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Article

Moral Judgments & International Crimes: The Disutility of Desert

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Moral Judgments & International Crimes: The Disutility of Desert

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The international criminal regime exhibits many retributive features, but scholars and practitioners rarely defend the regime in purely retributive terms – that is, by reference to the inherent value of punishing the guilty. Instead, they defend it on the consequentialist grounds that it produces the best policy outcomes, such as deterrence, conflict resolution, and reconciliation. These scholars and practitioners implicitly adopt a behavioral theory known as the "utility of desert," a theory about the usefulness of appealing to people's retributive intuitions. That theory has been critically examined in domestic criminal scholarship but practically ignored in international criminal law.

This Article fills this gap and argues that whatever its merits in the domestic realm, there are special reasons to be skeptical about the "utility of desert" claim in the international context. Moral intuitions as heuristics for moral judgments are error-prone, and the international criminal regime has a number of extraordinary features that may increase the likelihood and cost of these errors. These features include the complexity of the crimes; the diversity of stakeholders who possess heterogeneous intuitions; and the regime's multiple goals, some of which may be inhibited by moral condemnation. After examining these differences, the Article outlines the implications of the analysis for regime design. Some of these design implications accommodate the international criminal regime's current retributive approach, and some are fundamentally incompatible with retributivism.

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"From a behavioral perspective, the crucial question is the causal efficacy of [the] various justifications for retribution."[1]

INTRODUCTION

The international criminal regime is deeply retributive.[2] This retributivism could be defended as having inherent value. Yet scholars and practitioners rarely defend the regime only in retributive terms; instead,

1. Jon Elster, *Retribution*, in RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY 53 (Jon Elster ed., 2006).

2. Throughout this Article, I refer to "retributivism," by which I mean the general view that the guilty deserve to be punished. I contrast this typically non-consequentialist justification for a criminal sanction with the many consequentialist justifications such as deterrence, rehabilitation, or other goals. I do not seek to spark a debate about the merits of retributivism vis-à-vis consequentialism. Instead, I am solely concerned here with evaluating the claim that the regime's current retributive stance will produce favorable consequences.

they often articulate the *policy benefits* of a regime that is primarily concerned with punishing — and expressing moral condemnation of — those most responsible for international crimes. According to this view, condemning individuals for international crimes may or may not have inherent value, but more importantly, it reflects a community's desire to see justice done and therefore allows the regime to credibly express desirable norms, which in turn produces good consequences.[3]

This consequentialist defense of the regime's retributive features roughly hews to the domestic criminal law theory known as the "utility of desert."[4] This is a behavioral claim about the usefulness of appealing to retributive intuitions. People have a strong intuition that bad acts must be punished, the argument goes, and when the criminal regime quenches this retributive thirst, a host of ancillary benefits abide; when the regime fails to do so, a host of problems arise.

This is, by design, an intuitively appealing claim about criminal justice, and it has been widely discussed in the domestic criminal literature.[5] But does it make sense in the international context? Neither the general "utility of desert" claim nor the behavioral story behind it has been examined in the international realm. This is especially striking because much of the recent research that might help one evaluate the theory draws on data that are global in scope. In recent years, a number of studies have explored the innate features of moral judgments. These studies have shown similarities across human societies in sentencing patterns,[6] moral intuitions,[7] and

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3. *See* Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 6 (1998), *cited in* Janine Natalya Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Hercegovina*, 7 J. INT'L CRIM. JUST. 463, 464 (2009).

4. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454, 468–69 (1997) (introducing the "utility of desert" claim, that the most effective criminal regime is one that speaks to community perceptions of just deserts).

5. *See id.*; *see also* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.5, "Purposes of the criminal law–Theories of punishment" (2003); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003); Symposium, *Is Morality Universal, and Should the Law Care?*, 75 BROOK. L. REV. 433, 433–587 (2009).

6. *See* Peter H. Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224, 230 (1974); Monica A. Walker, *Measuring the Seriousness of Crimes*, 18 BRIT. J. CRIMINOLOGY 348, 348–49 (1978); *see also* Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007) (examining comparative data about criminal sentencing and finding consistency across many societies vis-à-vis a core set of offenses, including aggression, takings, and deception).

7. *See* Jonathan Baron, *A Psychological View of Moral Intuition*, 5 HARV. REV. OF PHIL. 36 (1995) (demonstrating the likely overlap between cognitive bias and heuristics in moral judgments and other areas of decision-making); Max H. Bazerman & Joshua D. Greene, *In Favor of Clear Thinking: Incorporating Moral Rules into a Wise Cost-Benefit Analysis*, 5 PERSP. ON PSYCHOL. SCI. 209 (2010) (reviewing the moral intuitions literature and identifying ways to enhance cost-benefit analysis); Joshua D. Greene et al., *Pushing Moral Buttons: The Interaction Between Personal Force and Intention in Moral Judgment*, 111 COGNITION 364 (2009) (discussing the difference in brain activity between subjects given different but functionally similar fact patterns about a runaway trolley car).

reciprocal altruism.[8] Much of that work has been incorporated into domestic criminal scholarship[9] — some of it in support of the "utility of desert" theory.[10] Little of it has appeared in international scholarship.[11]

Does the moral judgments literature, which offers insights about moral intuitions and their effects on decision-making, have implications for the backward-looking retributive approach that dominates the international criminal regime? Behavioral insights have prompted calls to reform international criminal doctrine, especially those doctrines such as incitement to genocide that directly address the unique social dynamics of mass atrocity.[12] But perhaps doctrinal innovations alone are not enough. Behavioral insights, especially about moral judgments, may call into question one of the main justifications for the current regime: the expressive capacity of retributive punishment.[13]

This Article examines the "utility of desert" claim in the international criminal context, and explores several design implications. The Article proceeds in three Parts. Part I outlines the contours of the "utility of

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8. *See, e.g.*, Robert Boyd et al., *The Evolution of Altruistic Punishment*, 100 PROC. NAT'L. ACAD. SCI. 3531 (2003) (describing the development of innate, non-selfish punishments that serve prosocial ends); Herbert Gintis, *The Evolution of Private Property*, 64 J. ECON. BEHAV. & ORG. 1 (2007) (reviewing a large literature on the innate, cross cultural nature of altruism); Joseph Henrich et al., *In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies*, 91 AM. ECON. REV. 73 (2001) (describing cross-cultural studies about the nature of reciprocal altruism and decision making more generally).

9. *See, e.g.*, Paul H. Robinson, Robert Kurzban & Owen P. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1644 (2007) (describing the evolutionary roots of innate, cross-cultural justice intuitions); *see also* Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007) (surveying recent social science evidence that moral intuitions are innate and widely shared). *Cf.* Donald Braman, Dan M. Kahan & David A. Hoffman, *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531, 1532–33 (2010) (surveying recent scholarship in the social sciences and in law about the universality of justice intuitions).

10. *See* Adam J. Kolber, *How to Improve Empirical Desert*, 75 BROOK. L. REV. 433, 434 (2009); Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1962 (2010) (relying in part on studies about the widespread and innate nature of moral intuitions to bolster the "utility of desert" view).

11. This may be changing. For a recent application of the "utility of desert" claim to the use of force regime, see Paul H. Robinson & Adil Ahmad Haque, *Advantaging Aggressors: Justice & Deterrence in International Law*, 3 HARV. NAT'L SEC. J. 143 (2011).

12. *See* Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 HARV. INT'L. L.J. 51, 92–93 (2010). For another example of how behavioral insights might affect international criminal doctrine, see Allison Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005) (acknowledging the unique social dynamics of group crimes).

13. As I discuss in Part I.B, the mechanisms behind this claim are not clear; scholars refer in general terms to the ability of an expressive regime to eradicate a state's prevailing "culture of impunity." *See, e.g.*, Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 HUM. RTS. Q. 624, 652 (2009) ("The still emerging culture of international accountability continues to navigate through the tenacious remnants of the culture of impunity that prevailed throughout much of the UN era.").

desert" view and finds evidence of its influence in both international criminal scholarship and the international criminal regime itself.

Part II offers several reasons to think that the standard justification of the "utility of desert" view — whatever its merits in the domestic context — makes less sense internationally. These concerns arise because of the international regime's global reach and its jurisdiction over extraordinary crimes. The idea that international criminal institutions ought to speak for all people depends on the claim that there are universal intuitions among people from different cultures to which a normative defense of international justice can appeal. Part II evaluates this claim and finds that despite some level of uniformity of global views toward crime and punishment, there is also evidence of enormous variation — enough variation to threaten the legitimacy of an institution that claims to enforce universal norms.[14] The diversity of moral intuitions is especially pronounced outside the ordinary domestic criminal context, a fact that undermines a key component of the "utility of desert" claim, namely, the local resonance of international justice.

Part II then explores whether moral intuitions should be relied on in the context of complex situations of harm. Moral intuitions are highly effective heuristics that nonetheless suffer blind spots. Those errors may be manageable at the domestic level, but they raise special concerns for the international regime, which has distinct goals from domestic criminal law. For example, the language of moral absolutes — that is, deontological language, the language of retributivism — is powerful for expressing condemnation. But moralistic language can also imperil conflict resolution, an important goal of the international criminal regime. Where the retributive stance of international tribunals risks further entrenching parties in a long-standing conflict, desert is unlikely to maximize utility. Finally, this Part evaluates the risk that, as some researchers have shown, moralistic or retributive thinking, with its emphasis on absolutes, crowds out more consequentialist thinking, thereby undermining law and policy attempts to maximize the regime's many policy goals.

Part III then outlines the implications of this analysis for the international criminal regime. If the "utility of desert" claim in international criminal law rests on a shaky foundation, there are two options for reform: strengthen that foundation, or abandon it altogether. Considerations in the first category include how the international criminal regime, armed with a more sophisticated understanding of cross-cultural behavioral insights, could enhance its retributive elements and reduce its consequentialist or non-retributive policies to build a more effective regime. For example, the idea of a distinct sentencing phase in

14. *See* Braman et al., *supra* note 9, at 1562.

international criminal trials could enhance the expressive capacity of the law without undermining the regime's retributive core.[15] The Article then turns to design elements that are incompatible with just deserts. These include reforms such as national unity measures, including amnesties and financial incentives for peace. The aim of this analysis is to provide a measure of clarity amidst an international criminal regime that is still "searching for a purpose."[16]

I. THE "UTILITY OF DESERT" CLAIM IN INTERNATIONAL CRIMINAL LAW

In one sense, the very point of a legal regime is to respond to emotionally charged events systematically and with deliberation — to use the rule of law to resist the impulse for base retribution.[17] The international criminal regime is heralded as a feat of the modern global order precisely because it seeks to replace the harmful cycle of atrocity-followed-by-retribution that has existed for centuries.[18] But the international criminal legal regime exhibits many features that reveal or even encourage the retributive impulse. This is not because the regime is retributive to its core; rather, it can best be justified by the view that desert serves the many policy goals of the regime. This Part outlines some of the international criminal regime's retributive features and their consequentialist defenses. It then outlines the generic "utility of desert" argument, upon which these justifications are based.

A. The Retributive Regime

The international criminal regime in general — and its sentencing practice in particular — appear to be animated by a deep retributive impulse.[19] Retribution is acknowledged at the outset in the long list of the

15. *See* Jens David Ohlin, *Towards A Unique Theory of International Criminal Sentencing*, *in* INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW 373, 392-397 (Goran Sluiter & Sergey Vasiliev eds., 2009).

16. MARK A. DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 167 (2007). Drumbl has perhaps done more than any other scholar to catalogue both the multitude of the regime's goals and their potential incompatibility with each other.

17. *See* SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE 5 (1985) ("The fact that a judge rather than a mob designates drawing-and-quartering as a proper mode of execution is, in strict legal terms, an advance in the social control of revenge, but it also means that the values of those who control the social order are scarcely more advanced than those of the mob."), *cited in* Clark, *supra* note 3; *see also* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 270–75 (1996).

18. *See* Anthony D'Amato, *National Prosecution for International Crimes*, *in* 3 INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT 294, 294–95 (M. Cherif Bassiouni ed., 3d ed. 2008) (describing the role of reprisals in international affairs before the rise of the international criminal regime).

19. *See* Ralph Henham, *Developing Contextualized Rationales for Sentencing in International Criminal Trials*, 5 J. INT'L CRIM. JUST. 757, 757–58 (2007) (noting the "pervading ideology of retributivism"

international criminal regime's goals.[20] As Allison Danner notes, retribution "may be considered the dominant sentencing model in international law."[21] The retributive bent of international criminal sentencing is all the more remarkable because it constitutes a salient trend amidst a regime sentencing policy that has been widely criticized as incoherent.[22] Penalties receive only glancing attention in the conventions that outline the major international crimes.[23] Judges have wide discretion — that is, little guidance — in determining the length, type, and purpose of their sentencing decisions.[24] Accordingly, they have suggested a range of sentences and a range of reasons for those sentences, perhaps none of which can fully serve the multiple goals of the regime.[25] But most of those involve an assumption that the appropriate punishment turns on the goodness or badness of the act, *not* on the implications or consequences of the punishment; that is, "[t]he sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused."[26] This idea is largely accepted in international criminal scholarship.[27]

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that affects nearly all aspects of the regime); see also Ohlin, *supra* note 15, at 392 ("[a]t the most foundational level, the warrant for punishing international crimes is retributivist — the perpetrators deserve to be punished.").

20. For a summary of these goals, see generally Mirjan R. Damaska, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329 (2008) (noting the many often-competing goals of the international criminal regime, including retribution, and arguing for a greater focus on the expressive function of international criminal law).

21. Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 449–50 (2001).

22. *See* DRUMBL, *supra* note 16, at 167; Ralph Henham, *The Philosophical Foundations of International Sentencing,* 1 J. INT'L CRIM. JUST. 64 (2003) (identifying the multitude of different justifications for international criminal sentences and arguing for their reexamining, specifically focusing on victim communities).

23. *See* M. Cherif Bassiouni, *Penalties and Sentences*, *in* 3 INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT, *supra* note 18, at 603 ("Penalties are not contained in the 267 international criminal law conventions applicable to the 28 international crimes discussed in volume one.").

24. *See id.* ("The respective charter and statutes of the IMT, IMTFE, ICTY, ICTR and even the ICC delegate to the judge the determination of penalties, as well as the standards for sentencing, thus raising questions about that practice's compliance with the 'principals of legality.'").

