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IN DEFENSE OF MORAL CREDIBILITY

Paul H. Robinson* and Lindsay Holcomb**

Abstract

The criminal justice system's reputation with the community can have a significant effect on the extent to which people are willing to comply with its demands and internalize its norms. In the context of criminal law, the empirical studies suggest that ordinary people expect the criminal justice system to do justice and avoid injustice, as they perceive it – what has been called “empirical desert” to distinguish it from the “deontological desert” of moral philosophers. The empirical studies and many real-world natural experiments suggest that a criminal justice system that regularly deviates from empirical desert loses moral credibility and thereby loses crime-control effectiveness. These crime-control benefits, together with an analysis of the sometimes-disqualifying weaknesses of alternative distributive principles such as general deterrence and incapacitation of the dangerous, suggest that maximizing the criminal law's moral credibility is the best distributive principle available. Critics have offered a range of objections to this proposal, which are here considered and answered.

* Colin S. Diver Professor of Law, University of Pennsylvania. The authors wish to thank Sarah Robinson for her generous research assistance. They also thank the critics who are cited here, for they have inspired the authors to make their proposal and its implications clearer. © Paul H. Robinson

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In Defense of Moral Credibility

- I. Introduction
- II. Moral Credibility and Crime
 - A. The Criminogenic Effects of Reduced Credibility
 - 1. The Disillusionment-Noncompliance Dynamic in Natural Experiments
 - 2. Disillusionment Expressed as Vigilantism
 - 3. Empirical Studies Showing the Disillusionment-Noncompliance Dynamic
 - 4. Natural Experiments on Law Enforcement Legitimacy and Compliance
 - 5. Empirical Studies on the Law Enforcement Legitimacy-Compliance Dynamic
 - 6. Conclusion
 - B. A Response to Critics
- III. The Determinants of Moral Credibility
 - A. Criminal Law's Regular Conflicts with Community Views as Undermining Its Moral Credibility
 - B. A Response to Critics
- IV. Constructing a Distributive Principle that Promotes Moral Credibility by Minimizing Conflicts with Community Views
 - A. Tracking Empirical Desert
 - B. A Response to Critics
- V. Philosophical, Political, and Ideological Objections
 - A. The Proposed Distributive Principle Would Necessarily Produce Draconian Sentences
 - B. The Proposed Distributive Principle Is Unprincipled and Meaningless
 - C. "Community Sentencing," "Cherry Picking," and the Public as Bad Policy Makers
- VI. Is There a Better Distributive Principle Than Maximizing Moral Credibility through Empirical Desert?
 - A. General Deterrence
 - B. Incapacitation of the Dangerous
 - C. Deontological Desert
 - D. Conclusion
- VII. Potential Weaknesses of the Proposed Distributive Principle Not Raised by Critics
 - A. Limiting the Use of Criminal Law as a Means of Changing Community Norms
 - B. The Need to Keep Testing Existing Norms Against Societal Aspirations
- VIII. Conclusion

I. Introduction

When the community observes the criminal law as regularly doing injustice or failing to do justice, the law's reputation as a reliable moral authority suffers. This loss in moral credibility tends to reduce people's willingness to defer to and acquiesce in the criminal law's demands and undermines the criminal law's ability to have people internalize its norms. And where the disillusionment arises from the criminal law's failure to do justice, it can provoke vigilantism. One of us has argued for several decades that these observations, which are backed by common sense, repeated anecdotal evidence, and empirical studies, suggest that criminal law's distributive principle for criminal liability and punishment ought to be to maximize the law's

moral credibility with the community, which can generally be done most effectively by having criminal law rely upon rules and policies that track the community's justice judgments, so-called *empirical desert*.¹

Recent events have illustrated some of these effects of reduced moral credibility. Those who believe that police regularly engage in wrongdoing without consequences have expressed their outrage in sometimes violent protest, attacking police and police stations. Those who see these violent protestors as regularly escaping punishment, often with the acquiescence of government officials, have confronted the protesters, sometimes violently. This downward spiral of disillusionment and vigilantism is just one of the mechanisms by which the system's poor reputation for doing justice reduces its crime-control effectiveness.

Some writers have criticized the proposal for a criminal law distributive principle that maximizes moral credibility.² This Article organizes and responds to those criticisms. The proposal and the criticisms of it are of four parts. First, some criticisms challenge the claimed causal connection between a system's reduced moral credibility and people's inclination to comply and defer, issues taken up in Part II. Another kind of criticism challenges the claim that criminal law rules that conflict with community views undermine the system's moral credibility, examined in Part III. A third kind of criticism suggests that it is simply impossible to construct a distributive principle that will minimize conflicts with community views, discussed in Part IV. Part V examines other philosophical, political, and ideological objections that have been offered. Part VI raises what may be the most important point in the debate: even if one could find flaws in the proposed distributive principle of maximizing moral credibility by minimizing criminal law's conflicts with community views – we agree the proposed distributive principle has weaknesses, although not those claimed by its critics – such a distributive principle is still the best available because all alternatives have greater, sometimes disqualifying, flaws. In other words, the greatest strength of moral credibility as a distributive principle may be the weaknesses of all alternatives. Some potential weaknesses of the proposed distributive principle that critics have not raised are offered in Part VII.

¹ PAUL ROBINSON, *INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT* (Oxford 2013); PAUL ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* (Oxford 2008); Paul Robinson & Josh Bowers, *Perceptions of Fairness & Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV., 211 (2012); Paul Robinson, Geoff Goodwin & Michael Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010); Paul Robinson, *Empirical Desert*, in Robinson, Garvey & Ferzan, eds., *CRIMINAL LAW CONVERSATIONS*, 29-39, 61-66 (2009); Paul Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L. J. 145-175 (2008); Paul Robinson & John Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 SOUTHERN CAL. L. REV., 1-67 (2007); Paul Robinson & John Darley, *The Utility of Desert*, 91 NORTHWESTERN U. L. REV. 453 (1998); Paul Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive vs. Normative Crime Control* 86 U.VA. L. REV. 1839-1869 (2000).

² John Rappaport, *Some Doubts About "Democratizing Criminal Justice"* 87 U. CHI. L. REV., 711 (2020); Christopher Slobogin, *Empirical Desert and Preventive Justice: A Comment*, 17 NEW CRIM. L. REV. 376 (2014). Julian Roberts & Jan de Keijser, *Democratizing Punishment: Sentencing, Community Views, and Values*, 16 PUNISHMENT & SOC'Y 474 (2014); Alice Ristroph, *Third Wave Legal Moralism*, 42 ARIZ. ST. L. J. 1151 (2010); Mary Sigler, *The Methodology of Desert*, 42 ARIZ. ST. L. J. 1173 (2010); Mary Sigler, *The False Promise of Empirical Desert*, in Robinson, Garvey & Ferzan, eds., *CRIMINAL LAW CONVERSATIONS*, 39-41 (2009); Adam Kolber, *Compliance-Promoting Intuitions*, in Robinson, Garvey & Ferzan, eds., *CRIMINAL LAW CONVERSATIONS*, 41-43 (2009); Alice Ristroph, *The New Desert*, in Robinson, Garvey & Ferzan, eds., *CRIMINAL LAW CONVERSATIONS*, 45-49 (2009); Adam Kolber, *How to Improve Empirical Desert* 75 BROOK. L. REV. 433 (2009); Deborah Denno, *The Perils of Public Opinion*, 28 HOFSTRA L. REV. 741 (2000); Kenneth Simons, *The Relevance of Community Values to Just Desert: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635 (2000).

II. Moral Credibility and Crime

The first of our claims is that the criminal law's loss of moral credibility with the community that it governs undermines its ability to gain deference, acquiescence, compliance, assistance, and internalization of its norms. Instead, such disillusionment is likely to provoke resistance, subversion, and vigilante action.

A. The Criminogenic Effects of Reduced Credibility

In many ways, the suggestion that criminal law's reduced moral credibility causes reduced compliance is just common sense. If a criminal law is widely viewed as unjust or unwilling to do justice, would we assume that this perception has no effect on the community's deference to that law? In what world would such a poor performance in doing justice – the criminal justice system's announced purpose – be a matter of complete indifference to citizens? And when such disillusionment does set in, do we think people would simply remain as compliant?

1. The Disillusionment-Noncompliance Dynamic in Natural Experiments

But is this commonsense view confirmed by experimental analysis? Not many governments in the world are likely to give the social psychologist experimenter permission to degrade the justness of their criminal justice system to see the resulting rising crime. But there have been a variety of natural experiments in which the criminal justice system's moral credibility has been noticeably degraded, and a corresponding reduction in compliance ensued. Consider a few examples of these natural experiments.

In 1920, Congress prohibited the sale, manufacture, and transportation of alcohol within the U.S. with the passage of the Eighteenth Amendment. Demand for alcohol remained high, however, and illegal stills, bootlegging operations, and speakeasies flourished. When even government officials openly ignored the rules of Prohibition, this overt disrespect for the criminal law reinforced public disillusionment with the Prohibition movement. As trust in the law waned, Americans violated the law to an even greater extent. The disillusionment tainted not only the alcohol prohibition rules but also reduced compliance with criminal law rules unrelated to alcohol.³

An analogous dynamic is seen in widespread resistance to the draft during the Vietnam War, which was enforced by criminal statutes requiring service. Starting in 1964, many young men fled the country or feigned injuries or illnesses in order to avoid service. Many who did not resist were nonetheless highly critical in their view of not only this particular crime – failure to report – but the criminal justice system and the government generally.⁴ This view was supported by a significant portion of the public. Polls showed a society-wide dramatic drop in

³ PAUL ROBINSON & SARAH ROBINSON, PIRATES, PRISONERS, AND LEPERS: LESSONS FROM LIFE OUTSIDE THE LAW 139-163 (2015).

⁴ Ilyana Kuziemko, *Did the Vietnam Draft Increase Human Capital Dispersion? Draft-Avoidance Behavior By Race and Class*, PRINCETON & NBER (Jan. 2010)

<https://www0.gsb.columbia.edu/mygsb/faculty/research/pubfiles/5798/vietnam.pdf>.

trust in government.^{5 6} With this widespread disillusionment, crime rose significantly; crime statistics showed an enormous spike for both crimes of violence and property crimes.⁷ The Vietnam War was seen by many as exposing a moral stain on American institutions that had long been widely trusted and revered. In response to this disillusionment, many people felt free to abandon self-regulating behaviors and to commit crimes.⁸

This same dynamic between the criminal law's credibility and compliance is seen anyone in variety of situations across many different eras and cultures. To give an example with present-day relevance, in 1918, as the Spanish Flu swept through the United States, communities across the country instituted a number of public health measures to slow the spread. Foremost among these was mask wearing.⁹ However, many people were unpersuaded that the inconvenience and the intrusiveness of the government action was justified by its supposed health benefits. When some local governments imposed mandatory mask ordinances and punished those who flouted the law with jail terms and fines,¹⁰ many in the community resisted. The sense that the mask mandates were excessive and the punishments unfair sparked protests *en masse*. In Denver, one local newspaper reported that the order to wear a mask was "almost totally ignored by the people; in fact, the order was a cause of mirth."¹¹ In San Francisco, 2,000 members of the Anti-Mask League held a rally to denounce the mask ordinance.¹² and in Tucson, despite widespread arrests and incarceration, the mask ordinance

⁵ Josh Zeitz, *How Americans Lost Faith in Government*, WASH. POST. (Jan. 30, 2018)

<https://www.washingtonpost.com/news/made-by-history/wp/2018/01/30/how-americans-lost-faith-in-government/>.

⁶ Writing in the New York Review of Books at the time, Hannah Arendt explained, "Truth or falsehood – it does not matter any more, if your life depends on your acting as though you trusted; truth that can be relied on disappears from public life and with it the chief stabilizing factor in the ever-changing affairs of men." Hannah Arendt, *Lying in Politics: Reflections on the Pentagon Papers* N.Y. REV. BOOKS (Nov. 18, 1971)

<https://www.nybooks.com/articles/1971/11/18/lying-in-politics-reflections-on-the-pentagon-pape/>.

⁷ *Crime Rate Up 11% for Nation in 1970* N.Y. TIMES (Sept. 10, 1971)

<https://www.nytimes.com/1971/09/10/archives/crime-rate-up-11-for-nation-in-1970-crime-in-nation-up-11-in-1970.html>.

⁸ Steven Pinker, *Decivilization in the 1960s* 2 HUMAN FIGURATIONS 2 (July 2013)

<https://quod.lib.umich.edu/h/humfig/11217607.0002.206/--decivilization-in-the-1960s?rgn=main;view=fulltext>.

⁹ James Rolph, *Proclamation of Mayor Asks Masks For All*, S.F. CHRONICLE at 8 (Oct. 22, 1918)

<https://quod.lib.umich.edu/f/flu/1620flu.0009.261/1/--proclamation-of-mayor-asks-masks-for-all?rgn=full+text;view=image;q1=conscience%2C+patriotism+and+self-protection+demand+immediate+and+rigid+compliance>.

San Francisco Mayor James Rolph told citizens, "Conscience, patriotism and self-protection demand immediate and rigid compliance;" John Davie, *Wear Mask, Says Law, Or Face Arrest*, OAKLAND TRIB. at 9 (Oct. 25, 1918) <https://quod.lib.umich.edu/f/flu/8540flu.0007.458/1/--wear-mask-says-law-or-face-arrest?rgn=full+text;view=image;q1=Face+Arrest> (Oakland Mayor John Davie explained to his constituents: "It is sensible and patriotic, no matter what our personal beliefs may be, to safeguard our fellow citizens by joining in this practice.")

¹⁰ J. Alexander Navarro, *Mask Resistance During a Pandemic Isn't New – In 1918 Many Americans Were "Slackers"* MICHIGAN HEALTH (Oct. 29, 2020) <https://healthblog.uofmhealth.org/wellness-prevention/mask-resistance-during-a-pandemic-isnt-new-1918-many-americans-were-slackers>.

¹¹ *New Orders Are Issued By Officials in Flu Fight* ROCKY MOUNTAIN NEWS 1, 5 (Nov. 26, 1918)

<https://quod.lib.umich.edu/f/flu/2290flu.0003.922/3/--new-orders-are-issued?page=root;rgn=full+text;size=200;view=image;q1=New+Orders+are+issued>.

¹² *New Cases of Influenza at Low Record* S.F. EXAMINER 12 (Jan. 26, 1919)

<https://quod.lib.umich.edu/f/flu/1320flu.0009.231/1/--new-cases-of-influenza-at-low-record?page=root;rgn=full+text;size=150;view=image;q1=New+Cases+of+Influenza+at+Low+Record>.

was intentionally disregarded.¹³ In Tucson, the local paper declared that the mask ordinance “was incapable of enforcement. No matter how many citizens the city authorities might have taken to the lock-up nor how many fines they imposed, they never could have brought about the general observance of masking.”¹⁴ In fact, irritated as they were by the mask ordinances and their associated criminal penalties, people took more and more liberties, hosting large gatherings, and refusing to wear a mask properly (or refusing to wear a mask at all) even when under the scrutiny of officers.¹⁵ Crimes in other areas of life rose as well; prostitution expanded as did drug consumption, and attacks on immigrants.¹⁶ Without buy-in from the community generally, greater enforcement served only to provoke greater resistance and reduced compliance.

In the 1960s Watts neighborhood of Los Angeles, where violations of the criminal law were increasingly met with charges and sentences that seemed to residents grossly disproportionate, the aggressive policing and punishment did not reduce crime, as intended, but rather increased it,¹⁷ as the criminal law’s credibility within the neighborhood increasingly weakened. (In August 1965, this tension came to a boiling point after a Watts resident’s violent encounter with the police inspired the community to take to the streets. An official investigation of the Watts riots conducted by the California Governor found that the riot was a result of the Watts community’s long-growing grievances and discontent with criminal law enforcement.¹⁸)

In Gilded Age New York City. At the end of the 19th century, the legislative process in New York City was notoriously corrupt: even valuable and legitimate legislation could not be passed unless the right political players were paid off.¹⁹ The result was a criminal law that simply failed to address the full range of conduct that social mores at the time saw as condemnable, such as abortion, gambling, and pornography.²⁰ As the criminal law came to be

¹³ Bradford Luckingham, *To Mask or Not to Mask: A Note on the 1918 Spanish Influenza Epidemic in Tucson* 25 J. OF ARIZ. HIST. 191, 200 (1984).

¹⁴ *Id.* at 201-202

¹⁵ *Id.* at 202

¹⁶ DAVID BLANKE, *THE 1910S* (2002).

¹⁷ See James Queally, *Watts Riot: Traffic Stop Was the Spark that Ignited Days of Destruction in L.A.* L.A. TIMES (July 29, 2015) <https://www.latimes.com/local/lanow/la-me-ln-watts-riots-explainer-20150715-htlstory.html> (explaining that “Anger and distrust between Watts’ residents, the police, and city officials had been simmering for years” and that many Watts residents suggested that the “riot had been triggered by long-smoldering resentment against alleged police brutality”); see also Elizabeth Hinton, *From the War on Poverty to the War on Crime* 108 (arguing that “haphazard, undisciplined, and aggressive police response only spawned an ever-more-violent reaction” and police warned that aggressive policing had backfired by “starting guerilla war in the streets”).

¹⁸ *Watts Riot*, CIV. RIGHTS DIGITAL LIB. (last modified Jan. 7, 2021) http://crdl.usg.edu/events/watts_riots/?Welcome.

¹⁹ Lincoln Steffens, *The Shame of the Cities* 34 (1904) Lincoln Steffens’ essays on corruption in *McClure’s Magazine* painted a dismal picture of a political system hanging to credibility by a thread. Discussing the rampant rent-seeking practices to get legislation passed, Steffens wrote, “As there was a scale for favorable legislation, so there was one for defeating bills. It made a difference whether the privilege asked was legitimate or not. But nothing was passed free of charge.”

