

**THE ROLE OF DETERRENCE IN THE FORMULATION OF CRIMINAL LAW RULES:
AT ITS WORST WHEN DOING ITS BEST**
(forthcoming 91 *Georgetown Law Journal* (2003))

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For the past several decades, the deterrence of crime has been a centerpiece of criminal law reform. Law-givers have sought to optimize the control of crime by devising a penalty-setting system that assigns criminal punishments of a magnitude sufficient to deter a thinking individual from committing a crime. Although this seems initially an intuitively compelling strategy, we are going to suggest that is a poor one; poor for two reasons. First, its effectiveness rests on a set of assumptions that on examination cannot be sustained. Second, the attempt to employ the strategy generates a good many crimogenic costs that are hidden if one is functioning within a deterrence paradigm

Experience has taught us to be precise about exactly what we are saying about the effectiveness of a deterrence strategy. There seems little doubt that having a criminal justice system that punishes violators, as every organized society has, does have an general effect in influencing the conduct of potential offenders. This we concede: having a punishment system does deter. But there is growing evidence to suggest skepticism about the *criminal law's* deterrent effect -- that is, skepticism about the ability to deter crime through *the manipulation of criminal law rules and penalties*. The general existence of the system may well deter prohibited conduct but the formulation of criminal law rules within the system according to a deterrence-optimizing analysis may have a limited effect or even no effect beyond the system's broad deterrent warning that has already been achieved. We will suggest that it may be true that criminal law manipulation *can* influence behavior, but the conditions under which this can happen are unusual, rather than typical, in criminal justice systems of modern societies. By contrast, criminal law makers and adjudicators formulate and apply criminal law rules on the assumption that they *always* influence conduct. And it is this taken-for-granted assumption that we find so disturbing and so dangerous.

Let us briefly sketch our line of argument and conclusions: In Part I we briefly summarize the conclusions of the social science literature that suggest a skeptical view of criminal law deterrence. There is reason to think that potential offenders do not know the law, do not make rational choices, and/or do not perceive an expected cost for a violation that outweighs the expected gain.

In sharp contrast, criminal law has been formulated on the assumption that those legal formulation decisions will have a direct deterrent effect on conduct, and that assumption has been used in formulating nearly every aspect of criminal law, from defining the rules of conduct, to formulating principles of liability, to determining offense grades, to setting sentencing rules and practice.¹ We document this pervasive reliance in Part II.

¹ Deterrence is not criminal law's only ex ante function. Deterrence speaks to discouraging prohibited conduct. But criminal law also *requires* that certain conduct be
(continued...)

Even if one concludes that deterrence skepticism overstates its case, there remain reasons for serious concern. We argue that even on the most cautious reading of the available studies enough is known to urge an end to the past practice of formulating criminal law based on a deterrence-optimizing analysis. In Part III we offer four primary arguments.

First, a disabling problem for deterrence as a distributive principle is its need for information that is not available and not likely to be available any time in the foreseeable future. Formulating criminal law rules according to a deterrence analysis can produce erroneous results if based upon missing or unreliable data. In fact, inadequately informed analyses could produce criminal law rules that reduce rather than increase the possibility of deterrence. In such an informational void, we argue, it makes sense to follow a distributive principle that at very least can achieve its objectives.

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

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

So, and third, there is an important implication here. Deterrence can only do better than another distribution -- such as a justice distribution (by "justice distribution" we mean a distribution according to the shared intuitions of justice of the community bound by the law²) -- only if and where it deviates from it. Thus, a deterrence-based distribution can deter better than a justice-based distribution only if and where it deviates from a just result. But it is just these instances of deviation from justice in which it is most difficult to get a deterrent effect. People assume the law is as they think it should be, which is according to their own collective

¹(...continued)

performed, a command carried in the law's creation of legal duties to act. Further, the criminal law *authorizes*, under special circumstances, conduct that otherwise is prohibited, the circumstances being set out in the criminal law's justification defenses. The same caution about legal rules influencing conduct applies to these ex ante commands as to deterrence. For the same reasons that we are skeptical of the influence of doctrinal formulations to deter conduct, we are skeptical of the criminal law's ability to induce conduct, at least in the way lawmakers assume when they create legal duties and justification defenses.

² We have discussed elsewhere in some detail what we mean by a "justice distribution" and how it can be determined. See Paul H. Robinson & John M. Darley, *Justice, Liability & Blame: Community Views and the Criminal Law* (1995), especially Chapter 7.

notions of justice. Thus, the simple prerequisite of making the deterrence-based rule know becomes a serious task. Further, it is these deviation-from-justice cases in which the system's deterrence-based rules are least likely to be followed. Because people commonly think of criminal liability and punishment in terms of justice, rather than deterrence, the exercise of police, prosecutorial, and judicial discretion, as well as jury nullification, commonly subvert application of deterrence-based deviation rules, thus subverting the deterrence program and confusing the deterrence message. Part III.B and C details these arguments.

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

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

I. GROWING REASONS TO BE SKEPTICAL OF CRIMINAL LAW DETERRENCE

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

³ See Paul H. Robinson & John M. Darley, [Deterrence Empirics] (forthcoming 2003).

rational self-interest choices. Let us summarize the central conclusions of the literature that are relevant to our current inquiry.

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

As to the perceived net-cost hurdle, the possibilities of deterrent effect are weakened by the difficulties in establishing a punishment rate that would be meaningful to potential offenders, the difficulties in avoiding the delay in imposition of punishment that seriously erodes its deterrent effect, and the difficulties in establishing and modulating the amount of punishment imposed, as an effective deterrence distribution of punishment must do.

Establishing some base expectation of a meaningful chance of punishment is also a necessary condition to any deterrent effect. Yet, the perceived probability of punishment is low, to the point where the threatened punishment commonly is not thought to be relevant to the potential offender.⁵

A delay between violation and punishment can dramatically reduce the perceived cost of the violation. Even if the punishment is certain, the more distant it is, the more its weight as a threat will be discounted. Further, the strength of the punishment memory -- that is, its recalled punitive "bite" as a perceived threat for a future violation -- is dramatically reduced as the length of delay increases. Unfortunately, in modern criminal justice such delay is substantial.⁶

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

⁴ Id. at ??.

⁵ Id. at ??.

⁶ Id. at ??.

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

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

As to the rational decision-making hurdle, there are a host of conditions that interfere with the rational calculation of self-interest by potential offenders: drug or alcohol use, personality types inclined toward impulsiveness and toward discounting consequences, and social influences such as the arousal effect of group action and the tendency of group members to calculate in terms of group rather than individual interests. Further, these conditions are disproportionately high among deterrence's primary target group: those persons for whom criminal conduct is not already ruled out by their own internalized norms or by those of their family or peers. This bodes ill for effective deterrence because it precludes, or at least diminishes, a rule's deterrent effect even if the rule is known and is backed by what is perceived as a meaningful threat of punishment. We can expect greater deterrent possibilities when dealing with more rational target audiences, such as white collar offenders. Unfortunately, the more serious and the more common offenses tend to be committed by persons less likely to exercise rationality.⁹

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

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

⁷ Id. at ??.

⁸ Id. at ??.

⁹ Id. at ??.

¹⁰ Id. at ??.

This view of a limited deterrent effect stands in stark contrast to the view of criminal law makers of the past four decades, who have relied heavily, almost primarily, on deterrence analysis in formulating criminal law rules on the assumption that deterrence is relevant to every aspect of criminal law doctrine.

Deterrence is said by some commentators to be the criminal law's "primary purpose"¹¹ or its "core purpose."¹² The Model Penal Code drafters -- for whom the Code's "dominant theme is . . . prevention" and its "major goal is to forbid and prevent" crime¹³ -- see incapacitation and desert as merely "subsidiary themes."¹⁴ Most criminal law course books at their start introduce students to deterrence principles as part of the standard litany for analyzing criminal law doctrine.¹⁵ As is illustrated below, criminal code commentaries, court opinions, legislative histories, and sentencing hearing transcripts are full of the language of deterrence in justifying every manner of criminal law rule and practice.

A. Doctrinal Formulations Calculated to Deter, or to Avoid Undercutting Deterrence

1. Prohibitions

The most common use of deterrence rationales is in shaping the criminal law's prohibitions.¹⁶ Explicit reliance on a deterrence rationale also is used in justifying decisions *not* to criminalize certain conduct, often on the view that a sanction would be ineffective or unnecessary as a deterrent. Such a rationale is offered to explain, for example, the

¹¹ Glanville Williams, *Criminal Law: The General Part* §191 at 601 (2nd ed., 1961); Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* §2.1 n.88 (1986).

¹² *Warren v. U.S. Parole Commission*, 659 F.2d 183 188 (D.C. Cir. 1981).

¹³ Model Penal Code §1.02 comment 14 (1985).

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

¹⁵ See, e.g., Richard G. Singer & Martin K. Gardner, *Crimes and Punishment: Cases, Materials, and Readings in Criminal Law* 87-94 (2nd ed. 1996); Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes: Cases and Materials* 101-02, 155-20 (7th ed. 2001).

¹⁶ See, e.g., the doctrines cited at notes [111-120] (describing instances where deterrence is the explicit justification given for obvious harms). The deterrence rationale also is used to prohibit conduct not because it is harmful in itself but because the prohibition will make some other conduct, which is harmful, more difficult. Thus, in criminalizing receipt of stolen property, it is explained: From a practical standpoint, it is important to punish receivers *in order to discourage theft*. The existence and functioning of the "fence" i.e., a dealer who provides a market for stolen property, is an assurance to thieves, and especially to professional thieves, of the ability to realize gain from their unlawful activity. Model Penal Code §223.6 comment 232 (1980).

decriminalization of suicide,¹⁷ assisting a suicide,¹⁸ failing to pay a valid debt,¹⁹ self-abortion and the preparation of home-made abortifacients,²⁰ and for limiting the "joyriding" offense to the person who actually operates or aids in the operation of the vehicle (thus, excluding willing passengers).²¹

Similarly, a deterrence rationale is used in formulating liability doctrines determining who should be held criminally liable: in support of the use of corporate/enterprise liability,²² in opposition to the use of corporate/enterprise liability,²³ in support of limiting liability of

¹⁷ Glanville Williams, *The Sanctity of Life and the Criminal Law* 305 (1957).

¹⁸ [A]ttempted suicide is . . . not criminal under the Model Code, for [suicide is not a crime and Section 5.01 attempt,] is limited to situations where the actor engages in inchoate behavior that has as its object the completion of conduct that the law declares to be criminal. . . . The judgment underlying the Model Code position is that there is no form of criminal punishment that is acceptable for a completed suicide and that criminal punishment is singularly inefficacious to deter attempts to commit suicide. There is scant reason to believe that the threat of punishment will have deterrent impact upon one who sets out to take his own life. By definition, the person who commits what could be denominated a criminal attempt to commit suicide intends to succeed. It seems preposterous to argue that the visitation of criminal sanctions upon one who fails in the effort is likely to inhibit persons from undertaking a serious attempt to take their own lives.

Model Penal Code §210.5 comment 94 (1980).

¹⁹ Model Penal Code §223.8 comment 258-259 (1980) (reasoning that insolvencies cannot be deterred by threat of criminal sanction because commonly result from factors out of the control of the debtor).

²⁰ It is apparent from the foregoing that criminal liability of the woman for an abortion committed on herself was not useful in suppressing self-abortion . . . this section favors exemption from criminal liability, except in the late-pregnancy situation specially covered by Subsection (4). The prospect of prosecution is unlikely to deter the unhappy woman who is not restrained by morality, physical danger, expense, and ignominy.

Model Penal Code §230.3 comment 438 (1980). See also *id.* at 440 (declining to criminalize home-made abortifacients).

²¹ Model Penal Code §223.9 comment 273 (1980) (explaining that the threat of liability for the operator is enough to deter such offenses).

²² Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 So. Cal. L. Rev. 1141, 1147-1154(1983) (arguing that the stigma of criminal conviction and punishment has a significant deterrent effect on corporations).

²³ On grounds that it makes a scapegoat of the corporation, allowing the corporate officials to escape liability and, therefore, undercuts deterrence. Williams, *General Part*, *supra* note (continued...)

corporate officials to the board of directors or high management,²⁴ in support of the use of vicarious liability,²⁵ in opposition to the use of vicarious liability,²⁶ and in support of *Pinkerton* and 'common design' rules in complicity.²⁷

Deterrence also is used as the guiding rationale in the formulation of inchoate liability rules: in support of the proximity test for attempt,²⁸ in support of a "substantial step" test for attempt,²⁹ in support of limiting the renunciation defense to cases where the offender is successful in avoiding the offense,³⁰ and in opposition to an impossibility defense for inchoate liability.³¹ For example, in justifying a renunciation defense to attempt, the Model Penal Code drafters explain:

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

²³(...continued)

[5], at §283.865; LaFave & Scott, *supra* note [5], at §3.10, 365.

²⁴ Model Penal Code §2.07 comment 336, 340 (1985) (reasoning that this is where the deterrent effect -- through pressure by shareholders -- is clear).

²⁵ *Davis v. City of Peachtree City*, 304 S.E.2d 701,703 (1983) (deterrence is objective of holding liquor store owners liable for employee alcohol sales to minors); see also LaFave & Scott, *supra* note [5], at §3.9. 352. 357.

²⁶ Some have opposed vicarious liability because if the actor himself has not done anything wrong, then there is no need for deterrence. *Commonwealth v. Koczwara*, 397 Pa. 575, 580, n.1 (1959)

²⁷ *Pinkerton v. United States*, 328 U.S. 640, 644 (1946) (arguing need to treat conspiracy as separate punishable offense from substantive offense, court quotes *U.S. v. Robinowich*, 238 U.S. 78, 88, "[conspiracy] is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered").

²⁸ Williams, General Part, *supra* note [5], at §203, 632; Stuart, *The Actus Reus in Attempts*, 1970 *Crim. L. Rev.* 505, 508 (1970); LaFave & Scott, *supra* note [5], at §6.2, 33; Model Penal Code §5.01 comment 323 (1985).

²⁹

³⁰ Model Penal Code §5.01 comment 360 (1985)

³¹ "When a man makes a harmless attempt to commit a crime, he may well try again, perhaps more effectively. The voodoo witch doctor may use a gun next time. Thus the purposes of special deterrence and neutralization can be served by punishing even the marginal cases. Elkind, *Impossibility in Criminal Attempts: A Theorists Headache*, 54 *Va. L. Rev.* 20, 33-34 (1968).

risk that the crime will be completed is correspondingly high. . . . [B]ecause of the importance of *encouraging desistance* in the final stages of the attempt, the defense is allowed even when the last proximate act has occurred but the criminal result can be avoided, as for example when the fuse has been lit but can still be stamped out. If, however, the actor has put in motion forces that he is powerless to stop, then the attempt has been completed and cannot be abandoned.³²

Similar kinds of behavioral control reasoning is found in justifying liability rules for solicitation³³ and conspiracy.³⁴

2. Culpability Requirements, Mitigations, and Defenses

Lawmakers' view that doctrinal manipulation can enhance or maintain deterrent effect appears as well in the formulation of culpability requirements, mitigations, and excuse

³² Model Penal Code §5.01 comment 359-60 (1985) (emphasis added).

