University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2003

The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best

Paul H. Robinson

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

Part of the [Criminal Law Commons](#), [Law and Society Commons](#), [Psychology Commons](#), and the [Social Control, Law, Crime, and Deviance Commons](#)

Repository Citation

Robinson, Paul H., "The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best" (2003). *Faculty Scholarship at Penn Law*. 56.

https://scholarship.law.upenn.edu/faculty_scholarship/56

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

ARTICLES

The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best

PAUL H. ROBINSON* AND JOHN M. DARLEY**

TABLE OF CONTENTS

INTRODUCTION	950
I. GROWING REASONS TO BE SKEPTICAL OF CRIMINAL LAW DETERRENCE	953
A. KNOWLEDGE HURDLE	954
B. PERCEIVED NET-COST HURDLE	954
C. RATIONAL DECISIONMAKING HURDLE	955
D. CUMULATIVE EFFECT	956
II. THE TRADITIONAL ASSUMPTION THAT THE FORMULATION OF CRIMINAL LAW DOCTRINE WILL INFLUENCE CONDUCT	956
A. DOCTRINAL FORMULATIONS CALCULATED TO DETER, OR TO AVOID UNDERCUTTING DETERRENCE	957
1. Prohibitions	957
2. Culpability Requirements, Mitigations, and Excuse Defenses	959
3. Grading Judgments	963
4. Sentencing Decisions	967
B. DOCTRINAL FORMULATIONS CALCULATED TO REQUIRE OR AUTHORIZE CONDUCT	969
1. Justification Defenses	969

* Colin S. Diver Distinguished Professor of Law, University of Pennsylvania Law School.

** Warren Professor of Psychology, Princeton University. The authors wish to acknowledge the contributions of participants of faculty workshops at the law faculties of the University of Pennsylvania, Northwestern University, Cornell University, Rutgers University-Camden, Notre Dame University, the University of Minnesota, and at the Law and Public Affairs Program at Princeton University. Also appreciated are comments by Eric Posner, Ariel Porat, and Dan Kahan, and research assistance by Gabriel Posner, David Wang, Amanda Adrian, Kenworthy Bilz, and Danielle Estrada.

2.	Duties and Liability for Omissions	971
C.	"DETERRENCE SPEAK" VERSUS DEVIATIONS FROM JUSTICE	971
1.	Deterrence Speak	971
2.	Deterrence Rationales that Do Real Work: Deviations From Justice	974
III.	THE CASE AGAINST USING DETERRENCE AS A DISTRIBUTIVE PRINCIPLE	976
A.	THE DIFFICULTIES OF DETERRENCE: THE INFORMATION AND COMPLEXITY PROBLEM	977
B.	A COMPARISON OF DETERRENT EFFECTS	980
C.	WHERE DETERRENCE DEVIATES FROM JUSTICE, IT CONFRONTS SPECIAL DIFFICULTIES	983
D.	CREATING CRIMINALS: THE PROBLEM OF OFFSETTING CRIMOGENIC EFFECT	985
IV.	THE POSSIBILITIES AND IMPOSSIBILITIES OF IMPROVING DETERRENT EFFECT	989
A.	ENSURING THAT THE TARGET AUDIENCE KNOWS, DIRECTLY OR INDIRECTLY, OF THE RULE DESIGNED TO INFLUENCE THEIR CONDUCT	989
B.	ENSURING THAT THE TARGET AUDIENCE PERCEIVES A MEANINGFUL NET COST TO A VIOLATION	992
1.	Probability	992
2.	Delay	994
3.	Amount	994
C.	ENSURING THAT THE TARGET AUDIENCE IS CAPABLE OF AND WILLING TO BRING A PERCEIVED THREAT OF PUNISHMENT TO BEAR ON THEIR CONDUCT DECISIONS	999
V.	SUMMARY AND CONCLUSION	1001

INTRODUCTION

For the past several decades, the deterrence of crime has been a centerpiece of criminal law reform. Lawmakers have sought to optimize the control of crime by devising a penalty-setting system that assigns criminal punishments of a magnitude sufficient to deter a thinking individual from committing a crime.

Although this seems initially an intuitively compelling strategy, we suggest it is a poor one; poor for two reasons. First, its effectiveness rests on a set of assumptions that on examination cannot be sustained. Second, deterrence strategies may have hidden criminogenic costs—that is, they may generate crime in unexpected ways.

Experience has taught us to be precise about exactly what we are saying about the effectiveness of a deterrence strategy. There seems little doubt that having a criminal justice system that punishes violators, as every organized society does, has the general effect of influencing the conduct of potential offenders. This we concede: Having a punishment system does deter. But there is growing evidence to suggest skepticism about the *criminal law's* deterrent effect—that is, skepticism about the ability to deter crime through the manipulation of criminal law rules and penalties. The general existence of the system may well deter prohibited conduct, but the formulation of criminal law rules within the system, according to a deterrence-optimizing analysis, may have a limited effect or even no effect beyond what the system's broad deterrent warning has already achieved. We suggest that, while it may be true that manipulation of criminal law rules *can* influence behavior, it does so only under conditions not typically found in the criminal justice systems of modern societies. In contrast, criminal lawmakers and adjudicators formulate and apply criminal law rules on the assumption that they *always* influence conduct. And it is this taken-for-granted assumption that we find so disturbing and so dangerous. In Part I we briefly summarize the social science literature that prompts our skepticism as to whether the criminal law deters, showing that potential offenders do not know the law, do not make rational choices, or do not perceive an expected cost for a violation that outweighs the expected gain.

In sharp contrast, the assumption that legal formulation decisions will have a direct deterrent effect on conduct, has been used in crafting nearly every aspect of criminal law, from defining the rules of conduct, to formulating principles of liability, to determining offense grades, to setting sentencing rules and practice.¹ On close inspection, we conclude that much of this is more a style of conversation—"deterrence speak"—than a true reliance upon deterrence analysis. But true reliance on deterrence is evident in a variety of rules that produce substantial deviations from what other principles for distributing liability and punishment, such as just deserts, would provide. We document these two phenomena in Part II.

1. Deterrence is not criminal law's only *ex ante* function. Deterrence speaks to discouraging prohibited conduct. But criminal law also *requires* that certain conduct be performed, a command carried in the law's creation of legal duties to act. Further, the criminal law *authorizes*, under special circumstances, conduct that otherwise is prohibited, the circumstances being set out in the criminal law's justification defenses. The same caution about legal rules influencing conduct applies to these *ex ante* commands as it does to deterrence. For the same reasons that we are skeptical of the influence of doctrinal formulations to deter conduct, we are skeptical of the criminal law's ability to induce conduct, at least in the way lawmakers assume when they create legal duties and justification defenses.

Even if one concludes that deterrence skepticism overstates its case, there remain reasons for serious concern. We argue that, even on the most cautious reading of the available studies, enough is known to urge an end to the past practice of formulating criminal law based on a deterrence-optimizing analysis. In Part III we offer four primary arguments. First, a disabling problem for deterrence as a principle for the distribution of liability and punishment is its need for information that is neither available nor likely to be available any time in the foreseeable future. Formulating criminal law rules according to a deterrence analysis can produce erroneous results if based upon missing or unreliable data. In fact, inadequately informed analyses could produce criminal law rules that reduce, rather than increase, the possibility of deterrence. In such an informational void, we argue, it makes sense to follow a distributive principle that at the very least can achieve its objectives.

Further, even if full and perfect information were available, we argue that the dynamics of deterrence are dramatically more complex than has been supposed. The deterrent process involves complex interactions, like substitution effects, that make deterrent predictions enormously difficult. And the deterrent process is a dynamic rather than a static one. The manipulation of a criminal law rule may well increase its deterrent effect as hoped, but that effect can itself change the existing conditions and require a new and different deterrence calculation. Part III.A examines deterrence's informational and complexity problems.

Second, once it is recognized that *any* distributive principle for criminal liability and punishment will produce some deterrent effect—if any is to be had—a deterrence-based distribution makes sense only if it can provide meaningfully greater deterrent effect than that already inherent in competing distributions that advance other valuable goals, such as doing justice.

Third, the important implication of our argument is that deterrence can do better than another distribution—such as a justice distribution²—only if and where the two distributive principles deviate. Thus, a deterrence-based distribution can deter better than a justice-based distribution only if and where it deviates from a just result. But it is just these instances of deviation from justice in which it is most difficult to achieve a deterrent effect. People assume the law is as they think it should be, according to their own collective notions of justice. Thus, the simple prerequisite of making the deterrence-based rule known becomes a serious task. Further, it is in these deviation-from-justice cases that the system's deterrence-based rules are least likely to be followed. Because people commonly think of criminal liability and punishment in terms of justice rather than deterrence, the exercise of police, prosecutorial, and judicial discretion, as well as jury nullification, commonly subvert application of deterrence-

2. By "justice distribution" we mean a distribution according to the shared intuitions of justice of the community bound by the law. For a detailed discussion of "justice distribution" and how it can be determined, see generally PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995), and in particular Chapter 7, at 201–15.

based deviation rules, thus subverting the deterrence program and confusing the deterrence message. Parts III.B and c detail these arguments.

Fourth, even if one assumes for the sake of argument that a deterrence-based distribution produces a greater deterrent effect than a justice-based distribution—despite the former's special deviation problems—there is reason to be concerned that the deterrence-based distribution simultaneously produces crime. Because it deviates from the community's shared intuitions of justice, the deterrence-based distribution can undercut the criminal law's moral credibility, lessening its own crime-control power as a moral authority—a dynamic that we suspect can have significant crimogenic effect. Thus, even if a deterrence-based distribution did successfully produce a greater deterrent effect than a justice-based distribution, that greater deterrent effect might be offset by its greater crimogenic effect in undercutting the moral authority of the criminal law. These are the potential costs, referred to above, that are incurred by a deterrence-based system. Part III.D details these arguments.

We believe that optimizing deterrence through doctrinal manipulation is possible, but only under narrow conditions not typical in American criminal justice. There are possibilities for reform that might broaden these conditions, but also serious limitations, due in large part to the sacrifices such reforms would demand: in greater financial cost, in infringing upon interests of privacy and freedom from governmental intrusion, in compromising basic notions of procedural fairness, and in doing injustice and failing to do justice. Our conclusion is that if one takes a realistic view of deterrence, even after plausible reforms are made, little increase in the deterrent effect of doctrinal manipulation would be produced, and not enough to justify its continued use as the standard mechanism of criminal lawmaking. Part IV offers a more realistic view of deterrence: the particular conditions under which it may work and the possibilities, and impossibilities, for improving its performance.

I. GROWING REASONS TO BE SKEPTICAL OF CRIMINAL LAW DETERRENCE

If a criminal law rule is to deter violators, three prerequisites must be satisfied: The potential offender must know of the rule; he must perceive the cost of violation as greater than the perceived benefit; and he must be able and willing to bring such knowledge to bear on his conduct decision at the time of the offense. But as we describe elsewhere,³ one or more of these hurdles typically block any material deterrent effect of doctrinal manipulation. The social science literature suggests that potential offenders commonly do not know the law, do not perceive an expected cost for a violation that outweighs the expected gain, and do not make rational self-interest choices.

3. See Paul H. Robinson & John M. Darley, *Does the Criminal Law Deter? A Social Science Investigation*, 24 OXFORD J. LEGAL STUD. (forthcoming 2004).

A. KNOWLEDGE HURDLE

The available studies suggest that most people do not know the law, that even career criminals who have a special incentive to know it do not, and that even when people think they know the law they frequently are wrong. Potential offenders typically do not read law books and their ability to learn the law, even indirectly through hearing or reading of particular cases, is limited by the fact that the legal rule is just one of hundreds of variables that influence a case disposition. To divine the operative liability rule, hidden as it is under the effects of all the other variables, would require both a higher number of reported cases than those to which potential offenders are exposed and a mind for complex calculation beyond that which is reasonable to expect.⁴

B. PERCEIVED NET-COST HURDLE

The possibilities of deterrent effect are further weakened by difficulties in establishing a punishment rate that would be meaningful to potential offenders, avoiding the delay in imposition of punishment that seriously erodes its deterrent effect, and establishing and modulating the amount of punishment imposed. First, establishing some base expectation of a meaningful chance for punishment is a necessary condition to any deterrent effect. Yet, the perceived probability of punishment is low to the point where the threatened punishment commonly is not thought to be relevant to the potential offender.⁵ Second, a delay between violation and punishment can dramatically reduce the perceived cost of the violation. Even if the punishment is certain, the more distant it is, the more its weight as a threat will be discounted. Further, the strength of the punishment memory—that is, its recalled punitive “bite” as a perceived threat for a future violation—is dramatically reduced as the length of delay increases. Unfortunately, in modern criminal justice such delay is substantial.⁶

Third, as to the amount of punishment, there is no question that any system that can impose punishment can produce a credible deterrent “bite.” The challenge for a deterrence-based system is to modulate the threatened punishment bite as the program for optimum deterrence requires. Lawmakers assume they have the greatest control over this aspect of the cost-benefit calculus in that they can modulate the bite by simply altering the length of prison term. But, in reality, the studies suggest that this aspect of the cost-benefit balance is neither simple nor predictable. The forces at work in determining perceived amount of punishment are complex. For example, the “hedonic adaptation” and “subjective well-being” studies suggest that one’s standard for judging perceived punitive effect changes over time and conditions. For example, both paraplegics and lottery winners return to their original state of well-being despite their dramatically changed circumstances. Thus, as a prison term continues, it can

4. *Id.* at § 1.A.

5. *Id.* at § 1.C(i) (Probability).

6. *Id.*

become increasingly less painful in effect, although its cost per unit time remains constant, making it increasingly less cost effective.⁷

In addition, it appears that it is the intensity of the punishment experience, rather than its duration, that is of significant effect. Indeed, because the remembered intensity is highly influenced by the end-point intensity, which we note above decreases over time, it is possible that the overall remembered bite of a prison term decreases as the length of the term increases! Therefore, while legislatures and judges believe they can reliably manipulate the amount of punishment threatened by simply manipulating the length of the prison term, such manipulation does not provide the punishment bite they assume.⁸

There is a failure of "special deterrence" when a person who serves a prison term does not experience the pain that conventional wisdom suggests he will. "Special deterrence" is the degree to which a punishment, once experienced, reduces the likelihood of the person who experienced the punishment risking a similar punishment by offending again in the future. The defender of the "general deterrence" approach to behavior control may point out that the difficulties we note do not pose similar difficulties with respect to modulating general deterrence among the population that has not experienced prison time, because that population would not have had the opportunity to discover that prison is not as painful as expected. For those who have not yet experienced prison, it is the imagined horribleness of a prison sentence that keeps them from committing crimes.

We do not think this distinction does much to rescue the deterrence approach to rule formulation. First, some of our other difficulties with the deterrence approach, such as the legal knowledge hurdle, apply to general deterrence as well as special deterrence. Second, given the generally known high rate of recidivism among criminals, the lack of special deterrence for future crimes among this group is a considerable failure. Third, those most at risk for committing their first crime are likely to have a good many ex-convicts among their acquaintances and in their neighborhoods, and will learn from them that "prison time isn't so bad." In other words, the diffusion of the prison experience information weakens general deterrence among the group at high risk of crime commission.

C. RATIONAL DECISIONMAKING HURDLE

Finally, there is a host of conditions that interfere with the rational calculation of self-interest by potential offenders: drug or alcohol use, personality types inclined toward impulsiveness and toward discounting consequences, and social influences such as the arousal effect of group action and the tendency of group members to calculate risk in terms of group rather than individual interests. Further, these conditions are disproportionately high among deterrence's pri-

7. *Id.*

8. *Id.*

mary target group: those persons for whom criminal conduct is not already ruled out by their own internalized norms or by those of their family or peers. This bodes ill for effective deterrence because it precludes, or at least diminishes, a rule's deterrent effect even if the rule is known and is backed by what is perceived as a meaningful threat of punishment. We can expect greater deterrent possibilities when dealing with more rational target audiences, such as white-collar offenders. Unfortunately, the more serious and more common offenses tend to be committed by persons less likely to exercise rationality.⁹

D. CUMULATIVE EFFECT

The most serious problems for deterrent effect stem from the combined effect of all three of these hurdles. A well-known rule carrying a credible threat of punishment that exceeds the benefit of the offense will be ineffective nonetheless in deterring a person caught up in rage, group arousal, and drug influence, as is the case with many gang-related offenses. A rational calculator who fears any form of punishment even if the likelihood of it is slight, nonetheless will not be deterred by a rule that he does not know, as where a homeowner shoots to protect his home, unaware that the law does not allow deadly force in protection of property alone. And a rule well-known by a rational calculator as carrying a meaningful penalty nonetheless will not deter if the chance of getting caught is seen as trivial, as illustrated by rampant tax cheating.¹⁰

II. THE TRADITIONAL ASSUMPTION THAT THE FORMULATION OF CRIMINAL LAW DOCTRINE WILL INFLUENCE CONDUCT

This view of a limited deterrent effect stands in stark contrast to the view of criminal lawmakers of the past four decades, who have relied heavily, if not primarily, on deterrence analysis in formulating criminal law rules on the assumption that deterrence is relevant to every aspect of criminal law doctrine. Deterrence is said by some commentators to be the criminal law's "primary purpose"¹¹ or its "core purpose."¹² The Model Penal Code drafters—for whom the Code's "dominant theme is . . . prevention" and its "major goal is to forbid and prevent" crime¹³—see incapacitation and desert as merely "subsidiary themes."¹⁴ Most criminal law course books at their start introduce students to deterrence principles as part of the standard litany for analyzing criminal law

9. *Id.* at § 1.B.

10. *Id.* at §§ 1.D–E.

11. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 2.1, at 103 (2d ed. 1986); accord GLANVILLE WILLIAMS, *CRIMINAL LAW* § 191, at 601 (2d ed. 1961).

12. *Warren v. United States Parole Comm'n*, 659 F.2d 183, 188 (D.C. Cir. 1981).

13. MODEL PENAL CODE § 1.02 explanatory note at 14 (1985).

14. "Subsidiary themes are to subject those who are disposed to commit crimes to public control [and] to prevent the condemnation of conduct that is without fault. . . ." *Id.*

doctrine.¹⁵ As is illustrated below, criminal code commentaries, court opinions, legislative histories, and sentencing hearing transcripts are full of the language of deterrence in justifying every manner of criminal law rule and practice.

