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UNDEMOCRATIC CRIMES

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

Abstract

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 arguments for demanding consistency between community views and criminal law rules based upon the importance of 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 seriously 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 of general deterrence and incapacitation of the dangerous over doing justice, usually at the urging of academics or other experts, 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 justice judgments 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 oversee the social science research and to help hold the legislature to these public promises.

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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 with the community 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 in fact 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 criminal law rules. Part III reviews the empirical studies that show the conflict between these and community views.

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 supposed 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 seek to avoid providing a clear rule—perhaps because it means facing controversy—by adopting a rule that essentially delegates criminal law rulemaking 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 that create regular conflicts with community justice judgments.

Legislators are not condemned to continue their current practices, although clearly there are significant pressures in the current political system that may resist change. We suggest a number of reforms that we believe are realistic. First, we suggest that legislatures publicly commit themselves to find out if proposed legislation conflicts with community justice judgments before they legislate, by looking to controlled empirical studies rather than their own hunch, 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 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 against any 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 on its commitment to publicize and explain proposed criminal law rules that conflict with community justice judgments.

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.¹ 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.

We know from empirical studies that ordinary people believe that criminal liability and punishment ought to be distributed in a way that is deserved and just.² They do not think in terms of general deterrence or incapacitation of the dangerous, as many academic consequentialists do. Nor are they able, or inclined, to give step-by-step rational analyses for why a particular criminal

¹ James Wilson, *Lectures on Law*, in *Collected Works* 1 at 723.

² See generally Robinson, *In Defense of Moral Credibility* [forthcoming].

law rule or principle and its results are just or unjust, as a retributivist would. 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 there are political values that demand consistency between criminal law rules and popular judgment—values of democracy that transcend particular theories of criminal punishment. It is those values we consider first.

A. Democratic Values

A democratic state's criminal law ought to institutionalize the 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 People's values. This *substantive* requirement is what we mean when we speak of criminal law "democratization."

Democratizing the criminal law has been the subject of much recent discussion,³ 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. 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.⁴ That said, there are strong arguments for democratization that are uniquely connected to crime and punishment. Making that case will be the work of Part II.B, while this sub-section takes up the challenge of justifying substantive democratization based on broad democratic values.⁵

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.⁶ 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.⁷

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 living under that law and government."⁸ He defines "ethical life" as "the values disclosed by a community's public deliberations or implicit in its social practices and

³ See, e.g., Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1706 (2017), *Symposium, Democratizing Criminal Justice*, 111 NW. U. L. REV. 1367 (2017), Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 297 (2019), John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711 (May, 2020).

⁴ 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* Pt. III.

⁵ 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.

⁶ For the former see, e.g., Pettit, *Is Criminal Justice Politically Feasible?*, 5 Buff. Crim. L. Rev. 427 (2002) for the latter, see, e.g., Zimring, . *Public Opinion and the Governance of Punishment in Democratic Political Systems*. 605 *Annals of the American Academy of Political and Social Science* (2019).

⁷ Consider, for example, Pettit's use of the federal reserve model for a penal policy board. Pettit, *Is Criminal Justice Politically Feasible?*, 5 Buff. Crim. L. Rev. 427 (2002)

⁸ Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW U L Rev 1455, 1468. 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"

institutions.”⁹ Drawing on and critiquing the work of Jürgen Habermas, Max Weber, and 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. 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.¹⁰ This condition cashes out in a requirement that the judgments of the community about blameworthiness be reflected in the criminal law’s substantive rules.

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. 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).¹¹ This fact differentiates criminal law from many other fields, where citizens lack comprehensive intuitions. This observation implies that the degree of democratic illegitimacy is uniquely egregious when the criminal law departs from shared lay justice judgments. When this occurs, the state thumbs its nose at the judgments of the overwhelming majority of the community, thus threatening the state’s legitimacy.¹²

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. 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. 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.”¹³ Kleinfeld sees this whole move as “a mistake of the first order.”¹⁴

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.” This authorial view is possible only if the law reflects the normative judgments of

⁹ *Id.* 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.

¹⁰ See Jean Jacques Rousseau, *The Social Contract and Other Later Political Writings*, Victor Gourevitch (ed. and trans.), Cambridge: Cambridge University Press, 1997 (explicating the idea of the general will).

¹¹ Paul Robinson, *Democratizing Criminal Law*, 111 *Northwestern L. Rev.* 1565 (concluding that ordinary people’s views are rooted in “principles of proportionality” and conflict with academic-utilitarian crime-control doctrines).

¹² 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 put in their faces in an especially forceful manner.

¹³ Kleinfeld, *Three Principles*, 1470. One sees such a view in the background of Pettit’s proposal for a Penal Policy Board. Pettit, *Is Criminal Justice Politically Feasible?* His Board is a recreation of society in miniature, in which a combination of predominating 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.

