

THE MORAL VIGILANTE AND HER COUSINS IN THE SHADOWS

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By definition, vigilantes cannot be legally justified—if they satisfied a justification defense, for example, they would not be law-breakers—but they may well be morally justified, if their aim is to provide the order and justice that the criminal justice system has failed to provide in a breach of the social contract. Yet, even moral vigilantism is detrimental to society and ought to be avoided, ideally not by prosecuting moral vigilantism but by avoiding the creation of situations that would call for it. Unfortunately, the U.S. criminal justice system has adopted a wide range of criminal law rules and procedures that regularly and intentionally produce gross failures of justice.

These doctrines of disillusionment may provoke vigilante acts, but not in numbers that make it a serious practical problem. More damaging is their tendency to provoke what might be called “shadow vigilantism,” in which civilians and officials feel morally justified in manipulating or subverting the criminal justice system to compel the system to deliver the justice that it appears reluctant to impose. Unfortunately, shadow vigilantism can be widespread and impossible to effectively prosecute, leaving the system’s justness seriously distorted. This, in turn, can provoke a damaging antisystem response, as in the “Stop Snitching” movement, that further degrades the system’s reputation for doing justice, producing a downward spiral of lost credibility and deference. We would all be better off—citizens and offenders alike—if this dirty war had never started.

What is needed is a reexamination of all of the doctrines of disillusionment, with an eye toward reformulating them to promote the interests they protect in ways that avoid gross failures of justice.

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I. INTRODUCTION

There are many good reasons for a criminal justice system to be devoted to doing justice. (“Doing justice” is meant here in its dictionary sense of giving an offender the punishment deserved¹). Many people see doing justice as a deontological value in itself, but it also has a practical value. As a wide variety of writers have observed, and as I have documented elsewhere, there is good reason to believe that a commitment to doing justice, and avoiding injustice, has important utilitarian crime-control benefits.²

A criminal justice system that fails to do justice, to earn “moral credibility” with the community it governs, can undermine its effective-

1. Justice: “reward or penalty as deserved; just deserts.” WEBSTER NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 795 (David B. Guralink et al. eds., coll. ed. 1962). In determining “just deserts,” it is not only moral philosophers, but also lay people, who are good at distinguishing among cases according to their relative moral blameworthiness. Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1846–80 (2007). While some factors are culturally dependent, there are many on which there is enormous agreement across all demographics, especially those relating to the core of criminality: physical aggression and taking without consent. *Id.* at 1876–80. People may disagree about the general level of severity within a punishment system—a disagreement that for decades masked the existence of the high agreement on relative blameworthiness—but such judgments about general severity are malleable, while shared judgments of relative blameworthiness may not be. Paul H. Robinson et al., *Realism, Punishment & Reform*, 77 U. CHI. L. REV. 1611, 1623–26 (2010).

2. The diversity of writers who have made these points includes James Fitzjames Stephen, Jeremy Bentham, Johannes Andenaes, Franklin Zimring & Gordon Hawkins, James Q. Wilson & Richard J. Herrnstein, Henry M. Hart, Jr., Herbert L. Packer, the U.S. Supreme Court, and the drafters of the ALI’s Model Penal Code. See the authorities collected at Paul H. Robinson et al., *Empirical Desert, Individual Prevention, and Limiting Retributivism: A Reply*, 17 New Crim. L. Rev. 312, 315–19, 326 (2014) [hereinafter Robinson et al., *Empirical Desert*]. For a discussion of the empirical evidence in support of these effects, see PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 141–238 (2013) [hereinafter ROBINSON, INTUITIONS OF JUSTICE].

ness in a variety of ways: (1) it can cause people to resist and subvert the operation of the criminal justice system; (2) it can short-circuit the criminal law's ability to stigmatize, an inexpensive yet powerful means of influencing people's conduct; (3) it can undermine the criminal law's ability to get compliance in grey-area cases where the condemnable nature of the prohibited conduct seems unsettled or ambiguous (think downloading music, insider-trading); and, perhaps most importantly, (4) it can undermine criminal law's role in shaping societal norms (think domestic violence, drunk driving, and date rape). In contrast, a criminal law that earns a reputation for doing justice and avoiding injustice—that earns moral credibility with its community—is one that can harness these sources of influence.

One final mechanism by which a system's earned moral credibility can promote effective crime control is its ability to avoid vigilantism. This source of influence is unique, however, in that it is asymmetrical: while the other mechanisms of influence gain power from avoiding both injustice and failures of justice, avoiding vigilantism depends only on the latter. This Article examines this vigilante dynamic and finds that its operation is also unique, and quite complicated. Failures of justice can provoke classic vigilantism—people going into the streets to impose the deserved punishment that the criminal justice system has failed to impose—but such classic vigilantism is not, as a practical matter, a serious problem in itself. The relatively low frequency of such conduct and the system's ability to effectively respond with punishment suggests the problem is at most symbolic.

There is, however, real danger in what might be called “shadow vigilantism,” in which both civilians and officials disillusioned by the criminal justice system's apparently intentional failures of justice feel morally justified in manipulating or subverting the system to compel the justice that the system seems reluctant to impose. Shadow vigilantism is more dangerous than the classic sort both because it can be pervasive and because the system has no effective means of countering it. A further source of damage comes in the predictable reaction to its common tendency to do injustice, which can then further undermine the system's reputation and its crime-control effectiveness in a downward spiral to greater tragedy.

Some failures of justice are unavoidable, and are easily understood and forgiven by the community. For example, people are likely to appreciate the natural limits on accurately reconstructing past events and the importance of being sure, beyond a reasonable doubt, about a defendant's guilt before imposing punishment. Failures for these reasons are likely to be accepted as a necessary price for avoiding injustice and wrongful convictions.

However, as Part IV details, the criminal justice system has adopted a wide range of rules and practices that it knows in advance will produce gross failures of justice where guilt is clear and where the offense is seri-

ous. Such doctrines will indeed undermine the system's moral credibility with the community. These failure-of-justice doctrines often have a rational basis—the criminal justice system promotes more values than just doing justice. Fairness in adjudication is a central concern, as are a variety of other interests, such as protecting privacy, limiting governmental intrusion in citizens' lives, and maintaining a proper separation of powers. But when these interests are advanced through mechanisms that let offenders who are clearly guilty of serious crimes go free, there is a cost of such failures of justice, both deontological and utilitarian—the failure to give deserved punishment and the lost crime-control effectiveness that flows from the system's lost credibility. These costs encourage society to seek a system that promotes its legitimate interests in ways that avoid or minimize the moral credibility costs of failures of justice.

No system can satisfy both ends of the spectrum by earning a perfect reputation for giving deserved punishment in all cases, and avoiding miscarriage of justice by inflicting undeserved punishment. The better the criminal justice system's reputation for doing justice, and for avoiding injustice, the stronger its moral credibility will be with the community it governs. The greater the criminal justice system's reputation for promoting these ideals, the more powerful its ability to affect people's conduct and their internalization of norms through the mechanisms of social influence described above will be, including avoiding vigilantism.

Among the law-abiding, vigilantism has a bad name, but probably for the wrong reason. Vigilantism is not always the KKK perpetrating a racist lynching in the dark of night. In many instances, vigilantism may be morally defensible, perhaps even morally demanded: Part II illustrates such instances. On the other hand, even moral vigilantism creates its own societal problems, which means it should be avoided where possible, as Part III explains. But that does not mean that the moral vigilantes must simply suffer in silence. Rather, it means that society has a moral obligation to hold up its end of the social contract so that its citizens are never put in the position of having to be a moral vigilante. Parts IV and V illustrate the complexity of fulfilling this obligation, and the potential damage to a society that fails to do so.

II. THE MORAL VIGILANTE

One of the earliest developments in civilized society is giving a governing entity a monopoly on violence by shifting punishment and protection duties from the individual victim or her group to the larger society, making justice and crime-control a governmental rather than an individual or small-group function. The shift is evident not only in practical reforms—the establishment of government-run police, courts, and corrections—but also in the symbolism enshrined in those institutions. Criminal cases are formally brought by “The People” or “The State,” rather than the victim. Criminal trials are typically required to be public. In the United States, criminal liability is to be decided by lay juries representing

the general population, both literally and symbolically. That symbolism helps advertise the societal nature of criminal judgments, which gives them a legitimacy, and thereby, an influence, that they would not otherwise have.

Indeed, it is this special characteristic of criminal law that is at the heart of the criminal-civil distinction. Criminal liability rests not so much on the fact that the offender has violated the victim's interest—civil liability could deal with that—but vindicates instead the violation of a society's shared norms. Indeed, many criminal offenses have little or no tort liability counterpart because they vindicate societal interests: counterfeiting is criminalized to protect the society's financial system; official bribery is criminalized to protect its political system; and bigamy is criminalized, even if consensual, to protect the institution of the family. Criminal law holds a special role in expressing societal values and vindicating societal wrongs and, to do this effectively, criminal liability and punishment must come from the society itself, not a self-appointed subgroup.

By shifting the justice and protection functions to the society, however, the individual does sacrifice her natural right to strike out against those that try to victimize her. But it is a fair trade, which is why this social contract is so universally accepted: A societal system of punishment and prevention has access to greater resources and, by virtue of its status, carries greater legitimacy, which translates into greater effectiveness from which every member of society benefits.

These virtues of societal justice help explain why vigilantism is commonly abhorred, especially in a democratic society. Vigilantism not only invites bias and risks lack of restraint, it is also antidemocratic. Its self-appointed nature undermines its legitimacy and, thereby, its normative influence.

Of course, there are occasions when the individual is thrown back into a brief state of nature, where the social contract for justice and protection can be of no help. For instance, imagine a person tries to kill you to get the money in your purse. The government's criminal justice system is nowhere to be seen. If you are to save yourself, you must act on your own behalf. Less dramatic forms of the problem can be common in everyday life, as when the tiger mother looking for that hard-to-find video game grabs it from your hands. You will need to use force against her to hang on to it, or to grab it back.

But the criminal law is not insensitive to the problem. It anticipates that sometimes people will have to act on their own, that the police cannot be everywhere. Indeed, the law typically provides detailed rules that describe just what and when a person may do what would otherwise be prohibited. *Justification defenses*, for example, allow use of force against unlawful aggressors.³ If it is necessary to protect yourself, you can shoot

3. See, e.g., MODEL PENAL CODE § 3.04 (1962).

the robber trying to kill you, or grab the wrist of the person trying to steal your video game.

But even here, the criminal law has a strong preference for having the state deal with the problem and to keep its near monopoly on the use of force. For example, you may not use force that risks serious bodily injury to the game thief, even if that is necessary to successfully maintain possession of the game.⁴ The law tells you it is better to let the thief have it, and hope that the police and courts can sort it out later. Similarly, in many states you may not use lethal force against the robber intent on killing you if you can retreat in safety.⁵ Nor can you ever act in anticipation of an attack that you know is coming; you must wait until it comes, even if that disadvantages you in your defense.⁶ In other words, the law commonly obliges a victim to sacrifice her own interests to protect the interests of the law-breaker if, from the larger societal perspective, this avoids a greater harm or evil.

Some victims will be unhappy with the sacrifices required of them.⁷ But the rules can be defended from a societal perspective that takes account of all parties' interests, even those of the law-breaker, and reduces the overall risk of escalation, even if it means sacrificing the victim's interests. It is better to defer to the courts, it is argued, even if the chance of their success in that instance is remote.

But what if the system fails to uphold its end of the social contract in more serious ways? What if the system's policies and practices let crime become a serious problem in the lives of citizens and it does not respond to popular pleadings? What if it lets crime become a serious problem for some minority of society but not others? What if the system, having acquired its near-monopoly on the use of force, simply becomes indifferent to citizen's judgments that doing justice and fighting crime are important? Obviously even in such a situation, law remains intact, and it is still illegal for an individual to do anything beyond the strict rules of justification defenses. But, would it be so clearly immoral to ignore the legal limits in such a situation? Is there such a thing as a moral vigilante? If so, what rules would define how such a person could stay within the moral realm?

Section A offers a series of case studies in which the social contract seems to have been broken and in which the vigilante action seems quite understandable, perhaps even morally justified. Section B, inspired by these examples, offers ten rules that one might suggest to a person or

4. *E.g., id.* §§ 3.06(1)(a) & (3)(d), 3.11(2).

5. *E.g., id.* § 3.04(2)(b)(ii); Robinson et al., *The American Criminal Code: General Defenses* (Univ. of Pa. Law School Faculty Scholarship, Paper 1425, 2014), available at http://scholarship.law.upenn.edu/faculty_scholarship/1425 (collecting authorities).

6. The use of defensive force until the threat is imminent, under the common law formulation, or the use of such force is "immediately necessary," under the formulation of Model Penal Code ("MPC") § 3.04(1). See PAUL H. ROBINSON & MICHAEL CAHILL, *CRIMINAL LAW* 512 (3d ed. 2011).

7. The growing popularity of the "stand your ground" rule, which creates an exception in some situations to the MPC rule requiring retreat before use of deadly force, probably reflects such unhappiness. *Id.* at 331–32.

group contemplating moral vigilantism. If these rules are satisfied, at least in spirit, if not in rigid detail, a group might have grounds to consider themselves morally justified, even if not legally so.

A. *Filling a Breach of the Social Contract*

Although to many people the classic vision of vigilantes is the Ku Klux Klan lynch mob, the term had a different association in its original use. In 1851 San Francisco, citizens publicly announced the formation of a committee to provide the protection and justice that the corrupt criminal justice system of their newly created government would not. The “Vigilance Committee,” as it called itself—from the Spanish word for guard or watchman⁸—advertised seeking members and published reports on what it did and why.

1. *San Francisco Vigilance Committee*

The city of San Francisco was created almost overnight with the discovery of gold in 1848.⁹ Statehood followed soon after,¹⁰ which brought elections for offices in the new government. But many of those who ran for office had neither local roots nor an interest in the city’s future. The transient electorate knew little of the candidates and was often happy to trade a vote for a free beer. They elected many rascals and the result was a criminal justice system as often in league with the criminal gangs as it was fighting them.¹¹

When the situation became intolerable, citizens were finally prompted to form their Vigilance Committee, which arrested and publicly tried offenders.¹² The Committee ultimately broke the worst of the gangs, “the Hounds,” and ran them out of the city.¹³ When government officials threatened to put some of the Vigilance leaders on trial, hundreds of Committee members came forward insisting that they too must be tried.¹⁴ The planned prosecutions stalled.¹⁵ When new elections brought more responsible officials, the Vigilance Committee disbanded itself.¹⁶

8. RAY ABRAHAMS, *VIGILANT CITIZENS: VIGILANTISM AND THE STATE* 4 (1998).

9. *See, e.g.*, ROBERT M. SENKEWICZ, *VIGILANTES IN GOLD RUSH SAN FRANCISCO* 14 (1985).

10. *See, e.g., id.* at 16.

11. *See, e.g.*, MARY FLOYD WILLIAMS, *HISTORY OF THE SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1851* 105, 107, 143–44, 214–19 (1921).

12. *Id.* at 203–04, 212.

13. *Id.* at 107 n.51.

14. *Id.* at 217.

15. *Id.*

16. *Id.* at 373.

2. *Lavender Panthers*

Well-motivated vigilantism exists outside of Wild West history. A century after the Vigilance Committee's battle with an ineffective criminal justice system, San Francisco was still seeing vigilante action, this time by gays being regularly bashed by homophobes as police stood by. Three hundred gay harassment cases were logged in 1973 alone, and many more than this went unreported to the unsympathetic police.¹⁷

In one typical incident, Reverend Ray Broshears called police when young men were harassing people leaving his Helping Hands Gay Community Service Center.¹⁸ The police came but did nothing except tell the harassers that it was Broshears who had called them and that it was he who planned to file a complaint against them.¹⁹ As soon as the police left, the young men beat Broshears severely.²⁰

Broshears was a Pentecostal evangelical minister who raised money for gay causes, helped homeless teenagers find shelter, and helped found the Gay Alliance.²¹ He picketed large companies to protest discriminatory hiring practices and helped organize San Francisco's first Gay Pride Parade.²² He had watched the growing power of the Black Panthers in nearby Oakland and after his beating he decided that his helping hand was not enough.²³ What was needed was an organization that would aggressively defend the rights of gays by providing the protection and justice that the system had shown itself unwilling to do.

In July 1973, he formed a new activist group that called itself the Lavender Panthers.²⁴ Its members did not carry guns, but were trained in various martial arts and patrolled areas known for a high incidence of gay bashing. Typically, harassers would wait outside a known gay bar, and then begin shoving the patrons as they left in order to provoke a response that could be used as an excuse to escalate their attack to a full-scale beating.²⁵ With the advent of the Lavender Panthers, however, the pattern changed. In one typical incident, when gay bashers began shoving and beating patrons outside the Naked Grape, a well-known gay bar, the Lavender Panthers pulled up in their trademark gray Volkswagen bus,

17. *The Sexes: The Lavender Panthers*, TIME (Oct. 8, 1973) <http://www.time.com/time/magazine/article/0,9171,908008,00.html>; see also, e.g., *Lavender Panthers Patrol SF Streets to Protect Homosexuals*, LOS ANGELES TIMES, July 8, 1973, at 3; *The Purple Gang: San Francisco Gays Turn Vigilante*, MILWAUKEE JOURNAL, July 10, 1973, at 25, available at <http://news.google.com/newspapers?nid=1499&dat=19730710&id=jHYfAAAAIIBAJ&sjid=xigEAAAIAIBAJ&pg=1420,624726>; Ivan Sharpe, *Vigilantes in Lavender*, LEADER-POST, July 10, 1973, at 11, available at <http://news.google.com/newspapers?id=onJVAAAAIIBAJ&sjid=uTwNAAAAIIBAJ&pg=1261%2C1382772>.

18. *The Sexes: The Lavender Panthers*, *supra* note 17.

19. *Id.*

20. *Id.*

21. *Id.*; see also *Lavender Panthers Patrol SF Streets to Protect Homosexuals*, *supra* note 17, at 3.

22. *Lavender Panthers Essay*, GOOGLE SITES, <https://sites.google.com/site/psabrittanybrock/the-lavender-panthers> (last visited Jan. 9, 2015).

23. See *The Sexes: The Lavender Panthers*, *supra* note 17.

24. See *id.*

25. See *id.*

grabbed pool cues, and began beating the harassers who quickly fled.²⁶ In this particular incident, the gay bashers made a tactical error in retreating without their car and were forced to return to the bar later to try to negotiate its return.

Another common strategy of the Lavender Panthers was to tag the harassers with red spray paint and use whistles to call attention to their harassment.²⁷ Within a year, the right of homosexuals to live openly in the community had gained sufficient acceptance, and the incidents of harassment had been sufficiently reduced, that the Lavender Panthers determined they were no longer needed and voluntarily disbanded their group.²⁸

The Lavender Panthers had probably never heard of the original San Francisco Vigilance Committee, but both organizations were spawned by a belief that failures of justice could not simply be tolerated, that it was sometimes both necessary and moral to take up the task that the criminal justice system was refusing to do. The social contract—by which citizens give up their right to use force and rely upon the criminal justice system for protection and justice—had been breached. Both the 1851 Vigilance Committee and the 1973 Lavender Panthers saw little choice, and complete legitimacy, in taking up their natural right to protect themselves and to do the justice that the official system had forsaken.

These are two examples of vigilante groups that can lay some colorable claim to moral, if not legal, justification. But, there are a wide variety of vigilante groups for which one might have some sympathy and understanding.

3. *Deacons for Defense and Justice*

In 1964, the Congress of Racial Equality (“CORE”) planned to stage a desegregation campaign in the city of Jonesboro, Louisiana.²⁹ In an effort to prevent this, the local branch of the Ku Klux Klan organized a motorcade to drive through a black neighborhood in the city.³⁰ The police participated, and helped cut off power to the neighborhood.³¹ It was in response to this intimidation and others like it that a group of about twenty African-American men first formed the Deacons for Defense and Justice, an armed paramilitary group, many of whose members were war

26. *Id.*

27. *Id.*, see also *Lavender Panthers Patrol SF Streets to Protect Homosexuals*, *supra* note 17, at 3; *The Purple Gang: San Francisco Gays Turn Vigilante*, *supra* note 17, at 25.

28. *Lavender Panthers Essay*, *supra* note 22.

29. Ben Garrett, *Profile: Deacons for Defense and Justice: The Use of Guns in the Civil Rights Movement*, ABOUT.COM, <http://civilliberty.about.com/od/guncontrol/a/Deacons-for-Defense.htm> (last visited Nov. 4, 2014); Elwood Watson, *Deacons for Defense and Justice*, BLACKPAST.ORG, <http://www.blackpast.org/aah/deacons-defense-and-justice> (last visited Nov. 4, 2014).

30. LANCE HILL, *THE DEACONS FOR DEFENSE: ARMED RESISTANCE AND THE CIVIL RIGHTS MOVEMENT* 37 (2004).

31. *Id.*

veterans.³² The group took on tasks of guarding activists, patrolling black neighborhoods, and protecting civil rights demonstrations from the Klan, and sometimes the police.³³ The members of the group did not publicly identify themselves for fear of sanctions by officials.³⁴

In 1965, in nearby Bogalusa, a local black paper mill manager named Robert Hicks had two CORE activists staying in his home with his family.³⁵ The night the activists arrived, the Bogalusa Police Chief, Claxton Knight, came to the house and told Hicks that he should turn over the CORE activists so they could be escorted out of town.³⁶ Hicks was told that the Klan would pay him a visit if he did not comply.³⁷ Klansmen also called the house, threatening to firebomb it.³⁸ Hicks called friends who later arrived to guard the house.³⁹ The Klan chose not to appear.⁴⁰ Three weeks later, in response to the ongoing threat, Hicks joined with the leaders of the Jonesboro Deacons to form the first satellite branch of the Deacons in Bogalusa.⁴¹ In similar fashion, the Deacons eventually spread across Mississippi, Alabama, and Louisiana.⁴²

In another incident, a few weeks after the formation of the Bogalusa chapter, Hicks' wife rescued an activist from his car after it had been surrounded by a group of angry Klansmen, by drawing a pistol and facing down the Klansmen.⁴³ Under the cover of night, the Klansmen returned and fired upon Hicks' home.⁴⁴ But the Deacons had heard this was going to happen, and seven members sheltered in the Hick's home returned fire.⁴⁵

The Deacons' activities were at first not well received by some Black civil rights groups and activists at the time. The nonviolent Dr. Martin Luther King, Jr. denounced their acts of "aggressive violence."⁴⁶ But increasing danger and the group's effectiveness ultimately convinced King to allow the Deacons to accompany him as security for the March Against Fear from Memphis to Jackson in 1966.⁴⁷ The Deacons also pro-

32. See *id.* at 38; Garrett, *supra* note 29; Watson, *supra* note 29.

33. See, e.g., HILL, *supra* note 30, at 30; George E. Hardin, *Deacons Largely Uncredited for Defense of Civil Rights*, TRI-STATE DEFENDER, May 20, 2010, available at <http://www.deaconsfordefense.blogspot.com/p/sources.html>; Mike Marqusee, *By Any Means Necessary*, NATION (July 5, 2004), <http://www.thenation.com/article/any-means-necessary?page=0,0#axzz2YBAyFlwu>; Douglas Martin, *Robert Hicks, Leader in Armed Rights Group, Dies at 81*, N.Y. TIMES, Apr. 24, 2010, www.nytimes.com/2010/04/25/us/25hicks.html?_r=0&pagewanted=print; Garrett, *supra* note 29; Watson, *supra* note 29.

34. Garrett, *supra* note 29.

35. Martin, *supra* note 33.

36. HILL, *supra* note 30, 93–95.

37. *Id.*

38. Martin, *supra* note 33.

39. See Martin, *supra* note 33.

40. See *id.*

41. *Id.*

42. Garrett, *supra* note 29.

43. HILL, *supra* note 30, at 118.

44. *Id.*

45. *Id.*

46. Martin, *supra* note 33.

47. Garrett, *supra* note 29.

vided armed security for Charles Evers' desegregation campaign in Natchez, Mississippi.⁴⁸

At its height, the Deacons expanded to approximately twenty-one chapters.⁴⁹ Although the Deacons' willingness to use arms led to investigations by the FBI, that attention faded when other far more aggressive organizations such as the Black Panthers arose.⁵⁰ The Deacons eventually ceased operations in 1968, and faded into relative obscurity in the history of the civil rights movement.⁵¹

4. Reverend Dempsey's Operation Confiscation

Reverend Oberia Dempsey, pastor of Upper Park Avenue Baptist Church in Harlem, New York, in 1962, was troubled by the increasing violence and other human misery associated with growing heroin and narcotics trade in the neighborhood—he believed that Harlem alone had 40,000 dope addicts.⁵² He was also troubled by the apparent indifference or at least ineffectiveness of the authorities in dealing with the drug pushers.⁵³

He formed the Anti-Crime and Anti-Drug Committee of Harlem, based out of his church, and initially focused on advocacy and grassroots campaigns, including a 1962 rally of block associations, church groups, and other community organizations to protest the official inaction on Harlem's drug problems.⁵⁴

Dempsey also organized a campaign called "Operation Interruption," to publicize the drug problem through newspaper articles, and to engage in such activities as picketing known drug dealer hangouts, bringing police officers to known drug-dealing sites, and opening a rehabilitation center for recovering drug addicts known as the House of Hope.⁵⁵

48. Marqusee, *supra* note 33.

49. Garrett, *supra* note 29.

50. Watson, *supra* note 29.

51. HILL, *supra* note 30, at 272; *see also* Marqusee, *supra* note 33; Seth Hague, "Niggers Ain't Gonna Run This Town": Militancy, Conflict, and the Sustainance of the Hegemony in Bogalusa, Louisiana, 29 LOYOLA U. NEW ORLEANS STUDENT HIST. J., 1998, at 1, available at <http://www.loyno.edu/~history/journal/1997-8/Hague.html#3>.

52. Editorial, *Claims Harlem Has 40,000 Dope Addicts*, CHI. DAILY DEFENDER, Oct. 10, 1962, at 2.

53. *See* Malcolm W. Browne, *Pastor Organizes Militia to Combat Crime in Harlem*, N.Y. TIMES, Oct. 21, 1967, at 33; *Churches in Harlem Hurt by Crime*, WASH. AFRO-AMERICAN, Jan. 21, 1969, at 3, available at http://news.google.com/newspapers?nid=2238&dat=19690121&id=RbYIAAAAIBAJ&sjid=8_QFAAAAIBAJ&pg=2948,278620; Editorial, *Claims Harlem Has 40,000 Dope Addicts*, *supra* note 52; Editorial, *Cop Slain, 2 Attack Lawlessness in Harlem*, N.Y. AMSTERDAM NEWS, Nov. 14, 1970, at 16; Editorial, *Harlem Vigilantes Move On 'Pushers'*, CHI. DAILY DEFENDER, June 23, 1965, at 2; Editorial, *Says Harlemites Arm Themselves Because of Crime Rise in Area*, N.Y. AMSTERDAM NEWS, Oct. 21, 1967, at 7; Michael Javen Fortner, "Must Jesus Bear the Cross Alone?": Reverend Oberia Dempsey and His Citizen's War on Drugs 19 (July 11, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103902&download=yes; Natalie Shibley, *Squashing Superfly: A Harlem Minister Fights Dope*, RELIGIONS OF HARLEM (Apr. 7, 2011), <http://religionsofharlem.org/2011/04/07/squashing-superfly-a-harlem-minister-fights-dope>.