²⁰ Charles Ellwood, *Has Crime Increased in the United States Since 1880?* 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 378, 378 (1910);

seen as increasingly out of touch with community norms, crime increased.²¹ Street gangs proliferated and even shoplifting among middle-class women rose.²²

In divided Berlin at the beginning of the Cold War, Berlin was divided into occupation zones controlled by the U.S., Great Britain, and France – the Allied Sectors – and the Soviet Union – East Berlin. In 1948, after negotiations between the allies and the Soviets broke down, the Soviets restricted the delivery of food, coal, and other crucial supplies into the Allied Sectors and controlled distribution within East Berlin according to political ideology.²³ Only those who professed allegiance to the Kremlin received provisions.²⁴ The restrictions created a thriving black market, which the Soviets worked to prevent with increasingly harsh penalties for unauthorized dealings.²⁵ These penalties were enforced by police officers who were chosen because of their “political reliability” – their commitment to the Kremlin – rather than professional competence.²⁶ In that sense, the laws could never be seen as fair, neutral, or unpolitical.²⁷ But as the penalties for such offenses went up, the stigma surrounding such lawbreaking went down and lawbreaking actually increased.²⁸ These small acts of resistance aimed not only to secure sustenance for Berliners but also to signal that Soviet justice system was no longer seen as morally credible.²⁹ After all, black market dealing was to some extent an ideological threat to the Soviet political project, exemplifying free market enterprise in no uncertain terms.³⁰ Despite the greater scarcity in the Allied Sectors, East Berliners increasingly escaped to West Berlin, in part because they felt they could better trust the government and

²¹ Daniel Czitron, *New York Exposed: The Gilded Age Police Scandal That Launched the Progressive Era* 88, 246-247 (2016); Elizabeth Garner Mazerick, *Selling Sex: 19th Century New York City Prostitution and Brothels* THE DIG (Sept. 3, 2017) <https://digpodcast.org/2017/09/03/19th-century-new-york-city-brothels/>; NEW YORK: ART AND CULTURAL CAPITAL OF THE GILDED AGE 211 (Laster & Bruner eds., 2018) (explaining that despite the strenuous efforts of social reformers, “pornography constituted an insistent part of Gilded Age visual culture”).

²² Dan Herbeck, *Crime was Rampant and Routine in 19th Century New York City*, THE BUFFALO NEWS (Feb. 10, 1991) https://buffalonews.com/news/crime-was-rampant-and-routine-in-19th-century-new-york-city/article_bee1c130-9005-5c8e-9443-a3188c1bb889.html; HERBERT ASBURY, *THE GANGS OF NEW YORK* 64, 232 (Vintage, 2008); ELAINE ABELSON, *WHEN LADIES GO A-THIEVING: MIDDLE CLASS SHOPLIFTERS IN THE VICTORIAN DEPARTMENT STORE* (1989).

²³ PAUL STEEGE, *BLACK MARKET, COLD WAR: EVERYDAY LIFE IN BERLIN, 1946-1949* 33 (2007); Katie Lange, *The Berlin Airlift: What It Was, Its Importance in the Cold War* U.S. Dept. of Defense (June 25, 2018) <https://www.defense.gov/Explore/Inside-DOD/Blog/Article/2062719/the-berlin-airlift-what-it-was-its-importance-in-the-cold-war/>.

²⁴ MALTE ZIERENBERG, *BERLIN’S BLACK MARKET 1939-1950* 127-186 (2015); MARK FENEMORE, *FIGHTING THE COLD WAR IN POST-BLOCKADE, POST-WALL BERLIN* Ch. 6 - Ch. 7 (2019)

²⁵ Thesis of Alice Autumn Weinreb, *Matters of Taste: The Politics of Food and Hunger in Divided Germany 1945-1971* U. MICH. DEPT. OF HIST. 100-101 (2009) (“The remarkable scale of bartering, stealing, and gathering food stuffs throughout all four zones, and especially the almost universal participation in the black market, make clear that the rationing calories allotted German civilians were not the population’s only source of sustenance”).

²⁶ Richard Bessel, *Policing in East Germany in the Wake of the Second World War* 7 POLICING AND SOCIETY 1, 11; 14 (2003) (“The unpopularity of the police is not accounted for only by unsatisfactory personnel policies, social difficulties and shortcomings...but also has its causes in the present-day economic situation of the population. The police very frequently are compelled to intervene against small-scale hoarders who are trying to improve their diet by buying additional food...these measures by the police are regarded as unjust”).

²⁷ *Id.* at 19.

²⁸ ANDRIE CHERNY, *THE CANDY BOMBERS: THE UNTOLD STORY OF THE BERLIN AIRLIFT AND AMERICA’S FINEST HOUR* 434 (2008); Steege *supra* note 23 at 185.

²⁹ *Id.*; See also Steege *supra* note 23 at 14 (Explaining that economic crimes were situated at “the intersection of competing senses of entitlement, justice, legitimacy, and power that were all bound up with the daily struggle to meet individual supply needs”).

³⁰ Bessel *supra* note 26 at 14.

police.³¹ Under a justice system they perceived as more trustworthy, escaped East Berliners committed less crime.³²

2. Disillusionment Expressed as Vigilantism

Frequently the disillusionment-induced lawlessness takes the form of vigilantism. As noted previously, current events illustrate this point. For example, many people saw the death of George Floyd, who was suffocated when an officer placed his knee on Floyd's neck during his arrest, as symptomatic of the criminal justice system's indifference to police wrongdoing against Blacks. Two activists summarized this view succinctly in a New York Times op-ed after Floyd's death, writing, "The problem is that the entire criminal justice system gives police officers the power and opportunity to systematically harass and kill with impunity."³³ In the weeks that followed, police in many cities were targeted, including, for example, eleven St. Louis police officers who were shot at in five separate attacks.³⁴ In Seattle, protesters attacked and firebombed a police station.³⁵ In Compton, California, a man ambushed two officers who were sitting in their patrol car, shooting them both and injuring them severely.³⁶ And in Los Angeles, a man walked into a police station and began firing wantonly at officers after pretending to seek assistance.³⁷

But the same vigilante impulse is not limited to those who distrust the justice system for its perceived lawlessness; those who believe that the system to often tolerate lawlessness also have resorted to vigilante violence. For example, in the aftermath of Floyd's death, several hundred protesters marching to the mayor's house in St. Louis broke down a gate and trespassed on the property of Mark and Patricia McCloskey. Police and prosecutors had ignored many previous violent protests and did nothing to intervene on this occasion.³⁸ The McCloskeys took it upon themselves to confront the group, he with an assault rifle and she with a

³¹ Leslie Colitt, *Escape From East Berlin* GUARDIAN (Aug. 16, 2011)

<https://www.theguardian.com/world/2011/aug/16/escape-from-east-berlin>.

³² CHERNY *supra* note 26 at 475; Steege *supra* note 23 at 233; Mary Fulbrook, *The State and the Transformation of Political Legitimacy in East and West Germany Since 1945* 29 COMP. STUDIES IN SOCIETY & HIST. 211, 214-230 (1987).

³³ Philip McHarris & Thenjiwe McHarris, *No More Money for the Police* N.Y. TIMES (May 30, 2020)

<https://www.nytimes.com/2020/05/30/opinion/george-floyd-police-funding.html>.

³⁴ Christine Byers, "Nobody's Safe in this City Right Now": Six Police Officers Shot in St. Louis This Summer KSDK (Aug. 3, 2020) <https://www.ksdk.com/article/news/crime/st-louis-police-officers-shot-summer-2020/63-d01a9932-4769-47dc-9fa5-55283c1dd97c>;

Jim Salter, *Police: 4 St. Louis Officers Hit by Gunfire During Protests* ASSOC. PRESS (Jun. 2, 2020), <https://www.fultonsun.com/news/local/story/2020/jun/02/missouri-protests-remain-tense-in-kansas-city-st-louis/829410/>.

³⁵ Tammy Mutasa, *Seattle Rioters Caught on Camera Trying to Trap Police in East Precinct, Set it on Fire*, KOMO NEWS REPORTER (Aug. 26th 2020) <https://komonews.com/news/local/police-spokesperson-accuses-rioters-of-attempted-murder-for-trying-to-barricade-officers>.

³⁶ Elliot McLaughlin & Cheri Mossburg, *Police Identify and Charge Man With Shooting Two Deputies, and He Was Already in Custody* CNN (Sept. 30, 2020) <https://www.cnn.com/2020/09/30/us/deonte-murray-compton-deputies-shooting-suspect-arrest/index.html>.

³⁷ Madeline Holcombe, *LAPD Officer Injured After Shooting at Harbor Station* CNN (Sept. 27, 2020)

<https://www.cnn.com/2020/09/27/us/lapd-harbor-shooting-officer-injured/index.html>.

³⁸ Christine Byers, *Charges Filed Against McCloskeys, St. Louis Couple Who Pointed Guns Toward Protesters*,

ST. LOUIS PUBLIC RADIO, (July 20, 2020), <https://news.stpublicradio.org/politics-issues/2020-07-20/charges-filed-against-mccloskeys-st-louis-couple-who-pointed-guns-toward-protesters>.

(On the decision to charge the McCloskeys, St. Louis Circuit Attorney said: "We must protect the right to peacefully protest, and any attempt to chill it through intimidation will not be tolerated").

semiautomatic handgun. They were charged with unlawful use of a weapon.³⁹ Similarly, 17-year-old Kyle Rittenhouse went to Kenosha to help protect a business that had been previously damaged by violent protesters because police and prosecutors had failed to act to prevent the violent protests.⁴⁰ He took with him his AR-15 assault rifle, and shot and killed two people after they tried to wrestle his rifle out of his hands.⁴¹ Rittenhouse was charged with, among other things, first-degree intentional homicide.⁴²

3. Empirical Studies Showing the Disillusionment-Noncompliance Dynamic

But one need not rely simply on common sense and anecdotal evidence to see the disillusionment-lawlessness connection. The dynamic is confirmed by controlled social psychology studies. The research suggests that the relationship between moral credibility and community deference and compliance is widespread and nuanced. Even small incremental losses in moral credibility can produce corresponding incremental losses in deference and compliance.⁴³

Consider, for example, a study using a within-subjects design in which subjects were asked a number of questions relating to various ways in which moral credibility is thought to affect deference, compliance, and the internalization of the law's norms. Will a citizen assist police by reporting a crime? Will they assist in the investigation and prosecution of a crime? Do people take the imposition of criminal liability and punishment as a reliable sign that the defendant has done something truly condemnable? Do people take the extent of the liability imposed as a reliable indication of the seriousness of the offense and the blameworthiness of the offender? With a baseline established on these issues, subjects were then disillusioned by exposing them to accounts of the system's failures of justice and perpetrations of injustice. Later retesting showed that the measures of deference, compliance, and internalization of norms had all decreased among the disillusioned subjects.⁴⁴

A follow-up study used a between-subjects design, giving different levels of disillusionment to three different groups and then testing their levels of deference, compliance, and internalization.⁴⁵ The results confirm the conclusions of the earlier within-subjects design: The greater the disillusionment, the greater the loss in deference, compliance, and

³⁹ Jessica Lussenhop, *Mark and Patricia McCloskey: What Really Went On in St. Louis That Day?* BBC News (Aug. 25, 2020) <https://www.bbc.com/news/election-us-2020-53891184>; <https://www.bbc.com/news/election-us-2020-53891184>.

⁴⁰ Pauleen Le, *Fires, Chaos Erupts in Kenosha for a Second Night Following Jacob Blake Shooting*, CBS58 (Aug. 25, 2020) <https://www.cbs58.com/news/fires-chaos-erupts-in-kenosha-in-second-night-following-jacob-blake-shooting>.

⁴¹ Minyvonne Burke, *Kyle Rittenhouse, Charged with Killing Two Kenosha Protesters Has Bond Set at \$2M* NBC NEWS (Nov. 3, 2020) <https://www.nbcnews.com/news/us-news/kyle-rittenhouse-charged-killing-2-kenosha-protesters-has-bond-set-n1245953>.

⁴² Akane Otani, *Who is Kyle Rittenhouse and What Happened in the Kenosha Shootings?*, W.S.J. (Aug. 29, 2020) <https://www.wsj.com/articles/who-is-kyle-rittenhouse-and-what-happened-in-the-kenosha-shootings-11598653456>; Yael Halon, *Tucker Carlson Tonight Airs Never-Before-Seen Footage From Deadly Kenosha Shooting* FOX NEWS (Sept. 22, 2020) <https://www.foxnews.com/media/kenosha-shooting-new-footage-kyle-rittenhouse-tucker>.

⁴³ ROBINSON (2013) *supra* note 1; Paul Robinson, Geoff Goodwin & Michael Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010).

⁴⁴ *Id.*

⁴⁵ *Id.*

internalization. A third study analyzing responses in pre-existing large datasets came to a similar conclusion using regression analysis.⁴⁶

The results in the studies are particularly striking because in each case, subjects came to the study with pre-existing views on the system's reputation for being just. The experimenters, within the context of the study, could only nudge those pre-existing views slightly. Yet even that incremental disillusionment produced corresponding incremental reductions in deference and compliance. This is a particularly important finding because it means that no matter the current state of a criminal justice system's moral credibility with the community, any incremental reduction in credibility can produce an incremental reduction in deference – and any increase can produce an increase in deference. Many other studies document the same point.

A 2002 study on the *flouting thesis* – the idea that the perceived justice of one law can influence compliance with unrelated laws – found that rules regarded as unjust have “subtle but pervasive influences on people's deference to and respect for the law.”⁴⁷ The experiment consisted of two parts. First, participants were exposed to a set of laws, which were chosen because of their apparent justness or unjustness.⁴⁸ Exposure was conducted via newspaper stories, which varied in their discussion of civil forfeiture, income tax, and landlord/tenant laws so as to emphasize the fairness or unfairness of the proposed laws.⁴⁹ Next, participants were told that they would be participating in a separate study in which they were asked to indicate their willingness to engage in particular types of future law breaking.⁵⁰ These items included drunk driving, parking in a no-parking zone, failing to pay taxes, and drinking alcohol under age 21.⁵¹ Non-compliance in the second study served as an indication of so-called “flouting” behavior.⁵² The study found that there was an overall trend for participants primed with unjust laws to demonstrate a higher probability of engaging in criminal behavior.⁵³ That is, perceptions of an unjust law activated a more general attitude about the unjustness of the legal system, but this remained on an unconscious basis.⁵⁴

A 2007 study using data from the European Union found that social willingness to comply with the law has significant positive effects on controlling traffic fatalities, outweighing even the influence of traffic exposure, speed, and alcohol consumption.⁵⁵ The authors examined road safety data from 15 European countries and modeled the number of fatalities in terms of social willingness to comply, controlling for factors such as traffic exposure, vehicle fleet characteristics, road infrastructure and economic conditions, population characteristics and road user behavior.⁵⁶ The authors found that social legitimacy is “a *sine qua non* for effective road safety policy because lack of public support will lead to insufficient willingness to comply and, in turn, more traffic fatalities.”⁵⁷ Regardless of the specific content of the country's

⁴⁶ *Id.*

⁴⁷ Janice Nadler, *Flouting the Law: Does Perceived Injustice Provoke General Non-Compliance?* NORTHWESTERN L. & ECON. RESEARCH PAPER SERIES, No. 02-09 3 (2002). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=353745

⁴⁸ *Id.* at 9.

⁴⁹ *Id.* at 11.

⁵⁰ *Id.* at 9.

⁵¹ *Id.* at 12.

⁵² *Id.* at 9.

⁵³ *Id.* at 14.

⁵⁴ *Id.* at 28.

⁵⁵ Lode Vereeck & Klara Vrolix, *The Social Willingness to Comply with the Law: The Effect of Social Attitudes on Traffic Fatalities* 27 INT'L REV. OF L. & ECON. 385 (2007).

⁵⁶ *Id.* at 398.

⁵⁷ *Id.* at 402.

traffic laws, the law-abiding behavior of drivers was found to have a positive, measured effect on traffic fatalities.⁵⁸ “The core idea of our paper is that social norms prevail over laws,” the authors explained.⁵⁹ That is, the public’s allegiance to the law writ large – evidenced by their willingness or unwillingness to comply with the law – was simply more important than the effectiveness or ineffectiveness of specific traffic laws.⁶⁰

A 2008 study of Swedes assessed whether there was a correlation between low institutional trust and illegal alcohol consumption.⁶¹ Alcohol consumption is a hotly contested topic in Sweden, and the Swedish national parliament has passed several laws intended to limit alcohol consumption. Sweden also has a state monopoly over alcohol sales. The authors of the study hypothesized that lower institutional trust “may be associated with high alcohol consumption” because “public institutions in Sweden are consistent and coherent in the way they view aspects such as high alcohol consumption.”⁶² The researchers asked respondents about their drinking habits probed their trust in various societal institutions. The results showed that lack of trust was associated with increased likelihood of harmful alcohol consumption. High trust in institutions, on the other hand, was correlated with a greater inclination to follow the advice of public officials, to trust in experts, and with steps to limit their own alcohol consumption.⁶³ Ultimately, the study showed that those who do not doubt a particular institution’s legitimacy are more likely to heed that institution’s rules and recommendations.

A 2003 study on the reasons why taxpayers obey, rather than simply evade taxes, found that trust in the legal system had a strong effect on compliance.⁶⁴ Based on survey data from Europe, the study’s authors asked respondents to rank whether they thought that cheating on taxes was “always justified,” “never justified,” or one of several options in the middle.⁶⁵ They were also asked to rank how much confidence they had in the legal system on a scale of “a great deal of confidence,” “no confidence,” or somewhere in between.⁶⁶ The study’s authors found that a perception of legitimacy in the legal system had a highly significant effect on so-called “tax morale.”⁶⁷ In fact, an increase in the trust scale of just one unit, increased the subjects’ likelihood to find cheating on taxes to be unjustified by 3.5 percentage points.⁶⁸ “Trust in the legal system leads to acceptance of governments’ decisions and produces the incentive to obey the rules,” the authors found.⁶⁹ Furthermore, where the public believed that officials were honest and competent – measured by their ranking of agreement with the statement “Public officials can usually be trusted to do what’s right” – willingness to comply with tax payments increased further.⁷⁰ Ultimately, the study suggested that rather than focusing on enforcement, governments concerned with cultivating “tax morale” should try to create confidence in the legal system and in the trustworthiness and capacity of tax officials.

⁵⁸ *Id.* at 386.

⁵⁹ *Id.* at 402.

⁶⁰ *Id.*

⁶¹ Johanna Ahnquist et al., *Institutional Trust and Alcohol Consumption in Sweden: The Swedish National Public Health Survey 2006*, 8 BMC PUBLIC HEALTH 283 (2008).