³³ Model Penal Code §5.02 comment 366 (1985).

³⁴ [T]he law [of conspiracy] should afford a significant incentive to persons to desist from pressing forward with their criminal designs.

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

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

Model Penal Code §5.03 comment 458 (1985) (footnotes omitted).

defenses. For example, in *United States v. Park*,³⁵ the president of Acme Markets, Inc., a national retail food chain with approximately 36,000 employees, 874 retail outlets, 12 general warehouses, and four special warehouses, was held criminally liable for violations of the Federal Food, Drug, and Cosmetic Act when a company warehouse in Baltimore, Maryland, held food in a building that could be exposed to contamination by rodents, even though there was no indication that Park was negligent as to the violation.³⁶ Such strict liability is defended on deterrence grounds:

[A] person engaged in a certain kind of activity *would be more careful* precisely because he knew that this kind of activity was governed by a strict liability statute. . . . [T]he knowledge that certain criminal sanctions will be imposed if certain consequences ensue might *induce a person to engage in that activity with much greater caution* than would be the case if some lesser standard prevailed.³⁷

Another useful example is found in the well known case of *Regina v. Dudley and Stephens*,³⁸ in which the defendants, adrift in an open boat at sea and soon to die from starvation, killed and drank the blood of a near-death cabin boy, an act that kept them alive long enough to be rescued. They were convicted of murder and sentenced to death. The court denied their claim of a necessity defense in large part because the court feared that recognition

³⁵ 421 U.S. 658 (1975).

³⁶ It could be argued that Park was blameworthy for his failure to take sufficient remedial steps after being informed of the violation -- he ordered a cleanup but gave this order to the same people who had allowed the problem to occur. But, while one might argue that the government could have shown Park's negligence -- we don't know if they could have -- the point is that the *Park* opinion allows statutes that do not require such a showing and, thus, allow criminal liability even if it is clear that no such showing can be made, the defendant acted entirely reasonably. See Norm Abrams, Criminal Liability of Corporate Officers for Strict Liability Offenses – A Comment on *Dotterweich* and *Park*, 28 U.C.L.A. L. Rev. 463, 476-77 (1981).

³⁷ Richard A. Wasserstrom, Strict Liability in the Criminal Law, 12 Stan. L. Rev. 731, 736 (1960) (emphasis added). He also notes that the deterrent effect may be in deterring people from engaging in the strict Liability activity at all, if they were concerned that they might not be able to avoid the prohibited harm. "[T]he presence of strict liability offenses might have the added effect of keeping a relatively large class of persons from engaging in certain kinds of activity." *Id.* at 737.

³⁸ 14 Q.B.D. 273 (1884). For more details on the case, see Paul H. Robinson, Criminal Law Case Studies 14 (2d ed. 2002); Brian Simpson, Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Leading Proceeding to Which it Gave Rise (1984).

of such a defense would undercut criminal law's prohibitions at a time when its deterrent threat must be at its strongest.

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

The Court then proceeded to pass sentence of death upon the prisoners.³⁹

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

Thus, in *State v. Williams*,⁴⁰ loving parents with little education and limited intelligence were held to have failed to meet the reasonable person standard in failing to get needed medical care for their 17-month-old child, who died of complications from what began as a toothache. The court ruled that it was sufficient negligence to support liability for manslaughter if "the conduct of a defendant, regardless of his ignorance, good intentions and good faith, fails to measure up to the conduct required of a man of reasonable prudence"⁴¹ Reliance upon a purely objective (unindividualized) standard of negligence is justified in much the same way as the result in *Dudley and Stephens*⁴²: as necessary to maintain a clear standard of conduct. Holmes, for example, concludes that the reason for adopting it is the criminal law's

³⁹ 14 Q.B.D. at 288 (emphasis added). The defendant's sentence was afterwards commuted by the Crown to six months' imprisonment. *Id.*

⁴⁰ 4 Wn. App. 908, 484 P.2d 1167 (Wash. App. 1971).

⁴¹ *Id.* at 913. Similarly, in *Edgmon v. State*, 702 P.2d 643, 645 (Alaska App. 1985), the court holds that the "peculiarities of a given individual -- his or her intelligence, experience, and physical capabilities -- are irrelevant in determining criminal negligence . . . since the standard is one of a reasonably prudent person."

⁴² See text at note [32-33] *supra*.

"immediate object and task to establish a general standard . . . of conduct for the community, in the interest of the safety of all."⁴³

To give just a few of many possible examples, deterrence arguments are used: in opposition to strict liability offenses,⁴⁴ and in support of strict liability offenses,⁴⁵ in opposition to liability based upon negligence,⁴⁶ in support of liability for negligent homicide⁴⁷ and negligent assault with a deadly weapon,⁴⁸ in support of an objective (unindividualized) standard of recklessness,⁴⁹ in support for a purely objective (unindividualized) standard for the provocation mitigation to murder,⁵⁰ in opposition to the individualized extreme emotional disturbance mitigation,⁵¹ in support of the partial responsibility mitigation in murder,⁵² in

⁴³ Commonwealth v. Pierce, 138 Mass. 165, 176 (1884). See also Richard Singer, The Resurgence of Mens Rea: II - Honest But Unreasonable Mistake of Fact In Self Defense, 28 B.C.L. Rev. 459, 489 (1987).

⁴⁴ On the grounds that this is not someone who needs to be deterred. Packer, Mens Rea and the Supreme Court, 1962 S. Ct. Rev. 107, 109.

⁴⁵ Wasserstrom, supra note [31], at; 736; Note 1970 Wisc. L. Rev. 1201, 1207. Deterrence arguments also have been used in resolving related issues. Note, 75 Colum. L. Rev. 1517, 1550 (1975) (requiring mens rea, even if burden of proof shifted to defendant, is not a good alternative because would result in significant loss of deterrence).

⁴⁶ Because such persons are not deterrable. Jerome Hall, General Principles of Criminal Law 137 (2d ed. 1960); Williams, General Part, supra note [5], at §43, 122.

⁴⁷ "Criminal punishment of negligent homicide is not impotent to stimulate care that might otherwise not be taken." Model Penal Code §210.4 comment 86 (1980).

⁴⁸ In order to induce "special care and restraint." Model Penal Code §211.1 comment 191.

⁴⁹ Report of the Royal Commission on Capital Punishment 52-53 (1953) (in the context of involuntary manslaughter). See also the discussion of the *Williams* case in the text at notes [34-37] supra.

⁵⁰ Royal Commission, id., at 52-53.

⁵¹ Unlike provocation, diminished responsibility is entirely subjective in character. It looks into the actor's mind to see whether he should be judged by a lesser standard than that applicable to ordinary men. It recognizes the defendant's own mental disorder or emotional instability as a basis for partially excusing his conduct. This position undoubtedly achieves a closer relation between criminal liability and moral guilt. Moral condemnation must be founded, at least in part, on some perception of the capacities and limitations of the individual actor. To the extent that the abnormal individual is judged as if he were normal, to the extent that the drunk man is judged as if he were sober, to the extent, in short, that the defective person is judged as if he were someone else, the moral judgment underlying criminal conviction is undermined. The

(continued...)

support of recognizing an insanity defense,⁵³ an immaturity defense,⁵⁴ a duress defense,⁵⁵ in support of a reasonableness requirement for a mistake as to a justification defense,⁵⁶ an involuntary act defense,⁵⁷ a statute of limitation,⁵⁸ and an entrapment defense,⁵⁹ and in opposition to recognizing a general reasonable mistake of law excuse⁶⁰ and a duress defense.⁶¹

⁵¹(...continued)

doctrine of diminished responsibility resolves this conflict in favor of an individualistic and subjective determination of criminal liability. But this approach has its costs. By evaluating the abnormal individual on his own terms, it decreases the incentives for him to behave as if he were normal. It blurs the law's message that there are certain minimal standards of conduct to which every member of society must conform.

Model Penal Code §210.3 comment 71 (1980).

⁵² Id.

⁵³ A. Goldstein, *Insanity Defense* 12-13 (1967).

⁵⁴ 3 E. Coke, *Institutes of the Laws of England* 4 (1797).

⁵⁵ G. Williams, *General Part*, supra note [5], at §246, 756; Model Penal Code §2.09 comment 374-5.

⁵⁶ Herbert Wechsler & Jerome Michael, *The Rationale of the Law of Homicide: I*, 37 *Colum. L. Rev.* 701, 736 (1937) ("To concede a privilege to kill only in cases of actual necessity is to lay down a rule that must either be disregarded or else must operate to deny freedom of action even in cases where the necessity exists and not merely in those where it does not. On the other hand, no such onerous limitation on freedom of action is imposed by requiring that men exercise the degree of care to appraise the facts correctly which is appropriate to the situation. It is desirable to deter men from acting without exercising sure care. . . .").

⁵⁷ LaFave & Scott, supra note [5], at §3.2, 275-6.

⁵⁸ Yair Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 *J. Legal Stud.* 99, 99 (2002) ("Because potential criminals tend to discount the future at higher rates than society, punishing crimes long after they are committed will be inefficient. Punishments after a long lag have only a nominal deterrent effect, while they may cost society substantial sums.").

⁵⁹ Model Penal Code §2.11 comment 406-7, 412 1985 (the defense is an "attempt to deter wrongful conduct on the part of the government"; "the primary justification for the defense . . . is to discourage unsavory police tactics").

⁶⁰ LaFave & Scott, supra note [5], at §5.1, 586-7. Kahan argues against recognizing a reasonable mistake of law defense for fear that it will encourage persons to engage in conduct close to the line of criminality. Dan Kahan, *Ignorance of Law is an Excuse -- But Only for the Virtuous*, 96 *Mich. L. Rev.* 127, 129 (1997).

⁶¹ 2 J. Stephen, *History of Criminal Law of England* 108 (1883) ("it is at the moment
(continued...)

Deterrence arguments also have been used to support particular formulations of excuse defenses, including use in support of a cognitive-prong-only formulation of the insanity defense⁶² and in support of a control prong.⁶³

3. *Grading Judgments*

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

[I]f experience shows, or is deemed by the law-maker to show, that somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies, or with resistance to officers, or if on any other ground of policy *it is deemed desirable to make special efforts for the prevention of such deaths*, the law-maker may consistently treat acts which, under the known circumstances, are felonious . . . as having a sufficiently dangerous tendency to be put under a special ban. The law may, therefore, throw on the actor the peril, not only of the consequences foreseen by him, but also of consequences which, although not predicted by common experience, the legislator apprehends.⁶⁴

The rule is thought to have the useful collateral effect of providing an additional deterrent to felonies generally, especially to dangerous felonies.⁶⁵

Another example of adjusting grade to enhance deterrence is found in the "three strikes" and other habitual offender statutes. Part of their justification no doubt is the incapacitation of dangerous offenders, future dangerousness being shown by the repeated past

⁶¹(...continued)

when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary").

⁶² See Wechsler, *Criteria of Criminal Responsibility*, 22 U. Chi. L. Rev. 367, 374 (1955); Model Penal Code §4.01 comment (T.D. No 4 1955); Waite, *Irresistible Impulse and Criminal Liability*, 23 Mich. L. Rev. 443, 454 (1925); *People v. Hubert*, 119 Cal 216 (1897).

⁶³ *State v. Green*, 78 Utah 580 (1931); Model Penal Code §4.01 comment 173, n. 24 (1985) (arguing for the ALI test as the best formulation for excluding from liability only the undeterables).

⁶⁴ Oliver W. Holmes, *The Common Law* 49 (1881) (emphasis added).

⁶⁵ "[The] rational function of the felony-murder rule is to furnish added deterrent to the perpetration of felonies which, by their nature or by the attendant circumstances, create a foreseeable risk of death." *State v. Goodseal*, 220 Kan. 487, 492, 553 P.2d 279, 285 (1976).

offenses. But such provisions also have been justified on deterrence grounds.⁶⁶ As the federal sentencing guidelines explain, "General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence."⁶⁷ (Indeed, it is in this context -- habitual offender statutes - that it has been argued that "deterrence is the surest ground for punishment."⁶⁸)

*Rummel v. Estelle*⁶⁹ illustrates such deterrence reliance. Thirty-year-old Rummel made his living through petty larceny and fraud. His pathetic check forgery was usually easy to discover, and he was caught and convicted several times. On a hot summer day, Rummel offered to fix a bar's broken air conditioner for \$129.75, with no intention of doing so. He was caught and convicted of theft, a felony under then-existing state law. After the state

⁶⁶ The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time.

Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 1144-45 (1980). See also William Clairborne, "Three Strikes": Tough on Courts Too; California's Sentencing Law Leads to Criminal Justice Logjam, Wash. Post, Nov. 7, 1995 at A1 ("Three Strikes" supporters expect deterrent effect over time); Dan Lungren, Three Cheers for 3 Strikes: California Enjoys a Record Drop in Crime, Policy Review: J. Am. Citizenship. 34, 36-7 (1996) (California's Three Strikes Law having a large deterrent effect); Walt Yost, "Three Strikes" Law is Hardball That Works, Says Scully, Sacramento Bee, April 21, 1996 at N7 (Sacramento County District Attorney comments that Three Strikes law deters criminals and has led to dramatic decrease in California crime rate).

⁶⁷ U.S.S.G. ch.4, pt. A, intro. comment.

⁶⁸ "[S]ince retributive norms are so unsettled and since incapacitation may, by removing one offender from the pool of offenders, simply make a career in crime more attractive to someone else, who is balanced on the razor's edge between criminal and legitimate activity and who now faces reduced competition in the crime 'market.'" U.S. v Jackson, 835 F.2d 1195, 1197 (1987) (Posner, Circuit Judge, concurring, citing Ehrlich, On the Usefulness of Controlling Individuals: An Economic Analysis of Rehabilitation, Incapacitation, and Deterrence, 71 Am. Econ. Rev. 307 (1981)).

⁶⁹ For a more detailed account of the Rummel case, see *Rummel v. Estelle*, 498 F. Supp. 793 (W.D. Tex. 1980); Tom Nelson, Rummel Ordered Released for Appeal, San Antonio Express, Oct. 4, 1980, at 11C; S.A. Man Gets Life, San Antonio Express, Apr. 13, 1973; Appeals Court Upholds Life Sentence for San Antonian, San Antonio Express, Jan. 13, 1979; S.A. Man Finally Free After 8-Year Ordeal, San Antonio Express, Nov. 15, 1980; Courts to Review Tough Texas Law: Billy Sol Bilks Companies Out of Millions; Rummel's Fraud Totals \$229.11. Estes Serving 10 Years – Rummel Gets Life, San Antonio Express, Sept. 9, 1979, at 14A.

presented evidence of two prior felonies, a “three-strikes” recidivist statute required that Rummel receive a sentence of life in prison without parole. The United States Supreme Court denied his appeal, concluding that the statute did not violate the Eighth Amendment’s prohibition against cruel and unusual punishment.⁷⁰ Rummel’s crime, a minor fraud, hardly seems to deserve life imprisonment without parole. Indeed, the cumulative impact of his entire criminal career — whether or not he had been formally sanctioned and punished for his earlier crimes — does not seem to merit such severe liability, at least on justice grounds. Yet three-strikes laws are willing to tolerate this deviation from justice in part in the name of general deterrence.