25. For a discussion of how the regime's current sentencing does not fulfill any of its goals well, including retribution, *see* DRUMBL, *supra* note 16, at 46; *see also* Ohlin, *supra* note 15, at 399. This is not to say, however, that the regime does not have a predictable sentencing practice. *See* Barbora Holá et al., *Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice*, 22 LEIDEN J. INT'L L. 79 (2009) (finding that the tribunals' sentences could be predicted by legal criteria).

26. Prosecutor v. Kupreskić, Case No. IT-95-16-T, Judgment, ¶ 852 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000); *see also* Prosecutor v. Furundz Ija, Case No. IT-95-17/1, Judgment, ¶ 290 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (holding that punishment was the right tool for achieving the regime's goal of retribution for gross rights abuses).

27. *See, e.g.*, Danner, *supra* note 21, at 452 (arguing that while *lex talionis* is not acceptable, "the harm inflicted on a victim is surely a legitimate metric in the sentencing decisions of the Tribunals"). *Cf.* Mark J. Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HUM. RTS. Q. 118, 130 (2000) ("It is by no means clear, to put it generously, that punishment should be primarily retributive and that criminal sanction must therefore precisely "correspond" in severity (whatever that might mean) to the defendant's wrong."). Of course, sentences that are tied to the gravity of the crime are not

The regime's creation story and its founding documents further reveal the strong retributive impulse. The Nuremberg tribunal, which effectively launched the international criminal regime, was "dominated by retributive policies."[28] More recently, in 2000, the Special Court for Sierra Leone was established to try those who "bear the greatest responsibility" for crimes committed during Sierra Leone's civil war.[29] This retributivism is further reflected in the regime's nearly deontological attachment to "ending impunity," a phrase that has saturated international scholarship.[30] In the words of the Rome Statute, the ICC's mission is "to put an end to impunity for the perpetrators . . . of the most serious crimes of concern to the international community as a whole."[31] This attachment to ending impunity is also plainly reflected in early debates over the ICC's creation.[32] Of course, none of this is conclusive proof of retributivism; but it may be suggestive of the retributive impulse. While accountability mechanisms come in many forms — sanctions and rewards,[33] ex post and ex ante,[34] formal and informal[35] — the international criminal regime is largely limited to backward-looking sanctions, the only form of accountability compatible with retributivism.

How can the regime's retributive bent be justified? It could be justified on its own terms — after all, one of the goals of the regime is retribution for international crimes.[36] It could reflect the moral view that punishment for heinous crimes has genuine value in and of itself — that there is

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therefore inherently retributive, but matching the gravity of the offense to the severity of the punishment is a requirement of retributivism.

28. Ohlin, *supra* note 15, at 388, n.71.

29. Statute of the Special Court for Sierra Leone, art. 1 (2002), *available at* http://tinyurl.com/86n3cma.

30. *See, e.g.*, Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights,* 44 CORNELL INT'L L. J. 493, 520 (2011) ("Finger pointing by a human rights institution in Costa Rica will not end impunity in Latin America."); Chernor Jalloh & Alhagi Marong, *Ending Impunity: The Case for War Crimes Trails in Liberia,* 1 AFR. J. LEGAL STUD. 53 (2005); Renu Mandhane, *Ending Impunity: Critical Reflections on the Prosecution of Heads of State*, 61 U. TORONTO L.J. 163 (2011) (reviewing a book celebrating the end of impunity and immunity for heads of state).

31. Rome Statute of the International Criminal Court, pmbl., ¶¶ 5, 9, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute].

32. *See* J. Alex Little, *Balancing Accountability and Victim Autonomy at the International Criminal Court*, 38 GEO. J. INT'L L. 363, 368–69 (2007) (giving an overview of the anti-impunity impulse and the language revealing this impulse in the ICC's founding documents).

33. *See* Andreas Schedler, *Conceptualizing Accountability*, *in* THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 13–28, at 17 (Andreas Schedler, Larry Diamond, & Marc F. Plattner eds., 1999) ("[E]ven if [a sanction is] missing we may still legitimately speak of acts of accountability.").

34. For a discussion of the ex ante/ex post distinction, see generally Yael Aridor Bar-Ilan, *Justice: When Do We Decide?*, 39 CONN. L. REV. 923 (2007).

35. *See* Richard Stewart, *Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations*, *in* INTERNATIONAL ADMINISTRATIVE TRIBUNALS IN A CHANGING WORLD 18 (Spyridon Flogaitis, ed., forthcoming).

36. *See* Danner, *supra* note 21, at 449–50.

"intrinsic merit in prosecuting those responsible for mass atrocities."[37] This view does not require punishment to serve any practical purpose, and it is satisfied when morally-appropriate punishment is meted out, whatever the consequences.[38]

Or the regime's retributivism could be justified by its utility. This is the view that focusing on punishing the wicked is a useful way to achieve the regime's many explicit policy goals, including reconciliation, individuation of guilt, historical documentation, and deterrence. Even scholars who explicitly give deontological justifications for just deserts punishments often emphasize the policy benefits of such an approach. For example, a leading treatise on international criminal law states the conventional view that "accountability is an end in and of itself," and then goes on to list the policy benefits of moral condemnation.[39] Scholars who make this argument — that not only is retributivism the right punishment scheme, but also one able to achieve the regime's multiple goals — acknowledge the utility of desert.[40]

B. *Consequentialist Justifications for Retributivism*

Views differ as to which of the regime's policy goals is best served by the retributive stance; indeed, most treatments suggest that retribution satisfies more than one policy goal.[41] Some see the mechanism working by appeasing victims' demands for retribution, which is thought to contribute to peace and reconciliation.[42] Others see the mechanism working through the credible expression of norms that in turn deter future atrocities.[43] The

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37. *See* Akhavan, *supra* note 13, at 625 ("Leaving such crimes unpunished contradicts our intuitive conceptions of fundamental justice.").

38. Examples of this viewpoint can be found throughout early international criminal literature, but see especially 3 INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT, *supra* note 18, at 703; Steven Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707 (1999); Michael P. Scharf, *The Amnesty Exception to the International Criminal Court*, 32 CORNELL INT'L L.J. 507 (1999) (discussing whether the usual defenses of retributivism make sense at the international level).

39. 3 INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT, *supra* note 18, at 703.

40. Ohlin, *supra* note 15, at 391 ("international law must recognize the basic, foundational elements of retributivism in the criminal process, if the non-retributive goals of public international law are to be achieved").

41. *See* Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN. AFF. 150, 150 (2001) ("Impunity may still be the norm in many domestic courts, but international justice is an increasingly viable option, promising a measure of solace to victims and their families and raising the possibility that would-be tyrants will begin to think twice before embarking on a barbarous path.").

42. Ohlin, *supra* note 15, at 391 ("If the retributive goals are ignored, victims lose confidence in the system, the guilty are not adequately punished, the moral fabric to the international community is not repaired, ethnic conflict reignites, and the twin goals of collective peace and security, as codified in the UN Charter, are not respected."). *See also* Jens David Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law,* 14 U.C.L.A. J. INT'L L. & FOREIGN AFF. 77, 89 (2009). (noting that "retributive considerations might yield positive consequences in repairing international peace").

43. *See* Roth, *supra* note 41, at 150.

latter claim, that retributivism serves general deterrence, is a frequent if not dominant form of the "utility of desert" argument in international criminal law.

To be clear, this "utility of desert" argument is distinct from specific deterrence. Under specific deterrence theory, a criminal sanction puts a would-be criminal on notice of the costs of crime and alters his cost-benefit analysis: a rebel leader, for example, considers the gains of a crime and the costs (many years in jail, loss of power) and if the costs outweigh the gains, he is deterred from criminal action. Specific deterrence can be achieved without a strictly retributive punishment scheme — any punishment that is harsh enough to alter the would-be criminal's calculus should have an effect, regardless of whether that punishment is calibrated to the moral severity of the crime. There are compelling reasons to think that people involved in society-wide upheaval, rebellions, civil wars, and genocides cannot be rationally deterred by the noncredible threat of a far-off sanction.[44] The more persuasive deterrence theory depends on the expressive function of retributive justice.

The "utility of desert" claim can therefore be thought of as a theory of general rather than specific deterrence. General deterrence theory imagines criminal sanctions to have an expressive capacity that ultimately produces a useful outcome — though whether this is meant to occur through private commitment to norms or peer-level socialization is not always made clear. According to this theory, "The punishment of particular individuals — whether star villains such as Karadzic or Mladic or ordinary perpetrators such as Tadic and Erdemovic — *becomes an instrument through which respect for the rule of law is instilled into the popular consciousness*."[45] The goal of general deterrence, then, is for criminal sanctions to tap into social conditions and social norms to deter criminal activity.

These deterrence theories can be further divided along a temporal dimension. Some scholarship is concerned with the immediate effects of a tribunal on an ongoing conflict,[46] while some of it is concerned with long-

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44. Because these reasons have been well documented, I will not revisit them here. For an economic analysis of the specific deterrence promised by international criminal tribunals, see Julian Ku and Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2006). Expressivists have made the same point. *See* Robert D. Sloane, *The Expressive Capacity of Criminal Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 74 (2007) ("Some war criminals and *génocidaires* do not weigh the costs and benefits of criminal conduct in a dispassionate way . . . . Others, particularly megalomaniacal elites, calculate (often correctly), that they will get away with it, or that the risk of apprehension and prosecution remains small.").

45. Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 749 (1998) (quoted in David Wippman, *Atrocities, Deterrence and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 486 (1999)) (emphasis added).

46. *See*, *e.g.*, Jide Nzelibe, *Courting Genocide: The Unintended Effects of Humanitarian Intervention*, 97 CAL. L. REV. 1171 (2009).

term deterrence. These deterrence theories, and the way they are implemented in the international criminal regime, are detailed in tabular fashion below.

TABLE 1. DETERRENCE THEORIES IN INTERNATIONAL CRIMINAL LAW

	Short-term (mid- and post-conflict)	***Long-term (pre-conflict)***
Specific	The "interruption" argument: Stop a rebel leader from an ongoing violent campaign. [e.g., the ICC's indictment of Joseph Kony in Uganda; the SCSL's indictment of Charles Taylor in Liberia]	The "specter of prosecution" argument: Deter similarly situated rebel leaders (the small handful of potential indictees) with the specter of an investigation, which would enable immediate specific deterrence through an indictment. This is generally aimed at high-level actors. [e.g., the idea of regional influence — by indicting Kony, all rebel leaders in the area are put on notice that they could be next. "Even if wartime leaders still enjoy popular support among an indoctrinated public at home, exclusion from the international sphere can significantly impede their long-term exercise of power."[47]]
General	The "tailspin" argument: Break the moral tailspin of an ongoing conflict; establish order and a sense of rules. [e.g., "In Croatia, cooperation with the ICTY has facilitated steps toward international integration, discrediting extremist elements and encouraging liberal political forces to consider the initiation of complementary war crimes prosecutions before national courts. In Rwanda, the ICTR has undermined the capacity of Hutu extremists to rehabilitate the remnants of their leadership abroad, and mitigated the severity of Tutsi reprisals against the Hutu by making accountability an important and constant political factor."[48]]	The "culture of impunity" argument: Establish cultural norms that will self-propagate and through society-wide penetration prevent the next atrocity. [e.g., a dominant justification for the ICC is that it will "create unconscious inhibitions against crime," that punishment of international criminals in international tribunals imbues international norms into local norms and attitudes.[49] The mechanism that drives this is not always clear and is sometimes described as spreading like a disease — "an unmistakable contagion of accountability."[50]]

47. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 7 (2001).
48. *Id.* at 9.
49. Akhavan, *supra* note 45, at 746.
50. Akhavan, *supra* note 47, at 9.

The "utility of desert" theory is most prominent in claims about long-term, general deterrence — the bottom-right field of Table 1. This is the sort of effect imagined when scholars speak of ending the "culture of impunity,"[51] and it is a core justification scholars and practitioners give for the international regime's deep retributivism. The deterrent effect of the law's "expressive function" is a component of consequentialist justifications for the regime's retributivism because a retributive regime allegedly has the most credibility to express moral values.[52] Once local communities adopt those values, behavior is meant to change for the better.[53] This is thought to be more efficient than specific deterrence: "In the long term, this effect of punishment likely deters far more criminal conduct than conscious rational calculation based on a fear of sanctions."[54]

Yet despite bold claims about the deterrent effects of international criminal punishment,[55] the available evidence speaks more to the ability of courts to interrupt ongoing conflicts[56] and to create a culture among members of the international elite in favor of international tribunals[57] — neither of which goes to the question of whether desert-based criminal inquiries promote general cultures of law-abidingness. The behavioral evidence does not unambiguously support the claim that "[p]ublicly vindicating human rights norms and ostracizing criminal leaders may help to prevent future atrocities through the power of moral example to transform behavior."[58] In fact, there is some evidence that on the score of local legitimacy — a crucial component to any expressive theory and an

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51. Akhavan, *supra* note 13, at 652; *see also* Akhavan, *supra* note 47, at 23 ("[T]he government believed that 'it is impossible to build a state of law and arrive at true national reconciliation' without eradicating the culture of impunity that had prevailed in Rwanda.").

52. *See* Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 490–91 (2001) ("In some versions of expressive theory, the relative length of prison sentences sends a message to the immediate offender and to other potential offenders about the seriousness with which the international community views the offense. Indeed, the ICTY has referred to sentencing determinations in distinctly expressive terms. In many ways, this expressive function of punishment best describes the purpose of sentencing by the Tribunals.").

53. *See generally* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (surveying expressive theories in domestic scholarship); *see also* Sloane, *supra* note 44, at 77 ("A [criminal] sentence that local institutions and actors view as cogent, legitimate, authoritative, and persuasive, one disseminated to the broadest possible audience, may contribute to the long-term project of preventing ICL crimes through mediums other than direct communication of a threat to potential criminals . . . .").

54. Sloane, *supra* note 44, at 75.

55. Akhavan, *supra* note 47, at 30 (noting that it is becoming increasingly hard "even for *realpolitik* observers and diehard cynics to deny the preventive effects of prosecuting murderous rulers.").

56. *See id.* at 9 ("The empirical evidence suggests that the ICTY and the ICTR have significantly contributed to peace building in postwar societies . . . .").

57. *See id.* ("Despite their ad hoc mandates, the ICTY and the ICTR directly influenced the adoption of the statute of the international criminal court (ICC) at the 1998 Rome Diplomatic Conference. Together with the ICTY and ICTR precedents, the ICC blueprint for a future international criminal justice system, however weak and limited, has raised accountability to unprecedented prominence in the politics of international legitimacy.").

