

8-11-2017

Trigger Crimes & Social Progress: The Tragedy- Outrage-Reform Dynamic in America


Paul H. Robinson

University of Pennsylvania Law School

Sarah M. Robinson

Independent

Follow this and additional works at: http://scholarship.law.upenn.edu/faculty_scholarship

 Part of the [American Politics Commons](#), [Criminal Law Commons](#), [Criminology and Criminal Justice Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), [Law Enforcement and Corrections Commons](#), [Legal History Commons](#), [Legislation Commons](#), [Policy History, Theory, and Methods Commons](#), [Politics and Social Change Commons](#), [Public Affairs Commons](#), [Public Law and Legal Theory Commons](#), and the [Social Control, Law, Crime, and Deviance Commons](#)

Recommended Citation

Robinson, Paul H. and Robinson, Sarah M., "Trigger Crimes & Social Progress: The Tragedy-Outrage-Reform Dynamic in America" (2017). *Faculty Scholarship*. 1738.

http://scholarship.law.upenn.edu/faculty_scholarship/1738

TRAGEDY, OUTRAGE & REFORM

Crimes that Changed Our World

Paul H. Robinson
Sarah M. Robinson

(forthcoming Rowman and Littlefield 2018)

Table of Contents

ACKNOWLEDGMENTS

PREFACE

1911 TRIANGLE FACTORY FIRE – BUILDING SAFETY CODES

1915 CHLOROFORM KILLER – MEDICAL EXAMINERS

1932 LINDBERGH KIDNAPPING & DILLINGER ROBBERIES – FEDERALIZATION OF
CRIMINAL LAW ENFORCEMENT

1937 SULFANILAMIDE CRISIS – DRUG SAFETY

1956 NYC MAD BOMBER – CRIMINAL PROFILING

1957 MAFIA COMMISSION APALACHIN MEETING – RICO

1962 HARLEM HEROIN EPIDEMIC – WAR ON DRUGS

1963 BIRMINGHAM CHURCH BOMBING – CIVIL RIGHTS

1964 GENOVESE MURDER WITNESS SCANDAL – 9-1-1 EMERGENCY SYSTEM

1965 WATTS RIOTS & TEXAS SNIPER – SWAT AND THE MILITARIZATION OF POLICE

1967 CALABRESE INTIMIDATION – WITSEC

1969 SANTA BARBARA OIL SPILL & CUYAHOGA RIVER FIRE – EPA

1972 TWA BOMBING AND HIJACKINGS – AIRPORT SECURITY

1980 KILLING OF CARI LIGHTNER – DRUNK DRIVING

1981 REAGAN ASSASSINATION ATTEMPT – INSANITY DEFENSE

1982 SCHAEFFER STALKING MURDER – STALKING OFFENSE

1983 BEIRUT BARRACKS BOMBING – INTERNATIONALIZATION OF THE FBI

1983 THURMAN BEATING – DOMESTIC VIOLENCE

1986 LEICESTERSHIRE MURDERS – DNA

1989 SHRINER MUTILATION – SEXUAL PREDATORS

1993 POLLY KLAAS ABDUCTION – THREE-STRIKES SENTENCING

2001 9/11 ATTACKS – WAR ON TERROR

2001 ENRON SCANDAL – FINANCIAL CRIMES

CONCLUSION: TRIGGER CRIMES & SOCIAL PROGRESS

NOTES

INDEX

PREFACE

As we go through our daily routines, all but the Pollyannas among us see flaws in our existing world. We may try to avoid dwelling on them, but they are there and they bother us, sometimes a lot. What is easy to miss, without the perspective of even recent history, is that the flaws are generally minor, even trivial, compared to the often appalling state of affairs that existed in the same space just decades ago.

Within the memory of living persons, our world was one with no system of food or drug safety, essentially no building or fire codes, woefully ineffective criminal law enforcement, no protection of the environment, the appalling treatment of some people based on race or other group characteristic, rampant drunk driving, rampant domestic violence, rampant sexual assault, and a host of other conditions that we would now find intolerable.

What can seem almost bizarre to us is that people of not that long ago accepted this state of affairs as perhaps regrettable but tolerable. When we examine that not-too-distant past we frequently end up scratching our heads wondering, “What were they thinking?”

Of course, this has always been the way of progress. You can be sure that in our not-too-distant future people will be scratching their heads wondering about us, “What were they thinking?” We may each have our pet theory on what their source of wonderment will be, but more likely than not, if history is any judge, most of us will guess wrong. Our successors will find appalling and intolerable things that we as a society are presently quite willing to tolerate.

