THE PROPER ROLE OF THE COMMUNITY IN DETERMINING CRIMINAL LIABILITY AND PUNISHMENT

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I. INTRODUCTION

Criminal law protects us from the most egregious harms. It also allows government to wield the most serious intrusions on our personal liberties. Given these special responsibilities and special powers, it is particularly appropriate that criminal law reflect the people's shared values – their shared values on what conduct deserves the condemnation of criminal conviction and their shared views on when and how much a violation of the criminal law should be punished.[2]

But in this chapter I would like to talk about an alternative justification, aside from its democratic value, for consulting the community's judgements of justice. Recent social science research has revealed that there is practical crime-control value in having the criminal law reflect community views. A criminal law that distributes criminal liability and punishment in ways that the community perceives as just gains moral credibility with the community, which translates into greater deference to, support for, and cooperation with the criminal justice system. In contrast, a criminal law that is seen as regularly doing injustice or failing to do justice loses moral credibility with the community, and thereby reduces its influence. People are less likely to defer to it, to support it, to cooperate with it, or to acquiesce in its commands.[3] Add to these powerful forces of social influence the general deterrence and incapacitation of dangerous persons that is inherent in what is seen as a just distribution of criminal liability and punishment, and it becomes difficult to justify adopting rules that conflict with community views.

In this paper I will describe some of the research that has revealed this practical value in having criminal law track people's shared judgements of justice, but also will describe the potential dangers that exist in considering community views in the adjudication of individual cases, especially when community views are assumed to be those contained in newspaper or Internet reports. Finally, I will say a word about the current debates on the subject in the United States and in China. The points of debate in the two countries are quite different and illustrate additional advantages and dangers of the approach.

II. THE PRACTICAL VALUE IN FOLLOWING THE COMMUNITY'S JUDGEMENTS ABOUT JUSTICE

The empirical studies examine two distinct questions. First, does knowledge that criminal law rules regularly do injustice or fail to do justice decrease respect for the criminal law? Second, if so, does such decreased respect reduce deference to the criminal justice system – specifically, reduced cooperation, compliance, and normative influence?

History certainly suggests such a dynamic, at least for dramatic levels of disrespect. For example, the early Soviet criminal justice system was notoriously arbitrary and corrupt with little or no moral credibility among the general population. The compliance it gained was through the coercion of a brutal and extensive police power.

When those power centers weakened with the collapse of the Soviet Union, the crime rate increased dramatically. It was only the coercive influence of the state's threat that had given the system effect, and once that was gone, so too went its control.

Empirical studies initially hinted, and more recent studies have confirmed, that this same relationship between the criminal justice system's moral credibility and its ability to gain deference applies not just to extreme situations but rather defines a general dynamic: the greater the system's moral credibility, the greater its ability to gain deference, influence, and cooperation.

We know that systems with public support have greater effect in gaining deference than systems with no public support and credibility with the community, such as the early Soviet system. (Obviously, there are many other examples that one could use of discredited criminal justice systems.) What the recent studies have shown is that a marginal decrease in credibility will produce a marginal decrease in deference. (This is represented by the dashed line in the lower left of Figure 1.) This suggests that a system with moral credibility might further improve its ability to gain deference by further improving its reputation for doing justice and avoiding injustice, as the community perceives it. (This is represented by the dashed line in the upper right of Figure 1.)

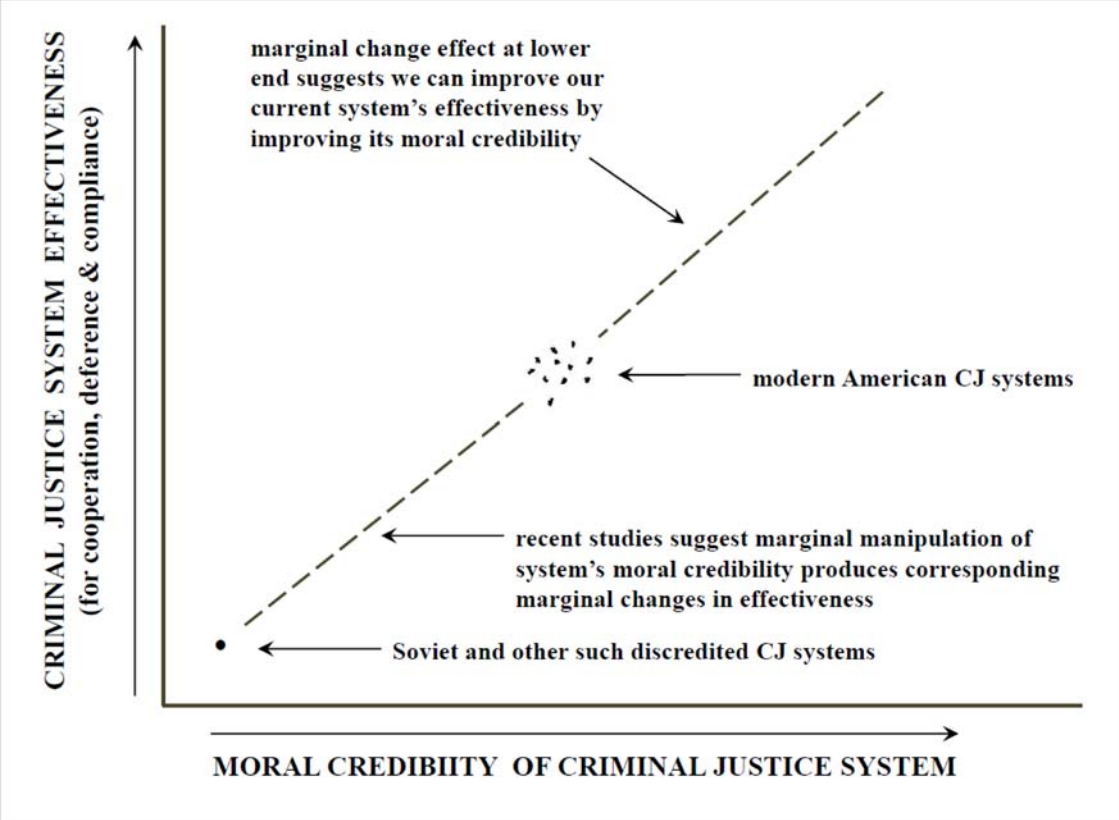

Figure 1. The Relation Between a System's Moral Credibility and Its Crime-Control Effectiveness

Why should it be the case that undermining the system's moral credibility undermines its crime-control effectiveness? The forces of social influence and internalized norms are potentially enormous. A criminal law that has earned moral credibility with the people can harness these powerful normative forces through a variety of mechanisms.[4]

First, a criminal law with moral credibility can harness the power of stigmatization. Many people will avoid breaking the law if doing so will stigmatize them and thereby endanger their personal and social relationships. A criminal law that regularly punishes conduct that is seen as blameless or at least not deserving the condemnation of criminal liability will be unable to harness the power of stigmatization.