58. *Id.* at 10.

essentially crucial component of the "utility of desert" claim — the international regime has not done particularly well.[59]

C. *Components of the "Utility of Desert" Argument*

Robinson and Darley, authors of the original "utility of desert" article, described the general contours of the argument this way: "[B]ecause it promotes *forces* that lead to a law-abiding society, a criminal law based on the community's perceptions of just desert is, from a utilitarian perspective, the more effective strategy for reducing crime."[60] They claim that the law affects behavior indirectly in two ways. First, it creates shared norms through adjudication, which involves community input and which educates the community about bright lines between acceptable and prohibited behavior.[61] Second, the moral authority of the law can create compliance in cases that are not obviously criminal. That is, people's strong intuition to follow the law can guide their behavior even in cases where they do not have strong intuitions about the rightness or wrongness of an act.[62]

International scholars have not articulated similarly specific behavioral mechanisms to explain or justify the "utility of desert" claim. But they have broadly adopted a generic form of this argument, one that shares a core set of assumptions. These assumption are that people have strong and identifiable intuitions about justice; the justice system that most closely matches their intuitions is one based on just deserts, the retributive ideal that, roughly speaking, bad acts must be punished according to their badness; the law's legitimacy is based in part on its perceived fealty to this desire for just deserts; and when the law is viewed as legitimate, a host of benefits abide, primarily among them the ability to guide behavior through the expression of desirable norms.

According to one influential scholarly treatment, people do not obey the law because they fear punishment — rather, they follow the law because they judge its values and procedures as legitimate.[63] If this is right, then an effective way for the law to control behavior is to speak to

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59. *See*, *e.g.*, TIM KELSALL, CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE 256 (2009) (arguing that the Special Court for Sierra Leone misinterprets local custom, and as a result, hands down sentences that do not accord with local perceptions of desert); Clark, *supra* note 3 (surveying members of the former Yugoslavia and finding evidence of a widespread sense that the ICTY is not fulfilling its promise).

60. Robinson & Darley, *supra* note 4, at 468–69 (emphasis added).

61. Relying on Kai Erikson's research, Robinson and Darley claim, "[T]he prosecution of a deviant brands the deviant as a criminal and casts a bright light on the exact location of a boundary that previously might have been obscure to the community." *Id.* at 472.

62. *See id.* at 475–76. Speeding is the classic example: It is not obviously immoral (*mala in se*), but rather wrongful because it is prohibited (*malum prohibitum*).

63. *See generally* TOM TYLER, WHY DO PEOPLE OBEY THE LAW? (2006) (explaining how obedience to the law turns on people's sense of the law's legitimacy).

peoples' robust and well-demonstrated intuitions for retribution. In order for the law to successfully claim moral authority, which is the source of its behavioral power, it needs credibility. Credibility, in these accounts, comes partly from consistent accord with community intuitions about justice. As Robinson and Darley acknowledge, this story gets complicated when it is less obvious what is meant by "community intuitions" or even by "community." That is, the "utility of desert" view also depends on a certain degree of harmony about community norms.[64] In other words, the expressive function of the law — its ability to express certain norms or reflect community appetites — works best when cultural consensus can be assumed.[65]

The "utility of desert" argument is often stated in the negative, as a warning about the slippery-slope dangers of deviating from community intuitions about just deserts. If the law veers too far from lay intuitions, some argue, it will lose legitimacy, causing people to defect.[66] The same argument appears in international "utility of desert" claims: Amnesties, scholars argue, must be avoided because "[e]very exception [to punishment] sends the message that criminal liability for the most serious international crimes can be negotiated."[67] Scholars have also phrased this in terms of victim satisfaction, warning that without retributive justice, victims — which, in some cases, means huge swaths of a society — will be willing to break the law themselves:

> [I]f the victims feel as if the perpetrators will not get the punishment that they deserve — because they will not be caught, because there are no tribunals within which to try them, or because the sentences will be too low — then the victims may decide to engage in self-help measures and take matters into their own hands.[68]

If international criminal law fails to punish the guilty, it will suffer credibility losses and put the broader goals of international justice in jeopardy.

The law's expressive function and its ability to regulate behavior through its moral authority depend on a core set of components: an identifiable and at least somewhat cohesive community, clarity of the rules at stake, and the perceived legitimacy of the legal regime. Each of these elements, upon closer examination, invites skepticism about the idea that

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64. *See* Robinson & Darley, *supra* note 4, at 482–83.

65. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 422–25 (1999) (noting that expressive functions of the law are less sensible when cultural accord cannot be taken for granted).

66. *See* Robinson & Darley, *supra* note 4, at 499.

67. Akhavan, *supra* note 13, at 652.

68. Ohlin, *supra* note 15, at 390–91.

retributivism is most likely to achieve the international criminal regime's many goals.

II. REASONS FOR SKEPTICISM

If the international criminal regime faces distinct policy and legal challenges as a criminal regime, then the assumptions underlying the municipal "utility of desert" view must be analyzed anew in that context. This Part examines six concerns about the "utility of desert" claim in the international criminal regime. Three of these concerns derive from the regime's extraordinary jurisdiction, while the other three relate to the moral judgment inherent in retributive justice and the potential for interference with the regime's unique goals. This is a limited critique — it does not address the broader "utility of desert" claim, at least insofar as that claim applies to features of domestic criminal regimes that are distinct from those in the international regime.[69]

A. The Extraordinary Jurisdiction and Goals of the International Regime

The international criminal regime differs from domestic criminal regimes in a number of important respects.[70] These include the multiple communities the international regime seeks to serve, the exceptional crimes under its subject matter jurisdiction, and its unique set of goals. Each of these is relevant to evaluating the usefulness of the retributive approach.

1. Multiple Communities

The "utility of desert" theory is premised on the dynamic relationship between law and community intuitions about justice. In the domestic criminal law context, there is at least a plausible claim that the law and moral intuitions come from and are meant for the same community — a community of citizens. Indeed, domestic criminal law applies differently to noncitizens partly for this reason. The same synchronicity between the people who make the law and the people upon whom it is imposed does not generally exist in the international criminal context. There, unlike in the municipal criminal context, the judges and funding bodies typically

69. Of course, this does not preclude the possibility that the concerns raised could inform a reevaluation of the "utility of desert" theory in the domestic context. While international legal scholarship borrows heavily from domestic theory, the opposite is rarely true, despite the fact that domestic courts increasingly take notice of international legal developments.

70. *See* Sloane, *supra* note 44, at 41 (noting the disanalogy between domestic and international crimes as well as regimes). *Cf.* Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762 (2004) (arguing that the distinction between transitional justice and domestic justice is overblown).

come from different cultures and nations (and hemispheres) than those being tried.[71]

Cultural relativists and other international law skeptics have used this fact to criticize the international regime, going so far as to argue that the regime is a form of neo-imperialism.[72] They emphasize the difference between the international and the domestic to argue that an international criminal regime can never credibly speak for all peoples. International criminal scholars make frequent reference to the "international community," and there is reasonable skepticism about whether such an identifiable community exists.[73] According to this view, there is simply too much variation across cultures to construct a global criminal regime. But these claims are often made without reference to the available evidence about cultural differences in justice intuitions. The fact that different cultures have different moral intuitions does not necessarily impugn the goals of the international criminal regime; but it does raise questions about the usefulness of emphasizing just deserts.

While international scholars have eschewed empirical investigation of whether moral intuitions about justice are in fact universal, there is a significant debate in domestic criminal law scholarship on this very topic. So-called "punishment naturalists," including some authors of the original "utility of desert" article,[74] have analyzed data suggesting that moral intuitions about the gravest crimes, like murder, are widespread across cultures, and perhaps even evolutionarily determined.[75] According to punishment naturalists, "highly nuanced intuitions about most forms of

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71. For example, the International Criminal Tribunal for Rwanda had no Rwandan judges. *See The Chambers*, UN INT'L CRIM. TRIBUNAL FOR RWANDA, http://tinyurl.com/86klmwv (last visited Feb. 6, 2012). The International Criminal Tribunal for the former Yugoslavia had no judges from the former Yugoslavia. *See The Judges*, UN INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, http://www.icty.org/sid/151 (last visited Feb. 6, 2012). Both tribunals were largely funded by the United States and Western European countries. *See* Steven D. Roper & Lilian A. Barria, *Donor Motivations and Contributions to War Crimes Tribunals*, 51 J. CONFLICT RESOL. 285, 288–89 (2007) (listing, in Table 2, the donations made by countries to the major ad-hoc tribunals).

72. This is the view that all cultural norms must be respected, and their very diversity means there can be no such thing as "universal" rights. For an overview of this argument, see Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984). For a sophisticated account of how the language of culture has inhibited and promoted human rights, see Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT'L L. & POL. 291 (2000).

73. I say "local" to mean the place where crimes that fall under the jurisdiction of the international criminal regime occur.

74. Paul Robinson co-authored *The Utility of Desert* with John Darley. Robinson & Darley, *supra* note 4. He then wrote *The Origins of Shared Intuitions of Justice* with Robert Kurzban and Owen Jones, and *Concordance and Conflict in Intuitions of Justice* with Kurzban. Robinson et al., *supra* note 9; Robinson & Kurzban, *supra* note 6.

75. *See* John Mikhail, *Moral Grammar and Human Rights: Some Reflections on Cognitive Science and Enlightenment Rationalism*, *in* UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS (Ryan Goodman et al., eds., forthcoming) (on file with the Virginia Journal of International Law Association) (discussing the evolutionary origins of innate justice intuitions).

crime and punishment are broadly shared because they are innate."[76] This view is deeply rooted in evolutionary psychology, and many of the proponents of punishment naturalism employ evolutionary explanations for their conclusions.[77]

The evidence about the innate nature of justice intuitions is powerful. Despite differences across cultures, laughter is universal; so, perhaps, are some justice intuitions. In one study, Robinson and Kurzban asked survey participants from different demographics to rank the severity of certain crimes, and the resulting lists shows remarkable consistency across socio-economic categories (listed along the top of Table 2). The crimes, listed vertically along the left side of Table 2, range from taking pies from an all-you-can-eat buffet to holding a child for ransom, raping and torturing the child, and then killing her after the ransom has been paid. The resulting table shows just how much uniformity people of different demographics demonstrate when they rank the wrongfulness of different crimes:

76. Braman et al., *supra* note 9, at 1532–33.
77. *See* Robinson et al., *supra* note 9, *passim*.

TABLE 2: RANKINGS OF WRONGFULNESS ACROSS DEMOGRAPHIC GROUPS AS REPORTED BY ROBINSON AND KURZBAN.[78]

Act	Rankings by Demographic								
	All Subjects	Male	Female	Non-White	White	<$60K Income	>$60K Income	<2 yr. Degree	>2 yr. Degree
Self-defense	0†	0	0	0	0	0*	0	0	0
Coerced theft	0	0	0	0	0	0	0	0	0
Umbrella mistake	0	0	0	0	0	0	0	0	0
Hallucination	0	0	0	0	0	0	0	0	0
Pies	5	5	5	5	5	5	5	5	5
Short change	6	6	6	7	6	6	6	6	6
T-shirt	7	6	7	6	7	7	7	7	7
Radio theft	8	8	8	7,8‡	8	8	8	8	8
Drill theft	9	9	9	9	9	9	9	9	9
Microwave theft	10	10	11	11	10	11	10	11	10
TV destruction	11	11	11	8	11	11	11	11	11
Slap	12	12	12	12	12	12	12	12	12
Head-butt	13	13	13	13	13	13	13	13	13
Stitches	14	14	14	14	14	14	14	14	15
Necklace & Stitches	15	15	15	15	15	15	15	15	14
Robbery	16	16	16	16	16	16	16	16	16
Clubbing	17	17	17	17	17	17	17	17	17
Pit bulls	18	18	18	18	18	18	18	18	18
Infant	19	19	19	19	19	19	19	19	19
Stabbing	20	20	20	20	20	20	20	20	20
Ambush	21	21	21	21	21	21	21	21	21
Abduction	22	22	22	22	22	22	22	22	22
Burning	23	23	23	23	23	23	23	23	23
Ransom	24	24	24	24	24	24	24	24	24
N=	246	123	123	53	193	102	103	169	77

* Forty-one subjects did not provide income information.
† "No punishment" as the modal response is shown as 0.
‡ The two ranks were a tie, thus both modes are reported.

The Table demonstrates that with regard to what the authors call "core offenses," there is a great deal of uniformity among diverse groups of people in their views about appropriate punishments for those offenses.[79] To the authors, this suggests a shared, evolutionary origin for justice intuitions.[80]

78. Robinson & Kurzban, *supra* note 6, at 1869 (cited in Braman et al., *supra* note 9). This list, compiled from Robinson and Kurzban and used by Braman et al., is useful because it demonstrates the perception of conformity of views: As crimes increase in severity, so too do perceived appropriate punishments.

79. Braman et al., *supra* note 9, at 1542 (citing Robinson & Kurzban, *supra* note 6, at 1877–78) ("Participants agreed on 91.8% of all pairwise judgments, and the ranking produces a Kendall's W of 0.88.").

80. *See* Robinson et al., *supra* note 9, at 1639 ("We suggest that one explanation for this

But if moral intuitions are universal, what accounts for the vast differences seen across cultures with regard to criminal sanctions? The enormous empirical literature that supports the punishment naturalist view also supports a competing view: While justice intuitions appear widely shared when stated at a very high level of abstraction, there is a huge amount of cultural variation in the real-world application of justice intuitions. The so-called "universal" prohibition against stealing is a good example of this. Cultures around the world prohibit unwanted takings. But what if the taking was a bus ticket needed to attend a sibling's wedding? In this case, people from certain cultures still insist that takings are not acceptable, while others suggest the taking is not only acceptable, but obligatory.[81]

In this hypothetical case, as in so many others, the so-called core offense may be universally prohibited, but all of the circumstances relevant to judgment of the action are culturally contingent. This may not have much bearing on how a relatively homogenous population decides to administer justice, if that group has shared norms and shared intuitions about wrongdoing. But it should have significant implications for regime design at the international level, where the judgment of wrongdoing occurs, by definition, across cultures and peoples. Nearly everyone agrees that killing is wrong as a general matter, but everyone may not share the same intuitions about when killing is justified — for example, in the context of ethnic conflict or resource struggles. Indeed, evidence from international criminal law suggests that despite great uniformity in the view that mass killing is wrong, there may not be such uniformity about the extent to which, or what sorts of, mitigating circumstances ought to lessen a conviction for mass killing.