This process of the continuous march of progress – of increasing and shifting expectations and ever-rising baselines – is an interesting story in itself. One might think it is the natural result of hundreds or thousands of small steps of gradual improvement over time. And in some cases it is. But it turns out that the march of progress also has some sharp turns in it. The path of the march may be a long series of course corrections but sometimes it is a quick turn or an unexpected lurch. Sometimes our present circumstances seem entirely acceptable – until they aren’t. Then in a flash, we suddenly feel different about things, and often just as suddenly do something about it.

This book is about that fiery dynamic – changes that come quickly, sometimes suddenly, sometimes unpredictably, and sometimes inexplicably. Our focus will be on a particular group of triggers to change that we think are the most interesting, the most powerful, and sometimes the most unexpected: *crimes*.

In the cases we explore, the general dynamic is the same: a terrible crime provokes public outrage that in turn produces important reforms. But there are many differences in how the dynamic works and what drives it. Why do some crimes trigger a turn from the current path while similar crimes only a year or two before did not? Or, why didn’t the turn wait until a similar crime several years or decades down the path? Or why a turn at all, rather than many gradual course corrections?

The exact nature of the crime-outrage-reform dynamic can take many forms, and we will explore those differences as we work through some of the most important cases of the past century. Each case is in some ways unique but there are repeating patterns that can offer important insights about how change comes, and how in the future we might best manage it.

But what these extraordinary cases have in common is that all of them deal with crimes that changed our world.

CONCLUSION: TRIGGER CRIMES & SOCIAL PROGRESS

Previous chapters have reviewed several dozen “trigger crimes” that have arisen since the early 1900s. In this final chapter we step back to examine the common pattern of tragedy, outrage, and reform that we see repeated in these cases. Our study of trigger crimes and the tragedy-outrage-reform dynamic suggests that there is explanatory power in distinguishing among three kinds of trigger crime.

New Problems, New Solutions, and Changing Norms

Some tragedies become trigger crimes because they focus public attention, and outrage, on a new societal problem that has only now become crystalized in the public’s mind. Other tragedies reflect long-standing problems but problems that now seem to have a plausible solution within reach. A final group of cases concern an old problem where a solution has been available in the past but what has changed is a shift in societal norms regarding the importance of solving the problem.

New Problems. The 1911 Triangle Factory Fire is an example of a new problem case. Prior to the late 1800’s, Americans made their own garments. A rush of immigrants came to New York with the new century, bringing a large talent pool of tailors, drapers, and engineers, and cheap labor. Now there is a product demand, a talent collection, and the bodies to run the machines, all amassed in the same compact area. By 1910 an estimated 70 percent of the clothing worn by U.S. women originates in New York’s Garment District.¹ The factories are housed in the new electrically-run steel buildings that are quickly built to house them. Even the engineering of such buildings is new. Skyscrapers, a term that was originally used in the 1880s to describe a building of 10 to 20 floors, becomes far more feasible when steel manufacturing grows sophisticated enough to supplant iron around 1895. All this progress creates conditions that allow the horrendous tragedy of the Triangle Factory Fire.

Such an advent of a new sort of societal problem is a common stimulus for trigger cases. The 1937 Sulfanilamide Crisis spawns a regime of drug safety that has not been needed in a world with limited commercial development and distribution of medicines. The 1972 TWA airplane bombings trigger a new focus on airline security only because hijackings have arisen as a growing problem.

New Solutions. The 1964 Genovese Rape Witness Scandal is an example of a new solutions case. About the time of the 1964 Genovese attack, AT&T implemented 6-1-1 as a universal customer service request number and 4-1-1 as a universal directory assistance number. Adding a third short number, 9-1-1, for emergency calls becomes a relatively quick, easy, and cheap solution to the problem of contacting local police.² At the time, rotary telephones are used and 9-1-1 is both easy to remember and quick to dial. (AT&T’s willingness to provide this service may not have been entirely altruistic. Without a universal number, people in emergencies sometimes called the operator, an AT&T employee, who had to stop other business to determine the proper police station to call and its phone number. The new nationwide emergency number is funded through a small additional charge placed on nearly everyone’s phone bill. The reform is thought to save the company millions of dollars.)

The availability of a new solution to an old problem is a common pattern in trigger crime cases. The advent of DNA as an investigative tool in the 1986 Leicestershire murder cases comes about because a researcher at a nearby university is at the time studying the uniqueness of each individual’s DNA. Similarly, when Megan Kankas is abducted there is no system to track sexual predators who live amongst vulnerable people. But a technological solution to the problem is

readily available and soon a computer data base can track dangerous sexual offenders around the country.