A. DOCTRINAL FORMULATIONS CALCULATED TO DETER, OR TO AVOID
UNDERCUTTING DETERRENCE

1. Prohibitions

The most common use of deterrence rationales is in shaping the criminal law's prohibitions.¹⁶ Explicit reliance on a deterrence rationale also is used to justify decisions *not* to criminalize certain conduct, often on the view that a sanction would be ineffective or unnecessary as a deterrent. Such a rationale is offered to explain, for example, the decriminalization of suicide,¹⁷ attempted suicide,¹⁸ failing to pay a valid debt,¹⁹ self-abortion and the preparation of home-made abortifacients,²⁰ and limiting the "joyriding" offense to the person who actually operates or aids in the operation of the vehicle, thereby excluding

15. See, e.g., SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 101-02 (7th ed. 2001); RICHARD G. SINGER & MARTIN K. GARDNER, *CRIMES AND PUNISHMENT: CASES, MATERIALS, AND READINGS IN CRIMINAL LAW* 87-94 (2d ed. 1996).

16. See, e.g., *infra* text accompanying notes 110-17 (describing instances where deterrence is the explicit justification given for obvious harms). The deterrence rationale also is used to prohibit conduct not because that conduct is harmful in itself but because the prohibition will make some other conduct, which is harmful, more difficult. Thus, in criminalizing the receipt of stolen property, it is explained: From a practical standpoint, it is important to punish receivers *in order to discourage theft*. "The existence and functioning of the 'fence,' i.e., a dealer who provides a market for stolen property, is an assurance to thieves, and especially to professional thieves, of the ability to realize gain from their unlawful activity." MODEL PENAL CODE § 223.6 cmt. at 232 (1980).

17. GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 305 (1957).

18. According to the Model Penal Code § 210.5 cmt. at 94 (1980):

[A]ttempted suicide is . . . not criminal under the Model Code, for [suicide is not a crime and Section 5.01 attempt] is limited to situations where the actor engages in inchoate behavior that has as its object the completion of conduct that the law declares to be criminal. . . .

.....
The judgment underlying the Model Code position is that there is no form of criminal punishment that is acceptable for a completed suicide and that criminal punishment is singularly inefficacious to deter attempts to commit suicide. There is scant reason to believe that the threat of punishment will have deterrent impact upon one who sets out to take his own life. By definition, the person who commits what could be denominated a criminal attempt to commit suicide intends to succeed. It seems preposterous to argue that the visitation of criminal sanctions upon one who fails in the effort is likely to inhibit persons from undertaking a serious attempt to take their own lives.

19. *Id.* § 223.8 cmt. at 258-59 (reasoning that insolvencies cannot be deterred by threat of criminal sanction because they commonly result from factors out of the control of the debtor).

20. *Id.* § 230.3 cmt. at 438:

It is apparent from the foregoing that criminal liability of the woman for an abortion committed on herself was not useful in suppressing self-abortion . . . [T]his section favors exemption from criminal liability, except in the late-pregnancy situation specially covered by Subsection (4). The prospect of prosecution is unlikely to deter the unhappy woman who is not restrained by morality, physical danger, expense, and ignominy.

See also *id.* § 230.3 cmt. at 439-40 (declining to criminalize home-made abortifacients).

willing passengers.²¹

Similarly, a deterrence rationale is used in formulating liability doctrines determining who should be held criminally liable. For example, the deterrence rationale is used both in support of²² and in opposition to²³ the use of corporate-enterprise liability, in support of limiting the liability of corporate officials to the board of directors or high management,²⁴ and both in support of²⁵ and in opposition to²⁶ the use of vicarious liability.

Deterrence is also used as the guiding rationale in the formulation of inchoate liability rules. For example, it is used in support of the proximity test for attempt,²⁷ in support of limiting the renunciation defense to cases where the offender is successful in avoiding the offense,²⁸ and in opposition to an impossibility defense for inchoate liability.²⁹ For example, in justifying a renunciation defense to attempt, the Model Penal Code drafters explain:

[The defense] provide[s] actors with a motive for desisting from their criminal designs, thereby diminishing the risk that the substantive crime will be committed. While under the proposed subsection such encouragement is held out at all stages of the criminal effort, its significance becomes greatest as the actor nears his criminal objective and the risk that the crime will be completed is correspondingly high. . . .

...[B]ecause of the importance of encouraging desistance in the final stages of the attempt, the defense is allowed even when the last proximate act has occurred but the criminal result can be avoided, as for example when the

21. See *id.* § 223.9 cmt. at 273 (explaining that the threat of liability for the operator is enough to deter such offenses).

22. See Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1147-54 (1983) (arguing that the stigma of criminal conviction and punishment has a significant deterrent effect on corporations).

23. The argument is that corporate-enterprise liability makes a scapegoat of the corporation, allowing the corporate officials to escape liability and, therefore, undercuts deterrence. See LAFAYE & SCOTT, *supra* note 11, § 3.10, at 365; WILLIAMS, *supra* note 11, § 283, at 865.

24. See MODEL PENAL CODE § 2.07 cmt. at 336, 340 (1985) (reasoning that this is where the deterrent effect—through pressure by shareholders—is clear).

25. See *Davis v. City of Peachtree City*, 304 S.E.2d 701, 703 (Ga. 1983) (stating that deterrence is the objective of holding liquor store owners liable for employee alcohol sales to minors); cf. LAFAYE & SCOTT, *supra* note 11, § 3.9, at 352-57 (asserting that while vicarious liability is useful for deterrence purposes, it should not be used for moral condemnation and that fines, not imprisonment, should be imposed).

26. Some have opposed vicarious liability because if the actor himself has not done anything wrong, then there is no need for deterrence. See, e.g., *Commonwealth v. Koczwar*, 155 A.2d 825, 828 n.1 (Pa. 1959).

27. See MODEL PENAL CODE § 5.01 cmt. at 323 (1985); LAFAYE & SCOTT, *supra* note 11, § 6.2, at 33; WILLIAMS, *supra* note 11, § 203, at 631-32.

28. See MODEL PENAL CODE § 5.01 cmt. at 360 (1985).

29. See Jerome B. Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 33-34 (1968) ("When a man makes a harmless attempt to commit a crime, he may well try again, perhaps more effectively. The voodoo witchdoctor may use a gun next time. Thus the purposes of special deterrence and neutralization can be served by punishing even the marginal cases.").

fuse has been lit but can still be stamped out. If, however, the actor has put in motion forces that he is powerless to stop, then the attempt has been completed and cannot be abandoned.³⁰

Similar kinds of behavioral control reasoning are found in justifying liability rules for solicitation³¹ and conspiracy.³²

2. Culpability Requirements, Mitigations, and Excuse Defenses

The belief of lawmakers that doctrinal manipulation can enhance or maintain deterrent effect appears as well in the formulation of culpability requirements, mitigations, and excuse defenses. For example, in *United States v. Park*,³³ the president of Acme Markets, Inc., a national retail food chain with approximately 36,000 employees, 874 retail outlets, twelve general warehouses, and four special warehouses, was held criminally liable for violations of the Federal Food, Drug, and Cosmetic Act when a company warehouse in Baltimore held food in a building that could be exposed to contamination by rodents, even though there was no indication that Park was negligent as to the violation.³⁴

30. MODEL PENAL CODE § 5.01 cmt. at 359–60 (1985).

31. See *id.* § 5.02 cmt. at 365–66 (1980).

32. See *id.* § 5.03 cmt. at 458 (footnotes omitted):

[T]he law [of conspiracy] should afford a significant incentive to persons to desist from pressing forward with their criminal designs.

The [renunciation] test adopted . . . is consistent with those in the attempt and solicitation sections. First, the circumstances must manifest complete and voluntary renunciation of the actor's criminal purpose. Second, he must take action sufficient to prevent consummation of the criminal objective. The kind of action that will suffice varies for the three different inchoate crimes. Since attempt involves only an individual actor, abandonment will generally prevent completion of the crime, although in some cases the actor may have to put a stop to forces that he has set in motion and that would otherwise bring about the substantive crime independently of his will. The solicitor, on the other hand, has incited another person to commit the crime, unless the solicitation is uncommunicated or rejected; consequently, the Code requires that he either persuade the other person not to commit the crime or otherwise prevent its commission. Since conspiracy involves preparation for crime by a plurality of agents, the objective will generally be pursued despite renunciation by one conspirator, and the Code accordingly requires for a defense of renunciation that the actor thwart the success of the conspiracy.

The means required to thwart the success of the conspiracy will of course vary in particular cases, and it would be impractical to endeavor to formulate a more specific rule. As a general matter, timely notification to law enforcement authorities will suffice, and this result accords with the similar means of exoneration allowed an accomplice who terminates his complicity prior to the commission of the substantive crime.

33. 421 U.S. 658 (1975).

34. *Id.* at 660. It could be argued that Park was blameworthy for his failure to take sufficient remedial steps after being informed of the violation because he ordered a cleanup but gave this order to the same people who had allowed the problem to occur. But, while one might argue that the government could have shown Park's negligence, the point is that the *Park* opinion allows statutes that do not require such a showing and thus allows criminal liability even if it is clear that no such showing can be made and that the defendant acted entirely reasonably. See Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on Dotterweich and Park*, 28 UCLA L. REV. 463, 476–77 (1981).

Such strict liability has been defended on the following deterrence grounds:

[A] person engaged in a certain kind of activity would be more careful precisely because he knew that this kind of activity was governed by a strict liability statute. . . . [T]he knowledge that certain criminal sanctions will be imposed if certain consequences ensue might induce a person to engage in that activity with much greater caution than would be the case if some lesser standard prevailed.³⁵

Another useful example is found in the well-known case, *Regina v. Dudley & Stephens*,³⁶ in which the defendants, adrift in an open boat at sea and soon to die from starvation, killed and drank the blood of a near-death cabin boy, an act that kept them alive long enough to be rescued.³⁷ They were convicted of murder and sentenced to death.³⁸ The court denied their claim of a necessity defense in large part because it feared that recognition of such a defense would undercut criminal law's prohibitions at a time when its deterrent threat must be at its strongest:

It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was wilful murder, that the facts as stated in the verdict are no legal justification of the homicide; and to say that in our unanimous opinion the prisoners are upon this special verdict guilty of murder.³⁹

The court then proceeded to pass sentence of death upon the prisoners.⁴⁰

35. Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 736 (1960). Wasserstrom also notes that people may be deterred from engaging in the strict liability activity altogether, out of concern that they might not be able to avoid the prohibited harm. "[T]he presence of strict liability offenses might have the added effect of keeping a relatively large class of persons from engaging in certain kinds of activity." *Id.* at 737.

36. 14 Q.B.D. 273 (1884). For more details on this case, see PAUL H. ROBINSON, *CRIMINAL LAW CASE STUDIES* 14–18 (2d ed. 2002); A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW: THE STORY OF THE TRAGIC LAST VOYAGE OF THE MIGNONETTE AND THE STRANGE LEGAL PROCEEDINGS TO WHICH IT GAVE RISE* (1984).

37. *Dudley & Stephens*, 14 Q.B.D. at 273–75.

38. *Id.* at 288.

39. *Id.*

40. *Id.* The defendants' sentence was afterwards commuted by the Crown to six months imprisonment. *Id.*

The influence of a deterrence rationale is also apparent in the formulations of the test for negligence. Many jurisdictions continue to use a purely objective standard against which to judge a person's culpability for failing to be aware of a prohibited risk. They refuse to take account of the particular capacities of the person at hand—of whether the person had the capacity to have met the reasonable person standard—for fear that any individualization would undercut the force of the law's prohibitions.

Thus, in *State v. Williams*,⁴¹ loving parents with little education and limited intelligence were held to have breached the reasonable person standard in failing to get needed medical care for their seventeen-month-old child, who died of complications from what began as a toothache.⁴² The court ruled that it was sufficient negligence to support liability for manslaughter if "the conduct of a defendant, regardless of his ignorance, good intentions and good faith, fails to measure up to the conduct required of a man of reasonable prudence."⁴³ Reliance upon a purely objective, unindividualized negligence standard is justified in much the same way as the result in *Dudley & Stephens*⁴⁴: it is necessary to maintain a clear standard of conduct. Holmes, for example, concludes that the reason for adopting it is the criminal law's "immediate object and task to establish a general standard . . . of conduct for the community, in the interest of the safety of all."⁴⁵

To give just a few of many possible examples, deterrence arguments are used in the following areas: in opposition to⁴⁶ and in support of strict liability offenses;⁴⁷ in opposition to liability based upon negligence;⁴⁸ in support of liability for negligent homicide⁴⁹ and negligent assault with a deadly weapon;⁵⁰

41. 484 P.2d 1167 (Wash. Ct. App. 1971).

42. *Id.* at 1169-70.

43. *Id.* at 1171. Similarly, in *Edgmon v. State*, 702 P.2d 643, 645 (Alaska Ct. App. 1985), the court held that the "peculiarities of a given individual—his or her intelligence, experience, and physical capabilities—are irrelevant in determining criminal negligence since the standard is one of a reasonably prudent person."

44. See *supra* text accompanying notes 36-40.

45. *Commonwealth v. Pierce*, 138 Mass. 165, 176 (1884); see also Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 489 (1987) (describing the movement among legal scholars and courts to apply an objective and pragmatic standard to "achieve the greatest good: deterrence of negligent and more culpable actors").

46. This argument is made on the grounds that someone who lacks mens rea need not be deterred. See Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109.

47. See Wasserstrom, *supra* note 35, at 736; Janet S. Harring, Note, *Liability Without Fault: Logic and Potential of a Developing Concept*, 1970 WIS. L. REV. 1201, 1207. Deterrence arguments also have been used in resolving related issues. See Steven S. Nemerson, Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517, 1550 (1975) (arguing that mens rea, even if burden of proof is shifted to defendant, is not a good alternative because it would result in significant loss of deterrence).

48. This argument is made on the grounds that such persons are not deterrable. See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 137 (2d ed. 1960); WILLIAMS, *supra* note 11, § 43, at 122.

49. "Criminal punishment of negligent homicide is not impotent to stimulate care that might otherwise not be taken." MODEL PENAL CODE § 210.4 cmt. at 86 (1980).

50. In order to induce "special care and restraint." *Id.* § 211.1 cmt. at 191.

in support of an objective unindividualized standard of recklessness;⁵¹ in support of a purely objective, unindividualized standard for the provocation mitigation to murder;⁵² in opposition to the individualized extreme emotional disturbance mitigation in murder cases;⁵³ in support of the partial responsibility mitigation in murder;⁵⁴ in support of recognizing an insanity defense,⁵⁵ an immaturity defense,⁵⁶ and a duress defense;⁵⁷ in support of a reasonableness requirement for a mistake as to a justification defense,⁵⁸ an involuntary act defense,⁵⁹ a statute of limitation,⁶⁰ and an entrapment defense;⁶¹ and in opposi-

51. See ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953, at 52-53 (1953) (in the context of involuntary manslaughter); see also *supra* text accompanying notes 41-43 (discussing *Williams* case).

52. See ROYAL COMMISSION, *supra* note 51, at 52-53.

53. As the Model Penal Code states:

Unlike provocation, diminished responsibility is entirely subjective in character. It looks into the actor's mind to see whether he should be judged by a lesser standard than that applicable to ordinary men. It recognizes the defendant's own mental disorder or emotional instability as a basis for partially excusing his conduct. This position undoubtedly achieves a closer relation between criminal liability and moral guilt. Moral condemnation must be founded, at least in part, on some perception of the capacities and limitations of the individual actor. To the extent that the abnormal individual is judged as if he were normal, to the extent that the drunk man is judged as if he were sober, to the extent, in short, that the defective person is judged as if he were someone else, the moral judgment underlying criminal conviction is undermined. The doctrine of diminished responsibility resolves this conflict in favor of an individualistic and subjective determination of criminal liability. But this approach has its costs. By evaluating the abnormal individual on his own terms, it decreases the incentives for him to behave as if he were normal. It blurs the law's message that there are certain minimal standards of conduct to which every member of society must conform.

MODEL PENAL CODE § 210.3 cmt. at 71 (1980).

54. See *id.*

55. See ABRAHAM S. GOLDSTEIN, *INSANITY DEFENSE* 12-13 (1967).

56. See SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 4 (R.H. Helmholz & Bernard D. Roams, Jr., eds., William S. Hein Co. 1986) (1797).

57. See MODEL PENAL CODE § 2.09 cmt. at 374-75 (1985); WILLIAMS, *supra* note 11, § 246, at 756.

58. As Herbert Wechsler and Jerome Michael stated:

To concede a privilege to kill only in cases of actual necessity is to lay down a rule that must either be disregarded or else must operate to deny freedom of action even in cases where the necessity exists and not merely in those where it does not. On the other hand, no such onerous limitation on freedom of action is imposed by requiring that men exercise the degree of care to appraise the facts correctly which is appropriate to the situation. It is desirable to deter men from acting without exercising such care. . . .

Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 736 (1937).

59. See LAFAYE & SCOTT, *supra* note 11, § 3.2, at 275-76.

60. See Yair Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. LEGAL STUD. 99, 99 (2002) ("Because potential criminals tend to discount the future at higher rates than society, punishing crimes long after they are committed will be inefficient. Punishments after a long lag have only a nominal deterrent effect, while they may cost society substantial sums.").

61. See MODEL PENAL CODE § 2.13 cmt. at 406-07, 412 (1985) (stating that the defense is an "attempt to deter wrongful conduct on the part of the government" and that "[t]he primary justification for the defense . . . is to discourage unsavory police tactics").

tion to recognizing a general reasonable mistake of law excuse⁶² and a duress defense.⁶³ Deterrence arguments also have been used to support particular formulations of excuse defenses. For example, deterrence rationales have been used to support definitions of insanity that cover both cognitive impairment and control dysfunction⁶⁴ and to support definitions of insanity that exclude control dysfunction.⁶⁵

3. Grading Judgments

An assumption that doctrinal formulations control deterrent effect also is reflected in the rationales offered for setting offense grades. An example is found in the popular felony-murder rule, which treats even a purely accidental killing as murder. The rule's traditional rationale assumes that a deterrent threat of severe sanctions if a death occurs will make felons more careful to avoid accidental injury:

[I]f experience shows, or is deemed by the law-maker to show, that somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies, or with resistance to officers, or if on any other ground of policy it is deemed desirable to make special efforts for the prevention of such deaths, the law-maker may consistently treat acts which, under the known circumstances, are felonious . . . as having a sufficiently dangerous tendency to be put under a special ban. The law may, therefore, throw on the actor the peril, not only of the consequences foreseen by him, but also of consequences which, although not predicted by common experience, the legislator apprehends.⁶⁶

The rule is thought to have the useful collateral effect of providing an additional deterrent to felonies generally, especially to dangerous felonies.⁶⁷

62. See LAFAYE & SCOTT, *supra* note 11, § 5.1, at 586–87. Dan Kahan argues against recognizing a reasonable mistake of law defense for fear that it will encourage persons to engage in conduct close to the line of criminality. Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 129 (1997).

