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Paul H. Robinson

University of Pennsylvania Carey Law School

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Life without Parole under Modern Theories of Punishment

PAUL H. ROBINSON

I. Introduction

Almost 10% of U.S. prisoners are serving life terms. In some states the figure is 17% or more; in California it is 20% of all prisoners.¹ Of the prisoners sentenced to life terms, almost 30% have no possibility of parole, and the number of prisoners serving life without parole (LWOP) has tripled in the past sixteen years.² Life sentences arise from a wide variety of offenses. A majority of life sentences are for offenses other than homicide,³ which is to be expected given that life is a common sentence under habitual offender statutes, such as so-called three-strikes laws.⁴

The underlying rationales for LWOP sentences include all three of the most common distributive principles for punishment: general deterrence, incapacitation of the dangerous, and deserved punishment.⁵ Some theorists have relied on general deterrence to support LWOP, arguing that it provides a serious deterrent effect that in some sense is even harsher than the death penalty. “[I]f most death row inmates surveyed, who obviously were not deterred from committing murder by the threat of capital punishment, maintain that LWOP is a worse sanction than death, does it not stand to reason that the penalty that is perceived as being the harshest will have been the greatest deterrent effect, whatever that effect might be?”⁶ Incapacitation rationales also are frequently relied on, often in support of habitual offender statutes, for example.⁷ As Danya Blair argues, “The release of offenders who present a danger to society is not a rare mistake, but rather an inherent flaw in an unworkable system, resulting from a general inability of parole boards to make intelligent predictions about an offender’s future behavior. Parole ineligibility for certain offenders operates to protect against this inefficiency by recognizing that some offenders are so dangerous that we cannot leave the question of their release to the vagaries of the parole system.”⁸

As an alternative to these instrumentalist distributive principles, desert or justice principles may be offered as a rationale for LWOP sentences. Desert has gained increasing prominence in recent years. The American Law Institute recently amended the Model Penal Code to set desert as the dominant distributive principle for punishment.⁹ Some courts have followed suit, as when the Supreme Court cited retributivism as the “primary justification for the death penalty.”¹⁰ In the LWOP context, some people have argued that LWOP is the sort of tough punishment needed for the most blameworthy offenders—especially if a jurisdiction lacks the death penalty. “If the death penalty is to be abolished, a replacement sanction of sufficient gravity needs to be provided by the law.”¹¹

However, close analysis suggests that none of these rationales in fact supports current LWOP practice. To signal those conclusions up front: The existence of the prerequisites of effective general deterrence commonly are the exception in LWOP cases, rather than the rule. Incapacitation of the dangerous would be cheaper and more effective for the community and fairer to detainees if done through an open civil preventive detention system that admitted its preventive detention purpose rather than being dressed up to look like criminal justice for past offenses. And fair and effective preventive detention would not likely support the common use of LWOP found in current practice. Finally, a system of deserved punishment requires careful attention to setting the extent of punishment to match the relative blameworthiness of the offender. Imposing LWOP, the highest punishment (or second highest, if the death penalty is available), on a wide range of cases—especially on 10% to 20% of all prisoners—is to trivialize important differences in the moral blameworthiness among serious cases. Further, the empirical evidence suggests that the doctrines that produce LWOP sentences regularly and seriously conflict with the community’s shared intuitions of justice. That conflict, through the high use of LWOP, undermines the criminal law’s moral credibility with the community it governs and thereby undermines the law’s crime-control effectiveness.

II. Justifying LWOP under Distributive Principles of Deterrence or Incapacitation

LWOP sentences are commonly justified under rationales of general deterrence or incapacitation of the dangerous, but there is good reason to doubt that these purposes are well served by the current common use of LWOP.

A. Deterrence

It is easy enough to see the attraction of general deterrence as a means of crime control. Under the right conditions, a system of general deterrence can avoid future crime. Indeed, it has the potential for enormous efficiency. For the cost of punishing just the offender at hand, one can deter thousands of others who hear about the case and heed its warning.

On the other hand, it may well be that general deterrence will be effective in only a limited number of instances. For it to work, three prerequisites must be satisfied. First, the deterrence-based rule can deter only if the intended targets are aware of the rule, directly or indirectly. Second, even if the target audience knows of the deterrence-based rule, a deterrent effect results only if they have the capacity and inclination to rationally calculate what is in their best interests. Finally, even if potential offenders know of the deterrence-based rule, are able to rationally calculate the conduct that is in their best interests, and do in fact make such a calculation, the rule will deter only if they conclude that the costs of committing the offense exceed its anticipated benefits. As discussed later, it may be rare that these three prerequisites are satisfied, thus casting doubt on the ability to realize the potential benefit of deterrence.¹²

The first prerequisite requires that the potential offender be aware of the deterrence-based rule. However, evidence suggests that this commonly is not the case. For example, a primary justification for the felony murder rule—treating even accidental killings during a felony as murder—is its presumed deterrent effect on potential felons. But few potential offenders are likely to know whether their jurisdiction has such a rule or what its terms might be. The adoption and formulation of the rule vary widely.¹³ The same is true of habitual offender statutes.¹⁴ The same may be true for LWOP generally. How many potential offenders will actually know their own state's practices relating to LWOP sentences? That sentence's threat cannot have a deterrent effect if the target of the threat does not know of it.

Studies suggest that most people assume the criminal law tracks their intuitions of justice. Therefore, deterrence will have its greatest difficulty in cases in which it *deviates* from what people intuitively think is just (empirical desert), because people are least likely to know the law when it conflicts with common intuitions. As part III.A of this chapter makes clear, habitual offender statutes, drug offenses, and felony murder statutes generating LWOP are just such deviations from desert as the community perceives it, and these deviations will not be anticipated by potential offenders unless they are specially advised of them.

Further, even in cases in which the potential offender knows of the rule intended to deter, he or she must be able and inclined to do the balancing of costs and benefits on which deterrence relies, the second prerequisite. Again, the evidence suggests that this commonly is not the case. Potential offenders as a group are less inclined than most people to think carefully about the future consequences of their conduct and are more likely to be under the distorting influence of drugs, alcohol, or mental illness. Indeed, the habitual offenders caught up in three-strikes statutes commonly are just the kinds of persons suffering such distortions in rational calculations, which is why they have repeatedly offended despite having endured past convictions and punishments. The same is true of many people involved in felony murders. Intentional killings are often fueled by drug or alcohol use, emotion, or mental illness, all of which inevitably cloud reasoning.¹⁵ Persons committing drug offenses are, not surprisingly, commonly involved in drug use, which distorts rational calculation.¹⁶ General deterrence threats of LWOP can have little effect when aimed at persons not inclined toward rational calculation.

The last prerequisite also reveals problems for the general deterrence program of LWOP threats: even if a potential offender knows the deterrence-based rule and is able to calculate his or her best interests, a variety of factors commonly lead potential offenders to conclude that the perceived benefits of committing a crime outweigh its perceived costs. In fact, capture and punishment rates are exceptionally low for most offenses, even low for the serious offenses that lead to LWOP sentences. While the frequency of LWOP sentences is high and increasing, it is nothing like the frequency of serious drug offenses or of homicide or aggravated assaults that may lead to homicide. Of the 1,745,712 drug violations in the U.S. in 2004,¹⁷ only 288,160 of them (16.5%) result in felony convictions.¹⁸ Even the most serious offenses often have low punishment rates. Of the 451,500 homicides and aggravated assaults in the U.S. in 2004,¹⁹ only 103,537 of them (22.9%) resulted in a felony conviction.²⁰ And of course, of people convicted of a felony offense, only a small percentage are given an LWOP sentence. A rational calculator might conclude that this distant risk of receiving an LWOP sentence is not sufficiently serious as to justify passing up the immediate benefit of committing the offense.

Even if actual punishment rates were not so low, a deterrent effect depends not on the reality of the deterrent threat but rather on its perception. Thus, even if the deterrent threat were significant, deterrence may fail if the intended target does not appreciate the true likelihood of punishment. Unfortunately, people show a natural tendency to discount future detriments

just as they discount future benefits, and many offenders are likely to overestimate their ability to avoid capture and punishment.²¹ These natural human predilections are not good for a general deterrence program.