⁶² *Id.* at 284.

⁶³ *Id.* at 290.

⁶⁴ Benno Torgler, *Tax Morale, Rule Governed Behavior and Trust* 14 CONST. POL. ECON. 119 (2003).

⁶⁵ *Id.* at 134.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 137.

⁶⁹ *Id.*

⁷⁰ *Id.*

A 2009 study used survey data from a number of African countries to model the relationship between perceptions that a government was fair and trustworthy and beliefs that such a government deserves deference to its rules.⁷¹ The authors focused on those factors that they believed would induce “voluntary deference to the directives of authorities and rules precisely because they are believed legitimate.”⁷² The data used in the study was collected through a survey of more than 23,000 respondents across 18 countries modeled in an effort to capture citizens’ legitimating beliefs in terms of their willingness to obey the police, courts, and the tax department.⁷³ The survey asked respondents the degrees to which they believed administrators were corrupt, authorities were capable of detecting and punishing crime, and the government treated citizens fairly.⁷⁴ Standard sociodemographic variables that can affect citizens’ acceptance of government authority were controlled for, including age and household income.⁷⁵ The authors found considerable evidence of a link between the perceived trustworthiness of government and criminal justice mechanisms and citizens’ willingness to defer to these institutions.⁷⁶ The results indicated that “the more trustworthy and fair the government, the more likely its population will develop legitimating beliefs that lead them to accept the government’s right to make people obey its laws and regulations.”⁷⁷

Notice that these last several studies tested not only the effect of people’s perceptions of the justness of the criminal law’s rules and dispositions but also its fairness in adjudicating cases and the trustworthiness and legitimacy of the government generally. There exists a separate literature on the latter, the fairness of the process (apart from the justness of the results). Natural experiments and empirical studies on these issues are relevant to our present purpose because they confirm that the criminal justice system’s reputation can have significant real-world effects in gaining compliance. Consider some of the evidence supporting this conclusion.

4. Natural Experiments on Law Enforcement Legitimacy and Compliance

There exists a host of natural experiments demonstrating the connection between compliance and a criminal justice system’s reputation for law enforcement legitimacy. Consider several examples.

The relationship between the police and the public in Nigeria presents something of an extreme case of unprofessional policing leading to diminished compliance. The police in Nigeria have been notoriously corrupt since the turn of the 21st century.⁷⁸ According to several reports, the Nigerian police often extort money from the public at taxi stands, marketplaces, and roadblocks. When citizens fail to pay the bribes, they are sometimes beaten, sexually assaulted,

⁷¹ Margaret Levi et al., *Conceptualizing Legitimacy, Measuring Legitimizing Beliefs* 53 AM. BEHAVIORAL SCIENTIST 354 (2009).

⁷² *Id.* at 355.

⁷³ *Id.* at 361.

⁷⁴ *Id.* at 362.

⁷⁵ *Id.* at 363.

⁷⁶ *Id.* at 367.

⁷⁷ *Id.*

⁷⁸ *Everyone’s In On the Game: Corruption and Human Rights Abuses by the Nigeria Police* HUMAN RIGHTS WATCH (Aug. 17, 2010) <https://www.hrw.org/report/2010/08/17/everyones-game/corruption-and-human-rights-abuses-nigeria-police-force#>.

or shot. Further, the police often neglect to perform their basic duties unless they are bribed.⁷⁹ Crimes are not investigated unless the victim is able to persuade the police to act. Officers at the upper echelons of the police force are widely known to siphon off significant portions of public funds for their personal uses.⁸⁰ A survey of Nigerian public opinion regarding police legitimacy found that a plurality of Nigerians expressed having “no confidence” in the police.⁸¹ Another found that Nigeria is plagued by “low levels of citizen cooperation with the police”⁸² and “a loss of confidence of the common man in the criminal justice system.”⁸³ Interviews reflected widespread distrust of the Nigerian police. One woman reported, “Any witness or crime victim who approaches the police without bearing in mind their lack of integrity and possible complicity in crime may end up becoming the criminal. The police doubt everything about you.”⁸⁴ As a result of this distrust, crime throughout Nigeria has increased. Analyses of crime data between 1999 and 2013 show that murder, armed robbery, and assault have increased dramatically during this period even as the Nigerian police have received more and more resources from the state.⁸⁵ In fact, some members of the Nigerian public have taken the law into their own hands by lynching suspects of crimes or by flouting the law altogether with shoplifting, car thefts, fraud schemes, and computer crimes.⁸⁶ Ultimately, crime has only become more widespread and more diverse in Nigeria as the police have become more corrupt, unprofessional, and ineffective in their practices.

After the shooting of Michael Brown in Ferguson, Missouri, an investigation found that Ferguson’s policing practices led to distrust and resentment among many in the Ferguson community, which is 67 percent African American. The report explained, “African Americans’ views of FPD are shaped not just by *what* FPD officers do, but *how* they do it.” Dozens of Ferguson residents told of officers cursing at them, verbally harassing them, and randomly brandishing their weapons in threatening ways.⁸⁷ Crime rates in Ferguson rose precipitously after the shooting. While some of this may have been due to reduced police intervention, the so-called “Ferguson effect,” one study suggests that a major contributor was the dramatic loss in police legitimacy crystallized by the Michael Brown killing and the protests that followed it.⁸⁸

⁷⁹ *In Nigeria, Majority of Police Encounters Marked by Bribery, Difficulty Getting Assistance, Survey Shows* AFRO BAROMETER (Oct. 16, 2020) <https://www.afrobarometer.org/press/nigeria-majority-police-encounters-marked-bribery-difficulty-getting-assistance-survey-shows>.

⁸⁰ HUMAN RIGHTS WATCH *supra* note 72.

⁸¹ Johnson Oluwole Ayodele & Adeyinka Abideen Aderinto *Public Confidence in the Police and Crime Reporting Practices of Victims in Lagos, Nigeria: A Mixed Methods Study* 9 INT’L J. OF CRIM. JUST. SCI. 46, 54 (2014).

⁸² CRIME AND CONTROL IN COMPARATIVE PERSPECTIVES 165 (Heiland et al., eds. 1991).

⁸³ *Id.* at 182.

⁸⁴ Ayodele & Aderinto *supra* note 75 at 56.

⁸⁵ Pelumi Oguntunde et al., *Analysis of Selected Crime Data in Nigeria* 19 DATA IN BRIEF 1242, 1245 (2018).

⁸⁶ Heiland et al. at 13.

⁸⁷ *Id.* at 79-80.

⁸⁸ Juleyka Lantigua Williams, *Has the “Ferguson Effect” Finally Been Debunked?* THE ATLANTIC (Sept. 29, 2016)

<https://www.theatlantic.com/politics/archive/2016/09/has-the-ferguson-effect-finally-been-debunked/502265/>; Matthew Desmond et al., *Police Violence and Citizen Crime Reporting in the Black Community* 81 Am. Sociological Rev. 857, 865 (2016) (finding that 911 calls drop after reports of police brutality); Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance* PEW RESEARCH CENTER (Sept. 29, 2016) <https://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/> (survey of Americans conducted just after the shooting of Brown found that just 14% of blacks say that they have a lot of confidence in their local police and less than half of blacks said they had at least some confidence in the courts in their community).

A loss of reputation of the criminal justice system can undermine compliance even when that loss stems from a perception of governmental illegitimacy apart from unfair criminal justice adjudication procedures or unprofessional police. Consider several natural experiments.

In 2003, then Mexico City mayor Manuel Lopez Obrador and billionaire Carlos Slim combined efforts to reduce crime in one of Mexico City's most notoriously lawless neighborhoods called Tepito.⁸⁹ The pair invested millions in surveillance technology and increased policing in order to curb the violence, drug trafficking, and sale of stolen or counterfeit goods.⁹⁰ Most notably, they relied on the help of a former New York City mayor whose private security firm provided high definition "hawkeye" surveillance cameras to monitor the goings on of the neighborhood and employed former New York City Police Department officers to train their Mexican counterparts.⁹¹ Residents of the neighborhood, including those who were not involved in any sort of criminal group, resisted. Feeling as though they were being policed by Americans, as opposed to their own countrymen, they viewed the neighborhood's security system as wholly illegitimate.⁹² In 2004, crime in the area increased by 25 percent.⁹³ Tepitans took part in a variety of activities that actively interfered with the new police procedures. Eventually, the Mexican government realized that the perceived illegitimacy of their new enforcement mechanisms was doing more harm than good and decided to sever ties with the American security personnel.⁹⁴

Similarly, consider the experiences of various Native American tribes whose tribal justice systems conflicted with the federal criminal justice system. The federal government had previously allowed tribes to have criminal justice jurisdiction on their reservations,⁹⁵ but in 1953 Congress passed Public Law 280 allowing states to decide whether to assume complete or partial jurisdiction over crimes by or against Native Americans on reservations.⁹⁶ The law was viewed as an affront to tribal sovereignty, failing to recognize Native Americans' status as members of domestic sovereign nations, and stifling the effectiveness of tribal courts.⁹⁷ Over the following decades, Native Americans developed increasingly negative views of the non-Native American criminal justice system, stemming from widespread distrust of the instruments

⁸⁹ Ibsen Martinez, *Tepito's Way* LIB. OF ECON. & LIBERTY (Oct. 3, 2005)

<https://www.econlib.org/library/Columns/y2005/MartinezTepito.html>.

⁹⁰ Diane E. Davis, *Zero Tolerance Policing, Stealth Real Estate Development, and the Transformation of Public Space: Evidence from Mexico City*, 40 LATIN AMERICAN PERSPECTIVES 53, 56 (2013).

⁹¹ *Id.* at 57-61.

⁹² Yustil Cruz Hernandez & Alfonso Hernandez, *The Obstnacy of Tepito* 6 SCAPEGOAT 167 (accessed Jan. 18, 2021)

http://www.scapegoatjournal.org/docs/06/Scapegoat_06_Hernandez%20and%20Hernandez_The%20Obstnacy%20of%20Tepito.pdf (In a study of the neighborhood's residents conducted in 2011, researchers found that a whopping 97 percent of residents believed that the police were not a "socially legitimate" force); Aurea Esther Grijalva Eternod & Esther Fernandez Molina, *Effects of Corruption and Mistrust in Police on Fear of Crime: An Exploratory Study in Mexico* 62 REV. MEX. POL. & SOC. SCI. 231 (Dec. 2017)

http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S0185-19182017000300167

⁹³ Davis *supra* note 84 at 71, fn 1.

⁹⁴ *Id.* at 70.

⁹⁵ Barbara Perry, *Impacts of Disparate Policing in Indian Country*, 19 POLICING & SOCIETY 263, 269 (2009) (explaining that between 1823 and 1832, the Supreme Court decided *The Marshall Trilogy*, a series of cases which determined that Native American tribes are domestic, dependent nations over whom state laws can have no force).

⁹⁶ Carole Goldberg & Heather Valdez Singleton, *Public Law 280 and Law Enforcement In Indian Country* NIJ RESEARCH IN BRIEF (Dec. 2005) <https://nij.ojp.gov/library/publications/public-law-280-and-law-enforcement-indian-country-research-priorities-research>.

⁹⁷ UCLA American Indian Studies Center *Public Law 280 and the Breakdown of Law in California Indian Country* in XI. FUNDING INEQUITY AND CALIFORNIA'S SPECIAL LEGAL STATUS <https://www.aisc.ucla.edu/ca/Tribes11.htm>

of justice implemented by the federal government.⁹⁸ As views became more negative, crime soared.⁹⁹

The situation of Northern Ireland in the 1970s provides another example of the connection between perceived legitimacy and increased crime. As tensions rose between Catholics who wanted a united Ireland, and Protestants who claimed allegiance to the United Kingdom, violence escalated.¹⁰⁰ In 1972, the British government suspended the Northern Ireland parliament and instituted direct rule from the U.K., replacing Irish criminal justice policies with their own. Law enforcement powers were expanded enormously, allowing for the indefinite detention of suspects without trial, juryless courts in cases of alleged terrorism, and increased police and army powers. The British police force, the Royal Ulster Constabulary, was widely perceived as unfairly partial to Protestant Loyalists and unaccountable to, and discriminatory against, Catholic Unionists. As two criminologists observed, “the costs in terms of negative effects on public trust in British institutions have been incalculable.”¹⁰¹ Politically motivated crimes increased with the rise in political tensions, but so did crimes unrelated to political action. As a result of this perceived illegitimacy, throughout the 1970s, the levels of recorded crime increased nearly sixfold.¹⁰² Murders rose rapidly, but property crime increased at an even higher rate during this period.¹⁰³ The burglary rate increased by a factor of fifteen, and drug dealing rose exponentially.¹⁰⁴ As the Irish populace became more disaffected and distrusting of the influence of the Royal Ulster Constabulary, they expressed their disillusionment by – among other things – committing more crime.¹⁰⁵

5. Empirical Studies on the Law Enforcement Legitimacy-Compliance Dynamic

But one need not rely only on these natural experiments for evidence of the connection between criminal justice legitimacy and compliance, for there is also a strong body of empirical evidence in support.

Most compelling here is the work of Tom Tyler.¹⁰⁶ Fair adjudication rules and police professionalism promote what he terms the criminal justice system’s “legitimacy,” as opposed to the justness of the liability and punishment rules that promote what Robinson calls the

⁹⁸ Kevin K. Washburn, *American Indians, Crime, and the Law* 104 MICH. L. REV. 709, 728, 736 (2009) (explaining that non-native prosecutors are seen as lacking the moral authority to act on behalf of the community and incapable of acting with community values in mind: “given the long history of federal-tribal relations, the federal prosecutor simply may not be anyone whom the community has any reason to trust”).

⁹⁹ DAVID LESTER, CRIME AND THE NATIVE AMERICAN 26-28 1999; Larry EchoHawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?* 5 N.Y.U. J. LEGIS. & PUB. POL’Y 83, 99 (2001) “Many Indians distrust the legal and social authorities that could be most helpful to them because of past experiences of unjust treatment”).

¹⁰⁰ NICOLA CARR, THE CRIMINAL JUSTICE SYSTEM IN NORTHERN IRELAND 2-3 (2017).

¹⁰¹ THE OXFORD HANDBOOK OF CRIMINOLOGY 127 (Maguire et al. eds., 1997).

¹⁰² Aogán Mulcahy, *The Impact of the Northern ‘Troubles’ on Criminal Justice in the Irish Republic* 280 in CRIMINAL JUSTICE IN IRELAND (O’Mahony ed., 2008).

¹⁰³ John Brewer et al., *Crime in Ireland Since the Second World War* 27 J. Statistical & Social Inquiry Society of Ireland 135, 144 (1996).

¹⁰⁴ Mulcahy *supra* note 96 at 282.

¹⁰⁵ Thesis of John Charles Murray, *Born of the Troubles: Lessons in Trust and Legitimacy From the Police Service of Northern Ireland* 53-54 Naval Postgraduate School (Dec. 2017).

¹⁰⁶ See TOM TYLER, WHY PEOPLE OBEY THE LAW 57 (2006); Tom Tyler, *Enhancing Police Legitimacy*, 593 ANNALS OF THE AMERICAN ACADEMY OF POL. AND SOCIAL SCI. 84, 95 (2004); TOM TYLER & YUEN HUO, TRUST IN THE LAW 101 (2002).

system's "moral credibility."¹⁰⁷ The two sorts of claims are analogous in that they both suggest that the criminal justice system's reputation can have real world effects on compliance rates.¹⁰⁸

Tyler and a colleague found that people were willing to voluntarily accept the decisions of judges where those decisions appeared both neutral and respectful.¹⁰⁹ If the decision-making process appeared to lack bias, focus on objective facts, recognize citizen rights, and treat people with dignity, then people were more likely to defer to the decisions of legal authorities. "People depend heavily upon their inferences about the intentions of the authority," the authors wrote. "If the authorities are viewed as having acted out of a sincere and benevolent concern for those involved, people infer that the authorities' actions were fair."¹¹⁰

Similarly, Tyler has found that law-abiding behavior can be encouraged where police exercise their authority over citizens through fair processes and with appropriate respect. In a study of adults in Chicago, for example, Tyler assessed the independent impact on compliance of people's perceptions of a variety of factors, including felt obligation to obey the law and allegiance to, or support for, the relevant authority.¹¹¹ These two factors – which roughly encapsulated perceived legitimacy of the justice system – were the single most important determinants in people's deference to the law. Similarly, in a study of 1,656 adults in Oakland and Los Angeles, Tyler found that 30 percent of the variance in subjects' overall assessment of the justice system's legitimacy was derived from perceptions of their own interactions with the police. Ultimately, both studies suggest that the divergence between people's perceptions of how the police should act versus their perceptions of how the police actually act is one of the most important indicators of law-abiding behavior.^{112 113}

This same effect is seen cross culturally. In a study of South Korean adults, researchers found that a perceived just distribution of punishment was one of the strongest predictors of compliance with the law.¹¹⁴ The study used data from surveys questioning citizens' attitudes and opinions towards the police and comparing it to their willingness to cooperate with law enforcement. The justness of police decisions was measured by asking whether pedestrian stops, traffic stops, and arrests were allocated in a just and unbiased manner. The survey found that respondents who perceived the police as allocating outcomes fairly were more likely to comply than those who view the police as unjust in their dealings.¹¹⁵ An Australian study came

¹⁰⁷ For a discussion of how Tom Tyler's legitimacy and Robinson's moral credibility compare and interact, see Joshua Bowers & Paul Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility* 47 WAKE FOREST L. REV. 211 (2012).

¹⁰⁸ TYLER & HUO *supra* note 101 at 101.

¹⁰⁹ *Id.*

¹¹⁰ Tyler (2004) *supra* note 101.

¹¹¹ Tyler & Huo *supra* note 101 at 59.

¹¹² Tyler *supra* note 101 at 67.

¹¹³ What may be most interesting about the Tom Tyler's studies for our present purposes is that Tyler finds that the effect in gaining compliance from increased moral credibility in getting the results right is nearly three times more powerful than gaining compliance from increased legitimacy from having fair procedures. See Tyler (2006) *supra* note 101 (conceding that moral credibility has a greater effect in shaping compliance than does legitimacy. Tyler reports that the relative weight of the factors shaping compliance with the law are: morality 0.33, legitimacy 0.11, and deterrence 0.02).