Changing Norms. The 1969 Santa Barbara Oil Spill and Cuyahoga River Fire is an example of a changing norms case. There have been notorious environmental disasters before the 1969 Santa Barbara oil spill and Cuyahoga River fire but little social or political will to pay the price to avoid them. Rachel Carson's 1962 book, *Silent Spring*, helps prime the pump of public concern by giving Americans a frightening view into a world of environmental degradation. DDT sprayed on crops kills the target insects but also kills many other creatures. It enters the human body and is retained in fat cells, causing cancer and other serious health problems. *Silent Spring* stays on the *New York Times* best-seller list for eighty-six weeks, and its message is widely disseminated before the oil spill. The notion of Americans killing themselves by killing the environment becomes a palpable concern.

The 1980 Lightner Crash is another, somewhat different kind of example of a changing norms case. Instead of the relatively quick public shift seen with the environmental trigger crimes, social norms against drunk driving took a long slog of concerted effort to change.

In the ten years before Cari Lightner's 1980 death, 250,000 people died in drunk-driving incidents and most Americans know someone who was injured or killed. "Alcohol was involved in nearly 60 percent of fatal crashes and we were banging our heads against the wall," remembers Jim Fell, an employee for the National Traffic Safety Administration. "Then, all of a sudden, a woman named Candy Lightner [Cari's mother] came along, kicking and screaming about her daughter who had been killed."³ Victims and their families start using MADD as a resource, which allows MADD to link all the individual harms into a national wrong that has previously gone unnoticed. As the strands knit together into a single stream of outrage, the politicians start listening. By 1982, less than two years after MADD's founding, one hundred MADD chapters exist around the country, with more forming daily. Forty-one states establish task forces and commissions to assess the state's drunk-driving problem and propose solutions.⁴ By 1983, one hundred and twenty-nine new anti-drunk-driving laws are in place around the nation.

MADD's very personal approach changes the political dynamics. MADD insists that legislators stop treating drunk-driving as an unfortunate reality. The community comes to reject the notion that, as Candy Lightner puts it, drunk driving "is the only socially acceptable form of homicide."⁵

The same sort of change in social norms can be seen as the determinative factor in other cases well. Domestic violence was simply tolerated as the way of the world until the appalling events of the 1983 Tracey Thurman beating helped trigger people's appreciation that that reality must change. Tracy becomes fearful for her life from her estranged husband who repeatedly attacks her and vows he to kill her. She consistently pleads with police to intervene but the police refuse, seeing the regular beatings as a private matter. When Buck Thurman nearly kills his wife with the police on the scene doing nothing, Tracey sues the township and wins. The resulting publicity promotes a dramatic shift away from public tolerance of domestic violence, which leads to nationwide reform.

Civil rights reforms show a similar history. Open violence against African Americans has been going on for decades. When Birmingham's 16th Street Baptist Church is bombed in 1963, killing four young girls in their Sunday dresses, the brutality of the violence finally awakens a great national cry for change.

Exploring the Tragedy-Outrage-Reform Dynamic

Why do some tragedies produce broad outrage while others, often of a very similar nature, do not? Why do some outrages produce reform while others, often with greater claims to outrageousness, do not?

The Triangle Factory Fire was a horrendous event but it was hardly the only horrendous event of its nature. Eight years earlier, the Iroquois Theatre fire on December 30, 1903 in Chicago killed 600 people. When firefighters respond to the blaze, they think the theater is in fact closed. No flames are visible and the doors seem locked. In fact, so many bodies are stacked up against the inward opening exits that the doors are as tight as though they were locked. The only person to serve any jail time in relation to the disaster is a nearby saloon owner who robs some of the dead bodies while his establishment serves as a makeshift morgue. Why is it the Triangle Factory fire that sparks such outrage and reform, rather than the Iroquois Theater fire?

One may observe the same phenomenon with regard to the 1969 Santa Barbara oil spill and Cuyahoga River fire. These were hardly the first environmental disasters. Indeed, for a century, the residents of Cleveland, Ohio have tolerated their river regularly catching fire – at least 11 different times on record. The fire of 1952 is particularly destructive, blazing for three days and causing \$1,800,000 worth of damage. The Cuyahoga isn't the only river known to catch fire. Michigan's Rouge River, the Schuylkill River of Philadelphia, the Buffalo River in Buffalo, and the Chicago River have all been known to burn, as well as both Baltimore and New York harbors. Why is it that it is the 1969 Cuyahoga River fire that inspires outrage and reform?

The same is true of drunk driving before the 1980 Cari Lightner death. No one bothered keeping national records of drunk driving deaths before 1980 but a survey of local records shows the enormous extent of the problem. In one day in that period, just after midnight a Florida barber crosses the street and is struck by a drunk 23-year-old house painter. Three minutes later, in South Carolina, a drunk 27-year-old slams into a middle-aged woman. Less than an hour later, a drunk Texas driver going the wrong way down the highway kills another driver. And on it goes until 54 people are dead in the single day due to impaired driving.⁶ Before the year ends, the death toll will be in excess of 21,000. Cari Lightner's death is just one of a continuing flood of victims. Why is it her death that triggers reform and not others before it?