Consider a concrete example. Late in the brutal Sierra Leonean civil war, rebel commander Issa Sesay was appointed interim leader of the armed group known as the Revolutionary United Front (RUF). He met with the president of Nigeria and the head of the armed UN forces in the region, and he promised to command his soldiers to put down their weapons; it was unclear if he did so expecting an amnesty. After convincing his men to disarm, he was arrested and tried before the Special Court for Sierra Leone. He received a sentence of fifty-two years, the harshest sentence issued by that court.[82] While some thought that this judgment was appropriate, many Sierra Leoneans felt that his sentence

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homogeneity of human intuitions of justice derives from that which all humans share by virtue of being human: their unique evolutionary history and resulting human nature.").

81. *See* Braman et al., *supra* note 9, at 1533–34.

82. *See* Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, (Mar. 2, 2009); *see also* Marlise Simons, *Long Sentences for Atrocities in Sierra Leone*, N.Y. TIMES, Apr. 9, 2009, at A12. The sentence was upheld on appeal. *See* Prosecutor v. Sesay, Case No. SCSL-04-15-A, Judgment (Oct. 26, 2009).

ought to have been vacated or greatly mitigated based on his role in the peace process.[83]

If a sizeable portion of Sierra Leoneans think the Sesay punishment is too harsh and not entirely deserved, this threatens the perceived legitimacy of the court, and also, therefore — if we take seriously the idea that people obey the law because they view it as legitimate — its efficacy. Ethnographic work from Bosnia and Herzegovina reveals similar cross-cultural misunderstandings that threaten the legitimacy of the International Criminal Tribunal for the former Yugoslavia (ICTY).[84] Even if cultural variance cannot be detected with regard to abstract crimes, it matters in interpreting the responsibility of a person for those crimes, and even more so in determining the appropriate (legitimate) punishment. The point in these cases is not that a community was divided over political differences; the point is that there appeared to be a *cultural* difference between the way the international criminal regime approached the problem and the way a local community approached the problem, and this cultural difference undermines the utility of desert. As Robinson and Darley readily admit, significant cultural differences raise questions about the "utility of desert."[85]

While behavioral evidence suggests that moral intuitions about punishment and justice have some universal elements, it also suggests that these intuitions vary more across cultures than the punishment naturalism story suggests. All that this means is that an attempt to create a universal criminal regime cannot rest on biological essentialism. It must account for significant cultural differences.

Of course, some domestic criminal orders also exist amongst great diversity. On the margin, the benefit of the expressive approach is that it can create consensus on some issues.[86] Indeed, one goal of criminal regimes is to bring cohesion to diversity. Yet, attempts to gloss over real dissensus can threaten to undermine the entire system. This is well illustrated by the phenomenon of jury nullification by African-American jury members who judge the American criminal justice system as bunk and not representative of their values.[87] The problem of cultural dissensus is exacerbated in the context of international justice. In addition to the evidence that there is considerable disagreement about important

83. *See, e.g.*, WAR DON DON (HBO Films 2010) (featuring interviews with Sierra Leoneans about the trial). To understand the importance of Sesay's role in convincing the rebels to disarm, see DAVID KEEN, CONFLICT AND COLLUSION IN SIERRA LEONE 267–68 (2005) (describing how the civil war was dominated by small armed groups who had little interest in ending the conflict).

84. *See* Clark, *supra* note 3.

85. *See* Robinson & Darley, *supra* note 4, at 471–77.

86. *See id.* at 457.

87. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

questions of justice across the globe,[88] there is a fundamental ambiguity about which community's norms are meant to be represented in international criminal law. The "utility of desert" model depends on a tribunal reflecting the community norms of those the tribunal seeks to influence; the model assumes that its audience and its home are one and the same. The problem for the international regime is that it seeks to influence both local populations and also the international community. This raises a problem for the "utility of desert" model: For whom, and to whom, should the regime speak?

These dual problems of cultural dissensus can be stated the following way. First, can an international tribunal, operating in a state where mass atrocity has occurred, expect the normal social benefits of the "utility of desert" approach (respect for prosocial norms, internalized commitment to the rule of law) when its laws and policies belong to the international community and not the host country? Secondly, can the same benefits of retributivism abide when there is no single dominant community (international or local) that legitimately represents the views of those affected by the relevant crimes? Much more empirical data is needed on cultural consensus with regard to both measurement and evaluation to begin to answer these questions. But if an answer is reached, either in favor of the "utility of desert" approach or against it, the experience may be instructive not only for future international tribunals, but also for domestic criminal regimes grappling with whether to embrace a deserts-based liability scheme.

2. *Unique Crimes*

Genocide, war crimes, and crimes against humanity are different from ordinary municipal crimes for a number of reasons stemming from their scope and severity. First, many of the crimes that are the subject of international criminal law are so grave they test the conceptual limits of retributivism.[89] Second, mass atrocity is often the product of exceptional circumstances, times of upheaval that see entire societies engage in morally questionable behavior — a fact that raises serious doubts about the utility of retributivism in that context.

a. Crimes Too Horrible for Retributivism

Retributivism requires that the punishment match the crime — not necessarily *lex talionis* ("an eye for an eye"), but certainly the severity of each punishment must reflect the severity of the crime in relation to punishments for lesser or greater crimes. That is, retributivism calls for a

88. *See* Braman et al., *supra* note 9, at 1552.
89. *See* DRUMBL, *supra* note 16, at 66.

positive linear relationship between crimes and their appropriate punishment, and the problem for some international crimes is that they are literally off the chart.[90]

As Elster notes, "If neither the severity of the crime nor the severity of the legal reaction can be even ordinally ranked, the case for using desert as a criterion for punishment is very weak."[91] If a state like the United States puts someone to death as punishment for murder, what can it do in response to the murder of a million? Putting aside the question of how to establish a sensible scale, many have wondered whether the gravity of some crimes against humanity can even be comprehended.[92]

The foregoing critique of retributivism for international crimes, which is not new,[93] does not necessarily apply with the same force to the "utility of desert" argument. That is, as long as people fail to detect the inconsistency in the court's sentencing scheme, and as long as they perceive the judgments as correlating to desert, retributivism may in fact produce a useful outcome. There is some evidence, however, that at least in some cases, the crimes in question are so horrible that the punishments meted out — still large by international standards — have been perceived as insufficient and as evidence of the legal regime's illegitimacy.[94] At least in these cases, the impossibility of matching sentences with desert undermines the utility of that approach.

b. Crimes of Unique Circumstances

The second and perhaps more important distinction between domestic and international crimes is the set of exceptional circumstances surrounding the perpetration of those crimes. Many scholars have noted the special circumstances that often accompany the perpetration of mass atrocity.[95] Given the overwhelming evidence that people determine what is right and wrong by looking to the behavior of those around them, it may not make much sense to punish an individual for the immorality of acting

90. *Id.*

91. Elster, *supra* note 1, at 48.

92. The most common reference for this point is HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963). For a survey of scholarly attempts to address the same question after Arendt, see the introduction to RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY, *supra* note 1, at 6–7.

93. *See generally* JUDITH SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 8 (1964) (noting that retributivism cannot accommodate complex international crimes).

94. The most recent example is public outcry over what was seen as the insufficient sentence of Kaing Guek Eav by the Extraordinary Constitutional Chambers of Cambodia. *See* Seth Mydans, *Anger in Cambodia Over Khmer Rouge Sentence*, N.Y. TIMES, Jul. 26, 2010, at A4. This example suggests that for the "utility of desert" model to work, international criminal tribunals would have to significantly increase the severity of their sanctions, at least in Cambodia.

95. *See* Nzelibe, *supra* note 46, at 1177–81.

on the moral authority of his peer group.[96] It can still make sense to punish him, if that punishment will deter future crimes or serve some other useful purpose, but it is harder to see the logic of telling him that he violated moral norms. He can discount this information by noting that the finger-pointer comes from a different community; some such individuals will even be revered as heroes despite, or perhaps because of, the condemnation of an outsider.

In the classical municipal model, a criminal is typically thought to be a social deviant who breaks the law and, because the law seeks to reflect and develop community norms, is punished for having violated community norms. But in the international criminal regime, there is no similar, singular set of established community norms. The international criminal is a deviant vis-à-vis international criminal law, but perhaps not a deviant vis-à-vis his state or his local community. This scenario deeply complicates the "utility of desert" story. Take, for example, the criminal who operates as part of a large rebel faction in which he was educated and raised, and whose actions merely support his community's norms (such as "kill the enemy Tutsis"). It will sound odd when a judge says to this defendant, per the "utility of desert" argument, "You broke community norms, and therefore you deserve punishment." More importantly, it will sound odd to the defendant's community. This is the problem of community ambiguity in international criminal law. When an international criminal tribunal says "community norms," it is often unclear whether the tribunal speaks for the international community or the local population, and if the latter is a divided population engulfed in civil conflict, the confusion is greater still. It is worth noting that this problem is not the same as saying, in absolute moral terms, that culture is relative; rather, if cultures vary, it raises troubling questions for the utility of retributive justice.

Evaluating the utility of moral condemnation for acts that arise out of exceptional circumstances is made both easier and more difficult by developments in international criminal doctrine. While there are doctrines such as joint criminal enterprise that seek to accommodate these exceptional circumstances, they raise new concerns as well. The doctrines of joint criminal enterprise and command responsibility both grew out of domestic analogs, but they both go beyond their ancestors and may not work the same way to reinforce community norms. For example, the doctrine of joint criminal enterprise does not require a showing of mens rea, which the court can establish by judicial ruling.[97] Can the community's norms be said to be enforced and promoted by punishing someone whose

96. *See* ROBERT CIALDINI, INFLUENCE 116 (3d ed. 2003) ("[O]ne means we use to determine what is correct is to find out what other people think is correct.").

97. William A. Schabas, *Mens Rea and The International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1033 (2003).

specific intention to commit harms has not been demonstrated? It would seem that such a liability regime based on behavior without intention could have a deterrent effect, but it would be harder to defend as a matter of deserts.

Leaving aside the perceived legitimacy of a deserts-based liability scheme, there is an additional problem of whether such a scheme can actually deter such crimes. International criminal scholars have argued that a significant portion of international criminals cannot be deterred.[98] The general failure of specific deterrence theory is one of the core justifications for the utility of desert, which seeks to achieve deterrence through normative purchase.[99] But there is significant evidence that norm internalization does not work in the sorts of contexts that accompany mass atrocities.[100]

This speaks to a wider limitation of the "utility of desert" model, which is that at some point, in every community, utility and desert will deviate. The authors of the theory suggest that desert is a useful heuristic; it gets things right most of the time, and for this reason, it can be expected to maximize utility. But this will not be true in all cases, and only with a regular evaluation of the likely behavioral effects of design choices can the regime detect the moment of this unraveling. This evaluation, made by annual reviews of the regime, or as a matter of course when negotiating the treaties that erect international criminal tribunals, may not predict an unraveling in all cases, and in the cases where international and local community norms appear to be in sync, the tribunal may seek to maximize its retributive features. The appeal of an alternative approach — one that does not insist on fidelity to just deserts — is that it gives the regime the flexibility to choose the right design elements for a given local-international locus, and, crucially, it leaves room for self-evaluation in a way that the retributive approach does not.

3. Multiple Goals

International criminal law has numerous goals — so many that some have questioned whether the regime can realistically achieve them all.[101] These goals, in addition to retribution for past crimes, include deterrence,

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98. *Id.*

99. *See* Robinson & Darley, *supra* note 4, at 459.

100. *See* Sloane, *supra* note 44, at 76 ("Finally, at least one study 'suggests that the internalization of norms is not sufficient to prevent atrocities.' David Wippman, reviewing findings of the International Committee of the Red Cross (ICRC) on war crimes in Bosnia-Herzegovina, notes that the ICRC concluded that such norms, while fully understood, supported, and accepted by combatants and civilians alike, 'broke down under the pressure of nationalist passions and hatred. They also broke down because a range of other wartime considerations diminished and superseded them.'") (citations omitted).

101. *See* DRUMBL, *supra* note 16, *passim*.

rehabilitation, reconciliation, dissipating calls for revenge, individuation of guilt, and establishing an accurate historical record.[102] Several of these goals are distinct from the goals of the domestic criminal regime and therefore may not derive the same benefits from the retributive approach envisioned in that context. For example, the use of retributive criminal trials to establish an historical record for grave crimes has been widely criticized.[103] There are better mechanisms, such as truth commissions, for establishing such a record after mass atrocity.

Rather than evaluate whether each individual goal of the regime can best be achieved through the retributive approach, regime designers should ask whether retributivism is the best way to achieve the regime's multiple goals. The regime is still young; its goals are not perfectly delineated, let alone ranked, and this flexibility may be useful for the regime. The question, then is whether the rigid consistency required by a retributive criminal model allows enough flexibility necessary for the regime to achieve its multiple goals efficiently.

There has been a loud and persistent call for greater consistency in the international criminal regime, especially its sentencing practices.[104] Greater consistency and predictability makes sense for a number of reasons: It gives the regime greater conceptual and practical coherence and sets uniform expectations about best practices worldwide. But by what metric should regime designers evaluate different sentencing proposals? Should they adopt a single metric, let alone a retributive one? Even if the retributive approach is useful sometimes, for some goals, that does not mean it will always be the right course. The regime might still need a mechanism to decide on a case-by-case basis whether its goals can best be achieved by emphasizing just deserts.

This idea — that an ideal strategy would include flexibility to change the goal of the criminal regime on a case-by-case basis because deterrent and expressivist approaches have different benefits — has been received skeptically in the domestic criminal literature. For example, after announcing that the ideal criminal regime would balance expressive and deterrence rationales, Kahan dismisses the idea because "it presupposes an unrealizable degree of both foresight and central control."[105] For the regime to operate with such precision, it would require simply too much analysis ex ante, and the information simply is not available. Moreover, getting it wrong may leave the regime worse off on net than had the

102. *See* Damaska, *supra* note 20, at 330 (noting that international scholars need more realistic expectations for what courts can accomplish).

103. *Id.* at 338 ("[T]he legal means of acquiring, marshaling, and presenting evidence in court depart, in various degrees, from optimal methods of reliable historical inquiry.").