Second, a system that has earned moral credibility with the people also can help avoid vigilantism. People will be less likely to take matters into their own hands if they have confidence that the system is trying hard to do justice.

Third, a reputation for moral credibility also can avoid inspiring the kind of resistance and subversion that we see in criminal justice system's with poor reputations. Such resistence and subversion can appear among any of the participants in the system. Do victims report offenses? Do potential witnesses come forward to help police and investigators? Do prosecutors and judges follow the legal rules, or do they feel free to make up their own? In systems with trial juries, do the jurors follow their legal jury instructions or substitute their own judgment? Do offenders acquiesce in their liability and punishment, or do they focus instead on the injustice that they think is being done to them?

Finally, the most powerful force that comes from a criminal justice system with moral credibility is its power to shape societal norms, and to cause people to internalize those norms. If the criminal law has earned a reputation for doing justice, then when the law criminalizes some new form of conduct or makes some conduct a more serious offense than it had previously thought to be, the community assumes that this action means the conduct really is more condemnable.

A variety of studies have this relationship,[5] but let me show the results of just one recent study about this dynamic between the system's moral credibility and people's deference to it.[6] Subjects were tested to determine their willingness to defer in the variety of ways just described: whether they would help investigators, or report an offense, or take criminalization to mean that the conduct really was morally condemnable, and so on. With this baseline established, the subjects were then told of a variety of real cases in which the criminal justice system had done serious injustice or failed to do justice, not by accident but as the result of the liability rules formally adopted with the knowledge that they would have such unjust results. The testing confirmed that this information tended to disillusion the subjects about the criminal justice system. After some other activities to distract them, they were tested again on their views on deference and compliance and all had weakened.

Here are the results.[7] (The first column lists not the full text of the questions used but just a short-hand identification of the question.)

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

Table 1. Pre- and Post-Stimulation Averages

Figure 2 displays the same results more visually. The white bars show the subjects' responses before the disillusionment, and the black bars after.

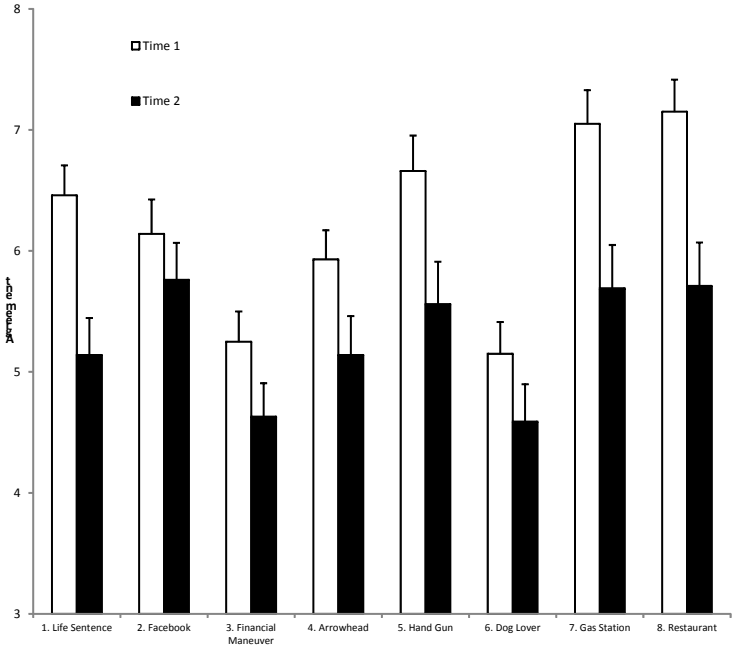

Figure 2. Graphic Display of Pre- and Post-Stimulation Averages

A follow-up study used a slightly different methodology.[8] Instead of the "within-subjects design" used in the former study, it used a "between-subjects design." That is,

instead of asking the same subjects their views before and after being "disillusioned" about the criminal justice system, the study used separate groups. Some were seriously disillusioned, some only mildly disillusioned, and some were not disillusioned at all. Then all subjects were asked the same deference and compliance questions. As Table 2 reflects, the study found that the extent of the disillusionment determined the extent to which the subjects would defer to the criminal justice system.[9] (Where two cells on a row DO NOT share the same letter, they are statistically significantly different.)

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

Table 2. Follow-Up Study Results for No, Low, and High Disillusionment

These are actually a quite surprising result, if you think about it. When adult subjects are being tested in a study like this, they come to the study with an already-formed opinion about the moral credibility of the criminal justice system. There is a limited amount that a researcher can do to shift this pre-existing view. But despite the fact that we can only slightly shift subjects' views, we nonetheless see a corresponding shift in the willingness of subjects to defer to and comply with the criminal justice system.

Another study did not collect new data but sought to determine whether the same dynamic was present in some of the very large datasets of previously collected survey data.[10] A regression analysis gave the results shown in Table 3.[11] The moral credibility measure in the study explains more of the variance in the “willingness to defer” measure than any of the other measures. In fact, it is the only predictor that is statistically significant.

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

Table 3. Regression Analysis Results

One could summarize the conclusions of the empirical studies this way: Criminal law rules that deviate from the community's notions of justice are not cost-free, as has generally been assumed in the past. Rather, when the criminal law adopts rules or practices that produce criminal liability or punishment that is seen as unjust or as a failure of justice, the system suffers a loss in effectiveness. To be most effective, the criminal justice system should try to distribute liability and punishment in accord with the shared judgments of justice of the community it governs. In that way, it can build moral credibility and, in turn, gain effectiveness by harnessing the power of social and normative influence.