¹⁴ *Id.* at 1470.

the community. 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 do provide persuasive support for the criminal law democratization project, we nonetheless recognize that reasons stemming from within punishment theory will likely be more convincing—as reasons most closely related to criminal law. Moreover, we contend that both consequentialism and retributivism generate pro-democratization arguments. It is to those arguments to 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. 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. If the community agrees that the law does ‘transcendent’ justice, then that’s ideal, but their approval is neither a necessary nor sufficient condition for determining what the rules ought to be.¹⁵ Indeed, our good utilitarian is likely to be affirmatively hostile to the views of ordinary people—to view them as primitive and vengeful, as targets to be undermined through surreptitious means or explicitly by ‘enlightening’ education.

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. Instrumentalist arguments for democracy exist¹⁶ and they sometimes argue that the laws of the democratic state will on balance be superior to those of the non-democratic state. This could be so for a variety of reasons—that democracy forces rulers to consider the interests of a wider set of persons, for example. 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.¹⁷

¹⁵ Perhaps community views only 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 Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, in 40 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 193, 233-34 (Mark Zanna ed., 2008) (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 & SOCIAL 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)

¹⁶ See, e.g., John Stuart Mill. *Considerations on Representative Government* (1861) (“...it 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.”).

¹⁷ See, e.g., Plato, *Republic* (trans. Jowett) (“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.”).

Moreover, even the democratic utilitarian could believe that criminal law is an exception where the experts ought to rule. Criminal law democratization comes in many flavors and one could be a “democrat” while being far from a “populist.”¹⁸ At an extreme edge we could locate the view that community judgment ought to actively determine specific case outcomes (imagine an online poll being held to determine guilt, sentence, etc., of particular offenders). To our knowledge, no writer supports such a position.

Further, any consequentialist would still be free to believe that the generally-preferable democratic procedure has gotten the rule wrong in a particular instance. 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.

So far then, it would seem that the good utilitarian has not been converted to the democratization cause. The arguments for democratizing either rely on non-instrumentalist values like equality of 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. But there is another extant consequentialist argument, one which 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.

Setting aside the accumulating evidence that general deterrence and incapacitation of the dangerous may be effective crime control distributive principles in principle but not in practice,¹⁹ recent research suggests that crime-control effectiveness depends in some significant part upon the criminal law’s moral credibility with the community. 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. 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 that will inspire resistance and subversion and will lose the ability to harness the powerful forces of social influence and internalized norms.²⁰ In short, effective crime control requires moral credibility which, in turn, requires democratization.

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 greater community violation. And the disillusionment tainted not only the alcohol prohibition rules, but also reduced compliance with criminal law rules unrelated to alcohol.²¹

¹⁸ See, e.g., Jose Luis Marti, *The Republican Democratization of Criminal Law and Justice*, In Samantha Besson & José Luis Martí (eds.), *Legal Republicanism: National and International Perspectives*. Oxford University Press (2009).

¹⁹ See Paul H. Robinson, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* (Oxford University Press, 2008) chs. 3-6; Paul H. Robinson and Lindsay Holcomb, *In Defense of Moral Credibility* (forthcoming 2021).

²⁰ For a summary of the supporting arguments and a response to criticisms, see Robinson and Holcomb, *In Defense of Moral Credibility* (forthcoming 2021).

²¹ Paul Robinson & Sarah Robinson, *PIRATES, PRISONERS, AND LEOPARDS: LESSONS FROM LIFE OUTSIDE THE LAW*, 139-163 (2015)

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 to residents grossly disproportionate, the aggressive policing and punishment did not reduce crime, as intended, but rather increased it, as the criminal law’s credibility within the neighborhood progressively weakened. 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. 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.²²

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. 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. Even small incremental losses in moral credibility can produce corresponding incremental losses in deference and compliance.²³

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. 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.²⁴

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.²⁵ The results confirm the conclusions of the earlier within-subjects design. The greater the disillusionment, the greater the loss in deference, compliance, and internalization. A study analyzing responses in pre-existing large datasets came to a similar conclusion using regression analysis.²⁶

The results in the laboratory studies are particularly striking because subjects come to the study with pre-existing views on the system’s reputation for being just. The experimenters, within the context of the study, could only nudge those pre-existing views slightly. Yet even that incremental disillusionment produced corresponding incremental reductions in deference and compliance. 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.

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. You don’t have to believe that liberty or equality (let alone desert) are values independent of utility to buy empirical desert’s democratization rationale. Nor need you believe that the community’s view has any

²² See generally Watts Riots (http://crdl.usg.edu/events/watts_riots/?Welcome).

²³ See Robinson (2013); Robinson, Goodwin & Reisig (2010)

²⁴ See Robinson, *Intuitions of Justice and the Utility of Desert*, ch. 2 (2013).

²⁵ *Id.*

²⁶ See Robinson Goodwin and Reisig, *Disutility of Injustice*, 85 NYU L. Rev. 1940, 2021-23 (2010).

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 equals 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.

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—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.

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.²⁷ 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.”²⁸ This dissension within the Commission reflects perennial controversies in philosophical discourse. 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.²⁹ There is no principled basis from within retributivism to determine which view should be codified because the disagreement is precisely about what retributivism entails.

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. 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.

