

THE CRIMINOGENIC EFFECTS OF DAMAGING CRIMINAL LAW'S MORAL CREDIBILITY

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ABSTRACT

The criminal justice system's reputation in a community can significantly affect the public's willingness to comply with its demands and internalize its norms. In the context of criminal law, empirical studies suggest that ordinary people expect the criminal justice system to do justice and avoid injustice, as they perceive it—a concept that has been called “empirical desert” to distinguish it from the “deontological desert” of moral philosophers. 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 criminal law's moral credibility is the best distributive principle available. Critics have offered a range of objections to this proposal, which this Article considers and answers.

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 the law's demands and undermines criminal law's ability to make people internalize its norms. And where the disillusionment arises from criminal law's perceived 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 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, or so-called *empirical desert*.¹

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¹ See generally PAUL H. ROBINSON, *INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT* (Oxford 2013) [hereinafter *INTUITIONS*]; PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* (Oxford 2008) [hereinafter *DISTRIBUTIVE PRINCIPLES*]; Paul H. Robinson & Josh Bowers, *Perceptions of Fairness & Justice: The Shared Aims and Occasional Conflicts*

Recent events have illustrated some of the effects of reduced moral credibility. Those who believe that the police regularly engage in wrongdoing without consequences have expressed their outrage in sometimes violent protest, attacking officers 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 of a criminal law distributive principle that maximizes moral credibility.² This Article organizes and responds to those criticisms. First, some criticisms challenge the claimed causal connection between a system's reduced moral credibility and people's inclination to comply with and defer to it. These issues are taken up in Part II. Another kind of criticism, examined in Part III, challenges the claim that criminal laws that conflict with community views undermine the criminal law system's moral credibility. A third kind of criticism suggests that it is simply impossible to construct a distributive principle that will minimize conflicts with community views, as discussed in Part IV. Part V examines other philosophical, political, and ideological objections to the proposal moral credibility as a distributive principle. 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 conflicts between criminal law and community views—we agree that it has weaknesses, although not those claimed by its critics—it is still the best distributive principle 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 of the proposed alternatives. Some potential weaknesses of the proposed distributive principle that critics have not raised are offered in Part VII.

of *Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211 (2012); Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010); Paul H. Robinson, *Empirical Desert*, in CRIMINAL LAW CONVERSATIONS 29–39, 61–66 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009); Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145–75 (2008) [hereinafter *Competing Conceptions*]; Paul H. Robinson & John Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 1–67 (2007) [hereinafter *Intuitions of Justice*]; Paul H. Robinson & John Darley, *The Utility of Desert*, 91 NW U. L. REV. 453 (1997) [hereinafter *Utility of Desert*]; Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive vs. Normative Crime Control*, 86 U. VA. L. REV. 1839, 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 V. Roberts & Jan W. de Keijser, *Democratizing Punishment: Sentencing, Community Views, and Values*, 16 PUNISHMENT & SOC’Y 474, 486–93 (2014); Alice Ristorph, *Third Wave Legal Moralism*, 42 ARIZ. ST. L.J. 1151 (2010); Mary Sigler, *The Methodology of Desert*, 42 ARIZ. ST. L.J. 1173, 1185–87 (2010) [hereinafter *Methodology of Desert*]; Mary Sigler, *The False Promise of Empirical Desert*, in CRIMINAL LAW CONVERSATIONS 39–41 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009) [hereinafter *False Promise*]; Adam Kolber, *Compliance-Promoting Intuitions*, in CRIMINAL LAW CONVERSATIONS 41–43 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009); Alice Ristorph, *The New Desert*, in CRIMINAL LAW CONVERSATIONS 45–49 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009) [hereinafter *New Desert*]; Adam Kolber, *How to Improve Empirical Desert*, 75 BROOK. L. REV. 433 (2009) [hereinafter *Improve Empirical Desert*]; Deborah Denno, *The Perils of Public Opinion*, 28 HOFSTRA L. REV. 741 (2000); Kenneth W. 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 that community's deference to, and internalization of, the criminal law's norms. Instead, this loss of moral credibility is likely to provoke resistance, subversion, and vigilantism.

A. THE CRIMINOGENIC EFFECTS OF REDUCED CREDIBILITY

In many ways, the suggestion that criminal law's reduced moral credibility decreases 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 achieving justice—the criminal justice system's ostensible purpose—be a matter of complete indifference to citizens? And when such disillusionment does set in, do we think that people would simply remain compliant?

1. The Disillusionment-Noncompliance Dynamic in Natural Experiments

But is this commonsense view confirmed by experimental analysis? Not many governments in the world would be likely to give the social psychologist experimenter permission to degrade the justness of their criminal justice systems in order to produce a resulting rise in crime. However, there have been a variety of natural experiments in which a 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 United States 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 of 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 laws 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.⁴ 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

³ PAUL ROBINSON & SARAH ROBINSON, *PIRATES, PRISONERS, AND LEPERS: LESSONS FROM LIFE OUTSIDE THE LAW* 139–63 (2015).

⁴ DAVID CORTRIGHT, *PEACE: A HISTORY OF MOVEMENTS AND IDEAS* 164–165 (2008); Blake Stillwell, *11 Ways People Dodged the Draft During the Vietnam War*, *BUS. INSIDER* (Jan. 5, 2020) <https://www.businessinsider.com/11-ways-people-dodge-the-draft-during-the-vietnam-war-2020-1>.

generally.⁵ A significant portion of the public supported this view; polls showed a society-wide dramatic drop in trust in government.⁶ With this widespread disillusionment, crime rose significantly; crime statistics showed an enormous spike in both violent crimes and property crimes.⁷ Many saw the Vietnam War 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 commit crimes.⁸

This same dynamic between criminal law's credibility and public compliance with it is apparent in a 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 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 were 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

⁵ Ilyana Kuziemko, *Did the Vietnam Draft Increase Human Capital Dispersion? Draft-Avoidance Behavior By Race and Class*, (Jan. 2010) (unpublished manuscript), <https://www0.gsb.columbia.edu/mygsb/faculty/research/pubfiles/5798/vietnam.pdf>.

⁶ Writing in the *New York Review of Books* at the time, Hannah Arendt explained, "Truth or falsehood—it does not matter which 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. OF BOOKS (Nov. 18, 1971), <https://www.nybooks.com/articles/1971/11/18/lying-in-politics-reflect-ions-on-the-pentagon-pape>; see also 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>.

⁷ See *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*, HUM. FIGURATIONS (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. CHRON. Oct. 22, 1918, at 8, <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> ("Conscience, patriotism and self-protection demand immediate and rigid compliance."); John Davie, *Wear Mask, Says Law, Or Face Arrest*, OAKLAND TRIB., Oct. 25, 1918, at 9, <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: "[i]t 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'*, MICH. HEALTH (Oct. 29, 2020, 8:43 PM), <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, Nov. 26, 1918, at 1, 5, <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. EXAM'R, Jan. 26, 1919, at 12, <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> [<http://hdl.handle.net/2027/spo.1320flu.0009.231>].

widespread arrests and incarceration, people intentionally disregarded the mask ordinance.¹³ The local paper in Tucson 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 masks properly (or 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 criminal law violations were increasingly met with charges and sentences that seemed grossly disproportionate, aggressive policing and punishment did not reduce crime as intended but, rather, increased it¹⁷ as the criminal justice system’s credibility within the neighborhood 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.¹⁸ Media coverage of the riot from the period reported that “the outburst was in large measure a protest against Police Chief William Parker’s cops.”¹⁹ Another report found that “the incident that ignite[d] disorder ar[ose] from police action.”²⁰ The report described an “atmosphere of hostility and cynicism” as well as “a widespread perception among Negroes of the existence of police brutality and corruption and of a ‘double standard’ of justice and protection – one for Negroes and one for whites.”²¹

At the end of the nineteenth century during the Gilded Age in New York City, 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.²² The result was a body of criminal law that

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, 199 (1984).

¹⁴ *Id.* at 201–02.

¹⁵ *Id.* at 202.

¹⁶ DAVID BLANKE, *THE 1910S* 11–14 (Greenwood Press 2002).

¹⁷ See James Queally, *Watts Riots: Traffic Stop Was the Spark that Ignited Days of Destruction in L.A.*, L.A. TIMES (July 29, 2015, 9:20 AM), <https://www.latimes.com/local/lanow/la-me-ln-watts-riots-explainer-20150715-htmlstory.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 (Harvard Uni. Press 2016) (arguing that “haphazard, undisciplined, and aggressive police response only spawned an ever-more-violent reaction” and then Cabinet member Ramsey Clark warned that aggressive policing had backfired by “starting guerilla war in the streets”).

¹⁸ GERALD HORNE, *FIRE THIS TIME: THE WATTS UPRISING AND THE 1960S* 53–60 (1995).

¹⁹ *Who’s to Blame?*, TIME (Aug. 27, 1965), <https://time.com/vault/issue/1965-08-27/page/18/>.

²⁰ OTTO KERNER ET AL., *REPORT OF THE NATIONAL ADVISORY COMMISSION OF CIVIL DISORDERS* 93 (1968).

²¹ *Id.*

²² Lincoln Steffens, *TWEED DAYS IN ST. LOUIS* (1902), reprinted in *The Shame of the Cities* 34 (McClure, Phillips & Co. 1904). Lincoln Steffens’ essays on corruption in *McClure’s Magazine* painted a dismal picture of a political system hanging to credibility by a thread. See generally *id.* 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 . . . [I]t made a difference in the price if there

simply failed to address the full range of conduct that social mores at the time condemned, such as abortion, gambling, and pornography.²³ As the criminal law came to be seen as increasingly out of touch with community norms, crime increased.²⁴ Street gangs proliferated, and even shoplifting among middle-class women rose.²⁵

At the beginning of the Cold War, Berlin was divided into occupation zones controlled by the United States, 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.²⁶ Only those who professed allegiance to the Kremlin received provisions.²⁷ The restrictions created a thriving black market, which the Soviets worked to prevent with increasingly harsh penalties for unauthorized dealings.²⁸ These penalties were enforced by police officers who were chosen because of their “political reliability”—their commitment to the Kremlin—rather than professional competence.²⁹ In that sense, the laws could never be seen as fair, neutral, or unpolitical.³⁰ But as the penalties for such offenses became more severe, the stigma surrounding such lawbreaking decreased and lawbreaking actually increased.³¹ These small acts of resistance aimed not only to secure sustenance for Berliners but also to signal that the Soviet

was opposition, and it made a difference whether the privilege asked was a legitimate one or not. But nothing was passed free of charge.” *Id.*

²³ Charles A. Ellwood, *Has Crime Increased in the United States Since 1880?*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 378, 385 (1910); Elizabeth Garner Mazarik, *Selling Sex: 19th Century New York City Prostitution and Brothels*, THE DIG: A HISTORY PODCAST (Sept. 3, 2017), <https://digpodcast.org/2017/09/03/19th-century-new-york-city-brothels>.

²⁴ DANIEL CZITROM, *NEW YORK EXPOSED: THE GILDED AGE POLICE SCANDAL THAT LAUNCHED THE PROGRESSIVE ERA* 88, 246–47 (2016); NEW YORK: ART AND CULTURAL CAPITAL OF THE GILDED AGE 210 (Margaret R. Laster & Chelsea Bruner eds., 2019) (explaining that despite the strenuous efforts of social reformers, “pornography constituted an insistent part of Gilded Age visual culture.”).

²⁵ See generally 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* 64s (Vintage Books 2008); ELAINE S. ABELSON, *WHEN LADIES GO A-THIEVING: MIDDLE-CLASS SHOPLIFTERS IN THE VICTORIAN DEPARTMENT STORE* 4 (Oxford Univ. Press 1989).

²⁶ PAUL STEEGE, *BLACK MARKET, COLD WAR: EVERYDAY LIFE IN BERLIN, 1946–1949* 36 (Cambridge Univ. Press 2007); Katie Lange, *The Berlin Airlift: What it Was, Its Importance in the Cold War*, U.S. DEP’T. OF DEF. (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>.

²⁷ MALTE ZIERENBERG, *BERLIN’S BLACK MARKET*, 127–86 (2015); MARK FENEMORE, *FIGHTING THE COLD WAR IN POST-BLOCKADE, PRE-WALL BERLIN* ch. 6–7 (Routledge 2019).

