

---

---

## UNDEMOCRATIC CRIMES

Paul H. Robinson\*  
Jonathan C. Wilt\*\*

*One might assume that in a working democracy the criminal law rules would reflect the community's shared judgments regarding justice and punishment. This is especially true because social science research shows that lay people generally think about criminal liability and punishment in consistent ways: in terms of desert, doing justice, and avoiding injustice. Moreover, there are compelling reasons to demand consistency between community views and criminal law rules, including respect for democratic values, effective crime-control, and the deontological value of justice itself.*

*It may then come as a surprise, and a disappointment, that a wide range of common rules in modern criminal law conflict with community justice judgments, including three strikes and other habitual offender statutes, abolition or narrowing of the insanity defense, adult prosecution of juveniles, felony murder, strict liability offenses, and a variety of other common doctrines.*

*In short, democratically elected legislatures have regularly chosen to adopt criminal law rules that conflict with the deep and abiding intuitions of their constituents. We endeavor to explain how this incongruent situation has arisen. Using the legislative and political histories of the doctrines noted above, we document four common causes: legislative mistake about the community's justice judgments, interest group pressure, prioritizing coercive crime-control mechanisms over doing justice and legislative preference for delegating some criminalization decisions to other system actors, such as prosecutors and judges.*

*Analysis of these reasons and their dynamics suggests specific reforms, including a legislative commitment to reliably determine community judgment before enactment and to publicly explain the reasons for enacting any criminal law rule that conflicts. Creation of a standing criminal law reform commission would be useful to*

---

\* Colin S. Diver Professor of Law, University of Pennsylvania. The authors give special thanks to Sarah Robinson, Andrew Lange, and Yosef Weitzman for invaluable research assistance. © Paul H. Robinson

\*\* Law Clerk to the Honorable Marjorie O. Rendell, United States Court of Appeals for the Third Circuit.

*oversee the social science research and to help hold the legislature to these public promises.*

TABLE OF CONTENTS

I.	INTRODUCTION .....	486
II.	WHY THE SUBSTANTIVE CRIMINAL LAW OUGHT TO REFLECT THE COMMUNITY'S JUSTICE JUDGMENTS .....	488
	<i>A. Democratic Values</i> .....	488
	<i>B. Theories of Punishment</i> .....	491
	1. <i>Consequentialism: Coercive Crime-Control</i> .....	492
	2. <i>Consequentialism: Empirical Desert's Normative         Crime Control</i> .....	494
	3. <i>Retributivism</i> .....	496
III.	CRIMINAL LAW CONFLICTS WITH COMMUNITY VIEWS .....	499
	<i>A. Abolition or Narrowing of the Insanity Defense</i> .....	500
	<i>B. Three-Strikes and Other Habitual Offender Statutes</i> .....	501
	<i>C. Adult Prosecution of Juveniles</i> .....	503
	<i>D. Felony Murder</i> .....	504
	<i>E. Strict Liability Offenses</i> .....	505
	<i>F. Drug Offense Penalties</i> .....	506
	<i>G. Other Conflict Points</i> .....	507
IV.	WHY DO LEGISLATURES ADOPT CRIMINAL LAW RULES THAT CONFLICT WITH COMMUNITY JUSTICE JUDGMENTS? .....	508
	<i>A. Legislative Mistake</i> .....	510
	<i>B. Interest Group Pressure</i> .....	521
	<i>C. Prioritizing Coercive Crime Control</i> .....	524
	<i>D. Legislative Preference for Criminal Law Delegation</i> .....	532
V.	PROPOSED REFORMS .....	536
VI.	CONCLUSION .....	538

I. INTRODUCTION

One might assume that in a working democracy the statutes governing criminal liability and punishment reflect community judgments of what is fair and just. Empirical studies show that ordinary people expect that their “criminal justice” system seeks to do justice and avoid injustice. As we discuss in Part II, the intelligentsia, be they consequentialists or retributivists, ought to join in this popular desire for doing justice. The consequentialists ought to see that the criminal law’s regular conflicts with community justice judgments undermine its moral credibility and thereby its crime-control effectiveness. The retributivists ought to see that, given the

---

---

practical impossibilities of operationalizing desert as an organizing principle for criminal code drafting, tracking community judgments of justice—so called “empirical desert”—provides what may be the best available approximation of the demands of ‘transcendent’ justice.

Thus, it may come as a surprise to many that a wide variety of current criminal law rules seriously conflict with community justice judgments, including three strikes and other habitual offender statutes, the adult prosecution of juveniles, abolition or narrowing of the insanity defense, felony murder, the use of strict liability offenses, and other doctrines. Part III reviews the empirical studies proving these conflicts.

In short, democratically elected legislatures have regularly chosen to adopt criminal law rules that conflict with the deep and abiding intuitions of their constituents. In Part IV, we endeavor to explain how this incongruent situation has arisen. Our examination of the legislative record reveals that such conflicts typically come about for any of four reasons. First, the legislators are simply ignorant of the conflict, and presumably would be surprised by the controlled empirical studies that reveal it. Second, special interest groups pressure legislators to adopt a rule that conflicts with community views but benefits the interest group. Third, legislators are persuaded, usually by academics and other experts, that they should prioritize coercive crime-control over doing justice, which commonly means focusing on maximizing general deterrence or the incapacitation of dangerous offenders, even at the cost of unjust results. Or, fourth, legislators refuse to provide a clear rule—perhaps to avoid controversy—by adopting a rule that essentially delegates their task to others in the criminal justice system. For reasons we discuss in Part II, consequentialists, retributivists, and anyone committed to robust democratic values ought to be opposed to these legislative practices, which create regular conflicts with community justice judgments.

Legislators are not condemned to repeat these patterns, although clearly there are significant pressures in the current political system which may resist change. In Part V, we suggest a number of reforms that we believe are realistic. First, we suggest that legislatures publicly commit themselves to finding out if proposed legislation conflicts with community justice judgments before they legislate, by looking to controlled empirical studies rather than their own hunches, the representations of special interest groups, or the view that has the loudest media presentation. Second, where the proposed legislation does conflict with community justice judgments, the legislature ought to formally commit itself to give a public explanation as to why such a rule ought, nonetheless, to be enacted. These two requirements together may have the effect of deterring many unjust and undemocratic legislative proposals, or at least limiting their scope. It would also

help minimize the damage to the criminal justice system's moral credibility by providing a public explanation for any conflict rule. Third, given the political pressures resisting change in the current system, the legislature ought to create an independent standing criminal law reform commission that can undertake the needed empirical studies and act as a brace against legislative backsliding.

## II. WHY THE SUBSTANTIVE CRIMINAL LAW OUGHT TO REFLECT THE COMMUNITY'S JUSTICE JUDGMENTS

James Wilson, speaking in 1791, predicted that the recently ratified United States Constitution would ensure “the voice of the representatives will be the faithful echo of the voice of the people” in the new Republic.<sup>1</sup> This prediction hits rough going when one considers contemporary criminal law. Too often, modern legislatures claim to be acting as the echo of their constituents' voices in matters of criminal justice, while in reality contradicting the community's deep and abiding value judgments.<sup>2</sup>

We know from empirical studies that ordinary people believe criminal liability and punishment ought to be distributed according to just deserts.<sup>3</sup> They do not think in terms of general deterrence or incapacitation of the dangerous, as many academic consequentialists do.<sup>4</sup> Nor are they able, or inclined, to give step-by-step rational analyses for why a particular criminal law rule or principle and its results are just or unjust, as a retributivist would.<sup>5</sup> But we argue here that both consequentialists and retributivists have good reason to support a criminal law that generally tracks community justice judgments.

Moreover, we believe that democratic values—which transcend particular theories of criminal punishment—demand consistency between the criminal law and community judgment. It is those values we consider first.

### A. Democratic Values

A democratic state's criminal law ought to institutionalize the political community's judgments about blameworthiness and punishment. This proposition flows from a demand that our democracy means more than mere electoral participation: it must mean that the People's law reflects the

---

1. 1 JAMES WILSON, *Lectures on Law*, in COLLECTED WORKS OF JAMES WILSON 399, 723 (Kermit L. Hall & Mark David Hall eds., 2007).

2. See Paul H. Robinson & Lindsay Holcomb, *The Criminogenic Effects of Damaging Criminal Law's Moral Credibility*, S. CAL. INTERDISC. L. J. (forthcoming).

3. *Id.*

4. *Id.* at 22.

5. *Id.* at 39.

People's values.<sup>6</sup> This *substantive* requirement is what we mean when we speak of criminal law "democratization."<sup>7</sup>

Democratizing the criminal law has been the subject of much recent discussion,<sup>8</sup> which we regard as a laudable development. But the discussion thus far has focused too much on criminal procedure, to the point that talk of democratizing the substantive criminal law is eclipsed.<sup>9</sup> This focus makes some sense, as citizen participation in American criminal justice is most salient in the jury, while the reasons to democratize the substantive law might seem less unique to *criminal* law; such reasons are apt to blend into more general arguments in the political authority literature regarding the merits of popular democracy.<sup>10</sup> That said, there are strong arguments for democratization that are uniquely connected to crime and punishment. Making that case will be the work of Section II.B, while this sub-section takes up the challenge of justifying substantive democratization based on general democratic values.<sup>11</sup>

Too much recent work on criminal law democratization has sought to either: (1) reduce the influence of popular sentiment on lawmaking; or (2) more radically, sought to displace it wholesale with control by bureaucratic elites.<sup>12</sup> Writers in these camps contend that the criminal law will remain "democratic" so long as citizens continue to participate in elections (thus acting as an accountability check on the government), even if the law ultimately passed is not consonant with the popular "will" on specific issues.<sup>13</sup>

In stark contrast is the work of Joshua Kleinfeld, who has persuasively argued that "in a democratic society, law and other exercises of governmental power should reflect and respond to the ethical life of the people

---

6. Yehezkel Dror, *Values and the Law*, 17 ANTIOCH REV. 440, 440 (1957).

7. See John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711 (2020).

8. See, e.g., Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1696 (2017); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1613 (2017); *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 297 (2019); Rappaport, *supra* note 7, at 711.

9. See Rappaport, *supra* note 7.

10. Or perhaps some authors still labor under the mistaken belief that the content of the criminal law in the United States already reflects the views of the citizenry, that our law is harsh and brutish because we are harsh and brutish. But this is not the case. See *infra* Part III.

11. See *infra* Sections II.A, II.B. Caveat: this paper is not primarily meant to be an exercise in political theory. This discussion, therefore, will be highly compressed. But it is a necessary foundation for the arguments and research that will follow.

12. For the former, see, for example, Philip Pettit, *Is Criminal Justice Politically Feasible?*, 5 BUFF. CRIM. L. REV. 427, 428 (2002). For the latter, see, for example, Franklin E. Zimring & David T. Johnson, *Public Opinion and the Governance of Punishment in Democratic Political Systems*, 605 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 265, 266–67 (2019).

13. Consider, for example, Pettit's use of the federal reserve model for a penal policy board. Pettit, *supra* note 12, at 442.

living under that law and government.”<sup>14</sup> He defines “ethical life” as “the values disclosed by a community’s public deliberations or implicit in its social practices and institutions.”<sup>15</sup> Drawing on and critiquing the work of Jürgen Habermas, Max Weber, and Alexis de Tocqueville, Kleinfeld argues that electoral participation and the advancement of liberal values are “facets” of democracy, but he insists that democracy must be understood to also embrace what he calls “the authorial ideal”: that the law must be “by the People,” as Lincoln put it.<sup>16</sup> This places a further condition on democracy: that the People be able to see themselves as the authors of the law, that they be capable of identifying their individual wills with the general will.<sup>17</sup> This condition cashes out in a requirement that the judgments of the community about blameworthiness be reflected in the criminal law’s substantive rules.<sup>18</sup>

The authorial ideal applies to the law generally. For example, it would be a problem for a state’s democratic credentials if its contract law was radically inconsistent with lay promising practices. But what is unique about criminal law is that ordinary people have such comprehensive and nuanced intuitive judgments here—judgments that can be rendered explicit via social psychology research techniques.<sup>19</sup> Indeed, persons of very different backgrounds possess remarkably consistent views on a wide array of criminal law issues, including fundamental normative questions (for example, whether the criminal law ought to be primarily aimed at doing justice or avoiding future crime).<sup>20</sup> This fact differentiates criminal law from many other fields, where citizens lack comprehensive intuitions.<sup>21</sup> This observation implies that the degree of democratic illegitimacy is uniquely

---

14. Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. UNIV. L. REV. 1455, 1466. In this essay, Professor Kleinfeld also tees up what will be the primary focus of Part IV: “Why American government, despite a system of elected representatives, establishes such laws [conflicting with popular judgment] is an interesting question to ponder . . .” *Id.* at 1468.

15. *Id.* at 1466. Note the similarity between Kleinfeld’s idea of ethical life as disclosed by social practices and institutions, to our lay justice judgments. To us, these are fundamentally the same idea. Kleinfeld would look to the fact that a large majority of the population has, say, used marijuana, and conclude that the community does not judge such behavior to be morally blameworthy. We extract the same sort of result via social science experiments, which allow us to probe peoples’ intuitions about justice.

16. *Id.* at 1465–66.

17. See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* (Victor Gourevitch ed. and trans., Cambridge Univ. Press, 1997) (1762) (explicating the idea of the general will).

18. See Kleinfeld, *supra* note 14, at 1484.

19. See Paul Robinson, *Democratizing Criminal Law*, 111 NW. UNIV. L. REV. 1565, 1570 (2017) (concluding that ordinary people’s views are rooted in “principles of proportionality” and conflict with academic-utilitarian crime-control doctrines).

20. *Id.* at 1567–68.

21. See Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 1 (2007).

egregious when the criminal law departs from shared lay justice judgments. When this occurs, the state thumbs its nose at the values of the overwhelming majority of the community, thus threatening the state's legitimacy.<sup>22</sup>

Returning to Kleinfeld's arguments, it is important to understand exactly how his position (and ours) clashes with that of the anti-democratizers. Kleinfeld resists: (1) the impulse to replace the "democratic project of self-rule" with a substantive set of political values; (2) the notion that elections alone are enough; and (3) the "rationalizing orientation" of Habermasian democratic theorizing.<sup>23</sup> To expand on this last point, one approach would determine the will of a community by hypothesizing about what outcome would be generated under idealized deliberative conditions.<sup>24</sup> This hypothetical consensus is then substituted for actual deliberative results, as the more "rational" and "democratic" outcome, threatening to turn democracy into "what the theorist imagines to be the best reasons rather than the rule of the people."<sup>25</sup> Kleinfeld sees this whole move as "a mistake of the first order."<sup>26</sup>

We agree with Kleinfeld's conception of democracy as applied to the criminal law; the ability of a free people to see itself as the author of the criminal law is necessary for a state to be "democratic."<sup>27</sup> This authorial view is possible only if the law broadly reflects the normative judgments of the community.<sup>28</sup> The stakes for legitimacy are particularly high respecting criminal law, and currently, the United States is radically deficient when judged against this ideal.

### B. *Theories of Punishment*

Although general political values support the criminal law democratization project, we recognize that reasons stemming from within punishment theory will likely be more convincing, as reasons most closely related

---

22. Further, consider the relative salience of crime in the media compared to say, contract disputes, or civil securities enforcement. Even assuming that people have strong intuitive judgments about these non-criminal matters, it remains the case that the criminal law's divergence from ordinary people's beliefs will be flaunted in an especially forceful manner.

23. Kleinfeld, *supra* note 14, at 1469–70.

24. *Id.* at 1470.

25. *Id.* One sees such a view in the background of Pettit's proposal for a Penal Policy Board. Pettit, *supra* note 12, at 442. His Board is a recreation of society in miniature, in which a combination of pre-dominating expert opinion and insulation from public deliberations will produce more 'rational' recommendations for the criminal law. Rather than hypothesizing about what would result from an idealized deliberative process, Pettit would have us create such an idealized setting 'in a bottle' and then implement the results.

26. Kleinfeld, *supra* note 14, at 1470.

27. *Id.* at 1472.

28. *Id.* at 1471.

to criminal law.<sup>29</sup> On this front, we contend that both consequentialism and retributivism generate pro-democratization arguments. It is to those arguments which we now turn.

### 1. *Consequentialism: Coercive Crime-Control*

At first blush, one would not expect the proverbial “good utilitarian” to care whether the justice system’s rules reflect community judgments or not.<sup>30</sup> On her view, there exists an ideal set of liability rules and corresponding punishments (contingent on time and place) which maximize utility through crime control; the primary mechanisms of control being deterrence and/or incapacitation of the dangerous.<sup>31</sup> If the community agrees that the law does ‘transcendent’ justice, then that is all well and good, but their approval is neither a necessary nor sufficient condition for determining what the rules ought to be.<sup>32</sup> Indeed, our good utilitarian is likely to be affirmatively hostile to the views of ordinary people, viewing them as primitive and vengeful, as targets to be undermined through surreptitious means or explicitly by ‘enlightening’ education.<sup>33</sup>

That said, democracy as a political system could tempt the good utilitarian, for that system may provide a desirable decision-procedure for determining the law in general.<sup>34</sup> Instrumentalist arguments for democracy exist,<sup>35</sup> and they sometimes hold that the laws of the democratic state will,

---

29. See Zimring & Johnson, *supra* note 12, at 278.

30. See generally Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, 40 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 193, 197 (2008).

31. *Id.* at 203.

32. Perhaps community views enter the approach insofar as the pragmatic utilitarian recognizes that the thoroughgoing retributivism of ordinary people limits the rules that are practically feasible in a political sense, but that is all. See *id.* at 233–34 (presenting empirical study showing that people primarily react to crime descriptions emotionally and favor proportional just deserts, and noting that “[c]ontempt will develop when the sentencing practices of the society are importantly out of synchrony with the citizens’ rank orderings of the blameworthiness of crimes”); Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCH. 284, 295 (2002) (presenting empirical study demonstrating that people assess punishment based upon desert criterion, rather than upon factors relevant to deterrence); John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 L. & HUM. BEHAV. 659, 676 (2000) (presenting empirical studies finding that people assess punishment based upon desert criterion, rather than upon factors relevant to dangerousness).