The dynamic can be observed for many other trigger cases: The 1963 Birmingham Church bombings is an appalling crime, but the period is marked by a string of appalling crimes against African-Americans. In 1956, Dr. Martin Luther King's home is bombed. On January 13, 1957, four black churches and two pastors' homes are bombed in Montgomery, Alabama. Two white men affiliated with the Ku Klux Klan, Raymond Britt and Sonny Livingston, are indicted in February 1957 after confessing to the bombings, but an all-white jury acquits them of all charges while spectators cheer. A sheriff executes two prisoners because a court suggests they have been denied a fair trial. And yet, as a nation, nothing changes. Why did the Birmingham church bombings seem to make a difference?

The 1983 Tracey Thurman beating is hardly an unusual event. Authorities didn't bother keeping statistics on domestic violence before that time but the available evidence suggests the extent of the problem. When Kansas City looked at their homicide statistics in 1971, it finds that 40% are spouse killings. In nearly half of those killings, police have been previously called to the home at least five times.⁷ A 1975 National Family Violence Survey Found that serious domestic abuse occurs in sixteen percent of American families every year.⁸

Nor are the egregious facts of the Tracey Thurman case particularly unique. In a 1955 case, Sandra Baker is afraid of her husband, a New York City policeman. She gets an order of protection but despite the order he threatens and beats her again and again. When Sandra again calls the police, they refuse to take action against the husband, saying the protection order is "no good" and "only a piece of paper." When Sandra again takes the matter to court, she is told her

husband is not coming to the hearing because he is sick. But she sees him in the building and she asks to remain in the court office because she is afraid of him. She is told she cannot stay and when she emerges from the office he shoots her. Yet it is the Tracey Thurman case that ends up inspiring broad national reform, rather than any of the thousands of earlier egregious cases. Why should this be so?

Which Tragedies Will Produce Broad Public Outrage? Which Instances of Public Outrage Will Produce Reform?

Producing Public Outrage. There are lots of tragedies but not all of them generate outrage. What are the circumstances that produce outrage in one case and not in another case that may seem equally outrageous?

The three categories of cases described above can provide part of the answer to these questions (although the three-part typology ought not be pushed too far⁹). For example, it may be easiest to generate outrage in cases where a new problem has arisen because the danger or suffering is not something that people have come to accept as an unfortunate part of their lives. Simply because it is new and different, it gains attention and calls out for a solution.

For similar reasons, the old problem-new solution cases are less likely to produce public outrage. People have come to accept the danger or suffering as simply an unfortunate part of their reality. It is only the availability of a new solution that can shake people from their lethargy.

The changing-norms cases are similar in that the past acceptance of the danger or suffering might minimize the outrage of some people. It is the power of the changed norm that is doing the work in these cases to generate outrage, even though a case similar to the trigger case did not generate outrage in the not-too-distant past.

Converting Outrage into Reform. There are lots of things that people get outraged about that do not produce reforms. What circumstances make some outrages produce reform while others do not?

Once there is public outrage, it may be easiest to convert that outrage into reform in cases of newly available solutions to old problems. As noted above, producing outrage in these cases is the hard part. The new availability of a solution makes the reform step easy.

The case studies suggest that one can also successfully convert outrage into reform in the new-problem cases and the changing-norms cases, but here the move to successful reform faces a complex situation: each outrage must compete with many other outrages to be the one to get the special attention of the political powers that will produce the legal reform. The legislative leaders may make their reform selections on their own but more often than not they are responding to the judgment of others: newspapers and other news organizations, influential lobbying groups, celebrities and other public figures and, increasingly, social media. How can one current outrage become the outrage that wins the reform lottery?

A number of factors, such as the extent of news media coverage, are obvious in their important effect, but other important factors are less obvious and some factors have an outsized effect that make them particularly important.

Dramatic Images. Perhaps a trigger-crime outrage can win the lottery just by being so spectacularly and visually outrageous – like the burning women falling from the sky in the Triangle Factory fire or the Cuyahoga River burning. Dramatic photographs for the media outlets can be compelling: oil-covered birds on the beach and piles of dead dolphins washing ashore. After the Birmingham church bombing, the news services publish a haunting image of young Sarah Collins blinded and shattered, lying motionless in a hospital bed. These are striking images that will give that outrage special attention. The larger point is that the same rules that affect publicity campaigns, such as dramatic visual images, also affect public opinion in cases of specific trigger-crime outrages.

