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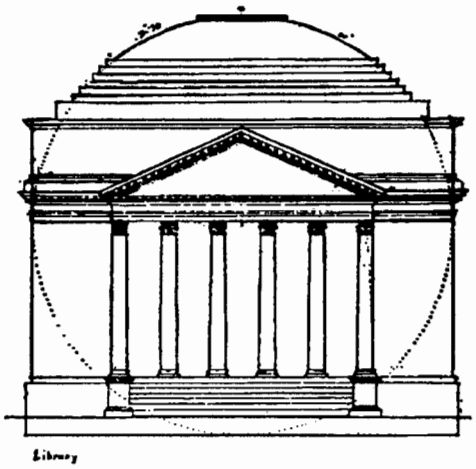

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WHY DOES THE CRIMINAL LAW CARE WHAT THE LAYPERSON THINKS IS JUST? COERCIVE VERSUS NORMATIVE CRIME CONTROL

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INTRODUCTION

THE criminal law codification movement of the 1960s and 70s was guided by instrumentalist principles designed to reduce crime, rather than by retributivist notions of giving offenders deserved punishment. The Model Penal Code, which served as a model for nearly all of the period's code reforms, was explicit on the point: The Code's "dominant theme is the prevention of offenses" and its "major goal is to forbid and prevent conduct that threatens substantial harm."[1] Yet, as Part I of this Article will show, even from such a staunchly instrumentalist code came a criminal law that defers to laypersons' shared intuitions of justice on issues touching essentially all criminal cases. Why should this be so? Lay intuitions of justice hardly produce a distribution of criminal liability that maximizes the traditional crime control mechanisms of deterrence, incapacitation, and rehabilitation. In fact, as Part I will make clear, reliance upon lay intuitions of justice commonly undermines the operation of these mechanisms. Why, then, should modern American code drafters follow an unspoken principle of heeding lay intuitions of justice?

One explanation might be that the drafters have an unexposed retributivist streak. Perhaps they have retained the natural impulse of most laypersons to think of criminal liability in terms of desert. If this were the case, the drafters' focus on instrumentalist arguments in explaining and justifying their code provisions would seem less than forthright.

There is, however, another explanation, in which the drafters' concern for lay intuitions of justice is justified by an instrumentalist

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[1] Model Penal Code § 1.02 explanatory note at 14 (Official Draft and Revised Comments 1985) [hereinafter MPC].

rather than retributivist rationale: The drafters may have believed that effective crime control requires a criminal code that is seen as adhering to the community's shared perceptions of just desert. While the Model Penal Code drafters offer no defense of this position—indeed, the principle itself is unarticulated by the drafters, even as they seem to follow it—Parts III and IV will offer arguments in its support. In those parts, I will argue that the perception of a criminal code as doing justice is necessary for the code's moral credibility, which in turn is necessary for the effective crime control that the drafters seek. It is necessary because the extent of criminal law's moral authority determines the extent of its ability to shape community norms and to influence people's conduct through normative forces.

Such use of a criminal code's normative powers represents a qualitatively different crime control strategy from the traditional mechanisms of deterrence, incapacitation, and rehabilitation, which might be called "coercive" crime control. Those mechanisms seek to prevent criminal conduct through coercive official action, most commonly in the form of threat or restraint. The crime control power of criminal law's moral credibility works in a different way. The "normative" crime control mechanism, as it might be called, does not shape desires by threat of official sanction, as deterrence does, or through a coercive regime of official therapy or treatment, as traditional rehabilitation does. Nor does it simply give up on altering desire and simply detain or incapacitate the offender. Instead, it works through unofficial avenues to bring the potential offender to see the prohibited conduct as unattractive because it is inconsistent with the norms of family or friends and, even better, with the person's own internalized sense of what is acceptable.

Not every potential offender is amenable to this normative pressure, but many non-offenders may obey the law because of it. Thus, code drafters must worry not only about controlling the hardest core amorals among us, but also about maintaining the criminal law's influence in keeping law-abiding that vast proportion of the population for which normative crime control is important, perhaps more important than coercive control. The end result of such lawmaker concerns is, as we shall see, a system that is highly instrumentalist in orientation without straying far from lay

intuitions of justice. Even when it does stray, it does so in a way that obscures the deviation.

The proposed answer to the title question, then, is that the criminal law, even a highly instrumentalist one, cares about laypersons' intuitions of justice because criminal law's power to influence conduct may reside in large part in its normative rather than its coercive crime control mechanisms. Effective normative crime control requires a criminal law that has moral credibility within the community it governs.

I. THE DEFERENCE TO LAY INTUITIONS OF JUSTICE AND ITS CONFLICT WITH COERCIVE CRIME CONTROL

An examination of the instrumentalist criminal law of modern America reveals what may seem a puzzling deference to lay intuitions of justice, one which commonly undercuts the traditional crime control mechanisms of deterrence, incapacitation, and rehabilitation. The puzzle appears both in the rules and the standards the criminal law uses in assessing criminal liability.

Consider the American Law Institute's ("ALI's") Model Penal Code. It is a hard case, and thus especially useful for the purposes of this Article, because it is explicit in its instrumentalist aims and is carefully and thoughtfully drafted. If such a code relies upon lay intuitions of justice even though they undercut the traditional coercive crime control strategies, one may conclude that it does so for a reason, not out of ignorance or carelessness. The Model Penal Code is also a useful case because it led the modern criminal code drafting revolution by advancing the virtues of comprehensiveness in code coverage and specificity in code formulation. Thus, if such a code commonly sacrifices these goals when it adopts vague standards that defer to lay intuitions of justice, it seems likely that it does so for some greater purpose.

Consider some interesting puzzles in current liability rules.

A. Rules

1. Recognizing Excuse Defenses

Every state's criminal law recognizes a variety of excuse defenses[2]—defenses given in situations where a violation of the rule of conduct is admitted but the defendant claims exculpation is deserved because some abnormal characteristic, circumstance, or condition "excuses" his violation.[3] Social science research makes clear that such excuse defenses are part of laypersons' intuitions of justice. Legal defenses such as insanity, involuntary intoxication, immaturity, and duress have all been tested and found to be supported in some form by lay intuitions.[4]

But why should an instrumentalist code recognize excuse defenses? Any recognition of an excuse defense or mitigation undercuts the criminal law's general deterrent threat. It creates the possibility that an offender may escape liability even though he has committed the offense. Even if they do not legitimately qualify for a defense, some potential offenders will calculate that they can manipulate the system to get one nonetheless.[5] This is true even if the defense is in fact difficult to abuse. It is a potential offender's perception of whether he or she can manipulate the system, not the reality, that matters. This is a significant point, especially given the evidence that people tend to exaggerate the ease of getting an excuse defense. The most famous example may be the persistent public overestimate of the rate at which insanity defenses are successful.[6] Thus, even if an excuse is rarely given, its recognition—the

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[2] For a list of excuse defense authorities for each state, see Paul H. Robinson, Criminal Law Defenses, § 171 n.1, § 173 nn.1–5, § 174 nn.1–3, § 175 nn.1–2, § 176 nn.1–3, § 177 n.1, § 182 nn.1–2, § 183 n.1, § 184 n.1, § 185 n.1, § 191 nn.1–3, § 194 nn.15–20 (1984 & Supp. 2000).