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

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, as we

²⁷ See Robinson, DISTRIBUTIVE PRINCIPLES 165-74.

²⁸ Breyer, Stephen (1988) "The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest," Hofstra Law Review: Vol. 17 : Iss. 1 , Article 1 at 15. He also complained that any desert-oriented system would lack objectivity. Id. at 16.

²⁹ See Harm Matters: Punishing Failed Attempts, 14 Oh. St. J. Crim. L. 629, n. 1, n. 2 (2017) (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., Bruno Waller, THE INJUSTICE OF PUNISHMENT (2017).

noted above.³⁰ 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. In one study, researchers found that people are intuitively drawn to retribution-related information.³¹ 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.³² A whopping 97 percent of subjects chose to consult retribution-related information on a first trial rather than deterrence-related information or incapacitation-related information.³³ 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.³⁴

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. On many issues, there is in fact a high degree of agreement across demographics on the relative blameworthiness of specific wrongdoers. Many of these areas of high agreement might be called the “core of wrongdoing” because they concern such fundamental offenses as physical injury to others, taking property without consent, and deceit in exchanges. Consider one study that had subjects rank order 24 scenarios according to overall deserved punishment.³⁵ The kinds of offenses in the scenarios represent 94.9% of the offenses committed in the United States. The results show a Kendall’s W of 0.95 for in-person subjects and 0.88 for Internet subjects—an astounding result. One can’t 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. This problem is not limited to archaic or rarely invoked code provisions; it effects doctrines as commonplace (and serious) as felony

³⁰ See also Kevin Carlsmith, John Darley & Paul Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. OF PERSONALITY AND SOC. PSYCH. 284, 284 (2002); John Darley, Kevin Carlsmith, and Paul Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 L. & HUM. BEHAV. 659, 659(2000)

³¹ Kevin M. Carlsmith, *The Roles of Retribution and Utility in Determining Punishment* 42 J. EXPERIMENTAL SOC. PSYCH. 437 (2006).

³² *Id.* at 440.

³³ *Id.* at 445.

³⁴ *Id.* at 446.

³⁵ Robinson and Kurzban, *Concordance and Conflict*, at 1846-80; IJUD Chapter 2.

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 they apply to. 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.³⁶

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*.³⁷ 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.”³⁸ Four other states follow a similar doctrine, termed the *mens rea approach*.³⁹ That approach is the most extreme attack on the insanity defense extant in American law.⁴⁰

However, there are 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.⁴¹ These departures from the “*M’Naghten* plus control” test, and the A.L.I.’s similar two-prong test, both seriously conflict with lay views.

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. In one study, for example, the vast 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.⁴² 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 result.⁴³

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

³⁶ Readers keen to dig deeper into the relevant evidence regarding code-community conflicts are encouraged to consult: Paul H. Robinson & John M. Darley, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995).

³⁷ See *Kahler v. Kansas*, 140 S. Ct. 1021, 1031 (2020).

³⁸ *Id.* at 1025 (citing Kan. Stat. Ann. § 21-5209 (2018 Cum. Supp.))

³⁹ Idaho Code Ann. § 18-207 (2016); Mont. Code Ann. § 46-14-102 (2017); Utah Code Ann. § 76-2-305 (LexisNexis 2017); Alaska Stat. §§ 12.47.010(a).

⁴⁰ We consider the MPC’s dual-prong substantial capacity doctrine to be the broadest variation available.

⁴¹ See Robinson & Goodwin & Reisig, *The Disutility of Injustice*, N.Y.U. L. Rev 1940, n. 57; see also Model Penal Code 4.01 (“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)

⁴² See ROBINSON & DARLEY, *JUSTICE, LIABILITY, AND BLAME*, *supra* note 42, at 132 R tbl.5.2 (illustrating respondents’ desires to impose civil commitment in cases involving serious offenses).

⁴³

freedom.”⁴⁴ 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.⁴⁵ In 2020, that sentence was upheld by the Louisiana Supreme Court.⁴⁶ 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 1992.⁴⁷ 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.⁴⁸

Dispositions like Bryant’s are hardly uncommon under America’s habitual offender sentencing regimes. So-called “three-strikes” laws are one of the most well-known examples of this phenomenon, 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.⁴⁹ In California, a defendant risks a life sentence by committing three non-violent offenses involving drugs and minors.⁵⁰ We could list many more variants.⁵¹ Every state (as well as the federal system⁵²) 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. The available studies suggest that people do see subsequent offenses as being slightly more blameworthy than equivalent first-time offenses, but that they do not support the extreme increases common in habitual offender statutes. 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. Of all respondents, 88.4% answered that they would support such a measure. The same set of subjects were 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). 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.” 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. 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. People’s true justice judgments simply did not match their reported views when asked about a politically-charged criminal justice policy.⁵³ Other studies report the same conflict between community judgments and three strikes statutes.⁵⁴

⁴⁴ *Black man serving life sentence for stealing hedge clippers getting shot at freedom*, CBS News, (<https://www.cbsnews.com/news/fair-wayne-bryant-bernette-johnson-black-man-life-sentence-stealing-hedge-clippers-shot-at-freedom/>)

⁴⁵ Kay Jones and Leah Asmelash, *Louisiana Supreme Court upholds Black man's life sentence for stealing hedge clippers more than 20 years ago*, CNN (<https://edition.cnn.com/2020/08/06/us/louisiana-supreme-court-trnd/index.html>)

⁴⁶ *Id.*

⁴⁷ *Louisiana v. Bryant*, No. 2020-KO-00077 (2020) (<https://www.lasc.org/Opinions/2020/20-0077.KO.bjj.dis.pdf>)

⁴⁸ *Id.*

⁴⁹ See SC SECTION 17-25-45 (Life sentence for person convicted for certain crimes).