(I have detailed elsewhere the kinds of instances in which I believe a society ought to deviate from the community's views, in order to promote a societal good by seeking to change community views. But a criminal law can help change community views only if it has previously earned a reputation as a credible moral authority whose views should be given weight.[12])

III. Is It Possible to Have the Criminal Law Track Community Views?

Part II suggests there is practical value in having criminal law track the justice judgements of those it governs, but one can imagine, and some have expressly made, a variety of arguments for why this, even if it were theoretically true, simply is not practically possible: people's notions of justice are simply too vague to be the basis for creating criminal law rules and, even if they were not, people simply disagree about notions of justice so it is not possible to determine a single community view. Indeed, some have argued that people's views about criminal liability and punishment aren't based on desert (moral blameworthiness) in any case, but rather upon principles of deterrence and incapacitation of the dangerous.

1. Notions of Desert as Hopelessly Vague

A common objection to empirical desert as a distributive principle is its supposed vagueness.[13] Other critics may be willing to concede that moral blameworthiness is not a hopelessly vague concept, that it has some meaning, but would make a related but

slightly different criticism: Desert cannot specify a *particular amount* of punishment that *should* be imposed; it can only identify a *range* of punishments that *should not* be imposed because such punishment would be seriously disproportionate.

These complaints are based in part on a failure to appreciate the specific demands of desert and of people's intuitions about it. The confusion arises in part from the failure to distinguish two distinct judgments: setting the endpoint of the punishment continuum and, once that endpoint has been set, ordinally ranking cases along that continuum. Every society must decide what punishment it will allow for its most egregious case, be it the death penalty or life imprisonment or 15 years. Once that endpoint is set, the distributive challenge that desert must guide is to determine the relative blameworthiness of different offenders – an ordinal ranking of offenders according to their relative blameworthiness.

Because people make very nuanced judgements about the relative blameworthiness of different cases and because there is a limited punishment continuum (as punishment amount increases, the size of meaningfully different punishment units also increases), the result is a specific amount of punishment for each particular offense. That amount of punishment is not the product of some magical connection between that violator's offense and the corresponding amount of punishment. Rather, it is the specific amount of punishment needed to *set the offender's violation at its appropriate ordinal rank* according to blameworthiness, relative to all other offenses. If the endpoint of the punishment continuum were changed, the appropriate punishment for each offender would change accordingly.

Those who complain that empirical desert is vague seem to assume (incorrectly) that it must provide a universal, absolute amount of punishment as deserved for a given offense no matter the time or the jurisdiction. But the real demand of empirical desert, at least as lay persons see it, is to ensure that offenders of different blameworthiness are given appropriately different amounts of punishment, each to receive an amount that reflects his blameworthiness relative to that of others. What critics see as vagueness or uncertainty about deserved punishment arises not from any vagueness in the ordinal ranking of offenses according to offender blameworthiness but rather arises from differences in the punishment-continuum endpoint that different societies adopt or that different people would want their society to adopt. However, once that endpoint is set, the distribution of punishment to offenders according to empirical desert suffers no vagueness or uncertainty.

But this does not fully settle the vagueness complaints. Some writers argue that even ordinal ranking is something that can be done only in the vaguest terms; establishing specific rankings is impossible. The claim is that ranking offenses according to blameworthiness is beyond the ability of people's intuitions of justice. People can roughly distinguish between "serious" and "not serious" cases but cannot provide the nuance needed to do more.

That claim is empirical and empirically it is false. The evidence from a wide variety of studies is quite clear: Subjects display a great deal of nuance in their judgments of blameworthiness. Small changes in facts produce large and predictable changes in punishment. The empirical evidence suggests that people take account of a wide variety of factors and often give them quite different effect in different situations. Alexis Durham offers this summary: “Virtually without exception, citizens seem able to assign highly specific sentences for highly specific events.”[14] People's intuitions of justice are not vague or simplistic, but rather sophisticated and complex.

Past research on lay intuitions of justice has included a wide range of topics, including such areas as the objective requirements of offenses, complicity, attempt, causation; the culpability requirements of offenses, liability doctrines including mistake, accident, voluntary intoxication, partial individualization of reasonable person standard for negligence; the justification doctrines of defensive force, law enforcement use of force; the excuse doctrines of insanity, immaturity, involuntary intoxication, and duress, as well as other general defenses, such as entrapment; grading doctrines, such as those relating to sexual offenses and homicide offenses; and extra-legal punishment factors, such as remorse, forgiveness, hardship, and good-deeds. Research of lay judgements of justice has also been undertaken to test empirical claims of criminal law theoretical literature, testing competing scholarly theories, such as those relating to justification defenses and to offense of blackmail, as well as testing claims about the nature of the shift from common law to modern American criminal codes.

2. Hopeless Disagreement as to Notions of Desert

In response to the suggestion that the criminal law should look to the community view, one might challenge: what community? Different communities may have different views. Which community view should the law look to? The short answer is this: look to the community that will be governed by the law at issue. If the question is the formulation of a provision of the state's criminal code, then look to the state as the relevant community. If the question is the sentencing practice in a particular city, look to that city's residents.

A related objection to using empirical desert as a distributive principle is that, even if individuals may have a clear and specific notion of what desert demands, people disagree among themselves. But, as with the claim that judgements of justice are hopelessly vague, this common wisdom simply does not match the empirical reality.[15] The studies show that there can be widely-shared intuitions about the relative blameworthiness of different cases, at least with regard to a "core" of wrongdoing: physical aggression, taking property without consent, and deceit in exchanges.

One recent study illustrates the striking extent of the agreement.[16] Subjects were asked to rank order 24 crime scenario descriptions according to the amount of punishment deserved. Despite the apparently complex and subjective nature of such desert judgements, the researchers found that the subjects had little difficulty performing the task and displayed an astounding level of agreement in their ordinal ranking.