²⁸ Alice Autumn Weinreb, *Matters of Taste: The Politics of Food and Hunger in Divided Germany 1945–1971*, at 100–01 (2009) (Ph.D. dissertation, University of Michigan) (on file with the University of Michigan Library system) (“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.”).

²⁹ Richard Bessel, *Policing in East Germany in the Wake of the Second World War*, CRIME, HIST. & SOC’YS, Dec. 2003, at 11, 14 (“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 . . . [T]hese measures by the police are regarded as unjust.”).

³⁰ *Id.* at 19.

³¹ ANDREI CHERNY, *THE CANDY BOMBERS: THE UNTOLD STORY OF THE BERLIN AIRLIFT AND AMERICA’S FINEST HOUR* 433–34 (2008); Steege, *supra* note 26, at 185.

justice system was no longer seen as morally credible.³² 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.³³ 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 police.³⁴ Under a justice system they perceived as more trustworthy, escaped East Berliners committed less crime.³⁵

2. Disillusionment Expressed as Vigilantism

Disillusionment-induced lawlessness frequently 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 Black people. Two activists summarized this view 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."³⁶ In the weeks that followed, police in many cities were targeted, including in St. Louis, where eleven police officers were shot at in five separate attacks.³⁷ In Seattle, protesters attacked and firebombed a police station.³⁸ In Compton, a man ambushed two officers who were sitting in their patrol car, shooting them both and injuring them severely.³⁹ And in Los Angeles, a man walked into a police station and began firing wantonly at officers after pretending to seek assistance.⁴⁰

But this vigilante impulse is not limited to those who distrust the justice system for its perceived lawlessness; those who believe that the system too often tolerates lawlessness among the public 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

³² CHERNY, *supra* note 31; see also Steege, *supra* note 26, 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.").

³³ Bessel, *supra* note 29, at 14.

³⁴ Leslie Colitt, *Escape From East Berlin*, THE GUARDIAN (Aug. 16, 2011, 4:01 PM), <https://www.theguardian.com/world/2011/aug/16/escape-from-east-berlin>.

³⁵ CHERNY, *supra* note 31, at 475; Steege, *supra* note 26, at 233; Mary Fulbrook, *The State and the Transformation of Political Legitimacy in East and West Germany Since 1945*, 29 COMPAR. STUD. SOC'Y & HIST. 211, 214–230 (1987).

³⁶ Philip V. 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>.

³⁷ Christine Byers, 'Nobody's Safe in This City Right Now': Police Officers Shot in St. Louis This Summer, KSDK (Aug. 3, 2020, 1:46 PM), <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*, FULTON SUN (June 2, 2020, 9:28 AM), <https://www.fultonsun.com/news/local/story/2020/jun/02/missouri-protests-remain-tense-in-kansas-city-st-louis/829410>.

³⁸ Tammy Mutasa, *Seattle Rioters Caught on Camera Trying to Trap Police in East Precinct, Set it on Fire*, KOMO NEWS REPORTER (Aug. 25, 2020), <https://komonews.com/news/local/police-spokes-person-accuses-rioters-of-attempted-murder-for-trying-to-barricade-officers>.

³⁹ Elliott C. McLaughlin & Cheri Mossburg, *Police Identify and Charge Man With Shooting Two Deputies, and He Was Already in Custody*, CNN, <https://www.cnn.com/2020/09/30/us/deonte-murray-compton-deputies-shooting-suspect-arrest/index.html> (last updated Sept. 30, 2020 10:54 PM).

⁴⁰ Madeline Holcombe, *LAPD Officer Injured After Shooting at Harbor Station*, CNN, <https://www.cnn.com/2020/09/27/us/lapd-harbor-shooting-officer-injured/index.html> (last updated Sept. 27, 2020 5:12 AM).

trespassed on the property of private citizens Mark and Patricia McCloskey.⁴¹ Police and prosecutors had ignored many previous violent protests and did nothing to intervene on this occasion, causing the McCloskeys to believe that they had to rely on themselves.⁴² The McCloskeys took it upon themselves to confront the group, he, with an assault rifle and she, with a semiautomatic handgun, and they were charged with unlawful use of a weapon.⁴³ Similarly, seventeen-year-old Kyle Rittenhouse traveled to Kenosha, Wisconsin to help protect businesses that had been previously damaged in a violent protest, which local police and prosecutors had failed to prevent.⁴⁴ He took with him his an assault rifle, and shot and killed two people after they tried to wrestle the rifle out of his hands.⁴⁵ Rittenhouse was charged with, among other things, first-degree intentional homicide.⁴⁶

3. Empirical Studies Showing the Disillusionment-Noncompliance Dynamic

But one need not simply rely on common sense and anecdotal evidence to see the disillusionment-lawlessness connection, as the dynamic is confirmed by controlled social psychology studies. The research suggests that the relationship between the criminal law's moral credibility and the community's deference to it is widespread and nuanced. Even minor diminutions in moral credibility that occur over time can produce corresponding losses in compliance.⁴⁷

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 the criminal law's moral credibility is thought to affect deference, compliance, and the internalization of its norms.⁴⁸ The study presented subjects with a number of scenarios to assess subjects' general attitudes towards the criminal justice system, namely: Will a citizen assist police by reporting a crime? Will they assist in the investigation and prosecution of a

⁴¹ *Central West End Couple Explains Why They Pointed Guns at Protesters Who Demanded Krewson's Resignation* CBS KMOV4 (Feb. 4, 2022), <https://www.kmov.com/2022/02/04/central-west-end-couple-explains-why-they-pointed-guns-protesters-who-demanded-krewsons-resignation/>.

⁴² *Id.*; Christine Byers, *Charges Filed Against McCloskeys, St. Louis Couple Who Pointed Guns Toward Protesters*, ST. LOUIS PUB. RADIO (July 20, 2020, 6:55 PM), <https://news.stlpublicradio.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.").

⁴³ 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>.

⁴⁴ Pauleen Le, *Fires, Chaos Erupts in Kenosha for a 2nd Night Following Jacob Blake Shooting*, CBS58 (Aug. 25, 2020, 5:23 AM), <https://www.cbs58.com/news/fires-chaos-erupts-in-kenosha-in-second-night-following-jacob-blake-shooting>; see also Eric Levenson & Omar Jimenez, *Things We Learned From Kyle Rittenhouse's Trial That Challenge Assumptions About the Case*, CNN (Nov. 19, 2021) <https://www.cnn.com/2021/11/18/us/kyle-rittenhouse-what-we-learned-from-trial/index.html> (summarizing Kyle Rittenhouse's testimony).

⁴⁵ Minyonne Burke, *Kyle Rittenhouse, Charged with Killing Two Kenosha Protesters, Has Bond Set at \$2M*, NBC NEWS (Nov. 3, 2020, 7:31 AM), <https://www.nbcnews.com/news/us-news/kyle-rittenhouse-charged-killing-2-kenosha-protesters-has-bond-set-n1245953>.

⁴⁶ Akane Otani, *Who Is Kyle Rittenhouse and What Happened in the Kenosha Shootings?*, WALL ST. J. (Aug. 29, 2020, 3:18 PM), <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>.

⁴⁷ See generally INTUITIONS *supra* note 1; see generally Robinson et al., *supra* note 1.

⁴⁸ See generally Robinson et al., *supra* note 1, at 1997–2004.

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?⁴⁹ With a baseline established on these issues, subjects were then disillusioned by being exposed 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.⁵⁰

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.⁵¹ The results confirm the conclusions of the earlier within-subjects study: the greater the disillusionment, the greater the loss in deference, compliance, and internalization. A third study analyzing responses in large preexisting datasets came to a similar conclusion using regression analysis.⁵²

The results in the studies are particularly striking because, in each case, subjects came to the study with preexisting views on the criminal justice system's reputation for being just. The experimenters, within the context of the study, could only nudge those preexisting views. 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 incrementally reduce deference—and any increase can likewise increase 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 in their everyday lives.”⁵³ 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.⁵⁴ Participants read about the laws in newspaper stories, which varied in their discussions of civil forfeiture, income tax, and landlord-tenant laws so as to emphasize the fairness or unfairness of the laws.⁵⁵ 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.⁵⁶ These items included drunk driving, parking in a no-parking zone, failing to pay taxes, and drinking alcohol under age twenty-one.⁵⁷ Non-compliance in the second study served as an indication of so-called

⁴⁹ *Id.* at 1998–99.

⁵⁰ *Id.* at 1999–2000.

⁵¹ *See id.* at 2004–05.

⁵² *Id.* at 2017–18, 2021–23.

⁵³ Janice Nadler, *Flouting the Law: Does Perceived Injustice Provoke General Non-Compliance?*, (NW. UNIV. SCH. OF L. & ECON. RSCH. PAPER SERIES, Paper No. 02–09, 3 2002), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=353745.

⁵⁴ *Id.* at 9.

⁵⁵ *Id.* at 10–11.

⁵⁶ *Id.* at 9.

⁵⁷ *Id.* at 12.

“flouting” behavior.⁵⁸ 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.⁵⁹ That is, perceptions of an unjust law activated a more general attitude about the unjustness of the legal system, even if that attitude was subconscious.⁶⁰

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.⁶¹ The authors examined road safety data from fifteen 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.⁶² 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, to more traffic fatalities.”⁶³ Regardless of the specific content of the respective countries’ traffic laws, the law-abiding behavior of drivers was found to have a measured positive effect on traffic fatalities.⁶⁴ “The core idea of our paper is that social norms prevail over laws,” the authors explained.⁶⁵ 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.⁶⁶

A 2008 study of Swedes assessed whether there was a correlation between low institutional trust and, among other things, illegal alcohol consumption.⁶⁷ Alcohol consumption is a hotly contested topic in Sweden, and the Swedish national parliament has passed several laws intended to limit alcohol consumption.⁶⁸ Sweden also has a state monopoly over alcohol sales.⁶⁹ 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” as negative.⁷⁰ The researchers asked respondents about their drinking habits and probed their trust in various societal institutions.⁷¹ The results showed that lack of trust was

⁵⁸ *Id.* at 9.

⁵⁹ *Id.* at 14.

⁶⁰ *Id.* at 28.

⁶¹ Lode Vereeck & Klara Vrolix, *The Social Willingness to Comply with the Law: The Effect of Social Attitudes on Traffic Fatalities*, 27 INT’L REV. L. & ECON. 385, 385 (2007).

⁶² *Id.* at 397–98.

⁶³ *Id.* at 402.

⁶⁴ *Id.* at 386.

⁶⁵ *Id.* at 402.

⁶⁶ *Id.*

⁶⁷ Johanna Ahnquist, Martin Lindstrom & Sarah P. Wamala, *Institutional Trust and Alcohol Consumption in Sweden: The Swedish National Public Health Survey 2006*, 8 BMC PUB. HEALTH 283, 284 (2008).

⁶⁸ See generally Richard F. Tomasson, *Alcohol and Alcohol Control in Sweden*, 70 SCANDINAVIAN STUDIES 477 (1998).

⁶⁹ Tim Stockwell et al., *Estimating the Public Health Impact of Disbanding a Government Alcohol Monopoly: Application of New Methods to the Case of Sweden* 18 BMC PUBLIC HEALTH 1, 2 (2018) (available at <https://bmcpubhealth.biomedcentral.com/track/pdf/10.1186/s12889-018-6312-x.pdf>).

⁷⁰ Ahnquist et al., *supra* note 67, at 285.

⁷¹ *Id.* at 285–289.

associated with increased likelihood of harmful alcohol consumption.⁷² High trust in institutions, in contrast, was correlated with a greater inclination to follow the advice of public officials, trust in experts, and take steps to limit their own alcohol consumption.⁷³ Ultimately, the study suggested 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.⁷⁴ Based on preexisting 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.⁷⁵ Respondents were also asked to rank how much confidence they had in the legal system on a scale of "none at all" to "a great deal of confidence."⁷⁶ The study's authors found that a perception of legitimacy in the legal system had a highly significant effect on so-called "tax morale," namely "why people do not cheat on their taxes."⁷⁷ 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.⁷⁸ "[T]rust in the legal system leads to acceptance of governments' decisions and produces the incentive to obey the rules," the authors concluded.⁷⁹ Furthermore, where the public believed that officials were honest and competent—measured by their reported level of agreement with the statement "Public officials can usually be trusted to do what's right"—willingness to comply with tax payments increased further.⁸⁰ Ultimately, the results suggest 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 capability of tax officials.