In sum, for general deterrence to effectively achieve its aims, three prerequisites must be satisfied. Yet satisfying each prerequisite encounters its own challenges, which general deterrence may have difficulty overcoming. And, even if the prerequisites are satisfied and some general deterrent effect results, the crime-control benefit of the effect may be outweighed by the crime-control cost that results from being in conflict with the community's intuitions of justice. More on this later.

B. Incapacitation

While there are serious concerns about the crime-control effectiveness of general deterrence, no similar doubts exist for incapacitation as a distributive principle. Incapacitation can reduce crime by the person detained even if he or she cannot or does not calculate cost-benefit analysis. Admittedly, incapacitation lacks the enormous potential efficiency of general deterrence. That is, it can have a crime-control effect only on the offender at hand. However, it does work.

The problem here is that, first, the current practice in the application of LWOP sentences may be difficult to justify and, second, it may be difficult more generally to justify incapacitation as a distributive principle for criminal liability and punishment. As a mechanism for preventive detention, criminal sentencing may be inefficient and unfair; preventive detention can be efficient and fair only when done in a civil commitment system that openly admits it is in the preventive detention business and adheres to the limits and procedures that logically follow from that purpose.²²

For incapacitation to be effective as a distributive principle, one must be able to identify persons who will commit offenses in the future, preferably with a minimum of "false positives" (persons predicted to be dangerous who in fact would not commit an offense). Presently, however, the behavioral sciences have only a limited ability to make such predictions accurately. "False positives" commonly exceed "true positives." They are problematic both because they are costly—one estimate put the average cost of each life sentence at \$1 million²³—and because they seriously intrude on liberty when no crime justifying such intrusion would have in fact occurred.

Instead of examining each offender to determine the person's actual present dangerousness, the current system uses prior criminal records as a proxy

for dangerousness—prompted by a perceived need to "cloak" preventive detention to make it look like criminal justice. Prior record has some correlation with dangerousness but is only a rough approximation, and its use in preventive detention guarantees errors of both inclusion and exclusion. A behavioral scientist's ability to predict future criminality using all available data is poor;²⁴ using the proxy of prior criminal history as the basis for prediction is even less accurate. It is often true that a person who has committed an offense will do so again. But it is also frequently false—many offenders do not commit another offense.²⁵ An explicit assessment of dangerousness would reveal that many second-time offenders are no longer dangerous, yet these offenders can receive long preventive terms under habitual offender statutes and criminal-history-based guidelines. At the same time, a direct and explicit reliance on dangerousness, rather than its proxy of criminal record, would reveal that many first-time offenders are dangerous, but these offenders are not preventively detained under habitual offender statutes and criminal-history-based guidelines.²⁶

Indeed, this particular cloaking device stands good prevention on its head. Evidence suggests that criminality is highly age related.²⁷ Whether due to changes in testosterone levels or something else, the offending rate drops off steadily for individuals beyond their twenties. The prior-record cloak leads us to ignore younger offenders' crimes when they are running wild and to begin long-term imprisonment, often life imprisonment under three-strikes, once the natural forces of aging would naturally rein in the offenders. Offenders with their criminal careers before them are not detained because they have not yet compiled their criminal résumés, whereas offenders with their criminal careers behind them are detained because they have the requisite criminal records. Such a scheme produces a costly and wasteful prevention system of prisons full of geriatric or soon-to-be geriatric life-termers. Simultaneously, the scheme leads to ineffective prevention, because the system does little or nothing during that period in a criminal's life when the need for preventive detention is greatest. A rational and cost-effective preventive detention system would more readily detain young offenders during their crime-prone years and release them for their crime-free older years. Yet the need to cloak preventive detention with deserved punishment prompts the use of prior records as a substitute for actual dangerousness.

An equally counterproductive aspect of the cloaked system is its mandating of fixed ("determinate") sentences soon after a guilty verdict or plea. In determining the length of a deserved sentence, all the relevant information is known at the time of sentencing—the nature of the offense and the personal

culpability and capacities of the offender. Thus, sentencing judges determining deserved punishment have little reason to impose any sentence other than a fully determinate one (that is, one that sets the actual release date) soon after trial. A system that instead allows a subsequent reduction of sentence, as by a parole board, undercuts deserved punishment. Citizens become cynical that a just sentence will be undermined by early release. It is this cynicism that gives rise to the demands for “truth in sentencing” and the legislative response of establishing determinate terms and abolishing early release on parole.²⁸

The cloaked preventive detention system, to maintain its justice cloak, must follow this practice of imposing determinate sentences soon after trial. But this practice is highly inappropriate for effective preventive detention. It is difficult enough to determine a person’s present dangerousness—whether he or she would commit an offense if released today. It is all the more difficult to predict an offender’s future dangerousness—whether he or she would commit an offense if released at some future date, such as at the end of the deserved punishment term. It is still more difficult, if not impossible, to predict precisely how long the future preventive detention will need to last. Yet that is what determinate sentencing demands: the imposition of a fixed term that predicts preventive detention needs far in the future.

A sentencing judge or guideline drafter is left to the grossest sort of speculation, inevitably doomed to setting either a term too long—thus unfairly detaining a nondangerous offender and wasting preventive resources—or a term too short—thus failing to provide adequate prevention. In deciding between these two bad choices, decision-makers commonly opt for errors of the first sort rather than the second, with the result, as has recently been the case, of harsher prison terms. A rational preventive detention system would do what current civil commitment systems do: make a determination of present dangerousness in setting detention for a limited period, commonly six months, and then periodically revisit the decision to determine whether the need for detention continues.²⁹

A preventive detention system hidden behind the cloak of criminal justice not only fails to protect the community efficiently but also fails to deal fairly with those who are being preventively detained. As noted earlier, the inaccuracies created by the use of prior records as a substitute for actual dangerousness result in the unnecessary detention of a greater number of nondangerous offenders. The inaccuracies created by the use of determinate sentences can have the same effect. In cases in which a nonincarcerative sentence would provide adequate protection, the use of a prison term provides one more example of needless restraint.

The irrationalities of the cloak of criminal justice extend to other aspects of the preventive detention system, such as the conditions of detention. Punitive conditions are entirely consistent with a punishment rationale for incarceration. But if an offender has served the portion of his or her sentence justified by deserved punishment and continues to be detained for preventive reasons, punitive conditions become inappropriate. Similarly, an offender being preventively detained should logically have a right to treatment, especially if such treatment can reduce the length or intrusiveness of the preventive detention—a specialized application of the principle of minimum restraint. If treatment can reduce the necessary individual sacrifice,³⁰ the offender ought to receive it.

One might achieve the preventive detention goal with greater accuracy, fewer wasted resources, and less unjustified intrusion on liberty—avoiding the criminal justice system’s regular conflict with desert—by relying instead on an open civil preventive detention system, as currently exists to civilly commit persons who are dangerous because they are mentally ill or have a contagious disease or drug dependency. If preventive detention can be more effective when performed apart from the criminal justice system, and if such separation avoids the crime-control cost of conflicts with empirical desert (discussed later), it seems difficult to justify using incapacitation as a distributive principle for criminal liability and punishment.

III. Justifying LWOP under a Distributive Principle of Desert

An alternative justification for a sentence of LWOP is that the offender simply deserves the extreme sentence, to match the extreme seriousness of his or her crime. The traditional desert rationale sees doing justice as a value in itself, which requires no further justification. Such “deontological desert,” as it has been called, focuses on the extent of the offender’s moral blameworthiness for his or her offense and seeks punishment that mirrors that degree of blameworthiness. Unfortunately, many of the offenses on which LWOP sentences are based, especially under habitual offender statutes, drug offenses, and felony murder rules, do not involve intentional killings, the most serious offenses, and thus are not appropriate under a desert analysis for this most serious sentence.