104. *See* DRUMBL, supra note 16, at 66; Danner, supra note 21, at 416.

105. *See* Kahan, *supra* note 65, at 499.

regime simply stuck with a single approach, faults and all, because the costs of making ad hoc determinations are simply too high, given the volume of cases in the domestic criminal regime.

But is the same true at the international level? A great deal of effort goes into determining if, when, and where to establish an international criminal tribunal — or in the case of the ICC, an inquiry. The question of whether the tribunal or inquiry should be guided by expressive or deterrence rationales might simply be folded into the ex ante analysis about whether to hold a trial at all. The load of international criminal cases, while on the rise, is still miniscule compared to most domestic regimes, so case-by-case review would not seem to present an undue burden. Finally, international criminal cases often deal with such different, sui generis situations that the approach to justice chosen for each case might depend on which goal was deemed most relevant in a given context. For situations where the goal of the regime is to reconcile differences, deterrence discourse might be preferred for its "secret ambition" to quiet conflict;[106] if the regime seeks to explicitly confirm a moral norm, then the regime might seek to avoid deterrence discourse. The situations of international crimes, which vary from internal civil conflicts to highly centralized totalitarian regimes that target their own citizens, are distinct enough, and enough pretrial investigation goes into determining whether to launch an international criminal inquiry in each situation, that varying the sorts of justifications for the regime may not be so impractical. If this is right, it argues against the standard retributive approach, which depends crucially on consistency for the legitimacy of its message. That consistency may be at odds with the flexibility that is important to fledgling legal regimes.[107]

The international criminal regime, then, has certain features — its global, cross-cultural reach, its complex crimes, and its unique goals — that make it distinct from domestic regimes and that undermine the core justification for the utility of desert. The next section shows how these problems are further aggravated by the moral condemnation inherent in the retributive approach.

B. Unwanted Effects of Moral Condemnation

One of the strengths of the retributive approach, according to the "utility of desert" theory, is that it resonates with and encourages the moral intuitions of community members. But moral intuitions are fallible and do not always maximize utility. For example, indignation and moral outrage have been shown to crowd out consequential thinking; naïve realism,

106. *Id.*

107. For an argument that the common law tradition gave the young American republic the needed flexibility to adapt as times changed, see KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 402 (1960).

which is encouraged by moral absolutism, can inhibit conflict resolution; and moral heuristics have been shown in some contexts to produce significant judgment errors.

1. Moral Outrage and Crowding Out Effects

One danger of the retributive approach is that it plays to powerful moral intuitions, which can crowd out deliberative thought. In cases that incite indignation and moral outrage, the retributive approach, which calls for concordance with community sentiment, may not maximize utility.[108] And in international criminal law, the moral emotions run high.[109]

The power of indignation to crowd out consequential thinking was elegantly demonstrated with an experiment about a hypothetical set of damages awards. Baron and Ritov asked subjects to determine damage awards in a tort case against a company that made harmful products.[110] Emotionally-charged fact patterns (facts that were likely to evoke indignation), caused respondents to set extremely high damage awards — and this was true when the respondents were told that the high damages would have no effect on the company's behavior and even when they were told the high damages would have *negative effects*, such as causing the company to cease manufacturing socially-beneficial products.[111] In two follow up studies, Sunstein and coauthors showed that in determining damages, people were motivated by concerns other than just the behavioral consequences of the damages.[112] When the chance of detecting a harm went up, even to one hundred percent, subjects did not decrease the penalties they would impose on the defendant, suggesting they were setting damages based on something other than a stable deterrence formula.[113] This finding mirrors earlier work on risk that suggested that individuals do not process risk in a straightforwardly consequentialist

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108. *See* Jonathan Baron and Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17–33 (1993) (showing that people tend to prefer retributive punishments over consequentialist/utilitarian ones). Baron and Ritov showed that people have a strong punitive intuition that is nonconsequentialist. For example, subjects said that a corporation should receive the same fine in two different scenarios, even if in the one scenario the fine would result in forcing the corporation to halt its production of a socially beneficial vaccine. *See also* Joshua D. Greene, *The Secret Joke of Kant's Soul*, 3 MORAL PSYCHOL. 35, 50 (2007) ("First, let us consider whether punitive judgments are predominantly consequentialist or deontological and retributivist. Jonathan Baron and colleagues have conducted a series of experiments demonstrating that people's punitive judgments are, for the most part, retributivist rather than consequentialist.") (citing Baron and Ritov).

109. *See* Elster, *supra* note 1, at 54.

110. *See* Baron & Ritov, *supra* note 108, at 17.

111. *Id.*

112. Cass Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237 (2000).

113. *Id.*

manner.[114] Emotion — in this case, moral outrage — affects a judgment that would have been, but for that element, goal maximizing.

Indignation, like moral outrage, is prominent in legal institutions, even though they are "usually intended to be deliberative, to override error-prone intuitions, and to pay close attention to [the deliberative cognitive system]."[115] This is especially true in the case of punishments, where people are "intuitive retributivists."[116] For this reason, some have argued that retribution should no longer be an acceptable rationale for punishments, given how wildly variable punishments can be when they depend on the level of outrage a particular case provokes.[117] It is not only that people are more interested in just deserts than deterrence; in some instances, indignant people appear to give *no weight whatsoever* to the consequences of their punishments. Having reviewed the studies by Baron and Ritov, Greene concludes:

> The results of these studies are surprising in light of the fact that many people regard the deterrence of future harmful decisions as a major reason, if not the primary reason, for imposing such fines in the real world. The strength of these results is also worth emphasizing. The finding here is not simply that people's punitive judgments fail to accord with consequentialism, the view that consequences are ultimately the *only* things that should matter to decision makers. Much more than that, it seems that a majority of people give no weight whatsoever to factors that are of clear consequentialist importance, at least in the contexts under consideration.[118]

This suggests that even self-professed consequentialists become unlikely to produce consequentialist judgments when their emotions get the better of them. People are inherently bad consequentialists when their emotions are primed with moral outrage. Insofar as the retributive approach primes such outrage, then, it is likely to inhibit consequentialist decision-making.

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114. *See, e.g.*, Paul Slovic et al., *Regulation of Risk: A Psychological Perspective*, *in* REGULATORY POLICY AND THE SOCIAL SCIENCES (Roger Noll ed., 1985); *see also* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman & Amos Tversky eds., 1983).

115. Cass Sunstein, *Some Effects of Moral Indignation on Law*, 33 VT. L. REV. 405, 433 (2009).

116. *Id.* at 417; *see also* Cass Sunstein, *Damages, Norms, and Punishment*, *in* NORMS AND THE LAW 35, 37 (John N. Droba ed., 2010) ("The most general conclusion is that social norms do not coexist comfortably with optimal deterrence theory. People seem to be intuitive retributivists. They come to the social role of juror with moral intuitions inconsistent with the economic theory of deterrence."); Cass Sunstein, Daniel Kahneman, David Schkade & Ilana Ritov, *Predictably Incoherent Judgments*, 54 STAN L. REV. 1153, 1167 (2002) (showing that peoples' judgments about appropriate damages are calibrated to the level of their outrage).

117. *See* Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Everything and Nothing*, 359 PHIL. TRANS. R. SOC. LOND. B 1775 (2004).

118. *See* Greene, *supra* note 108, at 51–52.

An alternative approach might suggest limiting moral outrage, precisely where the retributive approach encourages ramping it up.

What explains this desire to punish wrongdoers, regardless of cost? Both psychological studies and neuroimaging confirm that the desire to punish — and satisfaction with its completion — is most closely linked to emotional (or "System 1"), not deliberative (or "System 2"), thought processes.[119] We punish because it feels good, and because not punishing (allowing a culture of impunity to reign) feels bad.[120] Experimental economists have also found significant support for this desire in cooperation games, where players are willing to sacrifice their self-interest in order to punish the violator of a group norm. In these scenarios, the punishment may very well be consequentialist — to reinforce a group norm against cooperation.[121] But perhaps when this desire to punish applies to outside-group norms, it does more harm than good. This evidence may give us special reason for pause in the international criminal regime, where the moral emotions — and therefore the risk of crowding out deliberative consequential thinking — run especially high. This is so for a number of reasons.

First, the regime's focus on individuals as the target of punishment, instead of the group, has emotional side effects. The difficulty of squaring the societal involvement in mass atrocity with traditional criminal regimes is one reason why courts and scholars have trumpeted the benefit of "individuating guilt." According to this theory, courts provide the benefit of identifying the individuals who bear the greatest responsibility for otherwise diffuse group crimes.[122] From the standpoint of moral intuitions, that individuation may not be ideal. Studies have shown that

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119. *See id.* at 54. ("Recent neuroimaging studies also suggest that the desire to punish is emotionally driven.") Greene cites a prominent neuroimaging study by Alan Sanfey et al. that examined peoples' brains while they played an ultimatum game, and observed that when unfair offers were made, the anterior insula — part of the brain associated with anger or disgust — is activated. This desire to punish has been shown to be driven by emotion. *See* Alan G. Sanfrey et al., *The Neural Basis of Economic Decision-Making in the Ultimatum Game*, 300 SCIENCE 1755 (2003) (showing through functional magnetic resonance imagery of brain activity during an ultimatum game that the desire to punish is emotionally driven).

120. *See* Greene, *supra* note 108, at 70 ("Psychologically speaking, we punish primarily because we find punishment satisfying and find unpunished transgressions distinctly unsatisfying. In other words, the emotions that drive us to punish are blunt biological instruments. They evolved because they drive us to punish in ways that lead to (biologically) good consequences. But, as a by-product of their simple and efficient design, they also lead us to punish in situations in which no (biologically) good consequences can be expected. Thus, it seems that as an evolutionary matter of fact, we have a taste for retribution, not because wrongdoers truly deserve to be punished regardless of the costs and benefits, but because retributive dispositions are an efficient way of inducing behavior that allows individuals living in social groups to more effectively spread their genes.") (citations omitted).

121. For an explanation of how this works, see Herbert Gintis et al., *Strong Reciprocity and the Roots of Human Morality*, 21 SOC. JUST. RES. 241–53 (2008).

122. *See* Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 581 (2005).

just as people are more sympathetic and generous toward identifiable victims, they are more punitive with identifiable wrongdoers, even when the identity of the wrongdoer is irrelevant to the wrongness of the act.[123] The international criminal regime, in its effort to individuate justice, may in fact be creating special distortion effects — unique opportunities for moral outrage to crowd out deliberative thinking about mass atrocity. Of course, who is doing this deliberative thinking will affect any analysis of the effects of moral outrage on their judgment.[124]

Second, the horrendous nature of international crimes can lend themselves to greater and politically more powerful moral outrage. Crimes against humanity, according to the Rome Statute, "are *particularly odious offences* in that they constitute a serious attack on human dignity or grave humiliation or degradation of one or more human beings."[125] They constitute some of the gravest offenses known to man.[126] The subject of international criminal law is of such a grizzly nature that it is the kind of behavior that, when described closely,[127] could cause increased emotional (retributive) responses.[128] As Elster notes, the retributive impulse described by Baron and Ritov is all the stronger in the context of crimes against humanity: "[T]he pure backward-looking argument from desert often has an overwhelming appeal. It can tap into the very strong retributive emotions that are triggered by human rights violations on a scale and of an atrocity far beyond what are found under normal circumstances."[129] The gruesomeness of international crimes seems to present distinct risks of provoking the sort of outrage that undermines attempts at deliberately apportioning liability according to the regime's goals. This is true of efforts to determine both the mechanisms and institutions of liability, if any (say, a committee of state and international officials crafting the treaty that would create a tribunal or commission to address the atrocity), as well as efforts to implement the chosen mechanisms. The judges in international criminal trials and the

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123. *See* Deborah A. Small & George Loewenstein, *The Devil You Know: The Effects of Identifiability on Punishment*, 18 J. BEHAV. DECISION MAKING 311–18 (2005).

124. I turn to this in more detail below, but one way to increase the odds that local values are reflected in the judgments of international bodies may be to include locals in the design and makeup of those bodies, a finding that counsels in favor of hybrid local-international institutions.

125. ANTONIO CASSESE, INTERNATIONAL LAW 250 (2001) (emphasis added).

126. Indeed, there is a gravity requirement built into the Rome Statute. *See* Rome Statute, *supra* note 31, at art. 17.1.d.

127. This is an important modifier, as we will see below. There is also a contradictory nature of international crimes which makes them impossible to comprehend and causes people to respond to them less powerfully and less emotionally in the abstract than they would to crimes of a more personal nature.

128. Looking at Table 2, we can see that the crimes that warrant the harshest offenses are crimes that involve what Robinson and Kurzban call the "core" offenses, including aggression, takings, and deception. The crimes against international law are extreme crimes of aggression.

129. Elster, *supra* note 1, at 54.

commissioners overseeing truth and reconciliation bodies, whether they are from the place where the atrocity occurred or not, may be more susceptible to the sorts of distorting outrage that crowd out consequentialist thinking.

Third, there is a growing trend in international criminal law to pay special attention to victims, both in terms of their participation in the administration of justice and also in terms of the remedies doled out by the court, and this may invite the expression of moral outrage.[130] This concern for present victims of international crimes is most powerfully displayed at the ICC, which established a Victims and Witness Unit.[131] Victims have unique rights of participation in ICC proceedings, and the court is explicitly instructed to be cognizant of victims in their rulings.[132] Emphasizing the plight of victims amplifies the retributive aspects of a trial — particularly the story the regime tells about the moral wrongness of the acts on trial.

This is not to say that concern about the needs of victims after mass atrocity is inconsistent with a consequentialist approach to justice.[133] Insofar as the regime seeks to make victims whole, its sentences that serve this purpose are deeply consequential. The challenge to regime designers is to identify a way to address victim concerns without provoking moral outrage of the sort that crowds out consequentialist thinking. The ICC's special trust fund for victims is an especially good example of this — an innovation that may offer a unique way to decouple the regime's goal to make victims whole (at least from a financial standpoint) from the risk that victim involvement will derail a deliberative, consequential justice.[134]

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130. *See* Henham, *supra* note 19, at 758 (suggesting that "international sentencing should be more sensitive to the demands of victims and communities ravaged by war and social conflict"); Little, *supra* note 32, at 397 ("[I]ts goal should be clear: To confront the horror of victims' experiences on their own terms, accepting the fact that their views on the desirability of prosecution may not correspond with those of the Prosecutor, the international community, or our own."); *see also* MARK FINDLAY & RALPH HENHAM, TRANSFORMING INTERNATIONAL CRIMINAL JUSTICE: RETRIBUTIVE AND RESTORATIVE JUSTICE IN THE TRIAL PROCESS 260–70, 268 (2005) (describing how sentencing principles should evolve given that the "victim's (community's) desire is for restoration and retribution."). An exception should be made for the ICC's special victims' fund, which may offer a unique way to decouple the goal of the regime to make victims whole from the risk that victim involvement will derail a deliberative, consequential justice. Indeed, it harnesses the retributive response to victim suffering in order to raise money for their restitution and it may do so without affecting the money available for trials since that volunteered money may never have come on line but for the victims' fund.