Influential Victims. Another factor that can give one outrage an advantage over others is who it affects. The Santa Barbara oil spill damages a neighborhood with a good deal of money and influence. The residents clearly have the means and connections to get legislative attention and to whip up broader public support in ways not available to less influential victims. Richard Nixon is the U.S. President at the time and has his unofficial White House in nearby San Clemente. President Nixon visits the site of the oil spill: “It is sad that it was necessary that Santa Barbara should be the example that had to bring it to the attention of the American people.”¹⁰ (A corollary to the advantage of influential victims is that a tragedy can be converted into reform even without broad social outrage. Public outrage can certainly help, but legislative leaders can be influenced more directly.) In related fashion, the Triangle Factory fire comes out well in the reform contest by occurring in New York City, the home of Randolph Hearst. The Hearst papers and their syndicates around the country cover the fire for weeks.

Devoted Publicity Manager. But compare the influential-victim path to the drunk driving reform. It is not politically influential victims that create the outrage and reform. It is the relentless publicizing by Cari Lightner’s mother that does the job and compensates for her lack of political influence. The process here is slow but steady. Without singularly dramatic images or particularly influential victims, the building of outrage and the move to reform takes time: societal norms have to be changed first.

Pump Primers. A common pattern revealed by the trigger-crimes collection is the presence of a previous tragedy, often not too long before the trigger case, that in a sense primes the pump for the trigger case’s outrage to produce the broad reform. For example, the Iroquois Theater fire eight years earlier primed the pump for the public outrage and reform triggered by the Triangle Factory fire. Similarly, the outrage and reforms that follow the 1932 Lindbergh kidnapping are made possible in part because of the public sensitivity to the problem provided five years earlier with the kidnapping of twelve-year-old Marion Parker, who is tortured to death. In early 1963, just months before the Birmingham Church bombing, Martin Luther King, Jr. is in jail where he pens a widely published letter, with his iconic suggestion that “Injustice anywhere is a threat to justice everywhere.” The letter helps create the atmosphere that sparks the dramatic reaction to the Birmingham church bombing. Just one year before Polly Klaas is abducted and killed in 1993, Kimber Reynolds is killed by a career criminal. There is an attempt to address the problem of offenses by repeat offenders but the effort fails. The exercise does, however, seem to prime the pump for a stronger, more focused, reaction to reform that comes with the Polly Klaas killing.¹¹

Luck. There are only so many reform projects that a legislature can undertake at any given time. A tragedy may have the bad luck of occurring at the same time as an even greater tragedy, which then siphons off public outrage and clogs up the channels of reform. So there is a certain amount of luck involved in the path from trigger crime to legal reform. In some cases, the path from tragedy to reform can benefit from good luck. On the day that the Triangle Factory burns, Francis Perkins, then Secretary of the New York City Committee on Public Safety and later Secretary of Labor under President Roosevelt, is in a restaurant nearby. She is drawn to the commotion and witnesses the horrifying events of the fire. It is hard to imagine that her witnessing the events does not influence her resolve to do what she can to prevent future occurrences.

Ultimately, to get from tragedy to reform requires quite a few elements to be in place, both in prompting outrage and in converting that outrage into action. So there is a certain amount of “perfect storm” quality in the process – a specific combination of conditions must exist at the same time or in a certain relation to one another to actually produce reform.

Legislative Reform Versus Real-World Change

The tragedy, outrage, and reform process is not complete with the enactment of legislation. The legal reforms simply mark the end of the first phase. Legal change may have little or no effect on the real world.

In the case of the Triangle Factory fire, for example, the same defendants are brought to court again several years later for a similar incident and get a similar trivial punishment. In 1913, Blanck and Harris, the owners of the Triangle Shirtwaist Factory, are running a new factory where the doors are again being chained, trapping 150 women inside without means of escape in case of fire. The violation is discovered before a tragedy occurs. The result: Blanck is fined twenty-five dollars. Later that same year, on December 23, Blanck is again found to be in violation of the law and issued a warning, but on this occasion is not fined.

In the Lightner drunk driving crash case, two weeks after being released from custody for killing Cari Lightner, Busch is again a licensed driver. While drunk, he crashes into a car stopped at a red-light, totaling both cars. In 1992, Busch is again in court, for his sixth drunk driving conviction. He is fined \$583 and his driver's license is suspended for nine months.¹²

Laws on the books can have no effect unless witnesses, prosecutors, judges, juries, sentencing guideline commissions, and others take the offense more seriously and play their part in making the system work to actualize the new legal rules.

The notion of “trigger crimes” suggests a step function – a point of dramatic legal change – which is probably an accurate description of the legal reform phase of the process: the tragedy triggers a legal reform that did not previously exist. But in the subsequent phase, after the legislation is in place, the process of changing actual practice is more like a continuous curve than a step function. Real-world change requires a collective and interactive process, as in building a skyscraper. Steelworkers, carpenters, electricians, and plumbers must all do their work on each level before they can get to the next level. In a similar fashion, getting beyond legal reform to actual changing of practice on the ground requires that witnesses, prosecutors, judges, jurors, and all other participants in the criminal justice system must come to share the new norm if it is to be enforced.