[3] See e.g., Paul H. Robinson, Criminal Law 478 (1997) ("Excuses admit that the deed may be wrong but excuse the actor because the actor's characteristics or situation suggest that the actor is not blameworthy for the violation.").

[4] See Paul H. Robinson & John M. Darley, Justice, Liability and Blame 127–55 (1995); see also id. at 53–81 [hereinafter Robinson & Darley, Justice, Liability, and Blame] (revealing lay support for excuse for mistaken justification); Paul H. Robinson & John M. Darley, Testing Competing Theories of Justification, 76 N.C. L. Rev. 1095 (1998) (same).

[5] The same is not true for justification defenses, at least those of an objective sort, for the law has no interest in expending resources to deter conduct of which it approves.

[6] The persistent public overestimate of the availability and efficacy of the insanity plea has been well documented in a variety of contexts. In a 1981 article, Richard

possibility that it might be given—incrementally undercuts the strength of the deterrent threat.

Indeed, a general deterrence strategy might suggest just the opposite rule for excuse cases. Instead of giving a defense, the system could treat these cases as a special opportunity to demonstrate the seriousness of the deterrent threat. By punishing an insane offender, for example, the law can say, "Look! This shows how seriously we take the criminal law's prohibitions! If even the insane offender will be punished, you can be sure that you will be, too."

The recognition of excuse defenses might not always be inconsistent with a *special* deterrence strategy—that is, focusing on deterring *this* offender from committing future offenses, rather than on deterring others from committing similar offenses (general deterrence). If the nature of the excusing dysfunction prevents the potential offender from appreciating or responding to the deterrent threat, punishment would be a wasteful expenditure. Punishment will not deter one who cannot make the logical connection between criminal conduct and punishment or one who cannot resist the impulse to commit the criminal conduct no matter how clear the resulting liability or how unpleasant the consequences.

But few, if any, excuses or mitigations are justified by lawmakers primarily on grounds of special deterrence. Special deterrent arguments tend to be more of an afterthought. More importantly, excuse defenses generally are not formulated according to whether

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Pasewerk, Deborah Seidenzahl, and Mark Pantle surveyed college students, residents of two Wyoming communities, state legislators, law enforcement officers, and community and state mental health personnel about the frequency with which insanity pleas are entered and their efficacy in absolving criminal liability. While only 0.47% of criminal defendants entered the plea during the period studied, community residents believed that 43% of all criminal defendants entered the plea. And though only 0.99% of that fraction of defendants actually the entering the plea were judged Not Guilty by Reason of Insanity ("NGRI"), community members believed that 38% of such pleas were successful. See Richard Pasewerk et al., Opinions About the Insanity Plea, 8 J. Forensic Psychol. 63, 64–66 (1981). The existence of this public misperception was confirmed in a study conducted in 1983, immediately after John Hinckley, Jr. was found NGRI for the shooting of Ronald Reagan. See Valerie P. Hans & Dan Stater, "Plain Crazy:" Lay Definitions of Legal Insanity, 7 Int'l J.L. & Psychol. 105, 105 (1984). Despite the "relatively high information" about insanity pleas available through media coverage of the Hinckley trial, of the 434 Delaware men and women sampled, only one could express the correct legal formulation of the defense. See id. at 105, 110. Two-thirds of those sampled "'strongly agreed'" with the view "'[t]hat the insanity defense is a loophole that allows too many guilty people to go free.'" Id. at 110.

the offender is able to make the logical connection between crime and sanction. Excuse defenses typically look at the extent of the cognitive or control dysfunction that caused the person to commit *this offense*—a focus on blameworthiness—rather than whether punishment would deter a *future offense*. A person may be excused if a reasonable person in the actor's situation would have been similarly compelled to commit the offense. A duress defense is given under the Model Penal Code, for example, when "a person of reasonable firmness in [the actor's] situation would have been unable to resist" the coercion.[7]

The recognition of excuses and mitigations is all the more puzzling because they weaken the deterrent threat at just the moment when it needs to be strengthened, when other forces are leading the offender toward the offense. Consider the first-time offender who struggles but fails to resist coercion to commit an offense. If given a duress defense, the lesson the defendant learns from such acquittal may reduce his or her motivation to struggle if the situation were to recur. That is, the availability of the excuse defense undercuts the disincentive to commit a crime in just those situations in which a determined special deterrence strategy would increase it.[8]

From the view of incapacitation and rehabilitation strategies, the recognition of excuse defenses is even more inexplicable. Excuse defenses are given in cases where it has been conclusively demonstrated that some special condition, circumstance, or characteristic has caused the offender to commit an offense. That puts the offender in a group the criminal justice system should have a great interest in detaining for treatment or incapacitation. At the very least, legal custody would give an opportunity to investigate fully the likelihood of recurrence of the offense, or a similar offense, and would provide the legal jurisdiction for a probationary period and supervised release. Especially when the condition causing the offense continues to exist—as is common with insanity and immaturity, for

[7] MPC § 2.09(1) (duress). The same "reasonable person" standard is employed to serve a similar function in the Code's definition of what risk-taking is non-criminal, and what constitutes "negligence." Id. § 2.02(2)(d).

[8] Even in cases where the excusing conditions are such that the present violation is entirely unavoidable—for example, overwhelming coercion—there is special deterrence value in imposing liability if the offender might face less severe conditions in the future—for example, less than overwhelming coercion.

example—it seems odd indeed for an instrumentalist code to release such an offender.

We know, of course, that civil commitment mechanisms have been created to recapture some of these offenders acquitted under one of the excuses—insanity. But if the criminal justice system is in the business of crime control, why should we have to resort to civil commitment to protect ourselves from those who have already committed a criminal offense?

The recognition of excuse defenses is odd for another reason. Incapacitation and rehabilitation crime control strategies are commonly plagued with behavioral science's limited ability to predict future conduct. We are hesitant to incapacitate when so many predictions of future criminality are wrong.[9] But excuse cases are a select group for which this weakness is of less concern. By definition, these are cases where the excusing circumstance, condition, or characteristic has already led to criminal conduct, providing a ground to justify governmental intrusion on liberty at least sufficient to test for continuing dangerousness.[10]

2. Failing to Take Account of Such Coercive Crime Control Factors as Difficulty of Detection, Prior Employment, Age, and Family Situation

Not only does current law take account of factors that a purely coercive crime control system should ignore, such as an offender's perceived blamelessness, but it also fails to take account of factors that a purely coercive system should treat as central. Consider, for example, the difficulty law enforcement officials face in finding an offender. The effect of a deterrent threat is a product of both the severity of the threatened punishment and the likelihood of its im-

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[9] Some studies suggest that two-thirds or more of predictions of future criminality are wrong, so called "false positives." John Monahan, The Clinical Prediction of Violent Behavior 48 tbl.3 (1981) (reviewing studies of predictions of violent behavior). Studying psychiatric predictions of future dangerousness, John Monahan has concluded that even in conditions most conducive to their predictions, "psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period." Id. at 47 (emphasis omitted).