A different form of desert—what has been called “empirical desert”—focuses on doing justice not for its own sake but rather for its crime-control potential. Perhaps LWOP sentences can find better justification under a distributive principle of empirical desert? Unfortunately for LWOP, it does not.

On the contrary, the studies only highlight how badly the current practice of common LWOP sentences deviates from lay intuitions of justice, thus having the effect of undermining the criminal law's moral credibility with the community it governs and thereby undermining its crime-control effectiveness.

A. LWOP and the Ordinal Ranking Demands of Desert

The central concern for both deontological and empirical desert is not the absolute amount of punishment to be imposed but rather the relative amount of punishment among cases of differing degrees of moral blameworthiness.³¹ The focus is on ensuring that the offender receives the amount of punishment that puts the offender in his or her proper ordinal rank among all other offenders of greater and lesser blameworthiness.³² Of course, once a society has committed itself to a particular high-end point for its punishment continuum, which all societies must do (be it the death penalty or life imprisonment or something less), the ordinal rank of any given case necessarily converts to a specific amount of punishment: the amount of punishment that sets the offender at his or her appropriate ordinal rank. (The limited punishment continuum must accommodate a very high number of cases of distinguishable degrees of blameworthiness.) However, the amount of punishment itself has no magical significance. If the end point of the punishment continuum changes, the amount of punishment that an offender deserves also changes, to that amount of punishment that is necessary for the offender to keep his or her proper ordinal rank. This is why, even though different jurisdictions may have different high-end points on the punishment continuum, each can set a specific amount of punishment that each offender deserves depending on the offender's degree of relative blameworthiness.

The problem with current LWOP practice under a desert distributive principle is that it fails to take account of the sometimes dramatic differences in moral blameworthiness among serious offenses. As has already been noted, many LWOP sentences are imposed under habitual offender statutes when the current offense (and past offenses) are not even killings. While the offense at hand might well be serious, it is not as serious as a planned intentional killing, and to treat the two cases the same is to trivialize the greater blameworthiness of the more serious offense. For example, when thirty-year-old William James Rummel offered to fix a bar's broken air conditioner for \$129.75 with no intention of doing so—continuing his career of petty larceny and fraud—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. The U.S. Supreme Court denied his appeal, concluding that the statute did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Rummel's crime, a minor fraud, hardly seems to deserve life imprisonment. Indeed, the cumulative effect 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 desert grounds.³³

Similarly, many drug offenses may be serious, but it would be a gross distortion of desert to say they are as blameworthy as a planned intentional killing of a human being. The case of Ronald Allen Harmelin is on point. Harmelin was driving through Detroit in the early morning when he made an illegal U-turn through a red light. After he was pulled over and arrested for marijuana possession, a police search uncovered 672 grams of cocaine in the car's trunk—an amount approximately equal in size to one and half soda cans. Harmelin, who had no prior police record, was convicted under a Michigan drug statute and was sentenced to a mandatory term of life in prison without the possibility of parole, which the Supreme Court upheld as constitutional in *Harmelin v. Michigan*.³⁴

The same is true for LWOP sentences even for homicide—they commonly disregard the greater blameworthiness of planned intentional killings. Under the felony murder rule, an offender may have played no role in the killing; the offender's homicide liability may rest entirely on his or her complicity in the underlying offense, such as a theft or a robbery. While that may well be a serious offense, it is not as serious as an intentional killing, and to treat it the same is to trivialize the greater blameworthiness of the intentional killing. Even among killers there may be vastly different degrees of blameworthiness. Under the felony murder rule, offenders may have been at most negligent or reckless in causing the death, which makes them markedly less blameworthy than an offender who planned to kill.³⁵

Consider the case of Jerry Moore, who agreed to help an acquaintance burglarize a house while its owner was away.³⁶ Although neither man was armed when they arrived at the house, Moore's acquaintance found a gun in the house and shot the owner upon his unexpected return. At trial, the prosecution relied on Louisiana's felony murder rule to convict Moore. He was sentenced to life imprisonment at hard labor without the possibility of parole.

The disproportionality between life sentences generally and the seriousness of the underlying offenses is illustrated by the broader statistics on their

use. A majority of the life sentences in state courts are imposed for nonhomicide offenses.³⁷ At the same time, three-quarters of state murder sentences are less than life.³⁸ In other words, the majority of life sentences that are for offenses other than homicide are being punished more severely than three-quarters of murders. Desert requires that the uniquely high sentence of life imprisonment be reserved for the most egregious cases.

B. The Utility of Desert

The preceding desert analysis suggests that LWOP sentences are commonly imposed on offenders who are significantly less blameworthy than the most serious cases—cases that deserve this most serious punishment. However, the analysis is based on a reasoned notion of moral blameworthiness—desert as reasoned from principles of right and good by moral philosophers. Perhaps LWOP cases, while not justified under this notion of desert, might be justified under “empirical desert,” in which the measure of what is deserved is not derived from principles of moral philosophy but rather is measured from the shared intuitions of the community governed by the law. That is the subject of part III.C. A preliminary question, however, is why one might want to rely on such an empirical view of desert, rather than a deontological view.

Clearly, empirical desert is not “true justice” in a transcendent sense. It is not justice but only what the community’s intuitive principles think is justice. The community could be wrong. The difference between deontological desert—derived from the reasoned analysis of moral philosophy—and empirical desert—derived from the shared intuitions of justice of the community to be bound by the law—can produce important differences in liability and punishment rules. For example, moral philosophers disagree about the significance of resulting harm, and each side of the debate has plausible arguments to make.³⁹ In contrast, all available data suggest there is a nearly universal and deeply held view among laypersons that resulting harm, such as a resulting death, does matter. The absence of a resulting death reduces an offender’s blameworthiness, and its presence increases it, even if the actor’s conduct and culpable state of mind are the same.⁴⁰

One set of reasons offered to support empirical desert as the distributive principle for criminal liability and punishment rests on notions of democracy: it ought to be the people’s view of desert that controls, not that of the moral philosophy elite.⁴¹ That dispute is one of political theory, which will not be pursued here.

A different rationale that has been offered is purely utilitarian. It looks to the crime-control benefits of relying on criminal liability and punishment rules that are perceived as just by the community they govern and thus have a greater ability to harness the powerful forces of normative influence and internalized norms. If current LWOP practice conflicts with community views, as the following section suggests it does, it may do more harm than good in fighting crime because it undermines the criminal law’s moral credibility and thereby its crime-control effectiveness. Indeed, there is reason to believe that normative crime-control mechanisms can be more powerful and effective than traditional mechanisms of coercive crime control (i.e., deterrence, rehabilitation, and incapacitation of the dangerous). This is due in part to the strength of the normative forces that arise from criminal law’s moral credibility and in part to the practical limitations and weaknesses of traditional coercive crime-control mechanisms.⁴² Let me try to summarize the practical attraction of empirical desert.⁴³

Some of us have argued that empirical desert is an attractive distributive principle because by building the moral credibility of the system, it can promote cooperation and acquiescence with it, harness the powerful social influences of stigmatization and condemnation, and increase the criminal law’s ability to shape societal and internalized norms.

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

The effective operation of the criminal justice system depends on the cooperation, or at least the acquiescence, of those involved in it—offenders, judges, jurors, witnesses, prosecutors, police, and others. To the extent that people see the system as unjust—as in conflict with their intuitions about justice—that acquiescence and cooperation is likely to fade and be replaced with subversion and resistance. Vigilantism may be the most dramatic reaction to a perceived failure of justice, but a host of other less dramatic (but more common) forms of resistance and subversion have shown themselves. Jurors may disregard their jury instructions. Police officers, prosecutors, and judges may make up their own rules. Witnesses may lose an incentive

to offer their information or testimony. And offenders may be inspired to fight the adjudication and correctional processes rather than participating and acquiescing in them.