54. Fortner, *supra* note 53, at 20–21; *see also* Browne, *supra* note 53, at 3.

55. *See, e.g.*, Fortner, *supra* note 53, at 22, 36.

These activities had limited effect. According to Dempsey, “citizens fear to venture out after dark. Church members are afraid to go to their meetings at night. The law seems to be in the hands of the muggers and robbers. There’s panic among the people.”⁵⁶ Some merchants began keeping baseball bats behind their store counters because of “deep fear of robbery or other crimes.”⁵⁷

By 1965, Dempsey concluded his group must become more confrontational. They organized an armed vigilante patrol, consisting of community members and seven former police officers licensed to carry firearms.⁵⁸ Dempsey himself carried a .32 revolver and became known as the “pistol packin’ pastor.”⁵⁹ The Pastor renamed the patrol “Operation Confiscation” escalating its activities in a new initiative consisted of 200 citizen-patrol members, seeking to “watch for pushers, summon police, and where they are not forthcoming immediately, make citizen arrests.”⁶⁰ The group harassed suspected dealers and encouraged the people in the neighborhood to go after the pushers.⁶¹ If citizens had problems with pushers and were afraid to go to the police, they should come to him, he said, and he would deal with the problem.⁶²

Dempsey’s efforts were met with somewhat grudging acquiescence by the police. In reaction to the news that Dempsey had organized a militia to prevent drug crime in Harlem, local police said they “would not deny Mr. Dempsey’s basic premise,” and conceded that there were not enough officers available for crime control purposes.⁶³ As one police officer stated, “it’s a case of the good guys versus the bad guys . . . and without the good guys of the community with us, we can’t make Harlem safe.”⁶⁴

In 1969, Dempsey organized a petition to New York’s U.S. Attorney Robert Morgenthau warning, “if something isn’t done immediately, people are going to protect themselves. There’s going to be a lot of bloodshed.”⁶⁵ Dempsey also advocated for stricter penalties for drug dealers, including “death by firing squad” for dope traffickers.⁶⁶

By the early 1970s, Dempsey’s efforts had gained national attention; he was interviewed by *Ebony* magazine in 1970, in an article entitled “Blacks Declare War on Dope.”⁶⁷ After being attacked by local drug

56. Browne, *supra* note 53, at 33.

57. *Id.*

58. *Harlem Vigilantes Move on ‘Pushers,’ supra* note 53, at 2.

59. Shibley, *supra* note 53.

60. Editorial, *He Really Declares War on Dope*, N.Y. AMSTERDAM NEWS, June 19, 1965, at 6.

61. *Harlem Vigilantes Move on ‘Pushers,’ supra* note 53, at 2.

62. Oberia Dempsey, *Dope Battle ‘Lost’: The War Goes On*, N.Y. AMSTERDAM NEWS, Nov. 2, 1968, at 10.

63. Browne, *supra* note 53, at 33.

64. *Id.*

65. *Churches in Harlem Hurt by Crime, supra* note 53, at 3.

66. *Claims Harlem Has 40,000 Dope Addicts, supra* note 52, at 2.

67. *Black’s Declare War on Dope*, EBONY, June 1970, at 31; *see also* Shibley, *supra* note 53.

dealers in 1971, Dempsey encouraged citizens to arm themselves.⁶⁸ “[P]eople in Harlem should find the heaviest baseball bats around or any other type of weapon that’s sold legally to ward off these hoodlums.”⁶⁹

Dempsey’s efforts, and the rising crime problem in New York City, ultimately spurred local politicians to action. By 1973, New York was shifting away from its prior position using treatment, instead of prosecution and incarceration, to deal with the city’s drug and drug-related homicide and crime problem. Much harsher drug laws were enacted later known as the “Rockefeller drug laws,” mandating severe sentences for drug possession.⁷⁰ Among the communities most supportive of the laws was Dempsey’s neighborhood, where Black residents had run out of patience with the drug problem.⁷¹

5. *India’s Gulabi Gang (Pink Gang) of Women Vigilantes*

In 2006, Sampat Pal Devi, a forty-five year old Indian woman, was incensed by the misbehavior of her alcoholic brother-in-law, who had beaten her sister and dragged her by her hair into the streets of Banda.⁷² Located in the Indian state of Uttar Pradesh, Banda City and the greater Banda region was plagued by social, political, and economic problems, ranging from hunger, poverty, murders, and droughts, to pervasive problems of corrupt government.⁷³ The region was also known for repressive treatment of women and child marriage; it is a region where domestic and sexual abuse of women is considered a fact of life, and where people of lower castes are poorly treated.⁷⁴ Fully aware of these realities within her community, Devi understood that there was no local power that would come to the aid of her sister or any of the women who found themselves victims of violence at the hands of local men. As Devi put it, “[n]obody comes to our help in these parts. The officials and the police are corrupt and anti-poor.”⁷⁵ Knowing that the law would do nothing to help, Devi organized a group of neighborhood women to go after the vic-

68. Editorial, *Rev. Dempsey Tells Harlem to Arm Itself*, WASH. AFRO-AMERICAN, May 1, 1971, at 16, available at <http://news.google.com/newspapers?nid=2211&dat=19710501&id=HSImAAAIBA&sjid=Lf4FAAAAIBA&pg=5864.2441139>.

69. *Id.*

70. Brian Mann, *How the Rockefeller Drug Laws Changed America*, N. COUNTY PUB. RADIO, Jan. 24, 2013, available at 2013 WLNR 3751565.

71. Fortner, *supra* note 53, at 38–40.

72. See, e.g., *India’s Pink Posse*, ASIA SENTINEL (Jan. 18, 2008), http://www.asiasentinel.com/index.php?option=com_content&task=view&id=993&Itemid=34; see also Tracy Clark-Flory, *Beware the Pink Posse: Hundreds of Indian Women Clad in Pink Saris Roam the Streets Carrying Sticks and Axes*, SALON (Nov. 26, 2007), http://www.salon.com/2007/11/26/pink_posse/ (describing the Pink Posse’s cause); Amana Fontanella-Kahn, *India’s Pink Vigilantes*, DAILYBEAST (Feb. 26, 2011), <http://www.thedailybeast.com/articles/2011/02/26/meet-the-woman-behind-indias-pink-vigilantes.html> (giving examples of how the Pink Posse have helped individuals); Smriti Gopal, *Women’s Gang in ‘Pink Saris’*, DESI BLITZ (Dec. 25, 2010), <http://www.desiblitz.com/content/womens-gang-in-pink-saris> (describing the motivation behind making the movie ‘Pink Saris’).

73. *India’s Pink Posse*, *supra* note 72.

74. Clark-Flory, *supra* note 72; see also Gopal, *supra* note 72.

75. Clark-Flory, *supra* note 72.

timizing brother-in-law.⁷⁶ The women chased him down and beat him with whatever they had at hand, including metal rods and a child's cricket bat.⁷⁷

Tired of seeing the problems around her ignored by corrupt and inept officials, Devi formed a vigilante group called the Gulabi Gang (the "Pink Gang"), consisting of women dressed in trademark bright pink saris.⁷⁸ The organization would not let wife beaters and rapists go unpunished. They used police batons and bamboo rods to punish offenders that the official system would not.⁷⁹

In addition to tackling women's rights issues, the group also began confronting local wrongdoers and inept or corrupt local officials and police.⁸⁰ The group stormed a police station demanding that officials stop selectively enforcing laws because of the complaining victim's caste, and shamed officials for stealing subsidized grain designated for the poor.⁸¹ To support her operations and provide a gathering place for women to seek help, Devi opened a small center in her hometown where women could come and express their grievances and seek help.⁸²

The organization soon expanded to approximately 200 members, and then experienced explosive growth; membership numbers are now reportedly somewhere around 20,000 women, with ten district commanders operating in an area of approximately 36,000 square miles.⁸³ The group operates a number of outposts modeled on Devi's operations in Banda, providing a meeting place for women just as Devi's house does.⁸⁴

Although strictly a vigilante and activist group when formed in 2006, the Gulabi Gang eventually entered politics, partially leaving behind the beatings and apolitical stance it became famous for.⁸⁵ As of 2011, twenty-one members of the Gulabi Gang have won seats in municipality-level elections.⁸⁶ As a result of their newfound political power, the group has promoted such projects as construction and repair work of local roads, provided access to clean drinking water, and agricultural development projects.⁸⁷ Local village leaders who formerly ignored the concerns of women are now somewhat more receptive.⁸⁸ Devi, the initial founder of the Gulabi Gang, still remains its "commander-in-chief," defiantly stating that "[p]eople have tried to assassinate me, arrest me, abuse

76. *India's Pink Posse*, *supra* note 72.

77. *See id.*

78. Fontanella-Khan, *supra* note 72.

79. *See id.*

80. *India's Pink Posse*, *supra* note 72.

81. *Id.*

82. Fontanella-Kahn, *supra* note 72; *India's Pink Posse*, *supra* note 72.

83. Fontanella-Kahn, *supra* note 72.

84. *Id.*

85. *See id.*

86. *Id.*

87. *Id.*

88. *See id.*

me, and shut me up, but I won't be quiet until things improve for the women here."⁸⁹

B. *A Vigilante Code*

In the face of the system's gross insensitivity to the importance of doing justice, what are people to do? Is it possible to define what would and would not constitute legitimate vigilante action—to define a *vigilante code* that sets the preconditions to and limits of moral action? If a group were contemplating vigilante action, here are ten rules one could suggest to them so that they can reconsider their plan and stay within more morally defensible bounds.⁹⁰

1. *Do not act unless there is a serious failure of justice.* Any vigilante action will be disruptive. It cannot justify itself unless it produces more benefit than the disruption costs. For example, even if the police are lazy and indifferent and could solve the problem if they chose to do so, a pattern of petty thefts by youngsters in a market place is not likely to justify the social disruption of vigilante action, unless that vigilante action is itself of little or no disruption.

2. *Do not act unless there is no lawful way to solve the problem.* The law allows citizens to use force in defense of unlawful aggression against self, others, or property. Stay strictly within the requirements of this legally authorized force if that will provide the needed protection against lawlessness.

3. *Do not act alone.* The vigilante is one who acts for the community, not herself; vengeance is not vigilance. If your conduct is to reflect community views, that fact must be advertised by having the vigilante action be group action. The larger and more broadly-based the group, the better. Open membership would be ideal. There may be practical limits on how public some discussions can be, but the guiding principles, such as the adoption of rules (such as these rules as a charter), ought to be sought and approved by as large a group as possible.

4. *Do not cause more harm than is necessary and just, and avoid injury to innocent bystanders.* Part of doing justice means recognizing the societal interest in minimizing damage to all, even unlawful aggressors. If a person's safety and property can be protected with a punch, it ought not be defended with a shot. And, obviously, harm to innocent bystanders ought to be avoided at all costs.

5. *Before acting, be sure of the facts and take full account of all relevant mitigations and excuses.* Understand that this is a credibility contest with the official criminal justice system. To win the battle for hearts and minds, the vigilante must do it better, not worse. The point is to do justice, and justice requires taking account of the mitigations, as well as the aggravations, in a case. A vigilance committee can as easily discredit it-

89. *Id.*

90. *See supra* note 2.

self by showing an indifference to mitigations and excuses as the criminal justice system disgraces itself by showing indifference to doing justice.

6. *Show restraint and temperance, not arrogance or vindictiveness.* The goal is to be responsible, even if the government is not. Vigilante groups cannot exert themselves as the wrath of God, but just a means of shaming the government into doing what it ought to do—take justice seriously. A vigilante group must do more than just adhere to the moral-vigilante rules, it must make it clear that it is adhering.

7. *Give the government warning beforehand that it is in breach of its social contract, and give it the opportunity to fix the problem, unless it is clear that the warning would be useless.* Ideally, this means laying out the specifics of the government's failures of justice and how these failures can be avoided, as well as giving the government the time and opportunity to make things right. It is always preferable to have the official criminal justice system do justice, no matter how well-respected a vigilance committee may be. Admittedly, in some instances, the problem may be overwhelmingly obvious to all and a special notification would be senseless.

8. *Publicly report afterwards what you have done and why.* Failure to publicly take responsibility for your actions simply adds to the problem of perceived lawlessness. The community cannot judge the justness and reasonableness of a vigilance committee's actions unless it is given the details of what has been done and why it needed to be done.

9. *Respect the full society's norms of what is condemnable conduct.* Do not act in pursuit of justice for an offense unless it is clear that the larger society sees the offender's conduct as truly condemnable. A peculiar, perverted view of the world lacks the basis for moral vigilante action.

10. *If it becomes clear that the problem cannot be fixed through vigilante action, then withdraw from further action.* If it becomes clear that the criminal justice system literally cannot be changed, then further action toward that goal cannot achieve its purpose. Vigilante action must be a temporary and transitional state that moves the system to fix itself, not a permanent substitute for official conduct.

If you cannot abide by these rules, do not act. Justice is important and it ought to be pursued. But vigilante action that does not take account of the preconditions and limitations that morally justify it is doomed to do more harm than good to the community and, ultimately, to the cause of justice.

Vigilante action is never legally justified—if it were, by definition it would not be vigilante action—but if a group follows these ten rules, it might at least be morally justified.

Certainly, each case in Section A can make a plausible argument that the criminal justice system's failures to do justice morally authorized them to engage in conduct that was technically criminal and legally unjustified. The 1851 San Francisco Vigilance Committee would seem to

satisfy most of these ten requirements. Many of the other cases described above may satisfy many, if not most of the requirements, although it may depend upon the details of each of their specific criminal acts.

III. SOCIETAL PROBLEMS CAUSED BY VIGILANTISM THAT IS MORALLY JUSTIFIED

As Part II demonstrates, vigilantism cannot only be associated with the KKK hiding behind bed sheets for a racially motivated lynching. But even moral vigilantism can have negative consequences. In one sense vigilantism is like war: it is never a good thing, but sometimes it is the best of bad options. Below are four examples of the kinds of problems that can arise in morally-justified vigilante action.

A. *Going Too Far Once Criminal Law's Bright Line Is Crossed*

Criminal law, properly drafted, offers a bright line for permissible conduct—including what is justified in response to criminal conduct undeterred by the criminal justice system. But once that line is crossed, there are few obvious signposts telling the vigilante not to go a little further. Consider three vigilante campaigns each attempting to deal with the same problem of drugs and related violence that Reverend Dempsey's *Operation Confiscation* had some success in dealing with by eventually forcing the criminal justice system to take drug dealing more seriously.

Reverend Dempsey's struggle with Harlem's heroin problem in the 1960s was mirrored in the crack cocaine epidemic in the 1980s. The three examples of vigilante responses—from Philadelphia, Detroit, and Baltimore—took different paths in addressing the problem.

1. *Mantua Against Drugs ("MAD")*

The Mantua neighborhood of West Philadelphia was hard hit by the crack cocaine epidemic. An economically depressed area—with forty percent of its population below the poverty line and one of the worst infant mortality rates in the country—Mantua had an assortment of abandoned houses taken over by drug dealers and their customers.⁹¹ The neighborhood was frustrated by the police's unwillingness to do anything about the open criminality.⁹² The crackhouses brought not only the usual noise and blight, but also increased rates of crime and of neighborhood children being drawn into drug abuse.⁹³

91. Tucker Carlson, *Smoking Them Out: How to Close Down a Crack House in Your Neighborhood*, POL'Y REV., Winter 1995, at 56.

92. *See id.*

93. *See id.*; *Smoking Them Out: Community Efforts to Shut Down Crack Houses*, NEWS BRIEFS (Nat'l Drug Strategy Network, Silver Spring, M.D.), February 1995, at 1, available at <http://www.ndsn.org/feb95/crackhou.html>; Bruce Cadwallader, *Jackson Invites Drug Fighter to City*, COLUMBUS DISPATCH, May 10, 1991, available at 1991 WLNR 4618112; Yvonne Latty, *Mantua Drug Warrior Dies*

In 1986, Herman Wrice, an African-American who had run rehabilitation programs for addicts in other states, moved back to Philadelphia.⁹⁴ There he helped run an inner-city sports league in Mantua.⁹⁵ When he became fed up with the drug dealers' influence over the neighborhood's youth, he formed Mantua Against Drugs ("MAD") to confront the drug dealers and to drive them out.⁹⁶

MAD would picket and harass crackhouses, sometimes by blocking entry to customers or by singing and chanting outside the house to embarrass those within.⁹⁷ The drug dealers and demonstrators sometimes ended up in shoving matches, which occasionally escalated to brick-throwing battles.⁹⁸ MAD also pressured utility companies to cut service to the houses to drive the dealers out.⁹⁹ When the dealers left, MAD would board up the houses to prevent reentry.¹⁰⁰ The group also went to bail hearings for drug dealers, where they would interrupt defense counsels' presentations in an attempt to intimidate the locally-elected judges into setting higher bail.¹⁰¹

MAD's efforts seem to have paid off, in part because they eventually embarrassed local authorities into taking the drug problem more seriously.¹⁰² The 1644 felonies in Mantua in 1989 dropped by forty percent by 1993.¹⁰³ In later work, Wrice trained "street warriors" in over 350 communities.¹⁰⁴ Chants, marches, and vigils are now implemented in many neighborhoods around the country using his methods.¹⁰⁵ Even the Justice Department asked him to serve as a technical consultant on a program that helps neighborhoods fight crime.¹⁰⁶

The means used by MAD may fall within the permissible scope of the moral vigilante rules and may even be somewhat restrained given the frustration of the community. But clearly such confrontations risked spiraling into greater violence. The intimidation of judges by MAD members is more troubling, however, as there are serious societal risks that can come from this sort of interference with legal proceedings.

Herman Wrice Stricken in Fla. Before March, PHILLY.COM (Mar. 11, 2000), http://articles.philly.com/2000-03-11/news/25604360_1_herman-wrice-wrice-process-drug-dealers.

94. Carlson, *supra* note 91.

95. Latty, *supra* note 93.

96. Carlson, *supra* note 91.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *See id.*

103. *Id.*

104. Mireya Navarro, *Residents Disrupting Drug Trade*, N.Y. TIMES, Aug. 30, 1996, <http://www.nytimes.com/1996/08/30/us/residents-disrupting-drug-trade.html>.

105. *Id.*

106. *Id.*

2. *Detroit Crackhouse Burnings*

Detroit suffered from the same crack epidemic as Philadelphia, but in a somewhat more dangerous form: the drug trade was run by heavily-armed gangs willing to commit brutal and bloody violent acts to protect their trade. The crackhouses brought to the neighborhood not only the predictable crime but also common and random gunfire. Chanting and singing outside crackhouses probably would not have been an effective strategy there.

Outraged at the failure of authorities to deal with the problem and the toll that it took on the neighborhood, two local men, Angelo Parisi, an unemployed landscaper, and Perry Kent, an unemployed mechanic, took the lead in trying to get police to act to stop the open criminality, but with little effect.¹⁰⁷ After discussions throughout the neighborhood, the two men settled on their own plan: burn the crackhouses down.¹⁰⁸ The neighborhood took up a collection to buy the canisters of gasoline, which Parisi and Kent used to burn down a crackhouse in October 1988.¹⁰⁹

Authorities charged Parisi and Kent with arson, and considered pressing conspiracy charges against the neighbors who contributed to the fund.¹¹⁰ One local resident began a fund to help pay for the two men's defense, noting that "[n]inety percent of the people in this block support them. When they set the fire, everybody in the neighborhood knew they were going to do it and they knew why they were going to do it."¹¹¹ Even neighbors who did not necessarily approve of the methods used agreed that what they did was beneficial, or, at the very least, an understandable result of the men's frustration with the authorities.¹¹² As one neighbor put it, "I don't agree with their means But I don't want a crack house in my neighborhood. They did what they thought they had to do."¹¹³ At trial, despite overwhelming evidence of the men's guilt, the jury refused to convict, acquitting both men of all charges.¹¹⁴

Not long after this acquittal, crackhouses in other parts of Detroit were burned or demolished by neighbors.¹¹⁵ Neighbors stormed other crack houses wielding pipes and baseball bats to drive the dealers out.¹¹⁶

107. *See 2 Acquitted in Torching of Alleged Crack House*, CHI. TRIB., Oct. 7, 1988, at 3, available at 1988 WLNR 1743232; Editorial, *Crack: A Disaster of Historic Dimension, Still Growing*, N.Y. TIMES, May 28, 1989, at E4, available at 1989 WLNR 2085372; *Neighborhood Dilemma: Fight Crime With Crime?*, ASSOCIATED PRESS, Feb. 13, 1988, <http://www.apnewsarchive.com/1988/Neighborhood-Dilemma-Fight-Crime-With-Crime-/id-bb0554af524430c9aea95d505045feb9> [hereinafter *Neighborhood Dilemma*]; Isabel Wilkerson, 'Crack House' Fire: Justice or Vigilantism?, N.Y. TIMES, Oct. 22, 1988, <http://www.nytimes.com/1988/10/22/us/crack-house-fire-justice-or-vigilantism.html?pagewanted=all&src=pm>.

108. *See Neighborhood Dilemma*, *supra* note 107.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.*

113. *Id.*

114. Wilkerson, *supra* note 107, at 1.

115. *Id.* at 2.

116. *Id.*

Passing motorists honked their horns in celebration, and the crowd of on-lookers applauded as the dealers ran.¹¹⁷

Clearly, Detroit's house-burning approach created greater potential for a disaster than did the MAD approach in Philadelphia. But it is possible that the sufferings and dangers in Detroit may have been worse than those in Philadelphia. In the minds of the neighborhood members involved, at least, their sufferings justified the risks.

From the larger societal perspective, it obviously would have been better for law enforcement officials, rather than the neighborhood, to deal with the crackhouses. An official enforcement action could have avoided not only the confrontation risks, but also the subsequent vigilante action by others that the initial act inspired.

3. *Black October and the Off-the-Pusher Movement*

In Baltimore, when authorities did little to fix the endemic drug problem, antidealer graffiti appeared on inner-city walls urging people to "Off [kill] the pusher," as the only way to get drugs out of the community.¹¹⁸

On July 13, 1973, a group calling itself "Black October" called a local newspaper to tell it that Turk Scott could be found in the basement parking lot of his apartment building.¹¹⁹ Scott was a local heroine trafficker who was at the time indicted on eight criminal counts, involving the attempt to sell forty pounds of heroin worth millions of dollars.¹²⁰ Police found him surrounded by spent shell casings and twenty-five copies of a flyer with a warning message for other local dealers: "These Persons Are *Known Drug Dealers*. Selling drugs is an act of *treason*. The penalty for treason is *death!!* Black October."¹²¹ Scott had been shot more than seven times by multiple shooters.¹²²

Six days later, George Evans, another local drug dealer with a criminal record for narcotics offenses dating back more than a decade, was

117. *Id.*

118. For sources on the facts of this case, see, e.g., *Antidrug Group, Slaying Linked*, MILWAUKEE SENTINEL, July 19, 1973, at I-6 available at <http://news.google.com/newspapers?nid=1368&dat=19730719&id=VtAVAAAAIABAJ&sjid=iREEAAAAIABAJ&pg=7277,702072>; Karlyn Barker, *Dobson Guilty of Kidnapping, Robbery, Acquitted of Murder*, WASH. POST, Dec. 12, 1973, at B1-B2; *Black October Defends its Policy of Killing*, WASH. POST, Aug. 27, 1973, at C2; *Legislator, Indicted in Drug Case, Fatally Shot*, L.A. TIMES, July 14, 1973, at A4; *Minister's Son Charged with Murdering Legislator*, SPARTANBURG HERALD-JOURNAL, July 20, 1973, available at <http://news.google.com/newspapers?nid=1876&dat=19730720&id=OpoeAAAAIABAJ&sjid=Qs0EAAAAIABA&pg=7404,4003449>; *Slain Legislator Shot Seven Times: Anti-Drug Group Takes Credit for Killing Md. Man*, PHILA. TRIB., July 17, 1973, at 1; Edward Walsh, *Md. Del. Turk Scott Slain in Baltimore*, WASH. POST, July 14, 1973, at A1; Edward Walsh, *Baltimore Jury Indicts Suspect, 20, in Slaying of Indicted Md. Delegate*, WASH. POST, at D4, July 21, 1973.

119. *Slain Legislator Shot Seven Times*, *supra* note 118. Walsh, *Md. Del. Turk Scott Slain in Baltimore*, *supra* note 118.

120. Walsh, *Md. Del. Turk Scott Slain in Baltimore*, *supra* note 118, at A6.

121. *Id.*

122. *Id.*

shot to death.¹²³ Black October again took responsibility, sending a typed statement to the same Baltimore newspaper in which the group claimed that it would use any means necessary.¹²⁴ The letter expressed frustration with local police, saying that “[i]t is necessary now, after years of depending on corrupt police, to solve our own problems by any means necessary and available.”¹²⁵ The letter concluded by again exhorting the public to “[o]ff the pushers.”¹²⁶ In a manifesto presenting, among other things, “10 Black Laws,” it argued that, given how ineffective the authorities were, killings like that of Scott Evans were the only way to solve the drug problem.¹²⁷

After much investigation, the only member of Black October to be identified was a young man named Sherman W. Dobson, a college student from a Baltimore family.¹²⁸ He had no criminal record, and had been active in the civil rights movement and other community activities.¹²⁹ While Dobson awaited trial, the community reaction was surprising given the murders that had occurred. Some were happy that someone was doing something to get rid of the heroin dealers. One writer praised Black October’s actions: “[i]t is my opinion that ‘Black October’ is doing the most beneficial job of combating and eradicating the distribution of drugs into the community.”¹³⁰

On December 13, 1973, after fourteen hours of deliberation, the jury deadlocked on the murder charge, settling instead for a compromise verdict that held Dobson liable for a taxi hijacking that occurred earlier on the night of Scott’s murder, presumably in preparation for the killing.¹³¹

Baltimore was not alone in this violent response to drug dealing. A social worker in Washington, D.C. told the press that the most effective solution to the drug problem was “killing the pusher.”¹³² An apparently organized group in New York undertook a campaign of killing drug pushers, sometimes by throwing them off building rooftops.¹³³ Ten were killed in a period of eighteen months.¹³⁴

123. *Antidrug Group, Slaying Linked*, *supra* note 118, at I-7.

124. Letter to the Editor, *Black October’s Letter to Paper*, WASH. POST, TIMES HERALD, July 19, 1973, at A7.

125. *Id.*

126. *Id.*

127. *Id.*

128. Walsh, *Baltimore Jury Indicts Suspect, 20*, in *Slaying of Indicted Md. Delegate*, *supra* note 118, at D1.

129. *Id.*

130. Letter to the Editor, *Black October*, PHILA. TRIB., Aug. 14, 1973, at 8.

131. Barker, *supra* note 118, at B1.

132. William Raspberry, *Black Vigilantes May Start Killing Pushers of Heroin*, TUSCALOOSA NEWS, Feb. 13, 1972, available at <http://news.google.com/newspapers?id=lgMdAAAAIIBAJ&sjid=QJwEAAAAIIBAJ&pg=5399,2306760&dq=heroin+vigilante+killed&hl=en>.