[10] For a discussion of the trend toward doing just this, see Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 Harv. L. Rev. (forthcoming Apr. 2001).

position after a violation.[11] In other words, the likelihood of detection is an important variable in the deterrence formulae.[12] This means that offenses for which arrest rates are low—for example, burglary and motor vehicle theft[13]—ought to be graded more severely than they would be otherwise to compensate for their low detection rates. Perhaps offenses for which the difficulty in detection ranges widely from case to case ought to have a grading factor that adjusts the punishment accordingly. Thus, the offender who works hard at and creates a significant possibility of avoiding detection ought to suffer greater punishment if he is captured.

Yet likelihood of capture appears to play essentially no part in current criminal law. Difficulty of detection is rarely if ever used as a grading factor for offenses.[14] Nor is difficulty of detection commonly taken into account by criminal code drafters in initially setting the grade of an offense. Why not?

The same kind of omission is seen in relation to the crime control mechanisms of incapacitation and rehabilitation. There is strong social science evidence to support the importance of such things as prior employment, age, and family situation, for example, in predicting future criminality.[15] Yet there is no indication that

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[11] See Kenneth G. Dau-Schmidt, An Economic Analysis of the Criminal Law as a Preference-Shaping Policy, 1990 Duke L.J. 1, 10 n.48 (1990) ("The ex ante expected value of the criminal sanction is equal to the probability the criminal will be caught and convicted, times the cost of the criminal sanction to the criminal. The ex ante expected value is the relevant figure in considering the individual's decision whether to commit a crime since the rational person would discount the costs of the criminal sanction by the probability he will actually suffer that sanction in deciding whether to commit the crime.") (emphasis omitted).

[12] It is actually the perceived likelihood of detection that is relevant here. For a discussion, see Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. L. Rev. 453, 460 (1997).

[13] Of the incidents of burglary reported to the police, only 13.8% ended in arrest in 1996. Of the incidents of motor vehicle theft reported, only 14.0% ended in arrest in 1996. See Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics–1997, at 355 tbl.4.19 (Kathleen Maguire & Ann L. Pastore eds., 1998).

[14] The author could find no reference to difficulty of detection or likelihood of capture in any of the fifty-two American criminal codes.

[15] Age provides a particularly compelling example of these correlative factors. Only 14.6% of those arrested in 1994 for crime were age forty or older, although that age group made up 39.9% of the U.S. population in 1994. See Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook for Criminal Justice Statistics–1995, at 397 tbl.4.4 (Kathleen Maguire & Ann L. Pastore eds., 1996). In contrast, persons in their thirties made up 25.3% of arrests but accounted for only 16.9% of the population. See id. Homicide arrests rates suggest an even greater drop-off in criminality with age: 11.9 of 100,000 males in the 35–44 age bracket were arrested for homicide in 1993. See id. at

such factors are used either as a grading factor or in initially setting the grade of an offense.[16] Why does criminal law not include these and other predictors of future criminality as explicit factors in defining and grading offenses?

Such factors might be quietly taken into account by some sentencing judges in highly discretionary sentencing systems, but the factors have not made the transition to the newly articulated sentencing guideline systems.[17] Indeed, the legislation governing the

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423 tbl.4.17. Of those aged 25–29, the rate is more than two and a half times higher, 30.0 per 100,000. See id. For those aged 21–24, the rate is almost five times higher, at 56.8. See id. Of those aged 18–20, the rate is almost eight times higher, at 91.3. See id. The trend of the last several decades had been toward even less criminality by middle-aged persons. In 1970, the homicide rate for males aged 35–44 was two-thirds higher than it was in 1993, 19.5 per 100,000, versus 11.9. See id.

Family structure also seems to correlate with future criminality. In 1996, 29% of American households "were maintained by women with no husband present." U.S. Census Bureau, U.S. Dep't of Commerce, Current Population Reports, Population Characteristics, Household and Family Characteristics: March 1996 (Update) (1997). In contrast, 43.3% of persons jailed in that same year had lived with only their mother most of the time while growing up. See Bureau of Justice Statistics, U.S. Dep't of Justice, Special Report: Profile of Jail Inmates 1996, at 10 tbl.15(1998) [hereinafter Jail Inmates].

Public assistance and education level similarly correlate with criminality. 38.6% of jail inmates' families had received public assistance, lived in public housing, or both. See id. In 1994, a monthly average of 4.7% of the U.S. population as a whole received housing assistance; 2.0%, SSI; 5.5%, AFDC/GA; 9.7%, food stamps; and 11.3%, Medicaid. See U.S. Census Bureau, U.S. Dep't of Commerce, Dynamics of Economic Well-Being: Program Participation, Who Gets Assistance? 1993–1994, at 4 tbl.A (1999). Less than half (40.0%) of jail inmates in 1996 were high school graduates. See Jail Inmates supra, at 3 tbl.3. By contrast a majority (81.7%) of all adults age 25 and over in the United States had completed high school in 1996. See U.S. Census Bureau, U.S. Dep't of Commerce, Statistical Abstract of the United States 1997, at 158 tbl.243 (117th ed. 1997).

[16] The Model Penal Code never uses employment history as a factor in the grading of an offense, although it is used as a factor in determining appropriate sentencing. See, e.g., MPC § 7.07(3). Nor is age a factor when grading an offense, although it is a factor at the sentencing stage. See, e.g., id. § 7.03(1) (prohibiting sentencing someone under the age of 21 as a "persistent offender whose commitment for an extended term is necessary for protection of the public"). See also id. § 210.6(1)(d) (excluding a death sentence for those under 18 years of age). Finally, family situation is also irrelevant to the grading of an offense, but is a factor during sentencing and parole hearings. See, e.g., id. § 305.9(2)(e) (declaring that the parole board should consider whether a potential parolee has a supportive family structure to which to return).