⁵⁰ CA HLTH & S § 11353

⁵¹ See ROBINSON, *MAPPING AMERICAN CRIMINAL LAW: VARIATIONS ACROSS THE 50 STATES*, Ch. 2. (2018).

⁵² 18 U.S.C. § 3559(c);

⁵³ Robinson, *Disutility of Injustice*, at 1940.

⁵⁴ See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 189–97 (1995) (discussing theories and patterns of multiple-offense sentencing).

C. Adult Prosecution of Juveniles

At the close of the 1990s, all jurisdictions in the United States permitted juveniles to be transferred to criminal court and tried as adults.⁵⁵ 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. The lowest age for which transfer is allowed differs by jurisdiction. Some jurisdictions do not list any minimum age for transfer. Others explicitly allow transfer as early as age ten.

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.⁵⁶ Some states have changed their laws regarding the minimum age for transfer to adult court, via “raise the floor” laws.⁵⁷ California, notably, has now ended the transfer of 14- and 15-year-olds into adult court, making 16 the minimum age for criminal court jurisdiction.⁵⁸ Other states have explored various roll-backs of the pro-transfer laws of the 1990s.⁵⁹

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. In one study, a youth was described as committing the horrific offense of pouring gasoline on a sleeping companion and setting him on fire. 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 the offender was described as fourteen years old, 23% of the subjects would impose no liability, and the average sentence was 5.4 years. When the offender was described as ten years old, 47% of the subjects would impose no liability, and the average liability was 11 months.⁶⁰ Other studies report similar results.⁶¹ 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. The most popular version of the rule, used by forty jurisdictions, allows only inherently dangerous felonies (such as arson or drug

⁵⁵ Robinson, *Disutility of Injustice*, at 1953.

⁵⁶ See Report of the Justice Policy Institute, *Raise the Age* (http://www.justicepolicy.org/uploads/justicepolicy/documents/raisetheagesummary_final_3_6_16.pdf); see also National Conference of State Legislators, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws* (<https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx>).

⁵⁷ See Campaign for Youth Justice, *State Trends Report* (http://www.campaignforyouthjustice.org/images/A-StateTrends_Report-Web.pdf).

⁵⁸ See Maureen Washburn, *California's Latest Adult Transfer Law Models Pathways for Reform for Rest of U.S.*, JUVENILE JUSTICE INFORMATION EXCHANGE (<https://jjie.org/2018/10/03/californias-latest-adult-transfer-law-models-pathways-for-reform-for-rest-of-u-s/>).

⁵⁹ See *supra* note 57.

⁶⁰ Robinson, *Disutility of Injustice* at 1977.

⁶¹ See *id.* at 1977-78; see also Loretta Stalans and Gary Henry, (1994), *Societal Views of Justice for Adolescents Accused of Murder*, pg. 692, <https://doi.org/10.1007/BF01499331>; Sheryl Kubiak and Terrence Allen (2008), *Public Opinion Regarding Juvenile Life Without Parole in Consecutive Statewide Surveys*, pg. 509, <https://journals.sagepub.com/doi/pdf/10.1177/0011128708317987>).

trafficking) to trigger the rule's use.⁶² Ten jurisdictions allow the commission of any felony to be used.⁶³ Two jurisdictions have abolished the felony murder rule.⁶⁴

The available empirical evidence suggests that lay intuitions of justice do not support either the aggravation of culpability or the complicity aspect of the felony murder rule. In one study, for example, subjects aggravated culpability for an accidental killing during a felony, but only to the level of manslaughter, not murder.⁶⁵ The accomplice in the felony is punished at an even lower level than manslaughter,⁶⁶ 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.⁶⁷ Other studies have come to similar conclusions.⁶⁸

E. Strict Liability Offenses

It is now common for even serious offenses, like statutory rape, to be treated as strict liability offenses. Under such a regime, a culpable state of mind need not be proven with respect to a sexual partner's age. Most jurisdictions reject even a reasonable mistake as to age as a defense to statutory rape.⁶⁹ While other serious offenses, such as driving under the influence, can