A statistical measure of concordance is found in Kendall's W coefficient of concordance, in which 1.0 indicates perfect agreement and 0.0 indicates no agreement. In the study, the Kendall's W was .95, an astounding result. (One might expect to get a Kendall's W of this magnitude if subjects were asked to judge an easy and objective task, such as judging the relative brightness of different groupings of spots. When asked to perform more subjective or complex comparisons, such as asking travel magazine readers to rank eight different travel destinations according to their level of safety, one gets a Kendall's W of .52. When asking economists to rank the top 20 economics journals according to quality, one gets a Kendall's W of .095.)

Even more compelling, the astounding level of agreement cuts across all demographics. People from very different backgrounds, situations, and perspectives all

agreed upon the relative blameworthiness of the 24 offenders. Similar conclusions are found in cross-cultural studies. The level of agreement is strongest for those core wrongs with which criminal law primarily concerns itself -- physical aggression, taking property, and deception in exchanges -- and becomes less pronounced as the nature of the offense moves farther from the core of wrongdoing. However, the data overwhelmingly refutes the common perception that there is never agreement as to judgements of justice.

Disagreements among people's judgements of justice do exist. People obviously disagree about many things relating to crime and punishment, as the endless public debates make clear. But some appearances of disagreement are simply misleading. Poor testing methods will predictably underestimate the extent of agreement. When a test scenario is written ambiguously so that different test participants perceive the facts differently, the existence of shared nuanced intuitions of justice itself will predict different judgements among the participants. So too, when a case in the headlines has social or political implications, its relevant facts commonly will be perceived differently by different people. If people have different perceptions of the facts of a case, they are likely to have different views on the relative liability and punishment deserved.

One might wonder why core judgements of justice are so widely shared. Whether due to some evolutionarily-developed mechanism or to shared social learning, or some combination of the two, it is clear that the source of these intuitions is beyond even the powerful influences of culture or demographics. Because one does not see those differences in life experiences reflected in core intuitions, it follows that they must be somehow fixed, and therefore will be resistant to attempts by social engineers to manipulate them, at least using the kinds of intrusions on personal autonomy that modern societies would permit.

The point here is not to say that our existing intuitions of justice are good or bad. Rather, they are the reality, and effective social engineers must deal with the world as it exists, not as they wish it was. The criminal justice system must take account of these existing shared intuitions when in formulates its criminal law rules.

3. People's Natural Judgements About Punishment Are Based on Deterrence or Incapacitation, Not Desert

A third kind of criticism leveled against using empirical desert as the basis for distributing criminal liability and punishment is that people's punishment judgements are not really based on desert but rather on factors relating to effective deterrence or incapacitation. That is, when people ostensibly decide what punishment an offender should get, they are really deciding how much punishment is needed to deter or incapacitate. Having criminal law track people's judgments would not produce a desert distribution based on moral blameworthiness but a utilitarian crime-control distribution based on deterrence and dangerousness.

Again, however, the view does not match the available data.[17] Studies examining the criteria on which people rely on when making punishment judgments have found it to be desert – the offender's perceived moral blameworthiness. People's punishment judgements typically ignore deterrence or incapacitation concerns.

For example, one such study exploring whether desert or incapacitation are the driving force in laypersons' judging criminal liability and punishment gave participants

ten short descriptions of criminal cases, which were generated by combining five levels of case seriousness (theft of a CD, theft of a valuable object, assault, homicide, and assassination) with two levels of criminal history (no prior history, history of actions consistent with the crime committed). Participants were asked to assign a proper punishment to each case without any indication as to what that decision should be based upon, using a 7-point scale of punishment severity and a 13-point scale of criminal liability grades. Participants were thereafter asked to reconsider the scenarios and assign punishments from a just deserts perspective and from a incapacitation perspective.[18]

Punishment assignments based on just deserts were closely aligned with the original intuitive decisions, while punishments assigned using the incapacitation criteria were not. The study's authors conclude, "What this suggests is that the default perspective of sentencing is indistinguishable from the just deserts perspective, [and both the default and explicit desert perspectives] are significantly different from the incapacitation perspective." Other studies, which pitted justice against deterrence, reinforce this conclusion. People's intuitive default for assigning criminal liability and punishment is just deserts. While participants explicitly endorse deterrence justifications for punishment, they actually meted out sentences "from a strictly deservingness-based stance."[19]

IV. Reconceiving the Classic Retributivist-Utilitarian Debate

The research findings suggest an important twist in the classic punishment-theory debate. That debate has always seen two opposing camps: On one side are the retributivists, who urge distributing punishment according to desert because they see doing justice as a value in itself, and therefore needing no practical justification. On the other side are the crime-control utilitarians, who would distribute punishment so as to avoid future crime. They believe that punishment can be justified only by the benefits, specifically future crime reduction, that it can provide. Traditionally this meant distribute punishment to optimize the deterrence of future crime or the rehabilitation or incapacitation of dangerous offenders.[20]

The two opposing camps would propose punishment of different people and different amounts, because they look to different criteria: The retributivists, wanting to do justice, would look to an offender's moral blameworthiness, as defined by moral philosophers. The utilitarians, who want to reduce crime, would look to what would most effectively deter, rehabilitate, or incapacitate potential offenders. Historically, these two camps have been seen as diametrically opposed and unavoidably in conflict. The two goals – doing justice or fighting crime – commonly conflict and, when they do, one must choose between them. But the recent empirical studies suggest that the picture is actually quite different. These two positions – the retributivists versus the utilitarians – may not be so entirely incompatible.

As the recent studies suggest, the best way to fight crime may be to do justice. Thus, the utilitarians ought to be interested in "empirical desert" (shared community judgements of justice). And the retributivists ought to be interested in it as well. Empirical desert is not the transcendent deontological desert of moral philosophers but, given the obvious difficulties of operationalizing the latter (moral philosophers seem to

disagree on many if not most issues), empirical desert may be the best feasible approximation of deontological desert that one can hope for in the real world.