¹¹⁴ Youngki Woo et al., *Direct and Indirect Effects of Procedural Justice on Cooperation and Compliance: Evidence from South Korea*, 19 POLICE PRACTICE & RESEARCH 168 (2018).

¹¹⁵ *Id.*

to a similar conclusion, finding that people who viewed the police as delivering fair outcomes were more compliant towards law enforcement than those who did not.¹¹⁶

6. Conclusion

The evidence reported in the above subsections confirm the common-sense notion that the reduction in the criminal law's reputation for being a reliable moral authority will correspondingly reduce people's willingness to defer to it, to comply with its demands, and to internalize its norms. A host of real-world case examples have been given, including American Prohibition, notorious corruption in turn-of-the-century New York, overly aggressive policing and over-punishment in 1960s Watts, Cold War divided Berlin, the collapse of the Soviet Union, and the anti-mask movement of the 1918 Spanish Flu. Where the community critique of the criminal justice system focuses on its failures of justice, those failures can spark vigilantism, as in the anti-police violence after the death of George Floyd, and in the anti-protester conduct of the McCloskeys and Kyle Rittenhouse. Even more compelling, however, may be the significant collection of controlled empirical studies, both in the United States and overseas, demonstrating the relationship between the criminal justice system's moral credibility with the community and its ability to gain compliance, deference, and internalization.

B. A Response to Critics

Some critics argue that there is little empirical evidence that reduction in the moral credibility of the criminal law with the community will have an effect in reducing compliance.¹¹⁷ But this criticism simply ignores the existing evidence recounted in the previous section: the empirical studies that show a clear connection between reduced moral credibility and reduced compliance; the large collection of natural experiments that show this dynamic at work in the real world in a wide variety of situations with a wide variety of people from different cultures; and the empirical research and real-world case studies by social psychologists like Tom Tyler documenting an analogous dynamic between the system's reputation for fair adjudication and police professionalism as affecting compliance. There is also an element of common sense to this dynamic given what is understood about human nature. History is filled with examples of revolt and rebellion against unfair and illegitimate rule. Why would the system's loss of moral credibility with the community not result in less deference to it? Any assumption to the contrary would imply that people will happily consent to being governed by authorities they view as unjust. The critics have some work to do to discredit all of this evidence. What is their alternative explanation for the results in the empirical studies supporting the credibility-

¹¹⁶ Lyn Hinds & Kristina Murphy, *Public Satisfaction with Police: Using Procedural Justice to Improve Police Legitimacy* 40 *AUS. AND N.Z. J. OF CRIMINOLOGY* 27 (2007).

¹¹⁷ See Ristroph, (2010) *supra* note 2 at 1153 (arguing "In a country with active, if often contentious, discussions of the boundary between public and private, it is not at all clear that citizens expect or demand a close correspondence between the criminal law and their moral intuitions. And even if they do make that demand, it is not at all clear that society gains more by indulging the demand"); see also Christopher Slobogin & Lauren Brinkley Rubinstein, *Putting Desert In Its Place*, *STAN. L. REV.* 77, 123-124 (2013) (reporting the results of a study, which "suggests that a failure to track community members views and punishment does not have a significant or lasting impact on their willingness to be law-abiding citizens"). However, Robinson and co-authors have critiqued this study and its methodology and found that "With this study SBR have not undermined empirical desert but rather confirmed it, giving it empirical support that it did not previously have." Paul Robinson et al., *Empirical Desert, Individual Prevention, and Limiting Retributivism* 17 *NEW CRIM. L. REV.* 312, 340 (2014)

compliance dynamic? For the results in the natural experiments? Since many are denying the link between the criminal justice system's reputation and citizen compliance generally, they also need to provide an alternative explanation for the legitimacy-compliance dynamic shown in the "legitimacy" empirical studies and natural experiments.

Some critics point out that the research shows only a reduction in an intention to comply, not actual reduced compliance.¹¹⁸ Again, this simply ignores the existing evidence. It is true that social psychologists have not, and probably never will, be able to create and conduct a controlled experiment to show the dynamic. Few governments are likely to let the experimenters take over their criminal justice system in order to degrade its moral credibility in order to confirm an increase in lawlessness. However, we already have a large collection of natural experiments where a criminal justice system's reputation has, because of current events, noticeably increased or decreased its moral credibility with a resulting show of corresponding change in compliance.¹¹⁹

Other critics suggest that any reduced compliance is likely to be limited to the particular offense that the community sees as improper.¹²⁰ Yet again, this is simply contrary to the existing evidence. The empirical studies show that criminal liability or punishment perceived as unjust makes subjects less willing to give deference, for example, by reporting a different offense or interpreting conviction for a different offense as suggesting the conduct is condemnable.¹²¹ Further, this criticism also conflicts with the natural experiments described, in which the system's loss of moral credibility in one area of criminality increases crime rates and other related areas.¹²²

Some critics argue that the effect of reduced compliance only occurs where there is a dramatic reduction in moral credibility.¹²³ But this criticism is inconsistent with the empirical data that shows that the relationship between moral credibility and compliance is not a step function with trigger points but rather a continuous function: a marginal reduction in moral

¹¹⁸ See Roberts & de Keijser *supra* note 2 at 489-490 (arguing that all variables are measures of attitudes and behavioral intentions, whereas the claim involves people's behavior in response to the law and effectiveness of the criminal justice system: "The reported studies measured subjects' respect for the law, and their behavioral intentions to cooperate, support, and comply with the law. As such, these studies, on which the book's claims rest, remain at the level of attitudes and behavioral intentions of small samples of subjects undergoing experimental manipulations...In short, there is insufficient evidence for the effectiveness claims of empirical desert. Studies which measure actual behavior, not merely behavior intentions are necessary").

¹¹⁹ See *supra* Part II(A)(4), Part II(A)(2).

¹²⁰ See Rappaport *supra* note 2 at 806-807 (arguing that evidence for compliance effects of empirical desert is shaky because even though research indicates that people will be more willing to comply with a particular law that aligns more closely with their views, it does not necessarily indicate that people will comply with the law more generally: "In nearly all of the prior work Robinson cites, researchers investigated whether a law's moral credibility affects the stated likelihood of compliance with that law, not with the law more generally...Existing research does not distinguish between the credibility of outcomes in individual cases and that of the system as a whole. In other words, the data do not show whether people regard a system as morally credible when outcomes in individual cases are perceived as just but the systemic effects are not. After all, sentences are not the only systemic input that matters – budgets, police and prosecutorial discretion, and a host of other factors unrelated to sentencing go far toward determining how much punishment the system doles out and to whom").

¹²¹ See *supra* Part II(A)(5).

¹²² See *supra* Part II(A)(2), Part II(A)(4).

¹²³ See Simons *supra* note 2 at 662 (arguing, "It does not follow that the failure of states to conform their criminal legislation to their own constituents' views will perceptibly undermine compliance with the law. It might turn out that so long as the major corpus of the criminal law in each state is in very rough accord with its citizens' values, the power of internal moral sanctions will be maintained; discordance beyond that threshold might have virtually no effect").

credibility will produce a corresponding marginal reduction in compliance.¹²⁴ When subjects come into the laboratory, they have already formed some view about the criminal justice system's reputation, based upon lots of exposure to media accounts, conversations with other people, etc. In the period of time that the researcher has them in the laboratory, the best the researcher can hope to do is to nudge that view of the system in one direction or another. Yet, the evidence shows that even this minor nudge results in a noticeable shift in the subjects' willingness to comply, defer, and internalize. We know from empirical studies that ordinary people have extremely nuanced judgments of relative blameworthiness.¹²⁵ It is not unreasonable to speculate that a person's real-world exposure to a case they see as moderately disproportionate could provide as much of a nudge as the social scientist can provide by exposing the person to a case of greater disproportionality in a social psychology laboratory. Given subjects' nuanced judgments of disproportionality, any disproportionality will contribute to their overall judgment of the system and, as noted above, there is not some trigger point at which the effect occurs but rather a continuous function in which an incremental reduction in credibility produces an incremental reduction in compliance.

Other critics suggest that if conflict with community views really undermines compliance, then the criminal justice system should have collapsed by now or should at least show signs that it is headed for collapse.¹²⁶ Again, this ignores the continuous function relationship between moral credibility and compliance. It is not the case that any reduction in moral credibility will cause the criminal justice system to collapse. An incremental reduction in reputation simply creates a corresponding incremental reduction in compliance.¹²⁷ Whatever the state of one's criminal justice system at the moment, there is always value in attempting to

¹²⁴ See *supra* Part II(A)(5).

¹²⁵ Paul Robinson, Geoff Goodwin & Michael Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. Rev. 1940 (2010); Paul Robinson & John Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 SOUTHERN CAL. L. REV., 1-67 (2007); Paul Robinson & John Darley, *The Utility of Desert*, 91 NORTHWESTERN U. L. REV. 453 (1998).

¹²⁶ See Roberts & de Keijser *supra* note 2 at 488 (arguing that there is no evidence that large segments of the community are deeply dissatisfied with the criminal justice system or that their dissatisfaction plays out in terms of their compliance with the law: "Our first question is whether the strong form of his argument is overstated. The arguments for empirical desert appear intuitively attractive. The argument predicts that without connecting to shared community intuitions the criminal justice system's moral credibility will continue to decline, eventually leading to system failure. From an empirical point of view, this claim is problematic because it cannot be falsified by looking at existing criminal justice systems – which have yet to collapse. Why, in light of long-standing public criticism, have existing systems not yet lost all their moral credibility and collapsed? One answer may be that they are on the brink of collapse and it is simply a matter of time until the moral credibility reservoir is completely drained. The alternative explanation is that existing criminal justice systems already incorporate popular opinion in more diffuse and indirect ways, at least to the extent that it has protected the systems against total loss of moral credibility....Moreover, there is a marked and fundamental difference between observing that the community views will be detrimental to the moral credibility and effectiveness of the justice system. Similarly, focusing on justificatory defenses (i.e. self-defense), Robinson concludes from one of his scenario studies that striking differences between community views and the criminal law indicate that large segments of the community are 'deeply dissatisfied with the criminal justice system'. While the observation of a marked difference may be the result of empirical research, the stated implication is not"). Roberts and de Keijser challenge this notion, saying, "From an empirical point of view, this claim is problematic because it cannot be falsified by looking at existing criminal justice systems – which have yet to collapse. Why, in light of long-standing public criticism, have existing systems not yet lost all their moral credibility and collapsed? One answer may be that they are on the brink of collapse and it is simply a matter of time until the moral credibility is completely drained. The alternative explanation is that existing criminal justice systems already incorporate popular opinion in more diffuse and indirect ways, at least to the extent that it has protected the systems against a total loss of moral credibility."

¹²⁷ See *supra* Part II(A)(6).

improve its moral credibility, and there is always a compliance cost in letting its moral credibility slip.

Some critics point out that the empirical research suggests a mild reduction in compliance only upon exposing subjects to grossly disproportionate sentences, and thus, these critics suggest that there would be little real-world reduction in compliance from the run-of-the-mill disproportionality more common in the system.¹²⁸ This view is misguided because it assumes that people in the real world would not be exposed to grossly disproportionate punishments like those used in the studies. In fact, the empirical studies identify a significant list of common criminal law doctrines that regularly produce what the community sees as disproportionate punishment: three strikes, felony murder, high penalties for drug offenses, strict liability, adult prosecution of juveniles, criminalizing regulatory violations, and narrowing the insanity defense.¹²⁹ Further, many of the natural experiments don't involve some particularly grossly disproportionate shocking case but rather a continuing stream of lesser disproportionality's, which end up having the cumulative effect of reducing moral credibility and thereby increasing crime.¹³⁰

Some critics apparently concede that reduced moral credibility will lead to some reduction in compliance but argue that it would take more research to determine how much of a reduction it would create. Without this further research, such critics argue, we cannot determine whether this crime-control mechanism would provide better or worse crime-control than alternative distributive principles such as incapacitation of the dangerous or general deterrence.¹³¹ This is an important point, for if the justification for adopting maximizing moral

¹²⁸ See Rappaport *supra* note 2 at 807 (arguing that evidence detects only slight anticipated compliance effects from massively unjust sentences. We can presume that little to no effect would arise from mild injustices and their associated diminution of moral credibility: "Robinson's own studies present lay participants with vignettes involving criminal sentences that, by conjecture, are grossly disproportionate to anticipated views of just desert. Learning of these sentences, Robinson finds, reduces participants' expressed willingness to comply and cooperate with the law. Yet Robinson detects only slight anticipated compliance effects from massively unjust sentences, such as a fifty-year sentence for a nineteen-year-old who reasonably believed the minor with whom he had consensual sex was an adult"). See also Slobogin *supra* note 2 at 378 (arguing "Robinson appears to hold that failing to subscribe to empirical desert in most cases will result in noticeable disutility, whereas I am inclined to believe, in line with studies reported in *Putting Desert in Its Place*, that only significant, continuous, and highly publicized departures from law views will occasion the loss of compliance, cooperation, and respect that Robinson describes. People get upset about all sorts of things the government does – from Obamacare and surveillance to gun control and abortion. Changing the official stance on controversial issues to appease one group is likely to upset another. Whether the focus is criminal matters or something else, most people will not take their disgruntlement out on the system or on others, and those who do will be roughly equal in number regardless of which position government adopts"). (PHR: at some point we need to address the study that Slobogin published in the article that he cites here. It may be that we need not say anything more than that we have published a response to it that demonstrates that flaws in the study design and methodology mean that his results do not say what he claims they say, but instead serve to support our conclusions rather than to undermine them. Paul Robinson et al., *Empirical Desert, Individual Prevention, and Limiting Retributivism* 17 *NEW CRIM. L. REV.* 312, 340 (2014)

¹²⁹ See ROBINSON, (2013) *supra* note 1 at page 120.

¹³⁰ See *supra* Part II(A)(2) (Watts, Prohibition, Vietnam War, etc.).

¹³¹ See Kolber *supra* note 2 at 452 (explaining empirical desert advocates have yet to show how much compliance empirical desert can induce. We do not know if there are good consequentialist grounds for adopting potentially costly empirical desert policies: "We cannot use social science surveys alone to determine how much compliance empirical desert will generate. To do that, we would have to engage in the very difficult process of monitoring and analyzing the effects that empirical desert policies have on compliance behavior. We can use surveys to test short-term effects of people's beliefs about the law on their reported willingness to comply with the law. But such studies will still be a far cry from delivering the sort of real-world data we would need in order to estimate

credibility as a distributive principle is its crime-control advantages, then this comparison to other crime-control distributive principles is essential. This is the subject of Part VI, which concludes that the greatest strength of maximizing moral credibility as a distributive principle may be the weaknesses, sometimes disqualifying, of alternative crime-control principles.

III. The Determinants of Moral Credibility

Part II has shown that reduced moral credibility tends to reduce compliance, deference, and internalization. But one may ask: What determines the criminal law's moral credibility with the community? There are many aspects of the criminal justice system that contribute to its reputation, including, as noted above with regard to Tom Tyler's "legitimacy" research, the fairness of its adjudication procedures and the professionalism of its police. Our focus here is on its criminal law rules. What should be the distributive principle for criminal liability and punishment rules that will best promote and protect the criminal law's moral credibility? We argue that typically this can best be done by rules that minimize criminal law's conflicts with the community's justice judgments.

A. Criminal Law's Regular Conflicts with Community Views as Undermining Its Moral Credibility

We know from empirical studies that ordinary people think of criminal liability and punishment in terms of desert – offenders should get the punishment they deserve rather than, for example, the punishment that might best deter others or might best incapacitate dangerous offenders. Consider, for example, two empirical studies that explicitly tested the factors that drive ordinary people's criminal liability and punishment judgments.

One study focused on whether ordinary people thought general deterrence or just deserts was the proper basis for imposing criminal liability and punishment.¹³² Participants were given short vignettes of harmdoing, which varied factors of the harmdoing that could affect the sentence.¹³³ Subjects were then asked to recommend a punishment severity on two scales, ranging from not at all severe to extremely severe, and then not guilty to life sentence.¹³⁴ The degree to which his or her sentence recommendation was influenced by each of the factors of wrongdoing provides a clue to the respondent's underlying motivation for the punishment given. The variables used that would have a significant influence on a general deterrence distribution of criminal liability and punishment included the seriousness of the offense, the difficulty of detecting the particular type of crime, and in the publicity that the sentence received. These variables are all highly relevant in assessing liability and punishment based upon general deterrence.¹³⁵ The variables used that would be highly relevant to a desert distribution included the seriousness of the offense, conditions of moral mitigation, such as, for example, whether or not the offender expressed remorse, and whether or not the offender

compliance induced by real-world empirical desert policies. Therefore, we cannot operationalize empirical desert as part of a consequentialist punishment system until we can better estimate how much compliance empirical desert policies induce").

¹³² Kevin Carlsmith, John Darley & Paul Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment* 83 J. OF PERSONALITY AND SOC. PSYCH. 284, 284 (2002).

¹³³ *Id.* at 287-289.

¹³⁴ *Id.* at 289.

¹³⁵ *Id.* at 288-289.

committed her crime for ostensibly noble purposes.¹³⁶ Several studies were conducted using these basic parameters, controlling for various components to determine the validity of the results.¹³⁷ In their responses, participants appeared insensitive to general deterrence factors but highly sensitive to blameworthiness factors.¹³⁸ Although participants expressed support for deterrence as a general goal of having criminal justice system on an abstract level, they failed to assign punishment in a way that was consistent with it as a distributive principle for criminal liability and punishment.