133. *See id.*

134. For additional incidences of pushers being killed by vigilantes, see Snejana Farberov, *Trio of Vigilantes ‘Killed and Dismembered Drug Dealer, 19, with a Machete in Bid to ‘Rid the World of Evil,’* DAILY MAIL, Jan. 17, 2013, <http://www.dailymail.co.uk/news/article-2264219/Trio-vigilantes-killed-dismembered-drug-dealer-19-machete-bid-rid-world-evil.html>; *Suspect Held in Vigilante Killing*,

Clearly, killing dealers is significantly more criminal than burning crack houses. The practice would seem to violate many, if not most, of the rules that might morally justify vigilante action. Particularly distressing is the fact that Turk Scott was awaiting trial for drug dealing when he was murdered.¹³⁵ Apparently, those involved had little trust in the court's ability to deal effectively with the problem, even after the large-scale dealer had been indicted.

Taken together, these three cases show how easy it is for moral vigilante action to slide into immoral action. When the morally-defensible efforts are ineffective, the next logical step is to do a little more, until something does work. If harassing dealers does not work, then burning down their place of business is a logical next step. If that does not work, pushing them off the roof certainly will.

B. *Legitimizing Law-Breaking and Inspiring Extremists*

Another problematic aspect of even moral vigilantism is its effect in legitimizing law-breaking. Once a group takes the law into its own hands, especially when the action is seen and accepted by the community as morally justified, it creates a dangerous precedent. This precedent makes it that much easier for others, perhaps not so devoted to staying within moral bounds, to take the law into their hands, too. Indeed, the open acceptance of law-breaking may inspire others with quite extreme views toward vigilante acts that the community would consider as seriously condemnable. Consider a few examples.

1. *Project Perverted Justice*

In 2003, a group of computer-savvy volunteers, led by a man adopting the *nom de guerre* of Xavier von Erck, formed Perverted Justice in the belief that pedophiles were using the expanding web technologies to better lure children for abuse.¹³⁶ Consisting of former abuse victims, retired law enforcement officers, and civilian volunteers, the group would find and monitor online chat rooms where pedophiles were trying to make connections with teenagers.¹³⁷ Once they identified a predator trolling, the group would embarrass him to his spouse, significant others,

DAILY COURIER, June 1, 1984, available at <http://news.google.com/newspapers?id=LotaAAAAIBA J&sjid=R08DAAAABAJ&pg=2972%2C62710>; *The Message of a Vigilante Killing*, N.Y. TIMES, Mar. 23, 1988, at A26.

135. Walsh, *Baltimore Jury Indicts Suspect, 20, In Slay of Indicted Md. Delegate*, *supra* note 118.

136. For sources on the facts of this case, see, e.g., Allen Salkin, *Web Site Hunts Pedophiles, and TV Goes Along*, N.Y. TIMES, Dec. 13, 2006, at A1; Marisa Schultz, *Online Vigilantes Hunt Down Pedophiles*, USA TODAY, Mar. 16, 2004, http://usatoday30.usatoday.com/tech/news/internetprivacy/2004-03-16-online-vigilantes_x.htm; Jason Trahan & Chris Colgin, *Campaign Against Child Sex Predators Draws Critics*, DALL. MORNING NEWS, Sept. 11, 2006, available at 2006 WLNR 158770341; Eric Zorn, *Did Vigilante Catch Pedophile, or Wreck a Life?*, CHI. TRIB., May 9, 2004, at 4C.1, available at 2004 WLNR 19814047. NBC's Dateline wildly successful show "To Catch a Predator" was in partnership with the group. See Salkin, *supra*.

137. Trahan & Colgin, *supra* note 136.

employers, or the community by posting his chats with the teenage girls.¹³⁸ More aggressive forms of action included arranging to meet the man and filming his embarrassment when they, rather than a young teen, appeared for the meeting.¹³⁹ As of 2014, the group claims to have assisted 587 chat-based convictions, and claims it has information-sharing agreements with hundreds of local police agencies, as well as the Department of Homeland Security.¹⁴⁰

But, by elevating the public's emotional level of outrage against child sex-abuse and showing that individual citizens could be as effective, if not more effective than law enforcement, the group may have inspired other individuals to immolate their efforts in less justifiable ways. For instance, by legitimizing such citizen conduct, the project also may have inspired harassment or abuse of suspected child molesters with little proof behind the suspicion. For example, in 2006, Michael Anthony Mullen, incensed by a recent case he had heard about, pretended to be an F.B.I. agent and arranged to "interview" two sex offenders living together in Whatcom County, Washington.¹⁴¹ When a third roommate left the apartment, Mullen shot and killed the two offenders.¹⁴²

Whenever a group is very public in drawing attention to a law enforcement failure, there are always risks that the attention may inspire others to act, and perhaps in a way far beyond what the group would support. When a vigilante group acts, the danger is even greater—because part of the message of vigilante action is to suggest to citizens that they really can, and perhaps should, act where the criminal justice system has failed. That message makes it that much easier for the extremist to act by himself.

Consider two other examples of extremists inspired to vigilante action. Operation Rescue, for example, spent years intimidating and interfering with abortion clinics, which they saw as "baby killing mills," eventually prompting Congress to enact the Freedom of Access to Clinic Entrances Act ("FACE") in 1994.¹⁴³ Their activities are also thought to

138. *Id.*

139. *Id.*

140. *Info for Police*, PERVERTED JUSTICE, <http://www.perverted-justice.com/index.php?pg=policinfo> (last visited Nov. 4, 2014).

141. The Michael Mullen killings of the two sex offenders was similar in this respect to the killing by Scott Roeder of George Tiller, the abortion doctor. For sources on the facts of this case, see, for example, Donna Blankinship, *Man Turns Himself in for Killing 2 Child Rapists: Police Say They Believe Man's Claim and That He Was Able to Locate the Victims Through a County Sheriff Website That Lists Addresses of Sex Offenders*, VANCOUVER SUN, Sept. 7, 2005, at A3, available at 2005 WLNR 27929411; Sharon Cohen, *'Grim Reaper' Confesses; Another Remains Jailed*, AMARILLO GLOBE-NEWS, Dec. 26, 2000, http://amarillo.com/stories/2000/12/26/usn_grim.shtml; David Krajicek, *Michael Mullen, Sex Offender Vigilante*, CRIME LIBRARY 3, http://www.crimelibrary.com/criminal_mind/sexual_assault/duncan_and_mullen/4.html (last visited Jan. 9, 2015).

142. Krajicek, *supra* note 141, at 4.

143. For sources on the facts of this case, see, for example, *911 Call Reveals Cold-Hearted Attitude Toward MA Woman's Abortion Death*, OPERATION RESCUE (Dec. 6, 2007), <http://www.operationrescue.org/archives/911-call-reveals-cold-hearted-attitude-toward-ma-woman%E2%80%99s-abortion-death/>; *Abortion Blockades on Decline Trend Was Established Before Buffer Zone Ruling*, S.F. CHRON., July 5, 1994, at A3, available at 1994 WLNR 2773712; Mary Mapes, *No Mercy*, HUFFINGTON

have inspired Scott Roeder, a donor to the organization, to murder Dr. George Tiller in 2009, fatally shooting him in the head while he was at his church.¹⁴⁴

Another example is the Animal Liberation Front (“ALF”), which uses violence against institutions that use animals in research, railing against “speciesism,” defined by one activist as “the belief that nonhuman species exist to serve the needs of the human species, that animals are in various senses inferior to human beings, and therefore that one can favor human over nonhuman interests according to species status alone.”¹⁴⁵ ALF members have threatened researchers and others. For example: “[I]et this message be clear to all who victimize the innocent [animals]: We’re watching. And by axe, drill, or crowbar—we’re coming through your door. Stop or be stopped.”¹⁴⁶

According to the Department of Justice, between 1979 and 1993, ALF-affiliated individuals were responsible for more than three hundred incidents of break-ins, vandalism, arson, and thefts committed in the name of animal rights.¹⁴⁷ Other forms of violent action included sending letters booby-trapped with razor blades to scientists affiliated with research using animals, and the use of improvised incendiary and explosive devices against property, and occasionally, against the homes of researchers.¹⁴⁸

POST (July 25, 2009), www.huffingtonpost.com/mary-mapes/no-mercy_b_209529.html?view=print; Sara Rimer, *Abortion Foes in Boot Camp Mull Doctor’s Killing*, N.Y. TIMES, Mar. 19, 1993, <http://www.nytimes.com/1993/03/19/us/abortion-foes-in-boot-camp-mull-doctor-s-killing.html?ref=operationrescue&pagewanted=2>; Isabel Wikerson, *Drive Against Abortion Finds a Symbol: Wichita*, N.Y. TIMES, Aug. 4, 1991, <http://www.nytimes.com/1991/08/04/us/drive-against-abortion-finds-a-symbol-wichita.html>; Angela Williams & Fiona Morgan, *The Murder of Dr. George Tiller Recalls the Long History of Anti-Abortion Violence*, INDYWEEK, June 3, 2009, www.indyweek.com/indyweek/the-murder-of-dr-george-tiller-recalls-the-long-history-of-anti-abortion-violence/Content?oid=1215895&mode=print.

144. For sources on the facts of this case, see, e.g., Judy L. Thomas, *Roeder Upset at Operation Rescue*, WICHITA EAGLE, July 25, 2009, <http://www.kansas.com/news/special-reports/article1009125.html>; Karen Tumulty, *George Tiller Murdered*, TIME (May 31, 2009), <http://swampland.time.com/2009/05/31/george-tiller-murdered/>; Williams & Morgan, *supra* note 143. After the killing, Roeder expressed his disappointment at Operation Rescue for abandoning him, disavowing any connection with him, and distancing their organization from his actions. Thomas, *supra*.

145. Dr. Steven Best and Anthony J. Nocella II, *Behind the Mask: Uncovering the Animal Liberation Front, Introduction to TERRORISTS OR FREEDOM FIGHTERS?: REFLECTIONS ON THE LIBERATION OF ANIMALS* 8–63 (Stephen Best & Anthony J. Nocella II eds., 2004), available at www.pmpress.org/content/fmd/files/Behind_The_Mask.pdf. For sources on the facts of this case, also see, e.g., *Ecoterrorism: Extremism in the Animal Rights and Environmentalist Movements*, ANTI DEFAMATION LEAGUE, http://archive.adl.org/learn/ext_us/Ecoterrorism.asp (last visited on Nov. 4, 2014); Michael Janofsky, *Feds Accuse 11 of Ecoterrorism; Targeted Meatpacker, Ski Resort, Timber Firm*, CHI. TRIB., Jan. 21, 2006, http://articles.chicagotribune.com/2006-01-21/news/0601210075_1_elf-and-alf-indictment-federal-charges; Richard C. Paddock, *UCLA to Take Activists to Court*, L.A. TIMES, Feb. 21, 2008, <http://articles.latimes.com/2008/feb/21/local/me-animals21>; Kirsten Scharnberg & Tim Jones, *Ground Zero of Labs vs. Animal-Rights Activists*, CHI. TRIB., June 9, 2005, http://articles.chicagotribune.com/2005-06-09/news/0506090213_1_animal-rights-research-labs-animal-liberation-front.

146. Scharnberg & Jones, *supra* note 145.

147. *Ecoterrorism: Extremism in the Animal Rights and Environmental Movements*, *supra* note 145.

148. Janofsky, *supra* note 145.

C. *The Training and Personal-Interest Problems*

Another common problem that arises in vigilante action is a product of who it is that stands in for the government. Often, vigilantes lack police training, but are attempting to perform essentially a policing function. Vigilantes also have a personal-stake in the problem, rather than the dispassionate professionalism that we would hope for in police. Consider an example.

1. *Ranch Rescue*

In the late 1990s, the ranchers trying to make a living along the Mexican border, especially those in “the avenue of choice” for illegal immigrants entering the United States, had long complained to the U.S. Border Patrol about the failure to stem the flow of illegals.¹⁴⁹ The illegal crossers regularly killed their livestock, pulled down their fences thereby allowing cattle to stray and get injured or stolen, damaged their trucks and equipment, and broke into their houses.¹⁵⁰ The easy and unchecked flow across the border also attracted drug smugglers, who came heavily armed and were highly dangerous.¹⁵¹

After getting no help despite their repeated pleas, several of the ranchers organized “Ranch Rescue,” an organization that sought to do what the government refused to do.¹⁵² Volunteers patrolled the border using the same kind of equipment and tactics as the Border Patrol.¹⁵³ Other organizations, such as Arizona Guard, were born from this effort.¹⁵⁴ The group typically detained the trespassers and turned them over to the Border Patrol.¹⁵⁵ By 2006, Ranch Rescue claimed to have stopped more than 12,000 illegal entries.¹⁵⁶

Yet, the members of Ranch Rescue were hardly the best people to have performing this role. They did not have the training to properly screen suspects or to most effectively detain them without harm. But even with better training, the members of the group would not have been

149. For sources on the facts of this case, see, for example, Craig Bannister, *After Finding 13 Illegal Aliens Sleeping in His Barn, AZ Rancher Now Armed '24/7*, CNSNEWS.COM (May 10, 2012 1:26 PM), <http://cnsnews.com/blog/craig-bannister/after-finding-13-illegal-aliens-sleeping-his-barn-az-rancher-now-armed-247>; *Border Security Through the Eyes of a Southern Arizona Rancher*, FOX10PHOENIX.COM (Feb. 20, 2013 10:42 AM), <http://www.fox10phoenix.com/story/20962864/2013/02/04/border-security-through-the-eyes-of-a-southern-arizona-rancher>; Andrew Pollack, *2 Illegal Immigrants Win Arizona Ranch In Court*, N.Y. TIMES, Aug. 19, 2005, www.nytimes.com/2005/08/19/national/19ranch.html?pagewanted=all&_r=0; Mark Potok, *Anti Immigration Vigilante Loses Lawsuit*, UNITED PRESS INT'L, Nov. 23, 2006; Jerry Seper, *16 Illegals Sue Arizona Rancher*, WASH. TIMES, Feb. 9, 2009, <http://www.washingtontimes.com/news/2009/feb/9/16-illegals-sue-arizona-rancher/?page=all>.

150. Seper, *supra* note 149.

151. *Id.*

152. Pollack, *supra* note 149.

153. *Id.*

154. *Id.*

155. *Id.*

156. Seper, *supra* note 149.

a substitute for professional law enforcement officers detached from the conflict. The ranchers were the most interested of parties, more likely to have the emotional response of a person defending their property and themselves. Mistake and overreaction seem inevitable in such situations.

Roger Barnett, one of the founders of Ranch Rescue, and Casey Nethercott, one of its members, were both civilly sued by illegal immigrants for making angry threats and for the use of force when detaining them.¹⁵⁷ Nethercott ultimately lost his ranch in the civil lawsuits.¹⁵⁸ While the group was effective in stopping some illegal entries and successful in dramatizing and humanizing the illegal entry problem—the number of Border Patrol agents has doubled since that time¹⁵⁹—the loss of this ranch was an ignominious end to a project aimed at saving ranches.¹⁶⁰

D. *The Displacement Problem*

A final problem common to moral vigilante action is what might be called the *displacement problem*. Consider an example.

1. *The Crown Heights Maccabees*

In 1964, Crown Heights, New York, was awash in rampant crime and violence. The Hasidic Jewish community stood isolated between two high-crime areas, and persons from outside the neighborhood perpetrated most of the crime.¹⁶¹ Yeshiva students were regularly attacked and robbed.¹⁶² Home invasions turned violent.¹⁶³ People feared rapists and muggers and became wary of even walking in the street.¹⁶⁴ Shops began to close earlier and open later.¹⁶⁵

A local resident, Rabbi Samuel Schrage, sought additional police patrols, even meeting with New York Mayor Robert Wagner, but his repeated pleas were ignored.¹⁶⁶ Schrage then formed the Crown Heights

157. *Id.*

158. Pollack, *supra* note 149.

159. Border Patrol agents on the Southwest border of the United States increased from 9100 agents in 2001 to more than 18,500 in 2013. See DEP'T. OF HOMELAND SEC., BUDGET-IN-BRIEF, FISCAL YEAR 2014 71, available at <http://www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf>; U.S. DEP'T OF HOMELAND SEC., BORDER SECURITY RESULTS (2013), available at <http://www.dhs.gov/border-security-results>.

160. Pollack, *supra* note 149.

161. For sources on the facts of this case, see, for example, Austin Scott, *Maccabees' Patrol Helps Reduce Crime*, DAYTONA BEACH MORNING J., Dec. 21, 1964, at 3, available at <http://news.google.com/newspapers?id=DpMeAAAIBAJ&sjid=mMwEAAAIBAJ&pg=907%2C4655777>; Matthew Shaer, *Tough Jews*, TABLET MAGAZINE (Dec. 14, 2011), <http://www.tabletmag.com/jewish-news-and-politics/86067/tough-jews?all=1>; Michael Seligson, *Rabbi Samuel Schrage: The Maccabee*, CROWN HEIGHTS NEWS (Dec. 18, 2010), <http://crownheights.info/crown-heights-news/30851/rabbi-samuel-schrage-the-maccabee/>.

162. Shaer, *supra* note 161.

163. *Id.*

164. *Id.*

165. Seligson, *supra* note 161.

166. *Id.*

Maccabees, a neighborhood watch group—one of the first of its kind—with four squad cars, a radio network, and other equipment, all funded by the community.¹⁶⁷ The patrols were set such that no block of the neighborhood would be without surveillance for more than two minutes.¹⁶⁸ More than one hundred residents volunteered and were given instruction.¹⁶⁹

The Maccabees' goal was to be a deterrent force. The group was effective: when an outsider to the neighborhood would plan or begin an offense, they would then break off when the Maccabees came by on patrol or in response to a radio call from their network.¹⁷⁰ On some occasions, a confrontation with suspects would ensue.¹⁷¹ But once the Maccabees' practice became known, fewer offenders came to the neighborhood to commit their crimes.¹⁷²

The results were dramatic. From December 1963 to December 1964, crime fell by ninety percent.¹⁷³ A serial rapist attacking women in the areas around that patrolled by the Maccabees never attacked within their area again.¹⁷⁴

But the striking success of the Maccabees was also a problem. Many of the robberies and rapes that were deterred in the Maccabees area may well have been simply displaced to surrounding neighborhoods, aggravating the growing disparity in crime rates. The adjacent areas were predominantly African-American. The crime-rate disparity, along with claims of racial profiling, increased racial tensions, sometimes to the boiling point.

If the government had taken its obligation to keep all of its citizens safe more seriously—if it had not left the Jews in Crown Heights to fend for themselves—it likely could have avoided the crime disparity and the racial tensions. Only a society-wide crime-control program can be truly effective. Vigilantes, almost by definition, cannot provide this.

E. *The Solution*

Vigilantism, even when it is moral and effective, is no substitute for official action. Whenever community members feel compelled to do what the criminal justice system has failed to do, they can never be an effective replacement and will always incur a societal cost that could have been avoided.

But the solution to the problem is not to insist that the potential moral vigilantes simply suffer in silence. First, this may not be possible:

167. *Id.*

168. Shaer, *supra* note 161.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Scott, *supra* note 161, at 3.

174. *Id.*

strong feelings of disillusionment and victimization often spark action. More importantly, it ought not be asked: the government has obligations to its citizens under its social contract, and the government is not free to simply choose not to perform them. The criminal justice system ought to take seriously its obligation to assure that justice is done and crime is avoided whenever possible, so that people are never put in the position of having to consider moral vigilantism.

Prosecuting the vigilantes is possible, of course, but that may only contribute to the community's cynicism: the same system that is apparently unable to effectively punish drug dealers seems fully capable, somehow, of punishing those willing to step in to do the government's job in fighting them. Thus, the prosecution of the moral vigilante could change a community's view from feeling that the system is simply indifferent to the problem, to a feeling that the system is openly hostile to solving it.

IV. SPARKING THE VIGILANTE IMPULSE: DOCTRINES OF DISILLUSIONMENT

Against this backdrop, it is unfortunate that the U.S. criminal justice system has adopted a wide range of rules, policies, and practices that essentially guarantee that serious offenses by blameworthy offenders caught by the police nonetheless will go unpunished. Often by court decision, but sometimes as a result of insensitive policy-making or adjudication processes,¹⁷⁵ the current system commonly adopts practices that it knows will produce regular and serious failures of justice.

As noted at the start of this Article, some failures of justice may be unavoidable and can be easily forgiven by even a demanding public. The criminal justice system can only do so much to catch offenders and to reliably reconstruct what happened during some past event. Few people are likely to hold such failures against a system otherwise trying its best to do justice; the public would be appalled by the wrongful convictions and unjust punishment that might result from cutting corners on reliable adjudication of the facts. The doctrines at issue here are of a different sort: they allow the escape from deserved punishment by serious offenders who are in custody and whose guilt is clear. The offender's release may be as much a surprise to him as it is a shock to the community. He has won the lottery! But his release portrays to the community a criminal justice system indifferent to the importance of doing justice.

Below are a few illustrations, all instances in which the system's rules worked as designed and written—these are not law-breaking rogue judges at work—yet the resulting failures of justice can seem appalling to the average citizen.

175. But sometimes through the distortion of American crime politics. See ROBINSON, INTUITIONS OF JUSTICE, *supra* note 2, at 128–39.

A. *Unchecked Punishment Discretion*

A common source of failures of justice is the exercise of idiosyncratic discretion by sentencing judges and parole commissions. Consider several examples.

1. *Leaving Sentencing Discretion Unchecked*

Fifteen-year-old Latasha Harlins walked into a liquor store in South Central Los Angeles to buy a bottle of juice.¹⁷⁶ The following encounter was caught on the store's security tape. As she walked up to the register, Harlins put the juice in an outside pocket of her backpack, where it was partially visible.¹⁷⁷ She had two dollars in her hand to pay for it, but the storeowner, Soon Ja Du, apparently did not see the money.¹⁷⁸ She accused Harlins of shoplifting, which Harlins denied.¹⁷⁹ Du grabbed at Harlins to get the juice, which fell to the ground.¹⁸⁰ Harlins responded to the assault by punching Du in the face, knocking her down behind the counter.¹⁸¹ Du then threw a stool at Harlins.¹⁸² Harlins placed the juice on the counter, but Du knocked it away.¹⁸³ Harlins turned to leave.¹⁸⁴ Du then shot Harlins in the back of the head with a .38 revolver from three feet away, killing her instantly, with two dollars still clutched in her hand.¹⁸⁵

Du was indicted for first-degree murder.¹⁸⁶ At trial, the judge dismissed the first-degree murder charge, leaving the jury only the offense of voluntary manslaughter, of which Du was convicted.¹⁸⁷ The judge used her discretion to suspend a jail sentence, and instead sentenced Du to five years probation, a \$500 dollar fine, and community service.¹⁸⁸

In another case, Vincent Chin, a young Chinese-American man, was at a strip club in Highland Park, Michigan, for his bachelor party.¹⁸⁹ At

176. For sources on the facts of this case see, e.g., *People v. Du*, 5 Cal. App. 4th 822, 825–27 (1992); see also Linda Deutsch, *Prosecutor Says Korean Shopkeeper Didn't Act in Self Defense*, ASSOCIATED PRESS (Oct. 7, 1991), <http://www.apnewsarchive.com/1991/Prosecutor-Says-Korean-Shopkeeper-Didn-t-Act-in-Self-Defense/id-1ad0f4210194be9581767d27d334ecb0>; Karen Nikos, *Miscarriage of Justice' Claimed: Reiner Blasts Judge's Probation Sentence for Korean Grocer in Slaying*, L.A. DAILY NEWS, Nov. 19, 1991.

177. See *Du*, 5 Cal. App. 4th at 826.

178. *Id.*

179. See *id.*

180. *Id.* at 826–27.

181. *Id.*

182. *Id.*

183. *Id.* at 827.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. See *id.* at 829; see also Lisa Richardson, *Legacy of the Riots: 1992-2002*, L.A. TIMES, Apr. 27, 2002, available at 2002 WLNR 12418799 [hereinafter Richardson, *Legacy of the Riots*].

189. *United States v. Ebens*, 800 F.2d 1422, 1427–28 (6th Cir. 1986) (*abrogated by* Huddleston v. *United States*, 485 U.S. 681 (1988)); Ross Parker, *It's Not Fair . . . Vincent Chin's Last Words*, CT. LEGACY, Nov. 2007, at 1, 2, available at http://www.fbamich.org/Portals/31/Documents/Newsletters/200711_Court_Legacy.pdf.

the club, Chin got into an argument with Ronald Ebens and Ebens' stepson, Michael Nitz.¹⁹⁰ Ebens was a supervisor at a local auto factory and mistakenly assumed that Chin was of Japanese descent.¹⁹¹ During the disagreement, Ebens made racially charged remarks, calling Chin a "chink" and a "nip," and claiming that "it's because of you little motherfuckers that we're all out of work," a reference to the difficulties the U.S. auto industry was facing against Japanese imports at the time.¹⁹² The verbal insults soon degenerated into a barroom brawl, in which Chin injured Nitz.¹⁹³ They were both ejected from the club but the confrontation continued outside.¹⁹⁴ When Ebens took a baseball bat from his car, Chin and his friends gave up any thought of further brawling and fled.¹⁹⁵

Still angry, Ebens and Nitz cruised the area searching for Chin, and paid an unemployed local resident \$20 to help them find him and his friends.¹⁹⁶ When they did find him near a McDonald's two blocks from the strip club, Ebens attacked Chin with the baseball bat, striking him repeatedly.¹⁹⁷ Chin staggered outside and collapsed, where Ebens hit him again, striking him twice in the head.¹⁹⁸ Chin suffered severe head injuries, was declared brain dead, and died four days later.¹⁹⁹

Ebens and Nitz were charged with second-degree murder.²⁰⁰ As a supervisor at the nearby Chrysler plant in Detroit, where he had worked for seventeen years, Ebens was popular at the plant and among his neighbors in Eastpointe.²⁰¹ County prosecutors allowed Ebens and Nitz to plea guilty to manslaughter.²⁰² Despite the probation officer's presence report recommending a prison term, the judge sentenced Ebens and Nitz to a fine and three years probation.²⁰³ The judge later justified his sentence by stating that "[t]hese weren't the kind of men you sent to jail You don't make the punishment fit the crime: you make the punishment fit the criminal."²⁰⁴

Cases like Ja Du's killing of Latasha Harlin and Ebens' and Nitz's killing of Vincent Chin dramatically illustrate the problem of unchecked sentencing discretion. People will judge that an offender's sentence ought to be the product of what was done, as well as his state of mind and capabilities at the time of the offense, not a product of his good or bad luck in the sentencing judge he draws. Even more disillusioning is the possibil-

190. *Ebens*, 800 F.2d at 1427–28.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 1428; Parker, *supra* note 189, at 2.

197. *Ebens*, 800 F.2d at 1428.

198. Parker, *supra* note 189, at 2.

199. *Ebens*, 800 F.2d at 1428.