33. See Carlsmith & Darley, *supra* note 30, at 207.

34. Robinson, *supra* note 19, at 1581.

35. See, e.g., JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 81 (1861) (“[I]t is evident that the only government which can fully satisfy all the exigencies of the social state is one in which the whole people participate; that any participation, even in the smallest public function, is useful; that the participation should every where be as great as the general degree of improvement of the community will allow; and that nothing less can be ultimately desirable than the admission of all to a share in the sovereign power of the state.”).

on balance, be superior to those of the non-democratic state.<sup>36</sup> This could be so for a variety of reasons; for instance, democracy might force rulers to consider the interests of a wider set of persons.<sup>37</sup> But such arguments are naturally subject to falsification, and the relevant data set (the history of modern mass democracies) is arguably too small to draw firm conclusions about the superiority of democracy (assuming we disregard non-consequentialist values). And there are instrumentalist arguments against democracy too, from the likes of Plato and Hobbes.<sup>38</sup>

Moreover, a democratic utilitarian could believe that criminal law is an exception where the experts ought to rule. Criminal law democratization comes in many flavors, after all, and one can be a “democrat” while being far from a “populist.”<sup>39</sup> At an extreme edge, we could imagine the view that community judgment ought to actively determine *specific* case outcomes (imagine an online poll being held to determine the guilt and sentence of particular offenders). To our knowledge, no writer supports such a position.

Further, consequentialists are still free to believe that a generally preferable democratic procedure has gotten the rule wrong in a particular instance.<sup>40</sup> Democratic determination might usually be the best decision procedure, but that superiority could be a close-run thing, leaving open the option of consistent elite interference in democratically ordained outcomes, or at least elite campaigns to try to “enlighten” the masses to the desirability of alternative criminal law rules.<sup>41</sup>

So far then, it would seem the good utilitarian has not been converted to the democratization cause. The arguments for democratizing either rely on non-instrumentalist values like equality and liberty—which the true consequentialist will not care about in isolation—or they establish only that democracy ought to play some limited role in determining the criminal law.<sup>42</sup> But there is another extant consequentialist argument, one which

---

36. *Id.* at 255.

37. See MILL, *supra* note 35, at 64–69.

38. See, e.g., PLATO, THE REPUBLIC 123 (B. Jowett trans., Oxford Univ. Press 3d ed. 1888) (1861) (“The [democratic] State demands the strong wine of freedom, and unless her rulers give her a plentiful draught, punishes and insults them; equality and fraternity of governors and governed is the approved principle. Anarchy is the law, not of the State only, but of private houses, and extends even to the animals.”); Thomas Hobbes, Leviathan Ch. XIX (1651) (arguing that democracy is inferior to monarchy because, *inter alia*, “in a Democracy, or Aristocracy, the publique prosperity conferres not so much to the private fortune of one that is corrupt, or ambitious, as doth many times a perfidious advice, a treacherous action, or a Civill warre.”).

39. See, e.g., Jose Luis Marti, *The Republican Democratization of Criminal Law and Justice*, in LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES, 125, 123–46 (Samantha Besson & José Luis Marti eds., 2009).

40. *Id.* at 127.

41. Cf. PLATO, *supra* note 38, at 80–88.

42. See, e.g., Marti, *supra* note 39, at 129.

does not involve appeal to deontic values, and yet which can justify thoroughgoing democratization.

## 2. *Consequentialism: Empirical Desert's Normative Crime Control*

One of us has argued elsewhere that a good utilitarian has impeccable consequentialist reasons to support criminal law democratization: without a criminal law that reflects the community's judgments of justice, crime control is hobbled.<sup>43</sup>

Setting aside the accumulating evidence that general deterrence and incapacitation are ineffective,<sup>44</sup> recent research suggests that crime-control depends in some significant part upon the criminal law's moral credibility with the community.<sup>45</sup> A criminal justice system with a good reputation for reliably doing justice and avoiding injustice is one that will inspire cooperation, support, deference, and the internalization of its norms.<sup>46</sup> In contrast, a criminal justice system that earns a reputation for deviating from the community's principles of justice—deviating, that is, from “empirical desert”—is a system which will inspire resistance and subversion; it and will lose the ability to harness the powerful forces of social influence and internalized norms.<sup>47</sup> In short, effective crime control requires moral credibility which, in turn, requires democratization.<sup>48</sup>

It is easy to see this principle at work on a large scale anecdotally. Consider the Prohibition Era in the United States. When even government officials openly ignored the general ban on alcohol consumption, such public disrespect for the criminal law rule tended to reinforce people's disillusionment with the criminal law generally, which in turn promoted lawlessness.<sup>49</sup> Disillusionment tainted not only the alcohol prohibition rules, but also reduced compliance with criminal law rules unrelated to alcohol.<sup>50</sup>

An analogous dynamic can be seen in the so-called ‘Watts Riots’ of 1965. In the 1960s Watts neighborhood of Los Angeles, where violations of the criminal law were increasingly met with charges and sentences that seemed grossly disproportionate to residents, aggressive policing and punishment did not reduce crime as intended, but, rather, increased it, as the criminal law's credibility within the neighborhood progressively

---

43. See, e.g., PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 165 (Oxford Univ. Press 2008).

44. See *id.* at 21–34; Robinson & Holcomb, *supra* note 2.

45. Robinson & Holcomb, *supra* note 2, at 9–12.

46. *Id.* at 43.

47. *Id.*

48. *Id.* at 34.

49. PAUL H. ROBINSON & SARAH M. ROBINSON, *PIRATES, PRISONERS, AND LEPERS: LESSONS FROM LIFE OUTSIDE THE LAW* 139–63 (2015).

50. *Id.*

weakened.<sup>51</sup> In August 1965, this tension came to a boiling point, after a Watts resident's violent encounter with the police inspired the community to take to the streets.<sup>52</sup> An official investigation of the Watts riots conducted by the California Governor found that the riot was a result of the Watts community's long-simmering grievances and discontent with criminal law enforcement.<sup>53</sup>

But one need not rely simply on common sense and anecdotal evidence to see the disillusionment-lawlessness connection. The dynamic is confirmed by controlled social psychology studies.<sup>54</sup> The research suggests that the relationship between moral credibility, on the one hand, and community deference and compliance, on the other, is widespread and nuanced.<sup>55</sup> Even small incremental losses in moral credibility can produce corresponding incremental losses in deference and compliance.<sup>56</sup>

Consider, for example, a study using a within-subjects design in which subjects were asked a number of questions relating to various ways in which moral credibility is thought to affect deference, compliance, and the internalization of the law's norms.<sup>57</sup> Will a citizen assist police by reporting a crime? Will they assist in the investigation and prosecution of a crime? Do people take the imposition of criminal liability and punishment as a reliable sign that the defendant has done something truly condemnable? Do people take the extent of the liability imposed as a reliable indication of the seriousness of the offense and the blameworthiness of the offender? With a baseline established on these and related issues, subjects were then disillusioned by exposing them to accounts of the system's failures of justice and doing of injustice. Later retesting showed that the measures of deference, compliance, and internalization of norms had all decreased.<sup>58</sup>

A follow-up study used a between-subjects design, giving different levels of disillusionment to three different groups and then testing their levels of deference, compliance, and internalization.<sup>59</sup> The results confirm the conclusions of the earlier within-subjects design. The greater the disillusionment, the greater the loss in deference, compliance, and

---

51. See *Watts Riots*, CIVIL RIGHTS DIGITAL LIBRARY, [http://crdl.usg.edu/events/watts\\_riots/?Welcome\).%5bcc&Welcome](http://crdl.usg.edu/events/watts_riots/?Welcome).%5bcc&Welcome) (last visited Jan 7, 2021) [<https://perma.cc/55J4-YWF3>].

52. *Id.*

53. *Id.*

54. Robinson & Holcomb, *supra* note 2, at 9–12.

55. *Id.*

56. See *id.*; Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1995–2025 (2010).

57. Robinson, Goodwin & Reisig, *supra* note 56, at 1995–2004.

58. See PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 20 (2013).

59. Robinson, Goodwin & Reisig, *supra* note 56, at 2025.

internalization.<sup>60</sup> A study analyzing responses in preexisting large datasets came to a similar conclusion using regression analysis.<sup>61</sup>

The results in the laboratory studies are particularly striking because subjects come to the study with preexisting views on the system's reputation for being just. The experimenters, within the context of the study, could only nudge those preexisting views slightly. Yet even that incremental disillusionment produced corresponding incremental reductions in deference and compliance.<sup>62</sup> This is a particularly important finding because it means that no matter what the current state of a criminal justice system's moral credibility with the community, any incremental reduction in credibility can produce an incremental reduction in deference—and any increase can produce an increase in deference.<sup>63</sup>

Empirical desert—and its resulting moral credibility—thus provides a powerful, consequentialist rationale for the democratization of the criminal law. This moral credibility argument for democratization does not involve appeal to deontic values.<sup>64</sup> You do not have to believe that liberty or equality (let alone desert) are values independent of utility to buy into empirical desert's democratization rationale. Nor need you believe that the community's view has any special moral or epistemic status; that is, you do not have to think that a proposition is entitled to become law solely on account of public support, or that the public is particularly good at deciding what the "true" propositions of morality are. All that matters is the recognition of the *moral credibility* → *increased compliance* equation. The specific content of the community's views fades into the backdrop, and what remains is the synergistic relation between what they believe is right and what the law commands.<sup>65</sup>

Of course, none of this is to say that there are only consequentialist reasons for democratization; other rationales proceed from radically different premises but—we argue below—converge on similar conclusions.

### 3. *Retributivism*

The committed retributivist has good reason to be a democratizer about criminal law—indeed, they might already be one without knowing it.<sup>66</sup>

---

60. *Id.*

61. *Id.* at 2016–25.

62. *Id.* at 1995–2025.

63. *See id.*

64. *Id.* at 35.

65. *Id.* at 43.

66. *See infra* notes 67–71.

First, one of us has argued that, given the impracticality of implementing a retributivist criminal code, codifying the community's judgments ought to be the retributivist's immediate goal, as the closest she can come to implementing her system.<sup>67</sup> The pragmatic obstacles to implementing retributivism were on display during the drafting of the United States Sentencing Commission Guidelines, with Stephen Breyer stating in the aftermath that: "some students of the criminal justice system strenuously urged the Commission to follow what they call a 'just deserts' approach to punishment. . . . The difficulty that arises in applying this approach is that different Commissioners have different views about the correct rank order of the seriousness of different crimes."<sup>68</sup>

This dissension within the Commission reflects perennial controversies in philosophical discourse.<sup>69</sup> The relevance of resulting harm to deserved punishment is perhaps the most notorious such issue. Not only is it a necessary question that any criminal code must answer, but by the numbers, philosophers appear consistently split on the issue.<sup>70</sup> There is no principled basis from within retributivism to determine which view should be codified because the disagreement is precisely about what retributivism entails.<sup>71</sup>

It is not just that some moral philosophers will disagree about almost any issue. The problem is that there is no mechanism consistent with the reason-analysis mantra of retributivism to resolve those disputes in a principled way, as a criminal code drafter or a sentencing guidelines drafter must.<sup>72</sup> Reverting to voting within some specified group, be it the drafting commission, the legislators, or moral philosophers, is a violation of retributivism's commitment to rational analysis alone.<sup>73</sup>

Luckily for the retributivist, there may be a solution: codifying the community's judgments is a principle that can be used to generate a criminal code without infinite normative regress (thus satisfying the condition of practicability) and which would give rise to a code that is (by-and-large) retributivist, in the sense that its provisions will mostly match those of the

---

67. See ROBINSON, *supra* note 43, at 162–63.

68. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 15 (1988). He also complained that any desert-oriented system would lack objectivity. *Id.* at 16.

69. See, e.g., Richard L. Lippke, *Harm Matters: Punishing Failed Attempts*, 14 OH. ST. J. CRIM. L. 629, 629 (2017).

70. See *id.* at 629, n.1, n.2 (listing thinkers in the two camps). And even on less controversial questions there are almost always dissenters from the consensus. Some philosophers believe that punishment is never justified, as moral responsibility is a fiction. See, e.g., BRUCE N. WALLER, *THE INJUSTICE OF PUNISHMENT* 6 (2017).

71. See Lippke, *supra* note 69, at 629–30.

72. See Breyer, *supra* note 68, at 15–16.

73. See *id.*

majority view among academic retributivists.<sup>74</sup> It clearly is not ‘true’ retributivism, but it may be the best practical approximation of it that is possible.

As noted above, the resulting code would be a good approximation of a retributivist code because ordinary people base their liability and punishment judgments on conceptions of desert.<sup>75</sup> The empirical research bears out this generalization. For example, a number of studies have examined what is commonly referred to as the “innate retribution hypothesis,” or the idea that most people make punishment decisions on a retributivist basis, finding, ultimately, that people are sensitive to the gravity of the wrong and the degree of blameworthiness of the wrongdoer, rather than what can be achieved through punishment.<sup>76</sup> In one study, researchers found that people are intuitively drawn to retribution-related information.<sup>77</sup> In that study, subjects were given vignettes of crime and were presented with different categories of information about that crime—some with a retributive bent, some with a deterrence bent, and some with an incapacitation bent.<sup>78</sup> A whopping 97% of subjects chose to consult retribution-related information on a first trial rather than deterrence-related information or incapacitation-related information.<sup>79</sup> When, on a second survey, the same subjects were asked to sentence the offender in question and rate the confidence of their choices, those who had consulted retributive materials were substantially more confident in their sentencing decisions, while those who consulted utilitarian materials exhibited far less confidence, possibly indicating that they believed they had made poor choices.<sup>80</sup>

Empirical studies also tell us that people largely agree about the relative blameworthiness of hypothetical criminal cases, as well as on the factors that increase and decrease offender blameworthiness.<sup>81</sup> On many issues, there is a high degree of agreement across demographics on the relative blameworthiness of specific wrongdoers.<sup>82</sup> Many of these areas of high agreement might be called the “core of wrongdoing” because they

---

74. See ROBINSON, *supra* note 43, at 162–63.

75. See Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCH. 284, 284 (2002); see also John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW & HUM. BEHAV. 659, 659 (2000).

76. Steven R. Kraaijeveld, *Debunking (the) Retribution (Gap)*, 26 SCI. & ENG'G ETHICS 1315, 1318 (2020).

77. Kevin M. Carlsmith, *The Roles of Retribution and Utility in Determining Punishment* 42 J. EXPERIMENTAL SOC. PSYCH. 437, 438–39 (2006).

78. *Id.* at 440.

79. *Id.* at 445.

80. *Id.* at 446.

81. Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1848 (2007).

82. *Id.* at 1832.

concern such fundamental offenses as physical injury to others, taking property without consent, and deceit in exchanges.<sup>83</sup> Consider one study that had subjects rank order twenty-four scenarios according to overall deserved punishment.<sup>84</sup> The kinds of offenses in the scenarios represent 94.9% of the offenses committed in the United States.<sup>85</sup> The results show a Kendall's W of 0.95 for in-person subjects and 0.88 for Internet subjects—an astounding result.<sup>86</sup> One cannot normally get this level of agreement except in observational studies, as with asking subjects to judge the relative brightness of dot clusters.

This pervasive public agreement is critical; it means that our hypothetical criminal code drafter will not commonly encounter normative dilemmas on which the community is really split, and thus he will have little occasion to make a contestable normative judgment in designing the code.

In sum, the retributivist has good reason to support democratization of the criminal law. That approach holds out the best prospect for implementing a more deontologically just criminal code, in which offender blameworthiness is central, as opposed to utilitarian crime control.

### III. CRIMINAL LAW CONFLICTS WITH COMMUNITY VIEWS

Although criminal codes in the United States are promulgated by elected legislators, the law often diverges from the judgments of the electors.<sup>87</sup> This problem is not limited to archaic or rarely invoked code provisions; it effects doctrines as commonplace (and serious) as felony murder and the insanity defense, doctrines that can mean the difference between life and death for a criminal defendant.

Below, we make good on this undemocratic diagnosis, surveying compelling evidence that a variety of pervasive criminal law doctrines are in tension with the views of the communities to which they apply. Our presentation here is not meant to be comprehensive. Its main objective is to provide examples for use in the next analytical step—determining *why* this undemocratic regime exists.<sup>88</sup>

---

83. *Id.* at 1891.

84. *Id.* at 1889; ROBINSON, *supra* note 58, at 29–34.

85. Robinson & Kurtzban, *supra* note 81, at 1867.

86. *Id.* at 1867, 1872, 1874, 1890.

87. Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383 (1908).

88. Readers keen to dig deeper into the relevant evidence regarding code-community conflicts are encouraged to consult the following book: PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 207 (1995).

### A. *Abolition or Narrowing of the Insanity Defense*

Abolition of the insanity defense was a highlight of the Supreme Court's docket recently, in *Kahler v. Kansas*.<sup>89</sup> The Court considered and upheld Kansas's decision to eliminate a defendant's madness-induced "moral incapacity" as a defense; state law instead allows only that "[i]t shall be a defense to a prosecution . . . that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the offense charged."<sup>90</sup> Four other states follow a similar doctrine, termed the "mens rea approach."<sup>91</sup> That approach is the most extreme attack on the insanity defense extant in American law.<sup>92</sup>

There are, however, other, less extreme limitations on the defense on the books too. Down one notch from the "mens rea approach," thirty states forbid the presentation of evidence that would demonstrate a defendant suffered from a "control dysfunction," allowing only evidence going to cognition defects.<sup>93</sup> These departures from the "*M'Naghten* plus control" test, and the American Legal Institute ("ALI") similar two-prong test, both seriously conflict with lay views.<sup>94</sup>

The available evidence suggests that lay people hold mentally ill offenders blameless when they either: do not understand the criminality of their conduct; or, if they do understand it, have a substantially impaired capacity to control themselves.<sup>95</sup> In one study, for example, the large

---

89. See 140 S. Ct. 1021, 1031 (2020).

90. *Id.* at 1025, 1026 (citing KAN. STAT. ANN. § 21-5209 (2018)).

91. IDAHO CODE ANN. § 18-207 (West 2021); MONT. CODE ANN. § 46-14-102 (2021); UTAH CODE ANN. § 76-2-305 (LexisNexis 2021); ALASKA STAT. §§ 12.47.010(a) (2021).

92. We consider the MPC's dual-prong substantial capacity doctrine to be the broadest variation available.

93. See Robinson, Goodwin & Reisig, *supra* note 56, at 1955–56; see also MODEL PENAL CODE § 4.01 (AM. L. INST. 1962) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity *either* to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.") (emphasis added).