This same use of grading determinations -- to optimize deterrent effect -- has been offered in support of a variety of offense grade aggravations, such as grading according to type of victim (old, young, or police officer)⁷¹ or location (selling drugs near schools⁷²). Similarly, deterrence arguments have been used in support of a separate offense of robbery (rather than relying upon offenses of theft and assault),⁷³ in support of grading a vehicular killing while intoxicated as manslaughter even without a showing of negligence or causation,⁷⁴ in opposition to application of the felony-murder rule to killings by non-felons during the felony,⁷⁵ in support

⁷⁰ See *Rummel v. Estelle*, 445 U.S. 263 (1980).

⁷¹ [E.g., 720 Ill. Comp. Stat. Ann. §5/9-1 (West 2002) (elevates sentence for first degree murder: defendant can get death penalty victim was, inter alia, a police officer, under 12 years old, over 60 years old).]

⁷² [E.g., 720 Ill. Comp. Stat. Ann §570/407 (West 2002) (elevates sentence for illegal drug sales, i.e., sale of 1-15g of cocaine is Class 1 felony carrying fine of not more than \$250,000 but if sold on school grounds, is a Class X felony with fine not more than \$500,000).]

⁷³ Model Penal Code §222.1 comment 98 (1980) (arguing that because robber "menaces his victims with actual or threatened violence," as opposed to the "stealthy thief," penalty attached to theft not enough to deter him).

⁷⁴ See, e.g., *Baker v. State*, 377 So.2d 17, 19-20 (Fla. 1979):

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

Id. at 19.

⁷⁵ See, e.g., *Campbell v. State*, 293 Md. 438, 444 (1982).

of the premeditation aggravation for first degree murder,⁷⁶ in rejecting a mere grade reduction for renunciation (preferring a complete defense),⁷⁷ in support of grading inchoate liability less than that for the substantive offense,⁷⁸ and, where it is graded the same as the substantive offense in support of making an exception to this rule for first degree felonies,⁷⁹ in support of grading theft of livestock more than other thefts of equal or greater value because the former are particularly easy to commit and difficult to detect,⁸⁰ in support of a lower grade for intercourse upon invalid consent (by mistake or trick) than by force,⁸¹ in support of grading theft by amount stolen,⁸² in support of reduced grading for "joyriding" (in comparison to theft),⁸³ in support of grading credit card fraud of even a trivial amount as at least a

⁷⁶ F. Lindman & D. McIntyre, *The Mentally Disabled and the Law* 356 (1961) (should be decreased liability for unpremeditated killing because only those capable of thoughtful deliberation are likely to be deterred by threat of heavier sanction.)

⁷⁷ In considering the significance to be attached to abandonment of a criminal attempt, one solution that was rejected in drafting the Model Code was reduction of penalty in the event of abandonment. Insofar as encouragement of desistance is concerned, reductions in sanction would have to be very great to have a substantial impact on those already engrossed in a criminal attempt; indeed, it is unlikely that anything short of complete immunity would suffice.

Model Penal Code §5.01 comment 362 (1985) (footnote omitted).

⁷⁸ Model Penal Code §5.05 comment 490 (1985).

⁷⁹ It is doubtful...that the threat of punishment for the inchoate crime can add significantly to the net deterrent efficacy of the sanction threatened for the substantive offense that is the actor's object, which he, by hypothesis, ignores. Hence, there is a basis for economizing in use of the heaviest and most afflictive sanctions by removing them from inchoate crimes.

Model Penal Code §5.05 comment 490 (1985).

⁸⁰ *State v. Clark*, 632 P.2d 841, 843 (Utah 1981).

⁸¹ "Subsection (2)(c) deals in effect with an aggravated instance of seduction by trick, a kind of activity that most women can prevent and that can be deterred by sanctions less severe than those applicable to sexual imposition on a physically helpless female." Model Penal Code §213.1 comment 331 (1980).

⁸² Shorter sentences should be sufficient to deter those who have not as much to gain. On the other hand, longer sentences are called for in the case of offenders who realize greater sums. Escalation of penalty according to amount stolen decreases the incentive for crime that greater profits might induce.

Model Penal Code §223.1 comment 139 (1980).

⁸³ "Temporary takings do not require more severe deterrents" than this. Model Penal Code §223.9 comment 276.

misdemeanor,⁸⁴ in support of grading incest no higher than a class three felony, even if extreme moral indignation of the community would call for a higher grade,⁸⁵ in support of relatively low grading of perjury,⁸⁶ and in support of a grading reduction for a kidnapper who "voluntarily releases the victim alive and in a safe place prior to trial."⁸⁷

4. Sentencing Decisions

Sentencing judges and sentencing guideline drafters share the apparent assumption of code drafters and appellate judges that their decisions will influence the extent of the criminal law's deterrent effect. As an example, consider the case of DeSean McCarty, a young African-American from a crime ridden South Chicago neighborhood.⁸⁸ McCarty accepted an offer from one Griffin to "rent" Griffin's fiancé's car if McCarty, a drug user, would give

⁸⁴ Model Penal Code §224.6 comment 322 (1980) (citing as rationale for grading fact that these methods of defrauding lend themselves to repeated violations by transients, thus presuming that grading can have an effect on real world behavior).

⁸⁵ [Incest] is classified as a third-degree felony, carrying an ordinary-term maximum sentence of five years. This is based on the judgment that so heavy a threat will be enough to deter those people who are deterrable. Use of heavier penalties to reflect extreme moral indignation seems both unnecessary and unwise.
Model Penal Code §230.2 comment 422-3 (1980).

⁸⁶ Model Penal Code §241.1 comment 143 (explaining that "third degree felony sanctions are adequate to deter all deterrable perjury," *id.* at 142)

⁸⁷ If the most severe sanctions are available once some harm has come to the victim, there is no remaining incentive not to do further harm. Thus, while causing harm to the victim will aggravate the offense as explained above, the actor may still escape the extreme sanctions of a first-degree felony by preserving the life of the victim and voluntarily releasing him alive and in a safe place prior to trial. The effect of this scheme is to provide at every stage an incentive to release the victim and not to inflict any further harm.
Model Penal Code §212.1 comment 233-4 (1980) (footnotes omitted).

⁸⁸ For a more detailed account of the *McCarty* case, see Telephone Interview by C. Todd Inniss, Eve Brensike, and Colette Routel with Frank Rago, Public Defender, Markham Public Defender's Office (Feb. 1999) (notes on file with authors); Sarah Karp, Mother Copes with Cop's Death; Markham Officer Struck by Harvey Police Car, *Daily Southtown*, Sept. 22, 1997; Karen Mellen, Reckless Abandon; Families Want Driver Charged with Murder, *Chicago Tribune*, Oct. 7, 1998; T. Shawn Taylor, Cops Arrest Teen Linked to Officer's Fatal Chase; Police Want Subject Held Accountable, *Chicago Tribune*, Sept. 23, 1997; T. Shawn Taylor, Markham Cop's Death Becomes Murder Case; Bond Hearing Set in Fatal Police Chase, *Chicago Tribune*, Sept. 24, 1997; Paul H. Robinson, *Criminal Law Case Studies* 1-5 (2d ed. 2002).

Griffin some drugs. The exchange was made, but McCarty did not return the car at the agreed time. A few days later, McCarty was sitting in the car when a police cruiser drove by. Not wanting to get caught in the stolen car with drugs, he sped off, then abandoned the car and fled on foot. A police vehicle, in giving chase, ran down and killed an officer pursuing on foot. McCarty was convicted for the death of the officer under the Illinois felony-murder rule, which punishes as first degree murder any causing of death in the course of a felony.⁸⁹ As has already been noted,⁹⁰ the felony-murder rule itself has strong deterrent backing. The sentencing judge in *McCarty* also thought to advance deterrence through the exercise of his sentencing discretion. While he could have mitigated the harshness of the rule, instead he imposed a sentence of forty years in prison, explaining that he was considering "that a sentence does need to be imposed that would deter others from committing such a crime, a high speed chase with the police."⁹¹

Such a deterrence rationale is common in the formulation of a wide range of sentencing rules and policies,⁹² including arguments in support of the death penalty,⁹³ in opposition to the death penalty,⁹⁴ in support of automatic imposition of the death penalty on life-imprisonment

⁸⁹ Illinois continues to read the felony-murder rule broadly where it applies, although the rule's application has been limited to "forcible" felonies. Ill. Comp. Stat. §5/9-1(a)(3); see, e.g., *People v. Lowery*, 687 N.E.2d 973 (Ill. 1997) (upholding felony-murder conviction for robber where victim shot at fleeing robber with gun robber had dropped, killing bystander).

⁹⁰ See text accompanying notes [57-58] *supra*.

⁹¹ *People v. McCarty*, Circuit Court of Cook County, No. 97 CR 27339, Sentencing Transcript 00392:11-13 (Sept. 15, 1998).

⁹² Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169, 191-93 (1968) (regarding use of fines as punishment, assuming that commission of offense is function of fine and probability of conviction, set fine and probability at levels "that induce offenders to commit just \hat{o} [the optimal number] offenses."); George Stigler, *The Optimum Enforcement of Laws*, 78 J. Pol. Econ. 526, 530-31 (1970) (arguing that "rational law enforcement" must have "expected penalties increasing with expected gains so there is no marginal net gain from larger offenses" in order to achieve the optimal number of offenses); John Lott, *Do We Punish High Income Criminals Too Heavily?*, 30 Econ. Inquiry 583, 584, 605 (1992) (pointing out that the probability of conviction has greater deterrent effect on wealthy because they face additional lost income due to damage to reputation, "the total penalty they bear is simply so much higher than it is for poor individuals.")

⁹³ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

⁹⁴ *Enmund v. Florida* 458 U.S. 782, 799 (1982) (plurality opinion) (arguing against death penalty for felony murder because death not caused often enough in commission of a felony to make it an effective deterrent). See also authorities collected at LaFave, *Criminal Law* 25 n. 27 (3d ed. 2000). [Johnson (2001); Dezhbakhsh (forthcoming – SSRN)]

prisoners who kill,⁹⁵ in support of jail time for drunk driving,⁹⁶ in support of a statutory maximum for fines of double the pecuniary gain,⁹⁷ in support of applying a mandatory penalty enhancement for a subsequent offense to a second offense on a simultaneous conviction,⁹⁸ in support of higher fines for corporate offenders,⁹⁹ in support of a judicially imposed minimum term of imprisonment,¹⁰⁰ in support of fines for offenses of pecuniary gain,¹⁰¹ and in guidelines for the exercise of judicial discretion in setting the length of a prison sentence¹⁰² and the amount of a fine.¹⁰³

B. Doctrinal Formulations Calculated to Require or Authorize Conduct

The assumption that the doctrinal manipulation of criminal law rules can optimize deterrence is one application of a larger assumption that criminal law formulations can

⁹⁵ Model Penal Code §210.6 comment 132-33 (1980).

⁹⁶ Leon S. Robertson, Robert F. Rich & H. Lawrence Ross, *Jail Sentences for Driving While Intoxicated in Chicago: A Judicial Policy That Failed*, 8 *Law & Society* 55, 57 (1973) (“Chicago officials concluded that the fatalities involving alcohol resulted mainly from social drinking and that 7-day jail sentences for persons convicted of DWI would deter social drinkers from drinking an amount likely to involve them in fatal crashes.”).

⁹⁷ Model Penal Code §6.03 comment 61 (1985) (fine equal to double the pecuniary gain “is thought to be of maximum deterrent utility. Pocketbook sanctions are likely to be most effective in the context of pocketbook offenses.”).

⁹⁸ *U.S. v. Bernier*, 954 F.2d 818, 820 (2d Cir. 1992) (statute ordering enhanced sentence for the second of two simultaneous convictions for using a firearm during the commission of a violent crime reflects Congress’ intent to deter multiple commissions of a crime with a gun: “an enhanced deterrent effect is felt (if at all) as soon as the first crime is committed, rather than later, when the first conviction is obtained...the lesson is to be learned, if necessary, all at once.”).

⁹⁹ Model Penal Code §6.04 comment 65 (1985).

¹⁰⁰ Model Penal Code §6.06 comment 128 (1985).

¹⁰¹ Model Penal Code §7.02 comment 239-240 (1985).

¹⁰² See, e.g. Model Penal Code Arts. 6&7 intro. 2-3 (1985) (direction to court determining whether to impose a sentence of imprisonment that it should look to, inter alia, “whether a lesser sentence will depreciate the seriousness of the defendant’s crime” reflects “the principle of general deterrence, though it puts to the court a more realistic inquiry than whether a particular penalty for a particular offender is necessary to deter others.”).

¹⁰³ Model Penal Code §7.02 comment 240-41 (1985) (reasoning that, because deterrent effect of a particular fine depends on wealth of defendant, court must take that into account in sentencing).

influence conduct "on the street." The same assumption is equally suspect when criminal law rules are formulated that require conduct or authorize conduct that is normally prohibited.

1. Justification Defenses

The assumption appears, for example, in justification defenses, where lawmakers assume that their formulation of the defense will in fact guide a person's conduct when acting under the justifying conditions. Thus, in disallowing the use of force to resist an unlawful arrest, the drafters explain:

[T]hose who are subjected to arrest or to search *should be encouraged to submit* rather than respond with force, and thus should not be entitled to rely upon . . . errors by the officer as a justifying basis for the resort to defensive force.¹⁰⁴

Indeed, many justification provisions have highly detailed rules about what a person may and may not do under a particular set of conditions. For example, a person may use force that is necessary for self-defense against unlawful aggression, but may not use deadly force, unless deadly force or serious bodily injury is threatened, but not if the person can retreat in safety, but he need not retreat if he is in his own home or place of business, unless he was the initial aggressor or unless he is assailed at his place of work by a person who works at the same place.¹⁰⁵ Indeed, the Model Penal Code drafters prefer such detailed rules in part because they believe the law should (and can) give people specific guidance.¹⁰⁶

This attempt of lawmakers to control situations of conflicting interests through the formulation of justification defenses is present in a wide variety of justification rules, including, for example: barring the use of force to resist an unlawful arrest (in order to avoid

¹⁰⁴ Model Penal Code §3.09 comment 148 (1985) (emphasis added).

¹⁰⁵ Model Penal Code §3.04(1), (2)(b)(1985). A similar problem exists in the use of detailed renunciation rules. See Model Penal Code §5.01 comment 359, 362, §5.03 comment 458 (1985) (assuming that the code's detailed rules will in fact influence conduct).

¹⁰⁶ Any increase in precision does involve some sacrifice of flexibility in respect to unusual or unforeseen circumstances; *but it was deemed important that people be able to understand on what occasions the use of force is allowable*, and that jurors have the benefit of legislative judgments on that score. *It was believed that the law on this subject could influence behavior and moral perspectives, encouraging members of the community not to employ force when immediate emotional reaction might support its use but enlightened morality would reject it.* The alternative of a general standard of reasonableness would largely forfeit these advantages and would leave judgment to the uninstructed responses of particular juries.

