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Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change

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DEMOCRATIZING CRIMINAL LAW: FEASIBILITY, UTILITY, AND THE CHALLENGE OF SOCIAL CHANGE

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ABSTRACT—There are good reasons to be initially hesitant about shaping criminal law rules to track the justice judgments of ordinary people. People seem to disagree about many criminal law issues. Their judgments, at least as reflected in many aspects of current law such as three strikes and high penalties for drug offenses, seem harsh to many. Effective crime control would seem to require the expertise of trained experts and scholars who understand the complexities of general deterrence and the identification and incapacitation of the dangerous.

But this brief Essay, which reviews some previous studies and analyses, argues that distributing criminal liability and punishment according to the shared judgments of the community—so-called "empirical desert"—does not have the failings that many assume, such as those described above, and indeed ought to be preferred by both moral philosophers and crime-control utilitarians. It represents the best practical approximation of deontological desert. And it offers the greatest potential for effective crime control because, by tracking community views, the criminal law can build its moral credibility with the community and thereby harness the potentially enormous powers of social influence and internalized norms.

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view of it or the moral philosopher's view—but through more instrumentalist crime-control mechanisms, such as general deterrence or incapacitation of the dangerous. And finally, even if relying upon the community's views of justice was an effective crime-control mechanism, wouldn't such a system condemn us to live under the status quo of current community views? History teaches us that a society can improve itself and the lives of its members only by moving ever forward in refining its judgments of justice.

Thus, this brief Essay will take up these four questions: (1) Is there any such thing as the community's views of justice? (2) Are the community's views of justice brutish and draconian? (3) Why should a criminal law concerned with crime-control care what the community thinks is just? (4) Should criminal law ever deviate from the community's shared judgments of justice?

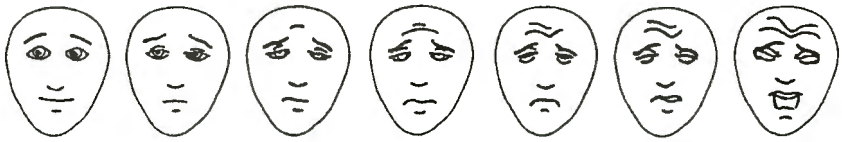
I. IS THERE ANY SUCH THING AS THE COMMUNITY'S VIEWS OF JUSTICE?

Given the subjective and complex nature of judgments about justice, one would expect disagreement among people. But the research suggests otherwise. It shows a high degree of agreement about judgments of justice across all demographics, at least for what one might call the core of wrongdoing—physical aggression, taking property without consent, and deceit in exchanges. As potential crimes move out from this core, the judgments become culturally dependent, and thus more diverse.[1]

The high level of agreement seen is not agreement on the exact punishment that should be imposed in any particular case, but rather is agreement on the relative blameworthiness of different offenders, a rank-ordering of cases according to the punishment they deserve. People and societies will disagree about the severity of punishment to impose. Different people may want to set a different high-end point on the punishment continuum. Some may set the high-end point as the death penalty; others may set it at life imprisonment, while still others may set it at ten years' imprisonment. The high-end point is a culturally dependent determination and is thus malleable. But once the high-end point is set, as it must be in every society, people commonly will agree where on the punishment continuum a given case falls for the amount of punishment deserved.

[1] For a more detailed discussion of these issues and the studies cited *infra* notes 2–6, see PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT ch. 2 (2013) [hereinafter ROBINSON, IJUD].

FIGURE 1



Important here is the fact that there is not an infinite number of meaningfully different points on a punishment continuum. The meaningfully different punishment units become larger as the punishment amount increases. The difference between sentences of three days and seven days is meaningful to people, but the difference between a sentence of ten years and three days versus ten years and seven days is not seen as meaningful different. The higher on the punishment continuum, the larger the meaningful punishment units. Thus, the number of meaningfully different punishment units on the punishment continuum is limited.

Yet, the number of cases that people will see as meaningfully different in the punishment deserved is very high. That is, each case requires a specific amount of punishment, not just a general range of punishment. There is not some magical connection between an offense and an amount of punishment. Rather, the specific amount of punishment required is an amount of punishment that will put that offense in its proper ordinal rank.