Criminal law also can have effect in gaining compliance with its commands through another mechanism: if it earns a reputation as a reliable statement of what the community perceives as condemnable, people are more likely to defer to its commands as morally authoritative and as appropriate to follow in those borderline cases in which the propriety of certain conduct is unsettled or ambiguous in the mind of the actor. The importance of this role should not be underestimated; in a society with the complex interdependencies that characterize ours, a seemingly harmless action can have destructive consequences. When the action is criminalized by the legal system, a citizen ought to respect the law and forbear the action, even though he or she may not immediately intuit the law's rationale. Such deference will be facilitated if citizens believe that the law is an accurate guide to appropriate prudential and moral behavior.

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

The extent of the criminal law's effectiveness in all these respects—in bringing the power of stigmatization to bear; in avoiding resistance and subversion to a system perceived as unjust; in gaining compliance in borderline cases through deference to its moral authority; and in facilitating, communicating, and maintaining societal consensus on what is and is not condem-

nable—is to a great extent dependent on the degree to which the criminal law has gained moral credibility in the minds of the citizens governed by it. Thus, the criminal law's moral credibility is essential to effective crime control and is enhanced if the distribution of criminal liability is perceived as “doing justice”—that is, if it assigns liability and punishment in ways that the community perceives as consistent with its shared intuitions of justice. Conversely, the system's moral credibility, and therefore its crime-control effectiveness, is undermined by a distribution of liability that conflicts with community perceptions of just desert.

As the next section demonstrates, recent studies show that many modern crime-control doctrines, especially those regularly resulting in LWOP, seriously conflict with the community's shared intuitions of justice, that this conflict undermines the criminal law's moral credibility, and that this loss has practical consequences that undermine the criminal justice system's crime-fighting effectiveness.⁴⁴ The findings are consistent with previous studies.⁴⁵

A greater appreciation for the value of desert as criminal law's distributive principle, and a greater appreciation for the limits and costs of alternative distributive principles, such as deterrence and incapacitation, may help explain the dramatic American Law Institute amendment of the Model Penal Code for the first time in the forty-eight years since its enactment.

As is well known, since 1962, the Code has been the model for the codification of criminal law in three-quarters of the states and, for the most part, has represented the epitome of instrumentalist thinking. The Code's original section 1.02 made clear its preventive focus. While the original Code was not entirely indifferent to the offender's moral blameworthiness, it did not direct liability and punishment to track desert but rather looked to a wide range of goals, touching on both deterrence and incapacitation of the dangerous.⁴⁶ The new Model Penal Code's “purposes” provision, in contrast, sets desert as the primary distributive principle for criminal liability and punishment—that is, the blameworthiness of the offender. Alternative distributive principles such as deterrence, incapacitation, or rehabilitation may be pursued only to the extent that they remain within the bounds of desert.⁴⁷

This rather dramatic turnabout is in part the result of a growing recognition of the weaknesses and limitations of the traditional mechanisms of coercive crime control. As noted in part II, deterrence may work under the right conditions, but those conditions may be the exception rather than the rule,⁴⁸ and incapacitation of the dangerous clearly does work but generally can be achieved more effectively and more fairly when done through a civil system that operates apart from the criminal justice system and that openly admits its preven-

tive detention purpose.⁴⁹ However, the Model Penal Code's turn to desert also may reflect a growing appreciation that doing justice is an attractive distributive principle because it advances both justice and instrumentalist crime control.

C. LWOP and the Disutility of Injustice

Does the current LWOP practice conflict with the community's shared intuitions of justice? The available evidence suggests that it does. Consider, for example, a recent study of the most common and politically popular crime-control doctrines, including three-strikes and other habitual offender legislation, felony murder, and drug-offense sentencing. As noted previously, many LWOP sentences result from these doctrines.

Subjects were first asked to rank and then assign a specific punishment to a wide range of cases, from minor theft to minor assault to robbery to aggravated assault to manslaughter to various versions of intentional killings. This ranking established "milestones" along the continuum of punishment. There was high agreement among the subjects on the relative rankings of these "milestone" cases. Subjects were then asked to add to the rankings another set of cases involving the crime-control doctrines just noted and then to assign specific punishments to them. These included two felony murder cases, *Moore* (J on fig. 4.1) and *Heacock* (H), in which sentences were given of LWOP and forty years, respectively; a three-strikes case, *Rummel* (F), in which a sentence of life was given; a drug case, *Harmelin* (G), in which LWOP was given; and two cases in which the abolition or severe narrowing of the insanity defense led to convictions of mentally ill persons, *Yates* (K) and *Clark* (I), who both received life sentences.

The results of the participants' rankings and sentencing are summarized in figure 4.1. The "milestone" cases are on the left; the crime-control cases are on the right. The subjects' sentences are shown in solid lines; the law's actual sentences are shown in dotted lines. As is apparent, the subjects ranked the crime-control cases dramatically less seriously than the law provided. Compare the subjects' judgments, represented by the solid lines on the right, to the law's determination, represented by the dotted lines on the right. Each numbered point on the scale represents about a doubling of punishment, so the difference between the solid and the dotted lines is dramatic—with the law sometimes imposing a sentence many times more severe than the subjects' sentence.⁵⁰ While the sentences imposed by the law were fully consistent with the law's requirements—that is, these were not rogue judges but rather judges following the law's direction to provide the sentences that

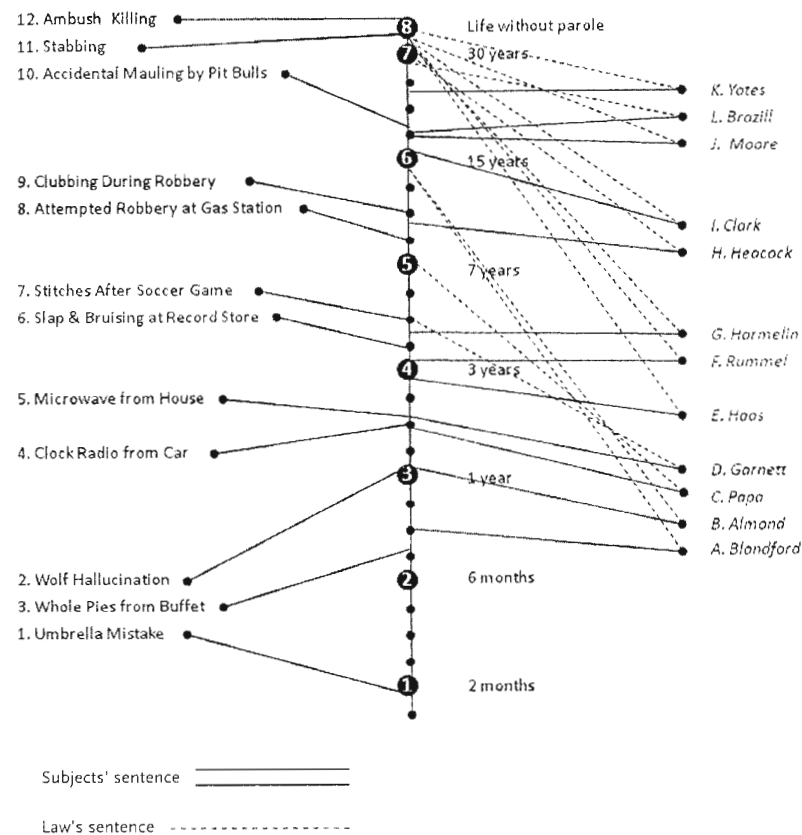


Fig. 4.1. Comparison of layperson judgments of relative blameworthiness to those of modern crime-control doctrines

would express the doctrine—they clearly are dramatically higher than what the subjects thought was just.