Subsequent legislative revisions have followed the Model Code in adopting fairly detailed provisions on self-defense and other justifications for the use of force. Model Penal Code §3.04 comment 34-5 (1985) (emphasis added).

an escalation of violence),¹⁰⁷ limiting the use of deadly force to defense against threats of death or serious bodily injury,¹⁰⁸ disallowing the use of deadly force if a person can retreat in safety,¹⁰⁹ barring use of force to recapture from a person acting under claim of right (in order to avoid an escalation of violence),¹¹⁰ requiring a request to desist before using force,¹¹¹ barring citizens (but not officers) from using deadly force to arrest,¹¹² allowing a defense for mistake in

¹⁰⁷ [T]here ought not to be a privilege to employ force against a public officer who, to the actor's knowledge, is attempting only to arrest him and subject him to the processes of law. It should be possible to provide adequate remedies against illegal arrest without permitting the arrested person to resort to force – a course of action highly likely to result in even greater injury to himself than the detention. . . . [I]t is believed to be entirely sound that the encouragement be in favor of judicial resolution of the legality of the arrest, rather than self-help.

Model Penal Code §3.04 comment 42-3 (1985) (footnote omitted).

¹⁰⁸ Model Penal Code §3.04 comment 48 (1985) (“the discouragement of the infliction of death or serious bodily injury is so high on the scale of preferred societal values that such infliction cannot be justified by reference to the protection of an interest of any lesser pretensions, with the possible exception of dispossession from one's own dwelling.”).

¹⁰⁹ Model Penal Code §3.04 comment 54 (1985) (“the protection of life has such a high place in a proper scheme of social values that the law should not permit conduct that places life in jeopardy, when the necessity for doing so can be avoided by the sacrifice of the much smaller value that inheres in standing up to an aggression.”).

¹¹⁰ Model Penal Code §3.06 comment 74 (1985).

¹¹¹ Model Penal Code §3.06 comment 90 (1985) (“on many occasions such a request will end a potential confrontation, for example, when the aggressor is acting under a mistake of fact and the request clarifies some matter.”).

¹¹² [T]he use of deadly force is restricted by Paragraph (ii) of Subsection (2)(b) to those who, under the law of the jurisdiction, are authorized to act as peace officers and to those who are assisting persons whom they believe are authorized to act as peace officers. Where the purpose to be served is the apprehension of persons to answer criminal charges, it has seemed important, in an age of firearms, to restrict the use of deadly force to situations where official personnel are involved, or at least are believed to be involved. This will mean, for the most part, that deadly force will be justified only at the instance or under the control of people who have been trained in the restraint that should be exhibited upon such occasions. It is thus an important limitation on the extent to which the private citizen can use force solely for the purpose of effecting arrest. By the same token, however, it does not penalize the private citizen who comes to the aid of a peace officer and either assists him under his direction or continues a course of conduct begun before the officer became disabled. It thus reflects what is believed to be an appropriate balance between the needs of effective law

(continued...)

the defense of others (for fear that their failure to do so would deter people from helping others),¹¹³ and limiting a mistake defense for citizen's making an arrest (as a means "of discouraging private vigilante activity").¹¹⁴

2. Duties and Liability for Omissions

The same sort of assumption that the formulation of criminal law doctrine will influence conduct is found in the creation of a variety of legal duties, backed up by the threat of criminal liability for a failure. Examples include the duty to return or report property lost or mislaid by another,¹¹⁵ to take reasonable measures in some instances to prevent or mitigate extensive injury or damage,¹¹⁶ and to eject tenants engaging in prostitution.¹¹⁷ In each instance, the lawmaker has created the legal duty under the belief that, by doing so, the creation will in fact induce people to perform as the law commands.

C. "Deterrence Speak" versus Deviations from Justice

1. "Deterrence Speak"

It is possible to give too much meaning to the ubiquitous use of deterrence rationales, for much of the use of deterrence as a justification appears to be just a form of expression, the standard form that modern criminal law theorists and makers have come to use to express themselves. Instead of saying that "conduct X is harmful" and, therefore, should be criminalized, it is common to say "conduct X should be deterred." Instead of saying that "the conduct was involuntary" and, therefore, should be exculpated, it is common to say, "it is non-deterrable."

This "deterrence speak" is common in a variety of contexts in which the end result is to suggest a rule that makes sense under nearly any distributive principle, including that of doing justice. It is used, for example, as the explanation for criminalizing: intercourse with young

¹¹²(...continued)

enforcement and the desirability of discouraging private resort to violence. Model Penal Code §3.07 comment 116 (1985) (footnote omitted).

¹¹³ Model Penal Code §3.05 comment 65-66 (1985).

¹¹⁴ Model Penal Code §3.07 comment 129 (1985).

¹¹⁵ See, e.g., Model Penal Code §223.5 (1980).

¹¹⁶ See, e.g., Model Penal Code §220.2(3) (1980).

¹¹⁷ See, e.g., Model Penal Code §251.2(2)(g) (1980).

children,¹¹⁸ tampering with private records,¹¹⁹ incest,¹²⁰ corruption in sporting events,¹²¹ retaliation against participants in official proceedings,¹²² witness tampering,¹²³ bail jumping,¹²⁴ obstruction of a public passageway,¹²⁵ public indecency,¹²⁶ and in support of greater punishment for armed robbery than for unarmed robbery.¹²⁷ These criminalization decisions are hardly startling conclusions. One could as easily say in each instance that such conduct

¹¹⁸ Model Penal Code §213.1(1)(d) comment 329 (1980) (“[T]he central goal of subsection (1)(d) . . . is to deter intercourse with very young children.”).

¹¹⁹ Model Penal Code §224.4 comment 312 (1980) (“In a highly organized society where accuracy of corporate and other records is nearly as important as accuracy of public records, the need for deterring those who would tamper with records for the purpose of deceiving or injuring anyone or to conceal wrongdoing seems reasonably clear.”).

¹²⁰ The incest prohibition regulates erotic desire in two ways that contribute to preservation of the nuclear family. First, the prohibition controls sex rivalries and jealousies within the family unit Second, by ensuring suitable role models, the incest restriction prepares the individual for assumption of familial responsibility as an adult. Model Penal Code §230.2 comment 406 (1980).

¹²¹ Model Penal Code §224.9 comment 338 (1980) (“It seems clear that this type of activity should be deterred in order to prevent wholesale fraud in both legal and illegal betting and to maintain the integrity of the amateur and professional sport.”).

¹²² Model Penal Code §240.4 comment 68 (1980) (“At the time the Model Code was drafted, there were some criminal statutes covering retaliation against jurors, court officials, and witnesses. The considerations that call for deterring retaliation against these persons would seem equally applicable to participants in other official proceedings and to public servants generally.”).

¹²³ Model Penal Code §241.6 comment 163 (1980) (“[T]he basic purpose . . . of the crime is to deter conduct that affects the integrity of the criminal justice system.”).

¹²⁴ Model Penal Code §242.8 comment 283 (1980) (“The purpose of Section 242.8 is to deter those who would obstruct justice by failure to appear for trial or service of sentence.”).

¹²⁵ Model Penal Code §250.7 comment 399-400 (1980) (“The purpose of this section is twofold: to prevent the danger and inconvenience that may result from unjustified obstruction of public passage; and, at the same time, to withdraw the threat of penal sanctions from lawful assembly.”).

¹²⁶ Model Penal Code art.251 comment 447 (1980) (“The common goal of these provisions is to protect against the open flouting of community standards regarding sexual or related matters.”).

¹²⁷ LaFave & Scott, *supra* note [5], at §8.11, 456, n. 108 (“[T]he greater punishment is awarded for armed robbery so as to deter the dangerous person who is actually capable of inflicting death or serious bodily harm.”).

ought to be criminalized because "it is harmful and condemnable conduct."¹²⁸ In other words, a deterrence explanation for the rule does not necessarily suggest that the writer is relying upon a deterrence cost-benefit analysis and has concluded that the deterrent benefits outweigh the deterrent costs. Rather, such deterrence language simply may reflect what has come to be the common mode of expression in modern criminal law analysis.

Indeed, some deterrence explanations for a conclusion are so frivolous as to strongly suggest that no actual deterrence analysis has gone on, for any such analysis would surely suggest a different or at least a more nuanced conclusion. For example, as noted above, some writers offer a deterrence explanation for providing excuse defenses, such as insanity,¹²⁹ immaturity,¹³⁰ or duress.¹³¹ They reason that a general deterrent purpose

would not be served by conviction and punishment of the insane, for 'the examples are likely to deter only if the person who is *not* involved in the criminal process regards the

¹²⁸ Or even, in some cases, that it suggests a dangerousness in the actor, thus calling for incapacitation.

¹²⁹ see, e.g., LaFave & Scott, *supra* note [5], at §4.1, 431 (punishing offenders will discourage them from committing crimes in the future but it 'can be effective only with men who can understand the signals directed at them by the [criminal] code, who can respond to warnings, and who can feel the significance of the sanctions imposed on violators.' Punishment, therefore, is not at all likely to deter the insane individual from future antisocial conduct.") Model Penal Code §4.01 art. 4, Appendix B, 199 (1985) (correspondence between Dr. M. S. Guttmacher and H. Wechsler debating how to determine insanity in order to "define the nondeterrables" for purposes of drafting exculpatory provisions of Model Penal Code). The argument is also made in support of a rule barring the death penalty for insane offenders. LaFave & Scott, *supra* note [5], at §4.4, 481 ("[T]he insane prisoner may be spared the death penalty without weakening the deterrent effect of that penalty. Taking the life of an insane person does not serve as an example to others, for a potential offender would not consider the possibility of escaping the death penalty by becoming insane after the conviction.").

¹³⁰ LaFave & Scott, *supra* note [5], at §4.11, 567 ("The early common law infancy defense was based upon an unwillingness to punish those thought to be incapable of forming criminal intent and not of an age where the threat of punishment could serve as a deterrent." citing Coke, *supra* note [48], at 4.

¹³¹ LaFave & Scott, *supra* note [5], at §5.3, 615 ("It has been suggested that it ought to apply, without regard to a balancing of harms done and avoided, where the unlawfully threatened harm is such that the threat of criminal punishment for doing the harmful conduct does not serve to deter the defendant."); Williams, General Part, *supra* note [5], at §246, 756 ("Whether or not it was socially better that the *littera legis* should be violated, there are limits to the efficacy of the threat of punishment in controlling conduct. If the accused was in thrall to some power that could do him more harm than the legal sanction, the legal sanction must be ineffective and therefore should be removed.).

lessons as applicable to him,' which he is likely to do 'only if he identifies with the offender and with the offending situation.' It is unlikely that the sane person . . . will identify with the insane defendant, and thus the insane cannot be effectively used as a deterrent example to others.¹³²

One may speculate that the conclusion -- in favor of recognizing an insanity defense -- came first to the writer, and that the "analysis" is simply a best effort at giving the obligatory deterrence argument in support of the desired conclusion. Clearly a true deterrence analysis would suggest the opposite conclusion, or at least would reveal conflicting deterrent interests. While the insane defendant at hand might not be deterrable, and while he will be seen by third parties as different from themselves, there is every reason to think that (if general deterrence works at all) it would be advanced by sanctioning the insane offender. Indeed, the insane offender provides a unique opportunity for the law to make clear just how serious it is about punishing a violation. "If the law sanctions even an insane offender," it might be understood as saying, "make no mistake that it will sanction you if you commit this offense." Indeed, punishing the insane offender may be the only means by which the law can dissuade those potential offenders who assume that, if caught, they can escape the threatened sanction by falsely claiming an excuse. Further, there is a deterrence argument for imposing greater liability in all cases of excuse in which either internal or external forces press an actor toward a violation. In arguing against a duress defense, for example, Stephen notes that "it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary."¹³³

Thus, general deterrence arguments seem clearly to favor denying recognition of excuse defenses. In opposition, the obvious reason to *recognize* excuse defenses, and likely the real reason driving even "deterrence speak" writers to such recognition, is that criminal law would be seen as grossly unjust if it denied excuses. The utilitarian must be concerned about this because it would tend to undermine the law's moral credibility with the community, which in turn entails serious negative consequences. (More on this in Section III.C.) But, if the analytic traditions of the day don't allow such justice-based objections to a doctrine, then some may feel forced to fabricate whatever lines of deterrence arguments are available to reach the desired result.

One may speculate about the reasons for such continuing reliance upon "deterrence speak" when it seems so awkward. Kahan argues that, "Citizens conventionally defend their positions in deterrence terms only because the alternative is a highly contentious expressive idiom, which social norms, strategic calculation, and liberal morality all condemn."¹³⁴ Whatever the reasons for the use, the practice highlights just how pervasive is the deterrence

¹³² LaFave & Scott, *supra* note [5], at §4.1, 431 (emphasis in original), quoting A. Goldstein, *The Insanity Defense* 13 (1967).

¹³³ Stephen, *supra* note [54], at 107.

¹³⁴ Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 *Harv. L. Rev.* 413, 414 (Dec. 1999).

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

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

But not all use of deterrence arguments are habitual "deterrence speak" or fabricated arguments to give a deterrence justification for a formulation based, in truth, on other considerations. Genuine deterrence analysis often does generate results that conflict with justice. And the results of such analysis often are followed at the expense of justice.

It is worth highlighting some examples of this given earlier in this Part, for it is these points of conflict with justice that offer the points of greatest interest in later Parts. To the extent a deterrence principle produces the exact same distribution as a justice principle, there is little worth talking about. Even if it is shown that deterrence optimization through doctrinal manipulation is rarely possible, there is little lost if the effect of the deterrence analysis is to reliably do justice. But if successful optimization is rare, as the social science literature summarized in Part I suggests, then reliance upon deterrence-analysis is of great concern because it produces real injustice for little or no benefit.

Recall these instances of deterrence-based doctrines that conflict with justice. The felony-murder rule, as we see applied in the *McCarty* case, authorizes (and a deterrence-focused sentencing judge imposes) a forty year sentence for fleeing from police.¹³⁵ In *Dudley and Stephens*, the need to keep clear the deterrent threat against killing and cannibalism demands the death penalty, even though the court essentially concedes it is imposing a standard of conduct that it might not be able itself to meet.¹³⁶ In *Park*, the president of Acme Markets, Inc., a national retail food chain with approximately 36,000 employees, 874 retail outlets, 12 general warehouses, and four special warehouses, is held criminally liable for a health violation in one of the company warehouses, even though Park knew nothing and was not negligent as to the violation.¹³⁷ In *Rummel*, the defendant is given a life sentence for a \$129.75 air conditioner repair fraud because of his prior felony convictions of a similar nature.¹³⁸ In *Williams*, loving parents of limited intelligence and education are held for criminally negligent homicide when their failure to get medical care for their baby leads to its death, despite their likely inability to meet the purely objective standard of care the court insists upon.¹³⁹ In each

¹³⁵ See text accompanying notes [81-84].