This helps explain why it has taken us so long to discover the high level of agreement on the relative seriousness of different core wrongs. People's disagreements about general severity of punishment—such as their disagreement about the proper high-end point of the punishment continuum—obscured their common agreement on relative blameworthiness.[7]

People commonly have a quick answer to such questions as "Should someone be punished for what they have done?" and "If so, what is the relative blameworthiness of this offender and offense as compared to other offenses?" The answers could be the result of reasoning—thinking carefully through the issue and applying some set of principles. However, for many, these answers are *intuitional* rather than reasoned. That is, these answers come to them without logically thinking through steps in applying principles. Instead, they arrive at an answer almost as if they were observing it as a fact.

As the Kahneman graphic depicts below, intuitions have much in common with pure perception. Intuitions produce answers that are fast,

Experienced by Children: Development, Initial Validation, and Preliminary Investigation for Ratio Scale Properties, 41:2 PAIN 139, 144 (1990), http://journals.lww.com/clinicalpain/toc/1998/03000.

[7] For a more detailed discussion of these issues, see ROBINSON, IJUD, *supra* note 1, at ch. 2.

sophistication does not depend upon education, intelligence, or upon other demographic factors. Research has repeatedly shown this to be true in a wide range of criminal law contexts. Examples of this are found in the following areas: the objective requirements of complicity; attempt; causation; offense culpability doctrines such as mistake, accident, voluntary intoxication, and the partial individualization of the reasonable person standard for negligence; justification doctrines such as defensive force and law enforcement use of force; culpability requirements; excuse doctrines such as insanity, immaturity, involuntary intoxication, duress, and entrapment; grading doctrines such as those relating to sexual offenses and homicide offenses; testing empirical claims of theoretical literature; and using individualized judgments to test competing scholarly theories, such as the nature of justification defenses, blackmail, and the nature of the shift from common law to modern penal codes.[10]

This picture of laypersons' judgments of justice—high levels of agreement on the relative blameworthiness of many aspects of the core wrongdoing, the apparently intuitional nature of many aspects of these judgments, and the high level of nuance and sophistication—may seem a bit puzzling. What can possibly explain why we are built this way?

One theory, supported by a good deal of evidence, suggests that this aspect of human nature results from pressures of evolutionary development. Early human groups on the Serengeti Plain were surrounded by bigger, faster, and stronger predators. What saved them—what made humans the most successful species in the history of the planet—was the ability they developed for cooperative action. To maintain cooperative action, a group must have certain foundational rules of conduct among members. The "core of wrongdoing" so universally agreed upon across demographics seems a good candidate for these foundational rules: no physical aggression against other group members, no taking of another's property without consent, and no deceit in exchanges. To allow such victimization would be to risk undermining the cooperation of the group member being victimized.

But the rules mean nothing without enforcement, so a system of punishment for violating the foundational rules must exist to maintain a desired level of cooperation. Complicating things is the fact that the only available methods of punishment seem themselves to be violations of the basic prohibitions: beating a violator, or taking his possessions, or depriving him of his share of the group's food. Thus, the group members had to appreciate the existence and special status of punishment for

[10] For more details, see ROBINSON, IJUD, *supra* note 1, and *infra* Parts III–IV.

Examining a host of natural experiments over the past century or two in which human groups were thrust into a situation where government and law could no longer have an effect on them, we still see evidence of the human predisposition toward shared views of wrongdoing and punishment across a staggeringly varied set of absent-law situations. These natural experiments include plane crashes, shipwrecks, forced leper colonies, gold-mining camps, pirate colonies, inmates in prison camps, prisoners after an uprising, residents of occupied territory in war, and a host of other absent-law situations.[14]

All of this is not to suggest that there is agreement on all criminal liability and punishment rules. There is not. As noted above, while people may agree on the relative seriousness of many aspects of core wrongdoings, they disagree on other issues. Also, the further out from the core, the greater disagreement can be. Further out from the core, the ultimate judgment increasingly depends upon a larger measure of reasoned judgment extrapolating from an initial intuition, and is more influenced by cultural or other demographic variables. But the larger point is that, contrary to the once common wisdom, justice judgments are not all matters on which everyone disagrees about everything. Some universal principles do exist, which means that one can reasonably speak of a core of a "community view."

In my discussion of the third question of this Essay, I will come back to the issue of the existence of disagreements on some issues. The significance of points of disagreement depends in part upon whether and why one cares about community views in the first place.