131. *See* Rome Statute, *supra* note 31, at art. 68. As Little notes, the Rome Statute mentions victims over thirty times, and states that "a panoply of [victims'] rights spans the entire document." Little, *supra* note 32, at 370.

132. Little, *supra* note 32, at 371.

133. *See* Adam J. MacLeod, *All for One: A Review of Victim-Centric Justifications for Criminal Punishment*, 13 BERKELEY J. CRIM. L. 31, 31–32 (2008) (identifying a third group in the debate between retributivists and consequentialists: victim-centric consequentialists).

134. *See* Rome Statute, *supra* note 31, at art. 79.1, ("A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the

Indeed, the victims' fund harnesses the natural retributive response to victim suffering in order to raise money for their restitution, and it may do so without affecting the money available for trials because that volunteered money may never have come on line but for the victims' fund.

Fourth, the political context in which international tribunals occur — often after a period of disinterested inaction by the international actors who eventually establish the tribunal — invites special moral outrage. Slovic has written about the faceless nature of mass atrocity abroad, which contributes to what he calls "psychic numbing" among populations in powerful countries.[135] This psychic numbing is partly explained by the affective bias, which suggests that when a person is identified, emotional responses such as generosity go up; when those faces cannot be identified, however, emotional responses go down.[136] This finding may explain the failures of states and electorates to respond to foreign genocides. But the same finding turned around suggests the risk of over-compensating ex post for the under-regulation of genocide ex ante. Scholars have noted the distorting effects of the pressure on international criminal tribunals to achieve prosecutions.[137] Whether because of guilt from previous inaction or not, these tribunals may be at greater risk of inciting indignation among important players in the justice system, including lawyers and judges — either guilt masking as outrage, or indignation amplified by the identifiability of the defendant (the individuation of guilt).[138] The search for just deserts can "tap into the needs of those who did nothing, for whom retribution can be a means to redeeming themselves in their own eyes and, no doubt, in those of others."[139]

Despite this, the very international aspect of the regime offers certain features that may counteract and mitigate these concerns. For example, if foreign actors — prosecutors, judges, rapporteurs, etc. — have lowered emotional responses to what they discover while investigating an atrocity, they may be able to act more consequentially. Whether this is true is, of course, an empirical question. The little data available suggest that once they dig into the details of a case or listen to a prosecutor's case, these

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Court, and of the families of such victims."); *see also* Trust Fund for Victims, http://www.trustfundforvictims.org/about-us.

135. *See* Paul Slovic, *"If I Look at the Mass I Will Never Act": Psychic Numbing and Genocide*, 2 JUDGMENT & DECISION MAKING 79 (2007); *see also* Ryan Goodman et al., *Psychic Numbing and Mass Atrocity*, *in* THE BEHAVIORAL FOUNDATIONS OF POLICY (Eldar Shafir ed., forthcoming 2012) (on file with the Virginia Journal of International Law Association) (applying the psychic numbing insight to international human rights and international criminal law).

136. For a review of best practices by charities, including the use of images to increase sympathy and donations, see STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING (2001).

137. *See generally* Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1 (2011).

138. *See* Small & Loewenstein, *supra* note 123, at 317.

139. Elster, *supra* note 1, at 54.

actors can feel a great deal of "righteous indignation," which threatens to send them off their consequentialist course.[140]

2. *Naïve Realism and Conflict Resolution*

The international criminal regime by its very nature deals with crimes that are often rooted in deep-seated conflict. Indeed, one of the goals of the regime is to abate such conflict.[141] This raises yet another distinct problem with the retributive approach: Moral realist language — the language of deontological rights and wrongs that accompanies and is expressed by a retributive regime — can make conflict resolution harder by increasing naïve realist thinking.[142]

Naïve realists — and we are all naïve realists at one time or another — think the world is the way they perceive it. Just as importantly, they think of themselves as reasonable and rational agents who are capable of persuading other reasonable people to see things their way, and of those who cannot be persuaded as lazy, stupid, or irrational.[143] The naïve realist thought process goes as follows:

1. I see things as they really are.
2. Other fair-minded people will share my views.
3. If someone doesn't share my views, and I can't convince him to adopt my views, then he is lazy, stupid, or biased.[144]

One of the central insights of the naïve realism finding is that we often underestimate the sincerity of an opponent's views. We have a tendency to discount the authenticity of our ideological opponents ("People will say anything!"), especially when they are enemies or competitors. Liberals, for example, tend not to believe that people opposing national health care actually think that nationalized medicine would harm Americans, but many of them do; likewise, conservatives suspect that when liberals propose nationalizing health care, what they *really* want is an increase in federal

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140. *See* WAR DON DON, *supra* note 83 (showing an interview with David Crane, former Chief Prosecutor for the Special Court for Sierra Leone, describing how hearing victim stories and preparing his oral argument would whip him into a state of "righteous indignation").

141. *See* Paul Seils & Marieke Wierda, *The International Criminal Court and Conflict Mediation*, INT'L CTR. FOR TRANSITIONAL JUST., June 2005, at 3, *available at* http://tinyurl.com/7k8kker ("It is now well understood that prosecution might contribute meaningfully to a range of issues that cannot be best or fully described in terms of retribution or deterrence alone. These include the reconstruction of trust and confidence in the institutions of the state, restoring dignity to victims as rights-bearing citizens, and the rehabilitation of offenders.").

142. See Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, *in* VALUES AND KNOWLEDGE 103, 103 (Edward S. Reed, Elliot Turiel & Terrence Brown eds., 1996) (describing how naïve realist thinking emboldens rivals and inhibits meaningful negotiation).

143. *See, e.g.*, LEE ROSS & RICHARD NISBETT, THE PERSON AND THE SITUATION (1991) (offering a description of naïve realism thinking).

144. This first-person schema is taken from Ross & Ward, *supra* note 142, at 110–11.

power generally, not just a more efficient health delivery system.[145] Each side doubts the other's sincerity; each looks to explain away the other's statements by questioning its motivations.

Numerous studies confirm this. One classic study from the 1950s showed that Dartmouth and Princeton fans watching the same football game judged the fairness of the game differently: both sides perceived the referees' calls to be biased against them.[146] A later experiment by Lee Ross and colleagues showed that both pro-Arab audiences and pro-Israeli audiences watching the same news coverage of the Israeli invasion of Lebanon in 1982 thought the coverage was biased against them.[147] A related and even more troubling study showed that when Palestinians and Israelis were given proposals for a solution to the contentious Israeli settlements, both sides preferred the others' proposals if and only if they thought it was in fact proposed by their side.[148] These findings help to explain why conflict can be so hard to negotiate away.

This is relevant to the international criminal regime because moral condemnation, and the moral realist language used to convey it, increases the likelihood of naïve realist thinking.[149] The "utility of desert" view depends on the expression of moral condemnation for its effect; naïve realism studies suggest that this condemnation may inhibit conflict resolution. The language of moral values plays to the emotions and emboldens political constituencies to resist conciliation; it thereby inhibits balancing and compromise.[150] The naïve realism literature, then, helps highlight how speaking in retributive terms may further entrench opposing sides of a conflict, and thereby prolong that conflict rather than shorten it.[151] The inadequacy of retributive justice to quiet conflict is further confirmed by recent human rights scholarship. As Eric Stover and Harvey Weinstein note, "[C]riminal trials — and especially those of local perpetrators — often divided small multi-ethnic communities by causing

145. For an excellent demonstration of this, see generally Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369 (2002).

146. Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 129–34 (1954).

147. Robert P. Vallone, Lee Ross & Mark R. Lepper, *The Hostile Media Phenomenon: Biased Perception and Perceptions of Media Bias in Coverage of the "Beirut Massacre,"* 49 J. PERSONALITY & SOC. PSYCHOL. 577, 577–85 (1985).

148. Susan Hackley, Max Bazerman, Lee Ross & Daniel L. Shapiro, *Psychological Dimensions of the Israeli Settlements Issue: Endowments and Identities*, 21 NEGOTIATION J. 209, 211 (2005).

149. Ross & Ward, *supra* note 142, at 130.

150. *See* Joshua D. Greene, The Terrible, Horrible, No Good, Very Bad Truth about Morality and What to Do About It 236 (Nov. 2002) (unpublished Ph.D. dissertation, Princeton University) (on file with the faculty of Princeton University), *available at* http://tinyurl.com/d6uvcm ("Conflicts of interest may be inevitable, but they need not be exacerbated by people's unflagging confidence that they're *right* and that their opponents are *wrong*. The solution, then, is to get rid of realist thinking and to start by getting rid of realist language.").

151. Ross & Ward, *supra* note 142, at 110.

further suspicion and fear. Survivors rarely, if ever, connected retributive justice with reconciliation. Reconciliation, in their eyes, was mostly a personal matter to be settled between individuals."[152] This is not to say that there is no room for moral judgment or even strong moral realist language in the international criminal regime. The point is a more modest one: Such language has costs, and these costs are relevant to determining the utility of desert.

3. Moral Heuristics and Judgment Errors

Jonathan Baron has convincingly demonstrated how relying on moral heuristics — the mental shortcuts that quickly produce moral judgments — can lead to significant problems for law and policy.[153] Take the example of a vaccine that carries some risk of death, but much less risk than that posed by the disease being vaccinated against. Some parents will opt not to give their child the vaccine because of a fear of actively playing a role in their child's death, a fear that is greater than the fear that the child will die of *not* receiving the vaccine.

The problem in this case is a heuristic that crowds out consequentialist thinking. The parent's judgment relies on an understandable and perhaps otherwise useful heuristic: *Do no harm*.[154] But in this case, the heuristic fails: Doing something to a child that might harm her (the vaccine) is actually necessary to prevent a greater harm (the disease). Because of errors like these, Baron argues against trusting intuitions, which rely heavily on heuristics, and encourages the promotion of deliberative thinking (and the kind of training that would make it second nature) to override the gut-level intuition that provides us with heuristics such as, "Don't do things to kids that carry risks."[155]

How moral heuristic failure occurs has been shown using fMRI scans of brains. Greene and his coauthors asked subjects a series of questions based on the now-famous trolley car dilemma: Say a train is heading down a track where five people are chatting, and the only way to save them is to switch the train's path to another track where only one man is in the way. This is known as the "trolley problem,"[156] and most people say they find it

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152. MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 323 (Eric Stover & Harvey M. Weinstein eds., 2004).

153. *See* Jonathan Baron, *Nonconsequentialist Decisions*, 17 BEHAV. & BRAIN SCI. 1, 1–10 (1994). For a helpful overview of this literature, see Cass Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531 (2005).

154. *See generally* Jonathan Baron, *Do No Harm.*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 197–213 (D. M. Messick & A. E. Tenbrunsel eds., 1996).

155. *Id.*

156. *See* Judith Jarvis Thompson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985); *see also* Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, 5 OXFORD REV. 5, 5–15 (1967), (describing for the first time the trolley thought experiment), *reprinted in* RIGHTS, RESTITUTION, AND RISKS: ESSAYS IN MORAL THEORY (Judith Jarvis Thomson ed., 1986).

morally acceptable to flip the switch and kill the one to save the five.[157] In a variant on this problem, known as the "footbridge dilemma,"[158] a fat man stands on a footbridge over the train's track, and only by pushing him onto the track, killing him, can the train be stopped and the five saved. Here, however, experiment subjects tend to agree that it is not acceptable to kill the one to save the five.[159]

Why do people exhibit a consequentialist reading of the trolley problem (kill one to save the five) but a deontological reading of the footbridge case (avoid killing the one, letting five die)? Greene and his colleagues suggest that the best explanation is that people tend toward consequentialism when emotions are not involved, but when emotions run high (as when people imagine themselves pushing someone to their death), they rely on a moral heuristic ("Do no harm"). That is, when subjects were given emotion-laden scenarios, such as the footbridge case, they gave nonutilitarian responses — finding it unacceptable to kill the one to save the five.[160] In the trolley case, however, they did not experience the same emotional surge, and they gave utilitarian answers — that it is acceptable to kill the one to save the five.

This difference was detected by brain scans. When they gave the trolley and footbridge problems to people under fMRI scanners, Greene and his coauthors found that different regions of the mind were activated: In the footbridge case, neural activity was seen in the region of the mind usually associated with emotions and social cognition (amygdale and medial surfaces of frontal and parietal lobes), while the trolley cases sparked neural activity in the area of the brain used for math and computation (the dorsolateral surfaces of the prefrontal cortex and parietal lobes).[161] This finding was especially robust. Different experiments showed that in some fact patterns, when subjects reach consequentialist outcomes over their deontological alternative, the fMRI recorded cognitive activity in the brain regions associated with such careful deliberation.[162] When subjects were

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157. *See* Greene, *supra* note 108, at 42 (noting that "[t]he consensus among philosophers, as well as people who have been tested experimentally, is that it is morally acceptable to save five lives at the expense of one in this case") (citations omitted).

158. *See* Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 THE MONIST 204, 204–17 (1976), *reprinted in* RIGHTS, RESTITUTION, AND RISKS: ESSAYS IN MORAL THEORY, *supra* note 156, at 90–92.

159. *See* Greene, *supra* note 108, at 42 ("Here the consensus is that it is not okay to save five lives at the expense of one.") (citations omitted).

160. *Id.* at 108 n.2 ("[I]ntuitive responses [to the moral judgment in the footbridge case] drive people to give nonutilitarian response to moral dilemmas that have previously been categorized as 'personal.' . . . [T]hese intuitive responses are emotional (i.e., constituted or driven by emotions).").

161. *See* Joshua D. Greene et al., *The Neural Bases of Cognitive Conflict and Control in Moral Judgment*, 44 NEURON 389, 389–90 (2004) (reviewing earlier literature, testing a hypothesis, and finding support for the claim that moral judgments can occur through two separate processes, one deliberative and one more automatic).