200. Parker, *supra* note 189, at 3.

201. *Id.* at 1.

202. *Id.* at 3.

203. *Id.* at 3–4.

204. *Id.* at 4.

ity of unchecked bias—for or against the race of the offender, or his victim, or for or against the outsider, or insider, or other status of the offender, or his victim. Is the well-connected local to be judged by a different standard than the wrong-colored victim?

Even setting aside egregious forms of bias and prejudice, individual sentencing judges commonly look to idiosyncratic factors that few in the community would support. For example, a recent empirical study showed that a variety of factors have been used in mitigating criminal punishment, even though there is little public support for them: special talents (only 10.6% of subjects supported this as a basis for mitigation, averaged across a range of offense seriousness), good deeds before the offense (15.0%), old age (22.3%), bad deeds or character (17.0%).²⁰⁵ Unguided sentencing discretion simply invites biased sentencing at worst and idiosyncratic sentencing at best.

Much of the problem can be avoided by use of sentencing guidelines, which retain some judicial sentencing discretion to individualize punishment, yet offer some guidance to reduce unjustified disparity. Yet, as of 2006, almost two-thirds of the states—thirty-one of fifty—have no sentencing guidelines.²⁰⁶ The system's reputation for doing justice is likely to suffer accordingly.

2. *Early Release of Parole*

In 1980, while at a bar in Chester, Pennsylvania, Cornelius Ferguson shot and killed a man.²⁰⁷ He was convicted of third degree murder, but served only a short stint in prison.²⁰⁸ Soon after his release, in September 1985, Ferguson shot and wounded another man and was convicted of aggravated assault.²⁰⁹ As a result of this conviction, he was sentenced to five years in prison for felony aggravated assault.²¹⁰ His release on parole for his earlier murder was revoked, but in 1991, in spite of his violent criminal record, he was again released on parole.²¹¹

205. Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good-Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 740–66, 782 tbl.5 (2012).

206. The following states have no sentencing Guidelines: Arizona, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Vermont, West Virginia, and Wyoming. Rachael E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 873, 1994 tbl.1 (2006).

207. For sources on the facts of this case, see, for example, *Hameen v. State*, 212 F.3d 226, 230–32 (3d Cir. 2000); *Ferguson v. State*, 642 A.2d 772, 784 (Del. 1994); *Ferguson v. Pa. Bd. of Prob. & Parole*, 534 A.2d 579 (Pa. Commw. 1987); *Commonwealth v. Ferguson*, 1987 Pa. Super. LEXIS 8078 (Pa. Super. Ct. May 27, 1987); see also *Death Row Executions*, STATE OF DEL., <http://doc.delaware.gov/deathrow/executions.shtml> (last visited Nov. 4, 2014).

208. *Ferguson v. Pa. Bd. of Prob. & Parole*, 534 A.2d at 580.

209. *Ferguson v. State*, 642 A.2d at 784.

210. *Ferguson v. Pa. Bd. of Prob. & Parole*, 534 A.2d at 580.

211. *Ferguson v. State*, 642 A.2d at 784–85.

Soon after his release, Ferguson shot and wounded Jimmy Mitchell, but was not caught.²¹² About two months later, he arranged to meet with Troy Hodges, a potential buyer for a half-kilogram of cocaine for \$10,000.²¹³ Ferguson and his associate brought no drugs to the gathering, apparently intending to rob Hodges instead of selling to him.²¹⁴ During the meeting, Ferguson shot Hodges in the back at point blank range, using the same gun he had used to shoot Jimmy Mitchell.²¹⁵

Such cases of early release on parole no doubt leave much of the public skeptical about the system's motivations. Did the sentencing judge impose the wrong sentence at the start? If so, why not fix that bad judging? If the sentencing judge did not err, why should the offender be released "early" at all? Why should he suffer anything less than the punishment he deserves?

Part of the problematic impression created comes from the system's demonstrated obfuscation. A sentence is publicly announced in court, but turns out not to be the real sentence—indeed, the announced sentence may never be the sentence actually served. The public perception is likely that some other group (the parole commission) announces the real sentence in the privacy of the prison, out of public and local view. If the system is designed to be this opaque, how many other outrageous cases are as bad or worse than the outrageous case the citizen happens to hear about?

It was in part a response to this problem that the federal Sentencing Reform Act of 1984 introduced so-called "truth in sentencing," which abolished the U.S. Parole Commission and required that all offenders serve at least eighty-five percent of the sentence imposed in court (but will continue to have a period of supervision after their release).²¹⁶ But most states still retain some form of parole commission that provides early release.²¹⁷

B. Criminal Justice, the Game

Another source of disillusioning failures of justice are judicial decisions that treat criminal justice as a game in which players are given a set of rules and the rules are to be blindly enforced no matter what the effect on justice or fairness—rules for their own sake. A clever defense tactic calculated to deceive can produce a dismissal with prejudice, even if the

212. *Id.* at 785.

213. *Id.* at 785–86.

214. *Id.* at 785.

215. *Id.*

216. H.R. REP. NO. 98-1017, at 114–15 (1984); *see also* S. REP. NO. 98-223, at 33–36 (1983) ("[T]he sentencing judges and parole officials are constantly second-guessing each other, and, as a result, prisoners and the public are seldom certain about the real sentence a defendant will serve.").

217. PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: TRUTH IN SENTENCING IN STATE PRISONS 3 (1999) ("Fourteen States have abolished early release by discretion of a parole board for all offenders. . . . A few other states have abolished parole board release for certain violent or felony offenders (Alaska, New York, Tennessee, and Virginia) or for certain crimes against a person (Louisiana).").

violation results in no actual unfairness to the defendant, or results in a disadvantage that can be fully remedied through some less justice-distorting means. Consider several examples.

1. *Speedy Trial as a Sword Rather than a Shield*

In August 1992, Kevin Healy picked up hitchhiker Laura Sage near Cicero, Illinois.²¹⁸ Sage offered to have sex with him for cash, money she would spend on drugs.²¹⁹ He agreed, and in November, when his wife was in the hospital, Healy looked Sage up again.²²⁰ When they had a disagreement about how much Healy would pay, Sage threatened to tell his wife.²²¹ Angry, Healy kneeled on top of Sage, choked her, beat her with a flashlight, strangled her to death, and dumped her body in the Chicago River.²²² After her body was found, a police investigation led to Healy, who was arrested.²²³

In preparation for trial, the prosecution had ordered forensic samples, but due to delays at the laboratory, the prosecutor asked for a number of postponements to the start of trial.²²⁴ Each time a new date was sought, Healy's lawyer would say something like, "I have no problem with any date in May, judge."²²⁵ The first time this exchange occurred, the trial judge, in an abundance of caution, asked defense counsel to confirm that this was a "by-agreement date," to which counsel repeated, "any date in May, we will be there."²²⁶

Healy was ultimately convicted of Sage's murder and sentenced to thirty years in prison, but his counsel argued on appeal that his carefully-worded statements were technically only an acquiesce, not an agreement to the postponement, thus not technically a waiver under the speedy-trial rules.²²⁷ Thus, Healy's trial was begun 65 days past the 120 days from arrest that was allowed absent a waiver by the defendant.²²⁸ The appellate

218. See, e.g., *People v. Healy*, 688 N.E.2d 786, 787 (Ill. App. Ct. 1997); *People v. Healy*, 1992 WL 12580086 (Ill. Cir. Dec. 10, 1992); see also Maurice Possley & Jerry Thomas, *Trial Delays May Set Murderer Free: Appeals Court Voids Man's Conviction in '92 Killing of Woman*, CHI. TRIB., Dec. 5, 1997, http://articles.chicagotribune.com/1997-12-05/news/9712050153_1_illinois_supreme_court_trial_act_conviction; David Southwell, *Killer Freed Because He Was Denied Speedy Trial*, CHI. SUN-TIMES, Apr. 18, 1998, available at <http://highbeam.com/doc/1P2-4441344.html>.

219. *Healy*, 688 N.E.2d at 787.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 788–89.

225. *Id.* at 788.

226. *Id.*

227. *Id.* at 789, 791.

228. *Id.* at 789. The Illinois Appellate Court held that the defendant had no duty to inform the trial court that the time limit was about to expire. *Id.* at 792. In response to this result, the Illinois statute that permitted Healy to walk free was later amended to prevent a similar result in the future. "Now, a defendant may use [the speedy trial provision] as a 'shield' to prevent an untimely trial, but not as a 'sword' to defeat a conviction after the fact." *Vill. of Mundelein v. Bogachev*, 952 N.E.2d 91, 96 (Ill. App. Ct. 2011) (citation omitted).

court reversed the conviction and Healy walked free, beyond prosecution for his beating and murder of Sage.²²⁹

Again, much of the community will wonder how so trivial an inconvenience to Healy, with no indication of any real prejudice, made evident in defense counsel's acquiescence in the delay, could entitle him to beat another human to death with impunity. And, in this instance, it appears that this outrage is simply the product of clever gamesmanship by a smart defense counsel—gamesmanship that the court apparently was willing to honor in place of an assessment of any actual unfairness or inequity in the situation. With these cases, the criminal justice system presents itself as uninterested in justice and fairness, but rather as a system that sees the process as a game, in which the cleverest gamer wins.

Few countries allow this kind of inflexible application of a speedy-trial right.²³⁰ Countries that have such a right often use sanctions other than dismissal and construct a sanction that attempts to compensate for any fairness and equity.²³¹ Most take account of a wide range of factors in assessing a violation,²³² including, for example, the impropriety of the

229. *Healy*, 688 N.E.2d at 792. The Illinois Supreme Court denied the state's petition to overrule the decision of the lower court. *People v. Healy*, 698 N.E.2d 546 (Ill. 1998) (table decision).

230. *See, e.g.*, David Clark, *The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law*, 24 MELB. U. L. REV. 866, 873 (stating that the right to a speedy trial has been rejected in Australia and New Zealand); *see R. v. Morin* [1992] 1 S.C.R. 771 (Can.) (holding that the right to a speedy trial is equivalent to a "trial within a reasonable time").

231. *See, e.g.*, Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 533–34 (1975) (noting that in England, the English Habeas Corpus Act of 1679 is commonly interpreted to grant only "release from custody, but neither expedition nor abatement of the criminal prosecution"). In the Netherlands, courts assess whether the right to be heard within a reasonable time has been violated then, if a breach is found, the remedy is a reduction in the penalty that would have otherwise been imposed. Martin Kuijer, *The Right to a Fair Trial: Effective Remedy for Excessively Lengthy Proceedings* (Articles 6 and 13 ECHR), European Judicial Training Network Seminar: *Effective Remedies, Lengthy Proceedings and Access to Justice in the EU* 10 (Feb. 28, 2013). "The degree to which the penalty is reduced depends on the degree to which the reasonable time limit has been overrun and the severity of the penalty imposed." *Id.* at 11. "In other European countries, legislative reforms are underway." *Id.* In Bulgaria, for instance, attempts have been made to create a right to compensation for excessively lengthy proceedings. *Id.* "Draft legislative reforms [to the State and Municipality Responsibility for Damage Acts] are expected to be prepared by Ministry of Justice working group during 2012 and adopted by the National Assembly thereafter." *Id.* A similar initiative was taken in Slovenia and Portugal. *Id.*

232. *See R. v. Morin* [1992] 1 S.C.R. 771, para. 48 (Can.) (holding that courts should consider the caseload of the jurisdiction and the prejudice to the accused). In *Jago v District Court of NSW* (1989) 168 CLR 23 (Austl.), the High Court of Australia held that, though there is no common law right to a speedy trial, there is a right to receive a fair trial. If circumstances, including unreasonable delay had the effect of depriving a trial of its fairness, then a permanent stay of the proceedings is warranted. *Id.* However, courts in Australia do not grant this remedy readily and require demonstration of extreme circumstances. *Id.*; *see* Robert M. Bloom, *Judicial Integrity: A Call for Its Re-Emergence in the Adjudication of Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 462, 487 (1993) (citing *Jago v District Court of NSW* (1989) 168 CLR 23 (Austl.)). In Japan, Article 37(1) of the Constitution provides accused persons the right to a 'speedy and public trial,' a right modeled after the United States Constitution. However, courts in Japan do not dismiss cases for failure to provide a speedy trial notwithstanding that some cases may take well over a decade to try. The case involving the subway sarin incident, for instance, has been proceeding for over a decade. CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* 497 (3d ed. 2012).

prosecution's conduct under the circumstances and the actual extent of prejudice to the accused.²³³

2. *Enforcing Bargained Immunity Built on Defense Lies and Deceptions*

Consider another case, arising in a different context but with a similar attitude about criminal justice. In the summer of 1979, Jean Packwood and Donald Desbiens robbed three banks in San Francisco.²³⁴ Desbiens became worried that his girlfriend, Janette Pimentel, knew about the robberies and could implicate them.²³⁵ To avoid this situation, Packwood and Desbiens took her to a park in San Francisco in the early morning hours of July 23, 1979, and “shot [her] to death execution style.”²³⁶

Arrested in New York in 1980, Packwood confessed to the robberies but claimed that Desbiens had done the murder of Pimentel alone.²³⁷ Desbiens had asked him to assist, he said, but he had refused.²³⁸ Based on this, Packwood worked out a plea agreement in which he pled guilty to the bank robberies and received a reduced sentence in exchange for assisting authorities in the prosecution of Desbiens for Pimentel's murder.²³⁹ The terms for the deal rendered it invalid if Packwood “willfully gave materially incomplete or false . . . information.”²⁴⁰

Later that year, authorities learned that two people had given statements saying Packwood and Desbiens had murdered Pimentel together, including a statement reporting Packwood's detailed description of how they had done it.²⁴¹ Eventually, Desbiens confessed to the murder, describing how he and Packwood had done it, and was tried and convicted of it, and sentenced to life in prison.²⁴²

Prosecutors then sought to convict Packwood for his part in the murder, but Packwood claimed his plea agreement protected him.²⁴³ Prosecutors pointed out that his deal was contingent on full and accurate information.²⁴⁴ But Packwood argued that at sometime prior to the killing, Desbiens had asked, and Packwood had, at that moment, declined to

233. PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE* 250 (Oxford Univ. Press, 2006) [hereinafter ROBINSON & CAHILL, *LAW WITHOUT JUSTICE*].

234. *United States v. Packwood*, 848 F.2d 1009, 1010 (9th Cir. 1988); James G. Jewell, *Deaf, Dumb & Blind: Canadian Justice at its Worst*, *THE POWER OF WORDS!!!* (June 21, 2013), <http://jgjewell.com/tag/donald-desbiens/>.

235. *Packwood*, 848 F.2d at 1010.

236. *See id.*; Jewell, *supra* note 234.

237. *Packwood*, 848 F.2d at 1010; Jewell, *supra* note 234.

238. *Packwood*, 848 F.2d at 1010.

239. *Id.*

240. *United States v. Packwood*, 687 F. Supp. 471, 472 (N.D. Cal. 1987) (*aff'd* 848 F.2d 1009 (9th Cir. 1988)).

241. *Id.* at 473; *Packwood*, 848 F.2d at 1010.

242. *Packwood*, 848 F.2d at 1010.

243. *Id.*

244. *See id.*; *see generally Packwood*, 687 F. Supp at 472 (Packwood's plea deal).

participate.²⁴⁵ It was at some time later that he agreed to participate in the killing.²⁴⁶ He argued, then, that his statement to authorities was not false—he had declined to help, albeit only on an earlier occasion.²⁴⁷ He argued that investigators should have asked a more specific question to dispel the misperception he had given them.²⁴⁸ Applying the contract principle that any an ambiguity in a contract is to be resolved against the drafter, *contra proferentem*, the court accepted the argument and quashed the indictment.²⁴⁹ Packwood’s clever moves, and the system’s willingness to give deference to them—to treat the criminal justice process as a game, rather than an exercise in fairness and justice—let Packwood kill Pimentel with impunity.²⁵⁰

It is easy to see how a citizen could conclude that the law does not care about the seriousness of the offense, the extent of the rule violation or whether the offender suffers any actual unfairness or disadvantage. The fact that Packwood’s clever ability to answer questions while omitting much of the truth was somehow worth more than the brutal killing of Janette Pimentel is both disappointing and bewildering. It would be little surprise if we found that the system’s reputation became badly soiled by its apparent blindness to the meaning and importance of fairness and justice.

The American mindset in this context is no different from that which gave deference to the defense counsel’s careful-language trick in the Kevin Healy speedy trial case.²⁵¹ As the average person will see it, that trick was judged to be worth ignoring Healy’s brutal murder of Laura Sage, just as Packwood’s trick here was judged to be worth more than Janette Pimentel’s life. It is easy for the public to perceive a system grown indifferent to the importance of doing justice; one that gives deference to such trickery, trivializing brutal killings. To the public, the system is beyond caring about actual unfairness and prejudice to defendants and interested instead in playing the rules of the game.

This blindness to actual effects on fairness and justice is not typical in the rest of the world, but rather a peculiar American approach. The European Convention on Human Rights (“ECHR”) looks to the ultimate effect on fairness,²⁵² rather than providing an automatic right to go free. In the context of speedy trial, for example, the U.K. House of Lords relies upon the ECHR provision to make clear that a remediable right

245. *Packwood*, 848 F.2d at 1010.

246. *See id.*

247. *Id.* at 1012.

248. *Packwood*, 687 F. Supp. at 474.

249. *Id.* at 473–75.

250. *See id.* at 473–74 ; Jewell, *supra* note 234.

251. In which the defense agreed to prosecution requests for trial continuations using careful language that they could later argue did not technically qualify as a waiver. *See supra* text accompanying notes 224–29.

252. AG’s Reference No. 2 of 2001, [2003] UKHL 68, [10] (appeal taken from Eng.), available at <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd031211/ref2-1.htm> (“[T]he focus of [Article 6.1 of the European Convention on Human Rights] is on achieving a result which is, and is seen to be, fair.”).

exists only if the delay causes harmful consequences to a defendant.²⁵³ New Zealand takes a similar approach, holding that where a delay has not affected the “fairness” of a trial, a remedy departing from normal trial procedure is unnecessary.²⁵⁴

C. *Defenses for Clearly Guilty Offenders*

A final source of disillusionment is the practice of providing rules that shield even clearly guilty offenders of very serious crimes. Consider four examples.

1. *Exclusionary Rule*

Larry Eyler picked up, tortured, mutilated, and murdered a series of eighteen young men, including Gustavo Herrera and Ralph Calise.²⁵⁵ Police suspected Eyler in the killings, and began trying to follow him during his nighttime drives, but lacked probable cause to arrest him for the murders.²⁵⁶ Early one morning, a highway trooper, who was unaware of the investigation, happened upon Eyler parked on the side of the highway.²⁵⁷ The trooper made a U-turn and intercepted Eyler as he and his passenger, now back in Eyler’s pick-up, attempted to leave.²⁵⁸ Unknown to the trooper, Eyler was in the process of coaxing the intended victim, Daryl Hayward, into the woods with a promise of money for sex and had in his hand his kit of rope and tape.²⁵⁹ The trooper became suspicious when Eyler was evasive in his answers and seemed like he was trying to hide the kit he had been carrying when the trooper first saw him.²⁶⁰

The trooper radioed his headquarters to ask about Eyler.²⁶¹ The investigators who had been following Eyler earlier that night, but had lost him, overheard this call.²⁶² They rushed to the scene and brought Eyler and his truck back to the station for further investigation.²⁶³ Hayward confessed that they were about to have sex for money.²⁶⁴ Eyler gave the officers permission to take his boots, which the investigators noticed matched the imprints left at a previous murder scene.²⁶⁵ He also gave permission for them to search his truck, in which they found clothesline

253. *Id.* at [135].

254. *Id.* at [85] (discussing *Martin v. Dist. Court at Tauranga* (1995), 2 NZLR 419 (C.A.)).

255. Michael Newton, *Larry Eyler, The Highway Murderer: Caged*, CRIME LIBRARY 5, http://www.crimelibrary.com/serial_killers/predators/eyler/caged_5.html (last visited Nov. 4, 2014).

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

and surgical tape like that used in previous murders, as well as a bloody knife.²⁶⁶

They did not arrest Eyler, but instead released him and his truck later that day.²⁶⁷ However, they obtained a warrant to search the home where Eyler was staying.²⁶⁸ There they found handcuffs, credit card receipts, and phone records that tied him overwhelmingly to previous murders.²⁶⁹ Laboratory analysis of the seized evidence confirmed their suspicions.²⁷⁰

Eyler was later arrested for the murders.²⁷¹ Eyler was released and the seized evidence was suppressed, however, because a court determined that taking Eyler to the station for investigation was effectively an arrest and that, at that point, there was insufficient probable cause to arrest Eyler.²⁷² The court's order excluded not only the evidence obtained with Eyler's permission at the station, but also the evidence obtained pursuant to the warrant to search Eyler's apartment, because the warrant was based upon the illegally-seized evidence, and thus was excluded under the doctrine of the "fruit of the poisonous tree."²⁷³

The inconvenience of the trip to the station and the twelve hours he was detained meant, under the criminal justice system, that Eyler's tortures and killings of those eighteen young men could not be punished—that is forty minutes detention per killing. Eyler's release is both puzzling—even to Eyler—and an outrage. A frustrated Sheriff Robert Babcox, as he watched Eyler drive off after release, said, "He is freed to kill. Hell, it's only a matter of time."²⁷⁴

The inconvenience to Eyler seems so comparatively trivial. How could it possibly justify letting him torture and murder eighteen young men with impunity? If the violation of Eyler's rights really was so serious a violation as to justify letting Eyler go free, then why have not all of the police officials who perpetrated this violation been put in jail? Why is the only effect that Eyler can murder with impunity?

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. The trial court determined that the initial stop was proper, however, the following twelve-hour detention at the police station was improper because it was not supported by probable cause. A *Terry* stop only allows detaining a person based on a "reasonable, articulable suspicion of criminal activity and the 'frisk' or pat-down search for weapons of the person detained," thus to handcuff Eyler and detain him at the police station required probable cause that he had committed an offense. *People v. Eyler*, 132 Ill. App. 3d 792, 800 (1985). The trial judge determined that probable cause could not flow from a statement from Eyler's passenger (Daryl Hayward) since Hayward's statement only established probable cause with respect to the crime of prostitution. *See id.* at 810. On appeal, the Appellate Court of Illinois upheld the trial court's finding that "there was a direct 'nexus' between the illegal arrest of the defendant and the subsequent statement made by Hayward" and agreed that Hayward's statement did not establish probable cause to arrest Eyler because "the tainted statement [concerning Eyler's solicitation] cannot be used to establish probable cause to arrest [Eyler] on a separate crime." *See id.* at 806.

274. ROBINSON & CAHILL, *LAW WITHOUT JUSTICE*, *supra* note 233, at 148.

To nonlawyers, the effect of the exclusionary rule is genuinely bizarre. The rule seems to ignore the seriousness of the offense, the reliability of the evidence, and the extent of actual unfairness to the defendant in order to focus on a trivial violation of defendant's rights. As the late Stanford scholar John Kaplan noted in 1974:

[T]he United States is the only nation that applies an automatic exclusionary rule [T]here are many other countries which do not have a mandatory exclusionary rule but which seem to be at least as able as we to prevent their police from intruding upon the rights of citizens. In fact, their leading legal representatives express in private, and occasionally in public, a complete mystification that the United States would adopt a rule that deprives the prosecution of reliable evidence of guilt. In other words, the exclusionary rule is hardly a facet of American jurisprudence that has aroused admiration the world over.²⁷⁵

The United States is still nearly alone in the world in applying an automatic exclusionary rule,²⁷⁶ and even the few other countries that have some form of exclusion take a significantly more flexible approach.²⁷⁷ The Canadians, for example, reject the United States' automatic exclusion in favor of a discretionary approach that looks to the effect on the system's reputation. Section 24(2) of the Canadian Charter of Rights and Freedoms provides:

Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.²⁷⁸

In *Eyler* and cases like it, of course, it is *excluding* the evidence that "would bring the administration of justice into disrepute" in the minds of much of the community.²⁷⁹

The U.K. rules also show a greater concern for the importance of doing justice. English law does not, for example, apply the "fruit of the poisonous tree" doctrine when the "fruit" is reliable evidence, as in *Eyler*.²⁸⁰ The European Court of Human Rights similarly rejects the

275. John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1031–32 (1974).

276. See James Stribopoulos, *Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 B.C. INT'L. & COMP. L. REV. 77, 93 (1999).

277. *Id.* at 84 (examining the exclusionary rule in England, Scotland, Australia, and Canada, concluding that each country uses the discretionary approach, which "leads to a more expansive and honest definition of constitutional rights").

278. *Id.* at 119.

279. A Canadian Appellate Court noted:

Section 24(2) was written to constitute an intermediate position between the automatic exclusionary rule familiar to American Bill of Rights jurisprudence and the automatic inclusionary rule of the common law for non-conscriptive real evidence

The main purpose of s.24(2) is to protect the reputation of the administration of justice.

R. v. Harrison, [2008] 89 O.R. (3d) 161 (Can).

280. The English exclusionary rule is explained as follows:

United States' automatic exclusion in favor an overall assessment of what is fair: "The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair."²⁸¹

Overall, other countries tend to focus on the effects on justice and fairness rather than on a mere technical rule violation.²⁸² In the United Kingdom, for example, whether evidence is admitted depends upon an overall assessment of whether it would "have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."²⁸³ The European Court of Human Rights holds that the European Convention of Human Rights "does not require suppression of evidence obtained through an illegal search and seizure," but will provide it if is necessary for an overall fair trial.²⁸⁴

Six months after his release from the traffic stop incident, Eyler used the same truck to pick up another young man, Danny Bridges. Eyler then tortured, murdered, and dismembered Bridges' body.²⁸⁵

2. *Double Jeopardy*

When Melvin Ignatow's girlfriend, Brenda Schaeffer, said she was breaking up with him, he lured her to his house where he raped, tortured, and murdered her with the help of a former girlfriend.²⁸⁶ The girlfriend-accomplice cooperated with police for a reduced sentence, but the jury found her trial testimony muddled.²⁸⁷ With this, and Ignatow's perjuring of himself on the stand, Ignatow was acquitted and released.²⁸⁸ Soon after, the buyers of his old house were remodeling and found, in a heating duct, photos that Ignatow had taken of the torture-murder session.²⁸⁹ Despite the incontrovertible evidence, and, despite his having obtained the

English law does not apply the 'fruit of the poisonous tree' doctrine when the "fruit" is reliable evidence. For example, when a coerced confession leads to recovery of stolen property, the confession will be suppressed but the property will be admitted in evidence. Thus, the English exclusionary rule as applied to the fruits of excluded confessions is tempered by a reliability principle.

Gordon Van Kessel, *Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 29-30 (1986).

281. P.G. and J.H. v. United Kingdom, 2001-IX Eur. Ct. H.R. 195, ¶ 76 (2001).

282. Christopher Slobogin, *A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases* 8 (Vanderbilt Pub. Law & Legal Theory Working Paper No. 13-21, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247746.

283. *Id.* at 9.