94. See ROBINSON & DARLEY, *supra* note 88, at 133–34 ("[T]he federal system, as well as several states following its lead, recently has reverted to a cognitive-only test, denying any defense for a control dysfunction. Our respondents would disagree with this change."); Bailis, D., Darley, J., Waxman, T., & Robinson, P. (1995). *Community Standards of Criminal Liability and the Insanity Defense*, L. & HUM. BEHAV. 19, 441–42 ("The rule that best describes the judgmental standards of our respondents is one that uses information about both cognitive and control dysfunction. This pattern suggests that formulations of insanity allowing both kinds of dysfunction are more in accord with community opinion than are those allowing only one. The ALI formulation allows both, and thus has some claim to community support, but the rule used by our respondents was more conservative than the ALI formulation: Our respondents were less likely to exculpate a defendant pleading insanity when only one of the two types of dysfunction was present.); Rebecca Helm, Stephen Ceci, Kayla Burd, *Unpacking Insanity Defence Standards: An Experimental Study of Rationality and Control Tests in Criminal Law*, EUR. J. PSYCHOL. APPLIED TO LEGAL CONTEXT (2016) (study finding that subjects excuse based on control and cognitive dysfunction "at roughly the same rates"—even when instructed to apply only the classic *McNaughten* standard).

95. See ROBINSON & DARLEY, *supra* note 88, at 132.

majority of subjects (66% to 92%, depending upon the facts of the case) imposed *no liability* in such cases, and even those who did impose liability significantly mitigated the punishment, even for a serious offense.<sup>96</sup> If lay intuitions of justice are taken as the yardstick for insanity defense law, then most current American variants are woefully wanting. Other studies confirm this conclusion.<sup>97</sup>

### B. *Three-Strikes and Other Habitual Offender Statutes*

In August 2020, national news outlets picked up a disturbing story of criminal sentencing run amok: “Black man serving life sentence for stealing hedge clippers getting shot at freedom.”<sup>98</sup> The story concerned a Louisiana man named Fair Wayne Bryant, who was convicted in 1997 of attempting to steal a pair of hedge-clippers, and was subsequently given a life sentence under Louisiana’s habitual offender laws.<sup>99</sup> In 2020, that sentence was upheld by the Louisiana Supreme Court.<sup>100</sup> Bryant’s previous felonies spanned decades, including attempted armed robbery in 1979, possession of stolen items in 1987, attempted forgery of a check in 1989, and burglary in 1992.<sup>101</sup> Cumulatively, these convictions made Bryant eligible for the life sentence imposed for the attempted theft—despite the fact that he had already served a ten year sentence at hard labor for his earlier robbery conviction.<sup>102</sup>

Dispositions like Bryant’s are hardly uncommon under America’s habitual offender sentencing regimes.<sup>103</sup> So-called “three-strikes” laws are the most well-known example of this phenomenon,<sup>104</sup> but it comes in many shapes and sizes. South Carolina, for example, has a “two-strikes” law, under which a defendant shall receive a mandatory life sentence if they commit two offenses from an enumerated list of “most serious” crimes.<sup>105</sup> In

96. *Id.* at 132 tbl.5.2 (illustrating respondents’ desires to impose civil commitment in cases involving serious offenses).

97. *Id.* at xvi.

98. Associated Press, *Black Man Serving Life Sentence for Stealing Hedge Clippers Getting Shot at Freedom*, CBS NEWS (Aug. 14, 2020, 4:54 AM), <https://www.cbsnews.com/news/fair-wayne-bryant-bernette-johnson-black-man-life-sentence-stealing-hedge-clippers-shot-at-freedom/> [<https://perma.cc/WY8W-JEDF>].

99. Kay Jones & Leah Asmelash, *Louisiana Supreme Court Upholds Black Man’s Life Sentence for Stealing Hedge Clippers More Than 20 Years Ago*, CNN (Aug. 6, 2020, 22:15), <https://edition.cnn.com/2020/08/06/us/louisiana-supreme-court-trnd/index.html> [<https://perma.cc/5VTJ-Y5S3>].

100. *Id.*

101. *State v. Bryant*, 2020-KO-00077, p. 1 (La. 7/31/20) (Johnson, C.J., dissenting).

102. *Id.* at 1–2.

103. *10 Reasons to Oppose “3 Strikes, You’re Out”*, ACLU, <https://www.aclu.org/other/10-reasons-oppose-3-strikes-youre-out> (last visited Jan. 16, 2022) [<https://perma.cc/8LMV-EYXP>].

104. *Id.*; see *Three Strikes Basics*, STANFORD L. SCH., <https://law.stanford.edu/three-strikes-project/three-strikes-basics/> (last visited Jan. 16, 2022) [<https://perma.cc/N9J3-PTVH>].

105. See S.C. CODE ANN. § 17-25-45 (2015) (Life sentence for person convicted for certain crimes).

California, a defendant risks a life sentence by committing three non-violent offenses involving drugs and minors.<sup>106</sup> We could list many more variants.<sup>107</sup> Every state (as well as the federal system<sup>108</sup>) holds out the possibility of a life sentence for habitual offenders.

Despite the popularity of habitual offender statutes with American legislators, these laws do not reflect community views.<sup>109</sup> The available studies suggest that people see subsequent offenses as being slightly more blameworthy than equivalent first-time offenses, but they do not support the extreme increases common in habitual offender statutes.<sup>110</sup> This result requires some excavation. For example, subjects given a survey in Ohio were asked whether they supported or opposed passing a “three strikes and you’re out” law in their jurisdiction.<sup>111</sup> Of all respondents, 88.4% answered that they would support such a measure.<sup>112</sup> The same set of subjects was then presented with a vignette, identified as a passage from a newspaper story, in which the story’s imaginary subject committed a serious felony after having committed two previous crimes in the state (the point being that under a three-strikes regime, the punishment would be life imprisonment).<sup>113</sup> Respondents were asked to assign an appropriate punishment on a scale ranging from “no punishment at all” to “life in prison, with no possibility of being released.”<sup>114</sup> Whereas true support for habitual-offender statutes would seem to predict a majority of answers in the “life in prison” range, only 16.9% of respondents gave this answer.<sup>115</sup> More tellingly, only 11.1% of those who chose a sentence of less than thirty years in prison (a group that includes 86.4% of all subjects) had answered that they opposed three-strikes legislation.<sup>116</sup> People’s true justice judgments simply did not match their reported views when asked in the abstract about this politically-charged policy.<sup>117</sup> Other studies report the same conflict between community judgments and three strikes statutes.<sup>118</sup>

---

106. CAL. HEALTH & SAFETY CODE § 11353 (West 2000).

107. See PAUL H. ROBINSON & TYLER SCOT WILLIAMS, MAPPING AMERICAN CRIMINAL LAW: VARIATIONS ACROSS THE 50 STATES 20–27 (2018) (listing jurisdictions that impose life sentences for habitual offenders).

108. 18 U.S.C. § 3559(c) (2006).

109. See ROBINSON & WILLIAMS, *supra* note 107, at 24–25.

110. *Id.*

111. Robinson, Goodwin & Reisig, *supra* note 56, at 1976.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1974–76.

118. See ROBINSON & DARLEY, *supra* note 88, at 189–97 (discussing theories and patterns of multiple-offense sentencing).

*C. Adult Prosecution of Juveniles*

By the close of the 1990s, all jurisdictions in the United States permitted juveniles to be transferred to criminal court and tried as adults.<sup>119</sup> Transfers can be accomplished by a discretionary, presumptive, or mandatory waiver of juvenile court jurisdiction, as well as by specific statutory criteria, and may be limited to specific offenses.<sup>120</sup> The lowest age for which transfer is allowed differs by jurisdiction. Some jurisdictions do not list any minimum age for transfer.<sup>121</sup> Others explicitly allow transfer as early as age ten.<sup>122</sup>

In recent years, however, one front in the broader movement to reduce the harshness of American criminal justice has focused on reforming juvenile prosecution procedures. So-called “raise the age” laws—which increase the maximum age for juvenile court jurisdiction—have been passed in many states and continue to be considered in others.<sup>123</sup> Some states have changed their laws regarding the minimum age for transfer to adult court, via “raise the floor” laws.<sup>124</sup> California, notably, has now ended the transfer of fourteen- and fifteen-year-olds into adult court, making sixteen the minimum age for criminal court jurisdiction.<sup>125</sup> Other states have explored various roll-backs of the pro-transfer laws of the 1990s.<sup>126</sup>

These reforms find support in lay intuitions of justice. The available studies suggest that people dramatically mitigate punishments for children, even for the most serious offenses.<sup>127</sup> In one study, a youth was described as committing the horrific offense of pouring gasoline on a sleeping companion and setting him on fire.<sup>128</sup> Although the offense generates high liability and punishment judgments when committed by an adult, it generated quite limited punishment when the offender was described as young: when

---

119. Robinson, Goodwin & Reisig, *supra* note 56, at 1953.

120. *Id.*

121. *Id.*

122. *Id.*

123. See JUST. POL’Y INST., RAISE THE AGE (EXEC. SUMMARY) 3 (2017), [http://www.justicepolicy.org/uploads/justicepolicy/documents/raisetheagesummary\\_final\\_3\\_6\\_16.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/raisetheagesummary_final_3_6_16.pdf) [<https://perma.cc/D7BT-G5E2>]; see also Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT’L CONF. STATE LEGISLATORS (Apr. 8, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx> [<https://perma.cc/N8KS-WJN8>].

124. See JEREE THOMAS, CAMPAIGN FOR YOUTH JUST., RAISING THE BAR: STATE TRENDS IN KEEPING YOUTH OUT OF ADULT COURTS (2015–2017) 41 (2017), [http://www.campaignforyouthjustice.org/images/A-StateTrends\\_Report-Web.pdf](http://www.campaignforyouthjustice.org/images/A-StateTrends_Report-Web.pdf) [<https://perma.cc/R5AB-NWP6>].

125. See Maureen Washburn, *California’s Latest Adult Transfer Law Models Pathways for Reform for Rest of U.S.*, JUV. JUST. INFO. EXCH. (Oct. 3, 2018), <https://jjie.org/2018/10/03/californias-latest-adult-transfer-law-models-pathways-for-reform-for-rest-of-u-s/> [<https://perma.cc/U8AQ-7K2A>].

126. See THOMAS, *supra* note 124, at 35–37.

127. Robinson, Goodwin & Reisig, *supra* note 56, at 1977.

128. *Id.*

the offender was described as fourteen years old, 23% of the subjects would impose no liability, and the average requested sentence was 5.4 years.<sup>129</sup> When the offender was described as ten years old, 47% of the subjects would impose no liability, and the average liability was 11 months.<sup>130</sup> Other studies report similar results.<sup>131</sup> In sum, public attitudes towards juvenile criminal offenders are in fact consistent with, not a departure from, attitudes about juveniles in other contexts—in which their relative lack of capacity is accepted as a given.

#### D. Felony Murder

The traditional felony-murder doctrine punishes as murder all deaths caused in the course of a felony—no matter how accidental the killing—and applies such murder liability to both the principal and to all accomplices in the underlying felony.<sup>132</sup> The most popular version of the rule, used by forty jurisdictions, allows only inherently dangerous felonies (such as arson or drug trafficking) to trigger the rule's use.<sup>133</sup> Ten jurisdictions

---

129. *Id.*

130. *Id.*

131. *See id.* at 1977–78; *see also* Loretta J. Stalans & Gary T. Henry, *Societal Views of Justice for Adolescents Accused of Murder*, 18 L. & HUM. BEHAV. 675, 692 (1994); Sheryl Pimlott Kubiak & Terrence Allen, *Public Opinion Regarding Juvenile Life Without Parole in Consecutive Statewide Surveys*, 57 CRIME & DELINQ. 495, 509 (2011).

132. *See* ROBINSON & DARLEY, *supra* note 88, at 169.

133. 18 U.S.C. § 1111(a); ALA. CODE § 13a-6-2(a)(3) (2020); ALASKA STAT. § 11.41.110(a)(3) (2020); ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (2021); CAL. PENAL CODE § 189(a), (e)(3) (West 2020); COLO. REV. STAT. ANN. § 18-3-102(1)(b) (West 2021); CONN. GEN. STAT. ANN. § 53(a)-54(c) (West 2021); D.C. CODE § 22-2101 (2021); FLA. STAT. ANN. § 782.04 (West 2021); IDAHO CODE ANN. § 18-4003(d) (West 2021); 720 ILL. COMP. STAT. ANN. 5/9-1(a)(3) (West 2020); IND. CODE ANN. § 35-42-1-2, 3 (West 2021); IOWA CODE § 707.2(1)(b) (2021); KAN. STAT. ANN. § 21-3401(b) (2020); LA. STAT. ANN. § 14:30(A)(1) (2021); ME. REV. STAT. ANN. tit. 17-A, § 202(1) (West 2020); MD. CODE ANN., CRIM. LAW § 2-201(a)(4) (LexisNexis 2021); MASS. ANN. LAWS ch. 265, § 1 (LexisNexis 2020); MICH. COMP. LAWS ANN. § 750.316(1)(b) (West 2021); MINN. STAT. ANN. § 609.185(a)(2)–(3) (West 2020); MONT. CODE ANN. § 45-5-102(1)(b) (2021); NEB. REV. STAT. § 28-303(2) (2021); NEV. REV. STAT. § 200.030(1)(b) (2020); N.H. REV. STAT. ANN. § 630:1-(b)(I)(b) (2020); N.J. STAT. ANN. § 2c:11-3(a)(3) (West 2021); N.Y. PENAL LAW § 125.25(3) (Consol.2020); N.C. GEN. STAT. ANN. § 14-17(a) (West 2020); N.D. CENT. CODE § 12.1-16-01(1)(c) (2020); OHIO REV. CODE ANN. § 2903.01(B) (West 2021); OKLA. STAT. ANN. tit. 21, § 701.7(B) (West 2020); OR. REV. STAT. § 163.115(1)(b) (2020); 11 R.I. GEN. LAWS § 11-23-1 (2021); S.D. CODIFIED LAWS § 22-16-4 (2021); TENN. CODE ANN. § 39-13-202(a)(2) (2021); UTAH CODE ANN. § 76-5-203(2)(d) (LexisNexis 2021); VT. STAT. ANN. tit. 13, § 2301 (2020); VA. CODE ANN. § 18.2-32 (2021); W. VA. CODE ANN. § 61-2-1 (2021); WIS. STAT. ANN. § 940.03 (West 2020); WYO. STAT. ANN. § 6-2-101(a) (2021).

allow the commission of any felony to be used.<sup>134</sup> Two jurisdictions have abolished the felony murder rule.<sup>135</sup>

The available empirical evidence suggests that lay intuitions of justice do not support either the aggravation of culpability or the complicity aspects of the felony murder rule.<sup>136</sup> In one study, for example, subjects aggravated culpability for an accidental killing during a felony, but only to the level of manslaughter, not murder.<sup>137</sup> The accomplice in the felony is punished at an even lower level than manslaughter,<sup>138</sup> reflecting a common tendency of people to discount the liability of accomplices even though the legal doctrine typically treats the two as having identical liability.<sup>139</sup> Other studies have come to similar conclusions.<sup>140</sup>

### E. *Strict Liability Offenses*

It is now common for even serious offenses, like statutory rape, to be treated as strict liability offenses.<sup>141</sup> Under such a regime, a culpable state of mind need not be proven with respect to a sexual partner's age.<sup>142</sup> Most jurisdictions reject even a reasonable mistake as to age as a defense to statutory rape.<sup>143</sup> While other serious offenses, such as driving under the influence, can be ones of strict liability,<sup>144</sup> the bulk of strict liability offenses are

134. ARK. CODE ANN. § 5-10-102(a)(1) (2021); DEL. CODE ANN. tit. 11, § 636(a)(2) (2021); GA. CODE ANN. § 16-5-1(c) (2021); MISS. CODE ANN. § 97-3-19(1)(c) (2021); MO. REV. STAT. § 565.021.1(2) (2021); N.M. STAT. ANN. § 30-2-1-(A)(2) (2020); 18 PA. CONS. STAT. § 2502(b) (2021); S.C. CODE ANN. § 16-3-20(C)(a)(1) (2020); TEX. PENAL CODE ANN. § 19.02(b)(3) (West 2021); WASH. REV. CODE ANN. § 9a.32.050(1)(b) (2021).

135. HAW. REV. STAT. § 707-701 (1996); KY. REV. STAT. ANN. § 507.020 (LexisNexis 2021).

136. ROBINSON & DARLEY, *supra* note 88, at 179–80.

137. *See id.* at 176.

138. *Id.* at 180 (“[W]hile the [felony murder] doctrine treats the accomplice exactly like a murderer, the subjects impose liability somewhat less than they would for manslaughter.”).

139. *Id.* at 36 tbl.2.9, 208–10 (dichotomous-continuous discussion).

140. *See* Norman J. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L. REV. 819, 876 (1990).

141. Robinson, Goodwin & Reisig, *supra* note 56, at 1956.

142. *Id.*

143. *See* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 385–91 (2003) (categorizing each state's approach as among true crime, strict liability, and hybrid, with majority employing strict liability). For states that employ a strict liability approach, see, for example, FLA. STAT. ANN. § 794.021 (2021), N.J. STAT. ANN. § 2C:14-5(c) (West 2021), and WIS. STAT. § 939.43(2) (2021). For states that allow for a mistake defense, see, for example, IND. CODE ANN. § 35-42-4-3(d) (2021), MO. REV. STAT. § 566.020(2) (2021), and W. VA. CODE § 61-8B-12(a) (2021). The federal approach is a hybrid, with strict liability only for sexual contact with children under the age of twelve. 18 U.S.C. § 2241(d).