63. 2 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 107 (William S. Hein & Co. 1980) (1883) (“[I]t is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary.”).

64. See *People v. Hubert*, 51 P. 329 (Cal. 1897); MODEL PENAL CODE § 4.01 cmt. at 156–60 (Tentative Draft No. 4, 1955); John Barker Waite, *Irresistible Impulse and Criminal Liability*, 23 MICH. L. REV. 443, 454 (1925); Herbert Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 374 (1955).

65. See *State v. Green*, 6 P.2d 177 (Utah 1931); MODEL PENAL CODE § 4.01 cmt. at 173 n.24 (1985) (arguing for the ALI test—excusing one who “lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law”—as the best formulation for excluding from liability only the undeterrables).

66. OLIVER W. HOLMES, THE COMMON LAW 59 (1881).

67. See *Jenkins v. State*, 230 A.2d 262, 268–69 (Del. 1967) (“[The] rational function of the felony-murder rule is to furnish added deterrent to the perpetration of felonies which, by their nature or by the attendant circumstances, create a foreseeable risk of death.”).

Another example of adjusting grade to enhance deterrence is found in the "three strikes" and other habitual offender statutes. Part of their justification no doubt is the incapacitation of dangerous offenders by predicting future dangerousness from repeated past offenses. But such provisions also have been justified on deterrence grounds.⁶⁸ As the federal sentencing guidelines explain, "General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence."⁶⁹ Indeed, it is in the context of habitual offender statutes that it has been argued that "deterrence is the surest ground for punishment."⁷⁰

*Rummel v. Estelle*⁷¹ illustrates such deterrence reliance. Thirty-year-old Rummel made his living through petty larceny and fraud. His pathetic check forgery was usually easy to discover, and he was caught and convicted several times. On a hot summer day, Rummel offered to fix a bar's broken air conditioner for \$129.75, but actually had no intention of doing so. He was caught and convicted of theft, a felony under then-existing state law. After the state presented evidence of two prior felonies, a "three strikes" recidivist statute required that Rummel receive a sentence of life in prison without parole. The United States Supreme Court denied his appeal, concluding that the statute did not violate the

68. According to *Rummel v. Estelle*, for example:

The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time.

445 U.S. 263, 284 (1980); see also Dan Lungren, *Three Cheers for Three Strikes: California Enjoys a Record Drop in Crime*, POL'Y REV.: J. AM. CITIZENSHIP, Nov.-Dec. 1996, at 34, 36-37 (1996) (recognizing California's Three Strikes Law as having a large deterrent effect); William Clairborne, "Three Strikes": Tough on Courts Too; California's Sentencing Law Leads to Criminal Justice Logjam, WASH. POST, Nov. 7, 1995 at A1 (noting that "Three Strikes" supporters expect a deterrent effect over time); Walt Yost, "Three Strikes" Law is Hardball That Works, Says Scully, SACRAMENTO BEE, Apr. 21, 1996 at N7 (reporting the Sacramento County District Attorney's comments that the Three Strikes law deters criminals and has led to a dramatic decrease in the California crime rate).

69. U.S. SENTENCING GUIDELINES MANUAL § 4A, introductory cmt. at 317 (2002).

70. As Chief Judge Posner stated in *United States v. Jackson*:

Indeed, deterrence is the surest ground for punishment since retributive norms are so unsettled and since incapacitation may, by removing one offender from the pool of offenders, simply make a career in crime more attractive to someone else, who is balanced on the razor's edge between criminal and legitimate activity and who now faces reduced competition in the crime 'market.'

5 F.2d 1195, 1199 (7th Cir. 1987) (Posner, C.J., concurring) (citing Isaac Ehrlich, *On the Usefulness of Controlling Individuals: An Economic Analysis of Rehabilitation, Incapacitation, and Deterrence*, 71 AM. ECON. REV. 307 (1981)).

71. For a more detailed account of the Rummel case, see *Rummel v. Estelle*, 498 F. Supp. 793 (W.D. Tex. 1980). See also *Appeals Court Upholds Life Sentence for San Antonian*, SAN ANTONIO EXPRESS-NEWS, Jan. 13, 1979; *Courts to Review Tough Texas Law: Billy Sol Bilks Companies Out of Millions; Rummel's Fraud Totals \$229.11. Estes Serving 10 Years - Rummel Gets Life*, SAN ANTONIO EXPRESS-NEWS, Sept. 9, 1979, at 14A; Tom Nelson, *Rummel Ordered Released for Appeal*, SAN ANTONIO EXPRESS-NEWS, Oct. 4, 1980, at 11C; *S.A. Man Finally Free After 8-Year Ordeal*, SAN ANTONIO EXPRESS-NEWS, Nov. 15, 1980, at 2-A C; *S.A. Man Gets Life*, SAN ANTONIO NEWS, Apr. 13, 1973, at 20D.

Eighth Amendment's prohibition against cruel and unusual punishment.⁷² Rummel's crime, a minor fraud, hardly seems to deserve life imprisonment without parole. Indeed, the cumulative impact of his entire criminal career—whether or not he had been formally sanctioned and punished for his earlier crimes—does not seem to merit such severe liability, at least on justice grounds. Yet “three strikes” laws are willing to tolerate this deviation from justice, partly in the name of general deterrence.

The use of grading determinations to optimize deterrent effect has been offered in support of a variety of offense grade aggravations, such as grading according to type of victim (old, young, or police officer)⁷³ or location (selling drugs near schools).⁷⁴ Similarly, deterrence arguments have been used in the following scenarios: in support of a separate offense of robbery (rather than relying upon the distinct offenses of theft and assault);⁷⁵ in support of grading a vehicular killing while intoxicated as manslaughter even without a showing of negligence or causation;⁷⁶ in opposition to application of the felony-murder rule to killings by non-felons during the felony;⁷⁷ in support of application of the felony-murder rule to killings by non-felons;⁷⁸ in support of the premeditation

72. *Rummel*, 445 U.S. at 284–85.

73. See, e.g., 720 ILL. COMP. STAT. ANN. § 5/9-1 (West 2002) (elevating sentence for first degree murder: Defendant can get the death penalty if the victim was, inter alia, a police officer, a minor under 12 years of age, or an adult over 60 years old).

74. See, e.g., 720 ILL. COMP. STAT. ANN. § 570/401(c)(2), 570/407 (West 2002) (elevating sentence for illegal drug sales near a school; for example, the sale of one 14-gram bag of cocaine normally is a Class 1 felony carrying a fine of not more than \$250,000 but if the same quantity is sold on school grounds, it is a Class X felony with a fine not more than \$500,000).

75. MODEL PENAL CODE § 222.1 cmt. at 98 (1980) (comparing the robber, who “menaces his victims with actual or threatened violence,” and the “stealthy thief,” who chooses not to confront his victim, and arguing that the penalty attached to theft is not enough to deter the robber).

76. See, e.g., *Baker v. State*, 377 So.2d 17, 19 (Fla. 1979), stating:

Is section 860.01(2) [Florida's DWI punishment law] a rational response to a real problem? We must respond that (i) the problem of drunken drivers operating motor vehicles on the highways of this state is pernicious and real, and (ii) the response embodied in section 860.01(2) can be justified on deterrence grounds. Both are supported by our recent decision in *Ingram v. Pettit*, 340 So.2d 922 (Fla. 1976), where, in the context of a civil action for punitive damages, the statistics regarding fatalities resulting from accidents where drinking was a contributing factor are recited, and the public policy of punishment of drunk drivers as a deterrent is recognized.

77. See, e.g., *Campbell v. State*, 444 A.2d 1034, 1038 (Md. 1982) (declining to convict one co-felon of felony-murder where the second co-felon was killed by a police officer during the course of an armed robbery, and noting that “the mere coincidence of homicide and felony is not enough to satisfy the requirements of the felony-murder doctrine.” (citation omitted)).

78. See *People v. Washington*, 402 P.2d 130, 136–39 (Cal. 1965) (Burke, J. dissenting) (“If a victim . . . seizes an opportunity to shoot first when confronted with robbers with a deadly weapon . . . any ‘gun battle’ is initiated by the armed robbers. In such a situation, application of the felony-murder rule supports, if not compels, the conclusion that the surviving robber committed murder.” (citations omitted)).

aggravation for first degree murder;⁷⁹ in rejecting a mere grade reduction for renunciation (preferring a complete defense);⁸⁰ in support of grading inchoate liability less than that for the substantive offense⁸¹ and, where it is graded the same as the substantive offense, in support of making an exception to this rule for first degree felonies;⁸² in support of grading theft of livestock more than other thefts of equal or greater value because the former are particularly easy to commit and difficult to detect;⁸³ in support of a lower grade for nonconsensual intercourse by mistake or trick rather than by force;⁸⁴ in support of grading theft by the amount stolen;⁸⁵ in support of reduced grading for "joyriding" (in comparison to theft);⁸⁶ in support of grading credit card fraud of even a nominal amount as at least a misdemeanor;⁸⁷ in support of grading incest no higher than a class three felony even if extreme moral indignation of the community would call for a higher grade;⁸⁸ in support of a relatively low

79. Cf. F. LINDMAN & D. MCINTYRE, *THE MENTALLY DISABLED AND THE LAW* 356 (1961) (discussing whether there should be decreased liability for unpremeditated killing because only those capable of thoughtful deliberation are likely to be deterred by threat of heavier sanction).

80. The Model Penal Code states:

In considering the significance to be attached to abandonment of a criminal attempt, one solution that was rejected in drafting the Model Code was reduction of penalty in the event of abandonment. Insofar as encouragement of desistance is concerned, reductions in sanction would have to be very great to have a substantial impact on those already engrossed in a criminal attempt; indeed, it is unlikely that anything short of complete immunity would suffice.

MODEL PENAL CODE § 5.01 cmt. at 362 (1985) (footnote omitted).

81. See *id.* § 5.05 cmt. at 490 (1980).

82. See *id.*, stating:

It is doubtful . . . that the threat of punishment for the inchoate crime can add significantly to the net deterrent efficacy of the sanction threatened for the substantive offense that is the actor's object, which he, by hypothesis, ignores. Hence, there is a basis for economizing in use of the heaviest and most afflictive sanctions by removing them from inchoate crimes.

83. See *State v. Clark*, 632 P.2d 841, 843 (Utah 1981).

84. "Subsection (2)(c) deals in effect with an aggravated instance of seduction by trick, a kind of activity that most women can prevent and that can be deterred by sanctions less severe than those applicable to sexual imposition on a physically helpless female." MODEL PENAL CODE § 213.1 cmt. at 331 (1980).

85. According to the Model Penal Code:

Shorter sentences should be sufficient to deter those who have not as much to gain. On the other hand, longer sentences are called for in the case of offenders who realize greater sums. Escalation of penalty according to amount stolen decreases the incentive for crime that greater profits might induce.

MODEL PENAL CODE § 223.1 cmt. at 139 (1980).

86. "Temporary takings do not require more severe deterrents" than this. *Id.* § 223.9 cmt. at 276 (1985).

87. See MODEL PENAL CODE § 224.6 cmt. at 322 (1980) (reasoning that these methods of defrauding lend themselves to repeated violations by transients and, consequently, that grading can have an effect on real-world behavior).

88. According to the Model Penal Code:

[Incest] is classified as a third-degree felony, carrying an ordinary-term maximum sentence of five years. This is based on the judgment that so heavy a threat will be enough to deter those

grading of perjury;⁸⁹ and in support of a grading reduction for a kidnapper who "voluntarily releases the victim alive and in a safe place prior to trial."⁹⁰

4. Sentencing Decisions

Sentencing judges and sentencing guideline drafters share the assumption of code drafters and appellate judges that their decisions will influence the extent of the criminal law's deterrent effect. As an example, consider the case of DeSean McCarty, a young African-American from a crime-ridden, South Chicago neighborhood.⁹¹ McCarty agreed to provide drugs to an acquaintance in return for the use of the latter's friend's car. The exchange was made, but McCarty did not return the car at the agreed time. A few days later, a police cruiser drove by McCarty sitting in the car. Not wanting to get caught in a stolen car with drugs, he sped off, then abandoned the car and fled on foot. A police vehicle, in giving chase, ran down and killed an officer pursuing McCarty on foot. McCarty was convicted for the death of the officer under the Illinois felony-murder rule, which characterizes any death caused in the course of a felony as first degree murder.⁹² As has already been noted,⁹³ the felony-murder rule itself has strong deterrent backing. The sentencing judge in *McCarty* also thought to advance deterrence through the exercise of his sentencing

people who are deterrable. Use of heavier penalties to reflect extreme moral indignation seems both unnecessary and unwise.

MODEL PENAL CODE § 230.2 cmt. at 422-23 (1980).

89. See MODEL PENAL CODE § 241.1 cmt. at 142 (explaining that "third degree felony sanctions are adequate to deter all deterrable perjury").

90. According to the Model Penal Code:

If the most severe sanctions are available once some harm has come to the victim, there is no remaining incentive not to do further harm. Thus, while causing harm to the victim will aggravate the offense as explained above, the actor may still escape the extreme sanctions of a first-degree felony by preserving the life of the victim and voluntarily releasing him alive and in a safe place prior to trial.

The effect of this scheme is to provide at every stage an incentive to release the victim and not to inflict any further harm.

MODEL PENAL CODE § 212.1 cmt. at 233-34 (1980).

91. For a more detailed account of the McCarty case, see Telephone Interview by C. Todd Inness, Eve Brensike, and Colette Routel with Frank Rago, Public Defender, Markham Public Defender's Office (Feb. 1999) (notes on file with authors). See PAUL H. ROBINSON, CRIMINAL LAW CASE STUDIES 1-5 (2d ed. 2002); Sarah Karp, *Mother Copes with Cop's Death; Markham Officer Struck by Harvey Police Car*, DAILY SOUTHTOWN, Sept. 22, 1997, at 1; Karen Mellen, *Reckless Abandon; Families Want Driver Charged with Murder*, CHI. TRIB., Oct. 7, 1998, at A1; T. Shawn Taylor, *Cops Arrest Teen Linked to Officer's Fatal Chase; Police Want Subject Held Accountable*, CHI. TRIB., Sept. 23, 1997, at Metro Southwest 1; T. Shawn Taylor, *Markham Cop's Death Becomes Murder Case; Bond Hearing Set in Fatal Police Chase*, CHI. TRIB., Sept. 24, 1997, at Metro Southwest 1.

92. Illinois continues to read the felony-murder rule broadly where it applies, although the rule's application has been limited to "forcible" felonies. ILL. COMP. STAT. ANN. § 5/9-1(a)(3) (West 2002). See, e.g., *People v. Lowery*, 687 N.E.2d 973, 979 (Ill. 1997) (upholding a felony-murder conviction where the victim shot at the fleeing robber with a gun that the robber had dropped, accidentally killing a bystander).

93. See *supra* notes 77-78.

discretion. While he could have mitigated the harshness of the rule, he instead imposed a sentence of forty years in prison, explaining that he hoped the sentence would deter others from leading the police on high-speed chases.⁹⁴

This sort of deterrence rationale is common in the formulation of a wide range of sentencing rules and policies,⁹⁵ including the following: arguments in support of the death penalty;⁹⁶ empirical evidence for the efficacy of the death penalty;⁹⁷ arguments in support of automatic imposition of the death penalty for prisoners already sentenced to life imprisonment who kill;⁹⁸ arguments in support of jail time for drunk driving;⁹⁹ arguments in support of extending the statutory maximum for fines to double the pecuniary gain;¹⁰⁰ arguments in support of applying a mandatory penalty enhancement for a subsequent offense to a second offense on a simultaneous conviction;¹⁰¹ arguments in support of higher fines for corporate offenders;¹⁰² arguments in support of a judicially imposed minimum term of imprisonment;¹⁰³ arguments in support of fines for

94. See *People v. McCarty*, Circuit Court of Cook County, No. 97 CR 27339, Sentencing Transcript 00392:11–13 (Sept. 15, 1998).

95. See Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 191–93 (1968) (assuming that the commission of an offense is a function of the size of the fine and the probability of conviction, and arguing that courts should set both the fine and probability at levels “that induce offenders to commit just $\hat{O}$ [optimal number of] offenses.”); John R. Lott, *Do We Punish High Income Criminals Too Heavily?* 30 ECON. INQUIRY 583, 584, 605 (1992) (pointing out that the probability of conviction has a greater deterrent effect on the wealthy because they face additional lost income due to damage to their reputations); George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 530–31 (1970) (arguing that “rational law enforcement” must have “expected penalties increasing with expected gains so there is no marginal net gain from larger offenses” in order to achieve the optimal number of offenses).

96. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (discussing two social purposes of capital punishment: retribution and deterrence).

97. See *Enmund v. Florida*, 458 U.S. 782, 799 (1982) (plurality opinion) (arguing against the death penalty for felony murder because death is not caused often enough in the commission of a felony to make the death penalty an effective deterrent); see also authorities collected at WAYNE R. LAFAYE, *MODERN CRIMINAL LAW* 25 n.27 (3d ed. 2000); Hashem Dezhbakhsh, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmortem Panel Data*, 5 AM. L. & ECON. REV. 344 (2003).

98. MODEL PENAL CODE § 210.6 cmt. at 132–33 (1980).

99. See Leon S. Robertson et al., *Jail Sentences for Driving While Intoxicated in Chicago: A Judicial Policy That Failed*, 8 LAW & SOC’Y REV. 55, 57 (1973) (“Chicago officials concluded that the fatalities involving alcohol resulted mainly from social drinking and that 7-day jail sentences for persons convicted of DWI would deter social drinkers from drinking an amount likely to involve them in fatal crashes.”).