¹³⁶ See text accompanying notes [32-33].

¹³⁷ See text accompanying notes [29-31].

¹³⁸ See text accompanying notes [62-63].

¹³⁹ See text accompanying notes [34-37].

case, the lawmakers and courts use deterrence explanations to help justify liability rules and the exercise of discretion that produces the case disposition in conflict with justice.

How do these five cases fair in light of the deterrence-skeptical conclusions summarized in Part I? One or more of the deterrence-prerequisite hurdles is likely to trip up a deterrent effect for many if not most of these deterrence-optimizing cases. McCarty, who gets felony-murder liability and a 40 year sentence for fleeing from police, probably knew nothing of the felony murder rule or its application to him when he chose to flee, nor will others like him be likely to apply the intended lesson in their drug-addled brains when the next police car appears. For Dudley, and others like him, for whom a painful death looms, little, if anything, will deter; and the price paid in *Dudley* to reinforce the prohibition on killing hardly seems worth the cost in injustice, especially given how well known the no-killing rule already is. People like Rummel might stop their air conditioning and similar frauds if they knew they would result in life imprisonment, but few are likely to perceive a meaningful chance of suffering such a sentence for such a fraud -- and they would be right: they have a greater chance of being struck by lightning. Most of such potential offenders probably don't even know that such a life imprisonment rule is applicable to them. (Do you know the terms of your state's habitual offender statute, or even if it has one?) Park, as the executive of a large and respectable corporation, no doubt would be appalled at the thought of a criminal conviction, but he also is not likely to know about the rodent droppings in Baltimore. And even if he did, and even if house counsel kept him well informed on relevant statutes, they no doubt would see criminal liability in the absence of even negligence as so remote on the facts as to be irrelevant to them. (If executives did think the chance of such strict *criminal* liability was meaningful, we would have few volunteers for Park's vacant position.) The Williamses, and other parents like them, will know little of the criminal law's liability rules or the nuances of the alternative negligence standards, and, in any case, will have no reason to think such rules are applicable to them because their baby only has a tooth ache.¹⁴⁰ Yet these dubious contributions to the law's deterrent threat are purchased at some considerable expense, in both the injustices they do and the reputational damage they cause to a criminal justice system that is seen as indifferent to doing justice.

III. THE CASE AGAINST USING DETERRENCE AS A DISTRIBUTIVE PRINCIPLE

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

¹⁴⁰ See text accompanying notes [128-132] *supra*.

Hart's terminology,¹⁴¹ deterrence is a sound justificatory purpose but a poor distributive principle.

But assume for the sake of argument that some deterrent effect exists. Indeed, we concede that some doctrinal manipulation can have a deterrent effect. The new leaders in Aliabad introduced a policy that worked to reduce what they regarded as lawlessness: the bullet-ridden robbers' bodies were hung from a tank barrel outside the village for two days.¹⁴² But even less draconian rules can work. In specific situations, rules that are publicly known, that target actors who are dispositionally rational and in immediate circumstances that allow for rationality, that provide for a high rate of violation detection, and provide a reasonable certainty of punishment following the detected violation, can deter. But even in such situations, there remain problems with formulating criminal law rules based upon deterrence analysis.

A. The Difficulties of Deterrence: The Information and Complexity Problem

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

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

Further, we need a sense of the equation that gives the relevant weights for each of these factors. For example, we noted previously that, if the probability of punishment were

¹⁴¹ See H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 76-78 (1968).

¹⁴² C.J. Chivers, *New Leaders Send a Signal By Hanging Bandit's Body*, *New York Times*, Dec 3, 2001, p. B4, col. 6.

high -- i.e., that a potential offender is highly likely to get caught for drunken driving or running a red light -- even moderately painful punishments seem sufficient to deter the conduct. And in the animal data we found hints that as the likelihood of punishment declines and the intensity or the delay of punishment also declines, the deterrent effect soon becomes greatly reduced or even negligible. That suggests that the probability of punishment should be more highly weighted in the deterrence equation than should the intensity of the punishment. Thus, a deterrence calculation would need to sort out just how much more weight should be given to probability of punishment than to the other facts in the equation.

Consider as well the difficulty in obtaining a reliable measure of the relevant information. We not only need “objective” measures of those factors, but “psychophysical” measures that translate, for instance, the objective measure of the average prison sentence for robbery of say five years into the quantum of Benthamite pain corresponding to the five years of prison in the mind of the person contemplating the crime.

Still further, one cannot underestimate the ability of erroneous data on one factor to distort the calculation. Part of the point here is that deterrence calculations are not intuitive. The results will depend upon the numbers, not a general principle that itself may make good sense. For example, one aspect of deterrence analysis would want to impose a greater punishment on a more serious offense -- murder more than assault or burglary -- if for no other reason than to deter a person who has committed the lesser offense from going further to commit the greater offense -- for example, to keep the burglar who is discovered by the home owner from killing the home owner to avoid being identified as a burglar. However, imagine a situation where the punishment rate was high for the more serious offense and low for a less serious offense. (In fact, the punishment rate for murder is approximately thirty times that for burglary.¹⁴³) One wants the total punishment “cost” high enough to deter the potential offense and, recall, the probability of punishment is an important determinant of the total punishment cost. This creates the necessity, within a deterrence analysis, to increase the punishment on a low capture-rate offense.¹⁴⁴ Therefore, *depending on exactly how the punishment weight calculations come out*, a deterrence optimizing theorist might conclude that one should have a greater penalty for the less serious offense! The point is not a hypothetical one. Recall, for example, the “drug laws” passed in various states in the belief that drug possession and use was highly dangerous to society and highly contagious. Legislators, driven by the logic of deterrence, set prison terms for possession of relatively small amounts of cocaine (and in some states marijuana) as considerably higher than those given for various crimes of violence.¹⁴⁵

Even if one had good information on the basic conditions that may influence deterrent effect, the calculations are all the more complex because of potential dynamics that one's

¹⁴³ See Robinson & Darley, [Deterrence Empirics], *supra* note [3], at Table 1, col. (d).

¹⁴⁴ In contrast, if there is a high-punishment rate offense, which is relatively rarely committed, thus signaling that deterrence is being successfully achieved with the existing punishment, then there is no need to increase the punishment amount, and there is the possibility of decreasing it since it may be inefficiently high.

¹⁴⁵ See, e.g.,

proposed rule itself might trigger. That is, one rule might make sense given the conditions that presently exist, but the introduction of that rule might quickly change the conditions. For example, Katyal points out that substitution effects are important to consider.¹⁴⁶ One might be inclined to increase the threatened punishment in order to deter an offense of moderate harm, but before doing so one must consider whether the potential offender will substitute an offense of more serious harm. There are drug addicts who steal to obtain money for their addictive habits. If we increase the punishment for thefts from empty buildings, will we cause the addicts to turn to assaults of citizens to gain the money to support their habits? A deterrence perspective generates these sorts of complex and dynamic considerations.

Consider another example. Bar-Gill and Harel suggest that, while we normally think of the crime rate as *a product of* the factors that effect deterrence -- such as the probability and amount of the expected sanction -- in fact the crime rate can be *a determinant of* these factors.¹⁴⁷ For example, a higher crime rate makes fewer resources available per crime and reduces the probability of detection; a lower crime rate may have a reverse effect. An increased rate of crime also may delay the imposition of punishment, due to congested courts, for example, which causes the future punishment discount to be incrementally higher, thus reducing the perceived punishment "cost"; a decrease in crime rate might have the reverse effect.¹⁴⁸

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

¹⁴⁶ Neil Kumar Katyal, *Deterrence's Difficulty*, 95 Mich. L. Rev. 2385 (1997).

¹⁴⁷ The expected sanction is determined by the size of the sanction and by the probability of apprehension and conviction (hereafter "the probability of punishment"). Both components of the expected sanction are influenced by the rate of crime. A higher crime rate may either increase or decrease the probability of punishment, depending on the law enforcement technology and the internal organization or modus operandi of the criminal community. Similarly, a higher crime rate may either increase or decrease the magnitude of the sanction, through its influence on the social sanction, which is a component of the overall sanction.

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

¹⁴⁸ *Id.*

B. A Comparison of Deterrent Effects

We assume that most people would see value in having a criminal justice system, that, broadly speaking, does justice, either for instrumentalist or deontological reasons.¹⁴⁹ The point of advocates for a deterrence-based distribution is not that doing justice has no value but that crime reduction through precisely adjusted deterrent punishments has a greater value. But, certainly, deterrent system advocates would concede that a deterrence-based distribution of punishment is not the only distribution of punishment system that will have a deterrent effect. Any distribution of punishment will have some deterrent effect, so having any one of a number of different kinds of distributive principles for assigning punishment will provide some deterrent effect. Thus, it is no justification for a deterrence-based distributive principle to simply show that it generates a deterrent effect. To prefer a deterrence-based distribution to the just-deserts-based system that we advocate, it must be shown that such a distribution provides greater deterrence than the justice-based distribution. Thus, even when a deterrent effect is shown, it does not uniquely support a deterrence-based distribution, that would require also showing that level of deterrence from such a distribution *exceeds that* of a just deserts-based distribution system.

This is not often recognized, and there are reasons why this is so. People tend to believe that the threat of punishment is all that deters those who are “criminally inclined.”¹⁵⁰ If one believes that the only mode of crime reduction is achieved by the potential criminal’s awareness of the punishments that would follow the commission of the crime, then there can be no alternative to a justice system that relies on making precise adjustments in criminal punishments to achieve those deterrent effects. But if one takes a broader view of the forces that keep individuals from committing crimes, another conclusion become possible: There is evidence to suggest that there is considerable crime-reducing potential in a distribution of punishment that tracks the principles of justice shared by the community -- what we have called a “justice based” system for the distribution of punishment. This crime-reducing potential is achieved in several complex ways: the first involves the application of social pressures from the community on those who might commit crimes, the second involves fostering internal norms -- moral prohibitions -- against committing crimes among those who might otherwise do so.

¹⁴⁹ See Paul H. Robinson & Michael T. Cahill, *Law Without Justice: How and Why Criminal Law Deliberately Sacrifices Justice* [??] (Oxford forthcoming 2003).

¹⁵⁰ See Catherine Sanderson & John Darley, *I Am Moral But You are Deterred: Differential Attributions About Why People Obey the Law*, *Journal of Applied Social Psychology* 375 (2001).

Evidence suggests that both social influence¹⁵¹ and internalized norms¹⁵² are powerful forces governing individual conduct,¹⁵³ even more powerful than the threat of official conviction and punishment by the criminal justice system.¹⁵⁴ (One might argue that the social influence forces are triggered also by criminal conviction, thus adding to the deterrent effect of official sanction, but the available studies suggest that the two sources of influence are independent, without significant interactive effect.¹⁵⁵) The social influence forces generated by the mobilization of community stigmatization for criminal conviction¹⁵⁶ can be quite powerful, including losses of any prospects of being hired into decent jobs or having friends or marriage partners from among the respectable segments of the community. However, these potential sanctions exist only if the criminal law has moral authority with the community that will trigger the imposition of these sanctions. But if the conditions for its applications exist, the threat of informal sanctions provide a highly cost efficient means of crime reduction, because it requires no government expenditures, as compared to the cost of imprisonment of \$20,000 per year.¹⁵⁷

¹⁵¹ Robinson & Darley, *The Utility of Desert*, 91 Nw. U.L. Rev. 453, 469 (1997) (“The normative pressures from other people, generally experienced as an external force by the actor, function like the more formal deterrence mechanisms were thought to function. People obey the social norms of their groups because those groups have rewards to give for doing so and sanctions for failing to do so.”).

¹⁵² Marc G. Gertz & Leroy Gould, *Fear of Punishment and the Willingness to Engage in Criminal Behavior*, 23 J. of Crim. Just. 377 (1995).

¹⁵³ Dan M. Kahan, *Ignorance of Law Is an Excuse - But Only for the Virtuous*, 96 Mich. L. Rev. 127 (1997) (arguing in support of the "ignorance is no excuse" maxim because of the effect it will have on the conduct of potential offenders); see generally Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349 (1997).

¹⁵⁴ Tom R. Tyler, *Why People Obey the Law* 64 (1990) (“The most important normative influence on compliance with the law is the person’s assessment that following the law accords with his or her sense of right and wrong; a second factor is the person’s feeling of obligation to obey the law and allegiance to legal authorities.”). S. Decker, R. Wright & R. Logie, *Perceptual Deterrence Among Active Residential Burglars: A Research Note*, 31 *Criminology* 135 (1993).

¹⁵⁵ Daniel S. Nagin & Raymond Paternoster, *Enduring Individual Differences and Rational Choice Theories of Crime*, 27 *Law & Society Rev.* 467 (1993).

¹⁵⁶ Daniel S. Nagin, *Deterrence and Incapacitation*, in M. H. Tonry, ed., *The Handbook of Crime and Punishment* 345 (1998); Harold G. Grasmick & Robert J. Bursik, *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 *Law & Society Rev.* 837 (1990); Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 *Law & Society Rev.* 545 (1986).

¹⁵⁷ James J. Stephan, *State Prison Expenditures: 1996*, Bureau of Justice Statistics Pub. No. 172211, U.S. Dep’t of Justice (1999).

The effect of informal sanctions goes further. A criminal law with moral authority can produce stigmatization of the offender by those in the community who become aware of his offense even without arrest and criminal conviction by the legal authorities: if the criminal law has such moral credibility that it has the force of social norms, then a violation of the criminal law's rules may trigger moral condemnation by those who know of the offender's violation, even if the law enforcement authorities do not, thus greatly increasing the criminal law's reach in preventing crime.¹⁵⁸

Finally, a number of studies suggest that a legal code that is perceived as having moral credibility can provide a clear set of guidelines around which childhood and adolescent socialization can coalesce.¹⁵⁹ Those so socialized obey the law not because they fear the penalties for not doing so, but because they regard the laws as specifying the right conduct, and thus there is a moral imperative, to "do as the law says you should do." People report that this, rather than the threat of arrest, is generally why they obey the laws that they consider to have moral credibility.¹⁶⁰

The point here is that before a deterrence-based distribution is to be preferred, it must be shown that its deterrent effect exceeds that of a just deserts distribution. This may be difficult to do. Evidence we review suggests that the gains of the just deserts system may be quite substantial, although they tend to be hidden if one is taking the perspective that crime control is achieved only through the direct deterrence of the threat of criminal punishment.