144. *See* Leocal v. Ashcroft, 543 U.S. 1, 8 n.5 (2004) (listing states where driving under the influence is treated as strict liability offense).

more minor, such as “public welfare offenses;”<sup>145</sup> speeding and other vehicular offenses; and liquor, narcotics, and food regulation infractions. “A few state courts have invalidated the use of strict liability for offenses that impose significant prison sentences or create an unreasonable expectation of knowledge in the offender.”<sup>146</sup> The Model Penal Code attempts to restrict the use of strict liability to “violations” rather than crimes,<sup>147</sup> although it too imposes strict liability for the serious felony of aggravated statutory rape.<sup>148</sup>

Available research suggests that people generally do not impose criminal liability in the absence of some level of offender culpability.<sup>149</sup> For example, in one study, offenders who made reasonable mistakes about whether a sexual partner was underage were given no punishment by 88% of the subjects, with substantial mitigation of punishment by those few subjects who imposed any.<sup>150</sup>

#### F. Drug Offense Penalties

Although they are traditionally governed by state law, in recent decades drug-related crimes have increasingly come under federal jurisdiction.<sup>151</sup> In an attempt to increase deterrent effects, federal sentencing for drug crimes has become quite harsh.<sup>152</sup> The average federal sentence for drug-related crimes in 2005 was 85.7 months.<sup>153</sup> If marijuana-related crimes are ignored, that average rises to 98.9 months.<sup>154</sup> As a point of comparison, the average federal sentence for all violent crimes is 95.2 months.<sup>155</sup> Homicide has an average sentence of 118.3 months—less than

---

145. See, e.g., *Morissette v. United States*, 342 U.S. 246, 255 (1952) (comparing nature of “public welfare offenses,” which involve neglect or inaction with regard to duty of care, to accepted classifications of common law offenses, which involve “positive aggressions or invasions”).

146. ROBINSON, *supra* note 58, at 119.

147. MODEL PENAL CODE § 2.05 (AM. L. INST. 1962).

148. MODEL PENAL CODE § 213.6(1) (AM. L. INST. 1962).

149. See ROBINSON & DARLEY, *supra* note 88, at 89 tbl.4.1 (showing respondents’ negligible imposition of punishment in light of negligent mistake).

150. *Id.*

151. See, e.g., Edward L. Glaeser, Daniel P. Kessler & Anne Morrison Piehl, *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 259–60 (2000) (stating that since 1970s, Congress has expanded federal jurisdiction over drug crimes, and noting that “virtually any drug crime can now be prosecuted federally.”).

152. The U.S. Sentencing Guidelines suggest 0 to 6 months for possession, and 0 months up to a maximum of 293 months for possession with intent to manufacture, import, export, or traffic. See U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(c), 2D2.1(a) (2006).

153. All sentencing statistics are taken from: ADMIN. OFFICE OF U.S. COURTS, JUD. BUS. OF U.S. COURTS, 2005 ANNUAL REPORT OF THE DIRECTOR 249 (2006), <http://www.albany.edu/sourcebook/pdf/t5252005.pdf> [https://perma.cc/MP8U-6YVT].

154. *Id.*

155. *Id.*

20% higher than the average sentence for nonmarijuana drug offenses.<sup>156</sup> Harsher federal penalties mean that an ever-increasing number of cases which could be brought in state courts are being prosecuted in federal court.<sup>157</sup>

The available empirical evidence suggests that, while many people see drug offenses as serious, they typically are not viewed as being nearly as blameworthy as current sentences would suggest. In one study, subjects ranked the offense of marijuana possession as a rather minor offense, comparable to, at most, a minor theft.<sup>158</sup> Possession of cocaine was deemed a bit more serious but still only about as blameworthy as a slightly more serious theft.<sup>159</sup> A conviction for dealing cocaine was seen as being considerably more blameworthy—more akin to breaking into a car or robbery.<sup>160</sup> Importing cocaine was seen as more serious still, similar in seriousness to burglary or assault.<sup>161</sup> Other studies come to similar conclusions.<sup>162</sup>

### G. Other Conflict Points

Here then are several common and highly visible criminal law rules which the evidence shows conflict with community justice judgments. This is hardly a comprehensive list of such code-community conflict points. Empirical research has shown similar conflicts for many other criminal law doctrines, including, for example, grading complicity equal to the principle offense,<sup>163</sup> imputing recklessness to the voluntarily intoxicated,<sup>164</sup> forbidding individualization of the reasonable person standard,<sup>165</sup> forbidding a

---

156. *Id.*

157. See Glaeser, Kessler & Piehl, *supra* note 151, at 260 (noting that expansion of federal jurisdiction and harsher federal penalties could implicate deterrence and equity considerations).

158. Compare Robinson & Kurzban, *supra* note 81, at 1885 tbl.6 (illustrating mean rank R of 7.4 assigned to marijuana possession in Study 3), and *id.* at 1888 tbl.8 (illustrating mean rank of 2.2 assigned to marijuana possession in Study 4), with *id.* at 1869 tbl.1 (showing mean rank of 6.8 assigned to short-changing in Study 1), and *id.* at 1876 tbl.3 (showing no offense with mean rank comparable to 2.2 in Study 2).

159. *Id.* at 1885.

160. *Id.*

161. *Id.* Note that the subjects in the study with the larger, more demographically diverse subject pool (Study 2) treated these four drug offenses as significantly less serious than those in the smaller, more narrow pool of Study 1. Compare the mean rankings found in Table 6 (Study 3), with those of Table 8 (Study 4), which suggests that the text here may overstate the seriousness with which the population generally sees drug offenses. *Id.* at 1885–88.

162. See, e.g., U.S. SENTENCING COMM'N, NAT'L SAMPLE SURV.: PUB. OP. ON SENTENCING FED. CRIMES (1997), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/19970314-public-opinion-on-sentencing/JP\\_CH3.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/19970314-public-opinion-on-sentencing/JP_CH3.pdf) [<https://perma.cc/TK3E-CJP2>].

163. ROBINSON, *supra* note 58, at 263–64.

164. *Id.* at 335.

165. ROBINSON & DARLEY, *supra* note 88, at 123.

legal ignorance defense,<sup>166</sup> refusing to recognize a broad lesser-evils defense,<sup>167</sup> the use of the substantial step test for attempt liability,<sup>168</sup> and treating proximate cause and self-defense in all-or-nothing terms, rather than along graded continuums.<sup>169</sup> Many other examples are possible.<sup>170</sup>

#### IV. WHY DO LEGISLATURES ADOPT CRIMINAL LAW RULES THAT CONFLICT WITH COMMUNITY JUSTICE JUDGMENTS?

In Part III, we examined several examples of conflict points in contemporary criminal law, that is, laws that are in tension with the normative intuitions of the lay public. We demonstrated exactly how out-of-step with lay intuitions these common doctrines are. We are now in a position to begin examining the question of why legislators in democratic polities (at both the state and federal levels) consistently pass laws which contradict the deep and consistent judgments of their constituents. It seems a genuinely puzzling situation. One might naturally conclude that the harshness of rules like “three strikes” reflects the harshness of the American people.<sup>171</sup> Yet, the social science research laid out above shows that such rules seriously conflict with community judgments.<sup>172</sup>

Below, we offer four explanations for why conflict point laws exist. To summarize the four explanations: First, legislators are often simply mistaken about what their constituents believe. It is common for conflict point laws to be justified on the basis of public support that, on closer inspection, is a mirage. Politicians are not wholly to blame for these mistakes, as their perception of public feeling is subject to various media and polling distortion effects through which that feeling is filtered and manipulated.<sup>173</sup>

---

166. Adam Alter, Julia Kernochan & John Darley, *Morality Influences How People Apply the Ignorance of the Law Defense*, 41 L. & SOC. REV. 819, 846 (2007).

167. Paul Robinson & John Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095, 1131 (1998).

168. ROBINSON, *supra* note 58, at 253.

169. Erich Green & John Darley, *Effects of Necessary, Sufficient, and Indirect Causation on Judgments of Criminal Liability*, 22 L. & HUM. BEHAV. 429, 447 (1998); ROBINSON, *supra* note 58, at 281–82.

170. See, e.g., ROBINSON, *supra* note 58, at 356–58; *id.* at 273 (omission liability); *id.* at 489–90 (mistake as to justification).

171. See, e.g., James Q. Whitman, *What Happened to Tocqueville’s America?*, 74 SOC. RSCH. 251, 256 (2007).

172. See *supra* notes 163–70.

173. This point can be connected to larger critiques about the reliability of polling as a means of divining public opinion. See, e.g., Joseph C. Sternberg, *The Polls Are Dead, Long Live Politics*, WALL ST. J. (Nov. 19, 2020, 1:07 PM), <https://www.wsj.com/articles/the-polls-are-dead-long-live-politics-11605809242?page=1> [<https://perma.cc/2UAQ-S6A6>]; Costas Panagopoulos & Kyle Endres, *Which 2020 Election Polls Were Most—and Least—Accurate?*, WASH. POST, (Nov. 25, 2020, 7:45 AM), <https://www.washingtonpost.com/politics/2020/11/25/which-2020-election-polls-were-most-least-accurate/>

Second, legislators are often responding to pressure from special interest groups.<sup>174</sup> These groups—ranging from agribusiness to recording companies—successfully lobby for conflict point laws which benefit their constituencies, often at the expense of doing justice as the broader community perceives it. The clearest examples include direct industry protections, such as laws attaching unique criminal penalties to theft of milk crates.<sup>175</sup>

Third, legislatures often prioritize coercive crime-control, typically general deterrence or incapacitation of the dangerous, at the expense of doing justice.<sup>176</sup> Individual legislators may not be conscious of this prioritization; that is, they likely do not contemplate the tensions of trading justice against crime control as an academic might. But regardless of what is in the minds of the actors, legislation is often grounded in coercive crime-control rationales which generate results in conflict with the public's normative judgments.<sup>177</sup>

Fourth, legislatures often adopt overbroad criminal law rules which, in practice, delegate criminalization decisions to judges and prosecutors.<sup>178</sup> The result is rules of sufficient breadth such that they may not directly command injustice, but they sanction enough discretion for other actors that doing injustice can easily result. Laws which lump conduct of radically different seriousness within the same offense grade,<sup>179</sup> for example, leave it to judges to make ad hoc calls on a defendant's deserved punishment. And, inevitably, different judges will make different judgments on similar cases, thereby introducing not only arbitrariness and unjustified disparity, but also dispositions that will conflict with community views.<sup>180</sup>

A few caveats are in order before we dive into these conflict-point explanations. To begin with, conflict-point laws, like any other piece of legislation, usually have multiple forces which drive their passage, with no

---

[<https://perma.cc/AVW5-9YJ5>] (discussing recent failures of the polls to predict the behavior of the American electorate and potential explanations).

174. Kleinfeld, *supra* note 14, at 1468.

175. *See, e.g.*, VA. CODE ANN. § 18.2–102.2 (West 1990); N.C. GEN. STAT. ANN. § 14–72.4 (West 1994).

176. Kleinfeld, *supra* note 14, at 1485.

177. *See* Robinson, *supra* note 19, at 1595.

178. *Cf.* 18 PA. STAT. AND CONS. STAT. ANN. § 2903(b) (West 2012) (leaving discretion to judges and prosecutors to determine the extremity of a kidnapping).

179. *See, e.g., id.* (false imprisonment of a minor).

180. Although judges are themselves members of the community (as are legislators), their professional training and experience may distort their ability to access the intuitive judgments most of the population automatically generate. *See* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility* 47 WAKE FOREST L. REV. 211, 244–45 (2012).

---

---

single causal analysis producing a complete picture.<sup>181</sup> For the laws examined below, we do not claim to provide the final and complete accounting of the legislative motivations at work—this is not a work of legal history. Rather, we seek to identify what are, at least, *important* reasons why legislatures choose to pass laws in tension with community views. There are clearly many reasons why the California legislature passed a Three Strikes law in 1994, including unique party and electoral dynamics active at the time;<sup>182</sup> but there is sufficient evidence of legislative mistake about the public’s judgment that this error can at least be called a substantial factor explaining why the law got through.<sup>183</sup>

Further, we do not claim that the explanations offered below are exhaustive. This essay is not meant as a complete taxonomy of criminal law-making behavior. Rather, our explanations represent an initial attempt to delineate the most significant causes of legislative misfire. We maintain that the identification of causes offered here is sufficiently complete that helpful proposals for reform based on them can be suggested in Part V. In the future, the identification of more detailed causal stories can form the basis for further reform proposals.

#### A. *Legislative Mistake*

Here, we consider several prominent examples of legislative mistake, modern criminal law enactments that were explicitly justified by proponents on the ground of popular support but that are in tension with popular intuitions of justice: insanity defense abolition, three strikes, and trying juveniles as adults.<sup>184</sup> We then consider some of the potential structural reasons why legislators consistently make such errors.

---

181. Indeed, many of the laws we examine below, such as extreme penalties for drug offenses, could easily recur between different explanation sections, highlighting different angles of their history and rationale. Partly for presentation reasons, we seek to have a limited range of unique, illustrative examples under each explanation heading, with a law’s placement determined by which factor seemed most predominant or clear from its history or objective purpose (excepting Three Strikes). Again, we do not claim to provide the final or definitive analysis of any specific criminal law, and this is not an article on legal history.

182. *See generally* FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY (2001).

183. Likewise, there is evidence that the Kansas legislature chose to abolish the insanity defense on the ground that doing so would prioritize crime control. *See Kahler v. Kansas*, 140 S. Ct. 1021, 1050 (2020). This explanation, however, seems to the authors subsidiary to the role played by the legislative mistake about public views on the defense.

184. We are willing to assume a certain amount of legislative sincerity in their appeals to popular support. Although it is conceivable that many legislators use these appeals reflexively, as mere rhetorical moves, it is also the case that self-interested legislators need to care at least to some degree about what their constituents believe and support.

*Insanity Defense Narrowing or Abolition.* The driving force behind Kansas' abolition of the insanity defense was the legislature's perception that the public demanded it.<sup>185</sup> The Petitioner's Brief in *Kahler* made exactly this point in detailing the legislative history, stating that "public fear and frustration about crime" prompted legislators to narrow the insanity defense.<sup>186</sup> The apparent public enmity for the defense at the time was focused on two contemporaneous Kansas cases in which the defendants had committed deadly shootings and then had been quickly acquitted on the basis of insanity.<sup>187</sup> Indeed, the legislature heard powerful testimony from the mother of one of the victims, who attacked the state's insanity regime.<sup>188</sup> These trials were local instantiations of a broader public "outcry" initially prompted by the acquittal of John Hinckley, Jr. for the attempted assassination of President Reagan,<sup>189</sup> with Kansas' legislature choosing to go further along the abolitionist path than the U.S. Congress would ultimately proceed.<sup>190</sup>

Raymond Spring, the architect and key proponent of the "mens rea approach" Kansas ultimately adopted,<sup>191</sup> has also argued that the legislature was responding to perceived public pressure to reform the insanity defense.<sup>192</sup> He believes that the Kansas legislature's repeated attempts to narrow the defense made "clear that the Legislature was seeking to be responsive in a responsible way to public anxiety," the legislators were "[r]esponding to public concerns generated by a few highly visible cases," and ultimate enactment of his proposal ensured that "public concerns have

---

185. Brief for Petitioner at 2, *Kahler v. Kansas*, 140 S. Ct. 1021 (2019) (No. 18-6135).

186. See *id.* (citing contemporary newspaper articles, including one with the memorable title of "Getting [t]ough on the [m]entally [i]ll").

187. See *id.* Both men were immediately committed after their acquittals. Montana is an interesting contrast. Abolition of the defense occurred there in 1979, before Hinckley or the national 'movement' against the defense. There were no other comparable local and sensational cases to focus the legislature's attention. See Andrew King-Ries, *Arbitrary and Godlike Determinations: Insanity, Neuroscience, and Social Control in Montana*, 76 MONT. L. REV. 281, 281, 291 (2015); Rita D. Buitendorp, *A Statutory Lesson from "Big Sky Country" on Abolishing the Insanity Defense*, 30 VAL. U. L. REV. 965, 965-66 (1996).

188. See Brief for Lynn Denton, et. al. as Amici Curiae Supporting Respondent at 9, *Kahler v. Kansas*, 140 S. Ct. 1021 (2019) (No. 18-6135).

189. See ASSOC. PRESS, *Hinkley Acquittal Brings Moves to Change Insanity Defense*, N.Y. TIMES (June 24, 1988), <https://www.nytimes.com/1982/06/24/us/hinkley-acquittal-brings-moves-to-change-insanity-defense.html> [<https://perma.cc/DA3W-FHHE>] (phone polling at the time showed 76% of respondents felt that "justice had not been done" in the case).

190. See Insanity Defense Reform Act of 1984 § 20, 18 U.S.C. § 17 (modifying federal insanity defense law by, *inter alia*, placing the burden of proof on the defendant).

191. See Brief for Respondent at 32, *Kahler v. Kansas*, 140 S. Ct. 1021 (2019) (No. 18-6135) (calling Spring "the leading advocate for the mens rea approach in Kansas" who "ultimately played a key role in convincing the Kansas Legislature to adopt it.").

192. Raymond L. Spring, *Farewell to Insanity: A Return to Mens Rea*, 66 J. KAN. BAR ASS'N 38, 44-45 (1997).

been addressed.”<sup>193</sup> Other, independent commentators on the law’s passage have agreed with Spring’s analysis, with one stating that the Kansas legislature acted “to soothe public concerns and gain popularity” and “[t]he public’s negative perception of the insanity defense is a major reason why the Kansas Legislature abolished [it].”<sup>194</sup> These conclusions are borne out by examples from the legislative history, with one proponent of the abolition bill (Rep. Elaine Wells) declaring that “the public outcry continues to mount of the injustice that occurs whenever another insanity defense is used.”<sup>195</sup>

Congresspeople like Rep. Wells seemingly had evidence to back up their claims of public outcry. In the wake of the Hinckley acquittal, one contemporary phone poll concluded that 74% of respondents believed “justice had not been done” in the case.<sup>196</sup> Other polls produced similar results.<sup>197</sup> As we have discussed, however, there are substantial problems with relying on top-line poll results of this sort in gauging the public’s true views about criminal justice issues.<sup>198</sup>

Moreover, it is a mistake to confuse transient public views about a particular insanity plea with deeply ingrained community judgments about the blameworthiness of insane offenders generally. The public likely believed (based on very incomplete and distorted information) that Hinckley *himself* did not qualify as blamelessly insane. Yet, the United States Congress fell into this trap. Even the drafters of the Insanity Defense Reform Act of 1984 explicitly recognized that much perceived public “disapproval” of the insanity defense only existed because people were misled into believing “myths” about the defense (*e.g.*, its frequency of success, the likelihood of effective malingering, etc.).<sup>199</sup> According to M.L. Perlin, this amounted to a concession that “[C]ongress must assuage sentiment it knows to be false” if those myths seem to “undermine[] public faith in the criminal justice system.”<sup>200</sup> To us, this shows the full extent to which mistaken perceptions of public disapproval have influenced legislative action in the insanity defense context. Congress believed so strongly that the then-extant version of the federal insanity defense undermined public faith in the justice system that they were willing to act on the basis of known

---

193. *Id.*

194. Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL’Y 253, 253, 255 (1998).