⁶² United States, 18 U.S.C. § 1111(a) (2006); Alabama, Ala. Code § 13a-6-2(A)(3) (2009); Alaska, Alaska Stat. § 11.41.110(A)(3) (2008); Arizona, Ariz. Rev. Stat. Ann. § 13-1105(A)(2) (2010); California, Cal. Penal Code § 1-8-1-189 (West 2008); Colorado, Colo. Rev. Stat. Ann. § 18-3-102(1)(B) (West 2009); Connecticut, Conn. Gen. Stat. Ann. § 53(A)-54(C) (West 2007); District Of Columbia, D.C. Code § 22-2101 (Lexisnexis 2010); Florida, Fla. Stat. Ann. § 782.04 (West 2007); Idaho, Idaho Code Ann. § 18-4003(D) (2004); Illinois, 720 Ill. Comp. Stat. Ann. 5/9-1(A)(3) (West 2002); Indiana, Ind. Code Ann. § 35-42-1-2, -3 (West 2004); Iowa, Iowa Code § 707.2.2-.3 (2007); Kansas, Kan. Stat. Ann. § 21-3401(B) (2007); Louisiana, La. Rev. Stat. Ann. § 14:30(A)(1) (2007); Maine, Me. Rev. Stat. Ann. Tit. 17-A, § 202(1) (2006); Maryland, Md. Code Ann., Crim. Law § 2-201(A)(4) (Lexisnexis 2002); Massachusetts, Mass. Ann. Laws Ch. 265, § 1 (Lexisnexis 2008); Michigan, Mich. Comp. Laws Ann. § 750.316(1)(B) (West 2004); Minnesota, Minn. Stat. Ann. § 609.185(A)(2)-(3) (West 2009); Mississippi, Miss. Code Ann. § 97-3-19(1)(C) (2005); Montana, Mont. Code Ann. § 45-5-102(1)(B) (2009); Nebraska, Neb. Rev. Stat. § 28-303(2) (2009); Nevada, Nev. Rev. Stat. § 200.030(1)(B) (2009); New Jersey, N.J. Stat. Ann. § 2c:11-3.A(3) (West 2005); New York, N.Y. Penal Law § 125.25(3) (Consol. 1998); North Carolina, N.C. Gen. Stat. Ann. § 14-17 (West 2000); North Dakota, N.D. Cent. Code § 12.1-16-01(1)(C) (1997); Ohio, Ohio Rev. Code Ann. § 2903.01(B) (West 2006); Oregon, Or. Rev. Stat. § 163.115(1)(B) (2009); Rhode Island, R.I. Gen. Laws § 11-23-1 (2002); South Carolina, S.C. Code Ann. § 16-3-20(C)(A)(1) (2003); South Dakota, S.D. Codified Laws § 22-16-4(1) (2006); Tennessee, Tenn. Code Ann. § 39-13-202(A)(2)-(3) (2006); Utah, Utah Code Ann. § 76-5-203(2)(D) (Lexisnexis 2008); Vermont, Vt. Stat. Ann. Tit. 13, § 2301 (2009); Virginia, Va. Code Ann. § 18.2-32 (2009); West Virginia, W. Va. Code Ann. § 61-2-1 (2005); Wisconsin, Wis. Stat. Ann. § 940.03 (West 2005); Wyoming, Wyo. Stat. Ann. § 6-2-101(A) (2009).

⁶³ Arkansas, Ark. Code Ann. § 5-10-102(A)(1) (2006); Delaware, Del. Code Ann. Tit. 11, § 636(A)(2) (2007); Georgia, Ga. Code Ann. § 16-5-1 (2007); Missouri, Mo. Rev. Stat. § 565.021.1(2) (1999); New Hampshire, N.H. Rev. Stat. Ann. § 630:1-B (2007); New Mexico, N.M. Stat. Ann. § 30-2-1-A(2) (2004); Oklahoma, Okla. Stat. Ann. Tit. 21, § 701.7(B) (West 2002); Pennsylvania, 18 Pa. Cons. Stat. § 2502(B) (1998); Texas, Tex. Penal Code Ann. § 19.02(B)(3) (West 2003); Washington, Wash. Rev. Code Ann. § 9a.32.030(1)(C), -.050(1)(B) (2009).

⁶⁴ Hawaii, Haw. Rev. Stat. § 707-701 (1996); Kentucky, Ky. Rev. Stat. Ann. § 507.020 (Lexisnexis 2008).

⁶⁵ See Robinson & Darley, Justice, Liability, And Blame, at 76.

⁶⁶ *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.”). *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.”).

⁶⁷ *Id.* at 36 tbl.2.9, 208-10 (dichotomous-continuous discussion).

⁶⁸ See Norman Finkel, 1990, *Capital felony-murder, objective indicia, and community sentiment*, pg. 876, https://heinonline.org/HOL/Page?handle=hein.journals/arz32&div=38&g_sent=1&casa_token=&collection=journal s).