[17] Indeed, when it established the United States Sentencing Commission, Congress explicitly stated its opinion that sentencing guidelines should not take such factors into account: "The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." 28 U.S.C. § 994(e) (1999). The Sentencing Commission's application of Congress' directive is contained in Section 5 of the Federal Sentencing Guidelines, which is divided into twelve sections addressing, among other characteristics: age; employment

United States Sentencing Commission guidelines expressly prohibits the use of those factors, as well as others that have obvious relevance to coercive crime control mechanisms.[18] If such factors are highly relevant in predicting future criminality, why are they not included in the guideline calculations?[19]

The answer, of course, is the same as the answer to the question of why difficulty-in-detection is not taken into account despite its centrality to effective deterrence: The factors relevant to future criminality are ignored because laypersons do not see them as relevant to justice. Some reliance upon them may exist in a purely discretionary system, where such reliance is not easily or clearly discernible. In an articulated sentencing guideline system, however, there is too much danger that use of such factors would become known and would damage the system's reputation among laypersons as a system aimed at doing justice.

3. Creating a False Impression that Resulting Harm is Significant by Including Result Elements in Offense Definitions

To illustrate more fully attempts by code drafters to use but hide their reliance on coercive crime control factors, consider one last example. When a person engages in conduct that intends or risks causing a prohibited result, it is of limited relevance for coercive crime control purposes whether the result comes about as hoped or

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record; family ties and responsibilities, and community ties. None of these is "ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range. U.S. Sentencing Comm'n, Federal Sentencing Guidelines Manual, § 5H1.1, at 351 (1999) [hereinafter Sentencing Guidelines]. However, old age and infirmity may be considered when determining whether home confinement is an appropriate substitute for confinement. See id. The guidelines also state that "[f]amily responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine." Id. at § 5H1.6, at 353. But see Bureau of Justice Assistance, U.S. Dep't of Justice, National Assessment of Structured Sentencing 79–80 (1996) (noting that North Carolina allows family support, employment history, and community support system to be considered when departing from the sentencing guidelines; Washington includes remorse, employment and/or employment record, and age as factors justifying departure from sentencing guidelines).

[18] See supra note 17.

[19] The Sentencing Commission guidelines do take account of prior criminal record, which correlates with future criminality. See Sentencing Guidelines, supra note 17, at §§ 4A1.1, 4A1.3. One might conclude that prior criminal record is used, while the other relevant factors are not, because prior criminal record is the one criminality predictor that can be plausibly offered as related to the offender's just deserts. For a discussion of the desert-prevention ambiguity of prior record and its usefulness to an incapacitation strategy, see Robinson, supra note 10.

risked or whether it luckily does not. A person who shoots at another in an attempt to kill is no less dangerous because the intended victim bends down to tie a shoe and is spared. Nor is the need to deter such conduct any less pressing. Similarly, a person who dumps toxic chemicals near a school yard is no less dangerous nor the conduct any less in need of deterrence, if the dumping is discovered before any child is poisoned. Because the coercive crime control mechanisms are forward-looking—attempting to avoid future crime—the fortuitous results in the case at hand are of little importance: Only the offender's conduct and state of mind matter. Why, then, does current law include result elements in offense definitions? Why not just criminalize specified conduct committed with a specified state of mind?

The answer, again, is that, as inconsistent as it may be with coercive crime control strategies, laypersons feel strongly that resulting harm is important in assessing just punishment.[20] Social science research confirms that laypersons have a strong intuition that the shooting attempt should be punished at a lower level than the successful killing—as attempted murder.[21] The toxic dumping ought to be punished at a lower level when no harm occurs than when children are actually injured or killed—as endangerment or as risking catastrophe.[22] Resulting harm is highly significant to laypersons, who think it ought to aggravate liability and punishment.[23]

Thus, the Model Penal Code drafters faced a difficult situation: a strongly held lay intuition in direct conflict with effective coercive crime control. People would never tolerate a criminal code that defined the substantive offense of rape or arson or theft as simply *doing an act with the intention to* commit rape, arson, or theft. People would insist that their criminal code distinguish the "real" offense—an actual rape, arson, or theft—from a mere attempt. To

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[20] See, e.g., Robinson & Darley, Justice, Liability and Blame, supra note 4, at 14–33, 181–89.

[21] See id. at 14–28, 181–89.

[22] See id.

[23] One could construct a general deterrence argument for giving significance to resulting harm. Where harm occurs, it might be argued, the offense draws more attention and, therefore, the punishment provides wider publicity—more advertising bang for your punishment buck. Other coercive crime control mechanisms, however, are undercut by taking account of resulting harm. The need to prevent similar conduct in the future is just as great, whether or not the harm is fortuitously avoided on any particular occasion.

ignore whether a forced intercourse did occur, whether a person's house was burned, or whether a person's property was taken might be seen as trivializing the victim's suffering.

In response to this, the drafters came up with a rather clever solution. They defined full substantive offenses and appropriately distinguished them from inchoate offenses. By including resulting harm in the definitions of substantive offenses, the code would look like the code people expected, with the offenses of rape, arson, theft, and a host of others requiring proof of the prohibited harm. In a separate provision governing the grading of inchoate offenses, however, the drafters provided that, with few exceptions, the completed offense and the inchoate offense were to have the same grade.[24]

Thus, while rape and attempted rape are distinct offenses in name, they are the same offense in effect. The Code's definition of rape requires intercourse,[25] just as its definition of arson requires a building be set on fire or exploded,[26] and the definition of theft requires an unconsented-to taking.[27] In fact, these resulting harm requirements are irrelevant to liability. If any are missing, the offender is liable "only" for attempt, but that attempt carries a grade of liability identical to the full offense. The drafters achieved their coercive crime control distribution principle, but preserved the appearance of a code that seems to track shared lay intuitions.

There is always the danger, of course, that the illusion will be dispelled. If the deception is discovered, there is the added danger that the public may become cynical, wondering what other deceptions are as yet unrevealed. Once such cynicism sets in, a criminal law may have difficulty gaining moral credibility even if it does in fact track lay intuitions of justice.[28]

Perhaps because of these dangers to a code's moral credibility, or perhaps because not all state code drafters share the Model Penal Code drafters' commitment to coercive crime control, the

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[24] See MPC § 5.05(1). The one exception maintained the traditional distinction between inchoate and completed offenses for first degree felonies, essentially murder and aggravated kidnapping. See id.

[25] See id. § 213.1(1).

[26] See id. § 220.1(1).

[27] See id. § 223.2.

[28] For a discussion of the complexities of building and repairing reputation, see Robinson & Darley, supra note 12, at 477–88, 495–96.

Model Penal Code's attempt grading scheme has been frequently (but not always[29]) rejected, even by state codes that otherwise are heavily influenced by the Code.[30]

The conclusion to be drawn from each of these three kinds of examples is the same: Even highly instrumentalist criminal code drafters are careful to construct a criminal law that at least appears to be consistent with lay intuitions of justice. The next Section's examination of the standards used in doctrinal formulations reinforces this conclusion.

B. Standards

Precision and specificity would seem to be obvious virtues in a criminal code designed to deter future crime. Vagueness in the definition of conduct rules (the rules defining what conduct is prohibited, or permitted or required) reduces the possibility of compliance. Potential offenders may not understand what conduct is prohibited and may engage in conduct that they otherwise would avoid if the prohibition were clear.