A 2009 study used survey data from a number of African countries to model the relationship between perceptions that a government is fair and trustworthy and beliefs that it deserves deference to its rules.⁸¹ The authors focused on factors that they believed would induce "voluntary deference to the directives of authorities and rules precisely because they are believed legitimate."⁸² The data used in the study was collected through a survey of more than twenty-three thousand respondents across eighteen countries and modeled in an effort to capture citizens' perceptions of institutional

⁷² *Id.* at 289.

⁷³ *Id.* at 290.

⁷⁴ Benno Torgler, *Tax Morale, Rule Governed Behavior and Trust*, 14 CONST. POL. ECON. 119, 134 (2003).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* ("To assess the level of tax morale we use the following question: Please tell me for each of the following statements whether you think it can always be justified, never be justified, or something in between: (. . .) Cheating on tax if you have the chance. The question leads to a ten scale index of tax morale with the two extreme points 'never justified' and 'always justified'. The ten-point scale has been recoded into a four-point scale (0, 1, 2, 3), with the value 3 standing for 'never justifiable'. 4-10 has been integrated in the value 0 due to a lack of variance."). *Id.* at 134.

⁷⁸ *Id.* at 137.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Margaret Levi, Audrey Sacks & Tom Tyler, *Conceptualizing Legitimacy, Measuring Legitimizing Beliefs*, 53 AM. BEHAV. SCIENTIST 354, 361 (2009).

⁸² *Id.* at 355.

legitimacy in relation to their willingness to obey the police, courts, and tax department.⁸³ The survey asked respondents the degrees to which they believed that administrators were corrupt, authorities were capable of detecting and punishing crime, and the government treated citizens fairly.⁸⁴ Standard sociodemographic variables that can affect citizens' acceptance of government authority, including household income, were controlled for.⁸⁵ 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.⁸⁶ 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."⁸⁷

Notice that these last several studies tested not only the effect of people's perceptions of the justness of the various criminal justice systems' laws and dispositions but also their fairness in adjudicating cases and the trustworthiness and legitimacy of their respective governments generally. Natural experiments and empirical studies on these issues are relevant to this Article's present purpose because they confirm that a criminal justice system's reputation can have significant real-world effects on compliance with its laws and regulations.

4. Natural Experiments on Law Enforcement Legitimacy and Compliance

There exist 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 twenty-first century.⁸⁸ According to human rights groups, the Nigerian police often extort money from the public at taxi stands, marketplaces, and roadblocks.⁸⁹ When citizens fail to pay the bribes, they are sometimes beaten, sexually assaulted, or shot.⁹⁰ Further, the police often neglect to perform their basic duties unless they are bribed.⁹¹ Crimes are not investigated unless the victim is able to persuade the police to act, and officers at the upper echelons of the police force are widely known to siphon off significant portions of public funds for their personal uses.⁹² A survey gauging Nigerian public opinion on police legitimacy found that a majority

⁸³ *Id.* at 361.

⁸⁴ *Id.* at 362–63.

⁸⁵ *Id.* at 363.

⁸⁶ *Id.* at 367.

⁸⁷ *Id.*

⁸⁸ "Everyone's In on the Game": Corruption and Human Rights Abuses by the Nigeria Police, HUM. RTS. WATCH (Aug. 17, 2010), <https://www.hrw.org/report/2010/08/17/everyones-game/corruption-and-human-rights-abuses-nigeria-police-force#>.

⁸⁹ *Id.* at 26.

⁹⁰ *Id.* at 40–50.

⁹¹ *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>.

⁹² HUM. RTS. WATCH, *supra* note 88.

of those surveyed expressed having “no confidence” in the police.⁹³ As 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.”⁹⁴ Another study found that Nigeria is plagued by “low levels of citizen cooperation with the police”⁹⁵ and “a loss of confidence of the common man in the criminal justice system,”⁹⁶ and still another found that “less than a tenth (7.7%) of [surveyed Nigerians] trust the police.”⁹⁷ As a result of this distrust, crime throughout Nigeria has increased.⁹⁸ Analyses of crime data between 1999 and 2013 show that armed robberies have increased dramatically even as the Nigerian police received more and more resources from the state.⁹⁹ Mistrust of the state is among the causes of heightened violence in recent years.¹⁰⁰ As one commentator has noted, “The situation is getting worse. The government has completely failed to provide even basic security.” In fact, some members of the Nigerian public have taken the law into their own hands by lynching suspects of crimes or flouting the law altogether by shoplifting and committing car thefts, fraud schemes, and computer crimes.¹⁰¹ Ultimately, crime has only become more widespread and diverse in Nigeria as the police have become more corrupt, unprofessional, and ineffective.

After the shooting of Michael Brown in Ferguson, Missouri, the Department of Justice conducted an investigation finding that Ferguson’s policing practices led to distrust and resentment among many in the Ferguson community, which is 67% Black.¹⁰² The report explained, “African Americans’ views of FPD [Ferguson Police Department] are shaped not just by *what* FPD officers do, but *how* they do it.”¹⁰³ Dozens of Ferguson residents told of officers cursing at them, verbally harassing them, and randomly brandishing their weapons in threatening ways.¹⁰⁴ The crime rate, and especially the homicide rate, in Ferguson rose precipitously after the

⁹³ Johnson Oluwale 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. CRIM. JUST. SCI. 46, 54 (2014).

⁹⁴ *Id.* at 56.

⁹⁵ Olufunmilayo Oloruntimehin, *Crime and Control in Nigeria*, in CRIME AND CONTROL IN COMPARATIVE PERSPECTIVES 165 (Hans-Gunther Heiland et al. eds., 1991).

⁹⁶ *Id.* at 182.

⁹⁷ Etannibi E.O. Alemika, *Crime and Public Safety in Nigeria*, CLEEN FOUND. 21 (2014), <http://new.cleen.org/Crime%20and%20Public%20Safety%20in%20Nigeria.pdf>; CHARLES OMOLE, THE NIGERIAN POLICE-PUBLIC RELATIONSHIP 73–91 (2017).

⁹⁸ Etannibi E.O. Alemika & Innocent C. Chukwuma, *Police-Community Violence in Nigeria*, CTR. FOR L. ENFORCEMENT EDU. & NAT’L HUM. RTS. COMM. 63(1999) <https://nairametrics.com/wp-content/uploads/2013/02/police-community-violence.pdf>.

⁹⁹ Pelumi E. Oguntunde, Oluwadare O. Ojo, Hilary I. Okagbue & Omoleye A. Oguntunde, *Analysis of Selected Crime Data in Nigeria*, 19 DATA IN BRIEF 1242, 1245 (2018).

¹⁰⁰ Alonso Soto, *Once Africa’s Promise, Nigeria is Heaving Under Crime, Few Jobs*, ALJAZEERA (June 15, 2021), <https://www.aljazeera.com/economy/2021/6/15/once-africas-promise-nigeria-is-heaving-under-crime-scare-jobs>.

¹⁰¹ Oloruntimehin, *supra* note 95, at 183.

¹⁰² German Lopez, *What Did the Justice Department’s Investigation Into the Ferguson Police Department Find?*, VOX (Jan. 27, 2016), <https://www.vox.com/2015/5/31/17937860/justice-department-ferguson-police-michael-brown-shooting>.

¹⁰³ U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., THE FERGUSON REPORT: DEPARTMENT OF JUSTICE INVESTIGATION OF FERGUSON 123 (2015).

¹⁰⁴ *Id.* at 123–24.

shooting.¹⁰⁵ While some of this increase in crime may have been due to reduced police intervention—the phenomenon known as the “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.¹⁰⁶ That is, instances of police use of lethal force against unarmed civilians diminish the public’s trust in the police, causing “(1) Higher crime rates as a direct reaction to diminished police legitimacy; (2) Reduced cooperation with police; (3) Reduced police budgets.”¹⁰⁷

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

In 2003, the then mayor of Mexico City, Manuel Lopez Obrador, and billionaire Carlos Slim combined efforts to reduce crime in one of Mexico City’s most notoriously lawless neighborhoods called Tepito.¹⁰⁸ Under the guidance of a security consulting firm run by former New York City Mayor Rudolph Giuliani, Slim invested millions in bolstering security in order to curb the violence, drug trafficking, and sale of stolen or counterfeit goods for which the neighborhood was known.¹⁰⁹ Surveillance cameras were installed throughout the neighborhood, the number of police officers patrolling the neighborhood increased enormously.¹¹⁰ Post-Giuliani law enforcement in Tepito was characterized by “an aggressive approach to petty crime, with increased arrests and stiff fines” as well as “zero tolerance” of graffiti and broken windows.¹¹¹ The Giuliani approach was viewed as largely illegitimate because Giuliani was not an elected official and was seen as targeting vulnerable Mexicans participating in the informal economy.¹¹² Residents of the neighborhood, including those who were not involved in any sort of criminal group, resisted.¹¹³ In 2003, Tepito residents managed to drive off 1,200 police officers who approached Tepito with helicopters and armored

¹⁰⁵ Richard Rosenfeld, *Was There A ‘Ferguson Effect’ on Crime in St. Louis?* THE SENTENCING PROJECT 1 (June 11, 2015) <https://www.sentencingproject.org/wp-content/uploads/2015/09/Ferguson-Effect.pdf>.

¹⁰⁶ 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, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOCIO. REV. 857, 865 (2016) (finding that 911 calls for service in Milwaukee dropped after the Michael Brown story broke); Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, PEW RSCH. CTR. (Sept. 29, 2016), <https://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance> (in a 2016 survey conducted just after the shooting of Brown, just 14% of Black people reported that they had a lot of confidence in their local police, and less than half said they had at least some confidence).

¹⁰⁷ Philip J. Cook, *Will the Current Crisis in Police Legitimacy Increase Crime? Research Offers a Way Forward*, 16 PSYCHOL. SCI. IN THE PUB. INTEREST 71, 71 (2015).

¹⁰⁸ Andalusia Knoll, *The Mexico City Barrio That Giuliani Couldn’t Conquer*, VICE (March 7, 2013), <https://www.vice.com/da/article/nn483w/tepito-is-mexico-citys-last-untamed-barrio>.

¹⁰⁹ *Id.*; Ibsen Martinez, *Tepito’s Way*, LIBR. OF ECON. & LIBERTY (Oct. 3, 2005), <https://www.econlib.org/library/Columns/y2005/MartinezTepito.html>.

¹¹⁰ Knoll, *supra* note 108.

¹¹¹ Matt Zapotosky & Karen DeYoung, *How Rudy Giuliani’s Brand as a Crime-Fighting Mayor Made Him Millions in Latin America*, WASH. POST (Nov. 21, 2016) https://www.washingtonpost.com/world/national-security/giuliani-abroad-selling-latin-america-on-his-crime-fighting-policies/2016/11/21/8b0615c2-ac57-11e6-8b45-f8e493f06fed_story.html.

¹¹² Katharyne Mitchell & Katherine Beckett, *Securing the Global City: Crime, Consulting, risk, and Ratings in the Production of Urban Space*, 15 IND. J. OF GLOBAL LEGAL STUD. 75, 96–97 (2008).

¹¹³ See generally MARKUS MICHAEL MÜLLER, *THE PUNITIVE CITY: PRIVATIZED POLICING AND PROTECTION IN NEOLIBERAL MEXICO* (2016).

vehicles.¹¹⁴ Since then, crime in the area has increased as Tepitans have largely ignored the new police procedures.¹¹⁵ 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.¹¹⁶

Similarly, consider the experiences of various Native American tribes whose tribal justice systems conflicted with the U.S. federal criminal justice system. Before 1953, the federal government had allowed tribes to have criminal justice jurisdiction over their reservations,¹¹⁷ but that year Congress passed Public Law 280, which allowed states to decide whether to assume complete or partial jurisdiction over crimes committed on reservations.¹¹⁸ The law was viewed as an affront to tribal sovereignty, as it failed to recognize Native Americans' status as members of domestic sovereign nations and stifled the effectiveness of tribal courts.¹¹⁹ 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 of justice implemented by the federal government in those cases where the states did not assume jurisdiction.¹²⁰ As views became more negative, crime soared.¹²¹

The situation in Northern Ireland during the 1970s provides another example of the connection between perceived illegitimacy and increased crime. As tensions rose between Catholics, who wanted a united Ireland, and Protestants, who claimed allegiance to the United Kingdom, violence escalated.¹²² In 1972, the British government suspended the Northern Ireland parliament and instituted direct U.K. rule, replacing Irish criminal justice policies with its own. Law enforcement powers were expanded enormously, allowing for the indefinite detention of suspects without trial, juryless cases

¹¹⁴ GREGORY TREVERTON, FILM PIRACY, ORGANIZED CRIME, AND TERRORISM 108 (2009).