¹⁵⁸ Paul H. Robinson, *Why Does the Criminal Law Care What the Lay Person Thinks is Just? Coercive vs. Normative Crime Control*, 86 Va. L. Rev. 1839, 1840 (2000) ("The crime control power of criminal law's moral credibility works in a different way [than the coercive effect of a deterrent threat.] [I]t works through unofficial avenues to bring the potential offender to see the prohibited conduct as unattractive because it is inconsistent with the norms of family or friends and, even better, with the person's own internalized sense of what is acceptable."); Robinson & Darley, *The Utility of Desert*, supra note [151], at 456-457, 468-471 ("a distributive theory that tracks the community's perceived principles of justice has a greater power to gain compliance with society's rules of lawful conduct."); Robinson & Darley, *Justice, Liability & Blame*, supra note [2], at ch. 1, 5-7. ch. 7, 201-203 ("recent empirical evidence suggests that the law's most powerful mechanism for gaining compliance lies not with the negative force of the deterrent threat but rather with the positive force of the law as an arbiter of proper conduct. Most people obey the law not because they fear punishment but because they see themselves as persons who want to do the right thing."). But stigmatization can be an effective deterrent only for those who value a good reputation with persons who would disapprove of criminal conviction. Steven Klepper & Daniel Nagin, *Tax Compliance and Perceptions of the Risks of Detection and Criminal Prosecution*, 23 *Law and Society Review* 209 (1989) (study of tax accountants who would be destroyed by loss of reputation).

¹⁵⁹ June Tapp, & Felice J. Levine, eds., *Law, Justice, and the Individual in Society: Psychological and Legal Issues* (1977).

¹⁶⁰ Sanderson and Darley, supra note [150] Also see note [158] supra for further evidence.

C. Where Deterrence Deviates from Justice, It Confronts Special Difficulties

As we have argued, a deterrence-based system for punishment can do better than a just-deserts-based system only when its rules deviate from the justice-based system. But for a number of reasons, it is just these instances of deviation in which it is most difficult to get a deterrent effect. First, citizens are quite unlikely to know the content of the law at exactly the point that the law deviates from their own notions of justice. People instead assume the law is as they think it should be, which is according to their own collective notions of justice. Several studies have demonstrated this. For example, in a survey of New Jersey citizens, it was found that they perceived that the morally appropriate penalty for attempts at crimes was an increasing prison sentence the nearer the perpetrator came to committing the crime. But even an attempt that came in “dangerous proximity” to the completed crime was penalized less than the completed crime. And when asked about the laws of the state in which they lived, they reported that they essentially matched to their moral intuitions. But they were badly wrong. New Jersey is a Model Penal Code state, that penalizes any attempt at a crime that goes past a substantial step toward its completion as heavily as it penalizes the completion of the crime.¹⁶¹ In another study, several states were identified each of which took a minority view with regard to a criminal law rule over which there were different formulations, yet took the majority view on other rules in the study. Citizens in all of the states had generally the same view of the existing legal rule, thus, generally ignorant of their state's position on the law – though they did not always think the rule was that of the majority view. Again, their perceptions of what the laws held were better predicted by their attitudes about what the laws should be than by the actual content of the laws.¹⁶²

As this makes painfully clear, just making the justice-deviation rule known to those whose behavior it is designed to control becomes a special task for those who seek to manipulate behavior by deterrence-driven changes in the laws. People assume the law is as they think it should be, according to their perceptions of shared intuitions of justice. Thus, it is in the deviation cases that criminal law has its greatest difficulty in conveying its rule, for it is in the deviation cases where the legal system must affirmatively change the community's initial contrary assumption about what the law provides. We see no evidence that there is often such an attempt to bring the changes in the law into community consciousness; a scan of the newspaper in the capitals of the states showed no particular publicity about the deviant laws the legislatures were enacting.

Further, it is these deviation cases in which the system's deterrence-based deviation rules are least likely to be followed during criminal justice adjudication. This is so because those who take the various discretionary roles within the criminal justice system are likely to have the same

¹⁶¹ John Darley, Catherine Sanderson & Peter LaMantia, Community Standards for Defining Attempt: Inconsistencies With the Model Penal Code, 39 *American Behavioral Scientist* 405 (1996).

¹⁶² John Darley, Kevin Carlsmith & Paul H. Robinson, The Ex Ante Function of the Criminal Law, 35 *Law & Soc. Rev.* 701 (2001).

moral intuitions as the other members of the community and are likely to allow those to influence their decisions. Thus the exercise of police, prosecutorial, and judicial discretion, and jury nullification will commonly subvert of deviation rule. thus confounding the deterrent program and certainly confusing the deterrent message. Juries may refuse to convict a person, even if the legal rules would seem to call for it, if the jurors believe it would be unjust to do so.¹⁶³ Prosecutors may similarly exercise discretion in subversion of rules that produce what they see as unjust results. Judges, by exercising sentencing discretion, or approving of lenient plea bargains, also may subvert the deterrence-based stance of the system, moving it in the direction of justice considerations. So if it is these adjudication decisions that the deterrence theorist is counting on to perform the needed re-education task, the hope seems a vain one. Decisionmakers are often likely to follow their own intuitions of justice and ignore the law's contrary rule, or at least look for ways to minimize the rule's effect. And this kind of distortion in application means that case dispositions often obfuscate rather than clarify the legal rule sought to be conveyed.

Given that we think that the justice system should be explicitly formed around justice considerations, it might be thought that we should applaud all of these processes that move the system in that direction. However, the problem is that the exercise of this sort of subversion is likely to be uneven. We earlier cited a case of a judge who, specifically to deter others from criminal involvement, gave a strikingly high sentence to an individual who was entangled in one of the more far-reaching construals of the felony murder rule.¹⁶⁴ But certainly there are cases in which other judges have treated similar cases much more leniently based on justice intuitions.

To generalize this, juries and prosecutors and judges may deal more leniently with offenders who are more attractive,¹⁶⁵ racially matched to the jurors,¹⁶⁶ more capable of mustering legal resources to defend themselves, or who are otherwise advantaged in public opinion. And, on the other side of the coin, it is also possible for the justice system to accuse and convict those who are regarded as deviants within the community based on “crimes” for which others would not be prosecuted. So one problem with the “under the table” intrusions of justice into a deterrence-based legal system is the unevenness with which it may occur, an unevenness that is likely to be systematic rather than random.

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

¹⁶³ Irwin A. Horowitz, *The Effect of Jury Nullification Instructions on Verdicts and Jury Functioning in Criminal Trials*, 9 *Law and Human Behavior* 25 (1985).

¹⁶⁴ See text accompanying note [81-84] *supra*.

¹⁶⁵ John Clark, *The Social Psychology of Jury Nullification*, 24 *Law and Psychology Review* 39 (2000).

¹⁶⁶ Erick L. Hill and Jeffrey E. Pfeifer, *Nullification Instructions and Juror Guilt Ratings: An Examination of Modern Racism*, 16 *Contemporary Social Psychology* 6 (1992).

D. Creating Criminals: The Problem of Offsetting Crimogenic Effect

Finally, we want to argue that certain consequences of a solely deterrence-based system for defining crimes and assigning punishments can lead to increases in criminal activities because citizens realize, with some shock and dismay, that the legal code does not instantiate their own sense of justice. Assume that a deterrence-based distribution has managed to clear the prior hurdle of showing a deterrent effect greater than that inherent in a justice-based distribution, despite the special problems for deterrence in the cases of deviation, the only cases where the deterrence-based distribution does real work. Its next problem is that it also is likely to generate certain quite substantial costs associated with its increasingly apparent deviation from community standards of justice. Of particular concern here is the injury that a deterrence-based distribution will cause to the criminal law's potential for influencing conduct through social influence, internalized norms, and stigmatization. This is the negative side to the points made immediately above.

We reviewed recent research that suggests that citizens, when they assign penalties that they think are appropriate for a particular crime, do so from a justice rather than a deterrence perspective. As this suggests, a deterrence-based system will generate conflict with the community's shared intuitions of justice. Laypersons do not distribute punishment according to the criterion of optimizing deterrence but rather according to their shared notions of justice.¹⁶⁷ And often the factors that maximize deterrence will conflict with the community sense of justice.¹⁶⁸ Part II gives many illustrations of the point. We highlighted several: McCarty's felony-murder liability and 40 year sentence for fleeing from police; murder liability for Dudley for killing the sick cabin boy to stay alive; holding Park criminally liable for the rodent droppings in Baltimore of which he had no knowledge; manslaughter liability for the retarded Williams for failing to recognize that their child needed medical care; and life imprisonment for Rummel's \$129 air conditioning fraud under a "3 strikes" statute.¹⁶⁹

¹⁶⁷ See note [3] *supra*.

¹⁶⁸

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

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

¹⁶⁹ See text at notes [128-132] *supra*. For a full discussion of how wide-ranging are the criminal law's doctrines of deviation from desert, see Robinson & Cahill, *supra* note [149].

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

Many analyses of the effects of the 1920s Prohibition suggest that this process does in fact occur.¹⁷⁰ Recently, two experimental studies have demonstrated empirically the beginnings of this process. In both studies, the respondents discover that the legislature has or is in the process of passing laws that the respondents can be predicted to find to be in conflict with their own moral intuitions. In one of the studies, respondents read what they took to be newspaper stories in which a person was sentenced to a prison term for behavior that most of the participants did not consider criminal.¹⁷¹ For those who did not consider the conduct criminal, their reported willingness to defer to the law in other instances decreased. Specifically, “they were more inclined to oppose incumbent legislators and prosecutors and take actions aimed at effective legal reforms.” Also they reported increased willingness to take actions that violated the law, less likely to call on or cooperate with the police, and more likely to engage in vigilante action against suspected wrongdoers. Particularly germane to our argument, they rated themselves less likely to use the law to guide their behavior in situations in which they were themselves unsure about the right thing to do.¹⁷² In the second study, respondents read about a legislature seriously considering adopting laws that the respondents perceived as unjust.¹⁷³ Another group read about a legislature considering laws considered just. Those who read about the unjust laws “were more willing, as a general matter, to flout unrelated laws. This willingness to disobey extended far beyond the unjust law in questions, resulting in participants

¹⁷⁰ J.R. Gusfield, *Prohibition: The Lie of the Land* (1982).

¹⁷¹ Erich Greene, *Effects of Disagreements Between Legal codes and Lay Intuitions on Respect for the Law*. Ph.D dissertation, Princeton University (2003).

¹⁷² *Id.*

¹⁷³ Janice Nadler. *Flouting the Law: Does Perceived Injustice Provoke General Non-Compliance?* Northwestern University Law & Econ Research Paper No. 02-9 (2002) quote from abstract.

expressing plans to flout unrelated laws in their everyday lives.” The author concludes that what she calls the “flouting thesis, the idea that the perceived justice of one law can influence the intention to comply with unrelated laws,” is empirically supported.¹⁷⁴

To summarize this set of points, at the level of social and moral influence, the criminal law can harness the forces only by building up its own moral credibility with the community.¹⁷⁵ Its task, in psychological terms, is to persuade the community of the moral validity of the lines it draws between conduct that is morally acceptable and unacceptable and the justice of the extent of liability and punishment it imposes. If it manages to persuade the community of this, then it has the power to persuade the community that in a specific case, in which the individuals in the community do not have an independent opinion about the rightness or wrongness of certain conduct,¹⁷⁶ they will follow the legal code’s guidance and obey the law.

If we continue the analogy with credibility and persuasion further, it provides understanding of some of the costs risked by a criminal justice system that deviates from justice. A broadly accepted general finding in the psychology of persuasion is that a communicator who has credibility can achieve greater persuasion than one with less credibility.¹⁷⁷ One way of gaining credibility is by having the recipient of the communication see the source as having similar values to the recipient. Research shows that communications coming from communicators whose values are close to the recipient are more persuasive than those coming from communicators who are seen as having dissimilar values.¹⁷⁸ The import of this for our purposes is this: if the criminal justice system is seen as making a number of decisions that are based on a deterrence stance rather than the justice perspective that the community holds, the justice system will be realized to not share the underlying justice values of the community. It will, therefore, lose the power to persuade the community to follow its guidance in spheres of behavior in which the community does not have well-formed opinions about what conduct is right and wrong. Much of what we have been arguing can be summed up by saying “reputation matters” and the reputation that matters for the criminal justice system is that it functions to impose just punishment on wrongdoers.

To summarize, if the criminal justice system is driven solely by deterrence considerations, it potentially forfeits the gains achieved when the justice system is regarded by

¹⁷⁴ Id.

¹⁷⁵ See generally Robinson & Darley, *The Utility of Desert*, supra note [151], at 456-457, 468-471; Robinson & Darley, *Justice, Liability & Blame*, supra note [2], at ch. 1, 5-7, ch. 7, 201-203.

¹⁷⁶ As an example of this, notice that the criminal code drafters are attempting this sort of persuasion when they criminalized the complex of actions and knowledge that defines “insider trading.”

¹⁷⁷ Richard E. Petty and John T. Cacioppo, *Attitudes and Persuasion: Classic and Contemporary Approaches* 61 (1981).

¹⁷⁸ George Goethals and R. Nelson, *Similarity in the Influence Process: The Belief-Value Distinction*, 25 *Journal of Personality and Social Psychology* 117 (1973).

the community as based on justice considerations. This could amount to a considerable loss, although a loss that is extraordinarily difficult or impossible to calculate. And, as we argue, there is a second cost, which is the potential crimogenic effect arising from citizens' perceptions of injustice arising from its contradiction of justice concerns. Even if one assumed for the sake of argument that there would be some greater deterrent effect of a deterrence-based distribution of punishment over a justice-based distribution of punishment, one would still question whether this marginal benefit exceeds the losses that the imposition of a deterrence-based system would incur.

Combined with the problems of unavailable information and complexity discussed in Part III.A., our conclusion is this: By generating punishment rules driven by deterrence analysis, one could suffer the crimogenic costs of deviating from justice and get nothing for it. Indeed, it might even be the case that a justice distribution would have greater inherent deterrent effect than the deterrence-based rule. In general, if we cannot make reliable deterrence calculations -- if we don't know whether we are really increasing deterrence or in fact decreasing it -- we suggest that we are better off following a distributive principle that will at least achieve its stated goal, such as doing justice under the community's shared intuition of justice, and is likely to achieve considerable deterrent force in the process.

IV. THE POSSIBILITIES AND IMPOSSIBILITIES OF IMPROVING DETERRENT EFFECT

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

A. Insuring That the Target Audience Knows, Directly or Indirectly, of the Rule Designed to Influence Their Conduct

As Part I notes, most people do not know the law; even career criminals who have a special incentive to know it do not; and even when people think they know the law they frequently are wrong. Potential offenders typically do not read law books and their ability to learn the law even indirectly through hearing or reading of particular cases is limited by the fact that the legal rule -- and often there are many rules interacting to produce the case result -- is just one of dozens of variables that have play in a case disposition. To divine the operative liability rule, hidden under the effects of all the other variables, would require both a higher

number of reported cases than potential offenders are exposed to and a mind for complex calculation beyond that which is reasonable to expect.

But there are some situations in which the criminal law rule can and will be known, and ways in which knowledge of it can be increased. First, a bare prohibition itself is the easiest rule to convey, in part because its effects can be dramatic. Either the police think they can arrest for such conduct or they do not, and the police decisions will become known within the target population. The more noteworthy the prohibition, or repeal of a prohibition, the more widely it will be known. If the legislature decriminalizes robbing convenience stores on weekends, the fact would be quickly reported (and would likely quickly increase robberies). Even here, however, for rules as simple as those defining the law's commands, the rule often is not known. Is it criminal to fail to help a stranger in serious danger if one can do so without endangering oneself? Is it a crime for a private person to keep a dead body without burial or cremation? Is it criminal to fail to try to find the owner when you come upon a valuable mislaid item? Most people can only guess (often incorrectly) about these criminal law commands. (The answer in each case is: it depends upon which jurisdiction one is in.)