Another study tested whether ordinary people are more inclined to assign criminal liability and punishment according to just deserts criteria or to look to criteria relevant to the incapacitation of dangerous persons.¹³⁹ Subjects in the study were given descriptions of a variety of harm-doing actions and were asked to assign punishments, using a 7-point Likert-type scale that asked for severity of punishment, and a more elaborate 13-point scale that provided actual prison sentences.¹⁴⁰ In the various vignettes, the seriousness of the crime as well as the likelihood that the actor would commit other harms in the future, were altered.¹⁴¹ The authors examined the weights that people placed on just deserts or incapacitation considerations as they assigned punishments to wrongdoers.¹⁴² The results indicated that respondents' natural inclinations more closely resembled just deserts judgements than incapacitation judgments.¹⁴³ The seriousness of the act, indexed in large part by the degree of moral outrage it provokes, determined the degree of punishment respondents assigned for the offense.¹⁴⁴

In a second part of the study, respondents were given three test cases to determine whether respondents would be willing to incapacitate a dangerous offender rather than to assign him a just deserts punishment.¹⁴⁵ In each case, a previously mild-mannered individual attacked and killed another person. In the control case, the actor killed out of a work-related jealousy; in another case, the actor killed a stranger because a previously undiscovered brain tumor caused the violent act, but the brain tumor was inoperable; and in the last case, the tumor was operable, so the individual was expected to become less dangerous if he received treatment. After reading the vignettes about the three offenders, the subjects were asked whether they would recommend incarceration in a prison, in a mental hospital, or whether they would set the person free.¹⁴⁶ In the jealous rage case, a strong majority of subjects (86 %) would send the offender to prison, as desert would require. In the brain tumor cases, where a majority of respondents saw the tumor is responsible for the offense rather than the actor, few subjects would send the offender to prison, whether the tumor was inoperable (7 %) or operable (21 %).¹⁴⁷ In other words, the vast majority of respondents again saw criminal punishment (prison) as appropriate only where they saw the offender as blameworthy for the

¹³⁶ *Id.* at 285.

¹³⁷ *Id.* at 289-295.

¹³⁸ *Id.* at 289.

¹³⁹ John Darley, Kevin Carlsmith, and Paul Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 L. AND HUMAN BEHAVIOR 659, 659 (2000)

¹⁴⁰ *Id.* at 661, 663.

¹⁴¹ *Id.* at 661-662.

¹⁴² *Id.*

¹⁴³ *Id.* at 671.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 672.

¹⁴⁶ *Id.* at 673.

¹⁴⁷ *Id.* at Table 2.

offense; dangerousness might be appropriate to civilly commit the person to an institution but could not be used as a basis for criminal liability and punishment.

In one study from 2006, researchers found that people are intuitively drawn to desert (“retributive”)-related information.¹⁴⁸ In that study, subjects were given vignettes of crime and were presented with different categories of information about that crime – some with a desert bent, some with a deterrence bent, and some with an incapacitation bent.¹⁴⁹ A whopping 97 percent of subjects chose to consult desert-related information rather than deterrence-related information or incapacitation-related information.¹⁵⁰ When, on a second survey, the same subjects were asked to sentence the offender and rate the confidence of their choices, those who had consulted desert materials were substantially more confident in their sentencing decisions, while those who consulted general deterrence or incapacitation materials exhibited far less confidence, indicating that they believed they had made poor choices.¹⁵¹ Thus, desert instincts prevailed as the strongest and most comfortably intuitive for the subjects.

In another study from 2006, a narrower examination of people’s desert impulses found that people are unlikely to endorse a system of restorative justice that lacks retributive features.¹⁵² The study asked subjects to read vignettes of crimes and assign the offenders to one of three courts.¹⁵³ The first court was purely restorative, with no punitive elements; the second court was mixed; and the third was desert-based only. The authors of the study found that people generally ascribed punishment according to desert principles. For higher levels of offending such as attempted rape or murder, none of the respondents accepted a purely restorative system.¹⁵⁴ As the authors explained, “These findings suggest that in order for citizens to view a restorative justice procedure as an acceptable alternative to the traditional court system for serious crimes, the procedure must allow for the option of some retributive measures.”¹⁵⁵

In a 2008 study, researchers found that self-reported justifications for punishment bear little relation to actual punishment-related behavior, underlying most people’s subconscious inclination to punish along desert grounds.¹⁵⁶ Participants completed an anonymous online experimental survey in which they were asked to sentence offenders based on varying vignettes and give reasons for their sentences.¹⁵⁷ Some scenarios were manipulated to encourage the participant to think about desert, while others were manipulated to encourage the participant to think about deterrence.¹⁵⁸ Participants then completed two further surveys, which assessed each participant’s endorsement of desert, deterrence, incapacitation, and rehabilitation.¹⁵⁹ The results showed that people’s self-reported punishment justifications did

¹⁴⁸ Kevin M. Carlsmith, *The Roles of Retribution and Utility in Determining Punishment* 42 J. EXPERIMENTAL SOC. PSYCH. 437 (2006).

¹⁴⁹ *Id.* at 440.

¹⁵⁰ *Id.* at 445.

¹⁵¹ *Id.* at 446.

¹⁵² Dena Gromet & John Darley, *Restoration and Retribution: How Including Retributive Components Affects the Acceptability of Justice Procedures* 19 SOC. JUSTICE RESEARCH 395 (2006).

¹⁵³ *Id.* at 400.

¹⁵⁴ *Id.* at 407.

¹⁵⁵ *Id.* at 430.

¹⁵⁶ Kevin Carlsmith, *On Justifying Punishment: The Discrepancy Between Words and Actions* 21 SOC. JUSTICE RESEARCH 119 (2008).

¹⁵⁷ *Id.* at 4.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 9.

not at all align with their actual punishment-related decisions.¹⁶⁰ Even though people expressed support for deterrence-related or incapacitation policies, they abandoned these policies as soon as they realized that such policies failed to track blameworthiness proportionality.¹⁶¹

It seems clear from this research that ordinary people normally expect and want criminal liability and punishment to be distributed according to an offender's just desert, rather than according to principles of general deterrence or incapacitation of the dangerous. Thus, where offenders are over-punished or under-punished in regards to laypeople's intuitions of a just desert-based punishment, one would expect laypeople to view the punishment as unjust.

Given the studies showing people's expectations and desires for the distribution of criminal liability and punishment, do criminal law rules that regularly conflict with the community's justice judgments, by doing injustice or by failing to do justice, undermine the criminal law's moral credibility? Again, the answer seems a matter of common sense. How could repeated conflicts with the community's shared principles of justice not reduce the law's credibility with the community?

Once again, though, we need not rely strictly on common sense because social psychology studies clearly confirm this dynamic. Some of the studies described above in Part II.A have already addressed this issue. For example, the "disillusionment" condition in the studies were sometimes created, quite successfully, by having subjects read about real-world cases in which the criminal law rules produced results that conflicted with community justice judgments. The studies did not assume that exposing the subjects to cases that conflicted with their justice judgments undermined the systems moral credibility with them. They actually tested for and measured the loss in moral credibility.¹⁶²

In a 1986 study, researchers interviewed more than one thousand prison inmates and asked them about their perceptions of the fairness of the criminal justice system's outcomes.¹⁶³ The researchers defined such distributive fairness as "the perception that the outcome is deserved when judged not in relation to the amount of harm done, but rather in relation to the comparisons between one's own outcome and the outcomes incurred by others."¹⁶⁴ The inmates were asked to rate the fairness of their sentences on five-point Likert scales from "very fair" to "very unfair."¹⁶⁵ The researchers found that perceived unfairness resulting from informal and discretionary procedures called the justice system's credibility into question.¹⁶⁶ Most notably, the inmates' belief that they had been sentenced fairly was more closely tied to their perception of the legitimacy of the justice system than the actual magnitude of the sentence received.¹⁶⁷ As the researchers explained, "routine departures from legalistic principles of due process create in the consumer a sense of injustice that undermines the legitimacy of legal authorities and thereby allows justification for past criminal activity and increases the likelihood of future criminality."¹⁶⁸

In a similar 1988 study, researchers interviewed hundreds male defendants charged with felonies shortly after their arrest and after the disposition of their case in order to

¹⁶⁰ *Id.* at 10.

¹⁶¹ *Id.* at 13.

¹⁶² *See supra* Part II(A).

¹⁶³ Jean Landis & Lynne Goodstein, *When Is Justice Fair? An Integrated Approach to the Outcome Versus Procedure Debate* 11 AM. BAR FOUND. RESEARCH J. 675, 685 (1986).

¹⁶⁴ *Id.* at 678.

¹⁶⁵ *Id.* at 686.

¹⁶⁶ *Id.* at 676.

¹⁶⁷ *Id.* at 704.

¹⁶⁸ *Id.* at 676-677.

determine what factors most strongly influenced their perceptions of their satisfaction with the outcome of their case.¹⁶⁹ The sentences received by the men ranged from time served to a prison term.¹⁷⁰ The men were asked about the severity of their sentence, which was measured by the researchers in terms of three factors: months incarcerated, sentence type, and deviation from expected sentence.¹⁷¹ This estimation of severity was compared with the results of questions regarding distributive justice – focusing on the defendant’s evaluation of how his sentence compared with those of similar defendants convicted of the same crime – as well as procedural justice – focusing on the defendants’ perceptions of the fairness of the process by which he was treated.¹⁷² The study found that the defendants had more confidence in the outcome of their case and trust in the criminal justice system where they felt that their sentence was fair.¹⁷³

In a 1972 study, dozens of defendants were interviewed about their perceptions of fairness of the sentences they received.¹⁷⁴ The study found that the defendants focused most intently on the process of plea bargaining, specifically making the best possible bargain and arranging a quick release.¹⁷⁵ The defendants felt that the plea bargain exemplified the “lying” and “deceitfulness” of the system writ large because sentencing depended not on deterrence, or rehabilitation, or retribution, but rather on the “way the bargaining game is played.”¹⁷⁶ They told researchers that using the plea bargain they felt that the justice system was just “a game to be played” or a “ritual” to be performed where the smart defendants were able to totally evade punishment. Plea bargaining made the men distrustful of the system because it reminded them of the criminal environments where many of the men came from.¹⁷⁷ The author of the study concluded that the effect of plea bargaining was to undercut the moral authority of the criminal justice system and contribute to defendant cynicism.¹⁷⁸

Several studies make an analogous point in the context of establishing or undermining the legitimacy of police. In 2008, Meares et al., for example, conducted a nationwide study on how the public judges the appropriateness of police conduct.¹⁷⁹ (Greater perceived legitimacy, recall, produces greater compliance.) One component of the study was a questionnaire revolving around citizens’ perceptions and evaluations of police-citizen encounters from their own experience. Another component was an experimental design testing citizens’ perceptions and evaluations of police-citizen interactions in videos they were shown, in which the police exercise varying degrees of authority over the person they stopped, including verbal commands and physical force.¹⁸⁰ After watching the videos, respondents were asked to evaluate the fairness of the police-citizen encounter, answering questions such as “Did the police act neutrally?” and “Were the police respectful?”¹⁸¹ Controlling for race, age, and gender, the

¹⁶⁹ Casper et al., *Procedural Justice in Felony Cases* 22 L. & SOC. REV. 438, 487-488 (1988).

¹⁷⁰ *Id.* at 488.

¹⁷¹ *Id.* at 490.

¹⁷² *Id.* at 491.

¹⁷³ *Id.* at 494.

¹⁷⁴ JONATHAN CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT’S PERSPECTIVE* xii (1972).

¹⁷⁵ *Id.* at 41.

¹⁷⁶ *Id.* at 83.

¹⁷⁷ *Id.* at 171-172.

¹⁷⁸ *Id.* at 173.

¹⁷⁹ Tracy Meares et al., *Lawful or Fair? How Cops and Laypeople Perceive Good Policing* 105 J. OF CRIM. L. AND CRIMINOLOGY 297, 321 (2015).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 322.

authors found that the perceived legitimacy of policing is based how people see officers exercising their authority and how professional they appear.¹⁸² “Where officers listen to people, explain the basis of their actions, treat them respectfully, and acknowledge people’s concerns in the situation, they are trusted and viewed as acting professionally,” the authors found.¹⁸³

The empirical studies reported here confirm the commonsense notion that regular conflicts with community views in the allocation of criminal liability and punishment will reduce the criminal law’s moral credibility. (And regular conflicts with community notions of fairness and professionalism in adjudication and policing will reduce the system’s legitimacy.)

B. A Response to Critics

Most critics have not explicitly disputed the claim that regular conflicts with community’s justice judgments undermine the system’s moral credibility.¹⁸⁴ Some expressly concede it,¹⁸⁵ but some critics have argued that ordinary people look to a host of social and cultural factors other than desert in judging appropriate criminal liability and punishment. Thus, conflicts with community justice judgments would not necessarily be disillusioning. Indeed, the *failure to deviate* from community justice judgments could itself be disillusioning in those cases where the community is relying upon non-desert factors in judging appropriate criminal liability and punishment.¹⁸⁶ But this criticism simply ignores the empirical evidence that ordinary people focus on desert in assessing proper criminal liability and punishment, at the exclusion of other criteria that might conflict with desert, as the studies described in the previous section show.¹⁸⁷

Even if one found that citizens, fearing for their own personal safety, for example, were willing to compromise their commitment to desert by taking into account some non-desert

¹⁸² *Id.* at 316.

¹⁸³ *Id.*

¹⁸⁴ Rappaport, Sigler, Denno, and Kolber do not analyze the issue.

¹⁸⁵ Ristroph explicitly concedes the point. “Alternatively, one could argue (as Robinson does) that whatever the metaphysical status of desert, the criminal justice system will control crime more effectively if it corresponds to popular beliefs about desert. That seems plausible. But remember: beliefs about desert are not fixed independently of sentencing policy. When community intuitions fail to correspond to policy, it is not obvious which should or will change to match the other...Desert rhetoric need not be fatal to reform, because desert is elastic. If we do scale back criminal sentences, and if we can generate popular support for such sentencing reforms, desert conceptions will adjust to view the new sentences as appropriate.” See Ristroph (2009) *supra* note 2 at 49.

¹⁸⁶ See Slobogin *supra* note 2 at 386-387 (arguing that people look to factors other than moral blameworthiness when asked to assign punishment: “Desert certainly plays a role in lay persons’ decisions about punishment (a conclusion that a number of our studies support), but it is not the sole consideration. If that is so, creating a criminal justice system that orders punishment solely on the basis of desert may create dissatisfaction with the criminal law, which is something Robinson wants to avoid. However, RBL also state that the facts that we thought would suggest a greater or lesser need for preventive sanctions – namely, prior crimes, a willingness to undergo treatment, apology, and restitution, and a vow to recidivate – are also consistent with desert”; See also Slobogin *supra* note 2 at 393 (“What RBL are calling the ‘moral credibility’ of the law may also hinge on the law’s allegiance to prevention factors independently of desert factors...All of this could be beside the point if divergence from the modal punishment assigned by lay people has little or no effect on the moral credibility of the law, or if any such effect it does have does not lead to serious real-world impacts in terms of compliance, cooperation, and related desideratum”).

¹⁸⁷ Slobogin relies upon his own study as showing that people do not necessarily think and punishment in terms of just deserts. See Slobogin *supra* note 2 at 386-387 (“Desert certainly plays a role in lay persons’ decisions about punishment (a conclusion that a number of our studies support), but not the sole consideration”). However, as Robinson and co-authors have shown in their response to Slobogin’s article, a close examination of Slobogin’s methodology and results suggest that they in fact support Robinson’s claim rather than undermining it. Paul

criteria, it hardly follows that this *deviation from desert* would boost the criminal justice system's moral credibility. On the contrary, the citizens themselves might well see the deviation as an unfortunate practical compromise for their safety, hardly something that they are proud of, and hardly something that improves the system's moral credibility with them. (Rather than doing justice, the empirical studies suggest that people might prefer, for example, to use of a civil commitment system to protect them from dangerous, blameless persons, and to preserve the criminal justice system's focus strictly on desert.)

One critic argues that there are a number of factors, beyond unjust results, that can affect the criminal justice system's overall reputation.¹⁸⁸ We completely agree. As we noted in Part II, for example, a criminal justice system's reputation for fair adjudication and professional policing will affect its reputation. One can call it the system's "legitimacy" as Tom Tyler does or can include it in the system's "moral credibility" as this critic seems to. But there is nothing in this that takes away from the value of generally tracking community justice judgments to maximize the system's moral credibility within the community. Deference, compliance, and internalization can be increased by improving the system's reputation in both respects. The fact that procedural fairness and police professionalism can help does nothing to take away from the fact that doing justice and avoiding injustice in allocating liability and punishment can also help.¹⁸⁹ Indeed, as noted above, the empirical evidence suggests that these two forces tend to reinforce one another.¹⁹⁰

Another critic argues that: "There is no good reason why empirical desert should induce compliance among laypeople if they are true retributivists."¹⁹¹ In other words, it's not empirical data about the community's views that matters to people, but rather their own views about what is just. But we have never argued that the ordinary person is a good consequentialist who will want to support empirical desert because of its crime-control benefits. On the contrary, the ordinary person will be more inclined to comply because they see a criminal law that, by their own personal view of just deserts, is in fact doing justice and avoiding injustice. Our calculations may be based on a data-driven empirical desert, but people will experience results is what they see as true deontological desert.

This critic wants to claim that this is a form of "exploitation" of ordinary people,¹⁹² because one is pretending that the system is retributivist (based on deontological desert) when in fact it is consequentialist (based upon empirical desert). But while this philosopher may well get worked up about whether the creation of liability rules are properly motivated – by the reasoning of deontological desert rather than the consequentialism of empirical desert – are we to assume that ordinary people care, or even understand, the difference? To them, either the

Robinson et al., *Empirical Desert, Individual Prevention, and Limiting Retributivism* 17 NEW CRIM. L. REV. 312, 340 (2014).

¹⁸⁸ See Rappaport *supra* note 2 at 807 ("There is an additional concern with the moral credibility argument: existing research does not distinguish between the credibility of outcomes in individual cases and that of the system as a whole. In other words, the data do not show whether people regard a system as morally credible when outcomes in individual cases are perceived as just but the systemic effects are not. After all, sentences are not the only systemic input that matters – budgets, police and prosecutorial discretion, and a host of other factors unrelated to sentencing go far toward determining how much punishment the system doles out and to whom").

¹⁸⁹ See Tyler (2006) *supra* note at 56 (reporting the relative weight of the factors shaping compliance with the law as: morality 0.33, legitimacy 0.11, deterrence 0.02).

¹⁹⁰ See *supra* PART II(A)(4).

¹⁹¹ See Kolber *supra* note 2 at 454-455.

¹⁹² *Id.* 453-454.

results are just or they are not. The theoretical motivations in the head of the lawmaker back when the rule was created have no practical relevance for ordinary people.