The law reform-social change dynamic is a bit of a chicken and egg problem. The new norm's internalization by criminal justice system participants and others depends to a large extent on the criminal justice system's enforcement of it backed by community support. But that enforcement and support depends to a large extent on these people and others internalizing the new norm. Increasing enforcement of the legal rules and increasing internalization of the new norm must move ahead together, incrementally – building the building floor by floor.

Going Too Far

When a trigger crime's outrage is translated into legal reform, it is not uncommon for that reform to go too far. The reasons for this might be explained by several phenomena, which one might call the “reform hysteria dynamic” and the “bureaucratic momentum dynamic.”

The Reform Hysteria Dynamic. It is common that in the heat of the moment, the energy and momentum that creates legislative reform ends up carrying the reforms too far.

The dynamic is illustrated by what has been called the “crime du jour” problem. A particular headline criminal case leads to the creation of a new offense, such as *carjacking*. Does anyone doubt that it was illegal to pull someone out of their vehicle and then take their car before the offense of carjacking was put on the books? Or, for another example, *home invasion* is now a new separate crime. Is home invasion any different from what was aggravated burglary? These are not new offenses; they are already fully criminalized. Adding the new name to an old offense gives legislators a chance to show that they share their constituents' concerns and are

“doing something” about them. Unfortunately, the only real effect is to create confusion and ambiguity, as the criminal code now punishes the same conduct under two separate somewhat differently defined offenses.

The same political motivations tend to exaggerate the punishment grade of offenses created or amended in response to public upset about the crime du jour. Everyone understands that crimes vary in seriousness. We want more serious crimes to be punished more severely than lesser offenses. But when the crime-du-jour dynamic exaggerates the crime seriousness set by the legislature in the heat of the moment, it throws off the criminal codes accuracy in accurately classifying offenses according to their relative seriousness. Over time, the crime-du-jour process creates serious internal inconsistencies and disproportionalities in the grading among different offenses. The dynamic is made worse by the fact that it creates a continuing upward spiral: after one crime du jour exaggerates the grading for an offense, the next crime du jour uses the exaggerated grading of the first as the new baseline from which the grading of the next crime du jour must be exaggerated.¹³

The same dynamic behind the crime-du-jour problem – the tendency of the uproar that sparks reform to go too far – is seen in new-problem cases and in changing-norm cases. The Polly Klaas abduction, by a man who had six previous convictions for violent felonies, ends up making three-strikes statutes a national phenomenon. But life without parole is not necessarily an appropriate sentence for every instance of three strikes. William Rummel, for example, was given life where his “third strike” was not returning to fix the air-conditioning for a bar owner who had paid him \$120. His previous two strikes were of similar seriousness.¹⁴

The Reverend Dempsey-inspired war on drugs actually makes sense under the circumstances of the moment. Illicit drugs are destroying entire communities and the criminal justice system seems unable or unwilling to slow the plague. But when legal reform is finally put into motion, initially in the form of the Rockefeller drug laws in New York and later in federal reforms, the legislation goes too far. In one case, student Clarence Aaron, a football player at Southern University in Baton Rouge with no criminal record, is given three life terms for introducing a buyer and seller for a cocaine deal, even though he never possesses or touches any of the drugs involved.¹⁵

The Bureaucratic Momentum Dynamic. Another common dynamic that tends to lead to going-too-far is found in those reforms that create governmental bureaucracies, typically to solve a new problem or a problem recently appreciated because of changed norms. The difficulties seem to arise, first, because government agencies, once established, tend to seek to build their empire. That is, as good bureaucrats, they tend to focus on what additional areas of our lives they can bring within their mandate. Further, because each government agency tends to focus on a particular interest – the interest they were created to promote and protect – and thereby exaggerate the value of that interest as against all other interests.

For example, no one can dispute that the Cuyahoga River fire and the Santa Barbara oil spill makes a strong case for the creation of the federal Environmental Protection Agency, but many people argue today that the EPA has gone too far, not only in expanding its reach but also in its balance of environment interests as against competing interests. In 2013, Marietta Industrial Enterprises, a company in Ohio is fined \$50,000 and president of the company Scott Elliott is jailed. The company, among other things, crushes medium carbon ferromanganese. Unknown to Elliot, the workers turn off the fans while the processing is going on. This is not a violation of any rule as the employees use other containment methods instead. After a time, Elliot learns that the fans are being turned off, and he instructs the workers that the fans should be left on. From then on, the fans are left on. Elliot’s crime? He did not report the non-use of the fans to the EPA. The EPA rule states that if the fans are not working properly then the company is obliged to report the fact. The company is criminally prosecuted for its failure to report.¹⁶ The

EPA has come a long way from simply preventing environmental disasters like the Santa Barbara oil spill or the Cuyahoga River fire.