162. *See* Greene, *supra* note 108, at 45–46 ("[W]hen people say 'yes' to such cases (the

prompted with questions that did not aggravate the moral emotional portion of the brain, subjects reached the consequentialist outcome; when the questions raised the subjects' emotional state, a different portion of the brain lit up, and they were much more likely to produce a nonconsequentialist outcome.[163]

This is relevant to determining the usefulness of desert in international criminal law. The risk that strong moral intuitions may guide decision-makers to outcomes that do not maximize utility may be particularly pronounced at the international level, where the subject matter, such as mass atrocity, can be difficult to comprehend. Greene offers an explanation for why moral intuitions may not lead to the most rational approach to global, complex wrongs. Moral heuristics developed over thousands of years out of a context of small, close-knit societies. Heuristics like "Don't harm a child" and "Don't push a human being" may produce more and greater errors as they are applied in contexts radically different from those out of which they came.[164] As the size of the world and its complexity increases, the emotional tools developed for small hunter-gatherer societies may be less useful in certain modern contexts.[165] For the international criminal regime, this means that systems must be implemented to offer a deliberative override for potentially harmful heuristics. This is consistent with the goals and some of the policies of the current international criminal regime. But it is inconsistent with the "utility of desert" view, which encourages reliance on moral heuristics, even when those heuristics may be faulty.

Of course, to some scholars, the expression of moral condemnation is enough, regardless of consequences.[166] But for those concerned with the regime's ability to learn from the past, to deter future crimes, and to resolve conflict, the above analysis should give reasons to be wary of the claim that retributive justice will produce the best consequences.

III. IMPLICATIONS FOR REGIME DESIGN

The implications of this research lead to two sorts of reforms: those designed to increase the utility of desert in the international realm, and those that seek to transcend it. If regime designers choose the former route, they can still capitalize on the above analysis, seeking to calibrate the

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consequentialist answer), it is because the 'cognitive' cost-benefit analysis has successfully dominated the prepotent emotional response that drives people to say 'no' (the deontological answer) . . . . In other words, people exhibit more 'cognitive' activity when they give the consequentialist answer.").

163. Different portions of the brain register activity that roughly maps onto what Greene calls "cognitive" and "emotional" thought. *See id.* at 40–41.

164. *See* Greene, *supra* note 150, at 237.

165. *Id.* at 232–33.

166. For a discussion of this deontological view, see Damaska, *supra* note 20, at 363.

law's message so that it resonates with its intended audience, thereby increasing the usefulness of the regime.[167] If regime designers choose the latter route, a host of transitional justice options become available, options that have nothing to do with desert.[168]

A. Increasing the Utility of Desert

While recent behavioral evidence offers several reasons to be skeptical of the "utility of desert" claim, it also offers design implications for enhancing that approach. This may even be of use to those who think, for reasons of political economy, that the regime must maintain its central concern with desert. These are specific considerations for tailoring the retributive approach to increase its utility in the international context. Most of the implications stem from the recognition of the central importance of local stakeholders to the "utility of desert" view.

1. The Primacy of Local Concerns

Should international criminal tribunals consider political backlash from the community most directly affected by the tribunal's actions? Concern for public opinion is in some ways anathema to the ideal of justice free from politics, especially in the context of widespread and systematic crimes, where public opinion may not square with international standards of justice. Yet, backlash can undermine the regime's legitimacy.[169] Indeed, it is a core principle of the desert view that "the system's moral credibility, and therefore its crime control effectiveness, is undermined by a distribution of liability that deviates from community perceptions of just desert."[170]

Recent experience suggests, however, that the international criminal regime has not been especially sensitive to local reception of its decisions. The Extraordinary Chambers in the Courts of Cambodia, for example, faced a huge public outcry when the tribunal sentenced Kaing Guek Eav (better known as "Duch") to thirty-five years in prison — a sentence that many thought was too low, and that clearly deviated from community perceptions of just desert.[171] The Special Court for Sierra Leone's conviction of Hinga Norman, who many saw as a war hero, was deeply

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167. These prescriptions may vary depending on the makeup, location, and jurisdiction of the court. To the extent that the argument presented here turns on the distinct features of the international regime, the less those features apply, and the less relevant is this inquiry.

168. Acknowledging the limits of the "utility of desert" view may in fact encourage greater, purer retributivism in the regime. That is, scholars and practitioners may abandon the need to justify the regime on consequential grounds and instead focus on the deontological value of punishment.

169. *See* Daryl Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 406 (2003) ("Sanctions that create nationalist backlash may turn out to be not just ineffective but actually counterproductive.").

170. Robinson & Darley, *supra* note 4, at 458.

171. *See* Mydans, *supra* note 94.

unpopular,[172] and the ICTY similarly took many unpopular steps.[173] This is not to say that courts should become primarily preoccupied with their popularity; only that the "utility of desert" view requires special attention to backlash.[174] It does not require avoiding backlash at all costs — in some cases, unpopular rulings have been shown to gain credibility if, over time, their rulings produce compliance.[175] But the foregoing analysis suggests at the minimum a considered attempt to understand the possibility and likely effects of backlash.

One strategy for decreasing the risk of backlash is to increase local participation in court procedures. On this dimension, one of the most promising developments in international criminal law for ensuring greater sensitivity to local concerns is the rise of hybrid tribunals, which feature a mix of domestic and international norms and actors. Hybrid tribunals have been both criticized and lauded for their distinct features.[176] To the extent that the "utility of desert" approach raises a problem of ambiguity about the relevant community served by the legal regime, hybrid institutions may allow enough flexibility to craft a deserts-based response to international crimes while remaining sensitive to competing constituencies' metrics for legitimacy. Perhaps the moral intuitions literature's greatest promise lies not in deciding *whether* international criminal tribunals should express moral condemnation, but instead *when, where,* and *how* to do so. As insights about moral intuitions become more fine-grained and their applications better understood, they may offer hope for crafting sensible tradeoffs in the design of hybrid international-local justice mechanisms.

2. *Embracing Uneven Application of the Law*

The international criminal regime is uneven in a number of respects. It is highly selective and therefore uneven in its enforcement,[177] it is uneven in the sentences it metes out,[178] and it is uneven in the length of time

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172. *See* KELSALL, *supra* note 59, at 33 (arguing that Hinga Norman should not have been indicted because Norman and the CDF were hugely popular in some parts of the country and the indictment cost the court legitimacy in the eyes of many Sierra Leoneans).

173. *See* Clark, *supra* note 3, at 471.

174. For a good discussion on the subject, see Cass Sunstein, *If People Would Be Outraged By Their Decisions, Should Judges Care?*, 60 STAN. L. REV. 155 (2008).

175. *See* Tom Ginsburg, *The Clash of Commitments at the International Criminal Court*, 9 CHI. J. INT'L L. 499, 512 (2009) (noting that courts can actually gain credibility and power by gambling on risky decisions if their gamble produces compliance).

176. For a helpful overview, see Laura Dickinson, Note, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003).

177. *See* ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL REGIME 191-220 (2005) (discussing both the need for and the cost of selective prosecutions).

178. For example, a review of the sentencing practice of the ICTR suggests that the tribunal has a "mixed" record when it comes to consistency and fidelity to established international standards. *See*

allowed before a tribunal is erected after mass atrocity.[179] In response, scholars have called for the standardization of sentencing practices, even calling for the equivalent of sentencing guidelines.[180] But if the regime aims to credibly express moral norms to local actors, and justice intuitions are not universal, then attempts to standardize sentencing may be counterproductive.

Consider the regime's selective enforcement. The regime is highly selective about investigations and prosecutions in two senses: First, tribunals (or, in the case of the ICC, active inquiries) are only established in some contexts; second, once a tribunal or investigation has begun in a particular situation, only certain individuals are identified for prosecution.[181] This selectivity has been hotly debated.[182] Insofar as selectivity means that some of the guilty go unpunished, it threatens the legitimacy of a system which, by its own telling, requires that the guilty be punished. If the goal of the retributive approach is to punish wrongdoers and therefore enforce community norms, allowing some of the guilty to go unpunished is counterproductive. For example, it is unlikely that the Special Court for Sierra Leone, by prosecuting only five men as the men with the "greatest responsibility" for the entire Sierra Leone civil war,[183] accurately reflects local community perceptions of just desert; indeed, without a measure of community perceptions, the regime is likely to sentence suboptimal numbers of people.[184]

The "utility of desert" framework requires optimal enforcement in order to credibly assert moral authority based on community intuitions about justice, but the evidence discussed here suggests that community intuitions vary widely. What is the international criminal regime to do? One potential solution, in keeping with the retributivist framework, would be to be extremely selective about which situations are investigated, but once a situation is chosen, to prosecute to the full extent of community desires. This echoes the current approach of the ICC, which is highly strategic in how and where it chooses to begin an investigation, but not its current practice.[185] The "utility of desert" approach demands that tradeoffs

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Robert D. Sloane, *Sentencing for the 'Crime of Crimes': The Evolving 'Common Law' of Sentencing of the International Criminal Tribunal for Rwanda,* 5 J. INT'L CRIM. JUST. 713, 734 (2007).

179. *See* Elster, *supra* note 1, at 46–47.

180. *See, e.g.*, Ohlin, *supra* note 15, at 397 (proposing an "International Sentencing Commission").

181. *See* CRYER, *supra* note 177.

182. *Id.*

183. Statute of the Special Court for Sierra Leone, *supra* note 29, at art. 1.

184. For evidence that the Special Court does not accurately reflect local perceptions of desert, see KELSALL, *supra* note 59, at 2–3.

185. For now, even the ICC does not have the resources to prosecute all relevant parties once an investigation begins. For a discussion of the court's constraints from limited resources, see HUMAN RIGHTS WATCH REPORT, COURTING HISTORY: THE LANDMARK INTERNATIONAL COURT'S FIRST YEARS 50 (2008) ("[I]n many country situations, a number of groups may have allegedly participated in committing ICC crimes, but the prosecutor's limited resources and broad mandate mean that his

in selective investigations be made with an eye toward the views of the local community, not the international community.

To this end, one thing that the retributive approach currently does not allow, but could, is a more calculated determination of how soon after atrocity to hold a trial. Trials need not be — and likely should not always be — the first response to society-wide trauma. And yet, they often are, when emotions are running high and the risk of moral outrage and naïve realism seem highest. Perhaps then criminal investigations should be witheld in some cases for a certain period of time — a mandatory wait period of sorts for international criminal trials. Current international criminal tribunal charters include sunset clauses, expiration dates after which the mandate is said to have been fulfilled. But perhaps peace treaties calling for the establishment of an international criminal tribunal should include sunrise clauses, which limit how soon the trials take place. Elster has shown that the average length of sentences in transitional justice cases decreases with the length of time from atrocity.[186] This suggests that there may be no universal and absolute sentence length for these crimes. If this is right, and if trials are costly, in some cases the money that might go to a tribunal could better be spent on reconstruction and healing. The sunrise clause might ensure that trials occur when passions have cooled, and it would ensure that they are less of an immediate drain on resources in the delicate aftermath of atrocity. If emotion and outrage warp sentences immediately after international crimes, then perhaps accountability mechanisms should correct for this, either by adjusting sentences or by waiting until tempers have cooled. (The passage of time does not always increase leniency, either.[187])

Nor should community intuitions about desert always result in uniform *sorts* of accountability mechanisms. International criminal tribunals might consider alternative sanctions beyond time behind bars. These might include accountability to professional peers — for example, military sanctions or revoking medical and legal licenses; lustration — barring people from public office if they are found to have committed grave crimes; and public hearings, or even simply publicizing the names of the accused, which would bring whatever informal social approbation is deemed appropriate by the community. Shaming has been eschewed by the international criminal regime on the grounds that it does not comport

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office cannot pursue allegations against all individuals simultaneously.").

186. *See* Elster, *supra* note 1, at 46.

187. *See* Clark, *supra* note 3, at 468 (noting that attitudes toward international criminal law have grown stronger in Germany since Nuremberg) (*citing* C. Burchard, *The Nuremberg Trial and its Impact on Germany*, 4 J. INT'L CRIM. JUST. 800, 801 (2006)). It is impossible to determine the cause of the change of attitudes in Germany towards international criminal law. Nuremberg itself could have been part of the cause, but time and changing social norms – in Germany and abroad – may have played an even bigger role.

with modern sentencing practice.[188] But whatever normative concerns they raise, shaming practices do not conflict, at least in theory, with the retributive approach and could perhaps, in some cases, enhance the utility of desert.

B. Beyond Desert

A number of the design implications of the behavioral research discussed above simply do not square with the retributive approach, even justified on consequentialist grounds. Some of these implications may call for design elements that have nothing to do with, or in fact specifically avoid, the question of desert. These are not included here as fully-developed policy prescriptions, and in fact there may be good normative reasons for not adopting some of them; that analysis is outside the scope of this Article. Rather, they are offered here as examples of the sorts of legal and policy options that become available once compatibility with retributivism is no longer a requirement for regime design. In some cases, just having a particular option — even an abhorrent one that policy-makers have no intention of using — can prove politically useful in negotiations over the very design of, say, transitional governments or ad hoc tribunals.[189]

1. National Unity Measures

Retributivism requires that the guilty be punished, but there are times when the guilty have unique access to resources needed to govern in the delicate transition out of conflict. There is precedent for states placing accused war criminals in positions of political power during periods of transitional justice. In South Africa, for example, the Government of National Unity allowed former State President F.W. de Klerk to remain in a position of limited political power for two years as the country emerged from Apartheid rule.[190] In some cases, it may make less sense to expend great cost on a trial of uncertain legitimacy when the alternative is to place the criminal in question in a political situation where he is effectively incapacitated *and* serving a useful social function.

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188. *See* Mark A. Drumbl, *Punishment Postgenocide: From Guilt to Shame to 'Civis' in Rwanda*, 75 N.Y.U. L. REV. 1221, 1257 (2000) (describing how the regime has shied away from shaming sanctions).

189. *See* Priscilla Hayner, *The Challenge of Justice in Negotiating Peace: Lessons from Liberia & Sierra Leone* 4 (June 26, 2007), Expert Paper delivered at International Conference: Building a Future on Peace and Justice, *available at* http://tinyurl.com/87nuer7 (noting that expanding the policy options available in transitional justice may enhance the negotiation of peace treaties, which often suffer from "a failure of creativity, such as in considering limitations or conditionalities to immunity schemes").

