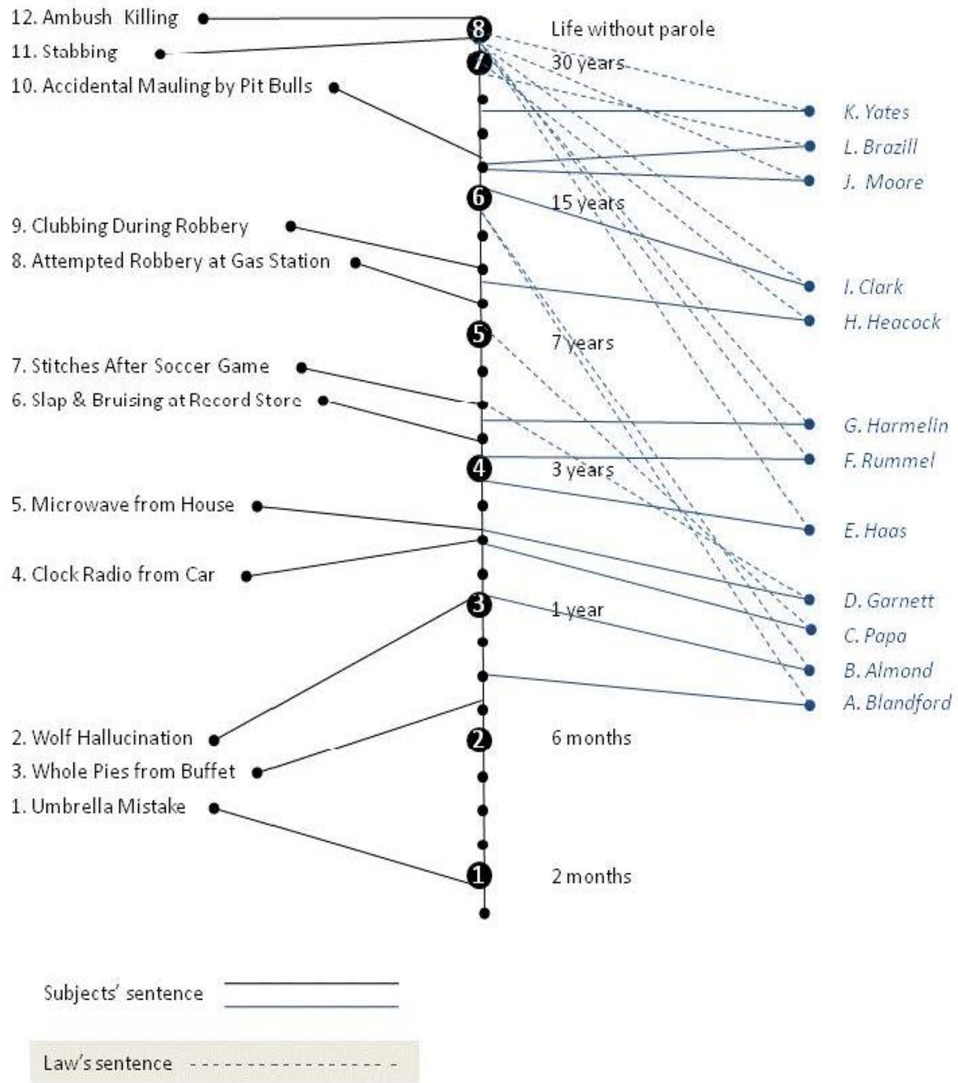
[28] From IJUD at 125.