284. Khan v. United Kindom, 31 Eur. Ct. H.R. 45, ¶¶35, 38 (2000), available at <http://www.bailii.org/eu/cases/ECHR/2000/195.html> ("The central question in the present case [concerning suppression of illegally obtained evidence] is whether the proceedings as a whole were fair.").

285. ROBINSON & CAHILL, LAW WITHOUT JUSTICE, *supra* note 233, at 148-49.

286. BOB HILL, DOUBLE JEOPARDY: OBSESSION, MURDER, AND JUSTICE DENIED 328 (William Morrow & Co. 1995) [hereinafter HILL, DOUBLE JEOPARDY]; ROBINSON & CAHILL, LAW WITHOUT JUSTICE, *supra* note 233, at 166.

287. HILL, DOUBLE JEOPARDY, *supra* note 286, at 241; ROBINSON & CAHILL, LAW WITHOUT JUSTICE, *supra* note 233, at 164-65.

288. ROBINSON & CAHILL, LAW WITHOUT JUSTICE, *supra* note 233, at 165, 170.

289. HILL, DOUBLE JEOPARDY, *supra* note 286, at 281.

acquittal by perjuring himself at trial, Ignatow was free from prosecution for his horrendous murder.²⁹⁰

In another case, in March 1987, Brenda Spicer's partially naked body was found in a dumpster on the campus of Northeast Louisiana University.²⁹¹ Spicer had been strangled; sperm was found in her rectum and vagina, bruises were found between her legs, and saliva on her breasts.²⁹² Ivryn Bolden, a boyfriend of Spicer's roommate who had a history of jealousy-fueled disputes with Spicer, was ultimately arrested and tried for her murder.²⁹³ At trial he denied any involvement with Spicer's death.²⁹⁴ The available physical evidence was not overwhelming and he was acquitted.²⁹⁵

Bolden then moved to Memphis with Spicer's roommate, Joel Tillis.²⁹⁶ In 1989, Tillis' badly decomposed body, wrapped in red sheets, was found in a ditch in Arkansas; she too had been strangled.²⁹⁷ Soon after, Bolden moved to New Jersey.²⁹⁸ Bolden's new girlfriend told New Jersey police that Bolden had admitted to the two murders.²⁹⁹ After questioning and a failed polygraph test, Bolden confessed.³⁰⁰ He gave a detailed account of his killing of Spicer: how he lured her to the storage locker, raped and strangled her, and then dumped her partially nude body on campus, facts that were confirmed by the forensic evidence.³⁰¹ Even though he openly admitted murdering Spicer, the previous acquittal based on his perjured testimony barred his prosecution.³⁰²

Why should Ignatow and Bolden walk free from their horrible crimes when we have such reliable evidence that they committed them? Indeed, by their perjury they helped trick the system into a false acquittal the first time around. Why should we let them rape and murder with such impunity? The existing law's answer will not be obvious to much of the community.

290. *Id.*, at 248, 303; ROBINSON & CAHILL, LAW WITHOUT JUSTICE, *supra* note 233, at 166, 170.

291. For sources on the facts of this case, see, e.g., *Bolden v. Warden*, W. Tennessee High Sec. Facility, 194 F.3d 579, 580 (5th Cir. 1999); *State v. Bolden*, 680 So.2d 6 (La. App. 3 Cir. 1996); *Acquitted Man Booked With Perjury*, NEW ORLEANS TIMES PICAYUNE, Aug. 29, 1992, available at 1992 WLNR 808337; *Basketball Slayings: Is Boyfriend Killer, or a Freak Victim?*, NEW ORLEANS TIMES PICAYUNE, July 9, 1989, [hereinafter *Basketball Slayings*], available at 1989 WLNR 499802; *Bolden Faces Perjury Charge in Louisiana*, MEMPHIS COM. APPEAL, Mar. 10, 1992, available at 1992 WLNR 2658313; see also Lawrence Buser, *Families Believe They, System Were Fooled by Smiling 2-Time Killer*, COM. APPEAL, Mar. 9, 1992, [hereinafter *2-Time Killer*], available at 1992 WLNR 2696410; Christopher Rose, *Murder Suspect Returned*, NEW ORLEANS TIMES PICAYUNE, Aug. 18, 1991, available at 1991 WLNR 818104.

292. *Bolden v. Warden*, 194 F.3d at 580; Rose, *supra* note 291.

293. *Bolden v. Warden*, 194 F.3d at 580; *2-Time Killer*, *supra* note 291.

294. *Bolden v. Warden*, 194 F.3d at 580.

295. *Id.* at 580, 585.

296. *2-Time Killer*, *supra* note 291.

297. Rose, *supra* note 291; *Murder Suspect Returned*, *supra* note 291.

298. *Bolden v. Warden*, 194 F.3d at 581.

299. *2-Time Killer*, *supra* note 291.

300. *State v. Bolden*, 680 So. 2d 6, 11 (La. App. 3 Cir. 1996).

301. *Id.*; *2-Time Killer*, *supra* note 291.

302. Bolden was convicted of perjury in the Spicer case, and pled guilty to involuntary manslaughter for his killing of Tillis. *Bolden v. Warden*, 194 F.3d at 580–81.

Yes, there is a “double jeopardy” prohibition in the U.S. Constitution, but the courts are the ones who have filled in the meaning of that phrase, and they have already recognized many obviously appropriate exceptions—instances where an offender may be twice put in jeopardy at trial. For example, a retrial is permitted if an offender’s conviction is reversed, even though nothing in the constitutional language authorizes this.³⁰³ Similarly, we allow a retrial if a first trial ends in a mistrial or a hung jury.³⁰⁴ We also allow a second trial, even after an acquittal, when brought by a different state, or by federal prosecutors, even if it is prosecution for the exact same conduct alleged to be criminal.³⁰⁵ Why not also except cases like *Ignatow and Bolden*, where there is compelling evidence of guilt and the offender helped induce the wrongful acquittal through perjury at trial?

Most countries, if they have a double jeopardy bar at all, would not apply it in the rigid way the United States does.³⁰⁶ For example, most countries allow appeals after acquittals.³⁰⁷ In the United Kingdom, under

303. See, e.g., *Green v. United States*, 355 U.S. 184, 189 (1957).

304. See, e.g., *Richardson v. United States*, 468 U.S. 317, 324 (1984); *Oregon v. Kennedy*, 465 U.S. 667, 672–73 (1982).

305. *Heath v. Alabama*, 474 U.S. 82, 89–90 (1985) (explaining that the dual sovereign doctrine permits prosecution of the same offense in both state and federal court because “the States are separate sovereigns with respect to the Federal Government because each State’s power to prosecute is derived from its own ‘inherent sovereignty,’ not from the Federal Government”); Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU’s Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693, 695–97 (1994) (explaining double jeopardy in the context of the Rodney King trials). Again, nothing in the Constitution’s prohibition of “double jeopardy” authorizes an exception for such a second prosecution. Rather, courts permit it by any number of arguments, saying, for example, that “jeopardy did not attach” because of some set of conditions or saying “jeopardy does not apply” because of some policy reason, such as the “independent sovereignty” of state and federal jurisdictions. Double jeopardy also does not apply when circumstances are such that the defendant is never actually “in jeopardy” of conviction in the first trial. For example, if the defendant bribes the judge in exchange for acquittal in the first trial, then the outcome was never in doubt and retrial is permitted. *Aleman v. Judges of the Circuit Court*, 138 F.3d 302, 308–09 (7th Cir. 1998).

306. See Mario Chiavario, *The Rights of the Defendant and the Victim*, in EUR. CRIM. PROCEDURES 541, 574 n.91 (Mireille Delmas-Marty & J. R. Spencer eds., 2002) (“The German provision allows the case to be reopened where the defendant’s case was helped by a false document or false evidence, where a judge . . . committed a punishable offense; and where the acquitted defendant makes a credible confession.”); K.N. CHANDRASEKHARAN PILLAI, DOUBLE JEOPARDY PROTECTION: A COMPARATIVE OVERVIEW 37 (K.M. Mittal, 1988) (explaining that double jeopardy receives restrictive interpretation in England, Canada, and India in the common law tradition); Erin M. Cranman, *The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right?*, 14 EMORY INT’L L. REV. 1641, 1649–51 (2000) (explaining that, although double jeopardy exists in England and Australia, the rule is more flexible); Nyssa Taylor, *England and Australia Relax the Double Jeopardy Privilege for Those Convicted of Serious Crimes*, 19 TEMP. INT’L & COMP. L.J. 189, 192 (2005).

307. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT’L L. 235, 288–89 (1993) (“The concept of double jeopardy is interpreted differently by different world legal systems In most continental European nations, however, the state may appeal an acquittal due to errors of law or questions of fact. A conviction may be reversed on appeal and a new trial ordered, or the judgment may be revised without remand for a new trial Furthermore, legal systems differ as to when jeopardy attaches.”); Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 256 n.74 (2000) (“In Italy, all parties may appeal the trial court decision, no matter if the decision was one of acquittal or of conviction”); David S. Rudstein, *Prosecution Appeals of Court-Ordered Midtrial Acquittals: Permissible Under the Double Jeopardy*

recent reforms, the prosecutor may apply to the Court of Appeals to retry an acquitted person for any of a list of serious offenses if there appears “new and compelling evidence” and the retrial would be “in the interests of justice.”³⁰⁸ These reforms contain a list of considerations that the court is to take into account in judging the matter, including the likelihood of a fair trial, the passage of time since the first trial, the likelihood that the new evidence could have been presented in the first trial but for prosecutorial error, and the existence of any other prosecutorial failure “to act with due diligence or expedition.”³⁰⁹

Other British Commonwealth countries also have undertaken reforms. In 2008, New Zealand created an exception to the double jeopardy bar for offenses whose maximum punishment exceeds fourteen years, where the defendant got an acquittal by committing an “administration of justice” offense—such as perjury, fabricating evidence, or corrupting witnesses.³¹⁰ The Council of Australian Governments permits “retrial of the original offence or prosecution for a similar offence where the acquittal is ‘tainted,’ . . . ”³¹¹ as occurred when Ignatow perjured himself at trial.

In other words, similarly to application of the exclusionary rule, other countries are more likely to look at the full set of interests in balance and make a determination based upon many factors, including assessments of what justice and fairness require. Such an application is radically different from the United States’ approach of having a fixed rule that ignores most interests—such as the seriousness of the offense, the extent of the unfairness to the defendant, the defendant’s culpability in gaining an earlier false acquittal, and the propriety of the prosecutor’s conduct—and favors instead a technical rule applied in a rigid fashion.

Clause?, 62 CATH. U. L. REV. 91, 94–95 & n.22 (2012) (noting that, although France, Russia, Italy, Mexico, and the Netherlands recognize double jeopardy, all generally allow the prosecution to challenge at least some acquittals by way of appeal).

308. Criminal Justice Act, 2003, c. 44, §§ 78(1), 79(1) (Eng.).

309. *Id.* § 79(2).

310. See NEW ZEALAND LAW COMMISSION, REPORT 70: ACQUITTAL FOLLOWING PERVERSION OF THE COURSE OF JUSTICE 7–8, 11 (2001), available at <http://www.lawcom.govt.nz/project/double-jeopardy/publication/report/2001/acquittal-following-perversion-course-justice>. The changes were approved by Parliament in 2008. LAW REFORM COMMISSION OF HONG KONG, CONSULTATION PAPER: DOUBLE JEOPARDY 3, 43 (2010), available at <http://www.gov.hk/en/residents/government/publication/consultation/docs/2010/DoubleJeopardy.pdf>; see Diana McCurdy, *Verdict of Public Hits the Courts*, NEW ZEALAND HERALD, June 27, 2004, at B08; Lesley Deverall, *Majority Verdicts Get the All-Clear*, THE DOMINION POST, <http://www.stuff.co.nz/dominion-post/news/politics/496239/Majority-verdicts-get-the-all-clear> (last updated June 6, 2008 12:47 AM).

311. Double Jeopardy COAG Law Reform Working Group, *Double Jeopardy Law Reform: Model Agreed by COAG 1* (April 2007), http://www.lccsc.gov.au/agdbasev7wr/sclj/documents/pdf/mcloc_projects_double_jeopardy_coag_model.pdf (COAG Model).

3. *Statute of Limitations*

On the evening of March 16, 1978, sixteen-year-old Lauren Kustudick went to a local dance club to meet friends for an early St. Patrick's Day party.³¹² Her friends never arrived, but when a young man (later identified as Herbert Howard) approached her to offer a ride home, she accepted.³¹³ As another young man drove, Howard jumped into the back seat, cracked Lauren in the face with his fist, and began to severely beat her.³¹⁴ The driver ignored Lauren's pleas to stop the car.³¹⁵ Howard, screaming obscenities and spitting on her, ripped off her clothes and forcibly raped her.³¹⁶ He also choked her, bit her, and burned her with a cigarette.³¹⁷ The beating was so severe it fractured her skull in multiple places.³¹⁸ When the driver pulled into a gas station, Lauren fled, completely naked, and was found by a Cook County Deputy Sheriff.³¹⁹

Lauren was too traumatized to help investigators, but police nonetheless identified Howard as their primary suspect on their own.³²⁰ Howard was later released when Lauren was unable to participate in the investigation and prosecution.³²¹ In 1991, Lauren began seeing a rape therapist.³²² Through therapy, she was able to remember the attack and to come to terms with the incident.³²³ At the urging of her therapist, Lauren contacted the police.³²⁴ She picked Howard from a book of photographs as the man who beat and raped her, and her cooperation led police to confirm other evidence of Howard's clear guilt.³²⁵

However, Illinois had a five-year statute of limitation for rape, and by the time Lauren was able to help police, that limitation period had run.³²⁶ Howard was immune from prosecution.³²⁷

In another case, in November 1982, in Brooklyn, New York, Donald Holloman argued with Herman Turner and another man about the \$100 he was owed for making a car repair.³²⁸ When a fight ensued, the un-

312. ROBINSON & CAHILL, *LAW WITHOUT JUSTICE*, *supra* note 233, at 53; Cook County Sheriff's Police Department Report (Mar. 17, 1978); Interview by Ryan McLennan with Lauren Kustudick in Glenview, Illinois (Nov. 28, 2000) (notes on file with author).

313. ROBINSON & CAHILL, *LAW WITHOUT JUSTICE*, *supra* note 233, at 53.

314. *Id.*

315. *Id.*

316. *Id.* at 53–54.

317. *Id.* at 54.

318. *Id.*

319. *Id.*

320. *Id.* at 54–55.

321. *Id.* at 55.

322. *Id.* at 56.

323. *Id.*

324. *Id.*

325. *Id.* at 57.

326. *Id.*

327. *Id.*

328. See *People v. Turner*, No. 3361-1998, 1998 WL 35307751, *1 (N.Y. Sup. Ct. May 24, 1998), *aff'd* 281 A.D.2d 568 (N.Y. App. Dir. 2001), *vacated*, 10 A.D.3d 458 (N.Y. App. Dir. 2004), *aff'd*, 840 N.E.2d 123 (N.Y. 2005); Kenneth Lovett, *Goof-y Slay Case - Botch Keeps Man Free*, N.Y. POST, Nov. 18, 2005, at 39, *available at* 2005 WLNR 23209880; Philip Messing, *B'klyn Man Charged in 15-Year-*

armed Holloman picked up a stick and then a bottle, but was shot twice by Turner, killing him.³²⁹ Police sought Turner for murder, but he fled to South Carolina.³³⁰ When Turner returned in 1994, witnesses to the killing tipped off police, who arrested him.³³¹ He was indicted for second-degree murder in 1998, sixteen years after the killing.³³² Turner's attorney supported giving a jury instruction that allowed conviction for either second-degree murder or first-degree manslaughter.³³³ The intermediate manslaughter verdict offered the jury a ready compromise to avoid murder, which they took.³³⁴ What the jury did not know was that Turner would then go free because the statute of limitations on manslaughter had run, leaving him unpunished for the killing.³³⁵

To the average citizen, the impunity with which Howard could rape and Turner could kill is puzzling indeed. The basis for punishment is clear. There is no suggestion that the prosecutors or investigators acted improperly in any way. It is hard to see that Howard or Turner were seriously inconvenienced or disadvantaged by the delay in prosecution—indeed, they have gotten the undeserved benefit of staying free while they should have been in prison. And if the delay had disadvantaged them in some way, their due process rights would allow them to challenge the delay as a violation.³³⁶

The continued justification for fixed statutes of limitations is unclear. Some states have essentially eliminated statutes of limitation, with no apparent negative consequences.³³⁷ Most countries in the world have no such fixed limitation period.³³⁸ England and Canada for example, rely instead upon judicial balancing to assess whether a preindictment delay is unwarranted and prejudicial, essentially engaging in a case-by-case fairness assessment.³³⁹

Old Murder, N.Y. POST, Mar. 28, 1998, at 12, available at 1998 WLNR 6578819; see also; Dan Morrison, *Man Charged in '82 Killing*, NEWSDAY, Mar. 29, 1998, at A35, available at 1998 WLNR 612136; Editorial, *Suspect Arrested in 1982 Brooklyn Slaying*, N.Y. TIMES, Mar. 28, 1998, at B5, available at 1998 WLNR 3032634.

329. See *Turner*, 1998 WL 35307751, at *1.

330. Messing, *supra* note 328.

331. *Suspect Arrested in 1982 Brooklyn Slaying*, *supra* note 328.

332. Messing, *supra* note 328.

333. *People v. Turner*, 10 A.D. 3d at 459.

334. *Id.*

335. *Id.*

336. *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (“[T]he due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.”).

337. Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 148–49 (2008) (highlighting that Wyoming and South Carolina have eliminated criminal statutes of limitation altogether and permit unduly preindictment delays to be addressed by due process challenges).

338. *Id.* at 149 (explaining that England and Canada, whose laws are in other ways quite similar to those of the United States, do not have limitation periods for most criminal offenses); see also ROBINSON & CAHILL, *LAW WITHOUT JUSTICE*, *supra* note 233, at 60–61.

339. Powell, *supra* note 337, at 149.

D. Disillusionment and Lost Credibility

As social psychology studies reveal, reputation is primarily a function of perceived motivation.³⁴⁰ It is not the failures of justice themselves that do the damage, as many of these failures are easily forgiven by a community that understands the practical limits of reliably reconstructing past events and abhors wrongful convictions and injustice. Doctrines like the beyond-a-reasonable-doubt standard of proof and excluding coerced confessions make sense to people even if some guilty offenders may go free as a result. What is damaging to a system's reputation are those instances, like the doctrines of disillusionment noted above, that suggest an indifference to the importance of doing justice. Letting offenders who are clearly guilty of serious offenses escape punishment for a seemingly trivial technicality portrays a system willing to trade justice in order to promote an interest that could be promoted in some other way.

The doctrines of disillusionment have a negative effect. No doubt the U.S. criminal justice system has a better reputation than that of many countries in the world.³⁴¹ But its reputation is quite mixed, and could be substantially improved with reform. In a 2011 Gallup poll, only twenty-eight percent said they had a "great deal" or "quite a lot" of confidence in the U.S. criminal justice system.³⁴² It ranked far below the ratings of many other institutions, including organized religion, the military, and small business. Even the police ranked dramatically higher. At fifty-seven percent, the police have more than twice the percentage of people expressing a 'great deal' or 'quite a bit' of confidence in them.³⁴³ Moreover, the reduced confidence in the criminal justice system has been consistent over the past two decades during which the polling has been done.³⁴⁴

Part of the disillusionment arises from a common view that the courts do not take the importance of doing justice seriously enough. An earlier ABA-sponsored nationwide survey found that, when people were

340. Paul Robinson & John Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 496 (1997).

341. See, e.g., MARK D. AGRAS ET AL., THE WORLD JUSTICE PROJECT RULE OF LAW INDEX 2012-2013 at 161, available at http://www.worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf (noting that in a global survey of ninety-seven countries, the United States ranked twenty-sixth in the overall "Criminal Justice" category, which included questions pertaining to the efficacy and impartiality of a country's criminal justice system).

342. Lydia Saad, *Americans Express Mixed Confidence in Criminal Justice System*, GALLUP (July 11, 2011), <http://www.gallup.com/poll/148433/americans-express-mixed-confidence-criminal-justice-system.aspx>. In 1999, the Hearst Corporation authorized a comprehensive national survey, "How the Public Views State Courts," that was coordinated by the National Center for State Courts. NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 7 (1999). The survey found that only ten percent of the respondents felt the courts in their communities handled cases in an "Excellent" manner. *Id.* Additionally, respondents who reported a higher knowledge about the courts expressed lower confidence in courts in their community. *Id.* Forty-two to fifty-seven percent of respondents said the slow pace of justice and the complexity of the law contributes "A Lot" to the cost of going to court. *Id.*

343. Saad, *supra* note 342.

344. *Confidence in Institutions Poll*, GALLUP, <http://www.gallup.com/poll/1597/confidence-institutions.aspx> (last updated Oct. 1, 2014, 12:00 AM).

asked whether “[t]he courts let too many criminals go free on technicalities,” seventy-four percent of people agreed or strongly agreed (only sixteen percent disagreed or strongly disagreed).³⁴⁵

One can understand how the Supreme Court decisions during the Warren Era in the 1960s could have produced this view, including decisions that applied the exclusionary rule in a variety of contexts and introduced the “fruit of the poisonous tree” doctrine.³⁴⁶ One Texas police chief captured the mood of many at the time: “It’s the damndest thing I ever heard . . .”³⁴⁷ President Dwight Eisenhower, who appointed Warren, later concluded that making Warren the Chief Justice was a mistake in light of Warren’s decisions in criminal cases, which some described as “handcuffing police.”³⁴⁸ Many in Congress called for Warren’s impeachment following the *Miranda* decision, making a similar argument that the decision was “handcuffing police” rather than the criminals.³⁴⁹ Truman Capote, testifying before a U.S. Senate committee, said: “It seems almost unbelievable to me that the police force of one of our major cities is literally frightened to death to ask the prime suspect a single question for fear that their case against him might be jeopardized.”³⁵⁰ It may be no surprise, then, that from 1965 to 1994 the percentage of Americans saying the courts were too lenient on criminals rose from forty-seven percent to eighty-five percent.³⁵¹

One should not underestimate the significance of such discontent from failures of justice. It is not just one more disagreement with a government policy, which is the way the scholarly and intellectual elites sometimes view it. For laypersons, failures of justice are deeply disappointing and often even dramatically disturbing. A woman upset by the light sentence for her husband’s killer reported it made her “sick to her

345. AMERICAN BAR ASSOCIATION, PERCEPTIONS OF U.S. JUSTICE SYSTEM 66 (1999), available at http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/perceptions_of_justice_system_1999_2nd_half.authcheckdam.pdf.

346. For example, the Court handed down *Mapp v. Ohio*, 367 U.S. 643, in 1961, *Escobedo v. Illinois*, 378 U.S. 478, in 1964, and *Miranda v. Arizona*, 384 U.S. 436, in 1966.

347. Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY U. L. REV. 323, 326 (2012).

348. DAVID A. NICHOLS, MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS REVOLUTION 91–101 (Simon & Schuster Paperbacks 2008) (2007); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. OF CRIM. L. & CRIMINOLOGY 621, 622 (1996); see also Patrick Malone, *You Have the Right to Remain Silent: Miranda After Twenty Years*, 55 AM. SCHOLAR 367 (1986).

349. Leo, *supra* note 348, at 622.

350. See George Gallup, *2 to 1 View: Confession Ruling Bad*, SALT LAKE TRIB., July 27, 1966, available at <http://newspaperarchive.com/salt-lake-tribune/1966-07-27/page-7>.

351. Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 851 tbl.2 (1998) (citing U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973, at 146–47 tbls.2.36, 2.37 (Michael J. Hindeland et al. eds., 1973)); BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1981, at 204–05 tbl.2.33 (Timothy J. Flanagan et al. eds., 1982); BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1994, at 174–75 tbl.2.43 (Kathleen Maguire & Ann L. Pastore eds., 1995)); Rostron, *supra* note 347, at 326–27.

stomach.”³⁵² People shocked by a justice failure have complained it is “absolutely unconscionable,”³⁵³ it “keeps me up at night,”³⁵⁴ “it’s a travesty,”³⁵⁵ “it’s unbelievable . . . we’re devastated,”³⁵⁶ “it’s insanity.”³⁵⁷ The upset over a justice failure may be even more exaggerated for a victim: “I will forever live with this shadow.”³⁵⁸ “There’s a sea of emotions I’ve had since this happened. . . . I find [the sentence] very insulting.”³⁵⁹ A rape victim explained she will “be forever marked” by the crime and the case’s “embittering conclusion.”³⁶⁰

This discontent with the criminal justice system has led neighborhoods to increasingly take up the role of law enforcement for themselves, a role that in many respects might better have been left a governmental function, as some of the case studies above illustrate.³⁶¹ The 2000 National Crime Prevention Survey estimated that forty-one percent of the U.S. population lives in communities covered by neighborhood watch.³⁶² The report concludes that, “this makes Neighborhood Watch the largest single organized crime-prevention activity in the nation.”³⁶³ The degree to which private entities have taken over law enforcement in this country is, as one writer says,

[E]xtraordinary [P]rivate security officers vastly outnumber public law enforcement officers, and spending on private security is approximately double the spending for public law enforcement. For the most part, this growth has all occurred within the past three or

352. Joseph Hosey, *Wife of Man Killed by Drunk Driver Blasts Sentence & System*, PATCH, (June 28, 2013, 4:49 PM), http://patch.com/illinois/channahon-minooka/wife-of-man-killed-by-drunk-driver-blasts-sentence--system_05ac6b6d#.VBfJqvldWO7.

353. Entopticon, Comment to *Former Asheville Firefighter Gets 4 Months for Shooting Cyclist*, MOUNTAIN XPRESS (Nov. 30, 2009, 11:07 PM), http://mountainx.com/news/community-news/former_asheville_firefighter_gets_4_months_for_shooting_cyclist/.

354. Tom Sherwood, *Bicyclist Disappointed in Hit-and-Run Sentence*, NBC WASHINGTON (Apr. 4, 2013, 10:05 PM), <http://www.nbcwashington.com/news/local/Bicyclist-Disappointed-in-Hit-and-Run-Sentence-201514801.html>.

355. Bob Segall, *13 Investigates: Violent Criminals Released Too Soon?*, WTHR.COM (Aug. 28, 2014, 3:03 PM) Oct. 25, 2012, <http://www.wthr.com/story/19919959/violent-criminals-released-too-soon>.

356. Julie Shaw, *Parents of Man Who Died After '08 Subway Attack Are Angered by Pending Release of One Assailant*, PHILLY.COM (July 2, 2010), http://articles.philly.com/2010-07-02/news/24966557_1_subway-attack-fatal-asthma-attack-state-prison.

357. *Don't Mess With Texas: Home Intruder Shot & Killed; Criminals Family Thinks He Should Have been Warned*, GLENN BECK (Feb. 21, 2013 2:18 PM), <http://www.glennbeck.com/2013/02/21/dont-mess-with-texas-home-intruder-shot-criminals-family-thinks-he-should-have-been-warned/>.

358. Mirta Ojito, *Kidnapping Victim Angered at Her Abductors' Sentences*, N.Y. TIMES, Apr. 10, 1997, <http://www.nytimes.com/1997/04/10/nyregion/kidnapping-victim-angered-at-her-abductors-sentences.html>.