100. MODEL PENAL CODE § 6.03 cmt. at 61 (1985) (arguing that a fine equal to double the pecuniary gain “is thought to be of maximum deterrent utility. Pocketbook sanctions are likely to be most effective in the context of pocketbook offenses.”).

101. See *United States v. Bernier*, 954 F.2d 818, 820 (2d Cir. 1992) (reasoning that a federal statute ordering enhanced sentence for the second of two simultaneous convictions for using a firearm during the commission of a violent crime reflects Congress’s intent to deter multiple commissions of a crime with a gun: “an enhanced deterrent effect is felt (if at all) as soon as the first crime is committed, rather than later, when the first conviction is obtained . . . the lesson is to be learned, if necessary, all at once.”).

102. MODEL PENAL CODE § 6.04 cmt. at 65 (1985).

103. *Id.* § 6.06 cmt. at 128.

offenses of pecuniary gain;¹⁰⁴ and guidelines for the exercise of judicial discretion in setting the length of a prison sentence¹⁰⁵ and the amount of a fine.¹⁰⁶

B. DOCTRINAL FORMULATIONS CALCULATED TO REQUIRE OR AUTHORIZE CONDUCT

The assumption that the doctrinal manipulation of criminal law rules can optimize deterrence is one application of a larger assumption that criminal law formulations can influence conduct "on the street." The same assumption is equally suspect when criminal law rules are formulated that require conduct or authorize conduct that is normally prohibited.

1. Justification Defenses

When crafting justification defenses, lawmakers assume that their formulation of the defense will in fact guide the conduct of a person acting under the justifying conditions. Thus, in disallowing the use of force to resist an unlawful arrest, the drafters of the Model Penal Code explain: "[T]hose who are subjected to arrest or to search should be encouraged to submit rather than respond with force, and thus should not be entitled to rely upon . . . errors [by the officer] as a justifying basis for the resort to defensive force."¹⁰⁷ Indeed, many justification provisions have highly detailed rules about what a person may and may not do under a particular set of conditions. For example, a person may use force that is necessary for self-defense against unlawful aggression; however, that person may not use deadly force, unless deadly force or serious bodily injury is threatened. Furthermore, even if deadly force or serious bodily injury is threatened, a person may not use deadly force if that person can retreat in safety; yet that person need not retreat if he is in his own home or place of business, unless he was the initial aggressor or unless he is assailed at his place of work by a person who works at the same place.¹⁰⁸ Indeed, the Model Penal Code drafters prefer such detailed rules in part because they believe the law should and can give people specific guidance.¹⁰⁹

104. *Id.* § 7.02 cmt. at 239–40.

105. *See, e.g., id.* arts. 6–7 intro. at 2–3 (explaining that the code's directing courts to consider, *inter alia*, "whether a lesser sentence will depreciate the seriousness of the defendant's crime" reflects "the principle of general deterrence, though it puts to the court a more realistic inquiry than whether a particular penalty for a particular offender is necessary to deter others.").

106. *Id.* § 7.02 cmt. at 240–41 (reasoning that, because deterrent effect of a particular fine depends on wealth of defendant, a court must take that into account in sentencing).

107. *Id.* § 3.09 cmt. at 148.

108. *Id.* § 3.04(1), (2)(b).

109. *See id.* § 5.01 cmt. at 359, 362; § 5.03 cmt. at 458 (assuming that the Code's detailed rules will in fact influence conduct). According to the Model Penal Code:

Any increase in precision does involve some sacrifice of flexibility in respect to unusual or unforeseen circumstances; but it was deemed important that people be able to understand on what occasions the use of force is allowable, and that jurors have the benefit of legislative judgments on that score. It was believed that the law on this subject could influence behavior and moral perspectives, encouraging members of the community not to employ force when immediate emotional reaction might support its use but enlightened morality would reject it.

This attempt of lawmakers to control situations of conflicting interests through the formulation of justification defenses is present in a wide variety of justification rules, including, for example, the following: rules barring the use of force to resist an unlawful arrest, in order to avoid an escalation of violence;¹¹⁰ rules limiting the use of deadly force to defense against threats of death or serious bodily injury;¹¹¹ rules disallowing the use of deadly force if a person can retreat in safety;¹¹² rules barring the use of force to recapture movable property from a person acting under claim of right, in order to avoid an escalation of violence;¹¹³ rules requiring a request to desist before using force;¹¹⁴ rules barring citizens—but not officers—from using deadly force to arrest;¹¹⁵ rules

The alternative of a general standard of reasonableness would largely forfeit these advantages and would leave judgment to the uninstructed responses of particular juries.

Id. § 3.04 cmt. at 34–35. Subsequent legislative revisions have followed the Model Penal Code in adopting fairly detailed provisions on self-defense and other justifications for the use of force. See sources collected at Paul H. Robinson, *Criminal Law Defenses*, § 132 n.1.

110. According to the Model Penal Code:

[T]here ought not to be a privilege to employ force against a public officer who, to the actor's knowledge, is attempting only to arrest him and subject him to the processes of law. It should be possible to provide adequate remedies against illegal arrest without permitting the arrested person to resort to force—a course of action highly likely to result in even greater injury to himself than the detention. . . . [I]t is believed to be entirely sound that the encouragement be in favor of judicial resolution of the legality of the arrest, rather than self-help.

Id. § 3.04 cmt. at 42–43 (1985) (footnotes omitted).

111. *Id.* § 3.04 cmt. at 48 (“[T]he discouragement of the infliction of death or serious bodily injury is so high on the scale of preferred societal values that such infliction cannot be justified by reference to the protection of an interest of any lesser pretensions, with the possible exception of dispossession from one's own dwelling.”).

112. *Id.* § 3.04 cmt. at 54 (“[T]he protection of life has such a high place in a proper scheme of social values that the law should not permit conduct that places life in jeopardy, when the necessity for doing so can be avoided by the sacrifice of the much smaller value that inheres in standing up to an aggression.”).

113. *Id.* § 3.06 cmt. at 74.

114. *Id.* § 3.06 cmt. at 90 (“[O]n many occasions such a request will end a potential confrontation, for example, when the aggressor is acting under a mistake of fact and the request clarifies some matter.”).

115. According to the Model Penal Code:

[T]he use of deadly force is restricted by Paragraph (ii) of Subsection (2)(b) to those who, under the law of the jurisdiction, are authorized to act as peace officers and to those who are assisting persons whom they believe are authorized to act as peace officers. Where the purpose to be served is the apprehension of persons to answer criminal charges, it has seemed important, in an age of firearms, to restrict the use of deadly force to situations where official personnel are involved, or at least are believed to be involved. This will mean, for the most part, that deadly force will be justified only at the instance or under the control of people who have been trained in the restraint that should be exhibited upon such occasions. It is thus an important limitation on the extent to which the private citizen can use force solely for the purpose of effecting arrest. By the same token, however, it does not penalize the private citizen who comes to the aid of a peace officer and either assists him under his direction or continues a course of conduct begun before the officer became disabled. It thus reflects what is believed to be an appropriate balance between the needs of effective law enforcement and the desirability of discouraging private resort to violence.

Id. § 3.07 cmt. at 116 (footnote omitted).

allowing a defense for mistake in the defense of others, for fear that failure to do so would deter people from helping others;¹¹⁶ and rules limiting a mistake defense for citizens making an arrest, as a means "of discouraging private vigilante activity."¹¹⁷

2. Duties and Liability for Omissions

The same sort of assumption that the formulation of criminal law doctrine will influence conduct is found in the creation of a variety of legal duties, backed up by the threat of criminal liability for a failure. Examples include the duty to return or to report property lost or mislaid by another,¹¹⁸ to take reasonable measures in some instances to prevent or to mitigate a catastrophe,¹¹⁹ and to eject tenants engaging in prostitution.¹²⁰ In each instance, the lawmaker has created the legal duty under the belief that, by doing so, the duty will induce people to perform as the law commands.

C. "DETERRENCE SPEAK" VERSUS DEVIATIONS FROM JUSTICE

1. Deterrence Speak

Too much attention perhaps has been paid to the use of deterrence rationales; often, "deterrence" may be merely a common way that modern criminal law theorists have chosen to express themselves. Instead of saying "conduct X is harmful" and, therefore, should be criminalized, it is common to say "conduct X should be deterred." Instead of saying "the conduct was involuntary" and, therefore, should be exculpated, it is common to say, "the conduct is non-deterrable."

This deterrence speak is common in a variety of contexts in which the end result is to suggest a rule that makes sense under nearly any distributive principle, including that of doing justice. It is used, for example, as the explanation for criminalizing the following: intercourse with young children;¹²¹ tampering with private records;¹²² incest;¹²³ corruption in sporting

116. *Id.* § 3.05 cmt. at 65–66.

117. *Id.* § 3.07 cmt. at 129.

118. *See, e.g., id.* § 223.5 (1980).

119. *See, e.g., id.* § 220.2(3) (1985).

120. *See, e.g., id.* § 251.2(2)(g).

121. *Id.* § 213.1(1)(d) cmt. at 329 ("[T]he central goal of subsection (1)(d) . . . is to deter intercourse with very young children.").

122. *Id.* § 224.4 cmt. at 312 ("In a highly organized society where accuracy of corporate and other records is nearly as important as accuracy of public records, the need for deterring those who would tamper with records for the purpose of deceiving or injuring anyone or to conceal wrongdoing seems reasonably clear.").

123. *Id.* § 230.2 cmt. at 406 ("The incest prohibition regulates erotic desire in two ways that contribute to preservation of the nuclear family. First, the prohibition controls sex rivalries and jealousies within the family unit Second, by ensuring suitable role models, the incest restriction prepares the individual for assumption of familial responsibility as an adult.").

events;¹²⁴ retaliation against participants in official proceedings;¹²⁵ witness tampering;¹²⁶ bail jumping;¹²⁷ obstruction of a public passageway;¹²⁸ and public indecency.¹²⁹ Deterrence speak also has been used to support greater punishment for armed robbery than for unarmed robbery.¹³⁰ These criminalization decisions are hardly startling. One could as easily say in each instance that such conduct ought to be criminalized because "it is harmful and condemnable conduct."¹³¹ In other words, a deterrence explanation for the rule does not necessarily suggest that the writer has relied upon a deterrence cost-benefit analysis and has concluded that the deterrent benefits outweigh the deterrent costs. Rather, such deterrence language simply may reflect what has come to be the common mode of expression in modern criminal law analysis.

Indeed, some deterrence explanations are so frivolous as to strongly suggest that no actual deterrence analysis has been made, for any such analysis would surely suggest a different or at least a more nuanced conclusion. For example, as noted above, some writers offer a deterrence explanation for providing excuse defenses, such as insanity,¹³² immatu-

124. *Id.* § 224.9 cmt. at 338 ("It seems clear that this type of activity should be deterred in order to prevent wholesale fraud in both legal and illegal betting and to maintain the integrity of the amateur and professional sport.").

125. *Id.* § 240.4 cmt. at 68 ("At the time the Model Code was drafted, there were some criminal statutes covering retaliation against jurors, court officials, and witnesses. The considerations that call for deterring retaliation against these persons would seem equally applicable to participants in other official proceedings and to public servants generally.") (footnote omitted).

126. *Id.* § 241.6 cmt. at 163 ("[T]he basic purpose . . . of the crime is to deter conduct that affects the integrity of the criminal justice system.").

127. *Id.* § 242.8 cmt. at 283 ("The purpose of Section 242.8 is to deter those who would obstruct justice by failure to appear for trial or service of sentence.").

128. *Id.* § 250.7 cmt. at 399-400 ("The purpose of this section is twofold: to prevent the danger and inconvenience that may result from unjustified obstruction of public passage; and, at the same time, to withdraw the threat of penal sanctions from lawful assembly.").

129. *Id.* § 251 intro. note at 447 ("The common goal of these provisions is to protect against the open flouting of community standards regarding sexual or related matters.").

130. LAFAYE & SCOTT, *supra* note 11, at § 8.11, at 456, n.108 ("[T]he greater punishment is awarded for armed robbery so as to deter the dangerous person who is actually capable of inflicting death or serious bodily harm.").

131. One could even say, in some cases, that the conduct suggests a dangerousness in the actor, thus calling for incapacitation.

132. See LAFAYE & SCOTT, *supra* note 11, § 4.1, at 431 (arguing that punishing offenders will discourage them from committing crimes in the future but such punishment "'can be effective only with men who can understand the signals directed at them by the [criminal] code, who can respond to warnings, and who can feel the significance of the sanctions imposed on violators.' Punishment, therefore, is not at all likely to deter the insane individual from future antisocial conduct.") (quoting ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 12-13 (1967)); see also MODEL PENAL CODE § 4.01, app. B, at 198-200 (1985) (detailing the correspondence between Dr. M. S. Guttmacher and H. Wechsler debating how to determine insanity in order to "define the nondeterrables" for purposes of drafting exculpatory provisions of Model Penal Code). A similar argument is made in support of a rule barring the death penalty for insane offenders. See LAFAYE & SCOTT, *supra* note 11, § 4.4, at 481 ("[T]he insane prisoner may be spared the death penalty without weakening the deterrent effect of that penalty. Taking

rity,¹³³ or duress.¹³⁴ They reason that a general deterrent purpose:

... would not be served by conviction and punishment of the insane, for 'the examples are likely to deter only if the person who is *not* involved in the criminal process regards the lessons as applicable to him,' which he is likely to do 'only if he identifies with the offender and with the offending situation.' It is unlikely that the sane person ... will identify with the insane defendant, and thus the insane cannot be effectively used as a deterrent example to others.¹³⁵

One may speculate that the conclusion in favor of recognizing an insanity defense came first to the writer, and that the above analysis is simply a best effort at giving the obligatory deterrence argument to justify the desired conclusion. In fact, a true deterrence analysis would suggest the opposite conclusion, or at least would reveal conflicting deterrent interests. While the insane defendant at hand might not be deterrable and will be seen by third parties as different from themselves, there is every reason to think that if general deterrence works at all, it would be advanced by sanctioning the insane offender. Indeed, the insane offender provides a unique opportunity for the law to make clear just how serious it is about punishing a violation. "If the law sanctions even an insane offender," it might be understood as saying, "make no mistake that it will sanction you if you commit this offense." Indeed, punishing the insane offender may be the only means by which the law can dissuade those potential offenders who assume that, if caught, they can escape the threatened sanction by falsely claiming insanity as an excuse. Further, there is a deterrence argument for imposing greater liability in all cases of excuse in which either internal or external forces press an actor toward a violation. In arguing against a duress defense, for example, Stephen notes that "it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary."¹³⁶

Thus, general deterrence arguments seem clearly to favor denying recogni-

the life of an insane person does not serve as an example to others, for a potential offender would not consider the possibility of escaping the death penalty by becoming insane after the conviction.").

133. See LAFAYE & SCOTT, *supra* note 11, § 4.11, at 567 ("The early common law infancy defense was based upon an unwillingness to punish those thought to be incapable of forming criminal intent and not of an age where the threat of punishment could serve as a deterrent." (quoting COKE, *supra* note 56, at 4)).

134. See *id.* § 5.3, at 615 ("It has been suggested that [the duress defense] ought to apply, without regard to a balancing of harms done and avoided, where the unlawfully threatened harm is such that the threat of criminal punishment for doing the harmful conduct does not serve to deter the defendant. . . ."); WILLIAMS, *supra* note 11, § 246, at 756 ("Whether or not it was socially better that the *litera legis* should be violated, there are limits to the efficacy of the threat of punishment in controlling conduct. If the accused was in thrall to some power that could do him more harm than the legal sanction, the legal sanction must be ineffective and therefore should be removed.").

135. See LAFAYE & SCOTT, *supra* note 11, § 4.1, at 431-32 (quoting ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 13 (1967)).

136. See STEPHEN, *supra* note 63, at 107.

tion of excuse defenses. In opposition, the obvious reason to recognize excuse defenses—and likely the real reason driving even deterrence speak writers to such recognition—is that criminal law would be seen as grossly unjust if it denied excuses. The utilitarian must be concerned about this because it would tend to undermine the law's moral credibility with the community, which in turn would entail serious negative consequences.¹³⁷ But, if the analytic traditions of the day do not allow such justice-based objections to a doctrine, then some may feel compelled to fabricate whatever deterrence arguments are available to reach the desired result.

One may speculate about the reasons for such continuing reliance upon deterrence speak when it seems so awkward. Kahan argues the following:

Deterrence theory helps to cool . . . expressive disputes. Its disembodied idiom of costs and benefits elides the points of moral contention that motivate public positions on . . . disputed issues. Citizens of diverse commitments converge on the deterrence idiom to satisfy social norms against contentious public moralizing. . . . Ultimately, the deterrence idiom takes the political charge out of contentious issues and deflects expressive contention away from the criminal law.¹³⁸

Whatever the reasons for its use, the practice highlights just how pervasive is the deterrence orientation of modern criminal law. Deterrence has become not only the standard analytic form, but also the standard expressive form, determining how we are to think and talk about problems of criminal law theory. And this suggests a larger danger: If, as we argue here, doctrinal formulation can have limited deterrent effect, then the current deterrence speak may mislead users into questionable results in a wide range of doctrines.

2. Deterrence Rationales That Do Real Work: Deviations from Justice

As demonstrated above, the law often engages in "deterrence speak" by providing a fabricated deterrence justification for a legal formulation that is, in truth, based on other considerations. In contrast, some legal formulations are truly grounded upon deterrence analysis and are designed to produce punishment results with maximum deterrent effect. However, as illustrated by some of the examples discussed earlier in this Part, deterrence often comes at the expense of justice. It is worth revisiting these examples, because it is precisely these situations in which deterrence analysis is of greatest concern. Recall that the social science literature summarized in Part I suggests that it is rarely possible to optimize deterrence successfully through doctrinal manipulation. As a result, where deterrence-based formulations conflict with justice, deterrence

137. For a discussion of the tension between a deterrence-based system and contemporary notions of justice, see *infra* Part III.c.

138. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 416–17 (1999).

analysis produces real injustice for little or no benefit. In contrast, where deterrence analysis nevertheless reliably does justice, little is lost.