⁶⁹ 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

be ones of strict liability,⁷⁰ the bulk of strict liability offenses are more minor, such as “public welfare offenses,”⁷¹ 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. The Model Penal Code attempts to restrict the use of strict liability to “violations” rather than crimes,⁷² although it too imposes strict liability for the serious felony of aggravated statutory rape.⁷³

Available research suggests that people generally do not impose criminal liability in the absence of some level of offender culpability. 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.⁷⁴

F. Drug Offense Penalties

Although they are traditionally governed by state law, drug-related crimes have increasingly come under federal jurisdiction in recent decades.⁷⁵ In an attempt to increase deterrent effects, federal sentencing for drug crimes has become quite harsh.⁷⁶ The average federal sentence for drug-related crimes in 2005 was 85.7 months. If marijuana-related crimes are ignored, that average rises to 98.9 months. As a point of comparison, the average federal sentence for all violent crimes is 95.2 months. Homicide has an average sentence of 118.3 months—less than 20% higher than the average sentence for nonmarijuana drug offenses.⁷⁷ Harsher federal penalties mean that an ever-increasing number of cases that could be brought in state courts are being prosecuted in federal court.⁷⁸

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

majority employing strict liability). For states that employ a strict liability approach, see, for example, Fla. Stat. Ann. § 794.021 (West 2007), N.J. Stat. Ann. § 2c:14-5(C) (West 2005), and Wis. Stat. Ann. § 939.43(2) (West 2005). For States That Allow For A Mistake Defense, See, For Example, Ind. Code Ann. § 35-42-4-3(C) (Lexisnexis 2009), Mo. Rev. Stat. § 566.020 (2000), and W. Va. Code Ann. § 61-8B-12 (LexisNexis 2005). The federal approach is a hybrid, with strict liability only for sexual contact with children under the age of twelve. 18 U.S.C. § 2441(d) (2006).

⁷⁰ 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).

⁷¹ 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”)

⁷² Model Penal Code section 2.05.

⁷³ Model Penal Code section 213.6(1).

⁷⁴ See ROBINSON & DARLEY, JUSTICE, LIABILITY, AND BLAME, at 89 tbl.4.1 (showing respondents’ negligible imposition of punishment in light of negligent mistake). 130 See id. at 172-73 tbl.6.

⁷⁵ See, e.g., Edward L. Glaeser et al., *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”).

⁷⁶ 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).

⁷⁷ All sentencing statistics are taken from: Bureau of Justice Statistics, U.S. Dep’t of Justice, Defendants Sentenced in U.S. District Courts: By Offense, and Type and Length of Sentence, Fiscal Year 2005, in SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.5.25.2005, <http://www.albany.edu/sourcebook/pdf/t5252005.pdf>

⁷⁸ See Glaeser et al. at 260 (noting that expansion of federal jurisdiction and harsher federal penalties could implicate deterrence and equity considerations).

offense, comparable to, at most, a minor theft.⁷⁹ Possession of cocaine was deemed a bit more serious but still only about as blameworthy as a slightly more serious theft.⁸⁰ A conviction for dealing cocaine was seen as being considerably more blameworthy—more akin to breaking into a car or robbery.⁸¹ Importing cocaine was seen as more serious still, similar in seriousness to burglary or assault.⁸² Other studies come to similar conclusions.⁸³

F. Other Conflict Points

Here then are a number of common and highly visible criminal law rules that 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,⁸⁴ imputing recklessness to the voluntarily intoxicated,⁸⁵ forbidding individualization of the reasonable person standard,⁸⁶ forbidding a legal ignorance defense,⁸⁷ refusing to recognize a broad lesser-evils defense,⁸⁸ the use of the substantial step test for attempt liability,⁸⁹ and treating proximate cause and self-defense in all-or-nothing terms, rather than along graded continuums.⁹⁰ Many other examples are possible.⁹¹

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 that 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

⁷⁹ Compare Robinson & Kurzban, *supra* note 88, 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).

⁸⁰ *Id.* at 1885.

⁸¹ *Id.*

⁸² *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) to 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.

⁸³ See e.g. U.S. SENTENCING COMM'N, NATIONAL SAMPLE SURVEY: PUBLIC OPINION ON SENTENCING FEDERAL CRIMES 25 (1997), available at http://www.ussc.gov/nss/jp_exsum.htm

⁸⁴ Robinson, *Intuitions of Justice*, 263-264.

⁸⁵ Robinson, *Intuitions of Justice*, 335.

⁸⁶ Justice, Liability, and Blame, 123.

⁸⁷ Adam Alter, Julia Kernochan, John Darley, *Morality Influences How People Apply the Ignorance of the Law Defense*, L. & SOC. REV. 819, 846 (2007).

⁸⁸ Paul Robinson and John Darley, *Testing Competing Theories of Justification*, 76 N. CAROLINA. L. REV. 1095, 1131 (1998).

⁸⁹ Robinson, *Intuitions of Justice*, 253.

⁹⁰ Erich Green and John Darley, *Effects of Necessary, Sufficient, and Indirect Causation on Judgements of Criminal Liability*, 22 L. & HUM. BEHAV. 429, 447 (1998); *Intuitions of Justice*, 281-2.

⁹¹ See, e.g., *Intuitions of Justice*, pg. 356-8 (entrapment); *id.* at 273 (omission liability); *id.* at 489-90 (mistake as to justification).

people.⁹² Yet the social science research laid out above shows that such rules seriously conflict with community judgments.