¹¹⁵ Karla Zabudovsky, *Rudy Giuliani Was Paid Millions to Make Mexico City Safer And It May Not Have Worked*, BUZZFEED (Nov. 17, 2016), <https://www.buzzfeednews.com/article/karlazabudovsky/rudy-giuliani-was-paid-millions-to-make-mexico-city-safer-an>.

¹¹⁶ See Mitchell & Beckett *supra* note 112, at 98.

¹¹⁷ Barbara Perry, *Impacts of Disparate Policing in Indian Country*, 19 POLICING & SOC'Y 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).

¹¹⁸ See generally Carole Goldberg & Heather Valdez Singleton, *Public Law 280 and Law Enforcement In Indian Country*—RESEARCH PRIORITIES, RESEARCH IN BRIEF, NAT'L INST. JUST. 1, 4 (Dec. 2005), <https://nij.ojp.gov/library/publications/public-law-280-and-law-enforcement-indian-county-research-priorities-research>.

¹¹⁹ See *Public Law 280 and the Breakdown of Law in California Indian Country*, UCLA AM. INDIAN STUD. CTR., <https://www.aisc.ucla.edu/ca/Tribes11.htm>.

¹²⁰ See Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 736 (2006) (explaining that non-Native prosecutors were seen as lacking the moral authority to act on behalf of the community and as 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.").

¹²¹ 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); Sarah Deer, *Federal Indian Law and Violent Crime: Native Women and Children at the Mercy of the State*, 31 SOC. JUST. 17, 25 (2004) ("Many Indians distrust the legal and social authorities that could be most helpful to them because of past experiences of unjust treatment.").

¹²² NICOLA CARR, THE CRIMINAL JUSTICE SYSTEM IN NORTHERN IRELAND 2–3 (2017).

of alleged terrorism, and increased police and army powers.¹²³ The British police force, the Royal Ulster Constabulary, was widely perceived as partial to Protestant Loyalists and unaccountable to, and discriminatory against, Catholic Unionists. As two criminologists observed, “[t]he costs in terms of negative effects on public trust in British political institutions have been incalculable.”¹²⁴ Politically motivated crimes increased with the rise in political tensions, but so did crimes unrelated to political action.¹²⁵ As a result of this perceived illegitimacy, throughout the 1970s, the levels of recorded crime increased nearly sixfold.¹²⁶ Murders rose rapidly, and property crime increased at an even higher rate during this period.¹²⁷ The burglary rate increased by a factor of fifteen, and drug dealing rose exponentially.¹²⁸ 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.¹²⁹

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

One need not rely only on these natural experiments for evidence of the connection between criminal justice legitimacy and compliance, though, as there is also a strong body of empirical evidence that supports the connection.

Most compelling here is the work of Tom Tyler.¹³⁰ Tyler contends that procedural fairness and trust in those enforcing the law, as opposed to the perceived justness of laws governing criminal liability which Robinson advances, promote criminal justice systems’ “legitimacy” or, as Robinson similarly calls it, “moral credibility.”¹³¹ The two claims are analogous in that they both suggest that a criminal justice system’s reputation can affect compliance with it.¹³²

In a 2002 study, Tyler and a colleague found that people were more willing to voluntarily accept the decisions of judges when those decisions appeared both neutral and respectful.¹³³ If the decision-making process

¹²³ See generally AOGÁN MULCAHY POLICING NORTHERN IRELAND: CONFLICT, LEGITIMACY AND REFORM (2006).

¹²⁴ THE OXFORD HANDBOOK OF CRIMINOLOGY 127 (Mike Maguire, Rod Morgan & Robert Reiner eds., 1997).

¹²⁵ John Brewer et al., *Crime in Ireland Since the Second World War*, 27 J. OF THE STAT. & SOC. INQUIRY SOC’Y OF IRE. 135, 148–161 (1996).

¹²⁶ Aogán Mulcahy, *The Impact of the Northern ‘Troubles’ on Criminal Justice in the Irish Republic*, in CRIMINAL JUSTICE IN IRELAND 280 (P. O’Mahony ed., 2008); see generally Ronald Weitzer, *Policing a Divided Society: Obstacles to Normalization in Northern Ireland*, 33 SOC. PROBLEMS 41 (1985).

¹²⁷ John Brewer, Bill Lockhart & Paula Rogers, *Crime in Ireland Since the Second World War*, 27 J. STAT. & SOC. SOC’Y IRELAND 135, 144 (1996).

¹²⁸ Mulcahy, *supra* note 126, at 282.

¹²⁹ John Charles Murray, *Born of the Troubles: Lessons in Trust and Legitimacy From the Police Service of Northern Ireland 53–54* (Dec. 2017) (M.A. thesis, Naval Postgraduate School) (on file with Dudley Knox Library, Naval Postgraduate School).

¹³⁰ See e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW 57 (2006) [hereinafter WHY PEOPLE OBEY]; Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 95 (2004) [hereinafter *Enhancing Police Legitimacy*]; TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW 101 (Russell Sage Foundation 2002).

¹³¹ For a discussion of how Tom Tyler’s legitimacy and Robinson’s moral credibility compare and interact, see generally Robinson & Bowers, *supra* note 1.

¹³² TYLER & HUO, *supra* note 130, at 101.

¹³³ *Id.* at 64, 75.

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.¹³⁴ In a later paper, Tyler again examined the relationship between procedural fairness and institutional trust, concluding that

[people] depend heavily upon their inferences about the intentions of the authority. 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. . . . People . . . have a strong desire to view the authorities as benevolent and caring. This view is directly tested during a personal encounter with those authorities, and people's views are powerfully shaped by whether they do, in fact, receive the behavior they expect from the police or courts.¹³⁵

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.¹³⁶ These two factors—which roughly encapsulate 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% of the variance in subjects' overall assessment of the justice system's legitimacy was derived from perceptions of their own interactions with the police.¹³⁷ Ultimately, both studies suggest that the level of divergence between people's perceptions of how the police should act and their perceptions of how the police actually act are some of the most important indicators of law-abiding behavior.¹³⁸

A similar effect can be seen cross-culturally. In a study of South Korean adults, researchers found that a perceived just distribution of encounters with law enforcement and punishment was one of the strongest predictors of compliance with the law.¹³⁹ The study used data from surveys of "citizens' attitudes and opinions towards the police and the law" and compared it to their willingness to cooperate with law enforcement.¹⁴⁰ One such exogenous variable was distributive justice, which was measured by asking respondents "the extent to which outcomes like pedestrian stops, traffic stops, and arrests

¹³⁴ *Id.*

¹³⁵ *Enhancing Police Legitimacy*, *supra* note 130.

¹³⁶ TYLER & HUO, *supra* note 130, at 59.

¹³⁷ WHY PEOPLE OBEY, *supra* note 130, at 63.

¹³⁸ What may be most interesting about Tom Tyler's studies for our present purpose 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 WHY PEOPLE OBEY, *supra* note 130, at 59 (conceding that moral credibility has a greater effect in shaping compliance than does legitimacy. Tyler reports that the relative weights of the factors shaping compliance with the law are 0.33 for morality, 0.11 for legitimacy, and 0.02 for deterrence).

¹³⁹ Youngki Woo, Edward R. Maguire & Jacinta M. Gau, *Direct and Indirect Effects of Procedural Justice on Cooperation and Compliance: Evidence from South Korea*, 19 POLICE PRAC. & RSCH. 168, 175–76 (2018).

¹⁴⁰ *Id.* at 172.

[were] allocated in a just and unbiased manner.”¹⁴¹ The survey found that respondents who perceived the police as allocating outcomes fairly were more likely to comply with the law than those who viewed the police as unjust in their dealings.¹⁴² An Australian study came to a related conclusion, finding that people who viewed the police as encountering the public in a procedurally just manner were more satisfied with law enforcement than those who did not.¹⁴³ “This link is primarily through the mediating influence of police legitimacy, more so than judgments about the effectiveness of police in crime control or the distribution of police services among communities,” the researchers found.¹⁴⁴

In conclusion, the evidence reported in the above subsections confirm the common-sense notion that a reduction in the criminal justice system’s reputation for being a reliable moral authority will correspondingly reduce people’s willingness to defer to it, comply with its demands, and internalize its norms. A host of real-world examples support this contention, including American Prohibition, waning public support for the United States and resistance to the draft during the Vietnam War, the anti-mask movement of the 1918 Spanish Flu, overly aggressive policing and excessive punishment in 1960s Watts, notorious corruption in New York at the turn of the twentieth century, and Cold War-divided Berlin. Where the community critique of the criminal justice system focuses on its contraventions of or failures to achieve justice, it can spark vigilantism, like the police-targeted violence after the death of George Floyd and the anti-protester conduct of the McCloskeys and Kyle Rittenhouse, respectively. 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 demonstrating that a reduction in the moral credibility of a criminal justice system with the community will reduce compliance with its laws.¹⁴⁵ But this criticism simply ignores the existing evidence recounted in the previous section—namely, the empirical studies that show a clear association between reduced moral

¹⁴¹ *Id.* at 174–76.

¹⁴² *Id.*

¹⁴³ Lyn Hinds & Kristina Murphy, *Public Satisfaction with Police: Using Procedural Justice to Improve Police Legitimacy*, 40 *AUS. & N.Z. J. CRIMINOLOGY* 27, 36 (2007).

¹⁴⁴ *Id.*

¹⁴⁵ See Ristroph, *supra* note 2, at 1153 (“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 . . . rather than ignoring it.”); 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 on punishment does not have a significant or lasting impact on their willingness to be law-abiding citizens.”). However, Robinson and coauthors have critiqued this study and its methodology and concluded, “With this study [Slobogin & Brinkley Rubinstein] have not undermined empirical desert but rather confirmed it, giving it empirical support that it did not previously have.” Paul H. Robinson, Joshua Samuel Barton & Matthew Lister, *Empirical Desert, Individual Prevention, and Limiting Retributivism*, 17 *NEW CRIM. L. REV.* 312, 340 (2014) [hereinafter *Empirical Desert, Individual Prevention*].

credibility and reduced compliance; the large collection of natural experiments that show this dynamic at work in the real world across a wide variety of situations and cultures; and the empirical research and real-world case studies, conducted by social psychologists like Tom Tyler, that document an analogous dynamic between a system's reputation for fair adjudication and police professionalism and compliance. There is also an element of common sense with respect to both dynamics, given what is understood about human nature. History is filled with examples of revolt and rebellion against unfair and illegitimate rule, which evidence a fundamental intuition: people are less likely to defer to authorities which they believe are worthy or deserving of deference. Any assumption to the contrary would imply that people will consent to being governed by authorities they view as unjust. The critics have some work to do to discredit this considerable amount of evidence and to propose viable alternative explanations for the results of the empirical and natural case studies that support the credibility-compliance dynamic. Since many continue to deny the link between criminal justice systems' reputations and citizens' 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.¹⁴⁶ Again, this simply ignores the existing evidence. It is true that social psychologists have not been able to, and probably never will, create and conduct a controlled experiment to directly prove the credibility-compliance dynamic. As mentioned earlier, few governments are likely to let experimenters take over their criminal justice system and degrade its moral credibility in order to confirm a hypothesized increase in lawlessness. However, we already have a large collection of natural experiments where a criminal justice system's moral credibility noticeably decreased because of current events, resulting in a corresponding decrease in compliance among the public.¹⁴⁷

Other critics suggest that any reduced compliance is likely to be limited to particular laws that the community sees as lacking in moral credibility.¹⁴⁸

¹⁴⁶ See Roberts & de Keijser, *supra* note 2, at 489–90 (arguing that all of the experimental variables are measures of attitudes and behavioral *intentions*, whereas empirical desert justifications make claims about 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 behavioural 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 behavioural 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 behaviour, not merely behavioural intentions, are necessary.").

¹⁴⁷ See *supra* Sections II.A.2, II.A.4.

¹⁴⁸ See Rappaport, *supra* note 2, at 806–07 (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 [E]xisting 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 are 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.").