Similarly, vagueness in adjudication rules (rules that determine when rule violations by what kind of offenders will be given what kind of liability) creates the possibility, and therefore creates the hope among potential offenders, that violators will escape liability. A vague defense provision creates the possibility of a defense beyond that intended by the drafters. A vague liability provision, such as that governing complicity or causation, creates the possibility of narrower liability than intended by the drafters.

Vagueness, then, one would think, should be avoided in an instrumentalist criminal code. Vagueness in a doctrine seems all the

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[29] The following jurisdictions have adopted the Model Penal Code's formulation of attempt liability: Connecticut, Delaware, Indiana, Mississippi, New Jersey, New Hampshire, North Dakota, and Pennsylvania. An additional five jurisdictions have gone beyond the Code's formulation by not exempting first degree felonies: Delaware, Hawaii, Maryland, Montana, and Wyoming. See Paul H. Robinson, The Role of Harm and Evil in Criminal Law: A Study of Legislative Deception?, 5 J. Contemp. Legal Issues 299, 320 n.67 (1994).

[30] The following jurisdictions have codes heavily influenced by the Model Penal Code but have refused to adopt the Code's inchoate grading provision: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Ohio, Oklahoma, Oregon, Puerto Rico, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin. See id. at 321 n.69.

more problematic when it arises from a doctrinal formulation that defers to reliance upon lay intuitions of justice. This is not just random vagueness, the instrumentalist might worry, but intractable vagueness. It is a vagueness that cannot be remedied by artful judicial construction but must be left vague.

Formulating criminal law rules in a way that defers to lay intuitions is also problematic for coercive crime control because available social science data suggests that lay intuitions in assigning criminal liability and punishment do not look to the factors that are central to deterrence, incapacitation, and rehabilitation, but look instead to desert. This point will be further developed in Part II.

Thus, a criminal code designed to advance the mechanisms of coercive crime control would have every reason to actively avoid the use of vague or imprecise standards that have the decisionmaker defer to lay intuitions of justice. But consider the following provisions common in American criminal codes, even the highly instrumentalist and tightly drafted Model Penal Code.

1. Explicit Reliance Upon Lay Intuitions of Justice

It is not uncommon for a code to incorporate explicitly within its liability assessment a call for the jury to look to their own intuitive notions of justice. The Model Penal Code defines an adequate causal connection, for example, as one that "is not too remote or accidental in its occurrence *to have a [just] bearing on the actor's liability or on the gravity of his offense.*"[31] Thus, the juror is explicitly left to look to her own sense of what should have a "[just] bearing on the actor's liability." Similarly, a violation of the rules of conduct is to be exempt from liability if it is "too trivial *to warrant the condemnation of conviction.*"[32] To apply this standard, the juror must look to her own sense of what warrants the condemnation of criminal conviction.

2. Vague Standards

Other provisions use standards so open that they inevitably invite a juror to look to her own intuitions of justice. This is common in provisions defining offenses. It is an offense if one "fails to take

[31] MPC § 2.03(2)(b), (3)(b) (alteration in original) (emphasis added).
[32] Id. § 2.12(2) (emphasis added).

reasonable measures" to control or report a fire,[33] to return lost property,[34] or to prevent a catastrophe.[35] The juror must divine what are "reasonable measures," and therefore non-criminal, and what are not, and therefore criminal. It is an offense to make "unreasonable noise"[36] or to treat a corpse in such a way that "outrages ordinary family sensibilities."[37] A reckless homicide is murder and an assault is aggravated assault if it "manifest[s] extreme indifference to the value of human life."[38] The juror must decide how much indifference is "extreme" and what will manifest such. Similarly, what would otherwise be murder is only manslaughter if "there is a *reasonable* explanation or excuse" for a defendant's "*extreme* emotional disturbance."[39]

Indeed, every offense that requires recklessness—the default culpability level in the code[40]—or requires negligence or uses the term "reasonable" (which is defined as non-reckless and non-negligent[41]) employs such a vague standard. Both recklessness and negligence are defined to require a finding that the actor disregarded, or should have been aware of, respectively, "a *substantial* and *unjustifiable* risk" that the offense elements exist or will result.[42] The disregard or unawareness must be "a gross deviation from the standard of [conduct/care] that a [law-abiding/reasonable] person would observe."[43] It is the juror, then, who must decide whether the risk was "substantial" or "justifiable" and whether the defendant's disregard/unawareness of the risk was "a gross devia-

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[33] Id. § 220.1(3).
[34] See id. § 223.5.
[35] See id. § 220.2(3).
[36] Id. § 250.2(1)(b).
[37] Id. § 250.10.
[38] Id. §§ 210.2, 211.1(2)(a).
[39] Id. § 210.3(1)(b) (emphasis added). Other examples of such vague standards are plentiful. A victim's consent that would otherwise be a defense will not be one if the person is "unable to make a reasonable judgment." Id. § 2.11(3)(b). The juror may well take this as an invitation to decide whether what was consented to was reasonable. An opportunity created by the police to commit an offense may provide an entrapment defense if it employs "methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." Id. § 2.13(1)(b). Detention constitutes kidnapping if the defendant removes a person "a substantial distance . . . or if he unlawfully confines the [victim] for a substantial period." Id. § 212.1.
[40] See id. § 2.02(3).
[41] Id. § 1.13(16).
[42] Id. § 2.02(2)(c), (d) (emphasis added).
[43] Id.

tion" from what the law-abiding/reasonable person would have done. Ultimately, this is not far from asking the juror to apply her own intuitions of justice in assessing liability.

Such an invitation also commonly appears in the Code's general liability provisions. For example, conduct constitutes an attempt when it has gone so far as to take "a *substantial step*" toward commission of the offense.[44] The juror must decide in each case when mere (non-criminal) preparation has become a criminal attempt. Similarly, a violation is to be exempted if it is "within a customary license or tolerance"[45] or if there exist "such . . . extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense."[46] It is for the juror to decide what must have been "reasonably envisaged" and what violations are generally tolerated.

Open-ended provisions are even more common in code provisions assessing whether an admitted violation is to be exculpated. For example, an offense is to be exculpated if "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented" by the offense.[47] The juror must determine the interests in conflict, give value to each, and then determine their relative value. A duress defense is given if "a person of reasonable firmness in [the actor's] situation would have been unable to resist [the coercion]."[48] The juror must decide whether the amount of coercion the defendant was subjected to justified his unlawful behavior. Another provision of the Model Penal Code excuses otherwise criminal behavior if it results from "*reasonable* reliance upon an official statement of the law."[49] The juror must intuit what reliance exculpates and what does not. An accomplice can escape liability if he "makes *proper effort* to prevent the commission of the offense."[50] The bounds of the withdrawal defense are then for the juror to determine, with reference to her own assessment of what would be "proper" in the situation.