359. *Detroit Police Officer Upset with 'Lenient' Sentence Against Shooter*, POLICE OFFICERS ASS'N MICH., <http://www.poam.net/the-police-beat/2012/detroit-police-officer-upset-with-lenient-sentence-against-shooter/> (last visited Nov. 5, 2014).

360. Cynthia Jones, *Nashua Rape Victim Feels Cheated Out of Justice*, NASHUA TELEGRAPH, May 8, 1982, at 1.

361. See KATY HOLLOWAY ET AL., U.S. DEP'T OF JUSTICE OFFICE OF CMTY. ORIENTED POLICING SERVS., CRIME PREVENTION RESEARCH REVIEW NO. 3: DOES NEIGHBORHOOD WATCH REDUCE CRIME? 6 (2008).

362. THE 2000 NATIONAL CRIME PREVENTION SURVEY: ARE WE SAFE?, NATIONAL CRIME PREVENTION COUNCIL 39 (2001).

363. HOLLOWAY ET AL., *supra* note 361.

four decades—only thirty-five years ago, there were more public police officers than private security guards.³⁶⁴

Another sign of the criminal justice system's reputational difficulties is found in popular culture. Many of the worst failure-of-justice rules were introduced in the 1960s and 1970s. Since that time, an entire movie genre depicting discontent has blossomed. The doing-justice-where-the-system-has-failed movie has become a fantasy favorite for Hollywood. Starting with the wildly successful 1970s franchises of Charles Bronson's *Death Wish* and Clint Eastwood's *Dirty Harry*, most big name actors have acted in a vigilante flick, including Jodie Foster (*The Brave One*), Gerard Butler (*Law Abiding Citizen*), Kevin Bacon (*Death Sentence*), Jeremy Irons (*Fourth Angel*), Liam Neeson (*Taken* series), Denzel Washington (*Man on Fire*), Christian Bale (*The Dark Knight* series), Robert DeNiro (*Righteous Kill*), and Michael Douglas (*Star Chamber*), among many others.³⁶⁵

It is not healthy for a society to have an entire entertainment genre built around protagonists who are seen as heroes for breaking the law, and audiences being thrilled by it. It is rare for these movie protagonists to satisfy the requirements for being a moral vigilante (per the rules in Section II.B.), but these protagonists are heroes nonetheless. Movie writers must pay careful attention to people's willingness to pay money to see a particular movie. Therefore, movie writers tailor their movies to their audience's sensibilities, given that the success of their movie often depends upon it. Heroic protagonists must be kept within a range of conduct that the public will find admirable. The fact that protagonists are admired despite their gross violation of the law reflects the negative public sentiment regarding the criminal justice system, as well as criminal law, generally.

E. Conclusion

The goal in this Part of the essay has been simply to illustrate the existence of failure-of-justice doctrines so the reader can appreciate how easy it would be for the average person to come to a skeptical view of the system's commitment to justice. Exactly how that balance of interests ought to be struck for each doctrine is a project many times larger than

364. Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 920–21 (2007).

365. See, e.g., Johnny Firecloud, *10 Best Vigilante Films*, CRAVE ONLINE (Nov. 18, 2009), <http://www.craveonline.com/film/articles/142210-10-best-vigilante-films>. Note that many of these movies use as triggers for the protagonist's vigilante action some of the failure-of-justice doctrines discussed in Part IV, such as *Law-Abiding Citizen* (reliable DNA evidence excluded), *Death Sentence* (improperly short sentence), and *Sudden Impact*, one of the Clint Eastwood's *Dirty Harry* movies (evidence excluded for improper search). In a few instances, the story line plays upon the problems that come from frustrated classic and shadow vigilantes who pervert the system—see Part V.C. of the Article—thereby requiring the hero to act, such as *Righteous Kill* (hero DeNiro must go classic vigilante to do justice because frustrated shadow vigilante cops have planted evidence, allowing the guilty to hide from justice), *The Star Chamber* (hero Eastwood takes down vigilante judge Douglas), and *Brotherhood of Justice* (Keanu Reeves as head of a high school vigilante group fighting crime, which spins out of control—based on the real case discussed in Part IV.A.).

this Article. The argument here is not that we ought to sacrifice our civil rights and liberties to promote justice, or deny discretion to officials in the criminal justice system. On the contrary, it would be highly unattractive to live in a society without those rights and liberties, or a society that tolerated unjust punishment. The only issue here is how those rights and liberties are to be protected and how injustice is to be avoided. It is urged here that frustrating justice ought to be a matter of last resort, not first, as it commonly seems to be. Intentionally frustrating justice is not cost free. It has both deontological and practical crime-control costs, which ought to be taken into account in formulating how the interests are to be protected and advanced.

Many doctrines promoting nonjustice interests will not, in fact, conflict with doing justice. This is the case with all rules and practices that touch on reliability in fact-finding, for example. Presumably everyone abhors wrongfully convicting the innocent, and anything that creates a risk of it. Thus, for example, the exclusion of coerced confessions, representation by competent counsel, and an opportunity to put on an effective defense are not at issue because they promote reliability. The conflict here arises only with regard to rules and practices that seek to go beyond the accurate fact-finding goal of the criminal justice process to promote some interest that seeks to bar liability and punishment *despite the clear guilt* of the offender for a serious offense.

There is no dispute as to the importance of the interests that commonly motivate the failure-of-justice rules and practices. It is important for a society to control police search and seizure, to protect the integrity of the courts, to limit multiple prosecution attempts, to limit preindictment delay, to control police sting operations, to require speedy trials, to enforce plea agreements as negotiated, and to allow the flexibility to individualize punishment. The argument here is rather that the means by which these interests are advanced ought to take account of the costs, both deontological and the practical crime-control costs, incurred when these interests are promoted by means that intentionally allow serious wrongdoing to go unpunished.

Can limitations on such justice-frustrating doctrines be morally justified? As John Rawls would have us consider: if one were in the Original Position under the Veil of Ignorance, not knowing whether one would end up in the world being Larry Eyler or his next victim, how would one formulate the rules to properly balance our interests in fairness and effectiveness in controlling police and prosecutors or in promoting the integrity of the criminal justice process with our interest in punishing serious wrongdoing and maintaining the moral credibility of the criminal law? In every rule and practice at issue here, it seems likely that the current U.S. position would not survive the Rawlsian Original Position. Who would support a rule that values Eyler's twelve hours of inconvenient detention over punishing him for torturing and murdering eighteen young men with impunity? Who would support a rule that values

Ignatow's peace of mind in being free from prosecution after his perjury-induced acquittal as more important than punishing him for his torture, rape, and murder of Brenda Schaeffer? This is true even when one throws onto the scales the interests of other guilty offenders in positions similar to Eyler's and Ignatow's.

The absolutist American approach not only regularly produces failures of justice, but does so without improving the criminal justice system's reputation for protecting human rights. Public perception of the fairness of criminal justice in European countries is as favorable, if not more favorable than that of the U.S. system. For example, in ten European countries (including the United Kingdom), over eighty percent of people surveyed expressed the view that police and courts make fair and impartial decisions.³⁶⁶ Contrast that with the United States, where only twenty-eight percent of those polled had a "great deal" or "quite a lot" of confidence in the U.S. Criminal Justice System.³⁶⁷ The World Justice Project's Rule of Law Index ranked the United States fourteen out of sixteen countries in the protection of human rights among the Western Europe & North American Regions.³⁶⁸

A better approach than the absolutist American rules would take account of a wide range of factors and consider the larger issues. As noted previously, this is an approach common in European and general international practice.³⁶⁹ For instance, foreign courts consider the following: was there actually any unfairness to the offender? To what extent was he actually disadvantaged? Are there ways to compensate him for any disadvantage by means other than frustrating justice? What is the seriousness of the offense? What would be the cost to the system's reputation for fairness to not provide a defense? What would be the cost to the system's moral credibility if a clearly blameworthy offender were given a defense? These inquiries seem preferable to the American rule-bound approach that commonly ignores everything but whether the rule as written was technically breached.

V. SHADOW VIGILANTISM

The damage created when the system's doctrines of disillusionment inspire vigilante impulses argues for minimizing such effect, for working to avoid a reputation for being indifferent to the importance of doing justice. It suggests a reconsideration of the system's willingness to so freely trade off justice to promote other interests.

Some people might argue, however, that the need is not so pressing because, even if frustrated by the system's intentional failures of justice, people generally will restrain themselves from vigilante action. Most

366. JONATHAN JACKSON ET. AL., EUR. SOC. SUR., TRUST IN JUSTICE: TOPLINE RESULTS FROM ROUND 5 OF THE EUROPEAN SOCIAL SURVEY 6-9 (2011).

367. Saad, *supra* note 342.

368. AGRAS ET. AL., *supra* note 341, at 25, 180.

369. See sources cited *supra* note 232.

people are law-abiding by natural inclination. In the unusual case where vigilantism does occur, follow-up instances can be effectively discouraged by the threat of criminal prosecution. Thus, the current level of intentional failures of justice can be maintained, it might be argued, with little danger. Whatever public frustration there may be can be deterred by the threat of criminal prosecution, or perhaps simply vented by the emotional play of the vigilante fantasies in Hollywood movies, crime fiction, and the like.

But this assumes that the damage of the doctrines of disillusionment expresses itself only in explicit vigilante action on the street, what might be called “classic vigilantism.” A closer look suggests otherwise. It can and does express itself in less obvious and more damaging ways: in low-level but pervasive resistance to, and subversion of, the criminal justice system, an effect that might be called “shadow vigilantism.”

When people see dramatic failures of justice like the cases above, or even when they see a system that in many smaller ways shows an indifference to the importance of doing justice, that disillusionment may be taken by some as the moral justification to manipulate the system to compel that missing justice. These disillusioned individuals will not form a vigilance committee like San Francisco’s or a street patrol like the Lavender Panthers’. They will instead resist and subvert the system in more hidden ways.

Perhaps juries will be more willing to ignore their legal instructions and substitute their own notions of justice. Perhaps police officers will be more inclined to justify lying in court about the circumstances of a search—so called “testilying”—as their own form of “playing the game” effectively. Truth and justice do not matter, only gamesmanship. Perhaps police, prosecutors, and judges will be more inclined to make up their own off-the-books investigative and prosecution rules. Perhaps sentencing judges and parole commissions will be more willing to look to their own political or other special interests, or their own idiosyncratic personal views rather than to the system’s official rules. Part of the real danger is that we cannot know just how much shadow vigilantism society engages in.

A. Community Complicity in Classic Vigilantism

To appreciate the potential breadth of shadow vigilantism, consider three examples of cases that display community complicity in classic vigilantism.

1. *William Malcolm: Shielding the Killer of an Unpunished Child Molester*

In 1981, William Malcolm lived in East London with his wife and her two children, a six-year-old stepdaughter and a nine-year-old stepson.³⁷⁰ He sexually abused both stepchildren on a regular basis.³⁷¹ During the trial, it came to light that he had been abusing his stepdaughter since she was three years old.³⁷² Caught and convicted of serial child abuse, Malcolm was given a two-year jail term.³⁷³

Malcolm was released in 1984 to return to the same house to resume life with the two children whom he had been convicted of abusing.³⁷⁴ Before the end of the year, Malcolm was again charged with abusing his stepchildren, as well as other young victims in the neighborhood, convicted, and sent back to jail.³⁷⁵ After being released again, Malcolm lived with a girlfriend and her five children.³⁷⁶ Malcolm continued to abuse children.³⁷⁷ In one instance, he tracked down a former victim who testified against him in a previous trial and raped her again.³⁷⁸ He told her that she was “asking for it” because she had helped send him to jail.³⁷⁹

In 1994, Malcolm was once again charged with sexually abusing children.³⁸⁰ The charges involved four children, including children who were living with Malcolm at the time.³⁸¹ Among the charges were multiple instances in which children were “tied to a bed and forced to perform sex acts.”³⁸² Details of some incidents include Malcolm leaving abused children shoeless in a bedroom, with carpet tacks spread on the floor outside the room, so he would be alerted to a victim trying to escape.³⁸³ It was also alleged that Malcolm frequently beat his victims with a belt.³⁸⁴

370. For sources on the facts of this case, see, for example, NIGEL CAWTHORNE, *UNDERWORLD U.K. VIGILANTES: FIGHTING CRIME WITH CRIME* 88 (2010); Mary Braid, *Uproar in Court as Paedophile Case is Dropped*, INDEP. (London), Nov. 29, 1994, at 6 (on file with the University of Illinois Law School Library); Mark Gado, *The Slaughter of Innocence*, CRIME LIBRARY 2, http://www.crime-library.com/criminal_mind/psychology/pedophiles/1.html (last visited Nov. 5, 2014); Gary Jones & James Fletcher, *We'll Shed No Tears; Murdered Sex Fiend Who Lived in Shadow of Hatred*, MIRROR (London) (Feb. 19, 2000), available at <http://www.highbeam.com/doc/1G1-60292519.html>; *Witness Plea After Paedophile Killing*, BBC NEWS (Feb. 19, 2000), http://news.bbc.co.uk/2/hi/uk_news/648475.stm.

371. Oliver Wright, *Paedophile Shot Dead on Doorstep*, TIMES (London), Feb. 19, 2000, available at <http://spotlightonabuse.wordpress.com/2013/02/18/paedophile-shot-dead-on-doorstep-19-2-2000-2/>.

372. Mike Sullivan & Andrea Busfield, *Gun Law*, SUN (LONDON), Feb. 19, 2000, at 4.

373. *Id.*

374. *Id.*

375. *Id.*

376. Michael Horsnell, *Freed Child Abuser Linked to Paedophile 'Catweazle'*, TIMES (LONDON), Nov. 30, 1994, available at <http://spotlightonabuse.wordpress.com/2013/02/18/freed-child-abuser-linked-to-paedophile-catweazle-30-11-94/>.

377. Jones & Fletcher, *supra* note 370.

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. Gado, *supra* note 370.

383. Jones & Fletcher, *supra* note 370.

384. *Id.*

Prior to prosecution for the latest charges, Malcolm underwent a psychological evaluation, which determined that he was a sexual psychopath.³⁸⁵ The report described him as having pedophile tendencies of a “strongly sadistic nature.”³⁸⁶ Social workers suggested that he was “incurably psychopathic and violent.”³⁸⁷ At trial, the judge described the crimes as “unspeakable,” but concluded that there could be no trial for the new offenses because his earlier offenses made a fair trial impossible.³⁸⁸ The judge explained that victims of the offenses could not realistically be expected to testify without mentioning previous abuse they had suffered from him, and such mention would be prejudicial to the defendant.³⁸⁹ Malcolm was released from custody without restriction.³⁹⁰

The victims and neighbors were not happy by the court’s refusal to even try Malcolm.³⁹¹ A female victim expressed disbelief: “The judge says he is not going to get a fair trial because of his history, but surely it’s that history which proves what a dangerous man he is.”³⁹² A male victim complained, “I didn’t have a childhood. I was petrified of him.”³⁹³ In court, furious cries of “kill the pervert” came from the public gallery.³⁹⁴ After being set free, Malcolm received death threats.³⁹⁵

Malcolm moved to a block of flats in Manor Park that overlooked a common area where children frequently played.³⁹⁶ Sharing the apartment with him was his current girlfriend and her several children, three of whom were under the age of six.³⁹⁷

Residents of Manor Park were furious when they learned where Malcolm lived.³⁹⁸ One neighbor explained, “There was a lot of trouble when he first moved here You can’t do what he did without creating an awful lot of enemies.”³⁹⁹ By lying about his background, Malcolm obtained a job across the street from a primary grade school.⁴⁰⁰

On February 18, 2000, at around 10 p.m., Malcolm answered the door of his flat and was shot in the head with a single bullet.⁴⁰¹ Neighbors rushed out to see what had happened, and found him lying on the floor

385. *Witness Plea After Paedophile Killing*, *supra* note 370.

386. *Id.*

387. Jones & Fletcher, *supra* note 370.

388. See Braid, *supra* note 370; David Williams & Nick Craven, *Child Sex Pervert is Murdered by Gunmen ‘Avengers,’* DAILY MAIL, Feb. 19, 2000.

389. Michael Horsnell & Simon de Bruxelles, *William Malcolm: Freed Paedophile ‘Still a Threat to Children,’* TIMES (LONDON), Dec. 3, 1994, available at <http://spotlightonabuse.wordpress.com/2013/02/17/william-malcolm-freed-paedophile-still-a-threat-to-children-3-12-94/>.

390. Gado, *supra* note 370.

391. Jones & Fletcher, *supra* note 370.

392. Braid, *supra* note 370.

393. CAWTHORNE, *supra* note 370, at 88.

394. Williams & Craven, *supra* note 388.

395. *Witness Plea After Paedophile Killing*, *supra* note 370.

396. Jones & Fletcher, *supra* note 370.

397. *Id.*

398. Sullivan & Busfield, *supra* note 372.

399. Williams & Craven, *supra* note 388.

400. *Id.*

401. Gado, *supra* note 370; *Child Sex Man Gunned Down*, BIRMINGHAM EVENING MAIL, Feb. 19, 2000, available at <http://www.highbeam.com/doc/1P2-17631454.html>.

still breathing but bleeding profusely.⁴⁰² An ambulance arrived, but Malcolm was pronounced dead on arrival at the hospital.⁴⁰³

News of Malcolm's killing was greeted with jubilation.⁴⁰⁴ As one neighbor explained, "I'm quite happy that people like him are out of this community. I can understand quite clearly why someone would want to have him out of the way."⁴⁰⁵ Another neighbor reported, "nobody will feel sorry, except maybe his relatives. I was shocked when I heard someone had been shot on the doorstep like that, but when I heard it was him I was relieved."⁴⁰⁶ Malcolm's brother, Andy, said, "I want to shake hands with his killers. . . . He was vermin, I'm glad he is dead [O]ur entire family wants to say how glad we are that Bill is no longer on this earth. As far as I'm concerned my brother was lower than the rats in my barn."⁴⁰⁷ Malcolm's former stepdaughter, now an adult, who was raped at the age of five, was ecstatic when she received news of the killing, saying "[h]earing the Animal was dead is the happiest I've ever felt."⁴⁰⁸ While she knew that, as one of his victims, she was a suspect, she insisted that she personally was not involved, saying, "[i]t was none of us. [But] I wish it had been me who killed him."⁴⁰⁹

This case is not different from others considered previously in this Article, in which vigilantes take the law into their own hands when the law shows itself unwilling to punish serious wrongdoing. But what happened next illustrates another dimension of vigilante action.

It was widely agreed that many neighbors knew who had done the killing, and many more had information that would have helped investigators find the killer.⁴¹⁰ Yet, no one came forward, and those who were interviewed did not provide information.⁴¹¹ Police investigators questioned many of Malcolm's former victims and relatives but received little help from them or from neighbors.⁴¹² The police urged witnesses who had seen white males of average height and build leaving the premises after the shooting to come forward.⁴¹³ Although a neighbor's younger brother had been killed by a pedophile in 1994, and despite the neighborhood uproar over Malcolm moving there, that neighbor claimed he did not know about Malcolm's criminal past.⁴¹⁴

402. Sullivan & Busfield, *supra* note 372.

403. Jones & Fletcher, *supra* note 370.

404. Gado, *supra* note 370.

405. *Witness Plea After Paedophile Killing*, *supra* note 370.

406. Jones & Fletcher, *supra* note 370.

407. John Kay & Mike Sullivan, 'Shooting Was Best Thing for My Evil Brother,' *Exclusive Interview: Andy Malcolm*, THE SUN (LONDON), Feb. 22, 2000, at 21.

408. Mike Sullivan, 'I'd like to Buy Child-Sex Fiend's Killers a Big Drink': *Exclusive*, SUN (LONDON), Feb. 21, 2000, at 9.

409. *Id.*

410. *Witness Plea After Paedophile Killing*, *supra* note 370.

411. See Steve Boggan, *No One Mourns and No One Talks: A Community Closes Ranks After a Paedophile Is Shot Dead*, INDEP., May 29, 2000, at 10.

412. *Id.*

413. *Witness Plea After Paedophile Killing*, *supra* note 370.

414. *Handley Brother Speaks*, BRISTOL EVENING POST, Feb. 21, 2000, at 2.

Three months after the murder, investigators were no closer to apprehending the killer or killers.⁴¹⁵ It was clear that Malcolm's murder was a crime that the neighborhood did not want solved.

2. *Venice, California: Public Silence on Smashing of Drug Gathering Place*

Venice, a neighborhood in Los Angeles, California, was known for its two-mile long promenade along the Pacific Ocean. The neighborhood had long attracted an eclectic mix of people, including street performers, tourists, and sun-worshippers drawn to the boardwalk. A tourist attraction during the day, it drew a less respectable crowd at night. A series of wooden pagodas with benches along the boardwalk provided tourists and neighbors with a welcome place to sit out of the sun, but at night brought local gang members who used the locations to deal drugs.⁴¹⁶

The neighborhood repeatedly appealed to police to deal with the drug problem, or at least to remove the pagodas so that the drug dealing would move to less public and prominent places, but their pleas had no effect.⁴¹⁷ One local resident finally took matters into his own hands, ramming the structures with his pickup truck until they were destroyed.⁴¹⁸ With the pagodas gone, the drug dealers moved away.⁴¹⁹

Over the objection of residents, the city rebuilt seating and tables, this time constructed in concrete.⁴²⁰ The newly installed gathering areas were popular with tourists and the local merchants who sold to them but, as expected, the drug dealers returned to them at night.⁴²¹ As a local resident put it, "once the picnic tables went back in, it re-created the problem."⁴²² Although local community members regularly called the police to report the drug dealing, the police rarely responded because, in their view, there were bigger crime problems elsewhere.⁴²³

Fed up with the lack of police response, local residents decided to again take matters into their own hands.⁴²⁴ One weekend in August, 1994, a group of residents in ski masks arrived at the site and took sledgehammers to the new benches.⁴²⁵ By the time the sun rose on Monday morn-

415. See Boggan, *supra* note 411.

416. See Adrian Maher & Kathleen Kelleher, *Destruction of Tables in Venice Draws Criticism: Vandalism: Despite Charges of Vigilantism from Youths and Others, Many Residents Say the Action Was Justified to Curb Noise and Violence*, L.A. TIMES, Aug. 30, 1994, http://articles.latimes.com/1994-08-30/local/me-32826_1_venice-resident; Lisa Richardson, *Breaking up the Party on the Boardwalk: Venice: Hammer-Wielding Residents Allegedly Smash Picnic Tables They Say Are Used for Raucous Late-Night Meeting Sites*, L.A. TIMES, Aug. 29, 1994, http://articles.latimes.com/1994-08-29/local/me-32582_1_picnic-tables.

417. Maher & Kelleher, *supra* note 416.

418. Richardson, *supra* note 416.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. Maher & Kelleher, *supra* note 416.

424. Richardson, *supra* note 416.

425. Maher & Kelleher, *supra* note 416; Richardson, *supra* note 416.

ing, all the tables had been destroyed, to the cheers of a large crowd of onlookers.⁴²⁶ Organizers had informed other neighbors that the demolition was going to occur, so loud demolition noises would not prompt calls to police by those unaware of their purpose.⁴²⁷ Ironically, one person had called police to report the incident, but the police had ignored the call as being of insufficient importance.⁴²⁸ Local drug dealers were unhappy with the destruction and that same morning sent their people swarming the local apartment buildings demanding to know who had destroyed their hangout.⁴²⁹

The people who demolished the benches justified their actions by the refusal of law enforcement to deal with the problem.⁴³⁰ As one of the perpetrators described their sledgehammer escapade, “[We’ve] got a bunch of nineteen-year-old kids that are running this street The fear is unbelievable We have the silent approval of the whole community. People were cheering—we even had a woman take a few swings.”⁴³¹ Another resident explained, “[s]ometimes you have to tear the house up to get the rat out We have complained and complained and complained to the police and they will not stop here It was intolerable.”⁴³² Others, less enthusiastic about the destruction, nevertheless conceded that “[t]he guys who did this may have some legitimate complaints”⁴³³

Despite the fact that eighty to ninety people witnessed the demolition, and one of the perpetrators was interviewed by the press, investigators could find no one willing to help them with their inquiries.⁴³⁴ As one investigator marveled, “[i]t is just amazing to me that there were three or four people out there busting up tables and none of the residents saw anything.”⁴³⁵ Because no one in the neighborhood was willing to help, no prosecution was ever brought.⁴³⁶

3. *Kevin McElroy: Protecting the Public Killers of the Local Intimidator*

A resident of Skidmore, Missouri, Kevin McElroy was a local thief, bully, and sexual predator.⁴³⁷ He rarely held a job but always had plenty of money from stealing anything he could get a “fence” to buy.⁴³⁸ He was

426. Richardson, *supra* note 416.

427. *See id.*

428. *See* Maher & Kelleher, *supra* note 416.

429. *See id.*

430. *See id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. *See id.*

435. *Id.*

436. *Id.*

437. *See* David Krajicek, *Ken McElroy*, CRIME LIBRARY 1–29, http://www.crimelibrary.com/notorious_murders/classics/ken_mcelroy/index.html (last visited Nov. 5, 2014).

438. *See id.*

an active livestock rustler and, as a result, for years Skidmore County had the highest incidence of cattle rustling in the state.⁴³⁹

His sexual preferences were for young girls between the ages of twelve and fifteen.⁴⁴⁰ Married three times, but never faithful, he attracted one young girl after another, keeping them compliant first by attention and support in this poor rural area, then by intimidation and abuse.⁴⁴¹ He fathered more than twenty children with different girls.⁴⁴²

If family or friends of the girl objected, he would respond with intimidation.⁴⁴³ In one instance, after hooking-up with a twelve-year-old girl in eighth grade, she soon became pregnant and dropped out of school.⁴⁴⁴ Sixteen days after her child was born, she went home to her parents to escape McElroy's regular beatings, but McElroy tracked her down and brought her back at gunpoint, beat her, then returned to her parents' house, shot their dog, and burned their house to the ground.⁴⁴⁵ Most people were too intimidated to report McElroy to the police, and even when they did little happened, perhaps because the police were afraid of him too.⁴⁴⁶ When he was charged with an offense, he would arrange for one of his coon-hunting friends to offer a fabricated alibi and would intimidate any witnesses.⁴⁴⁷ In one instance, when a neighbor complained of his trespassing, McElroy shot the man with a shotgun, wounding him.⁴⁴⁸ The neighbor insisted that charges be filed, but between the shooting and the trial McElroy parked outside the man's house to stare at him on nearly one hundred occasions.⁴⁴⁹ Acquitted after the usual alibi testimony, McElroy showed up at the complaining neighbor's farm and shot a rifle at him as he drove his tractor in the field.⁴⁵⁰

One episode finally brought things to a head. Some of McElroy's many children visited a local grocery store owned by Louis and Bo Bowenkamp, and were accused of stealing.⁴⁵¹ After an argument, McElroy was refused further service and banned from the store.⁴⁵² As usual, McElroy took an aggressive response, taking up a staring vigil outside of the store and outside of the Bowenkamps' home.⁴⁵³ Also as usual, the police refused to do anything.⁴⁵⁴ When McElroy twice fired a shotgun at his house, Bowenkamp insisted on filing a complaint, but nothing was

439. *See id.*

440. *See id.*

441. *See id.*

442. *See id.* ("He was in his mid-30s, had fathered nearly 10 children and already had two women, Alice and Marcia, sharing his bedroom.").