IV. Constructing a Distributive Principle that Promotes Moral Credibility by Minimizing Conflicts with Community Views

One might conclude that there is indeed crime-control value in trying to maximize the criminal law's moral credibility with the community by generally tracking empirical desert, but nonetheless conclude that such a practice is not possible, or at least not practical. How could such a maximize-moral-credibility distributive principle be constructed?

A. Tracking Empirical Desert

One can imagine any number of potential obstacles to constructing such a distributive principle. Perhaps justice such a complex judgment that everybody simply has their own personal view about everything? Perhaps people's justice judgments are just general vague notions, nothing that could be used to produce the specific rules required by a criminal code or sentencing guidelines? Perhaps the proposed distributive principle can't realistically be operationalized because people's justice judgments are constantly changing, and this makes it impractical or at least expensive to maintain such a distributive principle?

Is justice such a complex judgment that everybody simply has their own personal view about everything? The empirical evidence suggests otherwise.¹⁹³ On some issues, there is in fact a high degree of agreement across demographics. Many of these areas of high agreement might be called the "core of wrongdoing" because they concern such fundamental offenses as physical injury to others, taking property without consent, and deceit in exchanges. Consider one study that had subjects rank order 24 scenarios according to overall blameworthiness, deserved punishment. The kinds of offenses in the scenarios represent 94.9% of the offenses committed in the United States. The results show a Kendall's W of 0.95 for in-person subjects and 0.88 for Internet subjects — an astounding result. One can't normally get this level of agreement except in observational studies, as with asking subjects to judge the relative brightness of dot clusters. Where subjects are asked for something beyond the purely observational, to have this high level of agreement the analytic task requested must be almost intuitional.

Are people's justice judgments just general vague notions, nothing that could be used to produce the specific rules required by a criminal code or sentencing guidelines? The empirical studies suggest that even uneducated people have very sophisticated and nuanced judgments about justice. Small changes in facts produce predictable changes in blameworthiness judgments.¹⁹⁴ People's judgments don't tie a particular level of blameworthiness to a particular punishment level, but because ordinary people can distinguish so many cases along the blameworthiness continuum, and because the punishment continuum contains a finite number of points (meaningful differences require larger units as the length of imprisonment gets longer), people's judgments about the relative blameworthiness of a case against all other cases end up putting the case at a particular point on the punishment continuum. This is not because there is some magical connection between that amount of blameworthiness and that

¹⁹³ Robinson (2013) *supra* note 1 at 18–34.

¹⁹⁴ *See id.*, Part III for a wide range of such studies.

amount of punishment, but rather because it is that single point on the punishment continuum that puts the case in its proper ordinal rank in relation to all other cases. If the endpoint of the punishment continuum changes, so too will the punishment location of each case on the continuum.

The endpoint of the punishment continuum is not something on which people's judgments are fixed. We see significant endpoint differences among different societies, which confirms how malleable the endpoint judgment is. Judgments of relative blameworthiness, in contrast, especially concerning the core of wrongdoing, are not so malleable. This is confirmed by the fact that we find the same rank ordering of most crime scenarios across demographics and cultures.¹⁹⁵

This high level of agreement on relative blameworthiness within the core of wrongdoing is not a surprise when one considers that people's judgments of justice are in some significant part a feature of human evolutionary development.¹⁹⁶ And this is consistent with evidence suggesting that many justice judgments are in large part intuitional, rather than the product of conscious reasoning.¹⁹⁷

As one moves out from the core of wrongdoing, disagreements among people do appear. Downloading music from the Internet without a license can be seen as analogous to traditional theft but is not itself a physical taking without consent. Thus, while there may be strong agreement on issues relating to the core of physical taking, there will be disagreement on the downloading issue depending upon the extent to which a person has accepted the analogy between unlicensed downloading and physical taking.

Given that there is disagreement on some issues, doesn't that mean that it is simply impossible to track community views? No. As the studies cited in Part II make clear, there is no magical trigger point of moral credibility below which a criminal justice system will collapse. Rather, the credibility-compliance relationship is a continuous one. Any loss of credibility – perhaps because the law has adopted a majority view and the minority is thereby incrementally disillusioned – will create some corresponding incremental loss in compliance with those people. But this incremental loss in this minority on this issue does not alter the value of trying to maximize moral credibility with as much of the community as possible.

The critical point here is to see that tracking empirical desert is not something to be done for its own sake but rather is generally the best approach to building moral credibility with the community. The real question for the criminal code or sentencing guideline drafters is: what position will cause the least alienation and disillusionment among the population generally?

In some cases, this may not be the strict majority view. One can imagine an issue upon which the majority holds one view but without much strength of feeling, while a significant minority holds a contrary view with very strong feelings. To them, a criminal law that conflicts with this view would necessarily suffer an enormous loss of moral credibility. Thus, under the right circumstances, the criminal code or sentencing guidelines drafters would best protect and promote the system's moral credibility by adopting the minority view.

Perhaps the proposed distributive principle can't realistically be operationalized because people's justice judgments are constantly changing, and this makes it impractical or at least expensive to maintain such a distributive principle. However, the vast majority of issues that must be reflected in a criminal code or sentencing guidelines do not change – this is certainly

¹⁹⁵ *Id.*, 18-34.

¹⁹⁶ *Id.* 35-62.

¹⁹⁷ *Id.* 5-17.

true of criminal laws core principles of wrongdoing and blameworthiness¹⁹⁸ – and those issues that do change tend to shift only slowly. In the last decade or two we have seen a variety of developments resulting in criminal law changes, including, for example, the decriminalization of same-sex intercourse, the increased criminalization of unconsented to intercourse, and new offenses required by advances in technology. While this latest period has been a whirlwind of activity compared to previous eras, even these latest developments represent a new trivial portion of the issues that need to be decided by criminal code or sentencing guideline drafters.¹⁹⁹

B. A Response to Critics

We have already noted and responded to several sorts of criticisms about the feasibility of constructing a criminal code or sentencing guidelines based upon a distributive principle of maximizing moral credibility. First, the claim that such a project is not possible because there is no such thing as the community view²⁰⁰ – essentially the argument that everyone disagrees about everything – is simply not consistent with empirical evidence. The significant agreement across demographics on many core principles was hidden from us for some time because the agreement concerned the rank ordering of cases, while researchers were focused instead on levels of severity. That is, while different communities might disagree on how severely to punish murder, they generally agree that murder deserves more punishment than rape, which in turn deserves more punishment than theft, and so on.

Second, the claim that constructing a criminal liability and punishment system based upon community justice judgments is not possible because people’s judgments are only rough, general feelings,²⁰¹ is simply inconsistent with the evidence. People’s blameworthiness judgments, even people with little or no education, are generally nuanced and sophisticated. Ordinary people may not be very good at articulating the blameworthiness principles that they use, but even small changes in the offense situation can produce significant and predictable changes in people’s justice assessment.

Third, some critics have argued that the existence of controversial issues creates intractable problems for the project.²⁰² Other critics relatedly argue that the existence of issues

¹⁹⁸ Paul Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 *CAMBRIDGE L. J.* 145-175 (2008)

¹⁹⁹ See generally Paul Robinson & Ehson Kashfipour, *Criminal Law’s Core Principles* (forthcoming 2021) (explaining that people’s judgments on core principles such as “greater harm deserves greater punishment,” “harm to persons is more wrongful than harm to property,” “an actor who lacks the capacity to know his conduct is wrong or to avoid committing it is not blameworthy,” and more).

²⁰⁰ See Slobogin *supra* note 2 at 392 (explaining that his study found that “disagreement...was remarkably high”).

²⁰¹ See Christopher Slobogin, *Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law* 87 *J. CRIM. L. & CRIMINOLOGY* 315, 324 (1996) (noting that the community of individuals tested is “generally uninformed – both in the sense that it has not thought deeply about the relevant issues, and in the sense that it does not know the legal context in which a given legal provision operates”).

²⁰² See Ristroph (2010) *supra* note 2 at 1161 (“Much of Robinson’s work addresses the implications of moral intuitions for sentencing choices – how much to punish. Legal moralism, at least as represented in contemporary references to the Hart-Devlin debate, seems to be primarily an argument about criminalization – whether certain conduct, such as same sex intimacy between consenting adults, should be exempt from criminal regulation altogether. Robinson has written relatively little about controversial morals-based criminal prohibitions”).

upon which there are disagreements within the community means that by accommodating the views of one group one is necessarily alienating the other group.²⁰³

But these critics don't see the bigger picture. It is easy for academics in particular to focus on the points of controversy – such as disagreements about the criminalization of same-sex intercourse, or some other hot issue of the day – but the criminal code and sentencing guideline drafters have hundreds or thousands of issues to deal with, very few of which have such controversy. The primary work of a distributive principle is to give an answer to each of those thousands of diverse issues: criminalizing risk creation, the objective requirements of complicity, omission liability, desistance and renunciation in attempt, use of deadly force in self-defense, use of force in defense of property, citizens law enforcement authority, offense culpability requirements and mistake defenses, culpability requirements for complicity, voluntary intoxication, the individualization of the objective standard of negligence, formulations of the insanity defense, the immaturity defense, the involuntary intoxication defense, the duress defense, the entrapment defense, grading distinctions among sexual offenses, the felony murder rule, causation requirements, punishment of multiple offenses, and more. (Even in its present early stages of research, empirical studies on ordinary people's justice judgments already exist for every issue on this list.²⁰⁴) In the real world, the work of the criminal justice system that forms ordinary people's judgments about the justness of its results involves a lot more than the hot issue of the day.

It is true that a particularly controversial issue requires the special attention of code and sentencing guideline drafters. The greater the media attention to an issue, the greater the possibility for undermining the system's moral credibility, at least with regard to that issue in the short term. It is the long-term reputation of the system, of course, that matters in people's assessment of the system's general reputation as a reliable moral authority, but its handling of the current hot issue of the day remains important.

Does the existence of such a controversial issue present an existential threat to maximizing moral credibility as a distributive principle? No. The analytic process for criminal code and sentencing guideline drafters would be the same as with any other of the thousands of issues on which they must take a position. What position will most effectively promote and protect the criminal law's moral credibility with the community? As noted above, this may not be simply a matter of adopting the majority view.

V. Philosophical, Political, and Ideological Objections

The previous sections have responded to critics' attacks on the key elements supporting the proposed distributive principle: that reduced moral credibility incrementally reduces the criminal law's crime-control effectiveness, that regular conflicts with community justice judgments reduce the criminal law's moral credibility, and that it is feasible to use such a distributive principle to construct a criminal code, sentencing guidelines, and sentencing policy directives. But there remain a series of other criticisms that have been offered that go beyond these points, criticisms based primarily upon the philosophical, political, or ideological preferences of the critics.

²⁰³ See Slobogin *supra* note 2 at 378 (“Changing the official stance on controversial issues to appease one group is likely to upset another”).

²⁰⁴ See ROBINSON (2013) *supra* note 1 239-401.

A. The Proposed Distributive Principle Would Necessarily Produce Draconian Sentences

A common complaint is that relying upon community views would necessarily produce a draconian system of punishment, and one need only look at the current state of criminal law liability and punishment doctrines to confirm this. Today's punishment system is quite harsh. As one critic noted, "A majority of the country continues to support the death penalty and still believes that courts are too lenient. Well under 20 percent of Americans think that prison conditions are too harsh."²⁰⁵ In light of people's apparently harsh and draconian beliefs about punishment, "populism makes criminal justice more, not less, severe," this critic argues.²⁰⁶ "The movements to rein in [indeterminate sentencing as a mechanism of mercy] were fueled by the same distrust of experts and elites that the democratizers espouse today, boosted by harsh popular views."²⁰⁷

But these criticisms confuse "populism" generally with the proposal here that criminal liability and punishment rules be constructed to avoid conflicts with community justice judgments. The empirical evidence shows that ordinary people, as opposed to politicians and political advocates, do not in fact have the draconian sensibilities that the critics assume.

Consider, for example, a study that tested ordinary people's views on a wide variety of current crime-control doctrines, including felony murder, the three-strikes rule, the criminalization of regulatory violations, the narrowing of the insanity defense, high penalties for drug offenses, adult prosecution of juveniles, and the use of strict liability. Subjects were given scenarios describing twelve real-world cases that illustrate the operation of one of these, crime-control doctrines. The research reveals that such doctrines clearly do not reflect community views. Just the opposite; they dramatically conflict with them.²⁰⁸ They may well be consistent with the coercive crime-control strategies of general deterrence or incapacitation of the dangerous, but they have the effect of disconnecting criminal punishment from community notions of justice.

In the study, subjects were asked to rank order the twelve modern crime-control cases and twelve "milestone" cases – cases that previous research has shown provide milestones along the full length of the punishment continuum with a high degree of agreement across demographics. When the 24 cases are rank ordered, one can see just how serious the respondents thought the crime-control cases were in relation to each one of the milestone cases. The crime-control cases, which have draconian penalties in law, were in fact perceived by the subjects as being dramatically less serious and blameworthy than the law treats them. For example, in one case where the three-strikes doctrine was applied to a minor fraud, ultimately resulting in a life sentence for the offender, the subjects viewed the overall deserved punishment as somewhat more serious than stealing a microwave from a house and somewhat less serious than a minor assault at a record store. The subjects gave a sentence of 2.3 years and 3.9 years respectively, for these offenses – significantly less than the life sentence that air conditioning fraudster received.

The size of the disconnect between laypeople's intuitions and the actual results delivered by the criminal justice system is telling not only as a predictor of public disillusionment, but also as an indicator that legislative aims are out of touch with public needs. Note, for example, that the coercive crime-control cases here are not cases in which some

²⁰⁵ Rappaport *supra* note 2 at 764-65.

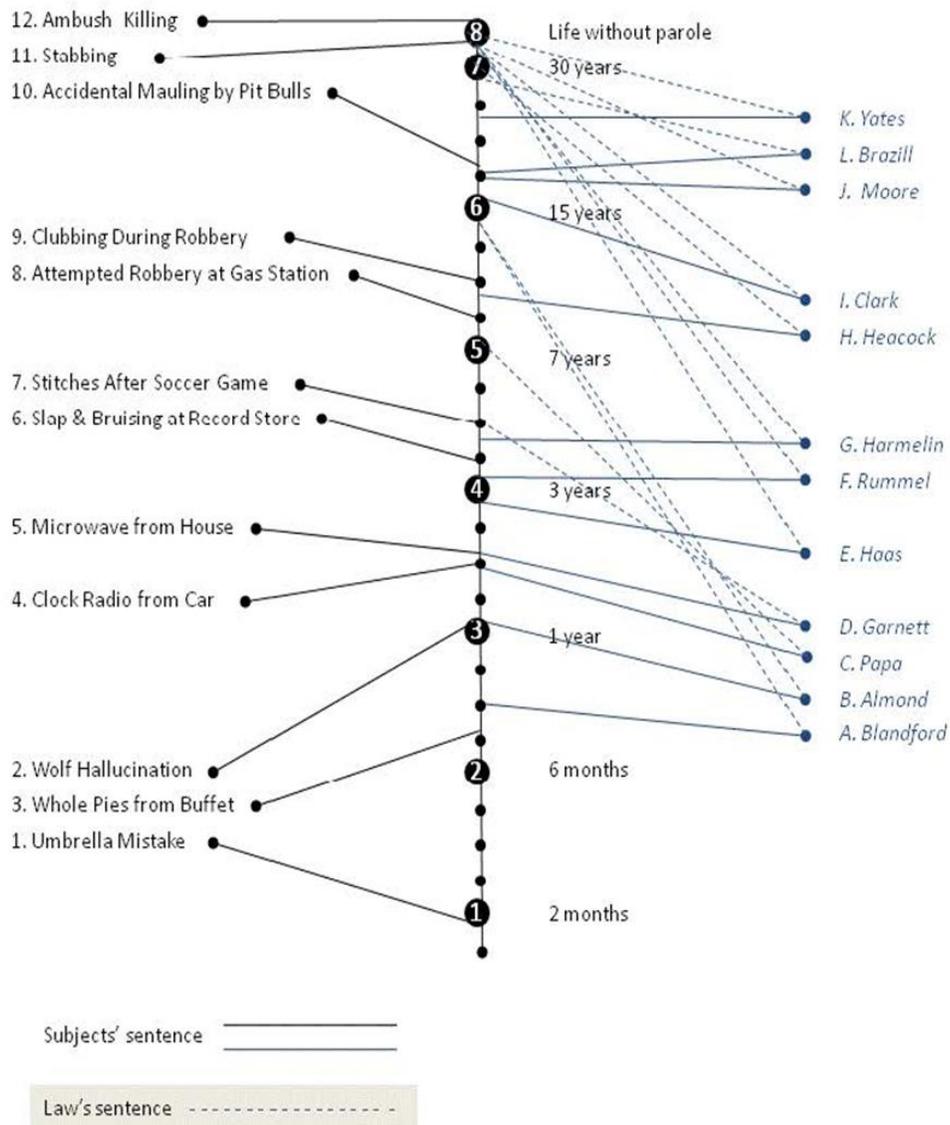
²⁰⁶ *Id.* at 775.

²⁰⁷ *Id.* at 785.

²⁰⁸ See ROBINSON (2013) *supra* note 1 at 110-140.

renegade prosecutor or rogue judge tricked the system but rather are cases where the crime-control doctrine is being lawfully applied as designed. The air conditioning fraud case discussed above went to the U.S. Supreme Court where the conviction and life sentence were affirmed.

The figure below visually displays the dramatic nature of the law-community conflict revealed by the study. Note Case F, the air conditioning fraud case, on the right-hand margin. The solid line to the center indicates where on the punishment continuum the subjects placed this case, close to the three-year mark. The dashed sloping line indicates the punishment that was actually imposed, life imprisonment.



The important point here is to see on the right-hand side the dramatic difference between the solid lines and the corresponding dashed lines for each case. The enormity of the law-community conflict is emphasized by the fact that the punishment scale in this graphic is exponential, not linear. Each of the large dots, 1 through 8, represents typically a doubling of punishment – the standard structure of criminal code offense grade categories in the United States. Thus, if the difference between the solid line and the dashed line for any case were only

the difference between 4 and 5 on the punishment scale, that small difference on the scale means that the offender got twice the punishment that the subjects thought was deserved. In fact, the community-law differences are all dramatically more than that.