For example, in the *Moore* case (J on fig. 4.1), the felony murder case discussed earlier, the subjects rated the offense as being more serious than a clubbing during a robbery but less serious than an accidental mauling by pit bulls, and gave it an average sentence of 17.7 years.⁵¹ In the *Heacock* case (H on fig. 4.1), another felony murder case, the defendant was given a *de facto* life sentence of forty years, yet the subjects, in contrast, thought that the offense was more serious than an assault that required stitches but less serious than an attempted robbery at a gas station, and gave the defendant an average sentence of 10.7 years.⁵² The three-strikes case shows a similar pat-

tern. In *Rummel* (F), the defendant is given a sentence of life, yet the subjects see the offense, a minor fraud after a string of previous offenses, as more serious than stealing a microwave from a house but less serious than an assault involving a slap that bruised, and on average gave a sentence than 3.1 years, even while knowing of Rummel's criminal history.⁵³ The same pattern is apparent in the drug cases. In *Harmelin* (G), the offender gets life without parole for transporting a pound and a half of cocaine in his car, even though he had no criminal record. In contrast, the subjects saw the offense as more serious than a slap with bruising but less serious than an assault causing stitches, and gave an average sentence of 4.2 years.⁵⁴

Does it matter that current practice conflicts with the community's shared intuitions of justice? The available evidence suggest that it does. Another part of the same recent study tested this issue. The study asked subjects the extent of their willingness to assist and to defer to the criminal law in a variety of situations. For example, the questions asked the extent of the subjects' willingness to help police by reporting a crime, to turn in contraband they found, to accept and internalize judgments that the law made about the condemnability of certain conduct, or to conform their own conduct to what the law requires.⁵⁵ The subjects were told of cases in which the law's punishment judgments conflicted with those of the community, as in the cases just discussed. When subjects were later asked again about their willingness to assist or to defer to the criminal law, they showed a marked lower willingness to assist or to defer than they had originally.

While the surveys were taken over the Internet with likely little pressure for subjects to do what they might have thought the experimenters wanted, the experimenters reexamined the same issue without using the baseline comparison technique. In this version of the study, subjects were randomly divided into a "high disillusionment" group and a "low disillusionment" group. The first group was exposed to the sentences that we know they would see as unjust. The second group was given cases in which the sentences would be less likely to conflict with what the subjects would think just. Both groups were then asked the questions regarding their willingness to assist or to defer to the criminal law. The results are shown in table 4.1, reproduced from the original study.⁵⁶

The results show that the "high disillusionment" subjects' willingness to assist or to defer was significantly lower than that of the "low disillusionment" group, which in turn was lower than that of the no-disillusionment condition (when the subjects were asked the same questions without being exposed to any sentencing).⁵⁷ The results show how people's perceptions that the criminal justice system is unjust serves to reduce their willingness to

TABLE 4.1
Study 2a Baseline and Study 2b Results

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

Note: Where two cells on a row do not share the same letter, their values are statistically different.

assist or to defer to it and thereby undermines the criminal justice system's crime-control effectiveness.

The divide between the sentences that courts often impose and the expectations of the community might be illustrated by the case of Clarence Aaron, who in 1993 was convicted of three charges linked to a drug distribution ring.⁵⁸ At the time a promising student athlete at Southern University at Baton Rouge but in need of cash to support himself, Aaron introduced a high school friend looking for drugs to an acquaintance drug dealer. Paid \$1,500 for arranging the meeting, Aaron became the center of the police's investigation. He was convicted on the testimony of his co-conspirators, all of whom received reduced sentences. The court sentenced Aaron to three consecutive life sentences without the possibility of parole.

The PBS documentary program *Frontline* interviewed one of Aaron's jurors, Willie Jordan, who before the interview did not know the severity of Aaron's sentence:

INTERVIEWER: What kind of sentence do you think he deserves?

JORDAN: Well, I wouldn't have thought a large number of years, no. Just . . . just . . . probably a short sentence. Now, what a short sentence is I don't know—three to five years, maybe something like that. I don't know.

INTERVIEWER: Do you know that he got life?

JORDAN: Life!

INTERVIEWER: Three concurrent life sentences.

JORDAN: Three concurrent life sentences. With no hope of parole?

INTERVIEWER: No hope of parole.

JORDAN: Well, that's more than I thought it would be. But see, I had no idea. Well, I'm surprised at that, I really am, that harsh a sentence. He seemed to be a pretty promising boy. Why did they get such a high sentence, I wonder? I wish I didn't know that they'd [*sic*] got life.⁵⁹

If the goal of the desert distribution is not only to do justice but also to build the criminal law's moral credibility with the community in order to harness the powerful forces of social and normative influence, the perception and shock of injustice that one sees in juror Jordan suggests that such common use of LWOP is hurting not helping the effectiveness of the criminal justice system.

IV. Conclusion

General deterrence and incapacitation of the dangerous have traditionally been used to justify the sentencing rules that produce sentences of LWOP. Yet the best available evidence suggests that neither of these is an attractive or wise distributive principle for liability and punishment. The existence of the prerequisites for effective general deterrence are the exception rather than the rule, especially in the kinds of cases that give rise to life sentences. Incapacitation as a distributive principle—setting an offender's punishment according to his dangerousness rather than according to his blameworthiness for a past offense—is simply a form of preventive detention, and an open civil preventive detention system would be more effective in protecting society and more fair to detainees than our present system of using criminal justice as cloaked preventive detention.

While desert provides a defensible distributive principle for criminal liability and punishment, the current practice in which LWOP sentences are common cannot be justified under either principle. The central demand of desert is that greater punishment be imposed on an offender of greater blameworthiness. Current practice imposes the same LWOP sentence on offenders of significantly different degrees of blameworthiness, thereby violating desert's proportionality principle and trivializing the greater blameworthiness of the more serious case. LWOP sentences ought to be reserved for the most egregious case or, if the death penalty is available, the second

most egregious case. Cases of less egregious blameworthiness ought to receive serious sentences, but sentences proportionally less than LWOP.

Nor does a distributive principle of specifically empirical desert support the current practice of common LWOP sentences. First, many, if not most, of the kinds of doctrines leading to a life sentence—such as felony murder, habitual offender statutes, and high penalties for drug offenses—have been shown to seriously conflict with the community's shared intuitions of justice. More broadly, lay intuitions of justice are quite nuanced and sophisticated. Small differences in facts regularly produce predictable differences in lay assessments of blameworthiness. As a result, the current practice of imposing the same LWOP sentence on a wide range of offenders with noticeably different degrees of blameworthiness produces regular conflicts with the community's shared intuitions of justice, which in turn undermines the criminal law's moral credibility and, thereby, its crime-control effectiveness.

As a separate matter, what is proposed here—seriously limiting the use of LWOP sentences—would also make good correctional policy. LWOP deprives inmates of hope, but hope can have powerful, positive effects. For instance, biologist Curt Richter found that rats immersed in water tended to keep themselves afloat for as many as eighty-one hours when they had previously been freed from confined areas. Rats who had not had that prior experience, thus had little hope, died within minutes.⁶⁰ Positive psychologists have seen similar, if less dramatic, effects of hope among humans.⁶¹ High levels of hope have been shown to correlate with academic performance, athletic success, better coping abilities, and psychological adjustment.⁶² “Low hoppers,” moreover, “are often depressed and vegetable-like in their demeanors, especially after encountering impediments.”⁶³ They are “lethargic and have an ‘I don't give a damn’ attitude.”⁶⁴

Thus, it is no stretch to think that some hope of future life outside of prison, even a distant hope, can improve inmate behavior and corrections efforts. Correspondingly, taking away all hope—the hallmark of the LWOP sentence—can create difficult problems for prison administration that can affect not only the rehabilitation of the offender but also the safety and quality of life of other prisoners and correctional staff. Even the “truth in sentencing” movement, as reflected in the Sentencing Reform Act of 1984, did not go all the way to require that offenders serve all of the sentence imposed but rather directed that offenders serve only 85% of the sentence imposed, under the reasoning that the potential for a 15% discount for good behavior gave correctional officials the ability to create a more productive and safer prison environment.⁶⁵

In other words, both justice and effective crime control, as well as sound correctional policy, support a sentencing policy that rarely imposes LWOP sentences, reserving them for only the most egregious case imaginable. This does not require a system that releases offenders early, before they have served the sentence that they deserve. It simply requires that the sentence imposed be one that does not fall at the extreme end point of the punishment continuum but rather falls on that point on the punishment continuum that puts each offender at his appropriate ordinal rank in relation to the blameworthiness of all other offenders.⁶⁶

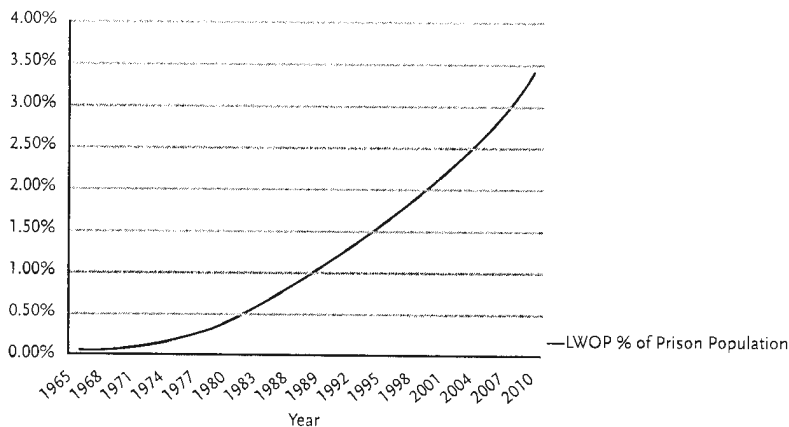
If we value doing justice, fighting crime, and having safe and productive correctional facilities, we should prefer a sentencing system that rarely imposes sentences of LWOP.