Yet again, this is simply contrary to the existing evidence. The empirical studies show that criminal liability or punishment that is 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.¹⁴⁹ Further, this criticism also conflicts with the natural experiments described earlier, in which losses of moral credibility in one area of the respective criminal justice systems led to an increase in crime rates generally.¹⁵⁰

Some critics argue that compliance decreases only where there is a dramatic reduction in moral credibility.¹⁵¹ But this criticism is inconsistent with the empirical data that shows that the relationship between the criminal law's moral credibility and the public's compliance with it is not a step function with trigger points but, rather, a continuous function: a marginal reduction in moral credibility will produce a corresponding marginal reduction in compliance.¹⁵² When subjects come into the laboratory, they have already formed a view of their criminal justice system's reputation, based upon their exposure to media accounts, conversations with other people, and so forth. In the period of time that they are in the laboratory, researchers can, at most, nudge that view of the system in one direction or another by virtue of the experiment's design. Yet the evidence shows that even this minor nudge results in a noticeable shift in subjects' willingness to comply, defer, and internalize. We know from empirical studies that ordinary people have extremely nuanced judgments of relative blameworthiness.¹⁵³ 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 at least shown signs that it is headed for collapse.¹⁵⁴

¹⁴⁹ See *supra* Section II.A.5.

¹⁵⁰ See *supra* Sections II.A.2, II.A.4.

¹⁵¹ See Simons, *supra* note 2, at 662 (“[I]t 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.”).

¹⁵² See *supra* Section II.A.5.

¹⁵³ Robinson et al., *supra* note 1; *Intuitions of Justice*, *supra* note 1, at 10, 35; *Utility of Desert*, *supra* note 1.

¹⁵⁴ 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 their level of 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

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.¹⁵⁵ Whatever the current state of a criminal justice system, there is always value in attempting to 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.¹⁵⁶ 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.¹⁵⁷ Further, many of the natural experiments discussed earlier do not involve particularly disproportionate, shocking cases but, rather, a continuing stream of lesser disproportionalities which yield the cumulative effect of reduced moral credibility and thereby increase crime.¹⁵⁸

Some critics apparently concede that reduced moral credibility will lead to some reduction in compliance but argue that it would take more research

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 would (for example) support a difference in grading of an offence depending on the degree of culpability and claiming that ignoring such community views will be detrimental to the moral credibility and effectiveness of the justice system. Similarly, focusing on justificatory defences (i.e., self-defence), 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.” (citations omitted).

¹⁵⁵ See *supra* Section II.A.6.

¹⁵⁶ See Rappaport, *supra* note 2, at 807 (arguing that evidence detects only slight anticipated compliance effects from massively unjust sentences—for present purposes, we 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 (“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 lay 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.”). *Empirical Desert, Individual Prevention*, *supra* note 145, at 340.

¹⁵⁷ See INTUITIONS, *supra* note 1, at 127.

¹⁵⁸ See *supra* Section II.A.1 (Watts, Prohibition, Vietnam War).

to determine how much of a reduction it would create.¹⁵⁹ These critics argue that without this further research, it cannot be determined whether this crime-control mechanism would prove more or less effective than alternative distributive principles such as incapacitation of the dangerous or general deterrence.¹⁶⁰ This is an important point, for if the justification for adopting a distributive principle that maximizes moral credibility is its crime-control advantages, then a comparison between its effectiveness and the effectiveness of 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 sometimes disqualifying weaknesses 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 still ask: what determines the criminal law's moral credibility with the community? There are many aspects of a 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 the justice system's criminal laws. How can a distributive justice principle best promote and protect the justice system's moral credibility? We argue that this can typically be done best by minimizing conflicts between criminal laws and the community's justice judgments.

A. CRIMINAL LAW'S REGULAR CONFLICTS WITH COMMUNITY VIEWS UNDERMINE ITS MORAL CREDIBILITY

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

One study focused on whether ordinary people relied on general deterrence or just desert as the basis for imposing criminal liability and punishment.¹⁶¹ Participants were given short vignettes of harmdoing, which

¹⁵⁹ See *Improve Empirical Desert*, *supra* note 2, at 452.

¹⁶⁰ See *id.* (explaining empirical desert advocates have yet to show how much compliance empirical desert can induce: "[W]e 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 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."). We, the authors, do not presume to know if there are good consequentialist grounds for adopting potentially costly empirical desert policies.

¹⁶¹ Kevin Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCH. 284, 288 (2002).

varied factors of the harmdoing that could affect the sentence.¹⁶² Subjects were then asked to recommend punishment severity on two scales, ranging from “not at all severe” to “extremely severe,” and then “not guilty” to “life sentence.”¹⁶³ With respect to each participant, the authors wrote, “The degree to which his or her sentence recommendation was influenced by each of these variables of wrongdoing provides a clue to the respondent’s underlying motivation for the punishment given.”¹⁶⁴ 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.¹⁶⁵ These variables are all highly relevant in assessing liability and punishment based upon general deterrence.¹⁶⁶ 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 committed their crime for ostensibly noble purposes.¹⁶⁷ Several studies were conducted using these basic parameters, controlling for various components to determine the validity of the results.¹⁶⁸ In their responses, participants appeared insensitive to general deterrence factors but highly sensitive to blameworthiness factors.¹⁶⁹ 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 either just desert criteria or criteria relevant to the theory of incapacitation of dangerous persons.¹⁷⁰ Subjects in the study were given descriptions of various crimes and were asked to assign corresponding punishments on a seven-point Likert-type scale that gave a general range for severity and on a more elaborate thirteen-point scale that provided actual prison sentences.¹⁷¹ 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.¹⁷² The authors examined the weight that subjects placed on just desert or incapacitation considerations as they assigned punishments to wrongdoers.¹⁷³ The results indicated that respondents’ natural inclinations more closely resembled just desert

¹⁶² *Id.* at 287–89.

¹⁶³ *Id.* at 289.

¹⁶⁴ *Id.* at 287.

¹⁶⁵ *Id.* at 289.

¹⁶⁶ *Id.* at 288–89.

¹⁶⁷ *Id.* at 285.

¹⁶⁸ *Id.* at 288–95.

¹⁶⁹ *Id.* at 289.

¹⁷⁰ John Darley, Kevin Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 L. & HUM. BEHAV. 659, 659 (2000) (defining “incapacitation” as “suggest[ing] that a wrong-doer’s likelihood of committing future offenses should be the primary determinant of present punishment. This tends to assume that during the punishment period, the wrong-doer is prevented from committing other harmful actions.”).

¹⁷¹ *Id.* at 661, 663.

¹⁷² *Id.* at 661–62.

¹⁷³ *Id.* at 660.

judgements than incapacitation judgments.¹⁷⁴ The authors concluded that “[t]he seriousness of the act, indexed in large part by the degree of moral outrage it provokes, determined the degree of punishment respondents assigned to the act.”¹⁷⁵

In a second part of the study, respondents were given three test cases, where differing facts in each test case suggested varying levels of criminal intent, to determine whether respondents’ motivation in assigning punishment was to incapacitate a dangerous offender or to dole out just deserts.¹⁷⁶ “In each case,” the authors explained, “a previously mild-mannered individual attacked and killed another person.”¹⁷⁷ In the first case, the offender killed the victim in a rage arising out of work-related jealousy; in another, the offender killed a stranger because a previously undetected inoperable brain tumor created violent tendencies; and in the last, the offender killed a stranger due to the same brain tumor, but the tumor was operable, so the offender later returned to his normal, nonviolent self after receiving treatment.¹⁷⁸ After reading the vignettes about the three offenders, the subjects were asked whether they would recommend incarceration in a prison, time in a mental hospital, or setting the person free.¹⁷⁹ In the jealous rage case, a strong majority of subjects (86%) recommended prison, as desert would require.¹⁸⁰ In the brain tumor cases, where a majority of respondents saw the tumor as responsible for the offense rather than the actor, few subjects recommended prison, whether the tumor was inoperable (7%) or operable (21%).¹⁸¹ The vast majority of respondents again saw criminal punishment, such as imprisonment, as appropriate only where they saw the offender as blameworthy for the offense; in other words, they regarded dangerousness as appropriate to civilly commit the person to an institution but not to be used as a basis for criminal liability and punishment.

In a 2006 study, researchers found that people are intuitively drawn to desert-related or “retribution” information when tasked with distributing punishment.¹⁸² Subjects in the study were asked to assign prison sentences to hypothetical offenders after selecting one of nine types of information—all either desert-related, deterrence-related, or incapacitation-related—which they believed would be most useful in their deliberations.¹⁸³ A whopping 97% of subjects chose to consult desert-related information rather than deterrence-related or incapacitation-related information.¹⁸⁴ When the same subjects were asked to rate their confidence in their choices, those who had consulted desert materials were substantially more confident in their sentencing decisions than those who consulted general deterrence or incapacitation materials, indicating that they believed they had made poor

¹⁷⁴ *Id.* at 671.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 672.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 673.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 673 tbl.2.

¹⁸² Kevin M. Carlsmith, *The Roles of Retribution and Utility in Determining Punishment*, 42 J. EXPERIMENTAL SOC. PSYCH. 437, 437 (2006).

¹⁸³ *Id.* at 444.

¹⁸⁴ *Id.* at 445.

choices.¹⁸⁵ Thus, subjects were most inclined toward and comfortable with their desert instincts.

In another study from 2006, a narrower examination of desert impulses found that people are unlikely to endorse a system of restorative justice that lacks retributive features.¹⁸⁶ The study asked subjects to read vignettes of various crimes and recommend a justice procedure for each criminal act.¹⁸⁷ The first procedure was purely restorative, with no punitive elements; the second was mixed; and the third was a traditional court procedure, which was purely punitive.¹⁸⁸ Participants were then asked to assign a sentence to the crimes for which they recommended mixed or traditional court procedures.¹⁸⁹ The authors of the study found that people generally ascribed punishment according to desert principles.¹⁹⁰ For the crime of rape, for example, none of the respondents accepted a purely restorative system.¹⁹¹ The authors explained that the study's findings "suggest that in order for citizens to view restorative justice as an acceptable alternative to the traditional court system for serious crimes, the procedure must allow for the option of retributive measures."¹⁹²

In a 2008 study, researchers found that self-reported justifications for punishment bear little relation to actual punishment-related behavior, revealing a subconscious inclination among most participants to punish on desert grounds.¹⁹³ Participants completed an anonymous online survey in which they were asked to sentence offenders for various crimes and identify whether the reasons for their sentences were retribution- or deterrence-based.¹⁹⁴ Some scenarios were manipulated to illicit greater or lesser punishment for participants motivated by desert, while others were manipulated to do the same for participants motivated by deterrence.¹⁹⁵ Participants then completed two further surveys that assessed the extent to which each participant endorsed just desert, deterrence, incapacitation, and rehabilitation.¹⁹⁶ The results showed that people's self-reported punishment justifications did not at all align with their actual punishment-related decisions.¹⁹⁷ 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.¹⁹⁸

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

¹⁸⁵ *Id.* at 446.

¹⁸⁶ Dena M. Gromet & John M. Darley, *Restoration and Retribution: How Including Retributive Components Affects the Acceptability of Justice Procedures*, 19 SOC. JUST. RSCH. 395, 395 (2006).

¹⁸⁷ *Id.* at 400.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 404.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 406 tbl.1 & fig.1, 407.

¹⁹² *Id.* at 424.

¹⁹³ Kevin M. Carlsmith, *On Justifying Punishment: The Discrepancy Between Words and Actions*, 21 SOC. JUSTICE RSCH. 119 (2008).

¹⁹⁴ *Id.* at 123–24.

¹⁹⁵ *Id.* at 123.

¹⁹⁶ *Id.* at 124.

¹⁹⁷ *Id.* at 127.

¹⁹⁸ *Id.* at 131.

deterrence or incapacitation of the dangerous. Thus, where offenders are over- or under-punished in relation to laypeople's intuitions of an appropriate 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?

However, once again, we need not strictly rely 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 several studies was created, at times quite successfully, by having subjects read about real-world cases wherein the relevant criminal laws 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 their perception of the system's moral credibility. They actually tested for and measured the corresponding loss in moral credibility.¹⁹⁹

In a 1986 study, researchers interviewed over one thousand prison inmates, asking them to rate the fairness of their trial and sentence in order to determine the basis of offenders' perceptions of the fairness of criminal justice system outcomes more generally.²⁰⁰ The researchers defined one possible basis, 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."²⁰¹ The inmates were asked to rate the fairness of their sentences on five-point Likert scales from "very fair" to "very unfair."²⁰² Notably, the inmates' judgments of the relative fairness of the outcomes of their own cases had a greater impact than the actual magnitude of their sentences on inmates' perceptions of the criminal justice system's outcome fairness overall.²⁰³ These results suggested that "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."²⁰⁴ The researchers explained that perceived unfairness resulting from informal and discretionary procedures can call the justice system's credibility into question.²⁰⁵

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

¹⁹⁹ See *supra* Section II.A.