190. *See* S. AFR. (INTERIM) CONST., 1993, sec. 235; Christopher Wren, *Parley to Begin in South Africa*, N.Y. TIMES, Dec. 19, 1991, at A13.

Similarly, states have considered paying rebels to disarm and be folded into legitimate institutions like the state military.[191] This strategy would appear to create a moral hazard — an incentive for people to start violence in order to be bribed into peace — but if the payments are set at the right amount, the moral hazard should be minimal.[192] It is just as unlikely that someone would start a campaign of violence with the distant hope to someday negotiate a small cash settlement as it is that the far-off threat of sanction by an international tribunal would prevent a warlord from taking violent steps to secure enormous political or economic power. Would such payments be unjust? For violence that is born of economic inequalities, they may offer a way to immediately address the harms of the past and to create the safety net required for developing lasting reforms. This Article has shown how the current retributive approach can be extremely costly, financially and otherwise. Depending on how the money saved by an alternative approach is used, it could ultimately increase welfare and reduce any fallout over the perceived injustice of appeasing criminals; in some cases, outrage fades as material welfare increases.[193]

The same goes for amnesties, which are completely contradictory to the retributive approach but have been effective tools for creating unity after atrocity.[194] There are times when a population is ready to move on from a period of upheavel, and amnesties offer the ability to trade a prosecution for something valuable, such as cooperation, peace, or stability. While truth commissions are often mistakenly believed to require amnesties in exchange for truth — many actually recommend sanctions[195] — they can expand the policy options available to a young post-conflict government. For example, if a trial is likely to produce either backlash or turmoil, an amnesty may better achieve some of the goals of the international regime, such as reconciliation and healing. Just as importantly, amnesties provide a

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191. *Ivory Coast Starts Paying Former Rebels For Peace*, REUTERS (Sept. 22, 2010), http://tinyurl.com/7fmaglp (noting that five thousand former rebels will receive payments and the chance to be incorporated into the national army, to minimize the risk of violence in advance of national elections). The same thing was tried in Iraq in 2004, after the disastrous policy of de-baathification, to limited to success. *See* Marc Santora, *Iraq to Rehire 20,000 Hussein-Era Army Officers*, N.Y. TIMES, Feb. 26, 2010, at A8.

192. The problem of moral hazard only applies if people are properly incentivized by the size of the payments; there may be a significant range of payments that are sufficient to incentivize combatants to disarm, but insufficient to incentivize rebels to engage in hostilities in the first place solely in the hopes of a payoff.

193. *See* Elster, *supra* note 1 (summarizing transitional justice initiatives involving restitution).

194. Amnesties may be difficult to justify under the Rome Statute. *See* Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 187–91 (2002) (noting that there is strong textual evidence that international law imposes a duty on states to prosecute and punish gross violations of human rights).

195. *See* PRESCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 87 (2002) (noting that many truth commissions have been precursors to and supported later prosecutions).

political opportunity to discuss the healing process — a discussion that may be crowded out by retributive narratives.[196] One standard argument against amnesties is that they do not say enough; they do not offer the normative content of a criminal sanction.[197] But this is too general to be right. Amnesties simply offer different normative content: a signal that forgiveness has value, and that the creation of a shared future matters more than responsibility for the past.

Amnesties are not new, of course, but they are widely considered incompatible with the demands of retributive justice.[198] Yet it is not obvious that amnesties offend some inherent notion of what justice requires. The foregoing analysis may suggest their wider use, and in particular, some specific design advances in how they are used. In addition to increasing their frequency, they could be issued, like sentencing decisions, with statements of purpose that explicitly establish the intended normative content of the amnesty.[199] Second, they could be issued as conditional on the defendant's public service. Public outreach may make especially good sense if the person granted the amnesty occupies a high-profile position and could persuade one group in a fractured conflict to work toward a peaceful transition away from violence.

As the few instances of national unity measures show, abandoning the goal of aligning punishments with deserts frees tribunals to embrace a wider role in society.[200] International criminal tribunals could follow the example of the Inter-American Court of Human Rights, which has required municipalities to erect physical monuments to commemorate past crimes. There are many forms of remembering, each of which might serve a useful transitional justice purpose: erecting memorials, museums,

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196. *See* TRAUMA, TRUTH AND RECONCILIATION: HEALING DAMAGED RELATIONSHIPS (Nancy Potter ed., 2006) (offering psychiatric evaluations of the reconciliation process after society-wide trauma); *see also* Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 235 (Robert I. Rotberg & Dennis Thompson eds., 2000).

197. *See* Catherine Maddux, *Amnesty Offer for Ugandan Rebel Kony Raises Controversy*, VOICE OF AMERICA (2006), *available at* http://tinyurl.com/7kjpwqj (quoting David Smock of the United States Institute for Peace, an American NGO, that the "downside of [an amnesty offer] is the impunity that it implies").

198. In fact, there are some who see amnesties as incompatible with international criminal law. *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 42–43 (4th ed. 2011).

199. This would follow David M. Kennedy's work in fighting urban gangs. His work suggests that giving clear, unambiguous notice of the normative content of the law (e.g., it is wrong to kill people; it is less wrong to deal drugs) can significantly affect would-be criminals' behavior. *See* David M. Kennedy, DETERRENCE AND CRIME PREVENTION: RECONSIDERING THE PROSPECT OF SANCTION 57 (2009).

200. *See generally* HAYNER (surveying twenty-one truth commissions and finding that they are an important complement to criminal trials because they explicitly address community healing and the construction of collective memory, among other things).

research institutions, and parks.[201] Another crucial role might be public education. In the *Barrios Altos* case, for example, the Inter-American Court of Human Rights required Chile to publish the court's decision in national media.[202] This is not a novel idea for international justice, but taking it seriously would be: the major ad hoc international tribunals were tasked with community outreach and education, a component of their mandate that most have not fulfilled.[203]

2. *Eroding the Civil/Criminal Distinction*

Legal scholars tout the special moral authority of criminal sanctions, which are thought to be distinct from civil sanctions precisely because they have a moral dimension.[204] But if moral intuitions increase the risk of certain errors, as the above discussion suggests, then there may be certain benefits to a regulatory regime that does not explicitly claim such moral authority. Taking this alternate approach — treating human rights abuses as grounds for civil liability — is drastically different from the current approach, which is very much modeled on domestic Western criminal regimes that self-consciously assert moral authority. Civil law relies on financial and material carrots and sticks, rather than the threat of jail time, to incentivize good behavior.

The international criminal regime is currently more concerned with identifying responsible defendants than it is about restitution for those harmed by atrocity. This comports with the dominant, Western criminal model — after all, criminal law is centrally concerned with identifying and prosecuting wrongs, while tort law is more traditionally concerned with compensating the wronged and preventing future accidents.[205] But perhaps, where atrocities are born of economic inequality, it makes sense to compensate victims, even in some cases before or at the expense of criminal sanctions. This has been the view of the South African Truth and Reconciliation Commission, which issued a report identifying the parties deserving compensation and the parties best suited to pay, and recommended the creation of a reparations fund.[206] The ICC has followed

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201. *See* Frederic Megret, *Of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice,* 16 BUFF. HUM. RTS. L. REV. 1 (2010).

202. *See* Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 87 (Mar. 14, 2001).

203. *See* Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541, 545 (2004).

204. *See* Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 206 (arguing that "criminal liability signals moral condemnation of the offender, while civil liability does not," and therefore, the law must preserve — not erode — the civil/criminal distinction).

205. For a discussion of this framing, see John Goldberg and Ben Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010) (arguing that torts, like criminal sanctions, express moral condemnation).

206. *See Final Report of the Truth and Reconciliation Commission of South Africa*, Truth and

this trend with its special "victims fund," but the fund is young and unique among international criminal tribunals.[207]

It may seem distasteful to mention money damages for gross abuses of human rights — can money really treat the emotional and societal trauma created by atrocity? But what about those cases where the relevant atrocities were born of economic inequalities? In Sierra Leone, for example, one of the central criticisms of the international tribunal was that it prioritized the prosecution of a few rights violators at enormous expense while the roads remained unpaved. Many people felt that justice could best be served by addressing the core economic inequalities that led to the civil war in the first place. In that case, the credible expression of moral norms is undermined when it comes at great expense and without an accompanying commitment to improving life on the ground. Of course, designing the scope and purpose of these money damages — deciding who would implement them, and how to make budget trade-offs between these damages and retributive punishments — is no trivial task. In Sierra Leone, is $250 million (the approximate cost of the Special Court for Sierra Leone[208]) best spent on a tribunal to punish the men most responsible for the civil war, or on giving people money damages for their losses during the civil war? What about paving the roads and installing electricity throughout Freetown, in the hopes that doing so would at least offer people the opportunity to get back on their feet economically and create the beginnings of a national recovery? Yet another option would be for an international commission to offer forgivable micro-loans with behavioral conditions (keep behavior in line with international norms and the loans are forgiven). These are not perfect alternatives to retributive justice. But from the standpoint of the goals of the regime — even from the narrower perspective of preventing further atrocity — it is not obvious why a punitive institution like a court is always going to be the right choice, so perhaps it should not be the only choice. Without making the full case for these alternatives, it is worth noting that these options are not and cannot be on the table under the dominant retributive approach.

An additional benefit of an approach that draws on the principles of civil as well as criminal justice is that it may minimize the extent to which the regime relies on the expression of moral condemnation to achieve its goals. If moralistic language is an impediment to conflict resolution, then perhaps it makes sense to treat atrocities more like accidents (which have enormous costs, but which may be preventable by ex ante design and the

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Reconciliation Commission, 2003, vol. 6, sec. 5, chap. 7 ("Findings and Recommendations").

207. *See* Megret, *supra* note 201, at 9.

208. *See The Future of International Justice: National Courts Supported by International Expertise*, ICTJ, http://tinyurl.com/7hwdlpp (last visited Feb. 6, 2012) ("The Special Court for Sierra Leone (SCSL) alone has cost $250 million and has dealt with only nine accused").

imposition of liability). This would require adopting the language of deterrence dominant in tort law. Principles of tort law also offer the idea that regulators should take into account future generations in addition to present victims.[209] Perhaps international tribunals should seek to make future victims as well-off as current ones, which would force judges to consider the long-term effects of their policies and might dissuade them from being overly concerned with placating immediate victims.

The international regime does not currently view domestic crivil sanctions as substitutes for international criminal trials. The Rome Statute, for example, prohibits the ICC from considering cases that are being "genuinely" investigated or prosecuted by a state with proper jurisdiction, but this has been narrowly interpreted to mean investigated as a matter of criminal liability.[210] Article 17 of the Rome Statute says that cases are inadmissible at the ICC if:

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>
> (d) The case is not of sufficient gravity to justify further action by the Court.[211]

The wording leaves the determination of so-called complementarity to the ICC. How deferential the ICC should be to domestic processes is an open (and debated) question.[212] The current prosecutor has generally read the requirements narrowly to include domestic *criminal* proceedings. But a non-retributive approach — one that allows for a broader conception of accountability — might lead the ICC to an interpretation of the principle of complementarity described in Article 17 that leaves more room for domestic mechanisms than simple ex post criminal sanctions. These might

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209. *See generally* Derek Parfit, *On Doing the Best for Our Children*, *in* ETHICS AND POPULATION 100–15 (Michael D. Bayles ed. 1976). For an introduction in the context of environmental damage, see generally RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS (Ernest Partridge ed. 1981).

210. Rome Statute, *supra* note 31, at art. 17.

211. *Id.*

212. *See* Abigail H. Moy, *International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity*, 19 HARV. HUM RTS. J. 267 (2006); *see also* COMPLEMENTARY VIEWS ON COMPLEMENTARITY (Jann Kleffner & Gerben Kor eds., 2005).

include the informal sanctions discussed here — accountability to peers, civil liability, etc. — or they could include customs and memorials that do not seek to establish responsibility at all, but are instead aimed at other regime goals, such as honoring the past and improving welfare in the future.

3. Prevention Strategies

Retributive justice may right the moral universe, but this discussion shows that at times, it risks undermining the regime's ability to prevent future harms. The preference for retributive justice is also consistent with the asymmetry of the regime, which consists of a huge backward-looking apparatus concerned with identifying wrongdoers, and a comparatively small forward-looking effort to identify and prevent future harms. Domestic criminal law includes, and accounts for, prevention strategies; international criminal law largely does not. The foregoing analysis suggests that it should.

Where retributive justice has a preference for ex post justice mechanisms, the behavioral or consequentialist approaches are ambivalent about the timing of different accountability mechanisms. Compared to the present regime, a non-retributive regime would generally seek to identify and address root causes of conflict more than the current international criminal regime does. This could include a number of activities, such as economic development work, which are currently considered tangential to or outside the scope of the international criminal regime.[213] The behavioral turn in domestic criminal law has led to new roles for police, prosecutors, and courts, and has generally been accompanied by a preference for proactive rather than reactive crime control tactics. A similar approach could be especially impactful in the international criminal context.[214] The specific conditions that incubate international crimes are not well understood, but the more that is learned, the greater the promise of preventive crime control strategies — strategies that will have nothing to do with desert.

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213. *See* Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT'L STUDIES Q. 939 ("Olsen, Payne, and Reiter (2007) support his argument by a cross-national statistical analysis. Both argue that economic resources are scarce and often needed elsewhere to address more pressing concerns after transition. The logic can be found in Elster's . . . argument: 'Funds, personnel, and political attention may be channeled into such forward-looking tasks as constitution making, economic reconstruction, or economic transformation, rather than in to the backward-looking tasks of trials and purges.'").

214. *See generally* Andrew K. Woods, *Toward a Social Influence Model for Regulating International Crimes*, CHI. J. INT'L L. (forthcoming 2012) (on file with the Virginia Journal of International Law Association).

CONCLUSION

The international criminal regime, despite its many consequential goals, appears deeply retributive. This retributivism has a behavioral justification: some scholars and policy-makers believe that a deserts-based criminal regime will produce the best consequences. However, the behavioral arguments that justify such a "utility of desert" view at the domestic level may not hold at the international level. The implications of this analysis for regime design are significant. This Article outlined these implications, paying particular attention to two sorts of design options: Those that would improve the utility of the current deserts-based approach, and those that would transcend it. More research is required to address the most fundamental question raised, but not answered, by this analysis – whether the international criminal regime should rely so heavily on backward-looking, ex post legal sanctions without an eye equally focused on forward looking, ex ante prevention strategies.