443. *See id.*

444. *See id.*

445. *See id.*

446. *See id.*

447. *See id.*

448. *See id.*

449. *See id.*

450. *See id.*

451. *See id.*

452. *See id.*

453. *See id.*

454. *See id.*

ever done about it.⁴⁵⁵ McElroy returned two nights later, firing again, with the same nonaction by authorities.⁴⁵⁶

On July 8, 1980, McElroy confronted Bowenkamp outside his store and shot him with a shotgun, hitting him in the neck.⁴⁵⁷ McElroy was arrested and charged.⁴⁵⁸ Free while awaiting trial, McElroy continued his campaign of intimidation, including threatening a minister and a local sheriff who could be witnesses against him.⁴⁵⁹

Despite his usual witnesses, who claimed they happened to be driving by just at the moment that McElroy shot in what they testified was self-defense, McElroy was convicted of second-degree assault and sentenced to two years in prison, but released on bail pending appeal.⁴⁶⁰ A hearing to consider revoking his bail was delayed several times.⁴⁶¹ When McElroy was heard ranting that he would kill the Bowenkamps, the townspeople planned a meeting to discuss how to deal with the problem and to arrange a watch to protect the Bowenkamps.⁴⁶²

McElroy heard about the meeting and showed up at a bar nearby.⁴⁶³ A group of the townspeople, hearing of his presence, went to the bar and followed McElroy out when he left.⁴⁶⁴ By now a group of about forty-five people had appeared.⁴⁶⁵ When McElroy was getting into his truck, a total of six shots from multiple directions were fired at McElroy, killing him.⁴⁶⁶

Despite the number of witnesses to the killing in broad daylight, no one was willing to provide information to investigators, aside from the uncorroborated statements of McElroy's latest wife, who was inside the truck at the time of the shooting.⁴⁶⁷ A state investigation was followed by an FBI investigation ordered by the U.S. Department of Justice.⁴⁶⁸ Nearly one hundred interviews of local residents and apparent witnesses turned up no one willing to provide information to investigators.⁴⁶⁹ The case remains unsolved.⁴⁷⁰

455. *See id.*

456. *See id.*

457. *See id.*

458. *See id.*

459. *See id.*

460. *See id.*

461. *See id.*

462. *See id.*

463. *See id.*

464. *See id.*

465. *See id.*

466. *See id.*

467. *See id.*

468. *See id.*

469. *See id.*

470. *See id.*

B. Manipulating the System to Compel the Justice It Seems Reluctant to Impose

The classic vigilantes in the cases above are doing what we have seen throughout Part II: taking the law into their own hands when they see gross failures of justice. The new element here is the conduct of the neighbors in protecting the classic vigilantes from prosecution. These “shadow vigilantes,” as they might be called, are not going out into the streets to break the law, as the classic vigilantes do. Their conduct, or omission, however, is designed to subvert the law, if not break it. Their motivation is likely the same as that of the classic vigilantes: the sense of moral justification arising from the system’s willful failures. I put “shadow vigilantes” in quotes above because they are not technically “vigilantes” as I have defined and used the term earlier in this Article. Depending on the circumstances, the shadow vigilantes’ conduct might be criminal or it might be only unethical. It shares a motivation with classic vigilantism: to force the criminal justice system to impose the justice that the system has up to that point failed to enact. The shadow vigilantes’ actions might or might not be morally justified (under Part II.B.’s rules), but no doubt these people probably think they are justified.⁴⁷¹ They likely see themselves similarly to how civil disobedience protesters see themselves: they know that what they are doing is inconsistent with the law, in spirit, if not in letter, but they see the violation as morally justified by the law’s own immorality in its indifference to doing justice.

Shadow vigilantism is in fact more damaging than classic vigilantism for several reasons. First, while less dramatic, it is more pervasive. Shadow vigilantism appeals not just to the unusual person or group willing to be a classic vigilante by openly breaking the law in serious ways. Rather, it appeals to the ordinary people who cannot bring themselves to such explicit lawlessness, but who *can* bring themselves to undermine and subvert, through noncooperation, lying, or other lower-level misconduct, a system they see as immorally indifferent to serious wrongdoing. Consider all the neighbors in the Section A cases that refused to help authorities pursue the classic vigilantes. If those neighbors were sitting on a jury for those vigilantes, would they be likely to vote to acquit? If they were the grand jurors or prosecutor in the case, would they want to avoid bringing charges? If they were voting on a proposal to change the rules that led to the failure of justice, would they vote for the change and for a politician who supported the change? It seems highly likely that they would easily do all of the above. The fact that an entire neighborhood can show its willingness to succumb to a shadow vigilante impulse shows the potential sweep of the problem.

⁴⁷¹ Diana Reese, *Reissued Book Recalls the Time Law Failed Skidmore, Mo.*, WASH. POST BLOG (July 10, 2012), http://www.washingtonpost.com/blogs/she-the-people/post/law-fails-skidmore-mo/2012/07/10/gJQAV7L7aW_blog.html.

Further, shadow vigilantism is more problematic than the classic form because the criminal justice system cannot effectively deter it in the way it can classic vigilantism. The failure to report a crime or to assist investigators often is not considered a crime in the United States⁴⁷² and other low-level shadow vigilantism misconduct, even if it is criminal, cannot be effectively prosecuted. More on the specific kinds of shadow vigilantism is discussed below.

But shadow vigilantism is also more damaging because it operates in the shadows. The classic vigilantes, by operating openly, serve as a public protest against the system's failures of justice – a call to the system to correct itself. Shadow vigilantism is generally unseen. Jury nullification, improper exercise of discretion in charging, sentencing and other criminal justice decisions, and support in the voting booth for unjust punishment policies go unseen.

Further, the level of shadow vigilante action in any given case is unpredictable, dependent as it is on a wide variety of factors, such as publicity and public reaction. That introduces arbitrariness and disparity among cases that can only contribute in the long run to the system's reputation as being less predictable, more arbitrary, more unreliable, and thus less just. In other words, shadow vigilantism only serves to exacerbate the system's moral credibility problem that triggered it.

Thus, as Section C below explains, the system's insensitivity to the importance of doing justice invites a downward spiral. The system's poor reputation prompts shadow vigilantism, which further degrades the system's consistency and predictability, which further undermines its reputation, making it that much easier for people to be provoked to undermine and subvert it.

Consider the many ways in which shadow vigilantism can manifest itself.

1. *Refusing to Report an Offense, Assist an Investigation, or Bring a Prosecution*

One form of shadow vigilantism has already been illustrated: the refusal to report offenses, assist investigators, or to testify in court. The three Section A cases above show such lack of cooperation in the prosecution of classic vigilantes. But the same refusal to cooperate may be seen in cases beyond those of protecting vigilantes. Consider, for example, cases in which the offender is seen by the community as using defensive force in trying to protect himself or the neighborhood. The shadow

472. Almost by definition, the shadow vigilante cannot meet the rules for the moral vigilante as laid out in Part I.B.: they typically do not give prior warnings, as rule 7 requires; typically do not report afterwards what they have done and why, as rule 8 requires; and also commonly are each acting alone, as rule 3 forbids. However, a group might be formed to coordinate activities in ways that might come closer to meeting the rules. An organization might publish guidelines and advice about what shadow vigilante actions people should take and why, and to report what is done anonymously and why. See *supra* Part II.B.

vigilante may believe that authorities ought to be providing the protection and, if they fail, at the very least, the law should do everything to help the victims who are forced to defend themselves.⁴⁷³

Empirical studies show strong support among laypersons for the use of defensive force against aggressors and for the excuse of defenders who make mistakes in using defensive force.⁴⁷⁴ The community views on this point are dramatically more liberal than the legal rules. For example, a summary of studies found that

In all of these studies, the community judges that these [defensive force] justifications are more compelling than the legal codes are willing to grant. Respondents frequently assign no liability in cases to which the code attaches liability. Even when respondents assign liability, they typically assign considerably less punishment than would be suggested by codes.⁴⁷⁵

The same phenomenon is seen in local prosecutors' charging decisions. Recall, for example, the recent case of George Zimmerman's killing of unarmed teenager Trayvon Martin. Zimmerman, the neighborhood watch coordinator, suspected unfamiliar Martin of being a trespasser in the gated community.⁴⁷⁶ He followed Martin and claimed he shot the unarmed Martin in self-defense.⁴⁷⁷ The local authorities filed no charges until national press focusing on the racial aspect of the case compelled a prosecution.⁴⁷⁸

The same dynamic was probably at work in the famous case of the New York "subway vigilante," Bernhard Goetz, who shot four young African-American men after he claimed they sought to rob him.⁴⁷⁹ After

473. It can be a crime to lie to police or to refuse to answer questions before a grand jury. *See, e.g.,* *Brown v. United States*, 359 U.S. 41, 50–51 (1959) (finding contempt where a witness refused to answer before a grand jury on grounds of self-incrimination privilege despite being granted immunity). *But see* FED. R. CRIM. P. 42 (Criminal Contempt); 18 PA. CONS. STAT. § 4906 (False Reports to Law Enforcement Authorities); *Harris v. United States*, 382 U.S. 162, 164 (1965) (identifying a similar scenario where criminal contempt was not appropriate). But shadow vigilantes can usually avoid committing such offenses simply by saying nothing to investigators in the first place and never drawing attention to themselves that might put them before a grand jury.

474. *See* ROBINSON, INTUITIONS OF JUSTICE, *supra* note 2, at 280.

475. For anecdotal instances of refusals to press charges by prosecutors or acquittals by juries, see Joe Palazzolo & Rob Barry, *More Killings Called Self-Defense*, WALL ST. J., Apr. 2, 2012, <http://online.wsj.com/article/SB10001424052702303404704577311873214574462.html>. The journalists cite two cases in Florida: a 2009 shooting in which a robber broke into a club for recovering alcoholics and threatened members at gunpoint; a man present in the club shot the robber with a concealed weapon, but was ultimately not charged, as local prosecutors claimed he had acted in self-defense. In another case in Florida, a judge dismissed a murder charge against an individual who fatally stabbed a suspected burglar who had stolen his car radio, because the individual had attempted to swing a bag of stolen radios at him. *Id.*

476. Greg Henderson & Scott Neuman, *Jury Acquits Zimmerman of All Charges*, NPR (July 13, 2013, 7:45 AM), <http://www.npr.org/blogs/thetwo-way/2013/07/13/201744637/jury-in-zimmerman-trial-enters-second-day-of-deliberation>.

477. Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN (May 23, 2012, 10:48 AM), <http://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details>.

478. *See id.*; Lizette Alvarez & Carey Buckley, *Zimmerman is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 13, 2013, http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html?pagewanted=all&_r=0.

479. *See* *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986).

a first round of shots that scattered the four, Goetz approached Darrell Cabey, who was grasping a seat by the conductor's cab, and said, "You seem to be doing alright. Here's another."⁴⁸⁰ He then shot Cabey, severing his spine.⁴⁸¹ When first presented the case, the grand jury refused to indict.⁴⁸²

2. *Jury Nullification to Counter the Law's Apparent Indifference to Punishing Unlawful Aggressors*

The same shadow vigilantism operates later in the system as well, when cases go to trial. When Zimmerman was finally charged with the killing of Martin, an all-woman jury acquitted him of all homicide charges.⁴⁸³ In the Goetz case, publicity centering on the racial component of the case eventually brought a resubmission to the grand jury and a trial.⁴⁸⁴ While it seems difficult to see how a jury could conclude that Goetz could "reasonably believe" shooting Cabey was necessary to protect himself, as the self-defense statute required, the jury acquitted Goetz of all assault charges.⁴⁸⁵ The law has its rules, but shadow vigilantes with the power of jury nullification have their own.

In a Minot, North Dakota, case, four men came to Jeremiah Tallman's home to complain of a theft they claimed occurred earlier in the day.⁴⁸⁶ They exchanged angry words with Tallman while standing in the entryway.⁴⁸⁷ They were told to leave, and did when Tallman cocked the slide of his gun.⁴⁸⁸ As they walked away, one pounded on the trailer and another broke a window.⁴⁸⁹ Tallman then shot one of the men in the back several times, killing him.⁴⁹⁰ He was acquitted of all homicide and assault charges.⁴⁹¹

480. *Id.* at 43; Jack Strickland, *Bernhard Goetz: "You Seem To Be Doing Alright, Here's Another,"* YOUTUBE.COM (July 3, 2014), <https://www.youtube.com/watch?v=xXtEle8JM2w>.

481. *Goetz*, 497 N.E.2d at 43.

482. *Grand Jury Refuses to Indict Goetz for Attempted Murder*, GADSDEN TIMES, Jan. 26, 1985, at A8.

483. *See* Henderson & Neuman, *supra* note 476.

484. *See Goetz*, 497 N.E.2d at 45.

485. *See* N.Y. PENAL LAW § 35.15; Jon Beeman & Evan Lange, *The Bernhard Goetz Trial: A Chronology*, UNIV. MO. KAN. CITY LAW SCH. <http://law2.umkc.edu/faculty/projects/ftrials/goetz/goetzchrono.html> (last visited Nov. 5, 2014).

486. Dave Caldwell, *Jury Decides Minot Man's Actions Were Self-Defense*, MINOT DAILY NEWS, May 25, 2011, <http://www.minotdailynews.com/page/content.detail/id/555056/Jury-decides-Minot-man-s-actions-were-self-defense.html?nav=5010>.

487. *Id.*

488. *Id.*

489. *Id.*

490. *Minot Murder Suspect Jeremiah Tallman Pleads Not Guilty*, BISMARCK TRIBUNE, Aug. 26, 2010, http://bismarcktribune.com/news/state-and-regional/minot-murder-suspect-jeremiah-tallman-pleads-not-guilty/article_a45f7f0c-b11f-11df-bb5d-001cc4c03286.html.

491. PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 80 (1995) ("Our subjects may believe that the criminal justice system is not likely to apprehend criminals, convict them when it apprehends them, or justly punish them when it convicts them. Our subjects may also believe that the criminal justice system is failing in its role of protecting citizens. Our discrepant results may stem from a general belief that when the criminal justice system does a poor job in punishing offenders, it is appropriate for individual citizens to do

According to one study, if self-defense is raised at trial, it succeeds much more often than any other kind of defense.⁴⁹² The survey respondents, consisting of judges, prosecutors, and defense attorneys, estimated that the defense succeeded seventy-six percent, forty-seven percent, and forty-six percent of the time, respectively.⁴⁹³

The same dynamic can apply to not just defensive force cases but also to cases in which the police are using aggressive force. Recall the 1991 case in which the police stopped an under-the-influence Rodney King after a long car chase and seriously beat him to subdue him.⁴⁹⁴ The gruesome and excessive beating was caught on videotape, yet the Ventura County jury acquitted the officers.⁴⁹⁵ Some of the jurors may well have thought that the police conduct was in violation of existing law. These jurors may have felt morally justified in acquitting the officers because they lacked confidence that existing law took proper account of the need for the use of force or gave sufficient deference to the ease of error in such situations.⁴⁹⁶

According to a Cato Institute study, prosecution, imprisonment, and other sanctions of police officers occur at a much lower rate than for civilians facing similar charges.⁴⁹⁷ In some cases, according to the Cato data, officers were acquitted even in the face of clear evidence, such as multiple witnesses or videotape.⁴⁹⁸ For example, in September 2009, a Spokane, Washington, jury acquitted an officer of assault for kicking a suspect in the face, though other officers present confirmed that he had done so.⁴⁹⁹ In another Washington State incident in 2010, an officer was acquitted after he was videotaped striking a fifteen-year-old girl who,

more in defense of both self and property as well as in law enforcement. The more ineffective the system is seen to be, the more people may be willing to let victims take matters into their own hands. . . . The strength of the differences between community standards and legal codes that we found would indicate, at a minimum, that large segments of the population are deeply dissatisfied with the criminal justice system. These observed discrepancies may illustrate one of the “hidden costs” to policies that fail to provide adequately funded police forces, or to court systems that fail to punish blameworthy offenders.”).

492. Neil P. Cohen et al., *The Prevalence and Use of Criminal Defenses: A Preliminary Study*, 60 TENN. L. REV. 957, 973 tbl.2 (1993).

493. *Id.* at 975 tbl.4.

494. Emily Langer, *Rodney King Dies; Victim of Police L.A. Beating Was 47*, WASH. POST, June 17, 2012, http://www.washingtonpost.com/national/rodney-king-dies-victim-of-police-la-beating-was-47/2012/06/17/gJQAVSh2jV_story.html.

495. See, e.g., Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 2 (1995). Again, national media attention driven by public unrest in some minority neighborhoods compelled a later trial in federal court in which two defendants were convicted of violating King’s civil rights. *Id.*

496. The empirical studies similarly suggest great leniency toward citizens exercising law enforcement authority, even when they make mistakes in the use of force. ROBINSON, INTUITIONS OF JUSTICE, *supra* note 2, at 293–99.

497. See CATO INSTITUTE, NATIONAL POLICE MISCONDUCT REPORTING PROJECT, 2010 ANNUAL REPORT, available at <http://www.policemisconduct.net/statistics/2010-annual-report/>.

498. See David Packman, *The Problem with Prosecuting Police in Washington State*, CATO INSTITUTE (FEB. 27, 2011, 12:55 AM), <http://www.policemisconduct.net/the-problem-with-prosecuting-police-in-washington-state/>.

499. Thomas Clouse, *Jury Acquits Spokane Officer*, SPOKESMAN-REVIEW, Sept. 10, 2009, <http://www.spokesman.com/stories/2009/sep/10/jury-finds-officer-not-guilty-assault/>.

when told to remove her basketball shoes, kicked toward a fellow deputy.⁵⁰⁰ The first trial resulted in a hung jury, while the second resulted in an acquittal.⁵⁰¹

3. *Neighborhood Watch and Beyond*

The shadow vigilante attitude also shows itself in the dramatic rise in neighborhood watch and private security organizations, as noted in Part IV.D. Thirty-five years ago there were more police than private security, while today there is twice as much spending on private law enforcement than public.⁵⁰² It is a literal, and usually lawful, form of the neighborhood taking on the role of the government, which has, in the community's view, proven itself inadequate to the task.⁵⁰³ But we know from the Maccabees' case study, as well as the Zimmerman case, that such citizen involvement in policing can easily end in conflict and violence, or in simply displacing crime from one neighborhood to another.

Some neighborhoods have gone beyond watch groups. A recent development is the "Glock Block," where neighborhoods in Oregon, Texas, and Arizona advertise "We Don't Call the Police."⁵⁰⁴ The threat itself may not be illegal, but it certainly signals a willingness to go far beyond the rules of lawful defensive conduct.

This kind of community action, at least of the tamer neighborhood watch variety, is consistent with the commonly-applauded trend in criminal justice toward greater community participation. At the trial and punishment phase, restorative justice has become extremely popular and has a broad political spectrum of supporters. Even community involvement in prosecution decisions, and what has been called "community prosecution" has gained support.⁵⁰⁵ Community involvement in most aspects of criminal justice is on the rise, and the underlying shadow vigilante impulse will have an increasing number of ways to express itself.

500. Scott Sunde, *No Third Trial for Ex-Deputy Accused of Jail Assault*, SEATTLE PI (July 8, 2010), <http://www.seattlepi.com/local/article/No-third-trial-for-ex-deputy-accused-of-jail-886478.php>.

501. *Id.*

502. See *supra* text accompanying note 364.

503. It seems unlikely that watch groups are formed in neighborhoods content with their law enforcement situation. See, e.g., ROBINSON, INTUITIONS OF JUSTICE, *supra* note 2, at 155.

504. *Citizens Band Together to Form "Glock Block" Saying "We Don't Call the Police."* MR.CONSERVATIVE.COM (June 18, 2013, 8:25 PM), <http://www.mrconservative.com/2013/06/19406-citizens-band-together-to-form-glock-block-saying-we-don-t-call-the-police/>; Anna Sanders, *Welcome to the 'Glock Block': Vigilante Neighbors in Oregon Town Say They Are No Longer Calling the Police and Have Armed Themselves Instead*, MAILONLINE.COM (June 17, 2013, 5:54 PM), <http://www.dailymail.co.uk/news/article-2343491/Welcome-Glock-Block-Vigilante-neighbors-Oregon-town-say-longer-calling-police-armed-instead.html>.

505. Nicholas W. Klitzing, *Fixing the Unfixable: Community Prosecution as a Problem-Solving Strategy to Reduce Crime and Restore Order in East St. Louis*, 32 ST. LOUIS U. PUB. L. REV. 157, 158 (2012).

4. *Morally Justifying Police “Testilying”*

Another form of shadow vigilantism is police officers morally justifying their lying in court to compensate for what they see as improper rules that regularly lead to failures of justice—complex rules that have “metastasized into a dizzying array of formalistic doctrines and subdoctrines.”⁵⁰⁶ Even police officials concede that police lying in court, especially to justify improper searches, is not uncommon.⁵⁰⁷ It has earned its own label, “testilying.” The term was coined by New York City police officers, apparently to help them justify in their own minds why it was different from normal lying under oath—even if not legal, it was morally justified.⁵⁰⁸ “When an officer is deceptive in court, the rationale goes, he is ‘not quite lying’ but ‘not quite testifying truthfully and completely’ either. Testilying is seen as a middle ground between pure honesty and pure dishonesty.”⁵⁰⁹

Most famous among the examinations of police perjury is the 1994 Mollen Commission Report on the New York Police Department: “Police perjury and falsification is a serious problem facing the Department and the criminal justice system.”⁵¹⁰ Such perjury was “probably the most common form of police corruption . . . particularly in connection with arrests for possession of narcotics and guns.”⁵¹¹ An empirical study by Orfield in Chicago concluded that “[v]irtually all the officers admit that the police commit perjury, if infrequently, at suppression hearings.”⁵¹² The study claimed that up to seventy-six percent of the officers surveyed had “shaded” facts in order to establish probable cause.⁵¹³

The Mollen Commission Report spoke to the reasons for the officers’ willingness to lie: “In their view, regardless of the legality of the arrest, the defendant is in fact guilty and ought to be arrested.”⁵¹⁴ It explained that the officers were frustrated with the legal rules that

506. George C. Thomas III, *Lost in the Fog of Miranda*, 64 HASTINGS L.J. 1501, 1501 (2013).

507. Michelle Alexander, Op-Ed., *Why Police Lie Under Oath*, N.Y. TIMES SUNDAY REV. (Feb. 2, 2013), http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html?pagewanted=all&_r=0 (quoting Peter Keane, former San Francisco Police commissioner: “[p]olice officer perjury in court to justify illegal dope searches is commonplace. One of the dirty little not-so-secret secrets of the criminal justice system is undercover narcotics officers intentionally lying under oath. It is a perversion of the American justice system that strikes directly at the rule of law. Yet it is the routine way of doing business in courtrooms everywhere in America”).

508. Larry Cunningham, *Taking on Testilying: The Prosecutor’s Response to In-Court Police Deception*, 18 CRIM. JUST. ETHICS 26, 26 (1999).

509. *Id.*

510. COMMISSION REPORT, THE CITY OF NEW YORK COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T 36 (1994) [hereinafter COMMISSION REPORT], available at http://www.parc.info/client_files/special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf.

511. *Id.*

512. Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1051 (1987).

513. Jon Loevy, *Truth or Consequences: Police “Testilying,”* 36 Litig. 13, 14 (2010) (citing Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987)).

514. COMMISSION REPORT, *supra* note 510, at 38.

protected criminals from search and seizure, because the rules were perceived as “unrealistic rules of law.”⁵¹⁵ Officers also expressed frustration in their “inability to stem the crime in their precinct through legal means.”⁵¹⁶ They have a strong belief that perjury was acceptable because it was necessary to stem the tide of crime, and such was “‘doing God’s work’—doing whatever it takes to get a suspected criminal off the streets.”⁵¹⁷

Other writers have made the same point: “Police view perjury as a necessary means to achieve the ends of justice. Constitutional rules—particularly the Exclusionary Rule—are viewed as technicalities that ‘let the criminal . . . go free because the constable has blundered.’”⁵¹⁸ One study found that testilying began soon after cases were dismissed under the 1961 exclusionary rule holding in *Mapp v. Ohio*.⁵¹⁹ To police, “there is a deep-seated disregard for what they consider to be silly little laws made by a silly little Supreme Court in a backroom far removed from the dangerous streets they are trying to bring into order.”⁵²⁰

Presumably judges, like others in the system, are well aware of the “testilying.” Yet some may share the shadow vigilante sympathy, and thus, while no doubt unhappy about perjury in their court, play along with the game and accept the testimony as sufficient to justify the search or the arrest. As Alan Dershowitz reports, when officers offer perjured testimony, the judge “shakes his head in knowing frustration, but accepts the officers’ account as credible.”⁵²¹

This is a sad state of affairs. But, in some ways it is a predictable development as the collection of outrageous results from the law’s “technicalities” accumulate (as in *Eyler*, *Ignatow*, *Healy*, and other cases in Part IV.). As the law increasingly loses moral credibility with the community, it becomes increasingly easier for shadow vigilantes to justify the subversion of what they see as an immoral system. It is probably no coincidence that “testilying” is most frequently associated with satisfying the technicalities of search and seizure law. The same officer who feels comfortable lying about which side of a house’s threshold he was on when he saw drugs in plain sight might think it abhorrent to lie about a matter related to the actual guilt or innocence of the defendant.

515. *Id.*

516. *Id.*

517. WAYNE PETHRICK ET AL., FORENSIC CRIMINOLOGY 118 (2010).

518. Cunningham, *supra* note 508, at 29.

519. Case Comment, *Effect of Mapp v. Ohio on Police Search and Seizure Procedures in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 94–95 (1968).

520. Nick Malinowski, *Testilying: Cops Are Liars Who Get Away With Perjury*, VICE (Feb. 3, 2013), www.vice.com/read/testilying-cops-are-liars-who-get-away-with-perjury.

521. Alan Dershowitz, Op-Ed., *A Police Badge is Not a License to Commit Perjury*, EVENING TRIB., Apr. 4, 1991, at B11.

5. *Prosecutorial Overcharging*

Another instance of shadow vigilantism, in which participants feel morally justified in subverting the system in order to do justice, is the now common practice of prosecutorial overcharging. The overcharging is of two sorts: vertical overcharging, in which the prosecutor charges offenses for which he has insufficient proof to convict, and horizontal overcharging, in which he charges a series of overlapping offenses arising from the same criminal act.⁵²² In the latter type, prosecutors charge every offense for which a defendant might theoretically satisfy the offense definition, no matter how overlapping the offenses may be. Thus, a prosecutor might take a standard rape case—using force to compel intercourse—and add on “assault, kidnapping, gross sexual imposition, etc.”⁵²³ This is made possible because most U.S. criminal codes, even those recodified in the Model Penal Code wave, now have a vast collection of overlapping offenses,⁵²⁴ as legislatures have been constantly adding new offenses, sometimes making the code seven or eight times longer than its original Model-Penal-Code-based form, but without substantially expanding its coverage.⁵²⁵

522. Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 704 (2014).