²⁰⁰ Jean M. Landis & Lynne Goodstein, *When Is Justice Fair? An Integrated Approach to the Outcome Versus Procedure Debate*, 11 AM. BAR FOUND. RSCH. J. 675, 685–86 (1986).

²⁰¹ *Id.* at 678.

²⁰² *Id.* at 686.

²⁰³ *Id.* at 704.

²⁰⁴ *Id.* at 676–77.

²⁰⁵ *Id.* at 676.

disposition of their case in order to determine what factors most strongly influenced their level of satisfaction with the outcome.²⁰⁶ The sentences received by the men ranged from time served to actual prison terms.²⁰⁷ The men were asked about the severity of their sentences, measured by three factors: 1) months incarcerated, 2) sentence type, and 3) deviation from expected sentence.²⁰⁸ The defendants' severity evaluations were compared with their answers to questions regarding distributive justice—focusing on defendants' evaluations of how their sentences compared with those of similar defendants convicted of the same crimes—as well as procedural justice—focusing on the defendants' perceptions of the fairness of the process.²⁰⁹ The study found that defendants had more satisfaction with the outcome of their case and trust in the criminal justice system when they felt that their sentence was fair.²¹⁰

In a 1972 study, dozens of defendants were interviewed about their perceptions of fairness of the sentences they received.²¹¹ The study found that the defendants focused most intently on the plea bargaining process, which specifically involves making the best possible bargain and arranging a quick release.²¹² The defendants felt that the plea bargaining process exemplified the “lying” and “deceitfulness” of the system writ large because sentencing depended not on deterrence, rehabilitation, or retribution, but rather on the “way the bargaining game is played.”²¹³ They told researchers that the process was just a “ritual” by which the smart defendants were able to totally evade punishment.²¹⁴ Plea bargaining made the men more distrustful of the system because it reminded them of the criminal environments that many of them came from.²¹⁵ The author of the study concluded that the plea bargaining process effectively undercut the moral authority of the criminal justice system and contributed to defendant cynicism.²¹⁶

Several studies make an analogous point in the context of establishing or undermining the legitimacy of police. For example, in 2008, Professor Tracey Meares and her colleagues conducted a nationwide study of how the public judges the appropriateness of police conduct.²¹⁷ One component of the study was a questionnaire inquiring into citizens' perceptions and evaluations of police-citizen encounters from their own experience. Another component was an experiment testing citizens' perceptions and evaluations of police-citizen interactions from videos they were shown, wherein the

²⁰⁶ Johnathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 L. & SOC. REV. 438, 487–88 (1988).

²⁰⁷ *Id.* at 488.

²⁰⁸ *Id.* at 490.

²⁰⁹ *Id.* at 491.

²¹⁰ *See id.* at 494.

²¹¹ *See* JONATHAN CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE xii (Prentice Hall, Inc., 1972); Clarence C. Kegel, Jr. & Timothy S. Hardy, *Review: American Criminal Justice: The Defendant's Perspective by Jonathan D. Casper*, 121 U. PA. L. REV. 1209 (1973).

²¹² *Id.* at 41.

²¹³ *Id.* at 83.

²¹⁴ *Id.*

²¹⁵ *Id.* at 171–72.

²¹⁶ *Id.* at 173.

²¹⁷ Tracey L. Meares, Tom R. Tyler & Jacob Gardener, *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. & Criminology 297, 321 (2015).

police exercised varying modes of authority over the person they stopped, including verbal commands and physical force.²¹⁸ After watching the videos, respondents evaluated the fairness of the police-citizen encounters by answering questions such as “Did the police act neutrally?” and “Were the police respectful?”²¹⁹ Controlling for race, age, and gender, the authors found that the perceived legitimacy of police is largely based on how people see officers exercising their authority and their professionalism during police-citizen encounters.²²⁰ “[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 concluded.²²¹

The empirical studies reported here confirm the common-sense notion that regular conflicts with community views on the fair allocation of criminal liability and punishment will reduce the justice system’s moral credibility. They additionally confirm that 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 a community’s justice judgments undermine a criminal justice system’s moral credibility.²²² Some expressly concede it,²²³ but others 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, a *failure to deviate* from community justice judgments could itself be disillusioning in cases where the community relies upon non-desert factors in judging appropriate criminal liability and punishment.²²⁴ But this

²¹⁸ *Id.*

²¹⁹ *Id.* at 322.

²²⁰ *See id.* at 316.

²²¹ *Id.*

²²² Rappaport, Sigler, Denno, and Kolber do not analyze the issue.

²²³ 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.” *New Desert*, *supra* note 2, at 49.

²²⁴ *See* Slobogin, *supra* note 2, at 386–87, 393 (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, [Paul Robinson, Joshua Barton, and Matthew Lister] 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 (“[W]hat [Paul Robinson, Joshua Barton, and Matthew Lister] 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.”).

criticism simply ignores the empirical evidence that ordinary people primarily focus on desert in assessing the appropriate criminal liability and punishment, at the exclusion of other criteria that might conflict with desert, as the studies described in the previous section show.²²⁵

Even if one found that citizens were willing to compromise their commitment to desert by taking some non-desert criteria into account, such as fear for one's own personal safety, it hardly follows that this *deviation from desert* would boost the criminal justice system's moral credibility. On the contrary, citizens might well see the deviation as an unfortunate practical compromise for their safety—hardly something that they would be proud of, and hardly something that would improve the system's moral credibility in their view. (The empirical studies suggest that people might prefer to preserve the criminal justice system's focus strictly on desert by, for example, utilizing civil commitment to protect society from dangerous, blameless persons, rather than doing justice.)

One critic argues that there are a number of factors, beyond unjust results, that can affect the criminal justice system's overall reputation.²²⁶ 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 overall 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 critique 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. The fact that procedural fairness and police professionalism can help does not detract from the fact that doing justice and avoiding injustice in allocating punishment can also help.²²⁷ Indeed, as noted above, the empirical evidence suggests that these two forces tend to reinforce one another.²²⁸

Another critic argues that "[t]here is no good reason why empirical desert should induce compliance among laypeople if they are true retributivists."²²⁹ 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 support empirical desert because of its crime-

²²⁵ Slobogin relies upon his own study as showing that people do not necessarily think about punishment in terms of just deserts. Slobogin, *supra* note 2, at 386-87 ("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."). However, as Robinson and coauthors 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 undermine it. *Empirical Desert, Individual Prevention*, *supra* note 145, at 340.

²²⁶ 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.").

²²⁷ See WHY PEOPLE OBEY, *supra* note 130, at 59 (reporting the relative weight of the factors shaping compliance with the law as 0.33 for personal morality, 0.11 for legitimacy, and 0.02 for deterrence).

²²⁸ See *supra* Section II.A.4.

²²⁹ See *Improve Empirical Desert*, *supra* note 2, at 454-55.

control benefits. On the contrary, the ordinary person is more inclined to comply with a criminal law that, by their own standards of just deserts, does justice and avoids injustice. Our conclusions may be based on a data-driven empirical desert, but ordinary people will experience the results of an empirically-based system of desert, not as a social scientific program, but as as true deontological desert.

This critic wants to claim that this is a form of “exploitation” of ordinary people,²³⁰ 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 is concerned about whether enacted criminal laws are properly motivated—by the retributive reasoning of deontological desert rather than the consequentialist reasoning of empirical desert—are we to assume that ordinary people care, or even understand, the difference? To them, the results of a law are either just or not. The theoretical motivations of a lawmaker for creating a rule 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 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 this distributive principle. Perhaps justice judgments are so complex that everyone simply has their own idiosyncratic view on every issue? Perhaps people’s justice judgments are just general, vague notions—nothing that could be used to develop specific rules for a criminal code or sentencing guidelines? Perhaps the proposed distributive principle is unrealistic because people’s justice judgments are constantly changing, and this makes it impractical or at least expensive to maintain?

Is justice such a complex judgment that everybody simply has their own personal view about everything? The empirical evidence suggests otherwise.²³¹ On some issues, there is, in fact, a high degree of agreement across demographics.²³² Many of these issues might be called the “core of wrongdoing” because they concern such fundamental offenses as causing physical injury to others, taking another’s property without consent, and being deceitful in exchanges. Consider one study that had subjects rank twenty-four scenarios according to their overall blameworthiness. The kinds of offenses in the scenarios represent 94.9% of the offenses committed in the

²³⁰ *Id.* 453–54.

²³¹ INTUITIONS, *supra* note 1, at 18–34.

²³² *Id.*

United States.²³³ The results show a Kendall's W ²³⁴ of 0.95 for in-person subjects and 0.88 for internet subjects—an astounding result.²³⁵ Researchers cannot normally get this level of agreement among participants except in observational studies, such as a study asking subjects to judge the relative brightness of dot clusters. When subjects are asked to judge something beyond the purely observational, the analytical task must be almost intuitional to produce such a high level of agreement.

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, and small changes in fact produce predictable changes in blameworthiness judgments.²³⁶ People tend not to tie a particular level of blameworthiness to a particular punishment level, but they can distinguish between many cases along the blameworthiness continuum. Because the punishment continuum contains a finite number of points, 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 amount of punishment, but rather because that single point on the punishment continuum places 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 location of each case on the punishment 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 people's judgments about the endpoint of the punishment continuum are.²³⁷ 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 for most crimes across demographics and cultures.²³⁸

This high level of agreement on relative blameworthiness for crimes falling within the core of wrongdoing is not surprising because people's justice judgments are, in some significant part, influenced by human evolutionary development.²³⁹ And this is consistent with evidence suggesting that many justice judgments are the product of intuition rather than of conscious reasoning.²⁴⁰

²³³ The offenses in the scenarios, which are the most common offenses committed in the United States, include: sexual assault, 0.8% of all offenses; robbery, 2.5%; assault, 19.0%; household burglary, 14.0%; and theft 58.6%. Bureau of Justice Statistics, *Criminal Victimization in the United States, 2003 Statistical Tables 14 tbl.1* (2005).

²³⁴ The Kendall's W is a type of statistic used to assess agreement among participants who complete a rating task. It ranges from 0—no agreement, or total randomness—to 1—complete agreement, or total unanimity among the participants. See MAURICE G. KENDALL, *RANK CORRELATION METHODS* 118 (Oxford 1990).

²³⁵ INTUITIONS, *supra* note 1, at 27, 52.

²³⁶ For a wide range of such studies, see *supra* Part III.

²³⁷ INTUITIONS, *supra* note 1, at 18–34.

²³⁸ *Id.* at 23.

²³⁹ *Id.* at 35–62.

²⁴⁰ *Id.* at 5–17.

As one looks outside 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 a *physical* taking without consent. Thus, while there may be strong agreement on issues relating to physical takings, there will still be disagreement on the downloading issue depending on the extent to which one accepts the analogy between unlicensed downloading and traditional theft.

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 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—for example, if a law adopts a majority view, thereby causing incremental disillusionment among the minority—will create some corresponding incremental loss in compliance. But this incremental loss in credibility with the minority on an 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 that tracking empirical desert is generally the best approach to building moral credibility with the community. The real question for drafters of criminal codes and sentencing guidelines is what position will cause the least alienation and disillusionment among the population.

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

Perhaps the proposed distributive principle cannot 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 addressed in criminal codes or sentencing guidelines do not change—this is certainly true of criminal law's core principles of wrongdoing and blameworthiness²⁴¹—and issues that do change tend to shift slowly. In the last decade or two, we have seen a variety of developments resulting in changes to the law, including the decriminalization of same-sex marriage, the increased criminalization of sexual assaults, 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.²⁴²

²⁴¹ *Competing Conceptions*, *supra* note 1, at 145–75.

²⁴² See generally Paul H. Robinson, *Criminal Law's Core Principles* (forthcoming 2021), https://scholarship.law.upenn.edu/faculty_scholarship/2251 (explaining people's judgments on core principles such as, "greater harm deserves greater punishment," "harm to persons is more wrongful than harm to property," and "an actor who lacks the capacity to know his conduct is wrong or to avoid committing it is not blameworthy.").