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[44] Id. § 5.01(1)(c) (emphasis added).
[45] Id. § 2.12(1).
[46] Id. § 2.12(3).
[47] Id. § 3.02(1)(a).
[48] Id. § 2.09(1).
[49] Id. § 2.04(3)(b) (emphasis added).
[50] Id. § 2.06(6)(c)(ii) (emphasis added).

Another well-known example is found in the formulations of the insanity defense. Research suggests that it does not matter which of the common insanity formulations is used: the ALI's "lacks substantial capacity"[51] or M'Naghten's "defect[s] of reason" or "insane impulse controlling their will or judgment."[52] The liability result in any given case will be the same under all formulations. These results make sense if one concludes that the formulations are all so open-ended that they simply invite the juror or study participant to rely upon her own intuitions of justice: that is, her own intuitions of whether a person with that dysfunction in that situation could reasonably have been expected to have avoided committing that offense.

Such a liability assessment scheme may be exactly what one would hope for if one were in the business of expressing community notions of justice. But, for a criminal law that seeks to engage the mechanisms of deterrence, incapacitation, and rehabilitation, such deference to lay intuitions of justice is odd indeed.

3. Rules Requiring Jury Speculation

Another way in which even the Model Penal Code incorporates lay intuitions of justice is through reliance on factual issues that cannot be resolved other than through jury speculation. Such speculation inevitably invites the juror to take account of his or her own intuitions of justice for how the case should be resolved. When a juror is required to speculate about a fact, and the juror believes the criminal justice system to be in the business of doing justice, logic suggests that the juror is more likely to reach a factual conclusion legally consistent with the perceived "proper" result in the case.

Most common among the issues upon which a jury must speculate are those regarding a defendant's state of mind at the time of the offense. Did he "believe[] or hope[]" that a result would occur?[53] Or, was he just "practically certain that" the result would

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[51] Id. § 4.01(1).
[52] Parsons v. State, 2 So. 854, 857, 863 (Ala. 1887).
[53] MPC § 2.02(2)(a)(ii).

occur?[54] Did he believe that such force was "immediately necessary for the purpose of protecting himself"?[55]

Frequently the juror is asked to determine a purely hypothetical state. Would the actor "have been aware of the risk had he been sober[?]"[56] At other times, the juror is asked to speculate about the state of mind of persons other than the defendant. Would "a person of reasonable firmness"[57] have been coerced to commit the offense? Would a person "other than [one] who [is] ready to commit [the offense]"[58] have been induced by the police conduct? Sometimes the jury is asked to speculate about what the defendant thought about what another person thought. Did the defendant think the other person was acting under "a false impression"[59] about the nature of the property?

The jury is even asked to guess what the defendant thought about what another person would have thought in a hypothetical situation. Did he "believ[e] that the owner, if present, would have consented"[60] to the taking if the owner had been asked? Did the defendant believe the owner "would have licensed him"[61] to enter had he been asked before the trespass?

It seems highly likely that, when given such speculative tasks, a juror draws upon his or her own life experience in determining what the defendant or the other person would have thought or what the defendant thought about what the other person thought. The juror's conclusion will also be shaped in some significant part by the juror's overall sense of how the case should come out. From the same objective facts, a juror may see more charitable interpretations of a defendant's beliefs and motivations if the juror is inclined against liability. Whether a defendant actually believed that "the force used was immediately necessary for the purpose of protecting [herself]"[62] may end up being a function of whether the juror thinks the defendant ultimately should be criminally liable for

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[54] Id. § 2.02(2)(b)(ii).
[55] Id. § 3.04(1).
[56] Id. § 2.08(2).
[57] Id. § 2.09(1) (duress).
[58] Id. § 2.13(1)(b) (entrapment).
[59] Id. §§ 223.3(1), (3).
[60] Id. § 223.1(3)(c).
[61] Id. § 221.2(3)(c).
[62] Id. § 3.04(1).

what she did. Why should an instrumentalist coercive crime control code use rules that call for such factual speculation?

The invited speculation is all the more an invitation to an open-ended "justice" judgment because in most instances the issue put to the jury is not simply whether the defendant "believed" a certain fact—whether the owner would have, for example, given consent had she been asked—but whether the defendant "*reasonably* believed" a certain fact.[63] A belief is "reasonable" if it is "not reckless or negligent,"[64] that is, if it does not satisfy the requirements of negligence:

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.[65]

In the process of determining whether a defendant "should [have been] aware of a substantial and unjustifiable risk" of the offense elements, and whether the risk was "of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care," using as the standard "the standard of care that a reasonable person would observe in the actor's situation," the jurors can hardly do anything but consult their own lay intuitions of justice.

My point here is not to criticize these statutory formulations. On the contrary, a criminal law that seeks to track our complex notions of justice must ask the jury to engage in such speculations on points where our intuitions are complex. The point here is to see that such inquiries are in fact explainable only by the apparent quest for justice, for they would be almost comical if offered as a determined system for coercive crime control.

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[63] See supra note 54; see also supra note 56.
[64] MPC § 1.13(16).
[65] Id. § 2.02(2)(d).

II. Some Alternative Explanations for the Deference to Lay Intuitions of Justice

One can conclude from the previous Part that, first, deference to lay intuitions of justice is common throughout criminal law, even in the most instrumentalist and tightly drafted codes, and second, that such deference is inconsistent with effective operation of the more traditional, coercive crime control mechanisms—deterrence, incapacitation, and rehabilitation. Why is such reliance upon lay intuitions of justice tolerated? The explanation to be offered here has already been signaled: Deference to lay intuitions of justice has instrumentalist value because it enhances the criminal law's normative crime control power. Before we turn to this claim, however, consider some alternative explanations that might be offered by advocates of traditional coercive crime control.

First, one might argue that reliance upon lay intuitions of justice is not inconsistent with the mechanisms of deterrence, incapacitation, and rehabilitation because people's intuitions naturally track the demands of these mechanisms. That is, laypersons naturally understand the demands of these crime control mechanisms and naturally think of the imposition of criminal liability as the means for advancing these mechanisms. Certainly this is true of many economists and law professors; perhaps it is true of laypersons as well. If this were true, it might undercut the claim of Section I.B that doctrinal standards inviting the use of lay intuition are inconsistent with the coercive strategies. Such reliance upon lay intuitions, it could be argued, is not deference to lay intuitions *of justice*, but rather lay intuitions that naturally take account of deterrence, incapacitation, and rehabilitation.