Scenario	Subjects' Mean	Court Actual
12 Ambush shooting	**between life and**	
11 Stabbing	**essentially**	
10 Accidental mauling by pit bulls	**20.6 years**	
L Accidental teacher shooting (juvenile)	*19.2 years*	*28 years w/o parole*
K Drowning children to save them from hell (insanity)	*26.3 years*	*life*
J Accomplice killing during burglary (felony murder)	*17.7 years*	*life at hard labor w/o*
9 Clubbing during robbery	**12.0 years**	
8 Attempted robbery at gas station	**9.1 years**	
I Killing officer believed to be alien (insanity)	*16.5 years*	*life*
H Cocaine overdose (felony murder)	*10.7 years*	*40 years*
7 Stitches after soccer game	**5.0 years**	
6 Slap & bruising at record store	**3.9 years**	
G Cocaine in trunk (drugs)	*4.2 years*	*life w/o*
F Air conditioner fraud (3 strikes)	*3.1 years*	*life w/o*
5 Microwave from house	**2.3 years**	
E Sex with female reasonably believed overage (strict liability)	*2.9 years*	*40 to 60 years*
4 Clock radio from car	**1.9 years**	
D Underage sex by mentally retarded man (strict liability)	*2.3 years*	*5 years*
C Marijuana unloading (drugs)	*1.9 years*	*8 years*
B Shooting of TV (3 strikes)	*1.1 years*	*15 years w/o parole*
3 Whole pies from buffet	**8.3 months**	
A Incorrect lobster container (regulatory)	*9.7 months*	*15 years to*
2 Wolf hallucination	**1.1 years**	
1 Umbrella mistake	**1.8 months**	

Below is a more graphic presentation of the information on this table.[29] The cases on the left of the graphic are the "milestone" cases, which provide points of comparison along the full length of the punishment continuum. The lines from each case to the punishment scale show how severely the lay persons would punish each of these milestone offenses.

[29] From IJUD at 127.

On the right are the cases illustrating the six common crime-control doctrines described above. The solid lines on the right show the amount of punishment that the study's subjects would impose in each case. The dotted lines show what punishment the law would impose, and did actually impose in the case. As you see, the law's punishment is dramatically higher than that of the study's subjects. The difference is even more striking when you take into account that the punishment continuum used here is exponential. That is moving from ❶ to ❷ triples the punishment (from 2 months to 6 months); just as moving from ❸ to ❹ triples the punishment (from 1 year to 3 years). Thus, the large difference in slope between the solid lines and the dotted lines for each case shows that the punishment the law imposes is commonly many times more severe than what study's subjects would impose.[30] The cases we are interested in our J (Moore), H (Heacock), E (Haas), D (Garnet), and A (Blandford).



How could such a discrepancy occur in a democracy, where the laws are enacted by elected representatives of the people? The underlying causes of this phenomena are the operation of crime politics in the United States. First, politicians have been persuaded – often by academics – that they should focus on crime-control without regard to its effect on deserved punishment. And second,

[30] For a discussion of other empirical studies mapping community views on culpability requirements for criminal liability, see IJUD chapter 14.

politicians frequently use criminal law legislation for their own political purposes, rather than to do justice or prevent crime. Many amendments and new offenses are enacted to show constituents their concern for some headline issue. One cannot be too critical here. Politicians are simply trying to be responsive to their community – normally something we see as a good thing, usually a positive feature of democracy.

But in many instances, "the problem" about which some constituents or the local newspaper headlines are concerned has little to do with a flaw in an existing criminal law. Not every problem can be fixed with a criminal code amendment. People will continue to commit outrageous crimes; judges will continue to make what are seen as sentencing errors, and so on. Yet, legislators often feel a need to do *something* to show that they are sensitive to their constituents' concerns. And there a few "somethings" that they can do. Changing or adding to the criminal law is one of the few things available. But when crime legislation is simply a vehicle for expressing concern, drafters have little reason to assure that their legislation in fact improves rather than degrades criminal law longer-term.

Unfortunately, criminal law bills, even if useless and unnecessary, commonly pass because legislators share a common reluctance to appear "soft on crime." When a new and unnecessary offense, say "library theft," is proposed, the issue becomes a referendum on whether legislators care about public libraries, not on whether the proposed legislation will actually do anything new to combat the problem of such theft, or on whether it will instead have pernicious ramifications for the application of the criminal code's general theft provision. A legislator is likely to vote in favor of the library-theft bill because there is a clear constituency – library users and taxpayers – who would seem to share a concern about library theft, and no constituency to complain about the new provision's less obvious and more diffuse drawbacks in creating inconsistencies, ambiguities, and overlaps.