195. Joint Appendix at 293, *Kahler v. Kansas* 140 S. Ct. 1021 (2019) (No. 18-6135).

196. ASSOC. PRESS, *supra* note 189.

197. *Cf.* Valerie P. Hans & Dan Slater, *John Hinckley, Jr. and the Insanity Defense: The Public’s Verdict*, 47 PUB. OP. Q. 202, 203 (1983).

198. *See infra* pp. 518–21 (discussing distortion effects).

199. Daniel J. Nusbaum, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of “Abolishing” the Insanity Defense*, 87 CORNELL L. REV. 1509, 1512–13 n.9 (2002).

200. *Id.* at 1512–14 n.9.

falsehoods.<sup>201</sup> All this to assuage a non-existent popular judgment that the insanity defense ought to be narrowed or eliminated.

*Three Strikes and Other Habitual Offender Statutes.* The recent history of American habitual offender laws presents a similar story of legislators motivated by mistaken perceptions of public views. As we explained in Part III, ordinary people do see repeat offenses as being somewhat more blameworthy than comparable first-time offenses.<sup>202</sup> This enhancement effect, however, is negligible when compared to the extreme sentencing differentials doled out under contemporary law.<sup>203</sup> Yet, analysis of legislative history and other evidence suggests that mistaken perceptions of public support for habitual offender laws has, at least since the 1990s, played a prominent role in getting such laws passed.<sup>204</sup>

Consider the California case, where a variant of Three Strikes was made law in the wake of the tragic and highly publicized murders of Polly Klass and Kimber Reynolds—two young girls killed by men with extensive criminal histories.<sup>205</sup> The new law imposed life imprisonment for anyone convicted of three “serious felonies”—a category broad enough to include burglary and drug possession—and included a five year sentence enhancement after their second conviction.<sup>206</sup> California’s Three Strikes law was far and away the most significant in the United States when judged by the number of defendants who have been sentenced under it.<sup>207</sup>

Contemporary evidence makes clear that perceived public support played an important role in the legislature’s (and governor’s) decision to support Three Strikes.<sup>208</sup> Indeed, then-Assembly Speaker Willie Brown stated that there was so much public pressure in favor of the bill that it was being passed without sufficient consideration: “This is a representative body. And [legislators] believe they are representing the will of their constituency.”<sup>209</sup> Brown stated that he himself was unable to catalyze a better dialogue and instead “got out of the way of this train because I am a

---

201. *Id.*

202. *See supra* Section III.B.

203. *See supra* Section III.B.

204. *See, e.g.,* Jerry Gillam, *Crime: Lawmakers, Including Himself, are Bowing to Intense Pressure, Speaker Says*, L.A. TIMES (Mar. 2, 1994, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1994-03-02-mn-28983-story.html> [<https://perma.cc/Z8TB-NXZC>].

205. *See* David Schultz, *No Joy in Mudville Tonight: The Impact of “Three Strike” Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL’Y 557, 568–71 (2000); *see also* PAUL H. ROBINSON & SARAH M. ROBINSON, CRIMES THAT CHANGED OUR WORLD: TRAGEDY, OUTRAGE, AND REFORM 265–78 (2018).

206. Schultz, *supra* note 205, at 558, 570.

207. *See generally* ZIMRING ET. AL., *supra* note 182.

208. Gillam, *supra* note 204.

209. *Id.*

realist.”<sup>210</sup> Legislative sensitivity to perceived voter opinion was heightened at the time as the campaign for three-strikes played out against the backdrop of an election year in California.<sup>211</sup>

Willie Brown was not the only California politician to come around to reluctantly supporting Three Strikes despite personal misgivings. Senator Leroy Green, for example, expressed similar sentiments: “I’m going to vote for these turkeys [the five three strikes measures] because my constituents want me to.”<sup>212</sup> Commentators have since picked up on this evidence and consistently concluded that perceived public fervor was critical to the enactment of California’s Three Strikes law.<sup>213</sup> Some of these same writers make the mistake of concluding this perception of public support was accurate, that the people of California (and other states) truly had abandoned any commitment to proportionality in sentencing.<sup>214</sup> This conclusion could not be more wrong, as demonstrated by the empirical studies revealing that the public does not in fact hold the views attributed to them.<sup>215</sup>

*Juvenile Offender Laws.* In a recent work on juvenile justice, Gideon Yaffe deploys a common-sense argument: “Kids who commit crimes are less culpable than adults. Kids who commit crimes are deserving of lesser sanctions than adults. And it is because of these facts that we are warranted in adopting policies under which kids who commit crimes are treated more leniently than adults who commit crimes.”<sup>216</sup> As we saw in Part III, this conclusion is in harmony with popular judgments of justice as revealed by social scientific research.<sup>217</sup> Yet, in the contemporary United States, the prosecution of juveniles in adult court—and resultant exposure to adult sentences—is commonplace.<sup>218</sup> Every jurisdiction in the country permits transfer to adult court under some circumstances, sometimes with no minimum statutory age, or, in two cases, with a minimum age of only ten years; until recently New York state placed certain offenders over the age of

---

210. Michael Vitiello, *Three Strikes: Can We Return to Rationality*, 87 J. CRIM. L. & CRIMINOLOGY 395, 416 n.113 (1997).

211. *See generally id.*

212. *Id.* at 416 n.113.

213. *See supra* notes 206–11. Note, however, the recent changes to the law mitigating some of its harshness. Lorelei Laird, *California Begins to Release Prisoners After Reforming Its Three-Strikes Law*, A.B.A. J. (Dec. 1, 2013, 10:00 AM), [https://www.abajournal.com/magazine/article/california\\_begins\\_to\\_release\\_prisoners\\_after\\_reforming\\_its\\_three-strikes\\_la](https://www.abajournal.com/magazine/article/california_begins_to_release_prisoners_after_reforming_its_three-strikes_la) [<https://perma.cc/55XW-UHA6>].

214. *See supra* Section III.B.

215. *See supra* Section III.B.

216. GIDEON YAFFE, *THE AGE OF CULPABILITY* 158 (Oxford Univ. Press 2018).

217. *See supra* Section III.C.

218. *See* Robinson, Goodwin & Reisig, *supra* note 56, at 1953.

fifteen into adult court by default (a practice which continues in North Carolina).<sup>219</sup>

The common law generally treated juvenile offenders similarly to adults, with a special set of presumptions operating in felony prosecutions.<sup>220</sup> But one should not imagine that harsh transfer laws are a simple holdover from the common law era. Rather, the current state of juvenile justice is the result of a long evolution away from the common law, which began in the late nineteenth century, and reached its zenith as a result of statutory changes of the 1980s and 90s.<sup>221</sup> Between 1992 and 1997, for example, laws in forty-five states were passed making it easier to transfer juveniles into adult court.<sup>222</sup> Our position is that much of this shift towards harsher treatment of juveniles can be explained by legislative error in perceiving popular support for such measures.

Consider the case of Pennsylvania's Act 33, made law in March of 1996.<sup>223</sup> The Act made several changes to juvenile justice in Pennsylvania, the flavor of which can be gathered from the amendment of the "purpose" clause to include, as goals: to "provide balanced attention to the *protection of the community* [and] the *imposition of accountability* for offenses committed . . . ."<sup>224</sup> The new approach emphasizing punishment and crime control included an expansion of the statutory exclusion list (those charges which will automatically place a juvenile defendant fourteen or older in the adult system) and the addition of several new factors to be considered by juvenile courts in discretionary waiver proceedings, including "the threat

---

219. *Id.*; see also Nicole Scialabba, *Should Juveniles Be Charged as Adults in the Criminal Justice System?*, AM. BAR ASS'N (Oct. 3, 2016), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/should-juveniles-be-charged-as-adults> [https://perma.cc/3QQT-9YW5]; *Raise The Age (RTA)*, N.Y. STATE UNIFIED CT. SYS. (Dec. 23, 2019), <https://www.nycourts.gov/CourtHelp/Criminal/RTA.shtml> [https://perma.cc/6529-DYDD]; *Juveniles Tried as Adults*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (Jan. 22, 2020), [https://www.ojjdp.gov/ojstatbb/structure\\_process/qa04105.asp](https://www.ojjdp.gov/ojstatbb/structure_process/qa04105.asp) [https://perma.cc/ZQU8-SR6G]. For extensive analysis of the history and varieties of juvenile justice in the United States, see generally MARGARET K. ROSENHEIM, FRANKLIN E. ZIMRING, DAVID S. TANENHAUS & BERNADINE DOHRN, *A CENTURY OF JUVENILE JUSTICE* (Univ. of Chi. Press 2002).

220. One under seven was conclusively presumed incapable of committing the crime, this presumption was rebuttable between the ages of seven and fourteen, and that no presumption in favor of the accused would operate over fourteen. See *Allen v. United States*, 150 U.S. 551, 558 (1893); see also RICHARD LAWRENCE & CRAIG HEMMENS, *JUVENILE JUSTICE 21* (Jerry Westby, Elise Smith, Diane Foster, Kristin Bergstad, eds., SAGE Publ'ns, Inc., 2008).

221. See LAWRENCE & HEMMENS, *supra* note 220, at 24–33.

222. *Id.* at 33.

223. Anthony R. Holtzman, *Juvenile Justice? The Increased Propensity for Juvenile Transfer to the Criminal Court System in Pennsylvania and the Need for a Revised Approach to Juvenile Offenders*, 109 PENN. ST. L. REV. 657, 669 (2004).

224. 42 PA. CONS. STAT. § 6301(b)(2) (emphasis added).

to the safety of the public or any individual posed by the juvenile” and “the degree of the juvenile’s culpability.”<sup>225</sup>

Act 33 reflected poll results indicating mass public support for trying juveniles fourteen and older accused of violent crimes as adults.<sup>226</sup> State politicians who supported Act 33 apparently believed such national results accurately reflected the attitude of their own constituents and acted accordingly.<sup>227</sup> Senator Fisher, for example, one of the co-sponsors and a principal proponent of the Act, stated during legislative deliberations that “when you look at the perceptions of the general public across Pennsylvania, people are fed up with violent crime, and they are particularly fed up with violent crime that has been committed and continues to be committed in this Commonwealth by juveniles.”<sup>228</sup> According to Fisher, the Act would be responsive to this public attitude:

It is a sensible step that is going to say to the people of Pennsylvania who are tired of being held up, who are tired of being robbed by young juveniles who are committing crimes and getting off like other juveniles, it is a sensible step that is going to say that that is going to end.<sup>229</sup>

Fisher described his perception of public demands:

I believe that is what the people of Pennsylvania have been telling us . . . [i]f they are convicted, they are going to be sentenced to a long period of time in jail, just as an adult offender would. I believe this is an appropriate step. I believe it is a step that the people of Pennsylvania have asked us to take, and I urge approval of Senate Bill No. 100 as it is before the Senate today from colleagues on both sides of the aisle.<sup>230</sup>

Juvenile justice is also the backdrop for a new trend in conflict point legislation: laws that depart from community views by showing too much leniency to offenders. Most of the conflict laws examined in this article buck public judgment in the opposite direction, by imposing too much punishment on habitual offenders, or punishing insane persons whom the public would hold blameless. Some new proposals, however, keep conflict

---

225. See Holtzman, *supra* note 223, at 671.

226. U.S. DEP’T OF JUST., BUREAU OF JUST. STATS., SOURCEBOOK OF CRIMINAL STATISTICS 2003, at 143 tbl.2.48 (Ann L. Pastore & Kathleen Maguire, eds., 2005), <https://www.ojp.gov/pdffiles1/Digitization/208756NCJRS.pdf> [ <https://perma.cc/A4MM-L994>].

227. S. 179-41, 1st Special Sess., at 227 (Pa. 1995).

228. See *id.*

229. *Id.* at 228. Also noting the “checks and balances” in the bill that could potentially check transfer to adult court in inappropriate cases; so that’s crime-control tradeoff right there; because they must recognize that the law as written is going to result in injustices and they want a release valve on it.

230. S. 179-57, 1st Special Sess., at 305 (Pa. 1995).

alive through overcorrection.<sup>231</sup> For example, Vermont legislators in 2016 passed a law allowing offenders up to age twenty to be tried in the juvenile system.<sup>232</sup> Similar proposals have appeared in Massachusetts, Connecticut, New York, and Illinois, but thus far have had little success.<sup>233</sup> New proposals continue to appear.<sup>234</sup> A more extreme version of this idea has recently been considered in the Colorado legislature; the bill there would permit defendants as old as twenty-five to potentially be placed under the jurisdiction of the juvenile justice system.<sup>235</sup> While Part III laid out in brief that community views support leniency for true juvenile offenders (as the public perceives the category), the same research reveals that the public does not give comparable culpability discounts to a twenty-year old offender as it does to a twelve or fifteen-year-old.<sup>236</sup> Scott, et. al.'s research reveals that a majority of American adults believe the minimum age for adult criminal prosecution generally should be about sixteen.<sup>237</sup> The study results also suggest that public judgment does not agree with raise-the-age advocate's argument that twenty-year-olds have comparable psychosocial maturity and culpability levels to fifteen-year-olds.<sup>238</sup>

*Distortion Effects.* Why do legislators make these errors about public judgment? Or, put another way: how do *we* resolve the apparent conflict between the social science and the popular opinion polls? We have seen this disjunction repeatedly, in the context of the insanity defense, three strikes laws, etc., that is, of a lenient public as revealed by social science, versus a ravenous public revealed by opinion polling and politicians' rhetoric. While this disjunct is not the primary focus of the present article,

---

231. See, e.g., Aidan Ryan, *Crime Bill Would Redefine Juveniles as Up to Age 21*, BOS. GLOBE (July 10, 2019, 1:14 AM), <https://www.bostonglobe.com/metro/2019/07/09/crime-bill-would-redefine-juveniles-age/maHshbBT6QaaX9ooVDVidN/story.html> [<https://perma.cc/C7XB-5DR7>].

232. *Id.*

233. *Id.*

234. See, e.g., S. 889 2019–2020 Reg. Sess. (Cal. 2020) (CA bill that would raise the age of juvenile jurisdiction to 19).

235. Michael Karlik, *Legislative Committee Advances Criminal Justice Reform Package*, COLO. POL. (Jan. 12, 2020), [https://www.coloradopolitics.com/news/legislative-committee-advances-criminal-justice-reform-package/article\\_ad49744a-fb77-11e9-bd07-43c207545f11.html](https://www.coloradopolitics.com/news/legislative-committee-advances-criminal-justice-reform-package/article_ad49744a-fb77-11e9-bd07-43c207545f11.html) [<https://perma.cc/23CE-TBWZ>].

236. Elizabeth S. Scott, N. Dickon Ruppaci, Jill Ontonishak & Jennifer T. DeGennaro, *Public Attitudes About the Culpability and Punishment of Young Offenders* (Colum. L. Sch. Pub. L. & Legal Theory Working Paper Grp., Paper No. 07-135, 2006).

237. *Id.* at 16.

238. *Id.* at 34. For the raise-the-age argument see Deborah Becker, *Why Vermont Raised Its Juvenile Court Age Above 18—And Why Mass. Might, Too*, WBUR NEWS (Oct. 3, 2019), <https://www.wbur.org/news/2019/10/03/juvenile-court-age-vermont-massachusetts> [<https://perma.cc/YP3Y-E35T>] (“For 18 and 19 year olds, they’re actually not that different from their 16- and 17-[year-old] counterparts. We know that, generally, emerging adults grow out of impulsive behavior.”).

sufficient groundwork has been laid elsewhere that we can sketch out an analysis that will help contextualize our argument.<sup>239</sup>

To begin with, most opinion polls are blunt instruments. Politicians who claim public backing for harsh measures against criminals are apt to cite the bluntest surveys of all: those that ask brief, binary questions, especially about hot policy issues (e.g., ‘Do you support the death penalty?’ or ‘Do you support Three Strikes?’).<sup>240</sup> By contrast, a social scientific study can present subjects with a variety of subtly different scenarios and then prompt the person to grade the scenarios by perceived blameworthiness, thus producing much more nuanced results, results that reveal a more lenient public than is often assumed.<sup>241</sup> The more punitive results of the simpler surveys can be explained by considering how lay people answer general questions about crime: by reference to paradigm cases.<sup>242</sup> When a citizen thinks about the appropriate sentence for a crime, she likely calls to mind a prototype or exemplar of the crime, which causes a systematic distortion because the prototype is usually the most clear, unqualified case.<sup>243</sup> For example, when asked about capital punishment, most citizens would think about deliberate murder, and not the cases that would require qualifying descriptions.<sup>244</sup> In other words, when thinking of murder cases, the citizen does not automatically consider mercy killings or killings done under provocation. Such distortions of the content of specific offenses occur for other crimes besides murder as well.<sup>245</sup> The dynamic is exacerbated by the fact that news coverage presents a misleading perspective of the frequency with which such dramatic crimes occur. In one analysis, 25% of media crime stories were about murder, yet murder is involved in a fraction of 1% of crimes.<sup>246</sup>

Further, when the media reports on particular crimes, they are apt to present an incomplete—and thus misleading—portrait of the events examined.<sup>247</sup> This distortion may lead citizens to conclude that a criminal has been sentenced too leniently, simply because the media did not report on

---

239. For a much more thorough analysis of these issues, see Robinson, Goodwin & Reisig, *supra* note 56, at 1981–94. See also Sara Sun Beale, *What’s Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 31 (1997).

240. See Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 6–7 (2000).

241. See, e.g., Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1838 (2007).

242. See Robinson, Goodwin & Reisig, *supra* note 56, at 1989.

243. *Id.* at 1987.

244. See Cullen et al., *supra* note 240, at 10–18.

245. See *id.* at 16–17.

246. Julian V. Roberts & Anthony N. Doob, *News Media Influences on Public Views of Sentencing*, 14 L. & HUM. BEHAV. 451, 452 (1990).