NOTES

The author thanks Sean E. Jackowitz, University of Pennsylvania Law School class of 2012, for his valuable research assistance.

1. Ashley Nellis and Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America* (Washington, DC: Sentencing Project, 2009), 9, table 2, http://www.sentencing-project.org/doc/publications/publications/inc_noexitseptember2009.pdf. Nellis and King survey state and federal departments of corrections to compile statistics on the size of the life and LWOP populations in the country's prisons.

2. *Ibid.*, 9–10. See also Kathleen McGuire and Ann L. Pastore, eds., *Sourcebook of Criminal Justice Statistics 1992* (Washington, DC: Bureau of Justice Statistics, 1993), 633, table 6.81s. Appleton and Grøver showed the same high growth rate for LWOP as of 2007:



LWOP growth in relation to the U.S. prison population (actual and estimated U.S. data)

Catherine Appleton and Bent Grøver, "The Pros and Cons of Life without Parole," *British Journal of Criminology* 47 (2007): 600, fig. 1.

3. Matthew Durose and Patrick Langan, *State Court Sentencing of Convicted Felons, 2002* (Washington, DC: Bureau of Justice Statistics, 2005), tables 1.2, 1.4, <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1534>. In 2002, only 41.2% of people serving life sentences in state prisons had been convicted of homicide. The remaining 58.8% included those whose most serious offense was some other violent crime such as rape or robbery (29.8%), a drug offense (15.4%), burglary (3.8%), or a weapons offense (0.6%).

4. See, e.g., Ala. Code § 13A-5-9(c) (LexisNexis 2005) (mandating LWOP for fourth-time defendants convicted of a Class A felony when one of the previous convictions is a Class A felony); Ark. Code Ann. § 5-4-501(d)(1)(A) (LexisNexis 2006) (mandating LWOP for defendants convicted of a Class Y felony with two prior violent felony convictions); Ga. Code Ann. § 17-10-7(b)(2) (LexisNexis 2008) (mandating LWOP upon conviction of a second "serious violent felony"); Miss. Code Ann. § 99-19-83 (West 2006) (mandating LWOP for third felony conviction when defendant has already served at least one year in prison and one of the prior convictions was for a violent felony); Wash. Rev. Code § 9.94A.570 (West 2003) (mandating LWOP for "persistent offender[s]," i.e., an offender convicted of a "most serious offense" who has been twice previously convicted of a most serious offense).

5. It would seem difficult to justify LWOP under rehabilitation or special deterrence rationales because both of those presume that the offender will be released back to society at some point. They are being rehabilitated against or deterred from further offenses upon their release.

6. Julian H. Wright, Jr., "Life without Parole: The View from Death Row," *Criminal Law Bulletin* 27 (1991): 353. For a compilation of other arguments building on general deterrence rationales (as well as incapacitation and desert rationales), see Appleton and Grøver, "Pros and Cons," 597–615.

7. For instance, former Senate majority leader Trent Lott explained the need for a federal three-strikes statute by noting that "there is no doubt that a small hardened group of criminals commit most of the violent crimes in this country" and that "many of the people involved in these crimes are released again and again because of the 'revolving door' of the prison system." 139 Cong. Rec. 27,822–23 (1993).

8. Danya W. Blair, "A Matter of Life and Death: Why Life without Parole Should Be a Sentencing Option in Texas," *American Journal of Criminal Law* 22 (1994): 198–99. See also Appleton and Grøver, "Pros and Cons," 603–4.

9. See n. 47 below.

10. *Spaziano v. Florida*, 468 U.S. 447, 461 (1984). For a collection of authorities citing desert as a primary distributive principle, see Paul H. Robinson, "Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical," *Cambridge Law Journal* 67 (2008): 145–46nn. 4–9.

11. Appleton and Grøver, "Pros and Cons," 605.

12. For a more detailed discussion, see Paul H. Robinson, "Does Criminal Law Deter?," chap. 3 in *Distributive Principles of Criminal Law: Who Should Be Punished How Much?* (New York: Oxford University Press, 2008).

13. See Paul H. Robinson, "Felony-Murder," sec. 14.3 in *Criminal Law* (New York: Aspen, 1997). The traditional felony murder rule has two components. First, it imposes liability for murder for any killing that occurs in the course of the attempt, commission, or flight from a felony. Second, accomplices to the felony are considered accomplices in

the murder. Although nearly every jurisdiction limits the traditional felony murder in some way, the limitations are far from consistent. For example, some require the killing to be a probable consequence of the unlawful act. Others may also require that underlying felony be a *malum in se* offense, an offense evil in and of itself.

14. See John Kimpflen, "Application; Federal 'Three Strikes' Law," sec. 6 in *American Jurisprudence*, 2nd ed., vol. 39, *Habitual Criminals and Subsequent Offenders* (New York: Thomson Reuters, 2008). For instance, habitual offender statutes may apply, depending on the jurisdiction, when a defendant has committed any prior felony offense or when he or she commits a felony within a certain time after a previous felony conviction. Furthermore, jurisdictions may specify enhanced penalties only for certain offenses or require a showing of a pattern of criminal conduct.

15. See Kathleen McGuire, ed., *Sourcebook of Criminal Justice Statistics Online*, table 3.120.2008, <http://www.albany.edu/sourcebook/pdf/t31202008.pdf>. In 2008, of instances of nonnegligent homicide for which data was available, 42.0% of victims were killed during an argument, and 7.6% were killed in circumstances involving alcohol or drugs. Regarding mental illness, one UK study found that of the five hundred homicide offenders for which psychiatric data could be obtained, 44% had a lifetime history of mental disorder, and 14% had symptoms of mental disease at the time of the homicide. Jenny Shaw et al., "Mental Disorder and Clinical Care in People Convicted of Homicide: National Clinical Survey," *British Medical Journal* 318 (1999): 1240-44.

16. According to data collected between 2002 and 2004, 60.1% of persons aged 18 or older who were arrested for homicide, forcible rape, robbery, aggravated assault, burglary, larceny theft, motor-vehicle theft, and arson reported illicit drug use in the year before their arrest. National Survey on Drug Use and Health, *Illicit Drug Use among Persons Arrested for Serious Crimes* (Washington, DC: Substance Abuse and Mental Health Services Administration, 2005), 2.

17. Federal Bureau of Investigation, *Crime in the United States 2004* (Washington, DC: Federal Bureau of Investigation, 2005), 280, table 29.

18. Federal courts convicted 25,310 defendants of felony drug offenses. See McGuire, *Sourcebook*, table 5.17.2004, <http://www.albany.edu/sourcebook/pdf/t5172004.pdf>. State courts convicted 262,850 defendants of felony drug offenses. See *ibid.*, table 5.44.2004, <http://www.albany.edu/sourcebook/pdf/t5442004.pdf>.