The available evidence does not support this claim. Laypersons do not intuitively apply principles of deterrence, incapacitation, and rehabilitation when they assess criminal liability and punishment. To the contrary, the studies suggest that lay assessments of criminal liability and punishment conflict with, rather than track, coercive crime control strategies. Some of the evidence has already been noted in Section I.A, above. Empirical studies show lay intuitions assign liability and punishment in ways that systematically conflict with the rules of liability and punishment that coercive

crime control strategies would follow. For example, lay intuitions support recognizing excuse defenses,[66] and taking account of resulting harm,[67] but do not support taking account of difficulty in detection.[68]

Also undercutting the claim that laypersons intuitively follow principles of coercive crime control is the example of the code drafters' treatment of attempt grading, where they work to obscure their use of coercive strategies that conflict with strong lay intuitions that resulting harm is significant. If the lay audience took the coercive crime control view, which would make resulting harm insignificant, there would be no need to obscure the coercive strategy. Criminal codes could openly declare the insignificance of resulting harm, by defining offenses solely in terms of conduct with a particular state of mind, without reference to resulting harm. Yet no criminal code takes this approach.

Another alternative explanation for the common deference to lay intuitions of justice might be that the drafters, as persons with intuitions of justice themselves, set the rules to match their own feelings about the importance of retributive justice. In other words, while the drafters' talk follows their intellect toward instrumentalist coercive crime control, their actions follow their hearts to retributive justice.

The evidence in support of this explanation is mixed. One might speculate that even law professors and economists cannot purge themselves entirely of their natural, human feelings for retributive justice. There are a number of passages in even the Model Penal Code where the drafters give some deference, albeit in highly re-

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[66] See Robinson & Darley, Justice, Liability, and Blame, supra note 4, at 127–55.

[67] See id. at 14–33, 181–89.

[68] See, e.g., Kevin M. Carlsmith et al., Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment (unpublished manuscript, on file with the Virginia Law Review Association) (reporting empirical studies that suggest laypersons would not take account of difficulty of detection or publicity in setting punishment); Cass R. Sunstein et al., Do People Want Optimal Deterrence? (Univ. of Chicago Law School, John M. Olin Law & Econ. Working Paper No. 77, May, 1999), available at http://www.papers.ssrn.com (SSRN database) (reporting two experiments suggesting that people do not spontaneously think in terms of optimal deterrence, and that people would have objections to policies based on the goal of optimal deterrence); see also John M. Darley et al., Incapacitation and Just Deserts as Motives for Punishment, 25 Law & Hum. Behav. (forthcoming Jan. 2000) (suggesting that a layperson would not take account of correlates of future criminality in setting punishment, especially when protective mechanisms other than the criminal justice system are available).

stricted form, to notions of desert. For example, they include among the list of otherwise crime control principles this purpose: "to safeguard conduct that is without fault from condemnation as criminal."[69]

This is hardly a claim that the criminal law is in the business of giving offenders the liability and punishment they deserve. It seems to set only a limit on liability rather than offer a positive principle for the distribution of liability, leaving coercive crime control principles elsewhere. And, it might be taken to be limited only to the issue of liability versus no liability, with no need to grade liability according to degree of desert. Thus, once held criminally liable, nothing in this statement of purpose would prevent a long prison term on incapacitation grounds for a minor offense by a person thought likely to commit a serious future offense.

On the other hand, the quoted statement of purpose is not insignificant. To some limited extent, it seems to advance retributivist views, and its application has the possibility of undercutting effective operation of coercive crime control strategies. It would seem to prohibit, for example, the imposition of liability on a person wholly blameless for the charged past offense, even if the person is predicted to commit a serious future offense. Is this not some evidence that the drafters let their Code express some of their own retributivist intuitions that doing justice is important for its own sake and that liability ought to track desert?

The answer, I think, is not necessarily. It is as plausible that the drafters saw a need to take account of lay intuitions of justice for purely instrumentalist reasons. They might have been fully prepared to follow a purely coercive crime control strategy, completely rejecting any retributivist feeling, yet recognized that laypersons have a strong sense of justice and that any effective coercive crime control system must take account of these lay feelings. The limited retributivist purpose they include in their list—"to safeguard conduct that is without fault from condemnation as criminal"—might simply be their assessment of the compromise necessary to preserve the criminal law's moral credibility with the public. Indeed, this inter-

[69] MPC § 1.02(1)(c). A later subsection, concerning the purposes of the provisions governing the sentencing and treatment of offenders, includes as a purpose "to differentiate among offenders with a view to a *just* individualization in their treatment." Id. § 1.02(2)(e) (emphasis added).

pretation explains well why the purpose carries the peculiar limitations that it does. It would be most disastrous for the system's moral authority to be found to be convicting persons who were wholly blameless. Whether a person is suffering more liability and punishment than he or she deserves is a matter less ascertainable by the public and in any case more a matter of close judgment easily obscured.[70] In several instances the Model Penal Code drafters concede that their drafting is influenced by public expectations of how a criminal code should look.[71]

III. NORMATIVE CRIME CONTROL: WHY PEOPLE OBEY THE LAW

The introduction to this Article signaled its proposed answer to the title question: The criminal law cares about layperson's intuitions of justice because their incorporation is essential to normative crime control. This Part and the next set out the arguments in support of this claim, first, by examining the evidence for the power of normative forces in influencing people's conduct, then in examining the role criminal law can play in harnessing these normative forces.[72]

More than because of the threat of legal punishment, people obey the law because they fear the disapproval of their social group if they violate the law, and because they generally see themselves as moral beings who want to do the right thing as they perceive it. The normative pressures coming from other people, generally experienced as an external force by the actor, function like the more formal deterrence mechanisms were thought to operate. People obey the social norms of their groups because those groups have

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[70] See Robinson, supra note 10.

[71] For example, with modern inchoate offenses, there is little need for a burglary offense, yet the drafters retain the offense, explaining that its retention:

> In part . . . reflects a deference to the momentum of historical tradition . . . . It is noteworthy that the civil-law countries know of no such offense, being content to penalize crimes involving intrusion by adding a minor term of imprisonment for criminal trespass to the appropriate sentence for the other crime committed or attempted . . . . Centuries of history and a deeply imbedded Anglo-American conception such as burglary . . . are not easily discarded.

Model Penal Code and Commentaries art. 221 introductory note & cmt. at 59, 66, 67 (Official Draft and Revised Comments 1980). The drafters similarly cite "long tradition" as part of their justification for keeping an offense of robbery, which is simply a combination of theft and threat offenses. See id. § 221.1 cmt. at 98 (1980).

[72] This last portion of the Article condenses the points made in Robinson & Darley, supra note 12.

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," or discredit in the eyes of others. 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 does not get arrested, informal sanctioning processes may occur.[73] 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, the ability to borrow money, the ability to command trust from others, and possible business partners.[74]

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 to internalize the beliefs represented by the social norms of the culture to which they belong. People come to hold the moral standards of the cultures in which they are raised; internal moral standards and external norms generally label the same actions as right or as wrong.