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 truly 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.⁹³

Second, legislators are often responding to pressure from special interest groups. These groups—ranging from agribusiness to recording companies—successfully lobby for conflict point laws that 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.⁹⁴

Third, legislatures often prioritize coercive crime-control, typically general deterrence or incapacitation of the dangerous, at the expense of doing justice. 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 that generate results in conflict with the public's normative judgments.⁹⁵

Fourth, legislatures often adopt overbroad criminal law rules that, in practice, delegate criminalization decisions to judges and prosecutors. The result is rules of sufficient breadth that they may not directly command injustice, but they sanction enough discretion for other actors that doing injustice can easily result. Laws that lump conduct of radically different seriousness within the same offense grade,⁹⁶ 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.⁹⁷

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 that drive their passage, with no single causal analysis producing a complete picture.⁹⁸ 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.

⁹² See, e.g., James Q. Whitman, *What Happened to Tocqueville's America?* 74 SOC. RES. 251 (2007)

⁹³ This point can be connected to larger critiques about the reliability of polling as a means of divining public opinion. See, e.g., <https://www.wsj.com/articles/the-polls-are-dead-long-live-politics-11605809242?page=1>; <https://www.washingtonpost.com/politics/2020/11/25/which-2020-election-polls-were-most-least-accurate/> (discussing recent failures of the polls to predict the behavior of the American electorate and potential explanations).

⁹⁴ See, e.g., Va. Code Ann. § 18.2-102.2 (West 1990); N.C. Gen. Stat. Ann. § 14-72.4 (West 1994).

⁹⁵ See *supra* n. 15.

⁹⁶ See, e.g., 2012 Pa. Legis. Serv. § 2903(b) (West) (false imprisonment of a minor).

⁹⁷ 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 Joshua Bowers and Paul H Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility* (2012). *Faculty Scholarship at Penn Law*. 596. https://scholarship.law.upenn.edu/faculty_scholarship/596.

⁹⁸ 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.

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;⁹⁹ 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.¹⁰⁰

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.¹⁰¹ We then consider some of the potential structural reasons why legislators consistently make such errors.

Insanity Defense Narrowing or Abolition. The driving force behind Kansas's abolition of the insanity defense was the legislature's perception that the public demanded it. The Petitioner's Brief in the *Kahler* case made exactly this point in detailing the legislative history, stating that "public fear and frustration about crime" prompted legislators to narrow the insanity defense.¹⁰² 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 been quickly acquitted on the basis of insanity.¹⁰³ Indeed, the legislature heard powerful testimony from the mother of one of the victims, who attacked the state's then-existing insanity regime.¹⁰⁴ 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,¹⁰⁵ with Kansas's legislature choosing to go further along the abolitionist path than the U.S. Congress would ultimately proceed.¹⁰⁶

⁹⁹ See generally ZIMRING, PUNISHMENT AND DEMOCRACY.

¹⁰⁰ 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* J.A. at 294), but this explanation seems to the authors subsidiary to the role played by the legislative mistake about public views on the defense.

¹⁰¹ We are willing to assume a certain amount of legislative sincerity in their appeals to popular support. While it is conceivable that many legislators use these appeals automatically, 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.

¹⁰² See *Kahler v. Kansas* Petitioner's Brief at 2-3. (citing contemporary newspaper articles, including one with the memorable title of "Getting tough on the mentally ill").

¹⁰³ 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 King-Ries, *Arbitrary and God-like*, and *Insanity Defense and its Alternatives* at 12; Rita Buitendorp, *A Statutory Lesson from "Big Sky Country" on Abolishing the Insanity Defense*, 30 Valparaiso L. Rev. 965 (<https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1902&context=vulr>).

¹⁰⁴ See *Kahler v. Kansas*, Brief of Lynn Denton, Arizona Voice for Crime Victims, Et. Al.

¹⁰⁵ See *Hinkley Acquittal Brings Moves to Change Insanity Defense*, N.Y. TIMES (<https://www.nytimes.com/1982/06/24/us/hinkley-acquittal-brings-moves-to-change-insanity-defense.html>) (phone polling at the time showed 74% of respondents felt that justice had not been done in the case).

¹⁰⁶ See Insanity Defense Reform Act of 1984 (modifying federal insanity defense law by, *inter alia*, placing the burden of proof on the defendant).