247. See *id.*

the facts which were considered in mitigation. At least one study supports this hypothesis. Julian V. Roberts and Anthony N. Doob examined how the public would perceive sentences if they had a different source of case accounts.<sup>248</sup> These researchers derived their own ‘court records’ account of a reported ‘newspaper’ case from the official courtroom records, creating a summary from actual quotes from the proceedings (or by paraphrasing actual documents).<sup>249</sup> Importantly, the summary included much information which is generally not found in news reports—including the offender’s previous convictions, a brief description of the offense, the defense’s and prosecution’s arguments regarding sentencing for the offender, a summary of the presentence reports, and the final comments offered by the judge.<sup>250</sup> Presenting two subject groups with either the ‘court documents’ account, or the ‘newspaper’ account created a clear disjunction: the former group were much more likely to conclude that the appropriate sentence had been imposed, whereas the latter group substantially more often thought it too lenient.<sup>251</sup>

Moreover, the media’s presentation of general crime issues is colored by the fact that the government is commonly the source for the information reported.<sup>252</sup> Katherine Beckett has connected this fact to the possibility the public does not cause politicians to focus on harshening criminal punishment but the reverse: that politicians gin up public concern about crime as an electoral strategy.<sup>253</sup> This hypothesis receives support from the lack of clear relationship between the crime rate and expressed public concern about crime.<sup>254</sup> Consider that in June 1993, only 7% of respondents in a national poll identified crime as the nation’s most important problem; by August 1994, this percentage had increased to 52%.<sup>255</sup> Amazingly, this increase contradicted the crime trends at the time, which showed a decrease over that period.<sup>256</sup> President Clinton’s January 1994 State of the Union address, however, spent significant time addressing the ‘crime problem’ in the country,<sup>257</sup> and—most importantly—one of the country’s landmark crime-control bills, the Violent Crime Control and Law Enforcement Act of 1994, was debated in Congress and passed that year. There is little doubt

---

248. *Id.* at 460–61.

249. *Id.* at 461.

250. *Id.*

251. *Id.* at 462–63.

252. KATHERINE BECKETT, *MAKING CRIME PAY* 65 (Oxford Univ. Press 1997).

253. *Id.* at 73.

254. *Id.* at 21.

255. *Id.* at 25.

256. *Id.*

257. William J. Clinton, U.S. President, Address Before a Joint Session of the Congress on the State of the Union (Jan. 25, 1994), <https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-the-state-the-union-12> [<https://perma.cc/QJ6H-RXG5>].

that these political events contributed significantly to the rise in public concern over crime policy that occurred between 1993 and 1994.

None of these factors is definitive; this short exegesis is far from exhaustive. But we have endeavored to give the reader at least a hint of why we are so confident in the social science results, despite their tension with conventional wisdom and the results of many opinion surveys.

*Fostering Ignorance.* In the next section, we will consider the role that special interest group pressure plays in creating laws that conflict with community views. By way of transition, we note that interest group lobbying intersects with legislative mistake; that is, interest groups may actively promote the legislators' ignorance about true public judgment.

First, notice who testifies at congressional hearings on criminal justice topics. Lisa Miller conducted research on witnesses at congressional hearings on crime for the period between 1947 and 1998.<sup>258</sup> She concluded, on the basis of outsized representation, that "federal, state, and local criminal justice bureaucrats have come to occupy a central role in the process of defining policy alternatives."<sup>259</sup> Significantly, this dominance comes at the expense of community and victim groups, as well as average citizens: "a mobilization of citizen/community groups [as a lobbying force] seems never to have materialized. The virtual absence of community groups is striking, particularly as national legislators refer to public support for punishment to justify lengthy sentences and increased spending on the criminal justice system."<sup>260</sup> This practice limits the range of viewpoints to which legislators are exposed.

Second, consider the ability of criminal justice bureaucrats to represent the views of the public. It is likely drowned out by their incentive to pursue the parochial interests of their respective institutions and by their unique professional experiences.<sup>261</sup> One of us has argued that:

[T]he viewpoints of police, prosecutors, and judges are shaded and shaped by their professional training and experience. Put differently, what technocrats perceive to be fair and just is not necessarily what laypersons perceive to be fair and just. Criminal-justice functionaries may simply be too institutionalized to tap and assess their own intuitions as means to effectively decipher prevailing lay beliefs.<sup>262</sup>

---

258. See generally Lisa L. Miller, *Rethinking Bureaucrats in the National Policy Process: Criminal Justice Agents and the National Crime Agenda*, 32 POL'Y STUD. J. 569 (2004).

259. *Id.* at 569.

260. *Id.* at 582 (citing BECKETT, *supra* note 252). Social science researchers on community justice judgments are never called as witnesses at legislative hearings, as far as we know.

261. See Bowers & Robinson, *supra* note 180, at 263.

262. *Id.*

The upshot is that legislators are, again, less likely to be exposed to lay intuitions of justice, at least in the context of congressional hearings.<sup>263</sup>

This situation is especially precarious from an empirical desert standpoint because the legislature may be misled into thinking the bureaucrat's judgment can be treated as a proxy for the lay one.<sup>264</sup> Stuntz has argued that Congress assumes a demand by federal prosecutors will have "immediate credibility with the public—more credibility than it deserves" because of mistaken beliefs about the relation between state and federal prosecution.<sup>265</sup> As a result, Congress acts like it will be seen publicly as soft-on-crime if it spurns federal prosecutors' demands, even when those demands are out-of-step with actual public priorities and views.<sup>266</sup> Effectively, the prosecutor's judgment may come to be seen by the legislator—mistakenly—as an expression of the community judgment.

### B. Interest Group Pressure

It has long been taken as a given that interest group dynamics explain much legislative behavior. Since the 1970s, public choice theory has provided a powerful and influential analysis of politicians as self-interested actors who generally seek to maximize their chances of re-election.<sup>267</sup> In other words, when we elect a legislator, we have not created a saint who will consistently work for the public good; we have instead positioned a personally ambitious person into a seat in the legislature from which he will keep a keen eye on his own personal interests.<sup>268</sup>

The legislator faces the need to raise money for increasingly expensive re-election campaigns and to take legislative stands which will attract voter support in later elections. Thus, one priority of the incumbent is to cast votes that do the bidding of various interest groups. The interest groups' response is to "pay off" the legislator for a favorable vote. The payoffs can be campaign contributions, votes which the interest group can mobilize for the candidate, implicit promises of future campaign contributions, or sometimes—a current favorite—a promise of a lobbying position

---

263. If bureaucrats have become too institutionalized to tap common intuitive judgment, then a similar effect may well operate on legislators, who consistently approach criminal justice matters from a standpoint radically differing from that of the average lay person.

264. See Bowers & Robinson, *supra* note 180, at 239.

265. William J. Stuntz, *Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 544–45 (2001).

266. *Id.* at 545 ("Congress is likely to give great weight to the demands of federal prosecutors, even though those demands may not advance goals the public cares about.")

267. See BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 193–95 (2006) ("The primary objective of politicians is to ensure their own reelection.")

268. *Id.* at 194.

in the interest group organization or in lobbying firms that the interest group controls after the politician leaves office.<sup>269</sup>

In the context of criminal law, this legislative incentive structure has given rise to a panoply of criminal code provisions which sacrifice doing justice in the service of interest group lobbying demands.<sup>270</sup> We discuss several examples below. In some cases, we present specific evidence of the lobbying group's efforts to create the law in question, while in others the linkage is, frankly, self-evident.

*Industry Protections.* This may well be the most voluminous category of conflict laws, that is, those which enhance or create criminal sanctions in order to protect an industry group's economic interests. These laws can conflict with community judgments in two ways: first, by criminalizing conduct which the public views as basically non-criminal; and second, by singling out behavior which is already criminalized for sentencing enhancement, solely on the ground that it harms a particular industry.<sup>271</sup> The latter treatment is usually achieved by creating a redundant offense provision, which can then be charge-stacked with the more generic offense (*e.g.*, criminal mischief and agricultural vandalism in Pennsylvania).<sup>272</sup>

Start with an example drawn from the first category: illegal music copying/sharing, *i.e.*, piracy. This conduct is treated as a felony at the federal level,<sup>273</sup> and many states have comparable classifications.<sup>274</sup> But it seems unlikely that these criminal provisions reflect democratic will, given that:

46% of all Americans and 70% of Americans aged 18-29 have illegally copied or downloaded videos or music; only 52% of all Americans and 37% of Americans aged 18-29 support criminal penalties for such copying or downloading; and only 12% of all Americans think such copying or downloading should be punishable with imprisonment.<sup>275</sup>

---

269. *Id.* at 193-94.

270. *See id.*

271. *Id.* at 204.

272. *See, e.g.*, 18 PA. STAT. AND CONS. STAT. § 3304 (West 2006); 18 PA. STAT. AND CONS. STAT. § 3309 (West 2001).

273. *See* 17 U.S.C. § 506; 18 U.S.C. § 2319 (describing penalties as harsh as ten years for a repeat offender).

274. *See, e.g.*, 18 PA. STAT. AND CONS. STAT. § 4116 (West 2017); N.J. STAT. ANN. § 2C:21 (West 2004). For a fifty-state survey *see* Alexander Lindey & Michael Landau, *Lindey on Entertainment, Publishing and the Arts* § 9:67 (3rd ed. 2021).

275. *See* Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1554 (citing JOE KARAGANIS & LENNART RENKEMA, AM. ASSEMBLY, COLUMBIA UNIV., COPY CULTURE IN THE US & GERMANY 30-31, 40-41 (2013), <http://piracy.americanassembly.org/wp-content/uploads/2013/01/Copy-Culture.pdf> [<https://perma.cc/L6TM-6KR7>]).

At a minimum then, we can say there is a strong consensus that the copyright laws are unduly harsh by the lights of the American public. This fact can be demonstrated by taking a particular state as a case study. In Pennsylvania, the offense of CD duplication is graded as a first-degree misdemeanor, punishable by a maximum sentence of five years imprisonment.<sup>276</sup> But according to a study of Pennsylvania residents, the people of the Commonwealth view CD duplication as equivalent to a mere summary offense.<sup>277</sup> The obvious reason for the draconian offense grading here is legislative “susceptibility to the influence of moneyed lobbyists.”<sup>278</sup> The recording (and film and software) industries see piracy as a threat to their bottom-line, so they exert their influence to get criminal measures passed to deter the behavior. Legislators comply despite the conflict with community views, deferring instead to the interest group’s power. Legislators may also count on prosecutorial discretion to ensure that only the most serious copyright law violators are criminally sanctioned.<sup>279</sup>

Or take an example from our second category: the unauthorized use of milk crates.<sup>280</sup> In North Carolina, for example, anyone who “[t]akes, buys, sells or disposes of any dairy milk case or milk crate, bearing the name or label of the owner, without the express or implied consent of the owner or his designated agent” has committed a Class 2 misdemeanor, punishable by up to thirty days imprisonment for a first offense.<sup>281</sup> This law is redundant, as larceny and possessing and receiving stolen goods are already codified offenses in North Carolina.<sup>282</sup> The situation in Pennsylvania is similar, but the law sweeps more broadly and punishes more harshly, doling out as much as ninety days imprisonment to the criminal milk-crate-user.<sup>283</sup> We assume that community judgment would not divine a morally-salient difference in offender blameworthiness between a milk-crate thief (or mere unlawful user) and one who steals or misappropriates any generic movable property of comparable value.<sup>284</sup> And yet the state codes

---

276. 18 PA. STAT. AND CONS. STAT. § 4116 (West 2017).

277. Paul H. Robinson, Thomas Gaeta, Matthew Majarian, & Megan Schultz, *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709, 719 (2010).

278. See Kleinfeld, *supra* note 276, at 1554 (citing LAWRENCE LISSIG, LESTERLAND: THE CORRUPTION OF CONGRESS AND HOW TO END IT (2013) (ebook)).

279. See *infra* Section IV.D.

280. Examples of such laws can be found in many state criminal codes. See, e.g., Annotation, *Sales or Use Tax Upon Containers or Packaging Materials Purchased by Manufacturer or Processor for use with Goods he Distributes*, 4 A.L.R.4th 581 (1981).

281. N.C. GEN. STAT. ANN. § 14-72.4 (West 1994); N.C. GEN. STAT. ANN. § 15A-1340.23 (West 2013).

282. See N.C. GEN. STAT. ANN. § 14-72 (West 1989).

283. See 18 PA. STAT. AND CONS. STAT. § 6712 (West 1987).

284. Anyone who has spent any length of time in an urban area knows that milk crates are commonly used as cargo attachments by bikers.

consistently single out milk crates for special punishment. The reason for this conflict is industry lobbying; the dairy industry apparently takes milk crate theft very seriously and expends substantial capital to ensure such laws are passed to protect its interests.<sup>285</sup>

Examples like the above could spill on for pages. Legislatures are clearly open to attempts by industry to use criminal code drafting to obtain unique protections for their parochial interests.

### C. *Prioritizing Coercive Crime Control*

Much modern criminal law represents an explicit legislative decision to prioritize crime control over doing justice. The main crime control philosophies which became dominant over legislative thinking in the late twentieth century are general deterrence and incapacitation of the dangerous.<sup>286</sup> Three Strikes, harsh drug penalties, adherence to the traditional felony-murder doctrine and other strict liability offenses all represent victories for these consequentialist goals. Such victories come at the expense of justice as conceived by the public, a result which has not only deontological costs, but also the consequentialist crime control cost of undermining the law's moral credibility and thereby its crime-control effectiveness, as discussed in Section II.B.2.<sup>287</sup>

In Part III, we demonstrated that each of these coercive of crime-control doctrines is in tension with public normative judgment as revealed by social science. Now, our objective will be to show that the legislative motivation in the enactment of such conflict doctrines is largely grounded in coercive crime-control rationales.

Thus far, we have assumed some legislative good faith, that when a legislator declared her constituents supported a bill, she really (though mistakenly) believed that assertion. Here, we will remain agnostic as to whether legislators backing coercive crime-control laws understood they were spitting on the blameworthiness-proportionality thinking so dear to

---

285. Andrew Jenner, *Why It's Illegal to Use Milk Crates for Anything Besides Milk*, MODERN FARMER (Aug. 28, 2013), <https://modernfarmer.com/2013/08/illegal-use-milk-crates-anything-besides-milk/> [https://perma.cc/F7QZ-H9CQ]. In 2019 alone the dairy industry expended nearly 8 million dollars in lobbying costs nationwide. *Dairy: Lobbying 2021*, OPEN SECRETS, <https://www.opensecrets.org/industries/lobbying.php?ind=A04++> (last visited Jan. 17, 2022) [https://perma.cc/3E7Y-7XL8].

286. See generally Roberto Galbiati & Francesco Drago, *Deterrent Effect of Imprisonment*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 1023–30 (Gerben Bruinsma & David Weisburd eds., 2014); FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAIN OF CRIME* 14 (Michael Tonry & Norval Morris eds., 1995) (arguing that incapacitation has had a much stronger policy influence than general deterrence).

287. See *supra* Section II.B.2. That is, these popular crime-control doctrines meant to maximize deterrence and incapacitation—"coercive crime control"—seriously undermine the "normative crime control" which comes with maximizing the criminal law's moral credibility.

the public. We do not know whether individual legislators consciously made a self-serving judgment that the political fallout from rising crime rates was more dangerous to their electoral future than subjecting citizens to unjust criminal punishments. It is possible few thought about their actions in terms of an explicit “trade-off,” despite how clear the academic origins of their arguments are on this point.<sup>288</sup> A student of the philosophy of punishment will quickly find herself frustrated by how rudimentary most political analysis of punishment problems is (despite how many legislators are lawyers).<sup>289</sup> In any case, the upshot for our present analysis is that their subjective beliefs are irrelevant; what matters is that, objectively speaking, they have chosen to pass many laws that prioritize coercive crime control to the detriment of justice.

*Three Strikes.* In the late twentieth century, a belief took hold in legal academic and political circles that incapacitating a relatively small number of offenders could produce large crime control gains.<sup>290</sup> Some estimated that

“as few as 5 percent of all offenders may account for over half of all robberies and other violent crimes for gain.” This research suggested that in many cases simple incarceration for a longer period of time of some habitual criminals would reduce the number of crimes.<sup>291</sup>

Powerful evidence for this position seemed to come from the famed Philadelphia birth cohort study, analyses of which held out the possibility of decreasing serious crimes by as much as 35% via incapacitation of select, repeat offenders.<sup>292</sup> In the early 1990s, this approach was highlighted by the perception of rising crime rates and general belief that rehabilitation had failed as a penal philosophy.<sup>293</sup> The stage was set for a new generation of harsh habitual offender laws, most notably three strikes and its variants.

Neither the consequentialist justifications for three strikes nor its frequent conflict with community views are difficult to demonstrate. As for the conflict, we laid the evidence out in Part III, showing that ordinary people do not support dramatic enhancement of criminal punishment based on

---

288. See Schultz, *supra* note 205, at 567.

289. See, e.g., David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1297 n.69 (1995) (congressional determination of drug offense penalties was completely arbitrary); Smita Ghosh, *Congressional Administration During the Crack Wars: A Study of the Sentencing Commission*, 23 U. PA. J. L. & SOC. CHANGE 119, 144–46 (2020) (describing congressional reaction to sentencing commission proposal to lower mandatory crack sentencing guidelines).

290. Schultz, *supra* note 205, at 567.

291. *Id.* (quoting Lawrence W. Sherman, *Patrol Strategies for Police*, CRIME & PUB. POL’Y 145, 160 (James Q. Wilson ed. 1983)).

292. See Hilde Wermink, Robert Apel, Arjan A. J. Blokland & Paul Nieuwebeerta, *Crime Preventative Effects of Incapacitation*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE, *supra* note 286, at 736.

293. Schultz, *supra* note 205, at 567, 567 n.87.

offense history. The public still believes in blameworthiness proportionality, despite the long-standing academic critiques of the concept.<sup>294</sup>

Further, the evidence shows that coercive crime control reasoning was an important factor in legislative decisions to enact such laws. As early as 1975, the logic of incapacitation was sounded from the highest levels of government, with President Gerald Ford declaring that “[t]he crime rate will go down if persons who habitually commit most of the predatory crimes are kept in prison for a reasonable period . . . because they will not then be free to commit more crimes.”<sup>295</sup> In California, the legislature had apparently come to similar conclusions years before three strikes even became law. Frank Zimring has detailed how the state created a Blue Ribbon Commission to study the problem of prison overcrowding, declaring in the authorizing statute that: “It is the intent of the Legislature that *public safety shall be the overriding concern* in examining methods of . . . heading off runaway inmate population levels,” and “*Public safety shall be the primary consideration* on all conclusions and recommendations.”<sup>296</sup> The meaning of “public safety” in this context turns out to be coercive crime-control.