523. Anon. 2.71828, Comment to “*Overcharging*,” SENTENCING LAW AND POLICY (Mar. 19, 2013, 10:45 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2013/03/overcharging.html.

524. For example, in the Illinois criminal code:

Chapter 720 includes narrow, specific offenses in addition to a broader prohibition against such conduct generally. For example, although one provision in current Chapter 720 covers theft generally, a number of other provisions in Chapter 720 prohibit the same underlying conduct — theft by taking (or its attempt)—in the context of specific circumstances or forms of property. The same situation exists for assault offenses and property damage offenses. Similarly, in addition to its general perjury offense, current Illinois law contains numerous offenses criminalizing false statements made under oath or affirmation about particular matters, in particular documents, and in particular proceedings.

MICHAEL T CAHILL & PAUL H. ROBINSON, FINAL REPORT OF THE ILLINOIS CRIMINAL CODE REWRITE AND REFORM COMMISSION xli (2003) [hereinafter CAHILL & ROBINSON, FINAL REPORT] (emphasis in original) (footnotes omitted). Kirk Dillard, a Republican state senator from Hinsdale, and a member of a later commission, acknowledged that lawmakers sometimes push for redundant measures in response to crimes within their districts. Dillard states, “When something occurs in any of the members of the General Assembly’s district in a criminal matter . . . the legislator always wants to add a new [law] for a lot of reasons, including public-relation’s purposes [W]e all add to the criminal code. And it turns into a hodge-podge.” John Chase, *Panel to Take on Crime Law Maze*, CHI. TRIB., Dec. 14, 2004, http://articles.chicagotribune.com/2004-12-14/news/0412140287_1_laws-criminal-code-divito.

525. See CAHILL & ROBINSON, FINAL REPORT, *supra* note 524, at xix (“The sheer verbiage of current law is one indication of its failure to consolidate similar offenses Overall, the Proposed Code’s Special Part uses only 14.9 percent—less than 1/6—of the words in the current code’s Special Part, and only 6.7 percent—about 1/15—of the current Special Part plus other, non-criminal code statutory felonies.”); PAUL H. ROBINSON, FINAL REPORT OF THE KENTUCKY PENAL CODE REVISION PROJECT xxix (2003) (“[N]early three decades of piecemeal modification of the Code have led to the addition of hundreds of new offenses, many of which cover the same conduct as previous offenses.”); see also Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 635–636 (2005) [hereinafter Robinson & Cahill, *Accelerating Degradation*] (“One might expect that over time, as more loopholes or omissions in a code are eliminated, there would be a reduced need to alter or expand that code, but historical trends demonstrate that the *opposite* is true . . . the Illinois Code underwent nearly twice as many amendments in its second twenty years of existence than in its first twenty years.”).

The forest of overlapping offenses exists in large part because prosecutors have politically promoted them. They do so by supporting a constant stream of new offenses that typically are just added on top of the old, and by opposing criminal code reforms that would streamline codes and eliminate unnecessary overlaps. For example, the political opposition of prosecutors effectively blocked attempts at a new criminal law codification in Illinois in 2003.⁵²⁶ One of the primary aims of this new codification was the consolidation of overlapping offenses.⁵²⁷ In turn, Illinois prosecutors sponsored a new reform commission that would keep the redundancies in the current code.⁵²⁸

Prosecutors' moral justification for such excessive charging might rest on any or all of several different claims, analogous to the sorts of claims heard from police to justify their testifying. First, the criminal justice process has so many barriers to an offender getting the liability and punishment he deserves that such excess is needed just to end up with some punishment that approximates what is really deserved.⁵²⁹ Further, to some it may make sense to try to get more liability and punishment than an offender deserves for the case at hand because, given the gross ineffectiveness of the system, the offense at hand is probably just the tip of the iceberg of the offenses he has actually committed.⁵³⁰

Finally, even if the overcharging generates liability that is undeserved for both present and unpunished past offenses, it is not something

526. Joseph Birkett, the most vocal prosecutor opposing the Criminal Code Rewrite and Reform Commission ("CCRRC") work, contended that "many of the special provisions and enhanced penalties are needed." John Patterson, *Are We Too Tough on Crime? Politicians' Fear of Appearing Soft Creates Avalanche of Laws*, CHI. DAILY HERALD, Apr. 1, 2001, available at 2001 WLNR 12161363. A Republican member of the Illinois House of Representatives and a member of the CLEAR commission (the prosecutor-sponsored successor to the original CRRRC), James B. Durkin, has acknowledged that prosecutors are hesitant to change. See Rep. James B. Durkin, Commentary, *Court Reform*, CHI. TRIB., June 27, 2000, at 12, available at 2000 WLNR 8231128. Gino DiVito, a former Illinois appellate judge who co-chaired the CLEAR commission, found that the code's illogic stems from laws passed to address a specific crime or a constituent complaint, without examining how the new law fits within the overall state code. "[T]he code reform project had barely gotten off the ground when prosecutors expressed their opposition and were unwilling to devote manpower or resources to assist in the project, even though their participation would have assured them a voice within the decision-making group." Robinson & Cahill, *Accelerating Degradation*, supra note 525, at 649.

527. The Commission's Report explained that "[T]he drafters have aimed to consolidate offenses. Perhaps inevitably, four decades of piecemeal modification of the 1961 Code have led to the addition of hundreds of new offenses, many of which cover the same conduct as previous offenses or appear in various other chapters of the Illinois Compiled Statutes rather than in the criminal code.

CAHILL & ROBINSON, FINAL REPORT, supra note 524, at v-vi.

528. The 1100-page bill emanating from the Criminal Law Edit, Alignment and Reform ("CLEAR") Commission, inter alia, declined to recommend narrowing the number of circumstances that can activate the charge of aggravated battery. They also declined to eliminate anachronistic offenses such as adultery and fornication. The last successful prosecution for fornication occurred in 1913, while the last charge of adultery brought in criminal court was in the early 1960s. Mike Ramsey, *Panel Assaults State Criminal Code*, COPLEY NEWS SERV., Dec. 29, 2006.

529. Graham, supra at note 522, at 713-16.

530. See, e.g., Gerald Leonard & Christine Dieter, *Punishment Without Conviction: Controlling the Use of Unconvicted Conduct in Federal Sentencing*, 17 BERKLEY J. CRIM. L. 260 (2012); *Al Capone Was Sent to Prison, But Still Beat the Courts: A 1931 Editorial on His Conviction for Tax Evasion*, NEW REPUBLIC, January 17, 2014, available at <http://www.newrepublic.com/article/116246/al-capone-1931-prison-conviction-tax-evasion>.

that ought to be a concern to prosecutors because the criminal justice system is no longer about justice. It is simply a system of mutual combat between defense counsel and prosecutors, with winners and losers, the goal of which is always to win and never to lose. Just as defense counsel see their job as always getting the least punishment possible for their guilty clients, the prosecutors, in a symmetrical fashion, should see their job as getting as much punishment as they can for guilty defendants.⁵³¹

To those unfamiliar with the system, strategic overcharging might seem too unethical to be done openly. But the increasing game-like features of the system have dulled participants' sensibilities. Indeed, one need only look at similar manipulative conduct by esteemed federal judges before the Sentencing Reform Act of 1984 stopped the practice. Existing federal law at the time required that all offenses be eligible for release by the U.S. Parole Commission immediately upon arrival at prison, but federal judges were authorized by statute to delay eligibility until an offender had served one-third of his sentence.⁵³² But judges who bridled at this early release could, and did, short-circuit the system by simply determining the sentence they really wanted, then tripling it.⁵³³ Thus, the offender would become eligible for release only after serving the full term the judge thought appropriate. Prosecutors may be making similar sorts of strategic manipulations when they overcharge.⁵³⁴

6. *Voting for Disproportionate Criminal Penalties*

The impulse to subvert or manipulate a system that is thought to have lost sight of the importance of doing justice manifests itself in the many ways described above. It is also seen in an even larger form: providing popular support for criminal justice reforms that would force justice from a sometimes reluctant system. Unfortunately, these sorts of jury-rigged attempts can produce their own problems and complications.

Consider, for example, the public dissatisfaction with the kind of improperly lenient sentencing illustrated in Part IV.A, such as the fine and community service for a shopkeeper who shot the customer in the back after wrongly accusing her of shoplifting, and a fine for the men

531. Richard A. Oppel Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, Sept. 25, 2011, http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html?pagewanted=all&_r=0.

532. U.S. PAROLE COMM'N, U.S. PAROLE COMMISSION RULES AND PROCEDURES MANUAL 10 (2010), available at http://www.justice.gov/uspc/rules_procedures/uspc-manual111507.pdf.

533. S. REP. NO. 98-225, at 46-47 (1983) ("Sentencing judges, trying to anticipate what the parole commission will do, undoubtedly are tempted to sentence a defendant on the basis of when they believe the parole commission will release him . . . in doing so, some judges deliberately impose sentences above the parole guidelines, leaving the parole commission to set the presumptive release date . . . other judges impose sentences consistent with or below the guidelines in order to retain control over the release date.").

534. It was in part this judicial manipulative practice that contributed to the enactment of the "truth-in-sentencing" provisions of the Sentencing Reform Act of 1984. 18 U.S.C. § 3551. People had become increasingly skeptical of the sentences that were publicly imposed because they always ended in early release. The new Act required that an offender serve at least eighty-five percent of the sentence imposed – an attempt to earn back some credibility for the system. *Id.*

who hunted down their victim after a bar confrontation and beat him to death with a baseball bat.⁵³⁵

Dissatisfaction with unduly lenient sentencing helped nurture the mandatory minimum movement. It took hold during the 1960s, when drug and crime rates were rising,⁵³⁶ yet sentencing discretion remained unrestrained.⁵³⁷ Once begun, it took on substantial momentum. For example, from 1991 to 2011, the number of the mandatory minimum penalties in the federal code nearly doubled.⁵³⁸ More than two-thirds of the states now have mandatory minimums for drug offenses.⁵³⁹ “[M]ore than eighty percent of the increase in prison population between 1985 and 1995 was due to drug convictions that triggered statutory mandatory minimum sentences.”⁵⁴⁰

The problem is that the shift to mandatory minimums essentially guarantees the regular and predictable imposition of sentences that are unjust, some grossly so. For example, one recent study of laypersons’ shared intentions of justice showed the dramatic conflict between the law’s application in real cases and the average person’s judgments about those cases.⁵⁴¹ In one “three strikes” case, the subjects gave 3.1 years; in reality, the court was required to give life imprisonment.⁵⁴² In a cocaine case, subjects gave 4.2 years, while the court was obliged to give life without parole.⁵⁴³ In a marijuana case, the subjects gave 1.9 years, while the court was compelled to give eight years.⁵⁴⁴ The unfortunate irony here is that even the lay public—who elected the politicians who put the sentencing rules in place—sees these cases as grossly unjust.⁵⁴⁵

Everyone—offenders and public alike—would have been better off if this sentencing war had never begun, if sentencing judges had restrained themselves from giving sentences that seriously conflicted with community notions of justice, or if the system had restrained the lenient-sentencing judges in more thoughtful ways, as with sentencing guidelines.

To be fair to the judges of that period, some of the improperly lenient sentencing was a product of theories of rehabilitation or other non-desert goals that were influential at the time. The sentencing policy landscape has changed. In the only amendment to the Model Penal Code

535. See *supra* notes 189–206 and accompanying text.

536. Kieran Riley, *Trial By Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine*, 19 B.U. PUB. INT. L.J. 285, 289–90 (2010).

537. *Id.* at 292–93.

538. Press Release, Senator Patrick Leahy, Bipartisan Legislation to Give Judges More Flexibility for Fed. Sentences Introduced (Mar. 20, 2013), available at <http://www.leahy.senate.gov/press/bipartisan-legislation-to-give-judges-more-flexibility-for-federal-sentences-introduced>.

539. Ellen Perlman, *Terms of Imprisonment*, GOVERNING (Apr. 2000), <http://www.governing.com/topics/public-justice-safety/Terms-Imprisonment.html>.

540. Riley, *supra* note 536, at 308.

541. Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 219 (2012).

542. Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1972 (2010).

543. *Id.*

544. *Id.*

545. For a discussion of how this conflict could have come about in a democratic society, see *id.* at 1979–94.

since its enactment in 1962, the American Law Institute in 2007 dramatically altered the sentencing purposes provision of the Model Code to set desert as the dominant purpose, which can never be violated.⁵⁴⁶ That new clarity of purpose, together with the use of carefully constructed sentencing guidelines, can avoid the problem of improperly lenient sentences and thereby eliminate the need for mandatory minimum sentences.

The problem is, however, that we now have mandatory minimums and, as unnecessary as they may be, getting rid of them will not be easy. We will for some time be paying for past sins of doctrines that produced predictable failures of justice. At very least, we can stop making things worse and begin to repair the system's moral credibility by having the system publicly and persuasively commit itself to doing justice and forsaking trading it away unnecessarily for minor benefits.

Some people may argue that the outrageous justice-failures illustrated in Part IV do not happen frequently enough to have a significant effect on public perceptions. But this misunderstands the dynamic at work. First, in many instances, failures of justice *do not occur* specifically because shadow vigilantes are subverting the system. For example, the rampant "testilying" by police, with the common acquiescence of judges, is aimed at and presumably successful in avoiding failures of justice. This is especially true in serious cases where the failure would be spectacular, since it is these cases in particular where the shadow vigilante impulse will be at its greatest. Interestingly, then, it is shadow vigilantism that in some ways may be saving some of these doctrines from themselves, by taking the edge off the credibility loss that the system would otherwise suffer were they not subverted.

Second, it is worth repeating social psychology's insight that motivation is everything in setting a reputation.⁵⁴⁷ All that is needed to provoke the shadow vigilante's conclusion that the system is indifferent to the importance of doing justice is an occasional headline case in which such apparent indifference is shown. The outrageous failure occurs, yet there is no indication that the judge or some other official is to be sanctioned for causing it. Thus it becomes clear that the outrageous result is authorized and approved—it is how the system is supposed to work. With the system's apparent indifference established, the observer can then easily assume that the same indifference motivates the system's decisions in the many other cases about which the observer never hears the details.

Finally, and most importantly, it is not the failure of justice itself that does the most serious damage, but rather the threat of it, for this is what creates the shadow vigilante impulse. That is, it is the *potential* of a doctrine to produce gross failures that calls for its subversion. The police would still engage in testilying to avoid a failure of justice *even if they had been successful in avoiding such a failure in every instance in the past*. It is

546. Paul H. Robinson et al., *Empirical Desert*, *supra* note 2, at 34 (citing MODEL PENAL CODE: SENTENCING § 1.02(2)(a) (approved May 16, 2007)).

547. See *supra* text accompanying note 340.

not the frequency of an outrage that is relevant—each is just an instance of the failure to prevent it through subversion—but rather the perceived threat of the outrage. If the threat exists, so will the impulse to prevent it.

C. Blowback and the Downward Spiral

Unfortunately, the distortions of the criminal justice system inspired by the shadow vigilante impulse, such as police “testilying” and injustice-guaranteeing mandatory minimums, are only the first act of this sad tragedy of the system’s lost credibility. The defendants in drug cases, and others present in the courtroom, obviously know the police are regularly lying in court. Once that practice becomes common knowledge in an area, one could reasonably expect that people would stop trusting the police and the courts. A community that sees a significant portion of its young men sent to prison for long terms by mandatory minimums far beyond what even the larger community thinks is just punishment⁵⁴⁸ could easily see the criminal justice system as an enemy to be subverted, rather than an institution worth supporting and helping.

One way in which this discontent plays itself out is through movements like “Stop Snitchin’,” which encourages people not to assist or cooperate with police.⁵⁴⁹ In some places the movement goes further, to urge the intimidation of people who might think of cooperating with authorities. “Snitches Get Stitches,” the saying goes.⁵⁵⁰ The antisnitch campaign has been boosted and glorified by popular music and culture.

Originally mentioned in rap lyrics, the “Stop Snitchin’” campaign has been fed by a DVD entitled “*Stop Fucking Snitchin’*,” and a clothing line of t-shirts and apparel using that phrase as its logo, as well as a follow-up DVD, “*Stop Snitchin’ 2*.”⁵⁵¹ The DVDs discuss threats and violence against witnesses, together with footage of people discussing their desire to kill those who “rat.”⁵⁵² In Newark, New Jersey, T-shirts carry pictures of witnesses that are to be killed, and pilfered witness statements are posted online.⁵⁵³ In Baltimore and Boston, rap artists tell residents not to cooperate with the local authorities.⁵⁵⁴ Sports stars also give legitimacy to the message. When asked how many pro athletes from high-crime areas would help identify criminals, Baltimore native and NBA veteran Sam Cassell said, ““One hundred percent of them would say no.

548. See *supra* text and authorities accompanying note 542.

549. Jamie Masten, “*Ain’t No Snitches Ridin’ Wit’ Us*”: *How Deception in the Fourth Amendment Triggered the Stop Snitching Movement*, 70 OHIO ST. L.J. 705, 705–07 (2009).

550. JULIE L. WHITMAN & ROBERT C. DAVIS, NAT’L CTR. FOR VICTIMS OF CRIME, SNITCHES GET STITCHES: YOUTH, GANGS, AND WITNESS INTIMIDATION IN MASSACHUSETTS 11 (2007).

551. Masten, *supra* note 549, at 705.

552. *Id.* at 705 n.5 (citation omitted).

553. David Kocieniewski, *SCARED SILENT: With Witnesses at Risk, Murder Suspects Go Free*, N.Y. TIMES, Mar. 1, 2007 [hereinafter Kocieniewski, *Witnesses at Risk*], http://www.nytimes.com/2007/03/01/nyregion/01witness.html?pagewanted=all&_r=0.

554. *Id.*

A hundred. If I see five guys doing something [illegal] on the street, I'm going to look the other way and hope I don't see no more."⁵⁵⁵

The norm against snitching has taken hold on the streets of many U.S. cities, including Newark, Baltimore, Philadelphia, Dallas, and Washington DC, and affects all demographics.⁵⁵⁶

The Stop Snitching movement has found its tipping point—and is now infectiously sweeping through the public . . . This code is being adhered to not only by prisoners, but also by thirteen-year-old girls in school, middle-aged neighbors across the street, and ordinary citizens who would rather run *away* from the police instead of *to* them.⁵⁵⁷

In 2005, a witness to a murder was attacked while in protective custody.⁵⁵⁸ Summoned to the door of his cell, he was seriously burned when sprayed by a mixture of water and baby oil that had been heated in a microwave.⁵⁵⁹ When asked why he had done it, the attacker replied that he had heard the person was a snitch.⁵⁶⁰

In Essex County (Newark), people willing to help despite the danger often do so only clandestinely, in some cases leaving notes for detectives in trash cans, or asking to be taken away in handcuffs “so that neighbors will think that they’re in trouble with the police and not cooperating.”⁵⁶¹ Investigators report that when they arrive at a crime scene, it is common for bystanders to leave, so as to avoid neighbors thinking that they might cooperate with police.⁵⁶²

Witness intimidation has become so prevalent and expected across major cities that a gang leader in prison in New Jersey awaiting trial for murder was unconcerned about the existence a potential informant against him: even if the informant “take[s] his plea deal . . . [t]hen what? What’s he going to do when he gets out? Where’s he going to go where no one will be able to find him?”⁵⁶³

In response to the Stop Snitchin’ norm in Essex County, prosecutors have adopted an unwritten policy not to pursue cases in which they have a single witness because the person is too likely to be killed or intimidated into silence.⁵⁶⁴ Even seemingly “slam-dunk” cases will not be pursued

555. Tom Farrey, ‘Snitching’ Controversy Goes Well Beyond ‘Melo’, ESPN (Jan. 18, 2006), <http://sports.espn.go.com/nba/columns/story?id=2296590>.

556. Masten, *supra* note 549, at 706–07.

557. *Id.* at 705–07 (emphasis in original).

558. David Kocieniewski, *SCARED SILENT: In Prosecution of Gang, A Chilling Adversary: The Code of the Streets*, N.Y. TIMES, Sept. 19, 2007 [hereinafter Kocieniewski, *Code of the Streets*], <http://query.nytimes.com/gst/fullpage.html?res=9C00E5DF173BF93AA2575AC0A9619C8B63&ref=scaredsilent>.

559. *Id.*

560. *Id.*

561. See, e.g., Kocieniewski, *Witnesses at Risk*, *supra* note 553.

562. *Id.*

563. Kocieniewski, *Code of the Streets*, *supra* note 558.

564. See Anthony Ramirez, *2 Newark Men Charged with Beating Informant*, N.Y. TIMES, Mar. 25, 2007, <http://www.nytimes.com/2007/03/25/nyregion/25witness.html?ex=13324752008&en=6d-3ea3138c6381&r=0>.

with a single witness, unless the witness' testimony is extensively corroborated by physical and forensic evidence.⁵⁶⁵ Although witnesses are considered particularly compelling at jury trials, the frequency with which they are intimidated or killed makes police reluctant to rely on them.⁵⁶⁶ Police detectives in Newark and other gang-violence prone areas of New Jersey try to avoid using witnesses whenever possible.⁵⁶⁷ As one state police detective explained: "[i]f you push someone and they agree to testify, now they're your responsibility . . . [y]ou've got to keep them from disappearing or getting hurt. Can we protect them? Maybe. But God forbid that two years later you have to tell someone their husband or father got killed."⁵⁶⁸ Even the then-Governor of New Jersey suggested that police should "use civilian witnesses sparingly."⁵⁶⁹ While the New Jersey State Police gang unit has prosecuted hundreds of cases statewide over the past five years, it has used civilian witness testimony less than a dozen times in that period.⁵⁷⁰

The scary truth appears to be that witness intimidation is a pervasive and growing trend in many places.⁵⁷¹ A study of witnesses appearing in Bronx County, New York, indicated at least thirty-six percent of witnesses had been directly threatened, and that among those not explicitly threatened, fifty-seven percent feared that they would be subject to reprisals.⁵⁷² A study conducted by the National Youth Gang Center indicated that eighty-eight percent of urban prosecutors have described witness intimidation as a serious problem.⁵⁷³ In cities such as Baltimore and Boston, prosecutors estimate that witnesses face some kind of intimidation in nearly eighty percent of all homicide cases, while in Essex County, New Jersey, prosecutors claim that at least two-thirds of their witnesses in homicide cases receive direct threats not to testify.⁵⁷⁴ It is perhaps no surprise that Essex County, with its unspoken rule that single-witness homicides generally will not be prosecuted,⁵⁷⁵ contains one of the most dangerous cities in the country: Newark, New Jersey.⁵⁷⁶

The success of Stop Snitchin' only feeds the vicious cycle by making effective prosecution of serious crimes more difficult. With the intimidators winning the battle against authorities over public allegiance, or at

565. *Id.*

566. David Kocieniewski, *SCARED SILENT: Keeping Witnesses Off Stand to Keep Them Safe*, N.Y. TIMES, Nov. 19, 2007, <http://www.nytimes.com/2007/11/19/nyregion/19witness.html?ref=scared-silent>.

567. *Id.*

568. *Id.*

569. *Id.*

570. *Id.*

571. Kocieniewski, *Code of the Streets*, *supra* note 558.

572. Kelly Dedel, *Witness Intimidation*, CENTER FOR PROBLEM-ORIENTED POLICING, http://www.popcenter.org/problems/witness_intimidation/ (last visited Nov. 5, 2014).

573. Kocieniewski, *Witnesses at Risk*, *supra* note 553.

574. *Id.*

575. Ramirez, *supra* note 564.

576. Abby Rogers, *The 25 Most Dangerous Cities in America*, BUSINESS INSIDER (Nov. 4, 2012, 11:10 AM), <http://www.businessinsider.com/the-25-most-dangerous-cities-in-america-2012-10?op=1>.

least compliance, that power only reinforces the impunity with which they can intimidate further. That, in turn, gives them a freer hand to commit offenses in the first place. In other words, the Stop Snitchin' response is a recipe for disaster for the neighborhood. The lack of cooperation reduces the system's crime-control effectiveness, which further damages its reputation, leading to less credibility, and less cooperation, in an endless downward spiral.

VI. CONCLUSION

The current system's apparent insensitivity to the importance of doing justice may not produce many vigilantes in the streets, but it has contributed to disillusionment about the criminal justice system's interest in doing justice. That disillusionment may help people increasingly justify subverting the system. In the spirit of the 1851 Vigilance Committee and the Lavender Panthers, the system's intentional and systemic failures of justice provide the shadow vigilantes with moral justification to "take the law into to their own hands." They do this not by taking to the streets—typically only Hollywood fantasy does that now—but by manipulating the system to their own ends as they see others doing to escape deserved punishment.

Such shadow vigilantism may be less dramatic than taking to the streets, but it can be pervasive, and ultimately even more damaging to the integrity of the process. The 1851 Vigilance Committee announced themselves and their doings so people would know their effect. Shadow vigilantism provides an unseen and unaccountable corrupting force that contaminates the entire process because one can never know when it is at work.

Yet, the criminal justice system currently portrays itself as free to create hostility among the community over failures of justice as it sees fit because there is nothing a disillusioned community can do about it. This is an arrogant and dangerous short game. There is much that a disillusioned and cynical community can do, beyond distracting itself by spending money to see vigilante hero movies. The community can manipulate the system through many avenues to force it to do what it often seems reluctant to do.

The tragedy of this dirty war is twofold. First, it could be avoided simply by being more sensitive to the importance of doing justice. The system could avoid doctrines that will predictably frustrate justice, unless there is a compelling reason to do so and there is no other, less justice-damaging alternative. Second, forcing the disillusioned into shadow vigilantism often produces results that, in the larger perspective, even the shadow vigilantes would find objectionable. Mandatory minimums avoid the problem of unchecked lenient sentencing, but they also produce a set of cases of predictable injustice. We would all be better off—both the offenders and the community—if the criminal justice system earned some

reputation for doing justice without the prodding of an outside force being necessary.

Rather than suffer the distortions of shadow vigilantism, it is argued here that the system ought to publicly commit itself to the importance of doing justice (and of avoiding injustice) in a way that will regain the trust of society. That public commitment, backed by action, can undercut the motivations for the unfortunate distortions that shadow vigilantism brings. It could build trust that the system is devoted to doing justice on its own, and need not be manipulated into it.

No criminal justice system can have a perfect reputation for both doing justice and avoiding injustice. Someone will always think the system has improperly allowed a clearly guilty offender to go free, even if the belief is mistaken. But just as the system ought not give up trying to avoid injustice simply because someone will always claim there is more to be avoided, neither should the system give up trying to avoid failures of justice simply because someone will always claim there are more to be avoided. The system can incrementally improve its moral credibility, and thereby its crime-control effectiveness, by reducing its current level of failures of justice (and of instances of injustice).

The cure for vigilantism, direct or shadowed, is a clear public commitment to giving the punishment deserved, nothing more and nothing less. That will require significant reforms to current rules and practices, but such reforms can bring not only greater justice, but also greater stability, respect, and deference to the criminal law in all its work.