B. A RESPONSE TO CRITICS WITH RESPECT TO THE FEASIBILITY OF THE PROJECT

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 view²⁴³—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,²⁴⁴ 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.²⁴⁵ Other critics relatedly argue that the existence of issues upon which there are disagreements within the community means that by accommodating the views of one group one is necessarily alienating the other group.²⁴⁶

These criticisms also fail to capture the bigger picture. It is easy for academics, in particular, to focus on the points of controversy—such as disagreements about the legalization of same-sex marriage or about some other hot issue of the day—but drafters of criminal codes and sentencing guidelines have thousands of issues to deal with, very few of which are controversial. The primary work of a distributive principle is to answer each

²⁴³ See Slobogin, *supra* note 2, at 392 (explaining that his study found that “disagreement . . . was remarkably high.”).

²⁴⁴ 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 that have been 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.”).

²⁴⁵ See Ristroph, *supra* note 2, at 1160–61 (“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.”).

²⁴⁶ See Slobogin, *supra* note 2, at 378 (“Changing the official stance on controversial issues to appease one group is likely to upset another.”).

of those thousands of diverse issues.²⁴⁷ 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 an issue receives, the greater its potential for undermining the system's moral credibility, at least in the short term with regard to that issue. It is the long-term reputation of the system, of course, that matters in people's assessment of the system's reliability as a moral authority, but its handling of the hotly contested issues remains important.

Does the existence of such a controversial issue present an existential threat to maximizing moral credibility as a distributive principle? We argue that it does not. The analytical 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 TO EMPIRICAL DESERT AS A DISTRIBUTIVE PRINCIPLE

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 critics have offered a series of other criticisms that go beyond these points based on their philosophical, political, or ideological preferences.

A. THE PROPOSED DISTRIBUTIVE PRINCIPLE WOULD NECESSARILY PRODUCE DRACONIAN SENTENCES

A common critique is that relying on community views would produce a draconian system of punishment, and one need only look at the current state of criminal liability and punishment doctrines to confirm this. Today's punishment system is quite harsh as it is, and as one critic points out, "A majority of the country continues to support the death penalty and still believes that courts are too lenient. Well under 20% of Americans think that

²⁴⁷ These issues include, but are not limited to, criminalizing risk-creating behavior, 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, and punishment for multiple offenses. Empirical studies on ordinary people's justice judgments already exist for every issue on this list, if only in their early stages. See *INTUITIONS*, *supra* note 1, at 239–401.

prison conditions are too harsh.”²⁴⁸ In light of people’s apparently draconian beliefs about punishment, “populism makes criminal justice more, not less, severe,” this critic argues.²⁴⁹ “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.”²⁵⁰

But this criticism confuses populism generally with the narrower proposal that criminal laws should 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 they do.

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 these doctrines clearly do not reflect community views—just the opposite: they dramatically conflict with them.²⁵¹ 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 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. The rank order of the twenty-four cases shows just how serious the respondents thought the crime-control cases were in relation to each of the milestone cases. Subjects perceived the conduct at issue in the crime-control cases, which have draconian legal penalties in the real world, as being dramatically less serious and blameworthy than the law treats them. For example, in one case where the three-strikes doctrine was applied in a minor fraud offense that ultimately resulted 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 sentences of 2.3 years and 3.9 years for these offenses, respectively—significantly less than the life sentence that the fraudster received.

The size of the disconnect between participants’ 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 desires. Note, for example, that the coercive crime-control cases in this study were not cases in which some renegade prosecutor or rogue judge tricked the system but, rather, cases in which the

²⁴⁸ Rappaport, *supra* note 2, at 764–65.

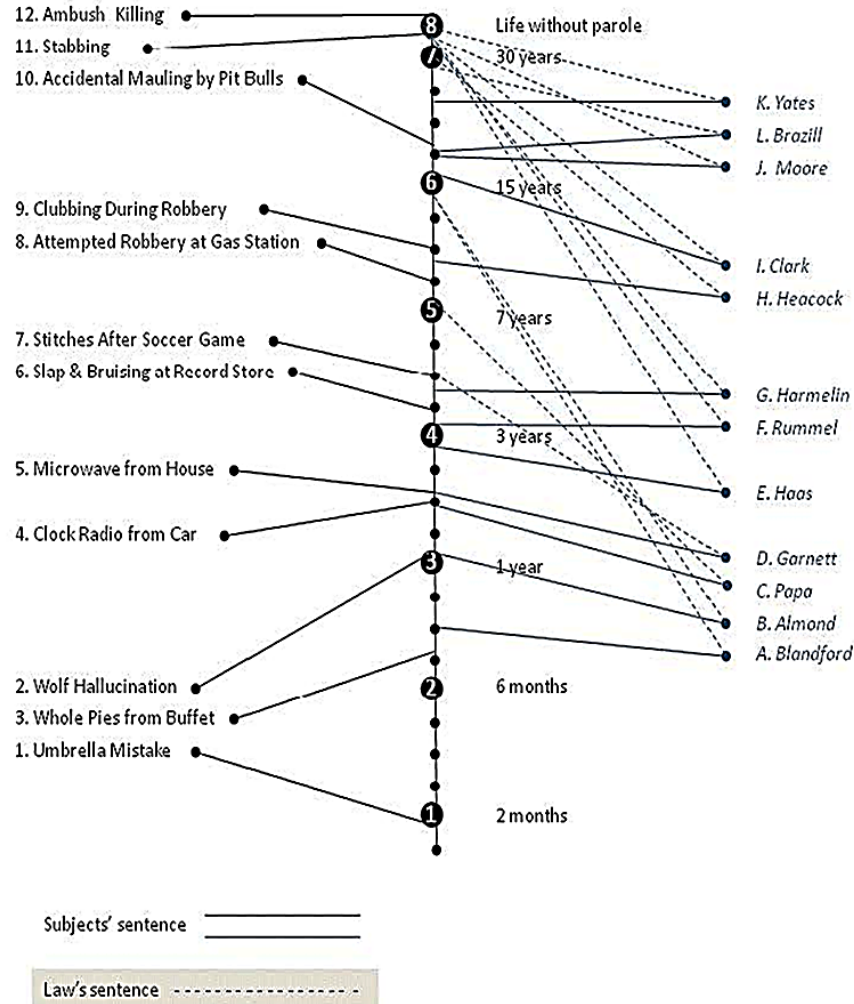
²⁴⁹ *Id.* at 775.

²⁵⁰ *Id.* at 785.

²⁵¹ See INTUITIONS *supra* note 1, at 110–40.

crime-control doctrine was lawfully applied as designed. The 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 fraud case, in the right-hand margin. The solid line in the center indicates where on the punishment continuum the subjects placed each case, close to the three-year mark for Case F. The dashed sloping line indicates the punishment that was actually imposed, life imprisonment.



The important point here is the dramatic difference between the solid lines and the corresponding dashed lines for each case on the right side of the figure. 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 larger dots, 1 through 8, represents about a doubling of punishment—the standard structure of the U.S. criminal code’s offense grade categories.²⁵² Thus, if the difference between the solid line and the dashed line for any case was only the difference between 4 and 5 on the punishment scale, then the offender in that case got a punishment twice as long as the subjects thought was deserved. In fact, the community-law differences in each case were all significantly greater 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 such as general deterrence and incapacitation of the dangerous—crime-control theories developed and largely pressed in the past by academics.²⁵³ Having criminal liability and punishment rules that 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.’”²⁵⁴ We may well agree with this critic’s personal sense, 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.²⁵⁵ 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 *deemed acceptable by the community at that moment*. However, one could nudge the endpoint of the punishment continuum to reduce severity incrementally and on a regular basis. Reducing it by 5% every year or two, for example, is unlikely to be sufficient to undermine the system’s moral credibility, and people will simply adjust their expectations accordingly.²⁵⁶ Indeed, this dynamic was seen after the enactment of 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.

²⁵² See 18 U.S.C. § 3559.

²⁵³ See DISTRIBUTIVE PRINCIPLES, *supra* note 1, at 21–130.

²⁵⁴ Slobogin, *supra* note 2, at 402.

²⁵⁵ See *Competing Conceptions*, *supra* note 1, at 172–73.

²⁵⁶ JOHN RAWLS, A THEORY OF JUSTICE 48 (rev. ed. 1999) (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).

While there was some initial upset, it soon passed, and people adopted the new sentences as establishing the new severity norm.²⁵⁷

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 personal preferences are malleable, and as community views shift toward lower severity, the proposed distributive principle would demand that criminal law shift as well.

Further, there is good reason to think that adopting a distributive principle that maximizes moral credibility through empirical desert would require an immediate reduction in the sentences imposed for most serious offenses. At the moment, most serious offenses are given the same punishment at the high end of the punishment continuum—death, life, thirty years, or whatever the maximum might be. As we have shown, however, people prefer strict blameworthiness proportionately, so the lay intuitions captured by empirical desert would likely reflect this preference. Further, a moral credibility distributive principle requiring strict blameworthiness proportionality must reflect actual differences in blameworthiness between the most serious cases. In other words, sentences for most serious offenses must be forced down from the high end of the punishment continuum in order to distinguish the more egregious cases from the less egregious cases. And, indeed, the punishment continuum high endpoint must be reserved for the most egregious possible case, as some proposed and enacted criminal codes adopting this principle state.²⁵⁸ (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.²⁵⁹) Ultimately, a punishment system based on the distributive principle of maximizing moral credibility through tracking empirical desert is likely to be less punitive than its coercive crime-control alternatives of general deterrence and 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 being 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 wrote.²⁶⁰ Another commented, "Once desert is untethered from the

²⁵⁷ See *Competing Conceptions*, *supra* note 1, at 229–32.

²⁵⁸ See e.g., Law No.6/2014 Penal Code § 92 (2014) (Maldives), <https://www.law.upenn.edu/live/files/4203-maldives-penal-code-2014>; Draft Report of the Somali Criminal Law Recodification Initiative, art. 1002(b), 47 (Mar. 2017), <https://www.law.upenn.edu/live/files/6310-vol-1-and-2-somali-recodification>.

²⁵⁹ See Law No. 6/2014 § 92.

²⁶⁰ Roberts & de Keijser, *supra* note 2, at 487–88.

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.”²⁶¹

These criticisms seem to assume that we offer empirical desert as a substitute for deontological desert and that it fails in that role. But we have never made such a claim. Maximizing moral credibility by tracking empirical desert, determined by social psychologists, is offered for its consequentialist crime-control benefits. Deontological desert, as espoused by moral philosophers, seeks to achieve objective justice through reasoning, argument, and analysis. We have always been careful and explicit in distinguishing the two.²⁶²

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, which 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—that a system’s increased moral credibility reduces crime—rather than a deontological one. And it is not meaningless; it simply has a different meaning from deontological desert.

C. “COMMUNITY SENTENCING,” “CHERRY PICKING,” AND THE PUBLIC AS BAD POLICYMAKERS

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

²⁶¹ *New Desert*, *supra* note 2, at 45; *see also Methodology of Desert*, *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.”).

²⁶² *See e.g., Competing Conceptions*, *supra* note 1, 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.”).

Some critics complain that the proposed distributive principle is one that involves “community sentencing,” which would be dangerous and unwise.²⁶³ 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 be distorted by media misstatements of the facts, or subconscious and conscious biases arising from the particular offender or offense.²⁶⁴

It is 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 that the proposal is a distributive principle of criminal liability and punishment for developing rules and policies; it does not outline a proposal for the adjudication of individual cases. As one of us wrote more than a dozen years ago, the proposal

envision[s] 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 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.²⁶⁵

One of the strengths of empirical desert experiments, which test 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 would generally agree are inappropriate in making criminal liability and punishment decisions, such as the race of the offender. On the whole, it appears that people are likely to see greater moral credibility in cases 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,” this 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.²⁶⁶ “To be clear, I am not arguing that empirical desert advocates should query

²⁶³ See *Intuitions of Justice*, *supra* note 1, at 43 (explaining one of the criticisms of empirical desert: “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.”).

²⁶⁴ See Denno, *supra* note 2, at 752–58.

²⁶⁵ *Competing Conceptions*, *supra* note 1, at 149.

²⁶⁶ *Improve Empirical Desert*, *supra* note 2, at 441.

angry, biased, or drug addicted subjects. Rather, I claim that advocates must defend their choices.”²⁶⁷

It is not difficult to defend against this challenge; 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 an 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.²⁶⁸

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.²⁶⁹ A more specific challenge of the same sort asks whether the public wants a distributive principle based upon empirical desert.²⁷⁰ This type of criticism asks whether people would prefer a distributive principle designed by experts rather than by their peers.