What is the evidence concerning crime prevention due to fear of social sanction or fulfillment of moral obligation? Harold Grasmick and his associates have done the most sustained work

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

[74] See Daniel Nagin & Raymond Paternoster, The Preventive Effects of the Perceived Risk of Arrest: Testing an Expanded Conception of Deterrence, 29 Criminology 561, 562 (1991); Kirk R. Williams & Richard Hawkins, Perceptual Research on General Deterrence: A Critical Review, 20 L. & Soc'y Rev. 545, 564, 565 (1986). For an examination of the effect of criminal conviction on an offender's future earning potential, see John R. 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 R. Lott, Jr., Do We Punish High Income Criminals Too Heavily?, 30 Econ. Inquiry 583, 584 (1992).

documenting the role of the informal determinants of obedience to the law. Their research consistently finds that both fear of social disapproval and moral commitment to the law inhibit the commission of illegal activity.[75] They comment that their "findings highlight the importance of internal control in producing conformity to the law."[76] Other researchers reach similar conclusions. Raymond Paternoster and LeeAnn Iovanni conclude that "the greatest effects on delinquent involvement are those from sources of social control."[77] Robert Meier and Weldon Johnson conclude that "despite contemporary predisposition toward the importance of legal sanctions, our findings are . . . consistent with the accumulated literature concerning the primacy of interpersonal influence" over legal sanction.[78] Tom Tyler's review of existing studies concludes that "testing the ability of each of the attitudinal factors . . . to predict variance in compliance . . . [reveals that t]he most important incremental contribution is made by personal morality."[79]

IV. THE IMPORTANCE OF LAY INTUITIONS OF JUSTICE TO NORMATIVE CRIME CONTROL

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 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 its operation as a societal mechanism through which the force of social norms is realized and by which the force of internal moral principles is strengthened. That is, the law has little independent force, in the way that social group norms and internalized norms do. It has

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[75] See Harold G. Grasmick & Donald E. Green, Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior, 71 J. Crim. L. & Criminology 325, 325 (1980).

[76] Harold G. Grasmick & Robert J. Bursik, Jr., Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model, 24 L. & Soc'y Rev. 837, 854 (1990).

[77] Raymond Paternoster & LeeAnn Iovanni, The Deterrent Effect of Perceived Severity: A Reexamination, 64 Soc. Forces 751, 757 (1986).

[78] Robert F. Meier & Weldon T. Johnson, Deterrence as Social Control: The Legal and Extralegal Production of Conformity, 42 Am. Soc. Rev. 292, 302 (1977).

[79] Tom R. Tyler, Why People Obey the Law 60 (1990).

power to the extent that it can amplify, sustain, and shape these two power sources, and it has power to the extent that it influences what the social group thinks and what its members internalize.

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

One effect the criminal law has in shaping conduct, specifically, in gaining compliance with its demands, is its ability to resolve ambiguity as to the wrongfulness of the contemplated conduct. 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.

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.[80] He notes that "[t]his 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 law. If authorities can tap into such feelings, their decisions will be more widely followed."[81]

Tyler also reviews a number of studies that suggest that the level of commitment to obey the law is proportional to what he 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

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[80] See id. at 36–37.

[81] Id. at 65. In another study, Grasmick and Green conclude: "each 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 75, at 326.

by the appropriate authorities.[82] 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 as influential in 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 Tyler reviews a number of studies that examine individual differences in perceptions of the law's legitimacy, and relates those differences to differences in support for legal authorities and felt obligations to obey the law:

> [S]ix 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 these 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.[83]

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 the current research supports the claim of a connection between perceptions of the law's moral credibility and obedience to the law.[84]

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[82] See Tyler, supra note 79, at 32–37, 64–68, 161–63.

[83] Id. at 31. Tyler suggests that the law gains legitimacy in two ways, only the first of which we emphasize in our argument. The law gains legitimacy because it is seen as 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, processes that society has agreed are the appropriate ones to enact such laws. See id. at 161–63. The laws are the products of legitimate authority, in other words. I agree that procedural fairness is an important additional element producing moral credibility for the law.

[84] 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 in this respect as a moral authority has effect primarily at the borderline of criminal activity, where there may be some ambiguity as to whether the conduct really is wrong.

B. The Criminal Law's Ability to Facilitate the Shaping of Shared Norms

A second and more powerful way in which criminal law influences conduct is by shaping the development of shared norms, thereby harnessing the powerful social forces of normative behavior control. 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, and the like. Cutting in line, being rude, or wearing revealing clothing may be annoying to some people, but such behaviors generally are 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 norms against violence and dishonesty.[85] As Michael Gottfredson and Travis Hirschi have remarked, the criminal law is about "force and fraud."[86]

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.[87] The public condemnation expressed in reaction to the offense supports and encourages the efforts of those who have resisted temptation and remained law-abiding. Having avoided breaking the law in question, people can regard themselves favora-

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[85] There are some exceptions, however. Bestiality and eating the flesh of human corpses, for example, remain criminal because the norms against such conduct remain strongly and widely felt.

[86] Michael R. Gottfredson & Travis Hirschi, A General Theory of Crime 4 (1990).

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

bly, which in turn reinforces their moral commitment to the norm expressed in the offense.

Further, every adjudication offers an opportunity to either 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.[88]

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 Philip 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."[89] In the long run, for those crimes in which "moral inhibition" plays an important role, announcing high severity of punishment may be an important communication—more important than ensuring high probability of punishment, which 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

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[88] See Kai T. Erikson, Wayward Puritans: A Study in the Sociology of Deviance 6, 7 (1966).

[89] Philip J. Cook, Punishment and Crime: A Critique of Current Findings Concerning the Preventive Effects of Punishment, 41 Law & Contemp. Probs. 164, 177 (1977).

that act endangers others, or otherwise fits the paradigm 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

This Article claims only that criminal law 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 show the law's limited ability to change norms even when the change is supported by a significant portion of the public.[90] Some would argue that the continuing controversy over our "war on drugs" raises a similar issue.[91] 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 rather 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 also has been at work in diluting existing norms 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 recog-

[90] The adoption of the Twenty-First Amendment in December of 1933 completed the repeal of the Eighteenth Amendment. It was, "[i]n hindsight . . . the logical outcome of a foolish, unpopular reform." David E. Kyvig, Repealing National Prohibition 3 (1979).

[91] See, e.g., Anthony Lewis, Prohibition Folly, N.Y. Times, Feb. 12, 1996, at A15.

nition and confirmation that come 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 preexisting 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 agreements 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.

That challenge for criminal law also gives it a potential power. A criminal law that earns a reputation for moral credibility can influence the shaping of norms and, through them, conduct. But to become a moral authority, the criminal law cannot deviate too far from what the community thinks is just, that is, too far from lay intuitions of justice. Why does the criminal law care what the layperson thinks is just? Because it is only by heeding those views that the criminal law can provide effective crime control.