Assuming that there is a community view of justice, if we are to move beyond academic discussion to the practical realities of lawmaking, we must face the possibility that different communities have somewhat different views on some criminal law matters. Thus, we must be able to answer the question, "Which community?" But the answer to that is simple, even obvious: the relevant community is that which will be bound by the rule being enacted. If the issue is how to construct a state criminal code, then the relevant community is the residents of that state. If the issue is the provision of a municipal code, the relevant population is the residents of that city. If the issue arises in the federal criminal code, the relevant population is all U.S. residents.

To summarize, research suggests there is a high degree of agreement among people at least in regard to crimes that are the core of wrongdoing. In addition, while people may disagree as to the exact punishment that

[14] *See generally* ROBINSON & ROBINSON, PIRATES, *supra* note 12.

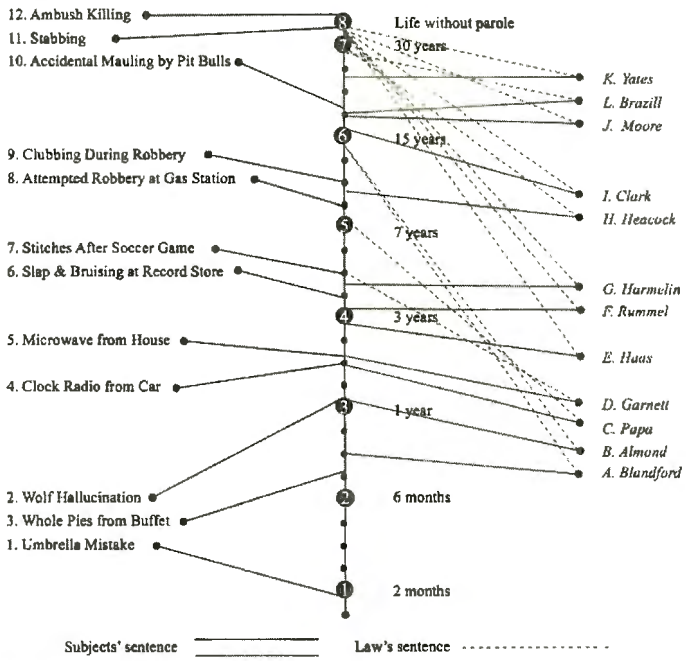
TABLE 1

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

Below is a more graphic presentation of the information in Table 2.[17] The cases on the left of the graphic are the milestone scenarios, which provide points of comparison along the full length of the punishment continuum. The lines from each case to the punishment scale show how severely the lay persons would punish each of these milestone offenses.

On the right are the cases illustrating the six common crime-control doctrines described above. The solid lines on the right show the amount of punishment that the study's subjects would impose in each case. The dotted lines show what punishment the law would impose, and did actually impose in the case. As you see, the law's punishment is dramatically higher than that of the study's subjects. The difference is even more striking when you take into account that the punishment continuum used here is exponential. That is, moving from ❶ to ❷ triples the punishment (from two months to six months), just as moving from ❸ to ❹ triples the punishment (from one year to three years). Thus, the large difference between the solid lines and the dotted lines for each case shows that the punishment the law imposes is commonly many times more severe than what the study's subjects would impose.

FIGURE 3



[17] This figure is reproduced from ROBINSON, IJUD, *supra* note 1, at 127, and Robinson et al., *supra* note 15, at 1973.

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

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

We see this unhealthy dynamic in every state that we have investigated.[19] In Kentucky, for example, a relatively thoughtful criminal law reformer among the states, it is estimated that there are now 440 provisions in the criminal code and 1800 criminal offenses outside of the code. This is a dramatic increase over what existed when the new comprehensive criminal code was enacted in 1974. Yet new forms of criminal activity that did not exist in 1974 make up only a trivial number of these new offenses.[20]

It is possible to recodify current American criminal codes to better reflect the community's true judgments of justice and to better maintain that correspondence in the future.[21] But the larger point here is that the