V. THE AMERICAN DEBATE: THE DISUTILITY OF INJUSTICE

This perspective is consistent with recent developments in the US. The American Law Institute, which is something like the national academy for law in the US, promulgated the Model Penal Code in 1962. In the several decades following, about three-quarters of the states have since codified their criminal law in ways modeled after that code. The Model Code was amended a few years ago for the first time in the nearly half century since its promulgation. The amendment revised the statutory section setting out the purposes of the code and how its provisions are to be interpreted. The new Model provision sets doing justice – looking to the moral blameworthiness of the offender – as the primary and inviolable principle for determining who should be punished how much.[21]

While this dramatic reform is consistent with the recent studies discussed above, some American scholars had reservations about the shift to moral blameworthiness. The concerns are of two sorts. One group was concerned that the shift to focusing on desert was giving in to the "retributivists" and was a defeat for those concerned about effective crime control.[22] But the empirical studies discussed above can help allay those concerns, because they show that doing justice in the community's view can actually improve the criminal law's crime-control effectiveness. By building the criminal law's moral credibility with the community, it can better harness the powerful forces of social and normative influence. (As I develop in my book, *Distributive Principles of Criminal Law*, crime-control utilitarians should be comfortable with empirical desert as a distributive principle not only because of its crime-control benefits but also because of the comparative weakness of the crime-control benefits of the traditional principles of deterrence and incapacitation.[23])

But another group of American scholars had a very different concern. They feared that a deference to community views of justice would make the criminal justice system extremely punitive, which they would very much disapprove. They noted, for example, that democratic action had brought about a series of modern crime-control programs that seemed, in their view, to impose harsh and unjust sentences. They feared that giving a greater deference to community views would make the criminal law even more draconian than it already was.[24]

I understand and sympathize with this view, but let me explain why I think it is seriously misguided. These scholars are correct in pointing out a variety of modern criminal law rules that do in fact generate serious injustice, but they are wrong to think that these rules reflect shared community notions of justice. On the contrary, these modern rules were designed not to do justice but rather were efforts to increase crime-control without regard to whether they did injustice. That is, when legislatures adopted these kinds of programs, they did so not because the community saw these rules as just but rather because crime-control experts had told legislators that these programs would reduce crime.

Let me give six examples of the kinds of modern programs that are at issue here – each adopted because it was thought to improve the control of crime.[25] The "three strikes" doctrine provides for long prison terms for an offender who has two previous

criminal convictions. High penalties for low-level drug offenses are thought to be useful in providing an added deterrence. Many jurisdictions have adopted rules that reduce the age at which an offender is prosecuted as an adult and thus is subjected to the full force of criminal penalties. Many jurisdictions have narrowed or eliminated the insanity defense, as a way of taking better control over people whose mental illness can cause harm. Some jurisdictions use what are called "strict liability" offenses, which do not require that the offender had a culpable state of mind toward the offense – that is, they do not require a showing that the offender committed the offense purposely, knowingly, or recklessly. Finally, the "felony murder rule" provides that anyone causing a death even entirely accidentally during the commission of a felony is liable for murder, the most serious form of homicide, which normally requires that the offender intentionally caused the death. Not every application of these doctrines produces injustice, but the doctrines are formulated such that unjust sentences – punishment more than an offender deserves – are not uncommon.

Recent empirical studies show that the criminal liability and punishment generated by these doctrines generate results that seriously conflict with peoples' shared intuitions of justice. In one recent study, subjects were asked to rate the relative blameworthiness of a variety of cases, each of which dealt with one of the six crime-control doctrines just listed.[26] (Each of the cases used was a real case, in which the doctrine was applied as it was designed to be.) The subjects' views were then compared to the punishment judgements reflected in the legal rules. Figure 2 shows the results.[27]