How could such a conflict occur in a democracy? It is not the draconian justice judgments of ordinary people that are producing these modern crime-control doctrines but rather politicians' reliance on coercive crime-control theories like general deterrence and incapacitation of the dangerous – crime-control theories developed and pressed in the past largely by academics.²⁰⁹ Having criminal liability and punishment rules track community views could be an effective way of short-circuiting these injustice-producing doctrines.

Still, some critics say that even the sentences imposed by the subjects in the study described above are too high. As one critic noted, "Although the sentences they chose were, on average, much more lenient than those imposed in the actual cases on which they were based, they were still quite substantial My own sense is that most of these sentences are 'harsh'."²¹⁰ We may well agree with this critic's personal sensibilities, but that still does not provide the basis for a conclusion that the proposed distributive principle would necessarily condemn us to harsh penalties. While the principle of blameworthiness proportionality may be permanently fixed in ordinary people's minds, we know from existing evidence that the general severity level of the punishment continuum is not. Different societies have significantly different endpoints on their punishment continuums, indicating different accepted levels of harshness.²¹¹ And nothing in the proposed distributive principle calls for higher rather than lower severity.

To maintain moral credibility, the criminal justice system cannot at any given time fall too far below the general severity level *that exists in the community's mind at that moment*. However, one could nudge the endpoint of the punishment continuum incrementally lower on a regular basis. Reducing it five percent every year or two, for example, is not likely to be enough to undermine the system's moral credibility, and people will simply adjust their expectations accordingly.²¹² Indeed, we have seen just such a dynamic after the enactment of the federal truth-in-sentencing legislation that did away with early release on parole. Sentences imposed in court dropped dramatically because they were now real sentences, not sentences subject to parole commission release before one-third of the sentence was served. While there was some initial upset, it soon passed, and people simply adopted the new sentences as establishing the new severity norm.²¹³

Of course, we may all have our own personal preferences about how severe punishment should be, but that does not make them the truth of the proper severity level. Ultimately, the proper endpoint of the punishment continuum is a political question for which any liberal democracy ought to take into account community preferences. But the point is that those preferences are malleable and to the extent that one has persuasive arguments for reducing the punishment continuum endpoint, as community views shift toward lower severity the

²⁰⁹ See PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 21-130 (Oxford University Press, 2008).

²¹⁰ Slobogin *supra* note 2 at 42.

²¹¹ Robinson *supra* note 188 at 172-173.

²¹² JOHN RAWLS, *A THEORY OF JUSTICE* 48 (1971) (explaining that the best sense of justice is one which matches a person's judgments in reflective equilibrium – a state reached after consideration of various conceptions of justice).

²¹³ Robinson *supra* note 188 at 229-232.

proposed distributive principle would demand that the criminal law rules and policies shift as well.

Further, there is good reason to think that the adoption of maximizing moral credibility through empirical desert as a distributive principle would immediately require a reduction in the sentences imposed for most serious offenses. At the moment, most serious offenses are given the same punishment at the high-end point of the punishment continuum – death, life, 30 years, or whatever the maximum might be. As we have shown, however, people prefer strict blameworthiness proportionately, and thus the lay intuitions captured by empirical desert would likely encompass such a demand. Under a moral credibility distributive principle that required strict blameworthiness proportionality, the serious blameworthiness differences present in the most serious cases must be given voice. In other words, most of the sentences for serious offenses must be forced down from the punishment continuum endpoint in order to distinguish the more egregious cases from the less egregious cases. And, indeed, the punishment continuum endpoint must be reserved for the most egregious case that could come along, as some proposed and enacted criminal codes adopting this principle note.²¹⁴ (One implication of this might be that, while the death penalty might remain on the books, it might never be used because it would be inappropriate if one could imagine a more egregious case than the case at hand, which one probably always can imagine.²¹⁵) Ultimately, a punishment system based on the distributive principle of maximizing moral credibility, generally by tracking empirical desert, is likely to be less punitive than its coercive crime-control rivals of general deterrence or incapacitation of the dangerous.

B. The Proposed Distributive Principle Is Unprincipled and Meaningless

In addition to their concerns about empirical desert's propensity for harsh punishment, a number of critics dismiss the proposed distributive principle as unprincipled and meaningless. "One aspect of this claim is particularly worrisome, and that is the implicit rejection of principle *per se*. Populist sentencing, rebranded as 'normative crime control' is proposed as the guiding factor at the expense of principled sentencing," one critic has written.²¹⁶ Another has commented: "Once desert is untethered from the retributive principle of an eye for an eye, what does it mean to say that someone deserves a particular punishment? Not much – or rather, almost anything you like."²¹⁷

These criticisms seem to assume that we offer empirical desert as a substitute for more philosophers' deontological desert, and that it fails in that role. But we have never made such a

²¹⁴ See e.g., Maldives Law No.6/2014 Penal Code (2006) <https://www.law.upenn.edu/live/files/4203-maldives-penal-code-2014>; Draft Report of the Somali Criminal Law Recodification Initiative (Mar. 2017) <https://www.law.upenn.edu/live/files/6310-vol-1-and-2-somali-recodification>.

²¹⁵ *Id.*

²¹⁶ Roberts & de Keijser *supra* note 2 at 487-488.

²¹⁷ Ristroph (2009) *supra* note 2 at 46; see also Sigler *supra* note 2 at 1174 ("Robinson's attempt to clear the way for empirical desert by discrediting its leading rival is based on a misconception of the prevailing methodology in deontological ethics. Thus, Robinson imagines moral philosophers engaging in flawed social science – merely surveying their own intuitions – to arrive at "transcendent" judgments of desert and justice. The actual process is normative, not empirical, however, and involves critical reflection on and systematic revision of one's considered convictions in terms of the values of the relevant political community. The resulting judgments are provisional, not transcendent, aiming at a coherent account of our deepest commitments and their normative implications. Robinson's breezy rejection of the method of moral philosophy is thus based on a fundamental misunderstanding of the enterprise").

claim. Maximizing moral credibility by tracking empirical desert as determined by social psychologists is offered for its consequentialist crime-control benefits. Deontological desert, as espoused by moral philosophers, seeks to develop the truth of justice through the reasoning of argument and analysis. We have always been careful and explicit in distinguishing the two.²¹⁸

Perhaps some of these critics know that we have been careful to distinguish deontological and empirical desert. Their real objection is just that: that empirical desert *is not* deontological desert. That is, perhaps they see value only in the principled, reasoned assessment of desert from moral philosophers, which empirical desert is not. We would agree that there is value in such philosophical work. It can provide a useful basis for contributing to the public conversation that can help shape community justice judgments. But as Part VI.C. below demonstrates, deontological desert, by its own terms, simply cannot produce a criminal code or sentencing guidelines.

The distributive principle proposed here is indeed “principled;” it simply has a consequentialist principle – the system’s increased moral credibility reduces crime – rather than a deontological one. And it is not meaningless; it simply has a meaning other than deontological desert.

C. “Community Sentencing,” “Cherry Picking,” and the Public as Bad Policy Makers

A number of criticisms have been offered that more than anything suggest a misunderstanding of what is being proposed. These criticisms, which encompass a wide assortment of flawed interpretations of empirical desert, are addressed below.

Some critics complain that the proposed distributive principle is one that involves “community sentencing” and such would be dangerous and unwise.²¹⁹ We agree that community sentencing would be dangerous and unwise. Community sentencing of individual cases would be seriously unwise because community views about a specific case could well be distorted by media misstatements of the facts, or subconscious or conscious biases arising from the particular offender or offense situation.²²⁰

It’s hard to know why these critics would think we would propose such a thing. It has been made explicit from the start of this work sometime ago that the proposal is for a distributive principle of criminal liability and punishment that sets rules and policies; it does not adjudicate individual cases. As one of us wrote more than a dozen years ago, for example, the proposal “envisions a set of liability and punishment rules to be applied identically to all defendants; it is not the community’s view of deserved punishment in a particular case that is relevant here. Further, in collecting data to construct the rules, real cases, especially publicly known cases, typically are not a useful source. People’s views on such cases are commonly

²¹⁸ See *e.g.*, Robinson *supra* note 178 at 152-53 (“The deontological conception of desert is based upon reasoned analysis from principles of right and good, which produce a transcendent notion of justice independent of the intuitions of justice of the community. The empirical conception of desert has no such independent basis...Perhaps even more important than such differences in blameworthiness judgments are the differences between the underlying theories that drive the two conceptions of desert and that thereby shape their application. In its most fundamental form, the difference is this: The special value of the empirical conception of desert is its utilitarian effectiveness in crime-control; the special value of the deontological conception of desert is its ability to produce true principles of justice independent of personal or community opinion”).

²¹⁹ See Robinson (2007) *supra* note 1 at 43 (Explaining that one of the criticisms of empirical desert is that “While a community may share a view that certain conduct is immoral or certain punishment is just, such views do not make it so. Witness the cases of slave holders in the pre-Civil War south”).

²²⁰ See Denno *supra* note 2 at 752-758.

biased by political or social context or by other factors, such as race, that all would agree have no proper role in setting principles of justice.”²²¹

One of the strengths of empirical desert’s social scientific methods of testing lay intuitions is that they can give a true sense of community justice judgments free of these distortion effects. The scenarios used to test subjects do not include factors that the community generally agrees would be inappropriate to affect the liability and punishment decision, such as the race of the offender. On the whole, people seem likely to see greater moral credibility in a criminal law that screened out these undesirable distortions.

But at least one critic apparently sees this aspect of empirical desert as a weakness rather than a strength. In what is referred to as the “cherry-picking challenge,” the critic argues that empirical desert theorists seek to capture only particular aspects of punishment intuitions that best align with their goals. “Empirical desert advocates have yet to show why the particular intuitions they examine are the ones most likely to help us improve compliance. Rather, they often screen out certain intuitions in ways that seem designed to promote more deontologically-justified policies. In so doing, they seem to shift into a justificatory mode that imports non-consequentialist values and undermines empirical desert’s consequentialist foundations,” this critic explains.²²² “To be clear, I am not arguing that empirical desert advocates should query angry, biased, or drug addicted subjects. Rather, I claim that advocates must defend their choices.”²²³

The defense is not difficult to provide: from their own life experience, ordinary people know the difference between an angry reaction and a thoughtful response that attempts to be fair-handed and unbiased. While they themselves might even be regularly guilty of the former, they will respect and give deference to a criminal justice system that tries to do the latter. Adopting this approach does not require the empirical desert advocate to become a retributivist, as is suggested. It simply requires asking what characteristics *the general community would find to be admirable and what characteristics it would find to be inappropriate* in judging criminal liability and punishment.²²⁴

Finally, some critics complain that ordinary people are simply too uninformed about matters important to criminal justice policy to be consulted in designing the system.²²⁵ A more specific challenge of the same sort asks whether the public wants a distributive principle based

²²¹ Robinson *supra* note 178 at 149.

²²² Kolber *supra* note 2 at 441.

²²³ *Id.* at 448

²²⁴ As Robinson has argued elsewhere, in designing their experiments, empirical desert researchers would do well to consult the moral philosophy literature early in the design process, for there is no other literature that has more carefully explored what the issues and alternatives might be. See Paul Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert* 48 W.M. L. REV. 1831, 1839 (2007) (“The moral philosophy literature is the richest and most sophisticated source about lay intuitions of justice that exists today, and it is the starting point that I recommend to any social psychologist doing research in the area”).

²²⁵ Denno *supra* note 2 at 754 (“Opinion polls in the United States and other countries show that the public has little knowledge of the nature and extent of crime. Moreover, what little knowledge the public has is substantially distorted...Opinion polls also show that people have limited or poor knowledge of their basic legal rights, or of particular pieces of legislation, even highly publicized legal reforms. The general public evidences very little knowledge of sentencing structure or of the severity of punishments that the legal system actually imposes...If the Justice respondents’ views are consistent with the public’s, their overestimate of crime rates and reoffending, as well as their underestimate of the criminal justice system’s sentencing severity, could influence their perceptions of certain legal doctrines”).

upon empirical desert.²²⁶ This sort of criticism asks whether people wouldn't prefer a distributive principle designed by experts rather than by their peers.

Once again, though, this criticism misunderstands empirical desert's function. As we have said earlier, we do not propose relying upon community views about criminal justice policy approaches such as what distributive principle to use. Rather, we recommend consulting community justice judgments to understand what will make the criminal justice system be seen as more morally credible to the community. Thus, even though we can actually discern what distributive principle the community would want – one based upon their conception of desert, as the empirical studies have made clear²²⁷ – we are not following the community's view here because we think they are the best policymakers but rather because their views on this point tell us how best to enhance the system's reputation with them.

VI. Is There a Better Distributive Principle Than Maximizing Moral Credibility through Empirical Desert?

Whatever one may conclude about the strengths and weaknesses of the proposed distributive principle – maximizing moral credibility through empirical desert – the ultimate question in shaping criminal law and sentencing rules is whether maximizing moral credibility is the best distributive principle or whether, all things considered, there is a better one, perhaps general deterrence, incapacitation of the dangerous, or deontological desert. We will explain in Part VII that a moral credibility-based distributive principle does have some weaknesses, although not those claimed by its critics, but all alternative distributive principles have much greater weaknesses, some of which may be altogether disqualifying. Thus, this Part examines these competing distributive principles and demonstrates the seriousness of their problems. We conclude that the greatest strength of maximizing moral credibility as a distributive principle may be the weaknesses inherent in all alternatives. Robinson has written a good deal on the subject,²²⁸ but let us quickly sketch the nature of our criticisms against the various distributive principles with whom moral credibility is said to compete.

A. General Deterrence

General deterrence can be an effective crime-control mechanism in principle, but rarely in practice.²²⁹ Having a criminal justice system that imposes punishment on wrongdoers certainly has a general deterrent effect. Less clear, however, is the effectiveness of general deterrence as the distributive principle for criminal liability and punishment – that is, *setting liability and punishment rules* so as to maximize their efficient general deterrent effect.

For a rule formulation to enhance general deterrence, it must meet at least three prerequisites. First, the intended audience must know of the rule. Second, the intended audience must be rational calculators who can and will behave in a way that promotes their self-interest in light of the rule. And third, their cost-benefit analysis under the rule must suggest that the cost of the contemplated violation outweigh its benefit.

²²⁶ Ristroph (2010) *supra* note 2 at 1168 (“If, as Robinson suggests, some democratically enacted laws such as California’s three strikes law are inconsistent with empirical desert, one might ask whether there is a majoritarian preference for laws aligned with moral intuitions”).

²²⁷ See *supra* Part II(A)(5).

²²⁸ Robinson *supra* note 189 at 21–98, 141–207.

²²⁹ *Id.* at 21–95.

Unfortunately, rarely do these prerequisites exist in the real world. First, the empirical research suggests that the target audience rarely knows the law. Even when they think they know, they commonly have it wrong.²³⁰ Academics and politicians spend a good deal of time agonizing over the formulation and adoption of coercive crime-control doctrines, such as a felony-murder rule, the three-strikes rule, the use of strict liability, and other crime-control doctrines. But when the drug addict is standing outside the convenience store deciding whether to go in and rob it, what are the chances that he will know whether his jurisdiction has a felony-murder rule and, if so, what variation it has. No doubt the jurisdiction spent enormous energy debating just these issues, but it is more than likely that those debates are all wasted on the would-be robber.

Second, even if people did know the legal rules, available research suggests that the target audience is more often than not anything but rational calculators. Instead, their decisions are heavily influenced by mental or emotional disturbance; drug use or addiction; group influence, especially by gangs; impulsiveness; and an indifference or inattentiveness to consequences.

Finally, even if the target audience did know the legal rules and were rational calculators, a general deterrent effect is possible only if the rational calculations suggest that the costs of the wrongdoing outweigh the benefits. Yet, the capture and punishment rate for most offenses are so low – commonly less than 100 to 1 for offenses other than homicide – that the target audience commonly sees the benefits as outweighing the costs. More importantly, the result of the calculation depends not on the reality of the situation but rather on the potential offender’s perception of it. Thus, when the empirical evidence suggests that many if not most potential offenders generally overestimate their ability to avoid detection and punishment, the general deterrence project can have limited effect even if punishment rates were in fact higher than people understand.

General deterrence’s problems only grow worse when it is compared to empirical desert. The liability and punishment imposed under empirical desert already carries some inherent general deterrent effect. The only way in which a general deterrence distributive principle can provide more deterrent effect is by deviating from desert, yet, when it deviates from desert it is operating at its worst.

First, if general deterrence as a distributive principle can have a greater deterrent effect than that already inherent in empirical desert distribution only by deviating from desert, then in every instance it will trigger the crime-control costs that arise from its conflict with community views. That is, the deviation from desert that gives it a deterrent edge also has the crime-control cost that follows from reduced moral credibility.

Second, it has an enormous educational challenge if it is to have any effect. To have an effect, people must know the deterrence-based rule. But the empirical studies make clear that ordinary people assume the criminal law rule is as they think it should be: formulated to give deserved punishment based upon an offender’s overall blameworthiness, as discussed previously.²³¹ Thus, whenever general deterrence deviates from empirical desert, it must overcome this desert-rule assumption and must make clear that the rule is different than people would otherwise expect. This can be difficult and often impractical.

²³⁰ This is a particular problem in the United States where there are 51 American criminal codes.

²³¹ See *supra* Part II(A)(3), Part II(A)(5); Paul Robinson & John Darley, *Intuitions of Justice: Implications for Criminal Law and Justice* 81 *SOUTH. CAL. L. REV.* 1, 39 (2007) (explaining that several studies have “examined the issue of what criteria people rely on when they make intuitive judgments of justice and found that it is desert, not deterrence or incapacitation, that drive people’s intuitive assignments of punishment”).

One might argue that it is unfair for us to offer this criticism because empirical desert has a similar education challenge. Its compliance mechanism depends upon the community having an opinion about the system's justness. One critic, for example, explains, "A wide range of survey research indicates that the public lacks knowledge about crime, crime rates, offender characteristics, and legal reforms. In turn, these misconceptions could influence the 'ordinary' person's perceptions of certain legal doctrines."²³²

But we think the effective communication hurdle that is so problematic for general deterrence does not apply to empirical desert. The message that general deterrence must send is one that identifies a particular kind of situation as one in which there is some exaggerated criminal liability and punishment threatened, more than that which the ordinary person would think was deserved. That is a specific nonintuitive fact which the general deterrence system must get into the minds of its target audience and to get them to use in evaluating the cost-benefit analysis when they make their conduct decision. In the case of empirical desert, in contrast, all that is required is for the person to have some general opinion about the moral credibility of the criminal justice system, an opinion that every ordinary person will necessarily have simply by being exposed to the endless stream of information that they take in from news media, governmental statements, friends, acquaintances, and others. Their having an opinion on the criminal laws general justness does not require that they have a particular fact, as general deterrence's educational challenge requires.