Consider again these instances of deterrence-based doctrines that conflict with justice. The felony-murder rule applied in the *McCarty* case, authorized—and a deterrence-focused sentencing judge imposed—a forty-year sentence for fleeing from police.¹³⁹ In *Dudley & Stephens*, the need to keep clear the deterrent threat against killing and cannibalism demanded the death penalty, even though the court essentially conceded that it was imposing a standard of conduct that it might not have been able itself to meet.¹⁴⁰ In *Park*, the president of Acme Markets, Inc., a national retail food chain with approximately 36,000 employees, 874 retail outlets, twelve general warehouses, and four special warehouses, was held criminally liable for a health violation in one of the company warehouses, even though Park was not negligent as to the violation.¹⁴¹ In *Rummel*, the defendant was given a life sentence for a \$129.75 air conditioner repair fraud because of his prior felony convictions of a similar nature.¹⁴² In *Williams*, loving parents of limited intelligence and education were convicted of criminally negligent homicide when their failure to get medical care for their baby led to his death, despite their likely inability to meet the purely objective standard of care the court insisted upon.¹⁴³ In each case, the lawmakers and courts used deterrence explanations to help justify both the liability rules and the exercise of discretion that produced case dispositions in conflict with justice.

How do these five cases fare in light of the deterrence-skeptical conclusions summarized in Part I? One or more of the deterrence prerequisite hurdles is likely to prevent a deterrent effect for many, if not most of these deterrence optimizing cases. For example, *McCarty*, who was convicted of felony-murder and received a forty-year sentence for fleeing from police, probably knew nothing of the felony-murder rule or its application to him when he chose to flee. Nor will others like him be likely to apply the intended lesson in their drug-addled brains when the next police car appears. For *Dudley*, and others like him, for whom a painful death looms, little, if anything, will deter; and the price paid in *Dudley & Stephens* to reinforce the prohibition on killing hardly seems worth the cost in injustice, especially given how well-known the no-killing rule already is. In contrast, people like *Rummel* might not commit air conditioning and similar types of fraud if they knew it would result in life imprisonment, but few are likely to perceive a meaningful chance of suffering such a sentence for this sort of fraud. They would be right: they have a greater chance of being struck by lightning. Most of such potential offenders probably do not even know that a life imprisonment rule is applicable to them. (Do you know the terms of your state's habitual offender statute, or even if it has one?)

139. See *supra* text accompanying notes 91–94.

140. See *supra* text accompanying notes 36–40.

141. See *supra* text accompanying notes 33–34.

142. See *supra* text accompanying notes 71–72.

143. See *supra* text accompanying notes 41–43.

Similarly Park, as the executive of a large and respectable corporation, would undoubtedly be appalled at the thought of a criminal conviction, but he also is not likely to know about the rodent droppings in Baltimore. Even assuming that he knew of the droppings and that counsel kept him well informed on relevant statutes, someone in Park's situation would likely see criminal liability in the absence of even negligence as so remote on the facts as to be irrelevant. (If executives did think the chance of such strict criminal liability was meaningful, we would have few volunteers for Park's vacant position.) The Williamses, and other parents like them, will know little of the criminal law's liability rules or the nuances of the alternative negligence standards and in any case, will have no reason to think such rules are applicable to them because their baby only has a toothache.¹⁴⁴ Yet these dubious contributions to the law's deterrent threat are purchased at some considerable expense, in both the injustices they do and the reputational damage they cause to a criminal justice system that is seen as indifferent to doing justice.

III. THE CASE AGAINST USING DETERRENCE AS A DISTRIBUTIVE PRINCIPLE

There are a number of reasons why one might decide against constructing a justice system based entirely on the logic of deterrence. The most obvious reason not to use deterrence to formulate criminal law rules comes from our prior conclusion that such doctrinal manipulation to optimize deterrence will rarely achieve its desired effect. While deterrence may be a good reason for having a criminal justice system that punishes violators, it is at best ineffective as a guide for distributing liability and punishment within that system. In Hart's terminology,¹⁴⁵ deterrence is a sound justificatory purpose but a poor distributive principle.

We concede that some doctrinal manipulation can have a deterrent effect. A recent event in Afghanistan makes this point starkly. The new leaders in Aliabad introduced a practice that worked to reduce what they regarded as lawlessness: The bullet-ridden bodies of robbers were hung from a tank barrel outside the village for two days.¹⁴⁶ This practice is likely to have a deterrent effect. Less draconian practices can work too. In specific situations, publicly-known rules can deter, if those rules (1) target actors who are dispositionally rational in circumstances that allow for rationality; (2) provide for a high rate of violation detection; and (3) provide a reasonable certainty of punishment following the detected violation. But even in such optimal situations, problems remain with formulating criminal law rules based upon deterrence analysis.

144. *See id.*

145. *See* H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 1-28 (1968).

146. C.J. Chivers, *New Leaders Send a Signal By Hanging Bandit's Body*, N.Y. TIMES, Dec. 3, 2001, at B4.

A. THE DIFFICULTIES OF DETERRENCE: THE INFORMATION AND COMPLEXITY PROBLEM

We have argued that, contrary to the expectations of scholars and lawmakers, the ability of doctrinal manipulation to produce an alteration of deterrent effect is highly limited, both in the instances in which it is at all plausible and in the extent of influence on deterrent effect that is possible. From this we conclude that scholars and lawmakers are rarely warranted in using deterrence arguments to justify doctrinal rules. Even where the prerequisites for deterrence exist, we think the use of deterrence analysis in the formulation of criminal law is dangerous. In this section, we argue that, when examined at the level of detail necessary to build a deterrence-based liability system, the causal connection between doctrine and effect is so complex and based upon so many factors about which we know little, that reliance upon deterrence arguments can easily lead to doctrinal formulations that reduce rather than increase deterrence. Without better information and without a better grasp of the complexities of the doctrine-effect dynamic, we cannot know which result will be produced.

Consider the wide range of factors that are relevant to a deterrence calculation. We would need to know, for example, what the potential offender perceives about the following: the chance of getting caught, convicted, and punished; the amount of punishment associated with each of the possible conviction outcomes; the degree of painfulness associated with each possible punishment outcome (for example, how painful the potential offender considers, say, a \$10,000 fine, two weeks in jail, a three year prison sentence, or solitary confinement for life?); the likely delay in any anticipated punishment; and the anticipated benefit of the contemplated offense.

Further, we need a sense of the equation that assigns the appropriate weights for each of these factors. For example, we noted previously that if the probability of punishment were high—that is, if a potential offender is highly likely to get caught for drunken driving or running a red light—even moderate punishments seem sufficient to deter the conduct. As the likelihood of punishment declines the deterrent effect soon becomes greatly reduced or even negligible.¹⁴⁷ This suggests that the probability of punishment should be more heavily weighted in the deterrence equation than should the intensity of the punishment.¹⁴⁸ A deterrence calculation would need to sort out just how much more weight should be given to probability of punishment than to the other factors in the equation.

Consider as well the difficulty of translating the parameters of the prison sentence that can be controlled by the authorities into the degree of deterrent effect produced by the contemplation of the pain of serving that sentence at some time in the future. Two translations are needed. The first is what is called the “psychophysical” translation. In general, a doubling of the intensity of a stimulus in terms of the physical system units in which that intensity is

147. See *supra* text accompanying notes 5–6.

148. For an illustration of this principle, see *supra* text accompanying note 146.

measured is not generally experienced by the person perceiving that stimulus change as a doubling of its intensity.¹⁴⁹ But annoyingly for predictive purposes, depending on the exact physical stimulus in question, it is sometimes perceived as more than a doubling in psychological intensity, and sometimes as less, and it also depends on the initial intensity of the stimulus from which the physical doubling takes place.

The calculations for this psychophysical translation are quite daunting to contemplate making, but it is probably the case that the need for the second translation introduces even more complexity. What the person who is contemplating a crime must do to make the calculation of whether a prison sentence is of enough magnitude to deter him from the contemplated crime, is not to estimate the level of discomfort, pain or dread that the sentence causes him to feel *now*, but to estimate the negative magnitude he *would* feel, if he experienced that sentence some time in the future. Without going into great detail about the rapidly growing psychological literature on this topic, it seems fair to say that people are often confident in their ability to forecast how they will feel if a major positive or negative life event happens to them in the future. If the major event does happen, it turns out that their predictions about their post-event feelings are quite poor. People are poor "affective forecasters."¹⁵⁰

Still further, one cannot underestimate the ability of erroneous data concerning one factor to distort the calculation. Deterrence calculations are not intuitive: Their results will depend upon the numbers, not a general principle that itself may make good sense. For example, one aspect of deterrence analysis would want to impose a greater punishment on a more serious offense, if for no other reason than to deter a person who has committed the lesser offense from proceeding to commit the greater one. Thus, murder receives a more severe punishment than does assault or burglary to keep the burglar who is discovered by the home owner from killing the home owner to avoid being identified.

However, imagine a situation where the punishment rate was high for the more serious offense and low for a less serious offense. In fact, the punishment

149. The relationship between the measured intensity of a stimulus and the psychological intensity of the stimulus perceived by the observer is described by the following function: $S = kI^b$, where S is the perceived intensity, I is the intensity of the stimulus in physical units, the exponent b varies depending on the physical properties of the stimulus, and k is simply a constant depending on the units of measurement being used. Light has a $b = 0.33$, which means that, as a very dim light doubles in brightness, it more than doubles in perceived brightness, but after it reaches a brightness of a certain intensity, a doubling in the physical brightness is perceived as much less than a doubling of perceived brightness. On the other hand, if the stimulus is an electric shock, $b =$ about 3.5. This means that at low intensities of electric shock, as the shock doubles in intensity it does not feel twice as painful. However, at moderate levels of shock, a doubling of physical intensity is more than twice as painful. See JOHN DARLEY, SAM GLUCKSBERG & RONALD KINCHLA, *INTRODUCTORY PSYCHOLOGY* 73-74 (1991) for a more complete discussion of these findings.

150. See generally Daniel Gilbert & Jane Ebert, *Decisions and Revisions: The Affective Forecasting of Changeable Outcomes*, 82 J. PERSONALITY & SOC. PSYCHOL. 503 (2002).

rate for murder is approximately thirty times greater than for burglary.¹⁵¹ One wants the total punishment cost to be high enough to deter the potential offense and, as we have already established, the probability of punishment is an important determinant of the total punishment cost. This creates the necessity, within a deterrence analysis, to increase the punishment on a low capture-rate offense.¹⁵² Therefore, depending on exactly how the punishment weight calculations come out, a deterrence optimizing theorist might conclude that one should have a greater penalty for the less serious offense! The point is not a hypothetical one. Recall, for example, the drug laws passed in various states in the belief that drug possession and use was highly dangerous to society and highly contagious. Legislators, driven by the logic of deterrence, set prison terms for possession of relatively small amounts of cocaine—and in some states for possession of marijuana—considerably higher than those for various crimes of violence.¹⁵³

Even if one had good information on the basic conditions that may influence deterrent effect, the calculations are all the more complex because of the potential feedback effects that one's proposed rule might itself trigger. That is, one rule might make sense given the conditions that presently exist, but the introduction of that rule might quickly change the conditions. For example, Neal Katyal points out that substitution effects are important to consider because an increased penalty for a lesser offense may encourage the commission of a greater one.¹⁵⁴ One might be inclined to increase the threatened punishment in order to deter an offense of moderate harm, but before doing so one must consider whether the potential offender will substitute an offense of more serious harm. There are drug addicts who steal to obtain money for their addictive habits. If we increase the punishment for thefts from empty buildings, will we cause addicts to turn to assaulting citizens to gain the money to support their habits? A deterrence perspective generates these types of complex and dynamic considerations.

Consider another example. Oren Bar-Gill and Alon Harel suggest that while we normally think of the crime rate as a product of the factors that affect deterrence, such as the probability and amount of the expected sanction, in fact the reverse can also be true: The crime rate can be a determinant of probability

151. See Robinson & Darley, *Does Criminal Law Deter?*, app. at Table 1, col.(d), available at <http://www.law.upenn.edu/fac/phrobins/OxfordDeterrenceAppendix.pdf> (unpublished appendix to Robinson & Darley, *supra* note 3).

152. In contrast, the fact that a high punishment-rate offense, is rarely committed, signals that deterrence is being achieved with the existing punishment. Therefore, there is not only no need to increase the punishment amount, but also a possibility of decreasing it because it may be inefficiently high.

153. A number of these intuition-defying comparisons are cited in Paul H. Robinson, *Dissent from the United States Sentencing Commission's Proposed Guidelines*, 77 J. CRIM. L. & CRIMINOLOGY 1112 (1986).

154. See generally Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385 (1997).

and amount of the expected sanction.¹⁵⁵ For example, a higher crime rate makes fewer resources available per crime and reduces the probability of detection; a lower crime rate may have a reverse effect. An increased rate of crime also might delay the imposition of punishments—due to congested courts, for example. Such delays cause the future punishment discount to be incrementally higher, reducing the perceived punishment cost. A decrease in crime rate might have the reverse effect.¹⁵⁶

Thus, one might set rules based on present conditions but then, as soon as one's rules began to take effect, they might cause those conditions to change. In other words, not only does reliable deterrence analysis require information that is not now available and an understanding of the interrelation among the relevant factors that we do not now have, but it also requires a constant updating of the analysis because the relevant factors themselves are constantly in motion. These are not circumstances under which it makes much sense to set criminal law doctrine according to attempts at deterrence analysis.

B. A COMPARISON OF DETERRENT EFFECTS

We assume that most people would see value in having a criminal justice system that, broadly speaking, does justice either for instrumentalist or retributivist reasons.¹⁵⁷ Advocates for a deterrence-based distribution argue not that doing justice has no value but that crime reduction through precisely adjusted deterrent punishments has a greater value. But deterrent system advocates certainly would concede that a deterrence-based distribution of punishment is not the only distribution that will have a deterrent effect. Indeed, any one of a number of different kinds of distributive principles for assigning punishment will provide some deterrent effect. Thus, a deterrence-based distributive principle cannot be justified simply by showing that it generates a deterrent effect. To prefer a deterrence-based distribution to the just-deserts-based system that we advocate, it must be shown that the deterrence-based distribution provides greater deterrence than the justice-based distribution.

This last point is not often recognized for a number of reasons. People tend to believe that the threat of punishment is all that deters those who are "criminally

155. Bar-Gill and Harel wrote:

The expected sanction is determined by the size of the sanction and by the probability of apprehension and conviction (hereafter "the probability of punishment"). Both components of the expected sanction are influenced by the rate of crime. A higher crime rate may either increase or decrease the probability of punishment, depending on the law enforcement technology and the internal organization or *modus operandi* of the criminal community. Similarly, a higher crime rate may either increase or decrease the magnitude of the sanction, through its influence on the social sanction, which is a component of the overall sanction.

Oren Bar-Gill & Alon Harel, *Crime Rates and Expected Sanctions: The Economics of Deterrence Revisited*, 30 J. LEGAL STUD. 485, 485–86 (2001).

156. *See id.*

157. *See generally* PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE: HOW AND WHY CRIMINAL LAW DELIBERATELY SACRIFICES JUSTICE* (forthcoming 2004).

inclined.”¹⁵⁸ If one believes that crime reduction is achieved only by the potential criminal’s awareness of the punishments that would follow the commission of the crime, then there can be no alternative to a justice system that relies on making precise adjustments in criminal punishments to achieve deterrent effects. But if one takes a broader view of the forces that keep individuals from committing crimes another conclusion becomes possible: Evidence suggests that there is considerable crime-reducing potential in a distribution of punishment that tracks the principles of justice shared by the community—what we have called a “justice based” system for the distribution of punishment. This crime-reducing potential is achieved in at least two complex ways: the first involves application of social pressures to those who might commit crime; the second involves fostering internal norms—moral prohibitions—against committing crime among those who might otherwise do so.

Evidence suggests that both social influence¹⁵⁹ and internalized norms¹⁶⁰ are powerful forces governing individual conduct,¹⁶¹ even more powerful than the threat of official conviction and punishment by the criminal justice system.¹⁶² One might argue that the social influence forces are also triggered by criminal conviction, thus adding to the deterrent effect of official sanction, but the available studies suggest that the effect of social influence and internalized norms are independent, without significant interactive effect.¹⁶³ The social influence forces generated by the mobilization of community stigmatization against the criminally convicted can be quite powerful, and can include the loss of any prospects of being hired into decent jobs or having friends or marriage

158. See Catherine A. Sanderson & John M. Darley, *I Am Moral But You are Deterred: Differential Attributions About Why People Obey the Law*, 32 J. APPLIED SOC. PSYCHOL. 375, 375–88 (2002).

159. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 469 (1997) (“The normative pressures from other people, generally experienced as an external force by the actor, function like the more formal deterrence mechanisms were thought to function. People obey the social norms of their groups because those groups have rewards to give for doing so and sanctions for failing to do so.”).

160. See generally Marc G. Gertz & Leroy C. Gould, *Fear of Punishment and the Willingness to Engage in Criminal Behavior: A Research Note*, 23 J. CRIM. JUST. 377 (1995) (finding that study participants’ tendency toward criminal behavior was dependent on their prior actions and internal notions of whether the action was wrong).

161. See Kahan, *supra* note 62 at 127–30 (arguing in support of the “ignorance is no excuse” maxim with the understanding that the laws reflect social morals not held by all members of society, but which are required for the effect they will have on the conduct of potential offenders); see generally Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) (describing the effects of social influences on individual behavior, and arguing that laws that suppress public criminality have a preventative effect by suppressing such social and peer influences).

162. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 64 (1990) (“The most important normative influence on compliance with the law is the person’s assessment that following the law accords with his or her sense of right and wrong; a second factor is the person’s feeling of obligation to obey the law and allegiance to legal authorities.”); Scott Decker et al., *Perceptual Deterrence Among Active Residential Burglars: A Research Note*, 31 CRIMINOLOGY 135, 145 (1993) (“Penalty only had an influence on offender decision making in combination with anticipated gain or perceived risk.”).

