

A TRUCE IN THE DISTRIBUTIVE PRINCIPLE WARS?  
EMPIRICAL DESERT, MORAL CREDIBILITY, AND THE INTERNALIZATION OF SOCIETAL NORMS

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Abstract

Criminal law theorists have long been divided by two seemingly irreconcilable ideas about what principles should shape criminal law rules. Some think the point of criminal law is to make us safer by deterring crime and incapacitating criminals. Others believe that what matters most is ensuring that individual offenders, and their victims, get what they deserve: justice in the individual case. This brief essay argues that these two views have more in common than we tend to think, because good empirical evidence suggests that doing justice for past wrongdoing according to the community's shared principles of justice – what has been called “empirical desert” – is probably the best way to make our societies safer.

But what exactly does empirical desert involve and what would be its effect for adopted as criminal law's primary distributive principle? The essay explores five key questions raised by the proposal: Is there any such thing as “the community's views” of justice? Are the community's views of justice too brutish and draconian to adopt? Why should those concerned with crime control care what the layperson thinks is just? Even if empirical desert as a distributive principle would reduce crime, might another strategy be more effective? And finally, if tracking the community's existing views of justice really is the best way to control crime, doesn't that leave us forever stuck with existing community norms many of which we might want to change?