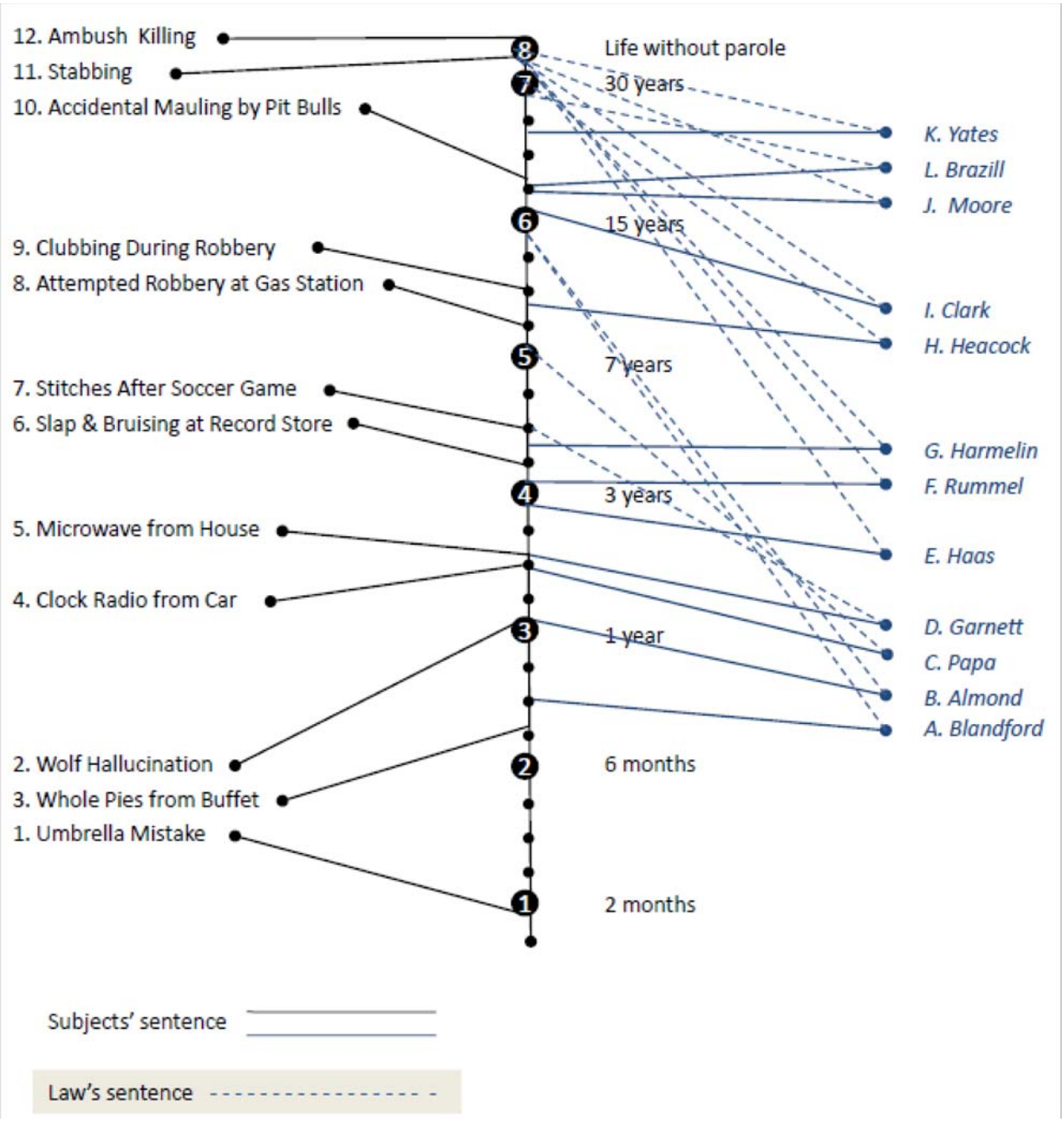

Figure 3. Comparison of Lay Verses Legal Judgements of Seriousness of Crime-Control Cases

The twelve cases listed on the left are what might be called "milestone cases." They provide a range of cases that mark out points of comparison along the full length of the continuum of offense seriousness and punishment. The solid lines from the cases to the center line show how the subjects "sentenced" each of these cases. Note that punishment scale provided is exponential rather than linear. Moving from ❶ to ❷ triples the punishment (from 2 months to 6 months); just as moving from ❸ to ❹ triples the punishment (from 1 year to 3 years). (This reflects both the approach of criminal code offense grading schemes and the way lay persons think about punishment

differences: The more serious the punishment the larger the noticeably different unit of punishment.)

The cases on the right are the "test offenses," each relying upon one of the modern crime-control doctrines noted above. The subjects"sentenced" the offender in these cases to sentences at various points along that punishment continuum – scattered among the various “milestone cases.” For example, the subjects saw the Haas case (a strict liability case) as more serious than the theft of a radio from a car but less serious than the theft of the microwave from a house. The solid lines on the right (from each case to the punishment scale) show the amount of punishment that the subjects would impose in each of the test cases.

The important point here is to look at the dotted lines on the right. The dotted lines show the punishment that the law would and did actually impose in these cases. Compare each dotted line with the solid line associated with the same case. As you see, the law's punishment is dramatically higher than that imposed by the study's subjects. The difference is even more striking when you take into account that the punishment continuum used here is exponential. The large difference in slope between the solid line and the dotted line for each test case shows that the punishment the law imposes is commonly many times higher than what study's subjects would impose.

How could such a discrepancy occur in a democracy, where the laws are enacted by elected representatives of the people? This conflict of criminal law with community judgments of justice arises for two reasons.[28] First, as noted above, the doctrines that generate these results have been adopted because they were thought to reduce crime. That is, the lawmakers were intentionally sacrificing justice because they were told it would reduce crime. Second, there is an unfortunate distortion effect in American politics when it comes to legislation relating to crime. Politicians have a tendency to exaggerate the seriousness of the crime problem and to be overly optimistic that legislation will have an effect in reducing crime. It is also common that legislators use crime-related legislation as a vehicle to make a reputation with the voters to get elected, even if the legislation really will not reduce crime.

Another misleading source of community views are so-called public opinion surveys, which purport to show public support for some political initiative. But these surveys are more often a test of subjects' politics than of their judgements of justice. When asked questions about abstract policies, the surveys get the test subjects' allegiance or rejection of the politics behind the policy. If you ask people whether they support "three strikes" legislation, for example, those who count themselves as conservative will support the issue because they know it to be part of the conservative political view. But we know from more responsible testing than "public opinion" polls, as with the laboratory experiment reported above, that conservatives as well as liberals will in fact see real three-strikes cases as dramatically less serious than the law treats them, contradicting the premise of the three-strikes policy.

The original point of the discussion here was some scholars' fear that shifting the criminal law to track community views would create draconian rules. In truth, however, the modern programs producing the unjust sentences to which these people object – three-strikes, felony-murder, etc. – do not reflect community views of justice, but rather conflict with them. Relying upon community views of justice would not encourage draconian punishments but rather would lead criminal law to discard rules, like these six, that produce what the community sees as unjust punishment. To worry that community views are draconian is to confuse people's judgements of justice with

politicians' rhetoric. The empirical studies on empirical desert could in fact serve as an important antidote to false political claims about what the community thinks is just.

Moreover, because people do not have fixed intuitions about the general severity of punishment – different societies can and do have noticeably different severity levels – reformers could over time shift a society's expectations toward lower severity. It would be a mistake to try to do so abruptly, for it might undercut moral credibility, but one could regularly reduce punishment levels across the board by an amount that would seem trivial in itself. For example, as an effort to reduce the overall cost of imprisonment on strained state budgets, one could reduce all sentences by five percent, and could do so repeatedly over many years.

VI. THE CHINESE DEBATE: THE DANGERS OF CONSIDERING COMMUNITY VIEWS IN THE DISPOSITION OF INDIVIDUAL CASES

I recently had occasion no give a series of lectures in China about these issues, including the idea of having criminal law track community views. There is serious debate in China about these issues but, interestingly, it is along quite different lines than those of the American debate.

One group of Chinese academics very much welcomes the notion of having criminal law based upon "empirical desert" – that is, derived from social science studies of shared lay judgements of justice. Chinese culture has had a long tradition of seeing wisdom in the people. It is said to be a classic Confucian theme. But that tradition has been used, these academics worry, to justify the increasingly common practice by newspapers or internet bloggers or others to undertake a public campaign for or against a particular defendant in a current case.

When a case attracts the attention of a newspaper or internet blogger, who presses a public campaign of hostility or of favoritism, one might conclude that "the people's view" is important to follow, that prosecutors and judges ought to defer to the expressions of views in such public campaigns. But if building the moral credibility of the criminal law is the goal, then giving influence to these kind of public campaigns is dangerous because it invites a result that longer-term, after passions cool, may be seen as unjust and thus serve to undermine the system's long-term reputation with the community.