There are seventy-seven departments within the EPA that operate largely free of congressional restraint.¹⁷ In 1972, the Clean Water Act covers navigable waterways. By 2015, the EPA has produced a 299 page document entitled the Waters of the United States Rule that seems to expand its jurisdiction to every bit of water no matter how small that is “within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or covered tributary.”¹⁸ Congressman Steve Scalise, for example, complains that the “EPA’s attempt to redefine ‘navigable waterways’ to include every drainage ditch, backyard pond and puddle is a radical regulatory overreach that threatens to take away the rights of property owners and will lead to costly litigation and lost jobs.”¹⁹

The same bureaucratic momentum dynamic may be seen in other areas as well. For example, the building safety codes inspired by the Triangle Factory fire have proved themselves to be invaluable. However, building safety is not cost free. Wider stairways and hallways mean smaller usable spaces. Specialty materials cost extra. Many people argue that homelessness in cities is driven partly by codes that dramatically increase housing costs. In El Paso County, Colorado wildfires destroyed 488 homes in 2013. Fire codes that had imposed on builders and home owners seemed smart when they were adopted in 2009. But when it came time to rebuild, few could afford to do so due to the cost of compliance. The county had to choose between no homes or homes that did not meet the existing standards.²⁰ The county relaxed their fire codes.

For another example, the federalization of criminal law inspired by the Lindbergh kidnapping and the Dillinger bank robberies has proved extremely valuable in effectively fighting crimes that individual states cannot handle. Nonetheless, that federalization has also shown what some people see as excesses. In one case, Idaho’s Snake River runs through a federal park area. Tom and Scott Lindsey launch their rafts to go fishing on the river at 7 am, rather than the 9 am that the federal regulations specify. That night they camp on a gravel bank below the high water mark, where no federal park permit is required. They cook on a gas stove; by regulation open fires are not permitted. The following day law-enforcement agents helicopter in to arrest the brothers for two felonies: camping without a permit and building a camp fire without a permit. They are taken into custody but the federal district court judge dismisses the case saying that the federal agents did not have authority over state-lands. The government appeals and the 9th Circuit Court of Appeals decides that the Forest Service is entitled to enforce its regulations on the state river because such is necessary to protect the adjacent federal land. The prosecutor declines to retry the brothers.²¹

Less Danger in New-Solution Cases. The going-too-far problem seems less common in the new-solution cases, perhaps because there may be less danger of overreach. Frequently, we are happy to let the new solution go as far as it can go.

The creation of the 9-1-1 emergency call system, triggered by the 1964 Genovese killing witness scandal, has been wildly successful and there seems little reason to rein it in. People call 9-1-1 about 2,000,000 times a month. Seventy percent of those calls come from cell phones.²² Similarly, having professional and well-trained medical examiners, triggered by the 1915 Chloroform Killer case, has only increased their effectiveness in solving crimes and avoiding public health threats. WITSEC, triggered by the 1967 Calabrese intimidation, has made it easier to gain the cooperation of reliable witnesses and, if anything, has not been made available enough. Criminal profiling, triggered by the 1950s New York City “mad bomber” case, has become increasingly sophisticated and can increasingly predict where a perpetrator lives as well as their personal characteristics. Again, there seems little interest in limiting the use of this investigative tool. DNA testing, pioneered in the 1986 Leicestershire murders, has become increasingly inexpensive and ever more reliable. The process has been expanded into forensic

DNA typing of pet hairs, seed pods, pond slime, and a host of other biologicals that can provide compelling reliable evidence in criminal investigation and prosecution.²³

Conclusion

The stories and analyses here demonstrate that, oddly, some crimes – “triggers crimes” – can make our world better. For a variety of reasons, these crimes prompt public outrage – when previous others equally bad did not – and that outrage produces legal and social reform – when previous instances of public outrage did not. Sometimes the heat or momentum of the reform energy goes too far and the tendency of government bureaucracies to expand their empire leads to overreach, but these excesses are often caught and corrected.

Particularly striking in this view of the tragedy–outrage reform dynamic is what it reveals about the nature of social progress. We may like to think that our triumphs of progress are the result of a planned, orderly, and rational process of democratic government. But in truth it is often chaotic and unpredictable, brought about by a seemingly random or at least unpredictable cast of characters and events. Who would have guessed that a single kidnapping would create the federalization of criminal law, that a particular sniper would lead to the creation of SWAT teams, or that an attack on a New York Street would inspire the national 9-1-1 system? Could anyone guess that the beating of a high-school drop-out would change our views on domestic abuse? A failed bombing attempt that hurt no one would inspire a regime of airport security? A group of deaths of some fragile old-people, that might or might not have been intentional, brought down the lucrative-patronage position for coroners. Or that a concerned pastor would change our nation’s drug policies?