163. See Daniel S. Nagin & Raymond Paternoster, *Enduring Individual Differences and Rational Choice Theories of Crime*, 27 LAW & SOC’Y REV. 467 *passim* (1993).

partners from among the respectable segments of the community.¹⁶⁴ However, these informal sanctions will occur only if the criminal law has moral authority with the community. If it has moral authority, the threat of stigmatization provides a highly cost-efficient means of crime reduction because it requires no government expenditures, as compared to the \$20,000 cost of imprisonment per inmate per year.¹⁶⁵

The effect of informal sanctions goes further. A criminal law with moral authority can produce stigmatization of the offender by those in the community who become aware of his offense even without arrest and criminal conviction by the legal authorities. If the criminal law has such moral credibility that it has the force of social norms, then a violation of the criminal law may trigger moral condemnation by those who know of the offender's violation, even if the law enforcement authorities do not, thus greatly increasing the criminal law's reach in preventing crime.¹⁶⁶

Finally, a number of studies suggest that a legal code that is perceived as having moral credibility can provide a clear set of guidelines around which childhood and adolescent socialization can coalesce.¹⁶⁷ Those so socialized obey the law not because they fear the penalties for not doing so, but because they regard the laws as specifying the right conduct, and thus there is a moral imperative to "do as the law says you should do." People report that this, rather than the threat of arrest, is generally why they obey the laws that they consider to have moral credibility.¹⁶⁸

In summary, before a deterrence-based distribution is to be preferred, it must

164. See Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 LAW & SOC'Y REV. 837, 837 (1990) ("We propose that significant others and conscience function as agents of social control in a manner similar to the state."); Daniel S. Nagin, *Deterrence and Incapacitation*, in THE HANDBOOK OF CRIME & PUNISHMENT 345, 351-53 (Michael Tonry ed., 1998); Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 LAW & SOC'Y REV. 545, 564-66 (1986) (discussing the "attachment costs" of an arrest: "negative consequences for relationships with close friends and relatives").

165. JAMES J. STEPHAN, U.S. DEP'T OF JUSTICE, STATE PRISON EXPENDITURES, 1996, iv (1999).

166. See ROBINSON & DARLEY, *supra* note 2, at 201-03 ("recent empirical evidence suggests that the law's most powerful mechanism for gaining compliance lies not with the negative force of the deterrent threat but rather with the positive force of the law as an arbiter of proper conduct. Most people obey the law not because they fear punishment but because they see themselves as persons who want to do the right thing."); Paul H. Robinson, *Why Does the Criminal Law Care What the Lay Person Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1840 (2000) ("The crime control power of criminal law's moral credibility works in a different way [than the coercive effect of a deterrent threat]. . . . [I]t 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."); Robinson & Darley, *supra* note 159, at 456 ("[A] distributive theory that tracks the community's perceived principles of justice has a greater power to gain compliance with society's rules of lawful conduct."); see also *id.* at 457, 468-71 (discussing the powerful effect of moral and social forces on deterring crime).

167. See LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 29-84 (June Tapp & Felice J. Levine eds., 1977).

168. See Sanderson & Darley, *supra* note 158; *supra* note 166.

be shown that its deterrent effect exceeds that of a just deserts distribution, which may be difficult to do. Evidence suggests that the gains of the just deserts system may be quite substantial, although they tend to be hidden if one takes the perspective that crime control is achieved only through the direct deterrence of the threat of criminal punishment.

C. WHERE DETERRENCE DEVIATES FROM JUSTICE, IT CONFRONTS SPECIAL DIFFICULTIES

As we have argued, a deterrence-based system for punishment can do better than a just-deserts-based system only when its rules deviate from the justice-based system. But for a number of reasons, it is just these instances of deviation in which it is most difficult to get a deterrent effect. First, citizens are quite unlikely to know the content of the law at exactly the point that the law deviates from their own notions of justice. People instead assume the law is as they think it should be, according to their own collective notions of justice. Several studies have demonstrated this. For example, a survey of New Jersey citizens found that they perceived that the morally appropriate penalty for attempts at crimes was an increasing prison sentence the nearer the perpetrator came to committing the crime. But even an attempt that came in "dangerous proximity" to the completed crime was penalized less than the completed crime. The respondents also reported that the New Jersey state laws essentially matched their moral intuitions. But they were wrong. As a state that follows the Model Penal Code, New Jersey penalizes any attempt at a crime that goes past a substantial step toward its completion as heavily as it penalizes the completion of the crime.¹⁶⁹

Another study tested the knowledge of criminal law rules that are applicable to the general population: for example, rules governing whether it is a crime to fail to turn in lost property, or whether it is lawful to use deadly force if necessary to protect property. Subjects were drawn from five states, each with fairly similar criminal codes. Each state followed the most common American formulation—the "majority" rule—with respect to most offenses, but each state also followed a divergent "minority" approach on one or more offenses. The testing revealed that citizens in all of the states had generally the same view of the existing legal rule, thus, were generally ignorant of their state's position on the law—though they did not always think the rule was that held by the majority. Again, their perceptions of what the laws held were better predicted by their attitudes about what the laws should be than by the actual content of the laws.¹⁷⁰

As the above studies make painfully clear, just making the justice-deviation rule known to those whose behavior it is designed to control becomes a special task for those who seek to manipulate behavior by deterrence-driven changes in

169. John M. Darley et al., *Community Standards for Defining Attempt: Inconsistencies with the Model Penal Code*, 39 AM. BEHAV. SCIENTIST 405, 414 (1996).

170. John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165, 168–79 (2001).

the laws. People assume the law is as they think it should be, according to their perceptions of shared intuitions of justice. Thus, it is in the deviation cases that criminal law has its greatest difficulty conveying its rule because it is in those cases that the legal system must affirmatively change the community's initial contrary assumption about what the law provides. We see no evidence of attempts to bring changes in the law into the community's collective consciousness; a scan of the newspapers in the capitals of the studied states showed no particular publicity about the deviant laws the legislatures were enacting.¹⁷¹

Furthermore, rules that deviate from shared notions of justice are less likely to be followed during criminal justice adjudications because those who take the various discretionary roles within the criminal justice system are likely to have the same moral intuitions as the other members of the community and are likely to allow those intuitions to influence their decisions. The exercise of police, prosecutorial, and judicial discretion, as well as jury nullification, will commonly be subversive of deviation rules, thereby confounding the deterrent program and certainly confusing the deterrent message. A jury may refuse to convict a person, even if the legal rules seem to call for it, if the jurors believe it would be unjust to do so.¹⁷² Prosecutors may similarly exercise discretion in subversion of rules that produce what they see as unjust results. Judges, by exercising sentencing discretion or approving lenient plea bargains, also may subvert the deterrence-based stance of the system, moving it in the direction of justice considerations. So if it is these adjudication decisions that the deterrence theorist is counting on to perform the needed re-education task, the hope seems a vain one. Decisionmakers are often likely to follow their own intuitions of justice and ignore the law's contrary rule, or at least look for ways to minimize the rule's effect. And this kind of distortion in application means that case dispositions often obfuscate, rather than clarify, the legal rule sought to be conveyed.

Given that we think that the justice system should be explicitly formed around justice considerations, it might be thought that we should applaud all of these processes that move the system in that direction. However, the problem is that this sort of subversion of deterrence-based rules is likely to be uneven. We earlier cited the *McCarty* case in which a judge acted specifically to deter others from criminal involvement, giving a strikingly high sentence under a broad felony murder rule for the accidental death of an officer resulting from McCarty's flight.¹⁷³ But certainly there are cases in which other judges have treated similarly-situated defendants more leniently based on justice intuitions.

To generalize, juries, prosecutors, and judges may deal more leniently with

171. *Id.* at 185.

172. See Irwin A. Horowitz, *The Effect of Jury Nullification Instructions on Verdicts and Jury Functioning in Criminal Trials*, 9 LAW & HUM. BEHAV. 25 *passim* (1985).

173. See *supra* text accompanying notes 91-94.

offenders who are physically attractive,¹⁷⁴ racially matched to the jurors,¹⁷⁵ more capable of mustering legal resources to defend themselves, or who are otherwise advantaged in public opinion. And, on the other side of the coin, it is also possible for the justice system to accuse and convict those who are regarded as deviants within the community based on "crimes" for which others would not be prosecuted. So one problem with "under the table" intrusions of justice into a deterrence-based legal system is the unevenness with which they may occur, an unevenness that is likely to be discriminatory, rather than random.

A further problem with this intrusion is that its workings often need to be disguised. If the judge is applying justice considerations in cases in which the deterrence-based legal rules dictate another outcome, then case dispositions, and the texts that promulgate them, are likely to be exercises in obfuscation rather than clarity. This, too, is likely to generate contempt for legal rulings.

D. CREATING CRIMINALS: THE PROBLEM OF OFFSETTING CRIMOGENIC EFFECT

Finally, certain consequences of a solely deterrence-based system for defining crimes and assigning punishments can lead to increases in criminal activity because citizens realize, with some shock and dismay, that the legal code does not embody their own sense of justice. Assume that a deterrence-based distribution has managed to clear the hurdle of showing a deterrent effect greater than that inherent in a justice-based distribution. Its next problem is that it also is likely to generate certain quite substantial costs associated with its deviation from community standards of justice. Of particular concern here is the injury that a deterrence-based distribution will cause to the criminal law's potential for influencing conduct through social pressures, internalized norms, and stigmatization.

Recent research suggests that when citizens assign penalties that they think are appropriate for a particular crime, they do so from a justice rather than a deterrence perspective.¹⁷⁶ As this suggests, a deterrence-based system will generate conflict with the community's shared intuitions of justice. Laypersons do not distribute punishment according to the criterion of optimizing deterrence but rather according to their shared notions of justice.¹⁷⁷ And often the factors that maximize deterrence will conflict with the community sense of justice.¹⁷⁸ Part II gives many illustrations of the point. We highlighted several: McCarty's

174. See John Clark, *The Social Psychology of Jury Nullification*, 24 LAW & PSYCHOL. REV. 39, 48 (2000) ("[T]he way a defendant is physically perceived has a direct bearing on one's degree of responsibility.").

175. Erick L. Hill & Jeffrey E. Pfeifer, *Nullification Instructions and Juror Guilt Ratings: An Examination of Modern Racism*, 16 CONTEMP. SOC. PSYCHOL. 6 *passim* (1992).

176. See Kevin Carlsmith, John Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 1 *passim* (2002).

177. See *id.*

178. As Robinson notes:

felony-murder liability and forty-year sentence for fleeing from police; Dudley's murder liability for killing the sick cabin boy to stay alive; Park's criminal liability for the rodent droppings in Baltimore of which he had no culpability; the Williamses manslaughter liability for failing to recognize that their child needed medical care; and Rummel's life imprisonment for committing a \$129 air conditioning fraud under a "three strikes" statute.¹⁷⁹

Deterrence's conflict with the community's shared intuitions of justice will generate costs that are not immediately apparent if one takes only a deterrence perspective on the forces producing law-abiding behavior. This conflict may result first in the community's sense that specific laws are unjust, which in turn may spread to a generalized contempt for the criminal justice system. Legal codes then no longer serve as a guide to just and moral behavior; they no longer become the core of a set of normative rules that citizens use to regulate their behavior. Further, each citizen will realize that the community no longer regards the criminal law as providing this guidance. This means that the citizen does not think that he or she will lose standing in or be condemned by the community if he or she transgresses some legal rule generated from a deterrence-based rather than a justice-based perspective. If the community comes to view the law as being irrelevant to justice—or worse, as violating justice—then a lawbreaker will not be stigmatized by the community. He or she may even be regarded as a Robin Hood, working to produce what the community considers to be justice, in defiance of the unjust legal system and its enforcers. According to this analysis, distributing punishment in a way that conflicts with shared lay intuitions of justice undercuts the criminal law's moral authority and thereby reduces its crime reduction effect.

Many analyses of the effects of Prohibition in the 1920s suggest that this undercutting process does in fact occur.¹⁸⁰ Recently, two sets of experimental studies demonstrate empirically the beginnings of this process. In both sets of studies, the respondents discover that the legislature has or is in the process of passing laws that the respondents can be predicted to find to be in conflict with their own moral intuitions. In the first set of studies, respondents read what they took to be newspaper stories in which a person was sentenced to a prison term

Deterrence frequently conflicts with desert . . . where some abnormal condition external to the actor, such as duress, coercion, or nonjustified necessity, contributes to the actor's criminal conduct. Because the conditions rather than the actor are judged responsible for the conduct, the actor is held blameless . . . and thus is acquitted or receives a reduced sentence. On the other hand, the same coercive conditions can create the need for a greater rather than lesser deterrent threat. Greater sanctions would provide a needed additional deterrent in the face of unusual pressure to commit the offense.

Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 Nw. U.L. Rev. 19, 27 (1987).

179. See *supra* text accompanying notes 33–43, 71–73, 91–94. For a full discussion of how wide-ranging are the criminal law's doctrines of deviation from desert, see ROBINSON & CAHILL, *supra* note 157.

180. See, e.g., SEAN DENNIS CASHMAN, *PROHIBITION: THE LIE OF THE LAND* (1981).

for behavior that most of the respondents did not consider criminal.¹⁸¹ For those who did not consider the conduct criminal, their reported willingness to defer to the law in other instances decreased. Specifically, “they were more inclined to oppose incumbent legislators and prosecutors and to take actions aimed at effective legal reforms—including the possibility of violating other laws in the course of trying to get the offending law changed.”¹⁸² The first set of studies also reported that respondents were more willing to take actions that violated the law, less likely to call on or cooperate with the police, and more likely to engage in vigilante action against suspected wrongdoers.¹⁸³ Particularly germane to our argument, they rated themselves less likely to use the law to guide their behavior in situations in which they themselves were unsure about the right thing to do.¹⁸⁴ In the second set of studies, one group of respondents read about a legislature seriously considering adopting laws that the respondents perceived as unjust.¹⁸⁵ Another group read about a legislature considering laws that the respondents considered just. Those who read about the unjust laws “were more willing, as a general matter, to flout unrelated laws This willingness to disobey extended far beyond the unjust law in question, resulting in participants expressing plans to flout unrelated laws in their everyday lives.”¹⁸⁶ The author concludes that what she calls the “flouting thesis”—the idea that the perceived justice of one law can influence the intention to comply with unrelated laws, is empirically supported.¹⁸⁷

To summarize, at the level of social and moral influence, the criminal law can harness these forces only by building up its own moral credibility with the community.¹⁸⁸ Its task, in psychological terms, is to convince the community of both the moral validity of the lines it draws between conduct that is acceptable and unacceptable, and the justice of the degree of liability and punishment it imposes for unacceptable conduct. If the criminal law manages to persuade the community on both scores, then in a specific case in which members of the community do not have an independent opinion about the rightness or wrongness of certain conduct,¹⁸⁹ they will follow the legal code’s guidance and obey

181. See Erich Greene, *Effects of Disagreements Between Legal Codes and Lay Intuitions on Respect for the Law*, abstract, iv–v (unpublished Ph.D dissertation, Princeton University 2003) (on file with authors).

182. *Id.* at 43.

183. *Id.* at 43–44.

184. *Id.* at 36.

185. Janice Nadler, *Flouting the Law: Does Perceived Injustice Provoke General Non-Compliance?* (unpublished manuscript, Northwestern University School of Law: Law & Economics Research Paper Series, Research Paper No. 02-9) (Apr. 1, 2002), available at http://ssrn.com/abstract_id=353745 (last visited Oct. 25, 2003).

186. *Id.* at 1.

187. *Id.*

188. See generally ROBINSON & DARLEY, *supra* note 2, at 5–7, 201–03; Robinson & Darley, *supra* note 159, at 456–57, 468–71.

189. For example, notice that the criminal code drafters attempted this sort of persuasion when they criminalized the complex of actions and knowledge that defines “insider trading.”

the law.

Continuing the analogy with credibility and persuasion further provides greater understanding of some of the costs risked by a criminal justice system that deviates from justice. A broadly accepted general finding in the psychology of persuasion is that a communicator who has credibility can achieve greater persuasion than one with less credibility.¹⁹⁰ One way of gaining credibility is by having the recipient of the communication see the source as having similar values to the recipient. Research shows that communications coming from communicators whose values are close to the recipient's are more persuasive than those coming from communicators who are seen as having dissimilar values.¹⁹¹ The import of this for our purposes is this: If the criminal justice system is seen as making a number of decisions that are based on a deterrence stance, rather than the justice perspective that the community holds, the community will realize that the justice system does not share the community's underlying values of justice. The justice system will, therefore, lose the power to persuade the community to follow its guidance in spheres of behavior in which the community does not have well-formed opinions about what conduct is right and wrong. Much of what we have been arguing can be summed up by saying "reputation matters," and the reputation that matters for the criminal justice system is that it functions to impose just punishment on wrongdoers.

To summarize, if the criminal justice system is driven solely by deterrence considerations, it potentially forfeits the gains achieved when the system is regarded by the community as based on justice considerations. This could amount to a considerable loss, albeit a loss that is extraordinarily difficult or impossible to calculate. And, as we argue, there is a second cost, which is the potential crimogenic effect stemming from citizens' perceptions of injustice arising from the system's contradiction of justice concerns. Even if one assumed for the sake of argument that there would be some greater deterrent effect of a deterrence-based distribution of punishment over a justice-based distribution of punishment, one would still question whether this marginal benefit exceeds the losses that a deterrence-based system would incur.

Combined with the problems of unavailable information and complexity discussed in Part III.A, our conclusion is this: By generating punishment rules driven by deterrence analysis, one could suffer the crimogenic costs of deviating from justice and get nothing for it. Indeed, it might even be the case that a justice distribution would have greater inherent deterrent effect than the deterrence-based rule. In general, if we cannot make reliable deterrence calculations—if we don't know whether we are really increasing deterrence or in fact decreasing it—we suggest that we are better off following a distributive prin-

190. See RICHARD E. PETTY & JOHN T. CACIOPPO, ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES 61-62 (1981).

191. See George R. Goethals & R. Eric Nelson, *Similarity in the Influence Process: The Belief-Value Distinction*, 25 J. PERSONALITY & SOC. PSYCHOL. 117, 121 (1973).

ciple that will at least achieve its stated goal, such as doing justice under the community's shared intuition of justice. That is likely to achieve considerable deterrent force in the process.

IV. THE POSSIBILITIES AND IMPOSSIBILITIES OF IMPROVING DETERRENT EFFECT

We have argued thus far that under existing conditions in modern criminal justice systems, the formulation of criminal law rules cannot normally materially increase deterrence. But perhaps existing conditions could be changed so that doctrinal manipulation could enhance deterrence. In this Part we discuss how a deterrent effect might be enhanced, if at all, and describe situations in which doctrinal manipulation might actually have a deterrent effect. Our goal is to give a more realistic view of deterrence as a distributive principle, a view that criminal lawmakers can use as a touchstone before relying upon deterrence analysis. To telegraph our conclusion, it is this: Avenues of reform to enhance deterrent effect are available, but most are unconstitutional or are unattractive because of the sacrifices they require. Within the realm of plausible reforms, one could work to foster conditions that favor the success of doctrinal manipulations designed to have deterrent effect, but such conditions would remain the exception rather than the rule.