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[19] *See, e.g.*, PAUL H. ROBINSON ET AL., REPORT OF THE DELAWARE CRIMINAL LAW RECODIFICATION PROJECT (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2950728 [https://perma.cc/9FFM-U8MA]; PAUL H. ROBINSON ET AL., FINAL REPORT OF THE MALDIVES PENAL LAW AND SENTENCING CODIFICATION PROJECT (2006), http://ssrn.com/abstract=1522222 [https://perma.cc/XT5A-KHS4]; PAUL H. ROBINSON, FINAL REPORT OF THE KENTUCKY PENAL CODE REVISION PROJECT (2003), https://ssrn.com/abstract=1523384 [https://perma.cc/3EDQ-B42B]; PAUL H. ROBINSON & MICHAEL T. CAHILL, FINAL REPORT OF THE ILLINOIS CRIMINAL CODE REWRITE AND REFORM COMMISSION (2003), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1290&context=faculty_scholarship [https://perma.cc/PK3C-83WW].

[20] Robinson & Cahill, *supra* note 18, at 635–37.

[21] For a discussion of the kinds of reforms one could make to the criminal law amendment process, see Robinson, *Resurrection*, *supra* note 18, at 182–90. For examples of how studies exposing grading irrationalities can be conducted, see Paul H. Robinson, Thomas Gaeta, Matthew Majarian, Megan Schultz & Douglas M. Weck, *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709 (2010); PAUL H. ROBINSON ET AL., REPORT ON OFFENSE GRADING IN NEW JERSEY (2011), https://ssrn.com/abstract=1737825 [https://perma.cc/HBP8-ABRJ]; PAUL H. ROBINSON ET AL., REPORT ON OFFENSE GRADING IN PENNSYLVANIA (2010), https://ssrn.com/abstract=1527149 [https://perma.cc/969P-9JMU].

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

But some previous empirical studies have hinted, and more recent studies have confirmed, that this same relationship between the criminal justice system's moral credibility and its ability to gain deference and compliance applies not just to extreme cases but to all—that there is a general relationship between the system's moral credibility and its ability to gain compliance.[24] Even a marginal decrease in the former will produce a marginal decrease in the latter. This suggests that any system can improve its ability to gain deference and compliance by improving its reputation for doing justice and avoiding injustice.

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

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

Second, a system that has earned moral credibility with the people also can help avoid vigilantism. People will be less likely to take matters into their own hands if they have confidence that the system is trying hard to do justice. And, as I detail elsewhere, the danger of vigilantism goes beyond those rare souls willing to "go into the streets"; it includes "shadow vigilantes" who try to force justice from a system apparently reluctant to do

[24] For a discussion of these issues, see ROBINSON, IJUD, *supra* note 1, at 176–88.

which the community would disapprove. After this disillusioning information, the subjects were tested again and their views on the measures of deference and compliance had all weakened. Both sets of questions used a nine-point scale where the higher the number, the greater the deference to the criminal law and willingness to comply with it. Here are the results[27]:

TABLE 3: WITHIN-SUBJECTS DISILLUSIONMENT STUDY

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

The graphic on the next page gives a visual display of this same information. The patterned bars show the subjects' responses before the disillusionment, and the gray bars after.

[27] This table is reproduced from ROBINSON, IJUD, *supra* note 1, at 180. The first column lists not the full text of the questions used but rather a short-hand identification of the questions.

TABLE 4: BETWEEN-SUBJECTS DISILLUSIONMENT STUDY

	Baseline: No Disillusionment	**Low Disillusionment**	**High Disillusionment**
1. Life Sentence	6.56[a]	6.59[a]	5.35[b]
2. Facebook	6.14[a]	5.38[b]	5.59[b]
3. Financial Maneuver	5.25[a]	5.16[a]	4.34[b]
4. Arrowhead	5.93[a]	5.65[a]	4.95[b]
5. Hand Gun	6.66[a]	5.40[b]	4.32[c]
6. Dog Lover	5.15[a]	4.75[a,b]	4.43[b]
7. Gas Station	7.05[a]	6.63[a]	5.63[b]
8. Restaurant	7.15[a]	6.47[b]	5.84[c]

Note: The difference between two figures in the same row is statistically insignificant if they share the same letter annotation. That is, the difference between two values within the same row is statistically significant if the figures are annotated with different letters.

Another study did not collect new data but sought to determine whether the same dynamic was present in some of the large datasets of survey data previously collected by others.[29] As the table below demonstrates,[30] the moral credibility measure in the study explains more of the variance in the "willingness to defer" measure than any of the other measures. In fact, it is the only predictor that is statistically significant.