In one case, for example, the defendant, Fu Zhongtao, struck and killed a 10 year old girl.[29] He was driving a Lincoln sedan, which showed him to be a rich person. The media played on the people's anti-rich bias and gave great attention to the case, fanning a public outrage over the offense. Fu was sentenced to death and executed. (It was only later revealed that Fu bought the car second hand and it was about to be scrapped, a fact omitted from the media coverage before the execution.)

In another case, the Police Commissioner Zhang Jinzhu at a police station in Zhengzhou, Henan Province, was driving drunk and hit a person on a bicycle. He drove away from the scene, intending not to report it. Unknown to him, the cyclist was stuck under his car and his driving away caused the cyclist's death. Because of a standing concern about official misconduct, the media continuously featured the case in its headlines, whipping up anger in the community and demanding that Zhang be given the death penalty. There was no indication that Zhang knew the cyclist was under his car,

and normally would be sentenced to no more than seven years for negligent homicide, but the courts bowed to public pressure and sentenced him to death.[30]

Let me suggest a variety of ways in which public campaigns about a particular case can promote results that later, upon closer examination and more thoughtful reflection, may be seen as unjust. First, the public reaction to a case may depend upon false or incomplete reporting of the true facts. The account of a case given in a newspaper article or an Internet blog is necessarily only a partial presentation of the facts presented at a fair trial, where both prosecution and defense have an opportunity to tell their full story. And when newspapers or bloggers give their shortened version of the facts, it is common for them to select those facts consistent with their point of view and to omit facts that are inconsistent with it. A distorted presentation of the case facts can produce only a distorted view of the liability and punishment that is deserved.[31]

Public influence in deciding individual cases also is a problem because some people may be biased in their judgments because of a defendant's ethnicity, religion, age, gender, political views, family affiliations, race, social background, sexual orientation, or, as in the Fu case, his apparent economic status.

Further, we know from social science research that even if one tries to be unbiased in one's judgments, it is sometimes difficult to do so. People tend to be more sympathetic to defendants who are like themselves, for example, and are less sympathetic to defendants who are different from themselves. The beauty of relying upon empirical research to determine community judgements of justice is that we can determine those judgements independent of potential biases by using testing methods that exclude the personal characteristics of a defendant that might bias people's judgement. We can get the true principles of justice that guide people's assessment of blameworthiness, insulated from the unfortunate biases that may exist with regard to a particular defendant.

An even greater problem in having public views influence individual cases is the extent to which this has a defendant's liability and punishment depend upon his good or bad luck – in avoiding or in attracting newspaper or blogger attention. A defendant's criminal liability and punishment ought to depend upon what he has done and his blameworthiness for doing it. It ought not depend upon whether his case happens to attract or escape media attention, especially if the media attention is the result of political or social influence by a victim's family or friends or is prompted by the political or social views or characteristics of a defendant.

A final difficulty with giving influence to public campaigns for or against a particular defendant is that they tend to focus on the defendant at hand in isolation, and fail to put the case in the broader perspective of other similar cases. We know from social science research that people have very nuanced and sophisticated judgments about the relative blameworthiness of different cases, and feel strongly that greater punishment ought to be imposed where there is greater blameworthiness, and less punishment ought to be imposed where there is less blameworthiness. Indeed, it is this *relative blameworthiness* judgment that is at the core of a criminal justice system's reputation for doing justice.

It is getting these judgments of relative blameworthiness correct that is essential to the criminal justice system earning long-term moral credibility with the community it governs. Yet it is just that judgment – of relative blameworthiness – that is most commonly distorted when there is a public campaign about a particular case. A common effect of such a campaign is to exaggerate the seriousness of the case as

against other cases, producing a punishment that later, after passions have cooled, will stand out as excessive.

Many Chinese academics welcome the notion of empirical desert as the basis for criminal law rules because they see it as a way to give deference to the traditional "wisdom of the people" while avoiding the dangers they see in the ad hoc public campaigns like those above – a view that seems to make good sense.

The practical value of following people's views of justice, described in Part II, exists only if those views accurately reflect the judgements of the community upon thoughtful reflection. The point, recall, is to build the reputation of the criminal justice system as being an institution that the community can rely upon to do justice and avoid injustice. This means that there is danger in following the views of an unrepresentative minority of the community or in following views formed in passion and emotion that will later be seen as unjust after the heat of the moment passes. To build a reputation for being just, the criminal justice system must not simply do what it thinks is popular in the case at hand but must aim to be proud of what it has done in all its past cases.

To summarize, community views ought to be influential in *setting the rules* for criminal liability and punishment, but not in deciding individual cases. Once community views have been used to set the criminal law's rules, those rules ought to be applied the same to all offenders in all cases.

However, there are academics in China who have an important alterative view of the situation. They would support giving deference to community views in individual cases, even given its dangers. They argue that, given how corrupt and discredited the criminal justice system is, sometimes the only way of getting justice and or of avoiding injustice is to look to public campaigns that rally public support against the normal workings of the official system. Left to its own devices, they argue, the official criminal justice system commonly will look not to what is just but rather to what the political or otherwise well-connected powers find to be expedient. The public voice is the only available means of keeping those corrupting forces in check.

In one recent case, for example, a young man, Xu Ting, found that an ATM machine from which he withdrew a thousand yuan only reduced his bank balance by one yuan. He then took advantage of the malfunction and withdrew a total of 175 thousand yuan (US$27,750). He was convicted and sentenced to life in prison, but after a public outcry, his sentence was changed to five years in prison.[32]

In another case, a local official, Deng Guida, and his deputy were drunk at the Dream Fantasy City bath center. He demanded sex from a local worker who was washing clothes in a room. When she explained that she was not a sex worker, he became angry, chased her, and verbally and physically assaulted her. The victim finally stabbed him with a fruit knife to stop his aggression, killing him, and was charged with murder. The local authority tried to censor many of the details of the case because of its embarrassment over the official being very drunk in a place selling sex. When the facts did come out, the public was highly suspicious of the case and argued strongly that the victim acted in self-defense. While initially charged with murder, the woman was ultimately convicted of intentionally inflicting injury but exempt from punishment.[33]

Clearly, there are special difficulties with a criminal justice system that, due to corruption or illicit political influence, will regularly do injustice and fail to do justice. At some point do the normal dangers of direct community influence in individual cases become the lesser of the two evils? One would hope that a society could find a way to

move toward a more just system rather than having to suffer the dangers of ad hoc public influence in individual cases.