A. ENSURING THAT THE TARGET AUDIENCE KNOWS, DIRECTLY OR INDIRECTLY, OF THE RULE DESIGNED TO INFLUENCE THEIR CONDUCT

As Part I notes, most people do not know the law; even career criminals who have a special incentive to know it do not; and even when people think they know the law they frequently are wrong. Potential offenders typically do not read law books and their ability to learn the law, even indirectly through hearing or reading about particular cases, is limited by the fact that the legal rule—and often there are many rules interacting to produce the case result—is just one of dozens of variables at play in a case disposition. It is not reasonable to expect that potential offenders would either know of prior cases or have the capacity for the complex calculations that would be necessary to grasp the operative liability rule hidden under the effects of numerous other variables.

But there are some situations in which the criminal law rule can and will be known, and there are ways in which knowledge of it can be increased. First, a bare prohibition itself is the easiest rule to convey, in part because its effects can be dramatic. Either the police can arrest for such conduct or they can not, and the police decisions will become known within the target population. The more noteworthy the prohibition, or repeal of a prohibition, the more widely it will be known. For example, if the legislature decriminalizes robbing convenience stores on weekends, the fact would be quickly reported and would likely quickly increase robberies.

However, the rule often is not known, even for rules as simple as those defining the law's prohibitions. Is it criminal to fail to help a stranger in serious

danger if one can do so without endangering oneself? Is it criminal for a private person to keep a dead body without burial or cremation? Is it criminal to fail to try to find the owner when you come upon a valuable mislaid item? Most people can only guess—often incorrectly—about these criminal law commands. The answer in each case is: It depends upon which jurisdiction one is in.

There are some situations in which the knowledge necessary for deterrence can be conveyed to the potential offender at the time and place of the potential offense, such as where the witness on the stand is reminded of the penalty for perjury,¹⁹² where life term inmates are informed of their special eligibility for the death penalty for certain crimes while in prison,¹⁹³ where an offender is told after an arrest for seduction that there is a “marriage defense” to the crime,¹⁹⁴ where road signs inform felons of a special duty to register in the jurisdiction,¹⁹⁵ or where a kidnapper is told that he will receive a lesser sentence if he releases the victim alive.¹⁹⁶ But such opportunities for special education are not typically available, and the government often does not take advantage of them when they are.

One could imagine requiring high school seniors to pass a knowledge-of-the-law examination to graduate, much as we give rules-of-the-road examinations before issuing a driver’s license. It would be useful for graduates to know the serious penalties associated with domestic violence, the conduct that constitutes criminal harassment, and whether it is a crime to tape-record one’s own phone conversation without permission of the other party. But government tends to rely instead on the maxim “ignorance or mistake of law is no excuse,”¹⁹⁷ pushing the full burden of education, unrealistically, on each individual.

One also could imagine criminal codes written using “plain language draft-

192. MODEL PENAL CODE § 241.1 cmt. at 94 (1980).

193. *See, e.g.*, CAL. PENAL CODE § 4500 (West 2002); 720 ILL. COMP. STAT. ANN. § 5/9-1(b)(10) (West 2002); N.Y. CRIM. PROC. LAWS § 400.27 (McKinney 2002); N.Y. PENAL LAWS § 125.27 (McKinney 2002); TEX. PENAL CODE ANN. § 19.03 (Vernon 2001). All statutes listed provide life imprisonment status as special aggravating factor for death penalty.

194. Modern codes often reject this once common defense. *See* MODEL PENAL CODE § 213.3 cmt. at 396.

195. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11590 (West 2002) (requiring registration of controlled substance offenders); CAL. PENAL CODE § 290 (West 2002) (requiring registration of sex offenders); 730 ILL. COMP. STAT. ANN. § 150/3 (West 2002) (requiring registration of sex offenders); N.Y. CORRECT. LAW § 168-e (McKinney 2002) (requiring that, upon release, sex offender must be informed of duty to register); *Lambert v. California*, 355 U.S. 225, 229 (1957) (holding that Los Angeles felon registration ordinance violated due process because the defendant had no knowledge of his duty to register).

196. MODEL PENAL CODE § 212.1 cmt. at 232–33 (1980).

197. *See, e.g.*, *Commonwealth v. Mash*, 48 Mass. (7 Met.) 472, 473 (1844) (finding a woman liable for polygamy, despite the fact that her first husband left home one morning saying that he would return immediately but was not heard from again for over three years, leading her to believe him dead); *People v. Marrero*, 422 N.Y.S.2d 384, 387–88 (App. Div. 1979) (finding prison guard liable for criminal possession of a weapon even though he reasonably believed that he was a “peace officer” and therefore not required to have a gun permit); *City of West Allis v. Megna*, 133 N.W.2d 252, 254 (Wis. 1965) (holding tavern-keeper liable for permitting a minor to loiter in the tavern, even though he had relied in good faith on the minor’s identification card, which was later determined to be false).

ing” techniques,¹⁹⁸ but in reality such laws contain mountains of technical legalese that even lawyers must work to understand.¹⁹⁹ Similarly, one could increase the chances that the legal rule could be known and followed by keeping rules simple. Being able to reduce a rule to a slogan that can be widely advertised, such as “Use a gun, go to jail,” might help. By contrast, the standard modern criminal code’s complex self-defense rules cited above appear rather silly.²⁰⁰ It would be unrealistic to think that a person could know—and in the pressure of an attack, follow—those complex rules. But one could distill the rules to highlight the basic principles that guided their formulation. The defensive force rule might read simply: “In order to defend yourself against an unlawful attack, you can use only the force that is necessary and that is not disproportionate to the harm threatened.”²⁰¹

One might be able to increase the complexity of a rule if it applied primarily to a group of persons who could be specially trained, such as police officers or public officials. Thus, a code might provide detailed rules governing the use of force by officers during an arrest;²⁰² or rules governing entrapment; or detailed rules limiting a public official’s ability to sell political influence;²⁰³ or even detailed rules for doctors performing abortions.²⁰⁴ More complex rules could also be applied to target groups that have the ability and are on notice of their need to specially educate themselves, such as rules governing the conduct of corporate officials, who can look to corporate counsel.

One final observation concerns criminal law rules of general application. As noted in Part I, while people rarely know “the law,” they generally assume that the criminal law is as they would expect it to be. That is, they use their own intuitions of justice and their own assessments of what is harmful or wrongful as the basis for assumptions of what the criminal law must provide. This

198. See generally Gregory J. Odorizzi, *Plain Language—Incentives and Recent Developments in the Federal Government*, 79 MICH. BAR J. 1210 (2000) (describing the efforts in federal agencies and the Clinton Administration to use “plain language” in their documents); Tom Goldstein, *The Law; Drive for Plain English Gains Among Lawyers*, N.Y. TIMES, Feb. 19, 1988 at B7.

199. See, e.g., Paul H. Robinson, *Why a New Criminal Code?*, in 1 FINAL REPORT OF THE ILLINOIS CRIMINAL CODE REWRITE AND REFORM COMM’N xvi (Paul H. Robinson, Rep., State of Illinois Jan. 2003), available at http://www.idoc.state.il.us/ccrc/files/frv1_introductory_materials.pdf (last visited Oct. 26, 2003).

200. See *supra* notes 108–09 and accompanying text.

201. See, e.g., 2 FINAL REPORT OF THE ILLINOIS CRIMINAL CODE REWRITE AND REFORM COMM’N, § 416, at 74 (Paul H. Robinson, Rep., State of Illinois Jan. 2003). The Final Report discusses the following Rule:

Section 416. Defense of Person

(1) The use of force against an aggressor is justified when and to the extent such conduct is immediately necessary to defend oneself or another person against the aggressor’s use of unjustified force.

(2) Definition. “Unjustified” conduct is conduct that satisfies the objective elements of an offense and is not justified by this Article.

202. MODEL PENAL CODE § 3.07 cmt. at 122 (1985).

203. *Id.* § 240.7 cmt. at 85 (1980).

204. *Id.* § 230.3 cmt. at 429.

suggests that the criminal law can ensure greater knowledge of its commands, with little or no need for special education efforts, if its rules track shared community views. Conversely, it would be difficult to get compliance with rules that appear to conflict with lay expectations, such as a rule barring force necessary to recapture property from a thief if the thief acts under a mistaken claim of right,²⁰⁵ barring resistance to an unlawful arrest,²⁰⁶ or barring use of deadly force necessary for self-defense if one can retreat.²⁰⁷ Where the law's rule conflicts with lay intuition, a special education drive will be needed.

But this is more bad news for the use of deterrent analysis in formulating criminal law doctrine. Using deterrence as a distributive principle has effect—that is, it can be argued that deterrence is preferable to a “perceived justice” (shared community intuitions) distribution—only when it produces results *that deviate from* such a justice distribution. Yet it is just these instances of deviation in which ignorance and mistake by the target audience is at its greatest. And it is just these instances of deviation in which the law must not only educate but must overcome the mistaken notion of the rules that people otherwise will have.

B. ENSURING THAT THE TARGET AUDIENCE PERCEIVES A MEANINGFUL NET COST
TO A VIOLATION

Part I noted the many difficulties in establishing a punishment rate that would be meaningful to potential offenders, both in avoiding the delay in imposition of punishment that seriously erodes its deterrent effect, and in establishing and modulating the amount of punishment imposed, as an effective deterrence distribution of punishment must do. This Section discusses several reforms that could improve the system's ability to make and modulate the threat of punishment, but concludes that the potential for improvement is, at best, modest.

1. Probability

The empirical studies seem to agree that increasing the probability of punishment provides a better chance of strengthening deterrence than increasing the severity of punishment.²⁰⁸ Establishing some base expectation of a meaningful chance of punishment is a necessary condition to any deterrent effect. Yet, we have previously noted just how low is the perceived probability of punishment²⁰⁹—a perception that results from the very low actual rates of punishment,

205. See *id.* § 3.06 cmt. at 74 (1985); see also ROBINSON & DARLEY, *supra* note 2, at 68–69 (discussing an empirical study that suggests a difference between the legal rule and lay intuition concerning the use of force in protection of property).

206. See MODEL PENAL CODE § 3.04 cmt. at 42–43 (1985); *id.* § 3.09 cmt. at 148.

207. See *id.* § 3.04 cmt. at 54; see also ROBINSON & DARLEY, *supra* note 2, at 56–57, 64 (citing an empirical study suggesting a difference between the legal rule and lay intuition concerning the use of deadly force in self-defense).

208. See Jeffrey Grogger, *Certainty v. Severity of Punishment*, 24 ECON. INQUIRY 297 (1991); Ann Dryden Witte, *Estimating the Economic Model of Crime with Individual Data*, 94 Q. J. ECON. 57 (1980).

209. See *supra* note 5.

and is further exacerbated by the human tendency to heavily discount a future event. Sentencing discretion contributes to the uncertainty of punishment, as does the discretion of the many other participants in the criminal justice system, from police officers, to prosecutors, to jurors, whose exercise of discretion regularly allow offenders to escape punishment or get less than they might. Such uncertainty can nurture in all cases a hope of avoiding punishment.

There appears little that can be done to improve the perceived probability of punishment. Increasing punishment certainty would require improving clearance rates—the rates at which offenders are arrested for given offenses—and conviction rates. The more important factor to address may be clearance rates, for they account for the greatest “leakage” of offenders escaping punishment.²¹⁰ Yet such increases would require one or all of the following: a significant increase in the amount we spend on law enforcement and criminal justice; an increase in the intrusiveness we suffer from law enforcement; and a reduction in the procedural safeguards we provide in criminal adjudications. The reality is that most people think they already pay too much in taxes,²¹¹ and limitations on investigative intrusiveness and on adjudication procedures typically are constitutionally based, and thus, unchangeable by legislative action. No doubt progress could be made around the edges, assuming people were willing to suffer the tradeoffs—higher taxes, more governmental intrusion, and fewer procedural safeguards—but the kind of dramatic changes that would be required to alter our current abysmal clearance rates significantly seem unlikely.

An additional complication in making such reforms—even if people were willing to make the tradeoffs required for them—is their effect on the criminal justice system’s reputation for procedural fairness, which, like its reputation for moral credibility, has crime-control implications. A system perceived as procedurally unfair will not earn the legitimacy required for the acquiescence and support, by defendants, witnesses, jurors, and officials—by extension by citizens in general—that the system needs to operate effectively. For example, we might obtain a higher conviction rate by lowering the standard of proof from the demanding “beyond a reasonable doubt.” But would criminal convictions retain even their current level of credibility if we did?

Tom Tyler and Yuen Huo, surveying a large sample of Chicago residents, found that the degree to which respondents felt that they had received fair treatment at the hands of the police predicted those respondents’ general confi-

210. See ROBINSON & DARLEY, *supra* note 2, at tbl.1, col.(c) (noting that only 8.1% of all burglaries, 14.4% of all rapes, and 7.8% of all assaults result in an arrest).

211. Some studies suggest a greater willingness to pay for crime control measures than had been previously reported. See Mark A. Cohen et al., *Willingness-to-Pay for Crime Control Programs* (Nov. 2001) (unpublished manuscript), available at <http://www.ssrn.com/abstract=293153> (last visited Oct. 26, 2003). Of course, these expressions of willingness show a willingness to pay if the expenditures would in fact reduce a particular kind of crime. There is little reason to think that such additional funds could actually produce the crime reduction demanded, in which case the willingness to pay would evaporate.

dence in legal authorities and, importantly, the degree to which they felt obliged to obey the law.²¹² Tyler and Huo, reporting on the National Center for State Courts survey, showed that responses to such statements as “the courts are concerned with people’s rights” predict respondents’ evaluations of the court system and their willingness to obey the laws. To summarize, people “were strongly influenced by whether they believed that the police and the courts treated people with respect, dignity, and fairness, and did not harass them or subject them to rude or inappropriate treatment.”²¹³ The point here is that the reputation of the criminal justice system for fair and respectful treatment of people is central to its ability to enlist voluntary compliance from citizens with the law, and the “procedural byproducts” of a criminal justice system that organizes itself to increase arrest rates may bring about highly consequential losses in citizens’ perceptions of procedural legitimacy.

2. Delay

We have noted that the delay between violation and punishment can dramatically reduce deterrent effect.²¹⁴ The more distant punishment is, the more its weight as a threat will be discounted, even if the punishment is certain. Further, when punishment is imposed, the strength of the punishment memory—that is, its recalled punitive “bite” as a perceived threat for a future violation—is dramatically reduced as the length of delay increases.²¹⁵ But, as with reforms to increase probability, decreasing the delay in punishment—perhaps by forcing defendants to trial more quickly or by giving law enforcement greater authority to intrude into personal affairs to find offenders more quickly—would require increases in resources or changes in procedural rules that could be held unconstitutional, or if not, would require unpopular trade-offs and could injure the criminal justice system’s reputation for fairness and, thereby, its legitimacy.

3. Amount

Part I noted that the greatest difficulties relevant to “amount” of punishment lie not in establishing a punitive bite but rather in manipulating it reliably so as to optimize deterrence. The aspect of perceived net cost over which lawmakers assume they have the greatest control is the amount of the threatened punishment, or its total punitive bite. Legislatures and judges believe they can manipulate the amount of punishment threatened by simply adjusting the length of the prison term. But such manipulation of sentence length does not provide the degree of change in punishment amount that lawmakers and judges expect, and indeed may have the opposite effect. The forces at work in determining the

212. TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 179 (2002).

213. *Id.* at 191.

214. *See supra* note 6.

215. *See id.*

perceived amount of punishment are considerably more complex than has been assumed.²¹⁶ The effect of this dynamic for punishment is that each additional unit of imprisonment adds increasingly less to the total punishment amount. Yet the cost of each unit remains essentially constant. Thus, as duration increases, each unit becomes increasingly less cost-effective, which is not a promising state of affairs when one wishes to use increases in duration as the primary means of increasing punishment amount. But as we saw, even this may be a wildly optimistic picture of the effectiveness of using duration to modulate punishment bite. The "duration neglect" studies suggest that total punishment bite has little to do with duration, and more to do with maximum peak intensity and end point intensity.²¹⁷ Given the predictable drop in intensity over time, the end point intensity decreases with increased duration. Thus, a longer sentence may have less remembered punishment bite than a shorter one. If this theory is empirically confirmed, both of its implications are devastating for deterrence's ability to increase total bite by increasing duration. First, as noted, increasing duration may have the reverse effect on total bite. Second, "duration neglect" means that the only effective means of increasing total punishment bite is to increase the intensity of the punishment experience.

But the criminal justice system in the United States, and probably in any liberal democracy, has little ability to increase punishment intensity beyond its current level. Earlier times saw attempts to do so, in the invention of increasingly excruciating tortures and humiliations, such as having an offender's bones broken and body ripped apart while still alive ("drawing" and "quartering"²¹⁸), or in repeated near-drownings ("dunkings"²¹⁹), which apparently produced a horrible suffocation sensation. But there would be neither the political will to provide nor the public acceptance of such torture today, nor of nearly anything much more unpleasant than the current prison experience. Imprisonment at "hard labor" might be tolerated by some, but would have its details scrutinized for unconstitutional "cruel and unusual punishment."²²⁰ For example, in one

216. Recall the hedonic adaptation and "subjective well-being" studies, which suggest that both paraplegics and lottery winners return to their original state of well-being despite their dramatically changed circumstances. See *supra* note 7 and accompanying text.

217. See *supra* text accompanying notes 7-8. "Duration neglect" refers to the following phenomenon: any experience, whether of pleasure or pain, has a duration of a certain length. The total experience of pleasure or pain, therefore, is the moment by moment pleasure or pain, times the duration of the experience. But now suppose that the experience is in the past, and the question is about the person's *remembered* experience of pleasure or pain. A startling empirical finding has emerged: If we are talking about the experience of pain, as we would when talking about a prison sentence, the remembered experience of pain is a function of the worst moment of pain, and the experience of pain at the end of the period. The experienced duration of pain has almost no effect on the remembered summary of the painfulness of the experience. *Id.*

218. 2 SIR FREDRICK POLLOCK & FREDRICK W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 500-01 (Cambridge University Press 2d ed. 1968).