It is certainly true that the criminal justice system ought to make an effort to improve its reputation because that improvement can bring greater compliance, but even if the system has no public relations campaign to improve its image, the moral credibility-compliance dynamic will be at work. It will still be the case that regular conflicts with community views will reduce its credibility and reduction in conflicts will increase it.

B. Incapacitation of the Dangerous

Incapacitation of the dangerous is as problematic a distributive principle as is general deterrence, but for different reasons.²³³ Unlike general deterrence, which has real difficulty producing a greater deterrent effect than that already inherent in a system designed to maximize moral credibility, incapacitation does in fact work. Putting people in prison does prevent further victimization, at least of the community. The problem with an incapacitation distributive principle is that behavioral scientists are at present relatively poor in reliably predicting future criminality in a specific individual. False positive rates are high, which creates enormous costs and intrusions on personal liberty with no crime-control benefit. The incapacitation distributive principle is particularly disadvantaged in the United States, where constitutional limitations imposed by courts limit the open use of such preventive detention and require instead that it be cloaked in criminal justice terms. Further, there is enormous political, and sometimes legal, resistance to preventive detention, so instead of being able to openly evaluate an offender's predicted future dangerousness in setting a criminal sentence, liability and sentencing rules commonly use substitutes like prior criminal record, which have turned out to be even worse approximations of future dangerousness.

Finally, as with general deterrence, even if there were a situation where such preventive detention could provide a crime-control benefit by deviating from desert, any such advantage

²³² Denno *supra* note 2 at 765.

²³³ Robinson *supra* note 188 at 99-107 (examining rehabilitation as a distributive principle).

could be wiped out by the loss of crime-control effectiveness that comes when such interventions deviate from desert. Incapacitation as a distributive principle can provide more prevention than that already inherent in a distributive principle of maximizing moral credibility only by deviating from empirical desert. But preventive detention in this respect is in an even worse position than general deterrence. At least general deterrence follows a proportionality principle of sorts that is consistent with empirical desert: the greater the wrongdoing to be deterred, the more it is worth investing in a greater deterrent threat (proportionality to harm rather than proportionality to blameworthiness). But incapacitation has no such principle of punishment proportionality to the seriousness of the past wrongdoing: the duration of the detention is tied to the duration of the dangerousness rather than the seriousness of the offense. It is for this reason, under an incapacitation theory, that the Supreme Court has historically allowed three-strikes-means-life rules for even minor crimes, such as for the air-conditioning fraud in the *Rummel* case discussed in Part V.A.²³⁴

Thus, punishment – the term fits awkwardly here because the detention has nothing to do with the past offense and everything to do with prediction of a future offense – unbound from any sense of proportionality to the wrongdoing, would likely to be seen as appallingly unjust by most citizens. Thus, it would be even more likely than general deterrence to destroy the “criminal justice” system’s reputation for being just and thereby undermine its social influence to gain compliance, deference, and internalization.

C. Deontological Desert

We are sympathetic to those advocating deontological desert as the criminal justice system’s distributive principle. Unfortunately, we must all face the reality that it is simply impossible to operationalize such a principle. Moral philosophers disagree among themselves about most issues relevant to criminal liability and punishment. If one were to endorse deontological desert as one’s distributive principle, how would a criminal code or a sentencing guideline drafter know which philosopher or group of philosophers to follow on any given issue? And, having non-philosophers make such judgments about the relative credibility of one philosopher over another short-circuits the reasoned rationality that marks out deontological desert as particularly desirable.

If one were trying to create a distributive principle that had high moral credibility *among moral philosophers*, voting among them might make sense, but that would not be deontological desert as a distributive principle but rather some special philosophers’ variation on empirical desert, which, given that philosophers as a group are not commonly a major source of crime, would seem to lack any utilitarian crime-control justification.

Perhaps the larger point is that deontological desert’s attraction is that it represents the true transcendent truth about justice. When two moral philosophers disagree on an issue, we know that one of them, if not both, must be wrong. The only way we can keep the transcendent-truth advantage of deontological desert is to have some rational reasoned mechanism by which we can figure out which philosopher is right, and there is no way by which humans can do that. The bottom line is that deontological desert is a beautiful aspirational goal but as a practical matter simply cannot be operationalized.

In evaluating the feasibility of operationalizing deontological desert consider, for example, the issue of grading criminal attempts. Should an unsuccessful attempt be graded the

²³⁴ See *supra* Part IIA(5).

same as the substantive offense or graded as less severe because the contemplated offense harm or evil did not come about? The empirical studies make clear that nearly all ordinary people would grade the completed offense as more serious than the failed attempt because the harm or evil of the offenses actually comes about and, in their minds, that increases the offender's blameworthiness and deserved punishment.²³⁵ But the deontologists are very much split on the issue.²³⁶ Some agree with the community view but many disagree, correctly pointing out that the attempted assassin's conduct and intention are exactly the same in the two cases, and it is only a matter of moral luck as to whether his victim is missed or killed. How is the criminal code or sentencing commission drafter to decide which of these conflicting camps to follow when they decide how to grade criminal attempts? What is the mechanism that they are to use in evaluating which of these camps is "correct"?

Even if one wanted to follow a distributive principle of deontological desert, any mechanism the drafters use for picking one philosophical camp over another would simply illustrate the impossibility of operationalizing such a principle. If they take a vote among the moral philosophers to see which position is the majority view or if they look to see which group is made up of scholars with better reputations within the moral philosophy community, they are no longer operating under the reasoned analysis that is the draw of deontological desert. If they instead simply look to their own personal judgments about which position best reflects just deserts, then again they are failing to abide by the reasoned analysis deontological desert requires. If they try to play the role of moral philosopher and review the arguments on both sides, and try to reason out for themselves which position is the correct position, then they might be able to claim that their method is reasoned analysis, but it would be hard to say that the stumblings of these amateur philosophers are what we can trust to produce the correct deontological desert answer.

The truth is that deontological desert simply cannot provide the "correct" deontological desert answer. It is not in fact an operationalizable distributive principle but rather an expression of the value of reasoned analysis and of thinking critically about criminal liability and punishment rules. But while academics may cherish reasoned debate, and can provide useful insights by doing so, that is something quite different from providing a distributive principle for criminal liability and punishment upon which the real world can draft a criminal code or sentencing guidelines and policy statements.²³⁷

²³⁵ *Id.*

²³⁶ Robinson *supra* note 200 at 152.

²³⁷ Another way of expressing this same point is to explain that asking a decision-maker to use deontological desert as a distributive principle in fact gives one a distributive principle significantly different from true deontological desert. It is rather a deceptive cloak that carries the deontological desert label but in fact represents the undisclosed personal beliefs and preferences of the decision-maker. When the criminal code commission members are deciding what culpability requirement to use for complicity, having been instructed to use deontological desert as a distributive principle, what will they in fact do? In a well-resourced and fastidious commission, they will go look at the moral philosophy literature on the point, but after finding that there is significant disagreement, they will have to choose one theory over another. But that choice of course will be a function of all sorts of things, such as their own personal views, that may have nothing to do with the strength of the competing philosophical arguments. Even if they are trained moral philosophers – we know of no such criminal code reform commission – and take the arguments seriously, why does their particular view of the debate, which conflicts with the views of other moral philosophers, suddenly qualify as the "truth." The larger point is that setting deontological desert as the governing distributive principle does nothing to assure a consistent, predictable, transcendent truth, but only an invitation to decision-makers to use in their own intuitions of justice. In contrast, empirical desert as a distributive principle can give a specific, clear, predictable, fixed answer based upon the collective intuitive judgments of the community rather than those of the particular decision-maker.

It is also the case that deontological desert would not have the crime-control effectiveness that empirical desert does. Unless, by chance, deontological desert comes out to exactly match empirical desert in its distribution of criminal liability and punishment, it will in places conflict with community views and thereby undermine the criminal law's moral credibility.

As a practical matter, empirical desert is probably the best *practical approximation* of deontological desert rules. In discussing the issue of grading attempt above we saw that the deontologists are split on the issue while ordinary people tend to agree that attempts should be punished less severely than the substantive offense. Attempt grading is a useful example to show that there really is a difference between deontological and empirical desert. However, it is also true that on most issues the majority of moral philosophers are likely to support the community's empirical desert position. That should be no surprise, really, given that deontologists are human beings that probably share the community's intuitions of justice, even if their reasoned theoretical work may in some instances lead them to different conclusions. In our experience, most moral philosophers reviewing the results of the empirical studies, on topics such as those listed previously,²³⁸ are likely to feel comfortable with most if not all of those results.

D. Conclusion

To summarize, general deterrence as a distributive principle is fine in theory but ineffective in practice, especially because it can have a greater general deterrent effect than that already inherent in maximizing moral credibility by tracking empirical desert distribution only in those cases where it deviates from desert, which is when it is at its least effective.²³⁹ Incapacitation of the dangerous as a distributive principle does work, in the sense that it can prevent crime by those detained, but it lacks the ability at our current clinical level to be able to reliably predict who will and will not be dangerous and, if implemented, would essentially destroy the criminal justice system's reputation for being a reliable moral authority that does justice and avoids injustice.²⁴⁰ Deontological desert is highly attractive as a distributive principle, but by its own terms of relying strictly upon rational analysis, it cannot produce a working criminal code or sentencing guidelines because there is no means by which the inevitable disagreements can be resolved by more rational analysis. In order to come up with the single answer required by drafters for each of the hundreds or thousands of issues that must be resolved, drafters must resort to non-deontological analysis, such as voting to decide competing claims, which leaves the result as being something other than deontological desert.²⁴¹ Support for this distributive principle should be seen more as a public acclaim for the value in rational discourse about the deeper meaning of justice, a project that we very much support, but not a project that qualifies as a distributive principle for criminal liability and punishment in drafting real-world rules.

²³⁸ See Robinson, *Intuitions of Justice supra* note 1 at 239-275 (testing lay intuitions on attempt liability, criminal risk, complicity, and omission liability).

²³⁹ See *supra* Part VIA.

²⁴⁰ See *supra* Part VIB.

²⁴¹ See *supra* Part VIC.

Among the critics, some seem to have never offered an alternative distributive principle,²⁴² which may have made it more difficult for them to see the virtues of empirical desert. Several critics seem to enthusiastically support deontological desert as a distributive principle,²⁴³ and at least one has publicly supported dangerousness as a distributive principle,²⁴⁴ but, as noted here, those principles simply do not provide realistic alternatives to maximizing moral credibility.

VII. Potential Weaknesses of the Proposed Distributive Principle Not Raised by Critics

While the critics have raised quite a few issues, which we think we have answered, there do exist some potential weaknesses in the proposed distributive principle of maximizing the criminal law's moral credibility with the community, usually by tracking empirical desert. Perhaps the critics would have eventually gotten around to offering these criticisms. Two issues are worth addressing: First, the proposed distributive principle puts limits on the extent to which criminal law can be used to change existing norms. Second, the proposed principle requires one to be ever-vigilant in testing existing norms for whether they might deserve special reform attention.

A. Limiting the Use of Criminal Law as a Means of Changing Community Norms

One reason to worry about having criminal law generally rely upon community justice judgments is that such a system may tend to impede the use of criminal law to bring about social change. Relying upon community views presumably means relying upon people's *existing* views. But we know from history that existing views are not always the best for society. Changing those views can sometimes bring a better world.

Does reliance upon a moral credibility distributive principle condemn society to live with existing views forever? No. As the criminal law improves its moral credibility with the community – as it “earns moral credibility chips” with the community – it can selectively “spend” those chips by having criminal law lead rather than follow on selected issues of special importance to social reformers. The greater the moral credibility of the criminal law, the greater is the criminal law's power to help shift community views. In other words, a criminal law that has earned a reputation as a reliable moral authority can be a powerful influence in the hands of social reformers. Consider, for example, the recent decriminalization of same-sex intercourse and increased criminalization of domestic violence and date rape. These criminal law reforms no doubt helped solidify the ongoing shift in community views.

However, the problem is that if the criminal law gets too far out in front of community views, the disparity between the two can potentially undermine the law's moral credibility. American Prohibition, discussed previously, proves the point. Where the law reform did not successfully change community views, it provided a constant source of conflict points that increasingly undermine the criminal law's moral credibility. As noted previously,²⁴⁵ crime rates during Prohibition went up, and not just for alcohol-related offenses but rather for a wide range of offenses unrelated to alcohol. People became habituated to lawbreaking. Perhaps worse,

²⁴² See, e.g., Denno *supra* note 2; Roberts & de Keijser *supra* note 2; Rappaport *supra* note 2; Ristroph (2010) *supra* note 2.

²⁴³ See, e.g., Simons *supra* note 2; Sigler *supra* note 2.

²⁴⁴ Christopher Slobogin, *A Jurisprudence of Dangerousness* 98 Nw. L. Rev. 1 (2003)

²⁴⁵ See *supra* Part II(A)(4).

pushing too far ahead without successfully shifting views can undermine the law's reputation in a way as to reduce law's usefulness to social reformers in the future.

The lesson for social reformers here is simply to be careful in "spending the criminal law's credibility chips." Don't use criminal law as a reform device until other societal institutions, political, social, religious, and other, have been used to gain community support. With that momentum, criminal law can make a real contribution. And, as community views continue to change, the damaging conflict points will increasingly diminish.

B. The Need to Keep Testing Existing Norms Against Societal Aspirations

Because empirical desert is not deontological desert, any society must be vigilant about testing their existing norms against what that society will want them to be in the future. With 20-20 hindsight, the Germans who voted for Adolf Hitler and the pre-Civil War Southerners who supported slavery might well have a very different opinion today. We have no magical way to see around history's corner – nor do moral philosophers – but we can remain aware that some of our current norms will indeed be seen as inappropriate by future generations, and we should constantly critically assess our existing norms to see whether we think they ought to change.

Moral philosophers, and many social and political organizations and institutions, are available to help us in that constant testing. But they are not likely to have clear answers for us, for if the answer were clear it probably would have already altered or be in the process of altering existing norms. Nonetheless, these sources of critical debate can at least identify for us the possibilities. Will society come to accept the notion that sentient animals should have the same rights as humans? Will ordinary expectations of privacy dramatically expand? Will suicide be seen as a human right? It is impossible to tell at the moment what our future society will decide, but it is worth having someone asking the question.

This is not a problem unique to moral credibility as a distributive principle, of course. Any distributive principle, including deontological desert, will have the same problem. While no one has the ability to see around history's corner, by openly acknowledging the problem we can advertise the importance of this societal questioning. There is nothing in the proposal that requires deontological desert supporters to get lobotomies, so there is no reason to think that they will cease to raise the challenges and questions that they have in the past, which are so helpful in our constant testing.

VIII. Conclusion

We have sought to show that the criminal justice system's reputation with the community can have a significant effect on the extent to which people are willing to comply with its demands and internalize its norms. That reputation can be affected by a variety of things, including the fairness of the system's adjudication procedures, the professionalism of its police, and the perceived legitimacy of the criminal justice authorities themselves. Our focus has been on the effect of the system's long-term reputation for doing justice and avoiding injustice, its "moral credibility" with the community. Real-world natural experiments as well as controlled empirical studies, to say nothing of commonsense, support the notion that reduced moral credibility incrementally reduces compliance and the internalization of the law's norms. The evidence also suggests that regular conflicts with community views undermine the law's moral credibility. Thus, we propose that the distributive principle used to draft criminal codes, sentencing guidelines, and sentencing policy statements be to maximize the criminal law's

moral credibility by adopting rules and policies that avoid such regular conflicts with community conceptions of justice.

We have presented and responded to a wide variety of objections from critics of this proposal. We show that those criticisms are commonly simply inconsistent with the available evidence, anecdotal and scientific, or reflect an inaccurate understanding of our proposal. On the other hand, we do suggest two sorts of complaints that one could make about our proposal, even though critics have not yet done so: the need for care in using criminal law to help change norms and the need to remain ever vigilant in testing the justness of current community views.

Perhaps most importantly, we have evaluated the alternative distributive principles and found that they have serious, often disqualifying, problems. We conclude that the greatest strength of maximizing moral credibility as a distributive principle may be the weakness of the alternatives. General deterrence works in principle, but because the prerequisites for its effective operation rarely exist in the real world, it is impractical as a distributive principle. Incapacitation of the dangerous does indeed work and does protect the community from dangerous offenders by incapacitating them, but because we lack the ability to predict future criminality with any significant degree of reliability, such a distributive principle would unjustifiably restrain non-dangerous offenders because of the high false positive rate and yet fail to identify some who are likely to be dangerous. Worse, because maximizing moral credibility carries with it an inherent general deterrent and incapacitation effect, these distributive principles can provide greater crime-control effectiveness *only by deviating from empirical desert*, thereby producing an endless stream of cases in which the community perceives a significant injustice or failure of justice, which then undermines the law's moral credibility and its compliance and internalization power..

Deontological desert is an attractive alternative, but we show that by its own terms it simply cannot be operationalized. Its search for the transcendent truth through rational analysis is an important and necessary activity, and one that we assume moral philosophers will continue to pursue even when maximizing moral credibility is the distributive principle. Deontologists can do much to encourage the constant testing of existing community views, which we encourage, and this constant questioning would hopefully lead to a public conversation by which community views over time change for the better. But the never-ending debate and analytic processes of deontological desert work well in the role of thoughtful gadfly but are simply unable to produce a codification of criminal law and sentencing guidelines and policies. Deontological desert supporters should take some comfort in the fact that an empirical desert distribution will produce results that most commonly match the majority views among deontologists. That is, while empirical desert is not deontological desert, it may be the best practical approximation of the most popular positions among deontologists.

Whether one believes that criminal law's goal ought to be to minimize future crime or to do justice and avoid injustice, one ought to support a distributive principle for making criminal law rules and policies so as to maximize its moral credibility with the community.