VII. CONCLUSION

Community views of justice have an important role to play in assessing criminal liability and punishment. Normally, that important role is not in pressuring prosecutors or judges to influence the adjudication of an individual case. Rather, the community's views, as established through empirical research, ought to be to set the basic criminal law rules for liability and punishment, with those rules ought to be applied the same to all defendants. A defendant should be judged by what he has done and with what culpability and capacity. His liability and punishment ought not depend on his good or bad luck in avoiding or attracting publicity by newspapers, bloggers, or others.

If the criminal justice system can earn a reputation for trying to be just in all its cases, its greater moral credibility with the community will increase its power to gain deference, cooperation, and acquiescence, which will increase its crime-control effectiveness. That is, the best way of fighting crime is by being devoted to doing justice.

NOTES

1. Colin S. Diver Professor of Law, University of Pennsylvania Law School.

2. Joseph E. Kennedy, Empirical Desert and the Endpoints of Punishment in Chapter 2 of Criminal Law Conversations, Oxford University Press, 54-55 (2009).

3. See generally Paul H. Robinson and John M. Darley, Intuitions of Justice: implications for Criminal Law and Justice Policy, Vol. 81 No. 1, Southern California Law Review, 1, 18-28 (2007) (hereinafter Implications); Paul H. Robinson et. al., The Disutility of Injustice, Vol. 85 No. 6, New York University Law Review, 1940, 1995-2011 (2010) (hereinafter Disutility); Paul H. Robinson, Distributive Principles of Criminal Law: Who Should be Punished and How Much?, Oxford University Press, 175-84 (2008) (hereinafter Distributive Principles).

4. For a more detailed discussion, see Implications, supra note 2, at 18-31; Distributive Principles, supra note 2, at 175-89.

5. For a discussion of the studies, see Implications, supra note 3, text accompanying notes 77-91.

6. See Disutility, supra note 2, at 1995-2011.

7. Id. at 2003.

8. Id. at 2004-08.

9. Id. at 2007.

10. Id. at 2016-23.

11. Id. at 2022.

12. See Paul H. Robinson, Criminalization Tensions: Empirical Desert, Changing Norms & Rape Reform, Chapter 9 in Antony Duff, Lindsey Farmer, Sandra Marshall, Massimo Renzo, Victor Tadros, eds., The Structure of Criminal Law 186-202 (Oxford 2011)

13. For a more detailed discussion and documentation, see Implications, supra note 2, at 32-35.

14. Alexis M. Durham III, Public Opinion Regarding Sentences for Crime: Does it Exist?, 21 J. Crim. Justice 1, 2 (1993).

15. For more detailed discussion and documentation, see Implications, supra note 2, at 36-38.

16. See Paul H. Robinson and Robert Kurzban, Concordance and Conflict in Intuitions of Justice, Vol. 9 No. 6, Minnesota Law Review, 1829, 1866-80 (2007).

17. For a more detailed discussion and for documentation, see Implications, supra note 2, at 38-41.

18. John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, Incapacitation and Just Deserts as Motives for Punishment, 24 L. & Hum. Behav. 659 (2000).

19. Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment, 83 J. Personality & Soc. Psychol. 284 (2002).

20. See generally, Distributive Principles, supra note 2, ch. 4-6 (explaining the distributive principles of deterrence, rehabilitation, and incapacitation).

21. MODEL PENAL CODE § 1.02 (Tentative Draft No. 1, 2007) (emphasis added):

> (2) The general purposes of the provisions governing sentencing and corrections, to be discharged by the many official actors within the sentencing and corrections system, are:
>
> > (a) in decisions affecting the sentencing and correction of individual offenders:
> >
> > > (i) to *render punishment within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders*;
> >
> > (ii) when possible with realistic prospect of success, to serve goals of offender rehabilitation, general deterrence, incapacitation of dangerous offenders, and restoration of crime victims and communities, *provided that these goals are pursued within the boundaries of sentence severity permitted in subsection (a)(i)*; and
> >
> > (iii) to render sentences no more severe than necessary to achieve the applicable purposes from subsections (a)(i) and (ii); . . .

22. See, e.g., Anthony Bottoms, *The Philosophy and Politics of Punishment and Sentencing*, *in* The Politics of Sentencing Reform 17, 39–41 (Christopher M.V. Clarkson & Rodney Morgan eds., 1995); David Larland, The Culture of Control" Crime and Social Order in Contemporary Society 13-14 (2001).

23. See generally Distributive Principles, supra note 2, at ch. 4, 6.

24. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1009 (2000); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 223-37.

25. For a more detailed discussion and for documentation, see Disutility, supra note 2, at 1949-61.

26. Id. at 1961-79.

27. Id. at 1973.

28. For a more detailed discussion and for documentation, see Disutility, supra note 2, at 1979-95.

29. Wang Zhiguang, Cao Guangyu, The case in which Ten-years-old Little Girl Killed by Lincoln Sedan will Be Tried Today, East Asia Economic and Trade News, March 3, 2005.

30. The Offender Who Killed a Ten-years-old Little Girl by Lincoln Sedan was Sentenced to Death, and Will Be Executed Today, The East Asia Economic and Trade News, April 6, 2005.

31. For example, note that the factual error in representing Fu as a rich person or, in note 28 infra, the attempt of authorities to hide the location of the killing in the stabbing case.

32. The First Instance Written Judgment of Xuting Case, http://wenku.baidu.com/view/b155a9d484254b35eefd3464.html.2012-10-11; The Final Instance Written Judgment of Xuting Case, http://www.ycxy.com/cn/lw/2010/26247.html,2012-10-11

33. See Cheng Baoxin, The Characteristics of Current China Justice Practice Exposed by Deng Yujiao case, 20 Law and Society 96 (2009).