The dominance of this logic in California would continue into the three strikes era. When he signed three strikes into law, Governor Wilson argued that “I’m convinced that if we are sending clear messages to career criminals, we will begin to see them reform their conduct” and that keeping prisoners behind bars would prevent them from committing crimes.<sup>297</sup> Other California lawmakers echoed a cold, coercive crime-control logic. Assemblyman Curt Pringle, for example, stated “[i]t’s proven that repeat offenders cost society much more than it costs to incarcerate them. We will not have repeat trials; we will not have to re-convict people who will be in prison all the longer.”<sup>298</sup> Key proponent Assemblyman Richard K. Rainey also made clear that the sole purpose of three strikes was future crime control: “We are only talking about the most violent people in society [to be placed within the law’s ambit]—the people we have not been able to turn around and who have proven they are going to continue to commit violent

---

294. See, e.g., Edmund L. Pincoffs, *Are Questions of Desert Decidable?*, in JUSTICE AND PUNISHMENT 75–88 (J.B. Cederblom & William L. Blizek, eds., 1977).

295. ZIMRING & HAWKINS, *supra* note 287, at 18 (quoting President Gerald Ford).

296. *Id.* at 16 (quoting the Blue Ribbon Commission).

297. See Daniel M. Weintraub, ‘3 Strikes’ Law Goes Into Effect, L.A. TIMES (Mar. 8, 1994, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1994-03-08-la-me-threestrikes-wilson-samuel-timeline-story.html#:~:text=Brushing%20aside%20criticisms%20of%20its,felons%20behind%20bars%20for%20life> [<https://perma.cc/8L6Z-E4AW>] (quoting then California Governor Pete Wilson).

298. *Id.* (quoting Assemblyman Curt Pringle); see also Dan Lungren, *Our Tough Law Works*, USA TODAY (Feb. 24, 1997), at A10; Pete Wilson, ‘Three Strikes’ Law Truly Makes California Safer, L.A. DAILY NEWS (Mar. 9, 1997), at V3.

crimes.”<sup>299</sup> Even years after the passage of three strikes, the justifications emanating from the state government would remain strictly consequentialist.<sup>300</sup>

Missing from all these justifications is any recognition of the tension between such extreme coercive crime control measures and basic principles of blameworthiness proportionality—principles we can be certain from the empirical research are held by the community.<sup>301</sup>

*Felony Murder/Strict Liability.* The Model Penal Code effectively did away with the traditional felony murder doctrine.<sup>302</sup> Its proposal has proven one of the less successful of the MPC’s reforms, with most states continuing to codify (in various versions) something closer to traditional felony murder.<sup>303</sup> This situation continues despite the conflict between these criminal provisions and public judgment.<sup>304</sup> Evidence from legislative history suggests that here too, legislatures maintain traditional felony murder doctrines on strictly consequentialist rationales.<sup>305</sup> Whereas three strikes justification centers on incapacitation, here general deterrence is primary.

299. Dan Morain, *Lawmakers Jump on ‘3 Strikes’ Bandwagon: Crime: Several Bills that Would Put Habitual Criminals in Prison for Good Gain Support in the Legislature. Also, an Initiative Drive Is Winning Signatures. But Some District Attorneys Are Skeptical of Its Impact*, L.A. TIMES (Jan. 31, 1994, 12:00 AM) <https://www.latimes.com/archives/la-xpm-1994-01-31-mn-17349-story.html> [<https://perma.cc/C73L-RJ9M>] (quoting Assemblyman Richard K. Rainey).

300. See Cal. Legis. Analyst’s Off., *The Three Strikes and You’re Out Law*, (Feb. 22, 1995), [https://lao.ca.gov/analysis\\_1995/3strikes.html](https://lao.ca.gov/analysis_1995/3strikes.html) [<https://perma.cc/WWN8-VZS4>]; 1998 CAL. ATT’Y GEN. REP.

301. See Schultz, *supra* note 205, at 558.

302. It defines murder as follows:

Section 210.2. Murder.

(1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

MODEL PENAL CODE § 210.2 (AM. L. INST., Official Draft 1962). Notice that the last sentence of subsection (1)(b) seems to provide something like a felony-murder rule: it allows the recklessness and indifference that would constitute murder under subsection (1)(b) to be presumed under felony-murder-like conditions. However, the practical effect of this apparent presumption is vitiated by MPC section 1.12(5)(b), which defines the effect of presumptions in such a way as to render them of little practical effect. The jury is still instructed that they must find the recklessness and extreme indifference required for murder beyond a reasonable doubt.

303. See ROBINSON & WILLIAMS, *supra* note 107, at 54.

304. See *supra* Part III.

305. See Martin Lijtmaer, *The Felony Murder Rule in Illinois: The Injustice of the Proximate Cause Theory Explored via Research in Cognitive Psychology*, 98 J. CRIM. L. & CRIMINOLOGY 621, 626 (2008).

For example, consider the New Jersey code, which contains a very broad felony murder provision.<sup>306</sup> It treats felony murder as a strict liability offense and extends liability to deaths caused by non-participants in the underlying crime.<sup>307</sup> It then provides a narrow affirmative defense.<sup>308</sup>

New Jersey undertook to recodify its criminal law in the 1970s, and based its new code primarily on the MPC's reforms.<sup>309</sup> In the initial draft of the new code, the drafters resolved to adopt the MPC's approach to felony murder and "[b]eyond this, we submit that the felony-murder doctrine, as a basis for establishing the criminality of homicide, should be abandoned."<sup>310</sup> The draft floated, as an alternative, the New York approach: retaining felony murder, but with a limited affirmative defense.<sup>311</sup> Ultimately, it was this latter proposal that was adopted, with the commission declaring in their official commentary that felony murder was being retained on general deterrence grounds:

The rationale is that if potential felons realize that they will be culpable as murderers for a death that occurs during the commission of a felony, they will be less likely to commit the felony. From this perspective, the

---

306. It is codified at N.J. REV. STAT. § 2C:11-3 (2021):

Murder.

a. Except as provided in N.J.S.2C:11-4, criminal homicide constitutes murder when . . . .

(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping, carjacking, criminal escape or terrorism . . . . and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants.

307. *Id.*

308. The only safety valve to the New Jersey felony murder offense is an affirmative defense:

Except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

*Id.*

309. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 *NEW CRIM. L. REV.* 319, 326 (2007).

310. *State v. Martin*, 573 A.2d 1359, 1369 (N.J. 1990) (citation omitted).

311. *Id.* at 1369–70.

imposition of strict liability without regard to the intent to kill serves to deter the commission of serious crimes.<sup>312</sup>

As we pointed out above, the New Jersey provision is cribbed from New York’s felony murder law, and several other states (*e.g.*, Connecticut, Maine, Washington) have comparable provisions.<sup>313</sup> The defense shows the legislature (in picking up the Commission’s proposal and reasoning) engaged in a conscious trade-off between general deterrence and doing justice.<sup>314</sup> The affirmative defense only exists because of recognition that a traditional felony murder rule is likely to sweep too broadly.<sup>315</sup> It is an *ex-post* attempt to reduce the number of unjust felony murder convictions, while maintaining the full deterrent force of the doctrine.<sup>316</sup> In New Jersey, this point is especially poignant, in that the arguments for the injustice of felony murder were explicitly made and initially adopted by the Code Reform Commission.<sup>317</sup>

Other serious criminal code provisions resemble this felony murder variant in operating as strict liability offenses.<sup>318</sup> They are similarly justified on general deterrence grounds, in an obvious tradeoff with doing justice. For example, New Jersey carries its own felony murder rationale over into a closely related doctrine: strict liability for drug induced deaths.<sup>319</sup> In the Drug Reform Act of 1987, the state legislature declared “that any person who manufactures, distributes, or dispenses a controlled dangerous substance ‘is strictly liable for a death which results from the injection, inhalation or ingestion of that substance . . . .’”<sup>320</sup>

312. *Id.* at 1368 (citing N.J. REV. STAT. § 2C:11-3 cmt. (2021)). NJ is far from the only state to be so explicit about their rationale. If anything Alabama’s official code commentary is even more direct, arguing that makes clear that felony murder liability is justified despite being a “departure from a subjective test of criminal liability” (in other words, of actual moral blameworthiness!) by the need for the “protection of the public” from offenders who have demonstrated their dangerousness by the commission of offenses including burglary, escape, and robbery. ALA. CODE § 13A-6-2 cmt. (2021).

313. *See* CONN. GEN. STAT. § 53a-54c (2021); 17-A; ME. STAT. tit. 17-A, § 202 (2021); WASH. REV. CODE. § 9A.32.030 (2021).

314. *Cf.* *People v. Miller*, 297 N.E.2d 85, 87 (N.Y. 1973). The point of the list of enumerated offenses is to impose potential for felony murder liability only as to felonies whose uniquely dangerous character make deterrence more important. Limiting of the list by the legislature was in recognition that in many crimes death would be so unforeseeable that felony murder liability should not be imposed.

315. *See* ALA. CODE § 13A-6-2 cmt. (2021).

316. *See id.*

317. *See e.g.*, Heather Young Keagle, *Manual on New Jersey Sentencing Law*, APP. DIV., N.J. SUP. CT. (Sept. 8, 2021), <https://www.njcourts.gov/attorneys/assets/attysources/manualsentencinglaw.pdf> [<https://perma.cc/TS2W-9FQS>].

318. Of course, not all states have strict liability forms of felony murder. *See* ROBINSON & WILLIAMS, *supra* note 107, at 53–63.

319. Comprehensive Drug Reform Act of 1987, N.J. STAT. ANN. §§ 2C:35-1 to :35-23 (West 2021).

320. *State v. Martin*, 573 A.2d 1359, 1372 (N.J. 1990). (quoting N.J. STAT. ANN. § 2C:35-9a). Michigan has a comparable provision. MICH. COMP. LAWS ANN. § 750.317a (West 2021). *See generally* DRUG

Thus, despite some recognition by legislatures of the tension between felony murder (and other strict liability offenses) and blameworthiness proportionality, they have consistently failed to grasp the full extent of the conflict between the laws they endorse, and the views of the public as revealed by the empirics.

*Drug Offense Penalties.* America's modern federal sentencing regime for drug offenses came into being in the 1980s and early 1990s, in an atmosphere of "frenzied" paranoia about the threat that drugs and drug-dealing posed to the country.<sup>321</sup> In the lead-up to the passage of the Anti-Drug Abuse Act of 1986—which instituted new mandatory minimum punishments for certain drug crimes—Senator Hawkins exemplified the hysterical tone of the times: "Drugs pose a clear and present danger to America's national security."<sup>322</sup> Other legislators echoed this militarist and alarmist theme. Senator Chiles, for example, characterized drugs as "insidious invaders" and a "form of terrorism," and described drug dealers as "people, who, while they may claim American citizenship, are nothing more than mercenaries without either country or conscience."<sup>323</sup> Representative Wright stated that "[i]t is time to declare an all-out war, to mobilize our forces . . . in a total coordinated assault upon this menace . . ."<sup>324</sup> Given this framing of the drug problem in terms of 'menace and 'danger,' it should be unsurprising that here too legislative justifications for harsh laws prioritized coercive crime control over doing justice.

Examples of this justification can be found in the history of the Anti-Drug Abuse Act—which famously instituted a 100:1 sentencing disparity between crack and powder-form cocaine.<sup>325</sup> Senator Leahy, who served on the task force that drafted the Act, announced that: "A major part of this bill involves deterrence. . . . These [new] penalties are appropriately aimed at the drug kingpins. They will deter any would-be trafficker who is capable

---

POL'Y ALL., AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE (2017), [https://www.drugpolicy.org/sites/default/files/dpa\\_drug\\_induced\\_homicide\\_report\\_0.pdf](https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf) [<https://perma.cc/EC3Y-X4P9>]; Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L. J. 285, 322 n.137 (2012).

321. Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs*, WASH. POST (Nov. 4, 1990), <https://www.washingtonpost.com/archive/opinions/1990/11/04/getting-too-tough-on-drugs/2b616e5c-e450-47d9-ad6d-09e0c83d449b/> [<https://perma.cc/M4AA-ELDZ>] (quoting Eric Sterling, then-staff member on House Judiciary Committee).

322. 132 CONG. REC. 26,436 (1986). *See generally* Sklansky, *supra* note 289.

323. 132 CONG. REC. 8289 (1986).

324. 132 CONG. REC. 22,659 (1986).

325. DEBORAH J. VAGINS & JESSELYN MCCURDY, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 1–2 (2006), [https://www.aclu.org/sites/default/files/field\\_document/cracksinsystem\\_20061025.pdf](https://www.aclu.org/sites/default/files/field_document/cracksinsystem_20061025.pdf) [<https://perma.cc/A9PQ-QFTX>].

of being deterred.”<sup>326</sup> The DOJ’s published handbook on the Act described its purposes as follows: “This Act was designed to provide a means by which serious, repeat offenders could be effectively deterred from committing further crimes . . . .”<sup>327</sup> Likewise, the follow-up Anti-Drug Abuse Act of 1988 contained a variety of provisions which were explicitly justified by a deterrence rationale.<sup>328</sup> Perhaps its most notorious element—the reinstating of the federal death penalty for so-called “drug kingpins”—drew strong support from legislative deterrence-thinking. Senator Dole called it an “essential deterrent to crime. For drug kingpins who are indiscriminately spreading death and violence, let them know the ultimate sanction will be used against them.”<sup>329</sup> Representative Conyers opposed the provision, but recognized that its proponents “argue that it will have a deterrence effect on those who kill, as well as provide proper punishment to those who have.”<sup>330</sup> Further, the 1988 Act’s provisions for fining drug users were similarly intended to act as “a deterrent for [drug] users.”<sup>331</sup>

Comparable evidence of deterrence-thinking’s influence on drug policy can be found at the state level. Although we are long-past the hey-day of maximalist drug war legislation, the ongoing opioid crisis has revived legislative interest in one type of anti-drug law: drug-induced homicide legislation.<sup>332</sup> A review of such legislation by the Drug Policy Alliance found

---

326. See U.S. DEP’T OF JUST., INDEXED LEGISLATIVE HISTORY OF THE “ANTI-DRUG ABUSE ACT OF 1986,” 1986, at S14295–96, <https://www.ncjrs.gov/pdffiles1/Digitization/126728NCJRS.pdf> [<https://perma.cc/SDD6-AXM9>] (describing the rehabilitative aspects of the law); see also Michele H. Kalstein, Kirstie A. McCornock, Seth A. Rosenthal, & Katherine M. Micholson, *Calculating Injustice*, 27 HARV. C.R. & C.L.L. REV. 575, 614 (1992) (“The primary justification advanced for these harsh punishments was that of deterrence. Legislators sought to raise the costs of dealing drugs by ensuring “swift and sure punishment . . . [and sending] a message across the country that the war on drugs is on, and it will be won . . . by increasing penalties for drug related offenses . . . [with] stiff, mandatory jail sentences” and longer prison terms. Assuming that these severe penalties would reduce crime, members of Congress reasoned that drug offenders undertook a cost-benefit calculus and concluded that drug trafficking’s promise of wealth outweighed the “offsetting costs . . . [which were] relatively small. The chances of being intercepted are not great . . . . And when caught, the suppliers find that the penalties are nothing more than a small cost of doing business.” Accordingly, members of Congress sought to set penalties at a level which they assumed would correctly value the costs and benefits of drug crime for each person. Their underlying assumption in this venture was that they could accurately gauge the subjective preferences and desires of each person involved with the drug trade.”).

327. U.S. DEP’T OF JUST., HANDBOOK ON THE ANTI-DRUG ABUSE ACT OF 1986, at 96 (1987), <https://www.ncjrs.gov/pdffiles1/Photocopy/157817NCJRS.pdf> [<https://perma.cc/5KRN-GL8Z>] (describing incapacitation as a secondary purpose in case deterrence fails).

328. *The Anti-Drug Abuse Act of 1988*, U.S. DEP’T JUST. (Jan. 17, 2020), <https://www.justice.gov/archives/jm/criminal-resource-manual-68-anti-drug-abuse-act-1988> [<https://perma.cc/Z58W-N2MH>].

329. 134 CONG. REC. 32,634, (1988).

330. 134 CONG. REC. 33,296 (1988).

331. 134 CONG. REC. H1,233 (daily ed. Oct. 21, 1988) (statement of Rep. Whitten).

332. See DRUG POL’Y ALL., *supra* note 320, at 15 (listing new states considering such laws as of 2017).

that legislators are again deploying the language of deterrence, just as they had in the 80s and 90s.<sup>333</sup> For example:

In support of Senate Bill 639 in Illinois, which expands the current offense of drug-induced homicide . . . State Senator Bill Haine stated: “This measure is about deterrence and making it clear we will not stand for illicit drug dealers providing lethal narcotics in our state.” Referring to H.B. 5367 in Connecticut, Representative Kurt Vail said, “I want to deter people from selling . . . and taking advantage . . . [b]ecause [dealers are] the ones bringing it into the streets. And then maybe when we get one dealer, we can get someone above them.”<sup>334</sup>

It is striking that, even as many legislatures have softened some of the harshest drug offense penalties from earlier decades, they remain wedded to the logic of deterrence in dealing with drug offenses.

#### D. *Legislative Preference for Criminal Law Delegation*

Our final conflict explanation is, in a sense, the most speculative. Unsurprisingly, legislators are not likely to brag about abdicating their criminalization duties to other government actors, at least not in the way they like to brag about protecting public safety by deterring or incapacitating offenders. Nevertheless, there is a rich scholarly literature examining this phenomenon<sup>335</sup> and clear illustrative examples can be exhibited.

The core problem is that American legislatures, especially the United States Congress, routinely pass criminal laws of absurd scope, theoretically criminalizing an incredible variety of behavior.<sup>336</sup> The legislature does not expect, however, that such laws will be enforced to their full extent; indeed, they are counting on judges and prosecutors to exercise their discretion, narrowing the scope of what is, in practice, criminalized.<sup>337</sup> This dynamic is problematic for ensuring criminal law’s consistency with popular judgment. The law may punish behavior that the public regards as blameworthy, but by casting such a wide net, and then counting on enforcement discretion, there is real risk of punishing individuals whom the public would not consider blameworthy, or of over-punishing the subtly blameworthy.<sup>338</sup>

---

333. *See id.*

334. *Id.*

335. *See, e.g.,* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 757 (1998); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?* 110 HARV. L. REV. 469, 469 (1996); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345 (1994).