TABLE 5: WILLINGNESS TO DEFER STUDY

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

What the studies show is that there is a continuous relationship between a system's moral credibility and its ability to gain deference and compliance. A marginal decrease in credibility produces a marginal

[29] Robinson et al., *supra* note 15, at 2016–23.

[30] The table below is reproduced from *id.* at 2022.

way, it can harness the powerful forces of social and normative influence to gain deference and compliance.[33]

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

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

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

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

[33] For a thoughtful critique, and our response immediately following, see Donald Braman, Dan M. Kahan & David A. Hoffman, *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531 (2010); and Paul H. Robinson, Owen D. Jones & Robert Kurzban, *Realism, Punishment, and Reform*, 77 U. CHI. L. REV. 1611 (2010). For another critique, see Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77 (2013). Our reply was Robinson et al., *Empirical Desert*, *supra* note 22.

The answer to this question may depend upon why one is adopting a criminal law based upon community views. If it is solely out of a commitment to democratic ideals, then perhaps the community view should always prevail. If one supports adopting the community view because it generally reflects the blameworthiness of the offender rather than utilitarian crime-control programs of deterrence and incapacitation of the dangerous—that is, because it is the best practical approximation of deontological desert—then again, one might be hesitant to deviate from those community views of justice.

However, if one supports a criminal law based upon community views because of its crime-control potential in harnessing the powerful forces of social and normative influence, then logically one ought to be open to having criminal law deviate from community views if, by doing so, one could get a crime-control benefit that exceeds the crime-control cost of the deviation. The good crime-control utilitarian would presumably simply run the numbers: one could justify doing injustice or a failure of justice, as the community sees it, if such would produce such a large deterrent or incapacitative crime-control benefit as to outweigh the crime-control cost of reduced moral credibility.

However, there is reason to be skeptical that this will regularly occur. While general deterrence works in theory, research suggests that it is the exception rather than the rule that one can increase the criminal law's deterrent effect by manipulating criminal law rules. The problem is that the intended targets of the deterrence program, the potential offenders, commonly do not know of the criminal law rules that have been formulated to maximize deterrence. And even if they did know the rules, this target population frequently is irrational; they are not rational calculators who will weigh the costs and benefits of their conduct. Rather, they commonly are subject to drug abuse, alcoholism, mental illness, impulsiveness, gang influence, and so forth. And even if the potential offender knows the criminal law rule and is a rational calculator, he commonly will see the benefits of crime as outweighing the risks. This is in large part because the conviction and punishment rate for offenses is so low as to create little real risk that the planned offense will be punished. And, indeed, it is not even the actual risks of being caught and punished that matter but the risks perceived by the target audience. The target audience that regularly underestimates the risk of punishment, as is commonly the case, can destroy a deterrence program.[35]

[35] For a more detailed discussion of this issue, see ROBINSON, DISTRIBUTIVE PRINCIPLES, *supra* note 23, at chs. 3–4.

time. What one can say, however, is that a society ought to be constantly vigilant in testing its current criminal law to determine whether its rules are producing unappreciated injustices.

One final reason to deviate from community views is likely to be more common, and more important. It is sometimes the case that government or social leaders can see a need to change community norms regarding a particular practice or conduct. In the United States, for example, over the past several decades people's views have shifted on the condemnability of such things as insider trading, domestic violence, drunk driving, downloading music without a license, and date rape. Social and political reformers have seen these shifts in public attitudes as important to the creation of a better society. But if criminal law is always to follow the community's current judgments of justice, then how can law play a role in helping to bring changes in community views? If empirical desert is the distributive principle, it would seem to condemn criminal law to be always a follower of public opinion, never a leader.

Certainly, if community views change, then criminal law can and should change with it. But must criminal law always be a follower? Can criminal law sometimes be used to help bring about changes in the community's judgments about what is condemnable? The criminal law certainly could be effective in doing this. By more broadly criminalizing certain conduct or by increasing the penalties assigned to it, the criminal law can signal to citizens that they ought to think of such conduct as being more condemnable than they had previously thought it.