Another sort of systemic problem might be called *punishment inflation*. In order to emphasize how seriously the legislators take the new offense they have created, the heat of the moment naturally pushes the grade of the offense higher than it might otherwise be. A year or two later, when that heat has died down, the grade may seem out of whack with other offenses, but the exaggerated grade lives on.

Worse, the dynamic creates a vicious cycle. Having exaggerated the grade of *yesterday's* "crime du jour," the legislator, in order to adequately express outrage over today's crime du jour, must exceed the new, exaggerated baseline established by yesterday's offense. The ultimate effect is to create an upward spiral of grading, and a hodge-podge of inconsistent offense grades. There is no fixing this problem ad hoc. Internal grading consistency within a code requires examining all of its offense and sub-offense grades at one time, comparing each against the grade of every other. We see this unhealthy dynamic in every state that we have investigated.[31]

It is possible to recodify current American criminal codes to better reflect the community's true judgments of justice and to better maintain that correspondence in the future. But the larger point here is that the unjust nature of today's popular crime-control doctrines is not a product of the community's judgments of justice but rather seriously in conflict with them. Those doctrines are more often than not the product of crime-control strategies such as general deterrence and incapacitation of the dangerous that ignore community judgments of justice (and have been aided and abetted by many of the academics who now complain about the injustice of current law resulting from such crime-control principles). A criminal law built upon lay people's judgments of justice would be dramatically more attentive to tying criminal liability and punishment to an offender's true blameworthiness. As I

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[31] See, e.g., Robinson et al., Report on the Delaware Criminal Law Recodification Project (September 2016); Robinson et al., Final Report of the Maldives Penal Law & Sentencing Codification Project (Republic of Maldives 2006); Robinson et al., Final Report of the Kentucky Penal Code Revision Project (Commonwealth of Kentucky 2003); Robinson et al., Final Report of the Illinois Criminal Code Rewrite and Reform Commission (State of Illinois 2003). See Paul Robinson and Michael Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 Hastings Law Journal 633, 635-637 (2005).

have argued elsewhere, empirical desert, having criminal law rules reflect community shared judgments of justice – produces the best practical approximation of true justice.[32]

Conclusion

One might oppose the use of strict liability and the criminalization of regulatory violations on purely desert grounds. Criminal liability and punishment cannot be justified, under the retributivists' view, in the absence of moral blameworthiness. And moral blameworthiness requires both the commission or attempt to commit a condemnable harm or evil and sufficient culpability to be morally accountable for the conduct.

But even if one rejects the notion that doing justice and avoiding injustice is a value in itself that requires no further justification, the devoted crime-control utilitarian ought to oppose the use of strict liability and the criminalization of regulatory violations because such practices undermine the criminal law's moral credibility with the community it governs and thereby undermines its crime-control effectiveness.

As the criminal law's moral credibility is incrementally reduced, the system is incrementally more likely to inspire resistance and subversion rather than acquiescence and assistance. Witnesses are less likely to report crimes and help investigators. Jurors are less likely to follow their legal instructions and more likely to substitute their own intuitions. Police and prosecutors are less likely to follow the system's rules and more likely to morally justified their subversions of those rules. Citizens are less likely to defer to the criminal law in the grey areas of criminality, and less likely to worry about a stigmatizing effect from criminal conviction. And most importantly, people are less likely to defer to and internalize the criminal law's norms.

Criminal law can harness the powerful forces of stigmatization, social influence, and internalized norms only if it has established itself as a moral authority. And the use of strict liability and the criminalization of regulatory violations can only undermine that goal.

[32] Robinson, *Distributive Principles*, supra note 2, at ch. 8.