19. FBI, *Crime in the United States 2004*, 280, table 29.

20. Federal courts convicted 757 defendants of felony homicide and assault offenses. See McGuire, *Sourcebook*, table 5.17.2004, <http://www.albany.edu/sourcebook/pdf/t5172004.pdf>. State courts convicted 102,780 defendants of felony homicide and assault offenses. See *ibid.*, table 5.44.2004, <http://www.albany.edu/sourcebook/pdf/t5442004.pdf>.

21. David A. Anderson, "The Deterrent Hypothesis and Picking Pockets at the Pick-pocket's Hanging," *American Law & Economic Review* 4 (Fall 2002): 295-313.

22. For a more detailed discussion, see Robinson, "Incapacitation of the Dangerous," chap. 6 in *Distributive Principles of Criminal Law*.

23. Marc Mauer, Ryan S. King, and Malcolm C. Young, *The Meaning of "Life": Long Prison Sentences in Context* (Washington, DC: Sentencing Project, 2004), 25.

24. Cf. Stephen J. Morse, "Blame and Danger: An Essay on Preventive Detention," *Boston University Law Review* 76 (1996): 126n. 39. Morse concludes that even in the closely supervised environment of a mental health institution, "the ability of mental health

professionals to predict future violence among mental patients may be better than chance, but it is still highly inaccurate, especially if these professionals are attempting to use clinical methods to predict serious violence" (*ibid.*, 126).

25. See *Recidivism of Adult Felons*, report 97-01 (St. Paul: Office of the Legislative Auditor, State of Minnesota, 1997), 55, <http://www.auditor.leg.state.mn.us/ped/1997/pe9701.htm>. The Minnesota Office of the Legislative Auditor reported that 55% of all felony offenders in its study were not convicted of a subsequent offense during the three years after their initial arrest. It further found that homicide offenders had one of the lowest recidivism rates. See also Allen J. Beck and Bernard E. Shipley, *Bureau of Justice Statistics Special Report: Recidivism of Prisoners Released in 1983* (Washington, DC: Bureau of Justice Statistics, 1989), <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr83.pdf>.

26. The chronic spouse abuser who turns to obsessive violence when the battered spouse leaves may have no criminal history—battering spouses are often able to persuade their victims not to press criminal charges—yet the abuser may present a clear and immediate danger. Similarly, a stalking and threat offense, depending on its circumstances, may suggest a high risk of serious danger. See, e.g., John Douglas and Mark Olshaker, *Obsession: The FBI's Legendary Profiler Probes the Psyches of Killers, Rapists, and Stalkers and Their Victims and Tells How to Fight Back* (New York: Scribner, 1998), 266. Yet most such offenses would not trigger the dangerousness add-on provisions that are components of recent reforms. That is, even if the circumstances and nature of the offense suggest a life-threatening level of violence, a system that looks to criminal history rather than to dangerousness will have no grounds to detain the perpetrator.

27. For example, only 15% of people arrested for crime in 1994 were in their forties or older, although that age group made up 40% of the U.S. population. Kathleen McGuire and Ann L. Pastore, eds., *Sourcebook of Criminal Justice Statistics 1995* (Washington, DC: Bureau of Justice Statistics, 1996), 397, table 4.4. In contrast, persons in their thirties made up 25.3% of arrests but accounted for only 16.9% of the population (*ibid.*). Persons between the ages of nineteen and twenty-nine made up 37.1% of arrests but only 15.9% of the population (*ibid.*). Homicide arrest rates suggest an even greater drop-off in criminality with age: in 1993, 11.9 of 100,000 males in the thirty-five-to-forty-four age bracket were arrested for homicide (*ibid.*, 423, table 4.18). Of those aged twenty-five to twenty-nine, the rate was more than two and a half times higher, 30.0 per 100,000 (*ibid.*). For those between twenty-one and twenty-four, the rate was almost five times higher, 56.8 (*ibid.*). Of those between eighteen and twenty, the rate was almost eight times higher, 91.3. The trend of the past several decades has been toward even less criminality by middle-aged persons. In 1970, the homicide arrest rate for males between thirty-five and forty-four was two-thirds higher than it was in 1993—19.5 per 100,000 versus 11.9 per 100,000 (*ibid.*). Yet the current reforms will detain a greater number of middle-aged offenders for a longer period of time.

28. One of the prime motivations for the federal Sentencing Reform Act of 1984, which among other things abolished the United States Parole Commission, was an attempt to reestablish credibility with an emphasis on "truth in sentencing" that determinate sentences bring. See, e.g., U.S. Sentencing Guidelines Manual ch. 1, pt. A, introductory cmt. (2009). The Sentencing Commission stated in its introductory notes that "Congress first sought honesty in sentencing . . . to avoid the confusion and implicit deception" arising out of the then-extant indeterminate sentencing system.

29. See, e.g., Idaho Code 66-337(a) (Michie 2000) (requiring department directors to examine a patient's need for commitment at the end of the first 90 days and every 120 days thereafter); R.I. Gen. Laws 40.1-5.3-4(f) (1997) (permitting courts to commit dangerous persons but requiring courts to review such orders every six months); S.D. Codified Laws Ann. 27A-10-14 (Michie 2000) (requiring a board to review a patient who has been committed for mental illness at least once every six months for the first year and at least once every twelve months thereafter).

30. For example, a number of encouraging studies have recently suggested that comprehensive treatment of pedophilia has a 90% or better success rate. See Robert E. Freeman-Longo, "Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention," *New England Journal on Criminal & Civil Confinement* 23 (1997): 323.

31. For a discussion of the alternative forms of desert, including a third kind—"vengeful desert"—which has few if any supporters among modern writers, see Robinson, "Competing Conceptions of Modern Desert," 146–55.

32. Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (New Brunswick: Rutgers University Press, 1985), 39–46. With regard to deontological desert, von Hirsch explains, "Desert should be treated as a determining principle in deciding ordinal magnitudes" (*ibid.*, 39).

33. *Rummel v. Estelle*, 498 F. Supp. 793 (W.D. Tex. 1980). The case is described in Paul H. Robinson, Geoffrey P. Goodwin, and Michael D. Reisig, "The Disutility of Injustice," *New York University Law Review* 85 (2010): sec. II.A.

34. 501 U.S. 957 (1991). See also Robinson, Goodwin, and Reisig, "Disutility," sec. II.B.

35. For a general discussion of the felony murder rule, see Robinson, "Felony-Murder."

36. For a description of Moore's crime, see *State v. Moore*, No. 2006-KA-1979, 2007 WL 914637, at *1 (La. Ct. App., Mar. 28, 2007). The case is also described in Robinson, Goodwin, and Reisig, "Disutility," sec. II.F.

37. See Durose and Langan, *State Court Sentencing*, tables 1.2, 1.4.

38. *Ibid.*, table 1.4.

39. Those who argue that resulting harm should matter include Leo Katz, "Why the Successful Assassin Is More Wicked Than the Unsuccessful One," *California Law Review* 88 (2000): 806 (arguing by hypothetical that principled moral analysis suggests that harm should be considered when assessing blameworthiness); Ken Levy, "The Solution to the Problem of Outcome Luck," *Law and Philosophy* 24 (2005): 263; Michael S. Moore, "The Independent Moral Significance of Wrongdoing," *Journal of Contemporary Legal Issues* 5 (1994): 267–71 (positing that our own experiences—we feel more guilty about our own completed misdeeds than we do about attempts, and we are dissatisfied with reasonable moral choices that produce undesirable consequences—suggest that "results matter" in the moral arena).

However, there is significant disagreement in this area. See, e.g., Joel Feinberg, "Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments against It," *Arizona Law Review* 37 (1995): 119; Sanford H. Kadish, "The Criminal Law and the Luck of the Draw," *Journal of Criminal Law & Criminology* 84 (1994): 686 ("[P]unishing attempts and completed crimes differently makes no sense insofar as the goal of the criminal law is to identify and deal with dangerous offenders who threaten the public."); Stephen J. Morse, "The Moral Metaphysics of Causation and Results," *California Law Review* 88 (2000): 879.