But using criminal law to change community views creates complications for empirical desert.[37] If empirical desert is attractive as a distributive principle because, by tracking community views, it can earn a reputation as being a reliable moral authority and can inspire greater deference to its commands and greater internalization of its norms,[38] then if the law conflicts with community views—by being out in front of public views—it can lose its crime-control effectiveness because it might come to be seen as an unreliable and unjust distributor of punishment.

Thus, whenever criminal law seeks to be a leader of community views, it must worry that such deviation risks undermining its moral credibility. American Prohibition in the 1920s illustrates the problem. Because of a combination of political forces, a constitutional amendment was passed that prohibited the sale of alcohol in the United States, even though only a minority of Americans actually supported such

[37] *See* ROBINSON, IJUD, *supra* note 1, at 70–82.

[38] *See* ROBINSON, DISTRIBUTIVE PRINCIPLES, *supra* note 23, at 175–212.

community views so as to build its reputation as a reliable moral authority. Once that reputation has been established—once the criminal law has earned "moral credibility chips" with the community—reformers can carefully and selectively "spend" those chips by having law criminalize or punish more severely the conduct about which it seeks to change community views. The legal change will signal to the community that they should see the conduct as more condemnable, and the law's credibility will induce citizens to accept and internalize this view. If the reform is successful in changing people's views, then the gap between the criminal law and community views will disappear and the reform can be consolidated. If the effort is not successful in changing people's views, then the effort should be abandoned before the conflict between community views and the criminal law brings the criminal law into disrepute.

To be clear, there is no problem with social reformers seeking to change community views through means other than criminal law reform. There is no damage to criminal law—no undermining of its moral credibility—if social reformers use mechanisms such as advertising, education, governmental proclamation, or any other mechanism to influence people.

Let me offer one last piece of advice to social reformers who are hoping to change community views on the condemnability of specific conduct: not all community judgments about what should be criminal can be effectively altered.[40] Some judgments are so deep-seated as to be essentially immune to attempts to change them. This is probably true of people's judgments that serious wrongdoing should be condemned and punished and people's view that the core of criminality—physical aggression, taking of property without consent, and deceit in exchanges—is condemnable. As noted above, there is good evidence to suggest that people's judgments on such matters are the product of a partially innate predisposition as a result of evolutionary development; they are not something that can be educated or coerced out of people's thinking.[41]

The immutability of people's judgments about the core of wrongdoing does provide an interesting insight that reformers might usefully exploit: reformers can increase their ability to have people see some conduct as deservedly criminal if they can build up in people's minds the strength of the analogy between that conduct and the core of wrongdoing. For example, there has been a major effort by companies and artists who produce music, movies, or books to persuade people that they should not

[40] *See* ROBINSON, IJUD, *supra* note 1, at 74–76.

[41] *See* ROBINSON, IJUD, *supra* note 1, at ch. 3.

therefore, greater moral credibility in the long term, than a system of ad hoc adjudication.

Once the criminal law has earned a reputation as a reliable moral authority, it can "spend" those moral credibility "chips" in trying to lead rather than follow community views on selective issues. But reformers must be ready to pull back if the reform efforts are not successful, in order to avoid damaging its reputation for justice and thereby endangering its effectiveness as an engine of reform in the future. Reformers should also avoid wasting their hard-earned chips by spending them on attempts to modify community views that are simply not malleable. It would be a hopeless and wasteful exercise, for example, to try to persuade the community that they should not want serious wrongdoing to be punished, as many modern punishment abolitionists seek to do.

Social reformers are encouraged to use any number of other institutions of social influence to shape community views, including schools, social media, religious organizations, community activism, and the political process. And whatever community judgments of justice are changed by these processes, the criminal law should be careful to follow if it is to maintain its reputation for justness.

To conclude, the available evidence suggests not that community judgments of justice are an endless collection of individual disagreements but that there is strong agreement on a core of issues regarding the relative blameworthiness of a wide range of offenses and offenders. And those shared judgments of justice are not brutish and draconian, but rather stand in stark contrast to the brutish and draconian measures created by the modern coercive crime-control doctrines of general deterrence and incapacitation of the dangerous, which disconnect criminal law from the constraints of justice. That disconnection, in the name of effective crime control, reflects a failure to appreciate the crime-control cost of criminal law's conflicts with community judgments of justice. Such evidence should influence criminal law reformers to attempt to firmly connect the criminal law to community judgments of justice.