There are some situations in which the necessary knowledge for deterrence can be conveyed to the potential offender at the time and place of the potential offense, as where the witness on the stand is reminded of the penalty for perjury,¹⁷⁹ where life term inmates are informed of their special eligibility for the death penalty,¹⁸⁰ where an offender is told after arrest for seduction that there is a "marriage defense" to the crime,¹⁸¹ where road signs inform felons of a special duty to register in the jurisdiction,¹⁸² or where a kidnapper is told that he'll get a lesser sentence if he releases the victim alive.¹⁸³ But such opportunities for special education are not typically available, and the government often does not take advantage of them when they are.

¹⁷⁹ Model Penal Code §241.1 comment 94 (1980).

¹⁸⁰ See, e.g., 720 Ill. Comp. Stat. Ann. §5/9-1(b)(10) (West 2002); Cal. Penal Code §4500 (West 2002); N.Y. Crim. Pro. Laws §400.27 (McKinney 2002); N.Y. Penal Laws §125.27 (McKinney 2002); Tex. Penal Code Ann. §19.03 (2001) (all statutes listed provide life imprisonment status as special aggravating factor for death penalty).

¹⁸¹ Modern codes often reject this once common defense. See discussion at Model Penal Code §213.3 comment 396.

¹⁸² See, e.g., Cal. Penal Code §290 (West 2002) (requiring registration of sex offenders); Cal. Health & Safety Code §11590 (West 2002) (requiring registration of controlled substance offenders); 730 Ill. Comp. Stat. Ann. §150/3 (West 2002) (requiring registration of sex offenders); N.Y. Correct Laws §168-e (McKinney 2002) (upon release, sex offender must be informed of duty to register); *Lambert v. California*, 355 U.S. 225 (1957) (Los Angeles felon registration ordinance violated due process because defendant had no knowledge of duty to register).

¹⁸³ Model Penal Code §212.1 comment 232-33 (1980).

One could imagine requiring high school seniors to pass a knowledge-of-the-law examination to graduate, much as we give rules-of-the-road examinations before issuing a driver's license. It would be useful for graduates to know the serious penalties associated with domestic violence, the conduct that constitutes criminal harassment, and whether it is a crime to tape-record one's own phone conversation without permission of the other party. But government tends to rely instead on the maxim "ignorance or mistake of law is no excuse,"¹⁸⁴ pushing the full burden of education, unrealistically, on each individual.

One also could imagine criminal codes written using "plain language drafting" techniques,¹⁸⁵ but the reality is mountains of technical legalese that even lawyers must work to understand.¹⁸⁶ Similarly, one could increase the chances that the legal rule could be known and followed by keeping rules simple. Being able to reduce a rule to a slogan than can be widely advertised might help: "Use a gun, go to jail." By contrast, the standard modern criminal code's complex self-defense rules cited above¹⁸⁷ appear rather silly. It would be unrealistic to think that a person could know and in the pressure of an attack follow those complex rules. But one could distill the rules to embody the basic principles that guided their formulation. The defensive force rule might read simply: In order to defend yourself against an unlawful attack, you can use only the force that is necessary and that is not disproportionate to the harm threatened.¹⁸⁸

¹⁸⁴ See, e.g., *People v. Marrero*, 422 N.Y.S. 2d. 384 (1979) (prison guard liable for criminal possession of weapon even though he reasonably believed he was a "peace officer" and therefore not required to have a gun permit); *City of West Allis v. Megna*, 133 N.W. 2d 252 (Wisc. 1965) (tavern-keeper liable for permitting minor to loiter in tavern even though he had relied in good faith on minor's identification card, which was later determined to be false); *Commonwealth v. Mash*, 48 Mass. 472 (1844) (woman liable for polygamy despite fact that her first husband left home one morning saying he would return immediately but was not heard from again for over three years, leading her to believe him dead).

¹⁸⁵ See generally Tom Goldstein, *The Law: Drive for Plain English Gains Among Lawyers*, *New York Times* C3 (Feb. 19, 1988); Gregory Odorizzi, *Plain language: Incentives and Recent Developments in the Federal Government*, 79 *Mich Bar J.* 1210 (2000).

¹⁸⁶ See Paul H. Robinson et al., *Report of the Illinois Criminal Code Rewrite and Reform Commission* ['Why a Criminal Code?'] (State of Illinois forthcoming 2003).

¹⁸⁷ See note [171] *supra*.

¹⁸⁸ See, e.g., Proposed Illinois Criminal Code, see note [236] *supra*, at §416: Section 416. Defense of Person

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

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

One might be able to increase the complexity of a rule if it applied primarily to a group of persons who could be specially trained, such as the rules governing the conduct of police officers or public officials. Thus, a code might provide detailed rules governing use of force by officers to arrest¹⁸⁹ or governing entrapment, or detailed rules limiting a public official's ability to sell political influence,¹⁹⁰ or even detailed rules for doctors governing abortion.¹⁹¹ This is also the case with a target group that has the ability and is on notice of their need to specially educate themselves, such as rules governing the conduct of corporate officials, who can look to corporate counsel.

One final observation concerns criminal law rules of general application. As noted in Part I, while people rarely know "the law," they generally assume that the criminal law is as they would expect it to be. That is, they use their own intuitions of justice and their own assessments of what is harmful or wrongful as the basis on which to project what they assume the criminal law must provide. This suggests that the criminal law can insure greater knowledge of its commands, with little or no need for special education efforts, if its rules track shared community views. Conversely, it would be difficult to get compliance with rules that appear to conflict with lay expectations, such as a rule barring force necessary to recapture property from a thief if the thief acts under a mistaken claim of right,¹⁹² barring resistance to an unlawful arrest,¹⁹³ or barring use of deadly force necessary for self-defense if one can retreat.¹⁹⁴ Where the law's rule conflicts with lay intuition, a special education drive will be needed.

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

¹⁸⁹ Model Penal Code §3.07 comment 122 (1985).

¹⁹⁰ Model Penal Code §240.7 comment 85 (1980).

¹⁹¹ Model Penal Code §230.3 comment 429 (1980).

¹⁹² See Model Penal Code §3.06 comment 74 (1985). See also Robinson & Darley, *Justice, Liability & Blame*, supra note [1], at 68-69 (empirical study suggesting a difference between the legal rule and lay intuition concerning the use of force in protection of property).

¹⁹³ See Model Penal Code §3.04 comment 42-43 (1985); §3.09 comment 148 (1985).

¹⁹⁴ See Model Penal Code §3.04 comment 54 (1985). See also Robinson & Darley, *Justice, Liability & Blame*, supra note [1], at 56-57, 64 (empirical study suggesting a difference between the legal rule and lay intuition concerning the use of deadly force in self-defense).

B. Insuring that the Target Audience Perceives a Meaningful Net Cost to a Violation

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

1. Probability

The empirical studies seem to agree that increasing the probability of punishment provides a better chance of increasing deterrence than increasing severity.¹⁹⁵ Establishing some base expectation of a meaningful chance of punishment is a necessary condition to any deterrent effect. Yet, we have previously noted just how low is the perceived probability of punishment,¹⁹⁶ a result of the very low actual rates, further exacerbated by the human tendency to heavily discount a future event. Sentencing discretion contributes to the uncertainty of punishment, as does the discretion of the many other participants in the criminal justice system, from police officers, to prosecutors, to jurors, whose exercise of discretion regularly allow offenders to escape punishment or get less than they might. Such uncertainty can nurture in all cases a hope of avoiding punishment.

There appears little that can be done to improve the perceived probability of punishment. Increasing punishment certainty would require improving clearance rates (the rate at which an offender is arrested for a given offense) and conviction rates. (The most important may be the first, clearance rates, for these account for the greatest "leakage" of offenders escaping punishment.¹⁹⁷) Yet such increases would require either or all of: a significant increase in the amount we spend on law enforcement and criminal justice, an increase in the intrusiveness we suffer from law enforcement, and reduction in the procedural safeguards we provide in criminal adjudications. The reality is that most people think they already pay too much in taxes,¹⁹⁸ and limitations on investigative intrusiveness and on adjudication procedures

¹⁹⁵ Jeffrey Grogger, *Certainty v. Severity of Punishment*, 24 *Econ. Inquiry* 297 (1991); Ann Dryden Witte, *Estimating the Economic Model of Crime with Individual Data*, 94 *Q. J. of Econ.* 57 (1980).

¹⁹⁶ See text at note [177-184] *supra*.

¹⁹⁷ See Robinson & Darley, [Deterrence Empirics], *supra* note [3], at Table 1, col. (c) (only 8.1% of all burglaries, 14.4% of all rapes, and 7.8% of all assaults result in an arrest).

¹⁹⁸ Some studies suggest a greater willingness to pay for crime control measures than had been previously reported. See Mark A. Cohen et al., *Willingness-to-Pay for Crime Control Programs*, unpublished manuscript, [SSRN No. 293153]. Of course, these expressions of

(continued...)

typically are of constitutional base, thus unchangeable by legislative action. No doubt progress could be made around the edges, assuming people were willing to suffer the trade-offs -- higher taxes, more governmental intrusion, and few procedural safeguards -- but the kind of dramatic changes that would be required to significantly alter our current abysmal clearance rates seem unlikely.

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

Tyler, surveying a large sample of Chicago residents, found that the degree to which respondents felt that they had received fair treatment at the hands of the police predicted those respondents' general confidence in legal authorities, and, importantly, the degree to which they felt obliged to obey the law.¹⁹⁹ Tyler and Huo, reporting on the National Center for State Courts survey, showed that responses to such questions as "the courts are concerned with people's rights" predict respondents' evaluations of the court system and their willingness to obey the laws. To sum people "were strongly influenced by whether they believed that the police and the courts treated people with respect, dignity, and fairness, and did not harass them or subject them to rude or inappropriate treatment."²⁰⁰ The point here is that the reputation of the criminal justice system for fair and respectful treatment of people is central to its ability to enlist voluntary compliance from citizens with the law, and the "procedural byproducts" of a criminal justice system that organizes itself to increase arrest rates may bring about highly consequential losses in perceptions of procedural legitimacy.

2. *Delay*

Part I notes that the delay between violation and punishment can dramatically reduce deterrent effect.²⁰¹ Even if the punishment is certain, the more distant it is, the more its weight as a threat will be discounted. Further, when punishment is imposed, the strength of the

¹⁹⁸(...continued)

willingness show a willingness to pay if the expenditures would in fact reduce a particular kind of crime. There is little reason to think that such additional funds could actually produce the crime reduction demanded, in which case the willingness to pay would evaporate.

¹⁹⁹ Tom Tyler and Yuen Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* 179 (2002).

²⁰⁰ *Id.* at 191.

²⁰¹ See text accompanying notes [216-222] *supra*.

punishment memory -- that is, its recalled punitive "bite" as a perceived threat for a future violation -- is dramatically reduced as the length of delay increases. But, as with reforms to increase probability, decreasing delay would require increases in resources or changes in procedural rules that could be held unconstitutional, or if not, would require unpopular trade-offs and could injure the criminal justice system's reputation for fairness and, thereby, its legitimacy.

3. *Amount*

Part I notes that the greatest difficulties relevant to "amount" of punishment lie not in establishing a punitive bite but rather in manipulating it reliably so as to optimize deterrence. The aspect of perceived net cost over which law-makers assume they have the greatest control is the amount of the threatened punishment (its total punitive "bite"). Legislatures (and judges) believe they can manipulate the amount of punishment threatened by simply manipulating the length of the prison term. But as such manipulation of sentence length does not provide the degree of change in punishment amount that law makers and judges think, and indeed may have the opposite effect. The forces at work in determining perceived amount of punishment are considerably more complex than has been assumed. [Recall the hedonic adaptation and "subjective well-being" studies which suggest that both paraplegics and lottery winners return to their original state of well-being despite their dramatically changed circumstances.] The effect of this adaptation dynamic for punishment is that each additional unit of imprisonment adds increasingly less to the total punishment amount. Yet the cost of each unit remains essentially constant. Thus, as duration increases, each unit becomes increasingly less cost-effective. Not a promising state of affairs when one wishes to use increases in duration as the primary means of increasing punishment amount. But as we saw, even this may be a wildly optimistic picture of the effectiveness of using duration to modulate punishment bite. The "duration neglect" studies suggest that total punishment bite has little to do with duration, and more to do with maximum peak intensity and end point intensity.²⁰² Given the predictable drop in intensity over time, the end point intensity *decreases* with increased duration. Thus, a longer sentence may have less remembered punishment bite than a shorter one. If the theory is empirically confirmed, both of the implications of this are devastating for deterrence's ability to increase total bite by increasing duration. First, as noted, increasing duration may have the reverse effect on total bite. Second, "duration neglect" means that the only effective means of increasing total punishment bite is to increase the intensity of the punishment experience.

But the criminal justice system in the United States, and probably in any liberal democracy, has little ability to increase punishment intensity beyond what it is currently. Earlier times saw attempts to do so, in the invention of increasingly excruciating tortures and humiliations, as in having an offender's bones broken and body ripped apart while still alive

²⁰² See text accompanying notes [200-205] *supra*.

("drawing and quartering"²⁰³), or in repeated near-drownings ("dunking"²⁰⁴), which apparently produces a horrible suffocation sensation. But there would be neither the political will to provide nor the public acceptance of such torture today, nor of nearly anything much more unpleasant than the current prison experience. Imprisonment at "hard labor" might be tolerated by some, but such a thing would have its details scrutinized for unconstitutional "cruel and unusual punishment."²⁰⁵ (In one recently reported case, a judge's attempt to bar the use of television, as part of a sentence of home detention, was challenged by defense attorneys, who persuaded the Second Circuit to temporarily stay the television ban.²⁰⁶)

Even if more intense punishments were not held unconstitutional, they might well be counter-productive. As we discuss in Part III.C., a criminal justice system that is seen as barbaric or as dispensing disproportionate punishment would likely lose moral authority with the community and, with it, the crime-control power that such moral authority can bring. One practical example relevant here is stigmatization, which can be highly effective in influencing conduct and has none of the financial costs of imprisonment, but which *is* dependent upon the criminal justice system having earned a reputation for reliability in making criminal liability judgements that accord with the community's shared intuitions of justice. A system would quickly lose its moral credibility if it distributed cruel or disproportionate punishment, or liability based upon any number of the factors that deterrence analysis would make central to liability and punishment but which are unrelated to moral blameworthiness.²⁰⁷

The best that one may be able to do to increase the threatened punishment bite is to explore ways of inflicting suffering (consistent with human dignity, as the community's moral sense demands) through minor adjustments to prison conditions -- that is, more dignified, shorter, but more unpleasant terms -- or through non-incarcerative alternatives, which have the advantage of being less expensive. For example, if it is the unpredictability of prison life that makes its aversiveness fresh, then it might be possible to increase that uncertainty and shorten the prison term over which it is experienced. For less serious crimes, we and others have

²⁰³ 2 Sir Fredrick Pollock & Fredrick W. Maitland, *The History of English Law* 500-501 (1968).