336. *See, e.g.,* 18 U.S.C. § 1341 (wire fraud); 18 U.S.C. § 1956 (money laundering).

337. *See, e.g.,* F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 332–33 (2021).

338. *See e.g.,* 18 U.S.C. § 1956(b) (describing the wide net of the federal money laundering statute).

Consider a recent example of this problem from *Yates v. United States*. In the wake of the Enron scandal (and other conspicuous examples of corporate wrongdoing), Congress passed the Sarbanes-Oxley Act, which was designed to combat white collar wrongdoing.<sup>339</sup> One provision—Section 1519—cured a strange omission in earlier law, by making it a criminal offense to:

knowingly alter[], destroy[], mutilate[], conceal[], cover[] up, falsify[], or make[] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . .<sup>340</sup>

Section 1519 creates a felony, punishable by up to 20 years imprisonment.<sup>341</sup>

Commercial fisherman John Yates was unaware of this provision when, on August 23, 2007, he chose to fling three undersized red grouper into the sea, rather than hand them over to federal authorities.<sup>342</sup> Yates was indicted and convicted for violating Section 1519, on the logic that the groupers were “tangible objects” within the law’s definition.<sup>343</sup> He was sentenced to 30 days imprisonment and three years of supervised release.<sup>344</sup> After an affirmance by the 11th Circuit, the Supreme Court reversed, concluding that the meaning of “tangible objects” should be read more narrowly than “any and every physical object,” in light of the statutory context and, in the alternative, that the rule of lenity required such narrowing.<sup>345</sup> Four Justices would have upheld the conviction.<sup>346</sup>

While no study has been conducted based on the *Yates* case, we submit that popular intuitions of justice would not consider tossing back groupers to be as criminally blameworthy as, say, distributing child pornography,<sup>347</sup> or arson<sup>348</sup>—and yet Yates was exposed to a comparable sentence length of twenty years.<sup>349</sup> This conflict only became possible because Congress had swept so widely in Sarbanes-Oxley that the government’s expansive reading of the statute appeared reasonable to four Supreme Court

---

339. Nance Lucas, *An Interview with United States Senator Paul S. Sarbanes*, 11 J. LEADERSHIP & ORG. STUDS. 3, 4 (2004).

340. 18 U.S.C. § 1519; *see also* *Yates v. United States*, 574 U.S. 528, 531 (2015).

341. *Yates*, 574 U.S. at 547.

342. *Id.* at 531–34, 547.

343. *Id.* at 534–35.

344. *Id.* at 535.

345. *Id.* at 530, 542, 546–48.

346. *Id.* at 552 (Kagan, J., dissenting).

347. *See* 18 U.S.C. § 2252.

348. *See* 18 U.S.C. § 844.

349. *Yates*, 574 U.S. at 547.

Justices and the 11th Circuit.<sup>350</sup> Congress had empowered prosecutors (and courts) to make a discretionary judgment about what sorts of evidence tampering really ought to warrant the stiff new penalty.<sup>351</sup> From the standpoint of empirical desert, federal prosecutors in Yates's case got the decision terribly wrong.

Further examples of this delegation problem can be found at the state level. One of us has undertaken extensive studies of the Pennsylvania and New Jersey criminal codes.<sup>352</sup> These studies reveal a consistent issue: the legislature's failure to distinguish offense seriousness within a single offense grade.<sup>353</sup> When the criminal code classes behavior of greatly diverging blameworthiness within one offense grade (together with indeterminate sentencing or a wide guidelines range calculation), then the code has effectively left decisions about offense seriousness to the discretion of individual sentencing judges. These judges may be unelected or elected within structures that do not respond to popular moral judgment.<sup>354</sup> Conformity with lay intuition remains possible, but the legislature takes a gamble by abdicating its duty to ensure it.

For example, in Pennsylvania, the offense of false imprisonment of a minor is defined so broadly as to include both chaining a fourteen-year-old to a wall for a month and illegally locking a seventeen-year-old in her room for a half an hour.<sup>355</sup> Under current law, both courses of conduct are graded as a second degree felony, carrying a maximum sentence of ten years, but the Pennsylvania survey participants graded the first as a first degree felony, carrying a maximum sentence of twenty years,<sup>356</sup> and the second as a third degree misdemeanor, carrying a maximum of one year.<sup>357</sup> Notice that the ten-year maximum sentence provided by statute is higher than is appropriate for the latter conduct but not high enough, in the residents' view, for the former.

---

350. See *id.* at 522 (Kagan, J., dissenting). See generally *Yates v. United States*, 733 F.3d 1059 (2013) (affirming Yates' conviction).

351. 18 U.S.C. § 1519; see also *Yates*, 574 U.S. at 531.

352. See Robinson, Gaeta, Majarian & Schultz, *supra* note 277, at 719; PAUL H. ROBINSON ET. AL., FACULTY SCHOLARSHIP AT PENN LAW, REPORT ON OFFENSE GRADING IN NEW JERSEY (2011), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1339&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1339&context=faculty_scholarship) [<https://perma.cc/3B6K-X3KF>].

353. See Robinson, Gaeta, Majarian & Schultz, *supra* note 277, at 719; ROBINSON ET. AL., *supra* note 352.

354. See generally Steven Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

355. 18 PA. CONS. STAT. ANN. §2903 (West Supp. 2010). In *Appeal of T.G.*, 836 A.2d 1003 (Pa. Super. Ct. 2003), the Court held that evidence that a fourteen-year-old took a six-year-old inside her house, pulled her hair, and kept her inside for less than half an hour when she was crying to leave was sufficient for a finding of false imprisonment.

356. Mean=7.22, Mode=7, SD=1.143.

357. Mean=2.17, Mode=0, SD=1.143, p<0.005.

In New Jersey, a waiter who does not declare \$500 in cash tips on his tax returns is punished under the same offense as an executive who sets up an off-shore account in which he hides \$100,000 to avoid paying taxes.<sup>358</sup> Under current law, both courses of conduct are graded as 3rd degree crimes, with a maximum sentence of five years,<sup>359</sup> but New Jersey residents graded the first scenario as a disorderly persons offense, with a maximum sentence of six months,<sup>360</sup> and the second scenario as a 3rd degree crime, with a maximum sentence of five years.<sup>361</sup>

Multiplying such examples by looking through state criminal codes would, unfortunately, be a time-consuming exercise. But the true challenge lies in discovering why legislatures are so keen to delegate their authority over the substantive criminal law. After all, one might expect legislatures to try to increase their own authority, reducing the independence of judges and prosecutors whose decisions may undermine legislative priorities. Legislators engage in lots of criminal law-making—the Illinois legislature, for example, added “hundreds of new offenses” to their state code between 1961 and 2003<sup>362</sup>—so it is not as though legislators are uninterested in the subject. What then can explain this delegation phenomenon?

The answer is debated, and a complete engagement would take us far beyond the scope of this Article. However, several proffered explanations warrant mention, as they are relevant to our corrective project. First, legislatures may see a legitimate policy virtue in expansive offense definition, as a means to head off new and creative forms of criminal conduct.<sup>363</sup> On this logic, the legislator is giving the prosecutor tools that will be ready-to-hand in a new situation when the need arises, but before a new offense provision can be legislated, lest a novel criminal scheme escape punishment. Second, expansive laws may allow legislators to reap the political rewards of symbolic criminal legislation, whilst being insulated from any potential blow-back.<sup>364</sup> The rewards lie in dynamics we have already discussed, such as the desire to appear “tough-on-crime” by never opposing new criminal enactments, no matter how badly written; while the insulation comes from the tradition of prosecutorial discretion: “because prosecutors

---

358. See ROBINSON ET AL., *supra* note 352.; N.J. STAT. ANN. §54:52-8 (West 2010) (Failure to file returns or reports with intent to defraud, evade, or not make timely payments).

359. See ROBINSON ET AL., *supra* note 352.; N.J. STAT. ANN. §54:52-8.

360. Mean = 2.63, Median = 3, SD = 1.21

361. Mean = 4.55, Median = 5, SD = 1.17

362. Paul H. Robinson & Michael T. Cahill, FINAL REPORT OF THE ILLINOIS CRIMINAL CODE REWRITE AND REFORM COMMISSION v (2003) (stating Illinois had made hundreds of laws since 1961 which the Committee sought to consolidate).

363. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 771 (citing *United States v. Maze*, 414 U.S. 395, 405, 407 (1974) (Burger, C.J., dissenting)).

364. *Id.* at 771–73; see also Stuntz, *supra* note 265.

will rarely charge sympathetic defendants, when they do, and when the case becomes known to the public, the public is likely to blame not the overbroad statute but the overaggressive prosecutor.”<sup>365</sup> Third, Congress may use non-textual methods to claw back some of its authority. Richman has argued that Congress ultimately does have tools at its disposal to control the enforcement of the federal criminal law, tools that transcend the code’s text, such as budgetary control of enforcement agencies.<sup>366</sup>

In sum, the phenomenon of legislative delegation in criminal lawmaking is far from well-understood, but it is a sufficiently influential problem that any writer interested in the substantive criminal law today cannot afford to ignore it. This Article certainly cannot, given the serious and abiding risk it represents for ensuring conformity between the law and popular moral judgment.

#### V. PROPOSED REFORMS

The obvious way to fix these problems is for the legislature to have criminal law rules track closer to community views, thereby building the criminal law’s moral credibility. But how is this to be done? Certainly, making legislators more aware of the costs of conflict with community justice judgments is an obvious starting point. But, again, as a practical matter how is this to be done? Here are three proposals for how things can realistically be moved in the right direction.

First, shouldn’t the legislature at least know what community justice judgments are on an issue before they enact a criminal law rule? That is, shouldn’t they at least know whether the proposed rule conflicts with community views? It would seem hard to argue against having such knowledge, for the many reasons discussed in Part II: to promote democratic values, to more effectively reduce crime by building the criminal law’s moral credibility with the community, and to better approximate true transcendent justice.<sup>367</sup> Imposing such a requirement—that the legislature find out whether the proposed rule conflicts or not – would be analogous to providing an environmental impact or fiscal impact statement for a proposed bill. It would help assure that the legislature had given sufficient, serious consideration to the issue and was acting with knowledge of the relevant facts.

Part of the challenge here will be to educate legislators about how unreliable polls and surveys are in determining the principles that govern the community’s justice judgments, as has been discussed previously.<sup>368</sup>

---

365. Stuntz, *supra* note 265, at 548.

366. Richman, *Federal Criminal Law*, *supra* note 363, at 789–804.

367. *See supra* Part II.

368. *See supra* Section IV.A. (discussing so-called ‘distortion effects’).

Criminal law is a special legislative subject, in this regard, for ordinary people's judgments have a strong intuition component in which they may not be fully aware themselves.<sup>369</sup> The only reliable way of determining whether a proposed criminal law rule will be seen over time by the community as being just when applied in a variety of cases is to have social scientists test people's justice judgments in a controlled way.<sup>370</sup>

A second reform proposal stems from this question: if the legislators know that the proposed rule conflicts with community justice judgments, should they not be obliged to at least explain why they believe the conflict is justified? Again, it would seem to be difficult to argue against this point. Once it is clear that there is a social, political, and a crime-control cost to criminal law rules that conflict with community judgments, it follows that some special justification is needed for enacting such a conflicting rule.<sup>371</sup> Just having this requirement may be enough to deter proposals for rules that conflict.

A third proposal would be to create a mechanism to help carry out and monitor these legislative obligations: establishment of a standing criminal law reform commission. Some states already have such commissions or bodies that perform this function.<sup>372</sup> The commission could develop and maintain the expertise and logistical capacity to do the research on community views called for by the first proposal. It could also provide or arrange expertise to help the legislature analyze and draw conclusions from the results of the studies. What is the nature and extent of the conflict? Can the conflict be justified in some way due to special circumstances? The commission could help investigate these questions, provide a forum for public discussion of the issues, if the legislature thought it appropriate, and could record and advertise the legislature's justification for enacting a conflict rule. A record of these legislative activities could be invaluable for subsequent application of such conflict rules by courts, as well as useful in future legislative consideration of conflicts.

One might think it unlikely that a legislature would be inclined to impose upon itself such obligations, or one might think that this or any limitation on the exercise of its power would be anathema to a state or federal congress. But criminal justice issues commonly present a special situation for legislators. Sometimes they can see for themselves that sharing the rule-making process with others can provide not only a better ultimate result but also provide some level of insulation from storms of public criticism. Note,

---

369. See *supra* Part I.

370. For a discussion of a reliable methodology, see, for example, ROBINSON, *supra* note 58, at 120–28.

371. See Part II.

372. Such bodies currently exist in Kentucky, Kansas, and Illinois.

for example, the Federal Sentencing Reform Act of 1984, by which Congress created the United States Sentencing Commission to which it effectively delegated much of its criminal punishment authority.<sup>373</sup>

The three proposals here are minor in comparison. They are less a delegation of legislative criminal rulemaking and more an imposition on themselves of an obligation to obtain information and explain their decisions, with an independent public body having only the authority to make public comment. On balance, the burdens and constraints created by such reforms might be viewed as much worth the increased legitimacy and credibility that they could provide the legislature.

## VI. CONCLUSION

This Article has demonstrated the hidden costs that follow from criminal law rules that conflict with community justice judgments: sapped democratic legitimacy, a loss of crime-control effectiveness, and state-sanctioned injustices. The most salient reasons for the prevalence of such laws—legislative mistake, interest group pressure, prioritizing coercive crime-control, and legislative preference for criminal law delegation—are understandable, and disappointing, but fixable.

As to avoiding legislative mistakes, self-interested legislators are presumably interested in learning the true beliefs of their constituents. Although politicians will still be presented with the inherently inaccurate opinion polls regarding criminal law rules, the more reliable empirical studies provide an obvious response when loud but unrepresentative voices demand legislative action in conflict with community views.<sup>374</sup>

Persuading legislators to stand up to special interest group pressure to adopt conflict rules is more complicated. Self-concern may push toward supporting the conflict rule, to reap the interest group's proffered rewards, but legislators' willingness to go along may be conditional on their ignorance of true community views.<sup>375</sup> Once the use of reliable empirical studies reveals the truth, they may be less inclined to grant the special interest request because, to do so, breaks faith with their larger constituency. Such a breach can seriously conflict with their self-interest in getting reelected by those constituents. In other words, legislators may be willing to promote special interests that conflict with community judgments only when that conflict is obscured.<sup>376</sup> A more active program of empirical study is poised to reduce or eliminate the existing obfuscation.

---

373. 28 U.S.C.A. §§ 991-998.

374. *See supra* Section IV.A.

375. *See supra* notes 259-67 and accompanying text.

376. *See supra* notes 259-67 and accompanying text.

Prioritizing coercive crime-control as a justification for adopting conflict rules also presents a complex problem for legislators. Laws that purport to avoid future crime have great appeal.<sup>377</sup> The choice, however, becomes less attractive when one considers the social science studies that reveal ordinary people's commitment to doing justice—having criminal liability and punishment track blameworthiness proportionality—exceeds their interest in general deterrence or incapacitation of the dangerous.<sup>378</sup> Perhaps even more important is the revelation that, as a practical matter, promoting the criminal law's moral credibility may have greater long-term crime-control effectiveness than either a program of general deterrence or incapacitation, both of which have serious problems and limitations in their implementation.<sup>379</sup> The combination of scientific proof and common-sense historical examples could be a potent combination in convincing legislators to resist the lure of harsh coercive crime control.

Finally, as to criminal law delegation, while the incentives may still exist, there is every indication that they are seriously diminishing. To the extent that legislators support very broadly defined offenses that include criminal conduct of dramatically different seriousness because they believe criminal codes cannot articulate meaningful differences, modern codes have shown their assumption to be false.<sup>380</sup> Modern American codes now typically contain an enormous number of offense grading distinctions.<sup>381</sup> And advances in drafting techniques have suggested that such nuance can be easily accommodated and even extended.<sup>382</sup>

Nor is it likely that the tolerance of broadly defined offenses will continue. The history of criminal law reform in the United States has been one of increasing grading nuance within criminal statutes.<sup>383</sup> Although the Model Penal Code drafters in 1962 were content with essentially five offense grades<sup>384</sup>—giving judges (and prosecutors) broad discretion—modern American criminal codes typically have more than a dozen offense grades.<sup>385</sup> And, while the Model Code commonly provided only the minimum requirements for liability for an offense, modern codes, as noted

---

377. See *supra* notes 109–18 and accompanying text.

378. See Robinson & Holcomb, *supra* note 2, at 22.

379. See generally PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW* (Oxford); Robinson & Holcomb, *supra* note 2.

380. See Robinson & Holcomb, *supra* note 2, at 22.

381. *Id.*

382. Paul Robinson, Matthew Kussmaul, & Muhammad Sarahne, *How Criminal Code Drafting Form Can Restrain Prosecutorial and Legislative Excesses: Consolidated Offense Drafting*, HARV. J. LEGIS. (2020).

383. *Id.*

384. The Model Penal Code has three degrees of felony plus categories of misdemeanor and petty misdemeanor. See MODEL PENAL CODE § 5.

385. Robinson, Gaeta, Majarain & Schultz, *supra* note 277, at 713.

---

---

above, have introduced an enormous number of grading factors.<sup>386</sup> Indeed, it is this demand for recognizing and controlling the most significant distinctions among cases for the same offense that has helped generate the modern sentencing guidelines movement.<sup>387</sup> The past practice of broad, unstructured legislative delegation seems unlikely to continue unchallenged.

The key to avoiding all of these sources of undemocratic crimes—legislative mistake, interest group pressure, prioritizing coercive crime-control, and legislative preference for criminal law delegation—is legislative education about the resulting conflict with community views. Legislators must be shown that these practices create great rifts between the criminal law and the deep intuitions of the people governed, thereby generating hidden crime-control and justice costs. Our hope is that this Article can help legislators begin a re-examination of these practices, so long taken for granted.

---

386. *See id.* at 726–28.

387. *Id.* at 721.