40. For a report of empirical studies, see Paul H. Robinson and John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* (Boulder, CO: Westview, 1995), 14–28, 181–96.

41. See, e.g., Andrew E. Taslitz, "Empirical Desert: The Yin and Yang of Criminal Justice," in *Criminal Law Conversations*, ed. Paul H. Robinson, Steve P. Garvey, and Kimberly Kessler Ferzan (New York: Oxford University Press, 2009), 56; Adil Ahmad Haque, "Legitimacy as Strategy," in *ibid.*, 57.

42. Robinson, "The Strengths and Weaknesses of Alternative Distributive Principles," chap. 10 in *Distributive Principles*.

43. For a fuller account, see Paul H. Robinson and John M. Darley, "Intuitions of Justice: Implications for Criminal Law and Justice Policy," *Southern California Law Review* 81 (2007): 1–67; Robinson, "The Utility of Desert," chap. 8, and "A Practical Theory of Justice: Proposal for a Hybrid Distributive Principle Centered on Empirical Desert," chap. 12, in *Distributive Principles*; Paul H. Robinson, "Empirical Desert," in Robinson, Garvey, and Ferzan, *Conversations*, 29–39; Robinson, Goodwin, and Reisig, "Disutility," part I.

44. See Robinson, Goodwin, and Reisig, "Disutility," parts V and VI.

45. See *ibid.*, sec. V.F.

46. The original "purposes" section of the code read,

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

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

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

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

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

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

(a) to prevent the commission of offenses;

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

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

Model Penal Code § 1.02 (Proposed Official Draft 1962) (emphasis added).

47. The new provision reads,

(2) The general purposes of the provisions governing the sentencing and corrections, to be discharged by the many official actors within the sentencing and corrections system, are:

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

(i) to render punishment within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders;

(ii) when possible with realistic prospect of success, to serve goals of offender *rehabilitation, general deterrence, incapacitation of dangerous offenders, and restoration of crime victims and communities*, provided that these goals are pursued within the boundaries of sentence severity permitted in subsection (a)(i); and

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

Model Penal Code § 1.02 (amended 2007) (emphasis added).

48. See Robinson, *Distributive Principles*, 21–46; Paul H. Robinson and John M. Darley, “Does Criminal Law Deter? A Behavioural Science Investigation,” *Oxford Journal of Legal Studies* 24 (2004): 173–205; Paul H. Robinson and John M. Darley, “The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best,” *Georgetown Law Journal* 91 (2003): 949–1002.

49. See Robinson, *Distributive Principles*, 130–33; Paul H. Robinson, “Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice,” *Harvard Law Review* 114 (2001): 1429–56.

50. The following table, from Robinson, Goodwin, and Reisig, “Disutility,” sec. III.D, table 4, describes all the cases shown in fig. 4.1.

Subjects’ Mean Sentences for Scenarios Compared to Actual Sentences

Scenario	Subjects’ Mean Sentence	Actual Court Sentence
12. Ambush shooting	between life and death	
11. Stabbing	essentially life	
10. Accidental mauling by pit bulls	20.6 years	
<i>L. Accidental teacher shooting (juvenile)</i>	19.2 years	28 years w/o parole
<i>K. Drowning children to save them from hell (insanity)</i>	26.3 years	life
<i>J. Accomplice killing during burglary (felony murder)</i>	17.7 years	life at hard labor w/o parole
9. Clubbing during robbery	12.0 years	
8. Attempted robbery at gas station	9.1 years	
<i>I. Killing officer believed to be alien (insanity)</i>	16.5 years	life
<i>H. Cocaine overdose (felony murder)</i>	10.7 years	40 years
7. Stitches after soccer game	5.0 years	
6. Slap & bruising at record store	3.9 years	
<i>G. Cocaine in trunk (drugs)</i>	4.2 years	life w/o parole
<i>F. Air conditioner fraud (3 strikes)</i>	3.1 years	life

Scenario	Subjects’ Mean Sentence	Actual Court Sentence
5. Microwave from house	2.3 years	
<i>E. Sex with female reasonably believed over-age (strict liability)</i>	2.9 years	40 to 60 years
4. Clock radio from car	1.9 years	
<i>D. Underage sex by mentally retarded man (strict liability)</i>	2.3 years	5 years
<i>C. Marijuana unloading (drugs)</i>	1.9 years	8 years
<i>B. Shooting of TV (3 strikes)</i>	1.1 years	15 years w/o parole
3. Whole pies from buffet	8.3 months	
<i>A. Incorrect lobster container (regulatory)</i>	9.7 months	15 years to life
2. Wolf hallucination	1.1 years	
1. Umbrella mistake	1.8 months	

51. *Ibid.*, sec. II.F.

52. *Ibid.*

53. *Ibid.*, sec. II.A. Similarly, in the Almond case (B), the defendant was given a sentence of fifteen years without parole, yet the subjects thought that his offense, shooting his television, was more serious than taking (two) pies from an all-you-can-eat buffet in violation of the rules but less serious than stealing a clock radio from a car, and gave a sentence of 1.1 years on average, even while knowing of Almond’s criminal history (*ibid.*).

54. *Ibid.*, sec. II.B.

55. *Ibid.*, table 7.

56. *Ibid.*, the figure, on the opposing page, which is reprinted from sec. V.D.

57. See *ibid.*, tables 8 and 10.

58. Details taken from Jennifer Lawinski, “Locked Up for Life, Part One: The Case of Clarence Aaron,” *Fox News*, December 4, 2008, <http://www.foxnews.com/story/0,2933,461747,00.html>.

59. Ofra Bikel, “Snitch: How Informants Have Become a Key Part of Prosecutorial Strategy in the Drug War” (includes interview with Willie Jordan), *Frontline*, PBS, January 12, 1999, <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/>.

60. Curt P. Richter, “On the Phenomenon of Sudden Death in Animals and Man,” *Psychosomatic Medicine* 19, no. 3 (1957): 191–98.

61. One prominent researcher in the field defined hope as “a positive motivational state that is based on an interactively derived sense of successful (a) agency (goal-directed energy) and (b) pathways (planning to meet goals).” C. R. Snyder, “Hope Theory: Rainbows in the Mind,” *Psychological Inquiry* 13 (2002): 250. In other words, Snyder defines hope with reference to our abilities to set and pursue goals. When those goals are frustrated, Snyder speculates that “the resulting disruptive negative emotions cycle back to register on the person’s dispositional and situational hopeful thinking” (*ibid.*, 255).

62. Hope has been shown to influence students’ grade expectancies, which in turn influence academic performance. Kevin L. Rand, “Hope and Optimism: Latent Structures

and Influences on Grade Expectancy and Academic Performance,” *Journal of Personality* 77 (2009): 232–60. Division I college athletes with high hope scores outperformed their low-hope peers. Lewis A. Curry et al., “Role of Hope in Academic and Sport Achievement,” *Journal of Personality and Social Psychology* 73 (1997): 1257–67. Adventitiously blind military veterans with high hope measures were better able to cope with their disability and enjoyed more functional ability. Warren T. Jackson et al., “Negotiating the Reality of Visual Impairment: Hope, Coping, and Functional Ability,” *Journal of Clinical Psychology in Medical Settings* 5 (1998): 173–85. Lower levels of hope have been shown to be associated with greater dysphoria, depression proneness, and maladjustment. Paul Kwon, “Hope, Defense Mechanisms, and Adjustment: Implications for False Hope and Defensive Hopelessness,” *Journal of Personality* 70 (2002): 207–31.

63. Snyder, “Hope Theory,” 265.

64. *Ibid.*

65. Report on Sentencing Reform Act of 1983, S. Rep. No. 98-225, at 146–47 (1983).

66. Nor does the approach require the abolition of parole. There are good reasons why every offender released from prison should remain under correctional supervision for a period of time to assist in the transition and to help the offender construct a new life without criminality. And if there is need to preventively detain dangerous offenders beyond the term of imprisonment that they deserve as punishment for their past offenses, that preventive detention ought to be done openly and forthrightly, in a civil commitment system with all the procedures and safeguards that preventive detention logically requires.

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