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²⁰⁵ See generally LaFave & Scott, *supra* note [5], at §2.14, 248-49 (reviewing Constitutional limitations on modes of punishment).

²⁰⁶ Benjamin Weiser, *Prime Time and Punishment*, *New York Times* A24, col. 1 (March 7, 2002). Whether or not the defendant ultimately prevails says something of the extent of scrutiny of "different" punishments that the Second Circuit would grant the stay.

²⁰⁷ A deterrence-based system might look to, for instance, the difficulty of detection of a crime, under the reasoning that if the system can catch only one out of the hundred people who commit some easily-hidden crime, it is necessary to punish the one we catch with dreadful severity to keep the "punishment weight" constant and deter others. Or to accomplish general deterrence of the population, one might give an exemplarily severe sentence to a case that one knew was generating a great deal of public interest so the sentence would be widely publicized.

shown that there are a number of alternatives to prison sentences that people would perceive as having a punitive “bite” comparable to that of a short prison term.²⁰⁸ This means that it is possible to create a sentence of the appropriate severity that would be a mix of these experiences. (For instance, a mix including home confinement, labor-intensive community service, weekends in jail, and a fine.) Again, it might be possible to rotate offenders through various of these punishment options, which might keep the aversiveness of the experiences fresh. Morally, there is a tightrope to be walked here. One is attempting not to increase the objective negativity of the punishments, but to increase the perceived negativity.

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

It is no doubt for this reason that mandatory minimum sentences have become popular in many states.²⁰⁹ But such legislative sentencing creates the danger -- increasingly recognized in public discourse -- of increased community perceptions of injustice, which, as before, can undercut the criminal law's moral authority. On the other hand, judicial discretion left unchecked produces unjustified disparity in the sentencing of similar cases, which also can produce perceived injustices.²¹⁰ The community expectation no doubt is that punishment

²⁰⁸ George Gescheider, Edgar Catlin, and Anne Fontana, *Psychophysical Measurement of the Judged Seriousness of Crimes and Severity of Punishments*, 19 *Bulletin of the Psychonomic Society* 275-278 (1982); Robert Harlow, John M. Darley & Paul H. Robinson, *The Severity of Intermediate Penal Sanctions: Psychophysical Scaling Approach for Obtaining Community Perceptions*, 11 *Journal of Quantitative Criminology* 71-95 (1995).

²⁰⁹ See, e.g., Gary Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 *Calif. L. Rev.* 61, 61-63 (1993).

²¹⁰ One survey of federal judges revealed that "While one-fourth of the judges thought rehabilitation was an extremely important goal of sentencing, 19 percent thought it was no more than "slightly" important; conversely, about 25 percent thought "just deserts" was a very important or extremely important purpose of sentencing, while 45 percent thought it was only slightly important or not important at all." S. Rep. No. 98-225, at 41 n.18 (1983) (Senate Report for Sentencing Act of 1984) (citing INSLAW/Yankelovich, Skelly & White, Inc., *Federal Sentencing* at III-4 (1981)). Research also confirms that these differences in philosophy do indeed translate into different sentences. One study done by the judiciary gave fifty judges the same twenty cases to sentence. The differences in sentences were staggering. In one extortion case, for example, sentences ranged from twenty years' imprisonment and a \$65,000 fine to three years' imprisonment and no fine. *Id.* at 44 n.23; see also *id.* at 42-43

(continued...)

should depend upon what the offender has done, not on the sentencing judge to whom he happens to be assigned.

Judicial discretion is also troublesome because it can produce not only inconsistency among different judges but inconsistency among a single judge's different cases. For example, when a judge picks out one case or another with which to "make an example" -- a practice typically justified on deterrence grounds²¹¹ -- the sentence is likely to be inconsistent with other cases of similar seriousness. The point of "making an example" of an offender is to give a *higher sentence than what one ordinarily would give in such or similar a case* in order to boost the deterrent message. But that suggests that each instance of "making an example" risks the criminal justice system's reputation for fairness and uniformity in application.

Further, such a "making an example" can backfire. The open acknowledgment that such offenders have not ordinarily been given such a punishment may tell listeners that the publicized punishment is not the regular punishment, and thus not the punishment that they should expect if they commit the offense, especially given that they will be end up being sentenced at a later time and may end up being sentenced by a different judge. The more newsworthy the "making an example," the more widely it is reported -- something deterrent effect normally desires -- the more unusual and atypical the sentence may be perceived as being. A more effective deterrent approach would be to advertise how consistent is the sentencing. Yet, that is difficult to do with today's high degree of judicial sentencing discretion.

A common means of compensating for the inconsistency among sentencing judges has been to have the real determination of sentence length made after the public sentencing, by a centralized authority such as a state-wide parole commission. But this solution creates its own problems, most importantly the (accurate) perception it produces that the sentence publicly announced after trial does not in fact represent the real punishment. The real sentence in such a system comes to be understood, especially by those familiar with the operation of the system, as much less than the official sentence announced. And the extent of the discount off the announced sentence can be substantial. In some jurisdictions, including the federal system

²¹⁰(...continued)

(citing Anthony Partridge & William Butler Eldridge, *The Second Circuit Sentencing Study* (1974)). This same disparity in sentencing is reflected in the sentences given in real cases every day. One study compared the sentences imposed in the different federal circuits. For forgery, as an example, the average sentence ranged from 30 months in the Third Circuit to 82 months in the District of Columbia. For interstate transportation of stolen motor vehicles, the extremes in average sentences were 22 months in the First Circuit and 42 months in the Tenth Circuit. *Id.* at 41 & n.21 (citing Whitney North Seymour, 1972 Sentencing Study: Southern District of New York, 45 N.Y.S. Bar J. 163 (1973)). See generally Marvin Frankel, *Criminal Sentences: Law Without Order* (1973).

²¹¹ See, e.g., McCarty Sentencing Transcript, *supra* note [84], at 00392:11-13 ("a sentence does need to be imposed that would deter others from committing such crime, a high speed chase with the police").

until recent reforms, a sentence of many years imprisonment could mean that the offender is in fact eligible for immediate release.²¹² When this truth becomes known, as it generally is in an open society, it is no surprise to find that the credibility of the system's punishment threat has been damaged. Further, once burned, the public may wonder, "If the system is misleading us on this issue, on what other issues is it similarly misleading?" This is not a good condition for projecting a credible punishment threat, but rather offers the worst of both worlds: it undercuts the deterrent threat meant to be carried by the publicly announced sentences, and simultaneously insures inconsistency and injustice that will undermine the system's moral credibility.

Perhaps the best that one can do to improve the credibility to the punishment threat is to institute reforms such as sentencing guidelines that regularize sentences²¹³ and "truth in sentencing" reforms that require offenders to serve all or most of the sentence imposed.²¹⁴

C. Insuring that the Target Audience Is Capable of and Willing to Bring a Perceived Threat of Punishment to Bear on Their Conduct Decisions

Part I notes that there are a host of conditions -- drug or alcohol use, personality types inclined toward impulsiveness and toward discounting consequences, and social influences such as the arousal effect of group action and the tendency of group members to identify with group rather than individual interests -- that interfere with rational calculation of self-interest in

²¹² In the federal system before the Sentencing Reform Act of 1984, any offender was eligible for immediate release unless the sentencing judge explicitly imposed a term of parole ineligibility, which, even if one was imposed, could never exceed one-third of the publicly announced sentence. "[A] court-imposed term of imprisonment in excess of one year frequently has little to do with the amount of time that an offender will spend in prison. The announced term represents only the maximum length of time the offender may spend in prison if he earns no good time credits and if the Parole Commission does not set a release date that falls before the date of expiration of the sentence." Sen. Rpt. 98-255, at 40, 48 (Aug. 4, 1983).

²¹³ "[S]entencing in the Federal courts is characterized by unwarranted disparity and by uncertainty about the length of time offenders will serve in prison. The lack of reasonable consistency in the sentences handed down by the courts is due in large part to the lack of a comprehensive Federal sentencing law. . . . This disparity is fair neither to the offenders nor to the public. Id. at 49.

²¹⁴ The federal system, for example, now requires that an offender serve 85% of the sentence imposed. That is, only a 15% reduction is allowed as credit for good behavior in prison. "Under the bill, the sentence imposed by the judge will be the sentence actually served. A sentence that exceeds one year may be adjusted at the end of each year by 36 days for a prisoner's compliance with institutional regulations. . . . The prisoner, the public, and the corrections officials will be certain at all times how long the prison term will be, and of the consequence of causing institutional discipline problems." Id. At 56.

potential offenders. Further, these conditions are disproportionately high among deterrence's target group (those persons for whom criminal conduct is not already ruled out by their own internalized norms or by those of their family or peers).²¹⁵ This bodes ill for effective deterrence because it precludes, or at least diminishes a rule's deterrent effect even if the rule is known and is backed up by what is perceived as a meaningful threat of punishment.

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

We understand that there remain serious limitations on the effectiveness of many if not most treatment programs that might help in this regard. Kleiman has suggested the conditions under which a monitoring program is likely to be successful in inhibiting drug or alcohol consumption.²¹⁶ But it might be that the shift in focus proposed here -- toward improving a person's ability for rational self-interest calculation -- in both the selection of programs to use and the selection of offenders to which they are to apply -- could better utilize what effectiveness there is in such programs.

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

²¹⁵ See text accompanying notes [149-167] *supra*.

²¹⁶ Mark Kleiman, *Coerced Abstinence: A Neopaternalist Drug Policy Initiative*, in Lawrence Mead, ed., *The New Paternalism: Supervisory Approaches to Poverty* 182 (1997).

One final point on clearing the rational-choice hurdle. The absence of rational decision-making seems greater for offenses that do not require sustained planning efforts. This is true both because persons who can so plan are also likely to be able to calculate self-interest, and because the longer the planning stage the greater the opportunity for self-interest to intervene to override impulsiveness or the other forces toward irrationality. This suggests that, if rehabilitating programs are to be revised to enhance a potential offender's self-interest calculation, the primary population for such treatment is not the white-collar criminal who may have been the primary client of rehabilitation programs in the past, but rather is the more dysfunctional, perhaps impulsive offender.²¹⁷

It is also true that we can expect more rational calculations of self-interest if the potential offender fully understands the governing criminal law rules, hence tying back to our previous discussion regarding clear and straightforward statutes. The reforms discussed there for improving the comprehensibility of the law²¹⁸ can have effect here in increasing the likelihood that a potential offender can at least understand the rule enough to include its implications in his calculations of self-interest. An obvious suggestion would be to simplify the rules -- about what conduct is legitimate in self defense or to make clearer what is or is not a case of date rape.

V. SUMMARY AND CONCLUSION

We do not dispute that having a criminal justice system that imposes punishment for a violation can and does deter violations. The system's generalized threat of punishment provides a clear disincentive to crime. It does not follow, however, that the manipulation of rules for determining liability and punishment within that system -- traditionally governed by deterrence analysis -- can send the more nuanced messages that are needed to influence the

²¹⁷ One also is reminded of the notion of "hardening" targets of criminal activities. For instance, every few years planners notice that an "open, friendly floor plan" of a bank may also offer bank robbers an easy target to rob, and they advocate design change. It is also known that anti-burglary devices on cars are simple for car thieves to overcome, if the owners have bothered even to activate them. Those people most concerned with being crime victims perhaps could succeed in "crime-proofing" the specific targets that they controlled, but it is unlikely that this would do other than displace criminal activities to targets that were unhardened. Having police patrols flood certain areas in which drug sales are common is often reported to decrease drug sales in that neighborhood, but is also reported to shift drug sales to adjacent neighborhoods rather than eliminate it. It is not immediately clear where this idea leads in a successful crime prevention via deterrence campaign. Much of the literature on reduction of crime via environmental design is reviewed and critiqued in C. Ray Jeffery & Diane Zahm, *Crime Prevention Through Environmental Design*, in Ronald Clarke & Marcus Felson, eds., *Routine Activity and Rational Choice*, 5 *Advances in Criminological Theory* 323 (1993).

²¹⁸ See text accompanying notes [229-244] *supra*.

conduct of potential offenders in a more precise way. It could happen. But the conditions under which it can happen are the exception rather than the rule: a potential offender who is aware at least indirectly of the rule intended to influence his conduct, a perception that the immediate benefit of the crime is less than the delayed and doubtful possibility of a distant punishment, a sufficiently rational actor sufficiently free of decision-distorting influences to be able and willing to bring such a perception to bear to guide his conduct, and, even if all these requirements are met, a resulting deterrent effect not so incrementally dissipated as to be trivial. We suggest that the infrequency of being able to achieve a meaningful deterrent effect through doctrinal manipulation reveals the deterrent-analysis tradition of modern criminal law scholars, judges, and lawmakers to be seriously out of touch with the reality of its limitations.

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

This is so because people assume the law is as they think it should be, according to their perceptions of shared intuitions of justice. Thus, it is in the deviation cases that criminal law has its greatest difficulty in conveying its rule, for it is in the deviation cases where the legal system must affirmatively change the community's initial contrary assumption about what the law provides. Further, it is the deviation cases in which the system will find it most difficult to perform the needed re-education task through the examples of case dispositions, for it is in these deviation cases that prosecutors and juries are most likely to follow their own intuitions of justice and ignore the law's contrary rule, or at least look for ways to minimize the rule's effect. This kind of distortion means that case dispositions often obfuscate rather than clarify the legal rule sought to be conveyed. Further, and most importantly, the tendency of system participants to undercut the deviation rules -- be it through the exercise of prosecutorial or enforcement discretion, sentencing discretion, jury nullification, or other means -- means, obviously, that the planned deterrence program will be frustrated.

But even if one could find some resulting deterrent effect to a deterrence-based doctrinal manipulation, there would be good reason to reject it in favor of tracking the shared intuitive principles of justice of the community. Such a justice distribution provides some deterrent effect. Thus as we pointed out above, a deterrence distribution can provide an advantage only to the extent that it deviates from justice and, by such deviation, provides a greater deterrent effect. But this sort of distributional system incurs costs that are often not realized by those advocating a deterrence-based system. This is so because it would provide this added deterrent effect only if the community members were aware that the legal codes deviated from their sense of what was morally right, either by being Draconian in criminalizing actions that the community regarded as not immoral, or failing to criminalize actions that the community does think are immoral. But it is just these rules that deviate from the community's sense of justice, that most undercut the criminal law's moral credibility with the community, and thereby reduce its long-term crime control power. In the community governed by a criminal justice system that punishes what the community regards as morally

appropriate actions, the “laws” are obeyed only under threat of apprehension by what comes to be seen as an oppressive police force and judicial system. Thus, even if a deterrence distribution had a net immediate “crime”-control benefit over a justice distribution, that benefit can over time be outweighed by its slowly building criminogenic effect that results when citizens have come to hold their criminal justice system in contempt.