219. A. EARLE, *CURIOUS PUNISHMENTS OF BYGONE DAYS* 11, 17 (1896) (discussing the use of the "dunking stool" to punish women who spoke too much).

220. See generally LAFAYE & SCOTT, *supra* note 11, § 2.14, at 248-49 (reviewing constitutional limitations on modes of punishment); cf. *Weems v. United States*, 217 U.S. 349, 405-06 (1910)

recently reported case, a judge's attempt to bar the use of television, as part of a sentence of home detention, was challenged by defense attorneys, who persuaded the Second Circuit to temporarily stay the television ban.²²¹

Even if more intense punishments were not held unconstitutional, they might well be counterproductive. As we discussed in Part III.C, a criminal justice system that is seen as barbaric or as dispensing disproportionate punishment would likely lose moral authority within the community and, with it, the crime-control power that such moral authority can bring. One practical example is stigmatization, which can be highly effective in influencing conduct and has none of the financial costs of imprisonment, but is dependent upon the criminal justice system having earned a reputation for reliability in making criminal liability judgments that accord with the community's shared intuitions of justice. A system would quickly lose its moral credibility if it distributed cruel or disproportionate punishment, or liability based upon any number of the factors that deterrence analysis would make central to liability and punishment, but which are unrelated to moral blameworthiness.²²²

The best option may be to explore ways of increasing the punishment bite—consistent with human dignity, as the community's moral sense demands—through minor adjustments to prison conditions. This could be achieved either through more dignified, shorter, but more unpleasant terms, or through non-incarcerative alternatives, which have the advantage of being less expensive. For example, if it is the unpredictability of prison life that makes its aversiveness fresh, then it might be possible to increase that uncertainty and shorten the prison term over which it is experienced. For less serious crimes there are a number of alternatives to prison sentences that people would perceive as having a punitive "bite" comparable to that of a short prison term.²²³ This means that it is possible to create a sentence of the appropriate severity that would be a mix of these experiences, such as home confinement, labor-intensive community service, weekends in jail, and fines. Again, it might be possible to rotate offenders through a variety of these punishment options, which might keep the aversiveness of the experiences fresh. There is a moral tightrope to be walked

(scrutinizing a Philippine statute that imposed a hard-labor sentence for falsifying public documents, and finding the sentence so disproportionate as to violate the Eighth Amendment).

221. Benjamin Weiser, *A Sentence of No TV? Unusual, Yes, but Cruel?*, N.Y. TIMES, March 7, 2002, at A1. Whether or not the defendant ultimately prevails, it says something about the extent of scrutiny of "different" punishments that the Second Circuit would grant the stay.

222. A deterrence-based system might look to, for instance, the difficulty of detecting a crime, reasoning that if the system can catch only one out of the hundred people who commit some easily-hidden crime, it is necessary to punish the one with dreadful severity to keep the "punishment weight" constant and to deter others. Or, to accomplish general deterrence of the population, one might give an exemplarily severe sentence to a case that one knew was generating a great deal of public interest so the sentence would be widely publicized.

223. See generally George Gescheider et al., *Psychophysical Measurement of the Judged Seriousness of Crimes and Severity of Punishments*, 19 BULL. PSYCHONOMIC SOC'Y 275-78 (1982); Robert Harlow et al., *The Severity of Intermediate Penal Sanctions: Psychophysical Scaling Approach for Obtaining Community Perceptions*, 11 J. QUANTITATIVE CRIMINOLOGY 71-95 (1995).

here. One is attempting not to increase the objective negativity of the punishments, but to increase the perceived negativity.

One last point on deterrent limitations of sentences, especially imprisonment: Most of what we have said so far focuses on legislative action in setting offense grades and their sentencing consequences. Even if a legislature found the most deterrent-efficient set of punishment rules and enshrined them in the criminal code, such rules would not necessarily produce the intended modulation of punishment amount required by a deterrence-based system. Judges, not legislators, impose sentences, and given the wide sentencing discretion that American judges traditionally have had and continue to have in the vast majority of states, judicial discretion not legislative policy will determine deterrent effectiveness.

For this reason, mandatory minimum sentences have become popular in many states.²²⁴ But such legislative sentencing creates the danger—increasingly recognized in public discourse—of increased community perceptions of injustice, which, as before, can undercut the criminal law's moral authority. On the other hand, judicial discretion left unchecked produces unjustified disparity in the sentencing of similar cases, which also can produce perceived injustice.²²⁵ The community expectation is that punishment should depend upon what the offender has done, not on the sentencing judge to whom he happens to be assigned.

Judicial discretion is also troublesome because it can produce not only inconsistency among different judges but inconsistency among a single judge's different cases. For example, when a judge picks out one case or another with which to "make an example"—a practice typically justified on deterrence grounds²²⁶—the sentence is likely to be inconsistent with other cases of similar

224. See, e.g., Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 61–63 (1993).

225. One survey of federal judges revealed that:

While one-fourth of the judges thought rehabilitation was an extremely important goal of sentencing, 19 percent thought it was no more than 'slightly' important; conversely, about 25 percent thought 'just deserts' was a very important or extremely important purpose of sentencing, while 45 percent thought it was only slightly important or not important at all.

S. REP. NO. 98-225, at 41 n.18 (1983) (citing INSLAW, Inc. et al., *Federal Sentencing: Toward a More Explicit Policy of Criminal Sanctions* III-4 (1981)). Research also confirms that these differences in philosophy do indeed translate into different sentences. One study done by the judiciary gave 50 judges the same 20 cases to sentence. The differences in sentences were staggering. In one extortion case, for example, sentences ranged from twenty years' imprisonment and a \$65,000 fine to three years' imprisonment and no fine. *Id.* at 42–44. This same disparity in sentencing is reflected in the sentences given in real cases every day. One study compared the sentences imposed in the different federal circuits. For forgery, as an example, the average sentence ranged from 30 months in the Third Circuit to 82 months in the District of Columbia. *Id.* at 41 n.21 (citing Whitney North Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S.B.J. 163, 167 (1973)). For interstate transportation of stolen motor vehicles, the extremes in average sentences were 22 months in the First Circuit and 42 months in the Tenth Circuit. *Id.* at 41 n.21. See generally MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

226. See, e.g., McCarty Sentencing Transcript, *supra* note 94, at 00392:11–13 ("a sentence does need to be imposed that would deter others from committing such crime, a high speed chase with the police").

seriousness. The point of "making an example" of an offender is to give a higher sentence than what one ordinarily would give in such a case in order to boost the deterrent message. But this suggests that each instance of "making an example" risks the criminal justice system's reputation for fairness and uniformity in application.

Further, "making an example" of an offender can backfire. The open acknowledgment that offenders may not ordinarily be given such a punishment may tell listeners that the publicized punishment is not the regular punishment, and thus not the punishment they should expect if they commit the offense, especially given that they will be sentenced at a later time and by a different judge. The more newsworthy the "example," and the more widely it is reported—normally desirable in a deterrence paradigm—the more unusual and atypical the sentence may be perceived as being. A more effective deterrent approach would be to advertise the consistency with which sentences are given. That is difficult to do with today's high degree of judicial sentencing discretion.

A common means of compensating for the inconsistency among sentencing judges has been to have the real determination of sentence length made after the public sentencing, by a centralized authority such as a state-wide parole commission. But this solution creates its own problems, the most important of which is the (accurate) perception that the sentence publicly announced after trial does not in fact represent the real punishment. The real sentence in such a system comes to be understood, especially by those familiar with the operation of the system, as much less than the official sentence announced. The extent to which the announced sentence is discounted can be substantial. In some jurisdictions, including the federal system until recent reforms, a sentence of many years imprisonment can mean that the offender is in fact eligible for immediate release.²²⁷ When this truth becomes known, as it generally does in an open society, it is no surprise to find that the credibility of the system's punishment threat has been damaged. Further, once burned, the public may wonder, "If the system is misleading us on this issue, on what other issues is it similarly misleading?" This is not a good condition for projecting a credible punishment threat, but rather offers the worst of both worlds: It undercuts the deterrent threat meant to be carried by the publicly announced sentences, and simultaneously ensures the inconsistency and injustice that will undermine the system's moral credibility.

Perhaps the best that one can do to improve the credibility of the punishment

227. In the federal system before the Sentencing Reform Act of 1984, any offender was eligible for immediate release unless the sentencing judge explicitly imposed a term of parole ineligibility, which, even if imposed, could never exceed one-third of the publicly announced sentence. 18 U.S.C. § 4205 (1982). *See also* S. REP. NO. 98-225, at 48 (1983) ("[A] court-imposed term of imprisonment in excess of one year frequently has little to do with the amount of time that an offender will spend in prison. The announced term represents only the maximum length of time the offender may spend in prison if he earns no good time credits and if the Parole Commission does not set a release date that falls before the date of expiration of the sentence.").

threat is to institute reforms such as sentencing guidelines that regularize sentences²²⁸ and "truth in sentencing" reforms that require offenders to serve all or most of the sentence imposed.²²⁹

C. ENSURING THAT THE TARGET AUDIENCE IS CAPABLE OF AND WILLING TO BRING A PERCEIVED THREAT OF PUNISHMENT TO BEAR ON THEIR CONDUCT DECISIONS

Part I noted that there are a host of conditions that interfere with rational calculation of self-interest in potential offenders, such as drug or alcohol use, personality types inclined toward impulsiveness and toward discounting consequences, and social influences such as the arousal effect of group action and the tendency of group members to identify with group rather than individual interests. Furthermore, these conditions are disproportionately high among deterrence's target group—those persons for whom criminal conduct is not already ruled out by their own internalized norms or by those of their family or peers.²³⁰ This bodes ill for effective deterrence because it precludes, or at least diminishes, a rule's deterrent effect, even if the rule is known and is backed up by what is perceived as a meaningful threat of punishment.

Can the rational calculation of self-interest among potential offenders be improved? Our present perspective may suggest an interesting twist on the modern skepticism about the effectiveness of treatment and rehabilitation programs. While it may not be realistic to think that criminals can be "rehabilitated" into good citizens, it is somewhat more realistic to think that the behavioral sciences could find a way to make potential offenders more able to exercise rational self-interest in response to a perceived threat of punishment. While current treatment techniques may not be able to make potential offenders good people, perhaps they could increase their susceptibility to being deterred!

There are various practical, procedural, and conceptual problems with creating effective regimes for increasing deterrent effects. Many would involve special monitoring programs that were enforced as conditions of parole. Mark Kleiman has suggested one such set of impositions under which a monitoring program is likely to reduce drug or alcohol consumption.²³¹ The essence of the program is a high frequency of testing for consumption of the banned substance,

228. [S]entencing in the Federal courts is characterized by unwarranted disparity and by uncertainty about the length of time offenders will serve in prison.

The lack of reasonable consistency in the sentences handed down by the courts is due in large part to the lack of a comprehensive Federal sentencing law. . . . This disparity is fair neither to the offenders nor to the public.

S. REP. NO. 98-225, at 49 (1983).

229. The federal system, for example, now requires that an offender serve 85% of the sentence imposed. That is, only a 15% reduction is allowed as credit for good behavior in prison. 18 U.S.C. § 3624 (2002) (providing that prisoners may qualify for good behavior credit of up to 54 days for each year served).

230. See *supra* note 9 and accompanying text.

231. Mark A.R. Kleiman, *Coerced Abstinence: A Neopaternalist Drug Policy Initiative*, in *THE NEW PATERNALISM: SUPERVISORY APPROACHES TO POVERTY* 182-219 (Lawrence Mead ed., 1997).

with graduated and at least initially non-draconian punishments for violation that increase in a step-wise fashion. To be sure, such programs are not always possible to design, are somewhat costly to administer, and do not produce perfect success in preventing people from pursuing crime. However, the shift in focus that we propose here could better capture the potential that does exist in these programs. While such programs may not prevent crime directly, carefully selecting the programs to use and the offenders for which they are used might lead a potential criminal to engage in the rational, self-interest calculation that will, in turn, permit traditional criminal law deterrence to accomplish its task.

One suggestion for increasing the effectiveness of treatment programs consists of increasing the level of surveillance until detection of lapses is nearly certain. Daily breath-analyzer tests for those who drink and drive or daily urine tests for those who use drugs will at least sort out those who have the "will power" to restrain themselves from lapsing when the penalties for lapsing are nearly certain. Those who continue to lapse under these detection conditions may require more incarcerative treatments to keep them from committing crimes while under the influence of alcohol or drugs. One can imagine that these sorts of high-frequency surveillance programs can be costly. But those costs need to be compared to the costs expended to keep the offenders in prison. Further, costs can be reduced by utilizing recent developments in computational power and electronic surveillance. There are now breath-analyzers that can be coupled to car ignitions to keep people from driving if they have consumed alcohol. It is now possible to have drug abusers randomly beeped to, for instance, give a blood sample that could be remotely tested for illicit drugs. Should these methods fail, electronically enforced daily periods of "house arrest" could allow an offender to continue employment while being restricted from other activities. These procedures are remarkably intrusive, even Orwellian, but they perhaps violate the person's autonomy and dignity less than the alternative, which is generally prison.

One final point on clearing the rational-choice hurdle: The absence of rational decisionmaking seems greater for offenses that do not require sustained planning efforts. This is true both because persons who can so plan are also likely to be able to calculate self-interest, and because the longer the planning stage the greater the opportunity for self-interest to intervene and override impulsiveness or the other forces toward irrationality. This suggests that, if rehabilitation programs are to be revised to enhance a potential offender's self-interest calculation, the primary target for such treatment is not the white-collar criminal who may have been the primary client of rehabilitation programs in the past, but rather the more dysfunctional, perhaps impulsive offender.²³²

232. It may be that the movement toward "crime prevention through environmental design" seeks to do this, to cause the perceived physical barriers to successful crime completion to be greater and more time and energy consuming, so that the potential criminal's good sense intervenes, and he decides not to attempt the crime. Much of the literature on reduction of crime via environmental design is reviewed

It is also true that we can expect more rational calculations of self-interest if the potential offender fully understands the governing criminal law rules, as stated in our previous discussion regarding clear and straightforward statutes.²³³ The reforms discussed there for improving the comprehensibility of the law increase the likelihood that a potential offender can at least understand the rule enough to include its implications in his calculations of self-interest. An obvious suggestion would be to simplify the rules—for example, about what conduct is legitimate in self-defense or what is or is not a case of date rape.

V. SUMMARY AND CONCLUSION

We do not dispute that having a criminal justice system that imposes punishment can and does deter violations. The system's generalized threat of punishment provides a clear disincentive to crime. It does not follow, however, that the manipulation of rules for determining liability and punishment within that system—traditionally governed by deterrence analysis—can send the more nuanced messages that are needed to influence the conduct of potential offenders in a more precise way. It could happen. But the conditions under which it could happen are the exception rather than the rule: a potential offender who is at least indirectly aware of the rule intended to influence his conduct; a perception that the immediate benefit of the crime is less than the delayed and doubtful possibility of a distant punishment; a sufficiently rational actor who is sufficiently free of decision-distorting influences to be able and willing to respond to the manipulation of rules by altering his conduct; and a resulting deterrent effect not so incrementally dissipated as to be trivial. We suggest that the infrequency of being able to achieve a meaningful deterrent effect through doctrinal manipulation reveals that the deterrent-analysis tradition of modern criminal law scholars, judges, and lawmakers is seriously out of touch with the reality of its limitations.

Indeed, while there may be situations in which doctrinal manipulation can have the desired deterrent effect, such an effect is most difficult and most unlikely in those situations where a deterrence distribution actually does some real work. That is because a deterrence-optimizing distributive principle only has effect—it only provides an advantage over a justice-based distributive principle—where it deviates from justice. But it is in just these deviation cases that achieving a deterrent effect is most difficult and most doubtful.

This is so because people assume the law is as they think it should be, according to their perceptions of shared intuitions of justice. It is in the deviation cases that criminal law has its greatest difficulty conveying its rule, for it is here that the legal system must affirmatively change the community's

and critiqued in C. Ray Jeffery & Diane Zahm, *Crime Prevention Through Environmental Design, Opportunity Theory, and Rational Choice Models*, in 5 *ADVANCES IN CRIMINOLOGICAL THEORY* 323 (Ronald V. Clarke & Marcus Felson eds., 1993).

233. See *supra* text accompanying notes 197–207.

initial incorrect assumption about what the law provides. Further, it is the deviation cases in which the system will find it most difficult to educate by example, through case dispositions, because it is in these cases that prosecutors and juries are most likely to follow their own intuitions of justice and ignore the law's contrary rule—or at least look for ways to minimize the rule's effect. This kind of distortion means that case dispositions often obfuscate rather than clarify the legal rule sought to be conveyed. Further, and most importantly, the tendency of system participants to undercut the deviation rules—be it through the exercise of prosecutorial or enforcement discretion, sentencing discretion, jury nullification, or other methods—means, obviously, that the planned deterrence program will be frustrated.

But even if a deterrence-based doctrinal manipulation did result in some marginal deterrence effect, there would be good reason to reject it in favor of a justice distribution that tracks the community's shared intuitive principles. Such a just-deserts distribution provides some deterrent effect. Thus, as we pointed out above, a deterrence distribution can provide an advantage only to the extent that it deviates from justice and, by such deviation, provides a greater deterrent effect. But such a deterrence-based distributional system incurs costs that are often not recognized by its advocates. This is so because the deterrence-based system would provide added deterrent effect only if the community members were aware that the legal codes deviated from their sense of what was morally right, either by being draconian in criminalizing actions that the community regarded as not immoral, or failing to criminalize actions that the community does think are immoral.

But it is just these rules that deviate from the community's sense of justice that most undercut the criminal law's moral credibility with the community and thereby reduce the law's long-term crime control power. In the community governed by a criminal justice system that punishes what the community regards as morally appropriate actions, the laws are obeyed only under threat of apprehension by what comes to be seen as an oppressive police force and judicial system. Thus, even if a deterrence distribution has a net immediate crime-control benefit over a justice distribution, over time that benefit may be outweighed by the slowly building crimogenic effect that results when citizens come to hold their criminal justice system in contempt. Lawmakers' constant emphasis on tweaking a doctrine's deterrent effect, even at the expense of justice, may not only be a waste of time, energy, and resources—it may actually have the counterproductive effect of increasing, rather than decreasing, crime.