As chaotic as our social progress may seem, the trigger-crime stories are comforting in the apparent inevitability of American progress. As unpredictable as our social and political life may seem, over time our democratic society does effectively identify problems and produce solutions. Our progress may be messy but it is relentless.

NOTES

¹ Lauren Benet Stephenson, *The History of the New York City Garment District*, Zady Inc. (2015).

² The narrative is drawn from the following sources: Sarah Stone, *How Did “911” Become The Emergency Call Number In North America?*, Today I Found Out (July 7, 2014), <http://www.todayifoundout.com/index.php/2014/07/911-become-emergency-call-number-united-states/>; 9-1-1 Origins and History, National Emergency Number Association (2013) [hereinafter *Origins and History*] <https://www.nena.org/?page=911overviewfacts>; 40 Interesting Facts About . . . 911 Emergency Calls, Random History.com (August 7, 2014).

³ James C. Fell and Robert B. Voas, *Mothers Against Drunk Driving (MADD): The First 25 Years*, Pacific Institute for Research and Evaluation (March 2006).

⁴ Gerald D. Robin, *Waging the Battle Against Drunk Driving: Issues, Countermeasures, and Effectiveness* (1991) [hereinafter *Waging the Battle*] at 9.

⁵ *Waging the Battle*, supra note 20, at 9.

⁶ Andrew H. Malcolm, *Drinking And Driving: New Year's Eve 1981*, New York Times (December 31, 1982).

⁷ *History of Battered Women’s Movement*, Indiana Coalition Against Domestic Violence (March 25, 2009) <http://www.icadvinc.org/what-is-domestic-violence/history-of-battered-womens-movement/>.

⁸ Cathy Young, *Domestic Violence: An In-Depth Analysis*, Independent Women’s Forum (September 30, 2005) <http://www.iwf.org/news/2432535/Domestic-Violence:-An-In-Depth-Analysis>.

⁹ There is a limit to the tightness of the categories. A single case may have bits of more than one category, for example.

¹⁰ *A Retrospective*, supra note 8.

¹¹ Of course, in some instances two cases are so close in time and intertwined in their effect that it would be hard to see only one of them as the trigger case. This occurs, for example, with the trigger for the development of SWAT teams in the militarization of police: the 1965 riots in Watts and the case of sniper Charles Whitman who used superior fire power to keep police at bay. Another example, already discussed above, is the Santa Barbara oil spill which was followed only six months later by the Cuyahoga River fire.

¹² Ivy Scarborough, *Winning Against DUI: A Handbook for Victims of Drunk Driving and Antidrunken Driving Advocates* 33 (1996) http://www.ivyscarborough.com/_assets/WinningAgainstDUI.pdf.

¹³ For a more detailed discussion of the crime du jour dynamic, see Paul H Robinson, *The Rise and Fall and Resurrection of American Criminal Codes*, 53 *University of Louisville Law Review* 173, 181 (2015); Paul H Robinson and Michael T Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 *Hastings Law Journal* 633, ?? (2005); Paul H. Robinson, Thomas Gaeta, Matthew Majarian, Megan Schultz & Douglas M. Weck, *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 *J. Crim. L. & Criminology* 709, 718–28 (2010).

¹⁴ See Paul H Robinson, *Criminal Law Case Studies* 38-46 (5th ed., West Academic 2015).

¹⁵ Seth Ferranti, *The Ugly Truth of Mandatory Drug Sentencing*, The Fix.com (May 22, 2012) <https://www.thefix.com/content/Getting-life-selling-drugs-seth-ferranti7314?page=all>.

¹⁶ EPA, *Environmental Crimes Case Bulletin*, 3 (December 2013).

¹⁷ *Investor’s Business Daily*, *Puddles, Potholes Under Government Control — Has EPA Gone Too Far?*, Climate Change Dispatch, (May 29, 2015) [hereinafter *Gone Too Far?*]. <http://climatechangedispatch.com/puddles-potholes-under-government-control-has-epa-gone-too-far/>.

¹⁸ Gone Too Far?, supra note 31.

¹⁹ Gone Too Far?, supra note 31.

²⁰ Ryan Maye Handy, El Paso County Weakened some Fire Codes after Destructive Black Forest Fire, *The Gazette* (October 30, 2015).

²¹ Paul H. Robinson and Michael T. Cahill, *Law Without Justice: Why Criminal Law Doesn't Give People What They Deserve* 187-192 (Oxford University Press 2006).

²² *Origins and History*, supra note 17.

²³ Some people have expressed concern about the creation of DNA databases, as raising potential privacy problems.