Once again, though, this criticism misunderstands empirical desert’s function. As we said earlier, we do not propose relying on community views about criminal justice policy approaches in order to determine what distributive principle to use. Rather, we recommend consulting community justice judgments to understand what increases the criminal justice system’s moral credibility in 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 clear²⁷¹—we are not proposing that a justice system follow the community’s view because we think laypeople are the best policymakers but, rather, because their views tell us how best to enhance the system’s reputation.

²⁶⁷ *Id.* at 448.

²⁶⁸ 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. Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert*, 48 WM & MARY 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.”).

²⁶⁹ 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 [I]f the Justice respondents’ views are consistent with the public’s, their overestimate of crime rates and re-offending, as well as their underestimate of the criminal justice system’s sentencing severity, could influence their perceptions of certain legal doctrines.”).

²⁷⁰ Ristroph, *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.”).

²⁷¹ See *supra* Section II.A.3.

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, though 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,²⁷² but let us quickly sketch the nature of our criticisms of 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.²⁷³ 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 general deterrent effect.

To enhance general deterrence, the formulation of a criminal law 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, the intended audience's cost-benefit analysis under the rule must suggest that the cost of the contemplated violation outweighs its benefit.

Unfortunately, these prerequisites rarely 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.²⁷⁴ Academics and politicians spend a good deal of time agonizing over the formulation and adoption of coercive crime-control doctrines, such as the felony murder rule, the three-strikes rule, the use of strict liability, and other crime-control doctrines. But when a drug addict is standing outside the convenience store deciding whether or not 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's lawmakers spent

²⁷² See generally DISTRIBUTIVE PRINCIPLES, *supra* note 1, at 21–98, 141–207.

²⁷³ *Id.* at 21–95.

²⁷⁴ This is a particular problem in the United States where there are fifty-one American criminal codes.

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 rates for most offenses are so low—commonly less than one hundred to one for offenses other than homicide²⁷⁵—that members of the target audience commonly see the benefits as outweighing the costs. More importantly, the result of the calculation depends not on the reality of the situation but on the potential offender's perception of it. Thus, the empirical evidence²⁷⁶ indicating that many, if not most, potential offenders generally overestimate their ability to avoid detection and punishment suggests that the general deterrence project can have limited effect even when capture and punishment rates were higher than suspected.

General deterrence's problems only grow worse when it is compared to empirical desert. Criminal liability and punishment imposed under empirical desert already have some inherent general deterrent effect. The only way in which a general deterrence distributive principle can provide a greater deterrent effect is by deviating from desert, yet a deviation from desert would indicate that general deterrence is operating at its worst.

First, if general deterrence deviates from desert, then in every instance it will trigger the crime-control costs that arise from its conflict with community views. That is, such a deviation would make general deterrence more effective but give rise to the crime-control costs that result from reduced moral credibility on the other.

Second, it faces 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.²⁷⁷ Thus, whenever general deterrence deviates from empirical desert, it must overcome this desert rule assumption and make clear that the rule is different than what people would otherwise expect. This can be difficult and often impractical.

One might argue that it is unfair for us to offer this criticism because empirical desert faces a similar challenge. Its compliance mechanism

²⁷⁵ See INTUITIONS *supra* note 1, at 100.

²⁷⁶ See DISTRIBUTIVE PRINCIPLES, *supra* note 1, at 35.

²⁷⁷ See *supra* Sections II.A.3, II.A.5; *Intuitions of Justice*, *supra* note 1, at 38 (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.”).

depends upon the community having an opinion about the system's justness, but as one critic 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."²⁷⁸

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 a threat of criminal liability and punishment, a more severe punishment than an 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. It must also get them to use this fact when performing the cost-benefit analysis that guides their conduct. In contrast, all that is required for empirical desert is for people to have some general opinion about the moral credibility of the criminal justice system, an opinion that every ordinary person will necessarily have from their exposure to an endless stream of information that they absorb from news media, governmental statements, friends, and others. Having an opinion on the justness of the criminal law does not require awareness of a particular fact, like general deterrence 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 still be at work. It will still be the case that regular conflicts with community views will reduce its credibility, and a reduction in conflicts will increase it.

B. INCAPACITATION OF THE DANGEROUS

Incapacitation of the dangerous is as problematic a distributive principle as general deterrence, but for different reasons.²⁷⁹ 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 prevents further victimization, at least of the community. The problem with an incapacitation distributive principle is that behavioral scientists are, at present, relatively poor predictors of recidivism for specific individuals. 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 enforced by courts limit the open use of 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 using predicted future dangerousness, liability and sentencing rules commonly use substitutes like prior criminal record to set sentences, which have turned out to be even worse approximations of recidivism.

²⁷⁸ Denno, *supra* note 2, at 765.

²⁷⁹ DISTRIBUTIVE PRINCIPLES, *supra* note 1, at 99–108 (examining rehabilitation as a distributive principle).

Finally, as with general deterrence, even if there were a situation in which preventive detention could provide a crime-control benefit by deviating from desert, any such advantage 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 only provide more prevention than that already inherent in a distributive principle of maximizing moral credibility 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 more the wrongdoing should 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; rather, the duration of the detention is tied to the risk of future 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 fraud in the Rummel case discussed in Part V(A).²⁸⁰

Thus, punishment (acknowledging that 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 be seen as appallingly unjust by most citizens. Thus, incapacitation of the dangerous 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 the criminal justice system endorsed deontological desert as its 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? 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. Given that philosophers as a group are not commonly a major source of crime, their principle would seem to lack any utilitarian crime-control justification.

²⁸⁰ See *supra* Section V.A.

Perhaps the larger point is that deontological desert's appeal is that it represents the transcendent truths 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 to preserve the transcendent-truth advantage of deontological desert from this dilemma 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.

To evaluate the infeasibility of operationalizing deontological desert, consider, for example, the issue of assigning punishment for criminal attempts. Should an unsuccessful attempt be punished the same as the substantive offense or be treated 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 offense actually manifests, which, in the minds of ordinary people, increases the offender's blameworthiness and deserved punishment.²⁸¹ But the deontologists are very much split on the issue.²⁸² Some agree with the community view, but many disagree, correctly pointing out that the conduct and intention of an assassin who attempts murder and one who actually commits it are exactly the same and that it is only a matter of moral luck as to which victim is missed and which is 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 drafters to follow deontological desert, any mechanism they could use for picking one philosophical camp over another would illustrate the impossibility of operationalizing deontological desert as a distributive 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 gives deontological desert its draw. If they instead simply look to their own personal judgments of which position best reflects just deserts, then again they would fail to abide by the reasoned analysis deontological desert requires. If they try to play the role of moral philosopher by reviewing the arguments on both sides and trying to reason which position is the correct position themselves, 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

²⁸¹ *Id.*

²⁸² DISTRIBUTIVE PRINCIPLES, *supra* note 1, at 146–47.

rules. But while academics may cherish reasoned debate and can provide useful insights by doing so, it is quite different from providing a distributive principle for criminal liability and punishment upon which the real world can draft criminal codes, sentencing guidelines, and policy statements.²⁸³

It is also the case that deontological desert would not have the crime-control effectiveness that empirical desert does. Deontological desert will, at times, conflict with community views and thereby undermine criminal law's moral credibility.

Empirical desert probably offers the best *practical approximation* of deontological desert rules. In discussing the issue of grading criminal attempts 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 corresponding 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 who 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 who review the results of the empirical studies on topics such as those listed previously²⁸⁴ will likely feel comfortable with most if not all of those results.

D. CONCLUSION

To summarize, general deterrence as a distributive principle is functional in theory but ineffective in practice, especially because it can have a greater general deterrent effect than that already inherent in our proposed distributive principle only when it deviates from desert, which is when it is least effective.²⁸⁵ Incapacitation of the dangerous as a distributive principle does work, in the sense that it can prevent crime by those detained, but researchers, at their current clinical capacity, are unable to reliably predict

²⁸³ 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 actually 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 do? In a well-resourced and fastidious commission, they will 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 many factors, such as their 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 a particular decision-maker.

²⁸⁴ See generally INTUITIONS, *supra* note 1, at 239–75 (testing lay intuitions on attempt liability, criminal risk, complicity, and omission liability).

²⁸⁵ See *supra* Section VI.A.

future dangerousness, and, if implemented, this principle would essentially destroy the criminal justice system's reputation for being a reliable moral authority that does justice and avoids injustice.²⁸⁶ 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 would have to resort to non-deontological analysis, such as voting to decide competing claims, which would yield a result that is not deontological desert.²⁸⁷ Support for this distributive principle should be seen as 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.

Among the critics, some seem to have never offered an alternative distributive principle,²⁸⁸ 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,²⁸⁹ and at least one has publicly supported dangerousness as a distributive principle,²⁹⁰ but, as noted here, those principles simply do not provide realistic alternatives to one that maximizes 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 have addressed, there are some potential weaknesses in the proposed distributive principle of maximizing the criminal law's moral credibility with the community, typically by tracking empirical desert. Perhaps the critics would have eventually gotten around to offering these criticisms, but two issues are worth addressing now: first, the proposed distributive principle limits 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

²⁸⁶ See *supra* Section VI.B.

²⁸⁷ See *supra* Section VI.C.

²⁸⁸ See, e.g., Denno, *supra* note 2; Roberts & de Keijser, *supra* note 2; Rappaport, *supra* note 2; Ristroph, *supra* note 2.

²⁸⁹ See, e.g., Simons, *supra* note 2; *Methodology of Desert*, *supra* note 2.

²⁹⁰ See Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. L. REV. 1, 1–2 (2003).

from history that existing views are not always the best for society. Changing those views can sometimes bring about a better world.

Does reliance upon a moral credibility distributive principle condemn society to live with existing views forever? No. As 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 the criminal law’s power to help shift community views. In other words, a criminal law system 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 marriage 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 criminal law deviates too substantially from community views, the disparity between the two can potentially undermine the law’s moral credibility. American Prohibition, discussed previously, proves this 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,²⁹¹ crime rates during Prohibition went up, and not just for alcohol-related offenses but also for a wide range of offenses unrelated to alcohol. People became habituated to lawbreaking. Perhaps worse, pushing too far ahead without successfully shifting views can undermine the law’s reputation such that the law becomes less useful 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.” Criminal law should not be used as a reform device until other societal institutions—political, social, religious, and others—have gained community support. With that momentum, criminal law can make a real contribution to social change. 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 what its members will want existing norms to look like in the future. Neither laypeople nor moral philosophers have clairvoyance to see around history’s corner, but we can remain aware that some of our current norms will indeed be seen as inappropriate by future generations. Further, 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.

²⁹¹ See *supra* Section II.A.4.

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 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. But by openly acknowledging the problem, we can emphasize the importance of this type of societal questioning. There is no reason to think that deontological desert supporters will cease to raise the challenges and questions that they have in the past, which is 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. Common sense aside, real-world natural experiments and controlled empirical studies support the notion that reduced moral credibility incrementally reduces compliance and internalization of the law's norms. The evidence also suggests that regular conflicts with community views undermine the law's moral credibility. Thus, we have proposed that the distributive principle used to draft criminal codes, sentencing guidelines, and sentencing policy statements should maximize the criminal law's moral credibility, which can be achieved by adopting rules and policies that avoid persistent conflicts with community conceptions of justice.

We have presented and responded to a wide variety of objections from critics of this proposal. We have shown that those criticisms are commonly and simply inconsistent with the available evidence, anecdotal and scientific, or reflect an inaccurate understanding of our proposal. Conversely, we have suggested two limitations of 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 current community views on the justness of our system's norms.

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 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. 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 might perceive a significant injustice or failure of justice. This would undermine the law's moral credibility and reduce both compliance with the laws and its internalization power.

Deontological desert is an attractive alternative, but we have shown that 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 if criminal justice systems adopt a distributive principle that maximizes moral credibility. Deontologists can encourage the constant testing of existing community views, which we endorse. Constant questioning will hopefully lead to public conversations by which community views over time change for the better. But while the never-ending debate and analytic processes of deontological desert work well in the role of thoughtful gadfly, they cannot generate a codified body of criminal law or sentencing guidelines and policies. Deontological desert supporters should take some comfort in the fact that an empirical desert-based distributive principle will produce results that most closely align with 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 that maximizes their moral credibility with the community.