Raymond Spring, the architect and key proponent of the *mens rea* approach Kansas ultimately adopted,¹⁰⁷ has also argued that the legislature was responding to perceived public pressure to “reform” the insanity defense. 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,” that the legislators were “[r]esponding to public concerns generated by a few highly visible cases” and that ultimate enactment of his proposal ensured that “public concerns have been addressed.”¹⁰⁸ 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 that “[t]he public’s negative perception of the insanity defense is a major reason why the Kansas Legislature abolished [it].”¹⁰⁹ 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.”¹¹⁰

Congressmen like Rep. Wells certainly 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 that “justice had not been done” in the case.¹¹¹ Other polls produced similar results.¹¹² 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.¹¹³

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 just believed (based on very incomplete and distorted information) that Hinckley *himself* did not qualify as blamelessly insane. Yet the United States Congress seemed to fall into precisely this trap. Even the drafters of the Insanity Defense Reform Act explicitly recognized that much perceived public “disapproval” of the insanity defense only existed because people were misled into believing “myths” about the defense (such as its frequency of success, the likelihood of effective malingering, etc.).¹¹⁴ According to M.L. Perlin, this amounted to a concession that “congress must assuage myths it knows to be false” if those myths seem to “undermine public faith in the justice system.”¹¹⁵ To us, this shows the full extent to which mistaken perceptions of public disapproval have influenced legislative action in the insanity defense context: the U.S. 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 falsehoods. 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.¹¹⁶ However, this enhancement effect is negligible when compared to the extreme sentencing differentials doled

¹⁰⁷ See Kahler, Brief for Respondent, at 32 (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.”)

¹⁰⁸ Spring, *Farewell to Insanity* 44-45.

¹⁰⁹ Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 Kan. J.L. & Pub. Pol’y 253 (1998-1999).

¹¹⁰ See Kahler, J.A. at 293.

¹¹¹ See [supra note 107](#).

¹¹² Valerie P. Hans and Dan Slater, *John Hinckley, Jr. and the Insanity Defense: The Public’s Verdict*, THE PUBLIC OPINION QUARTERLY, Vol. 47, No. 2 (Summer, 1983), pp. 202-212.

¹¹³ See *infra* p. 23 (discussing distortion effects).

¹¹⁴ Nusbaum, *The Craziest Reform of them All: A Critical Analysis of the Constitutional Implications of Abolishing the Insanity Defense* 87 Cornell L. Rev. 1509, n. 9 (2002).

¹¹⁵ *Id.* .

¹¹⁶ See *supra* Pt. III.

out under contemporary law.¹¹⁷ 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.

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 who were each killed by men with extensive criminal histories.¹¹⁸ 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 the “second strike”.¹¹⁹ 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.¹²⁰

Contemporary evidence makes clear that perceived public support played an important role in the legislature’s (and governor’s) decision to support Three Strikes. 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.”¹²¹ 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 realist.”¹²² 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.¹²³

Willie Brown was not the only California politician to come around to reluctantly supporting Three Strikes in spite of 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.”¹²⁴ Commentators since have picked up on this evidence and consistently concluded that perceived public fervor was critical to the enactment of California’s Three Strikes law.¹²⁵ 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. 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.¹²⁶

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.”¹²⁷ As we saw in Part III, this conclusion is in harmony with popular judgments of justice as revealed by social scientific research.¹²⁸ Yet, in the contemporary United States, the prosecution of juveniles in adult court—and resultant

¹¹⁷ *Id.*

¹¹⁸ See Schultz, *No Joy in Mudville*, 569-71. see also ROBINSON, CRIMES THAT CHANGED OUR WORLD.

¹¹⁹ *Id.*

¹²⁰ See generally ZIMRING, PUNISHMENT AND DEMOCRACY.

¹²¹ See <https://www.latimes.com/archives/la-xpm-1994-03-02-mn-28983-story.html>.

¹²² Michael Vitiello, *Three Strikes: Can We Return to Rationality*, 87 J. Crim. L. & Criminology 395, n. 113 (1997).

¹²³ See generally *id.*

¹²⁴ *Id.* at n. 113.

¹²⁵ See Vitiello, Schultz, Zimring. Though note recent changes to the law mitigating some of its harshness. https://www.abajournal.com/magazine/article/california_begins_to_release_prisoners_after_reforming_its_three-strikes_la.

¹²⁶ See *supra* Pt. III.

¹²⁷ YAFFE, THE AGE OF CULPABILITY 158.

¹²⁸ See *supra* Pt. III.

exposure to adult sentences—is commonplace.¹²⁹ Every jurisdiction in the country permits transfer to adult court under some circumstances, sometimes with no minimum statutory age, in two cases with a minimum age of only 10 years; until recently New York state placed certain offenders over the age of 15 into adult court by default (a practice that continues in North Carolina).¹³⁰

The common law generally treated juvenile offenders similarly to adults, with a special set of presumptions operating in felony prosecutions (that one under seven was conclusively presumed incapable of committing the crime, that this presumption was rebuttable between the ages of seven and fourteen, and that no presumption in favor of the accused would operate over fourteen).¹³¹ 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 19th century, and reached its current form as a result of statutory changes of the 1980s and 90s.¹³² Between 1992 and 1997, for example, laws in 45 states were passed making it easier to transfer juveniles into adult court.¹³³ 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, which was made law in March 1996.¹³⁴ 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....”¹³⁵ The new approach emphasizing punishment and crime control included an expansion of the statutory exclusion list (those charges that will automatically place a juvenile defendant 14 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 to the safety of the public or any individual posed by the juvenile” and “the degree of the juvenile’s culpability”).¹³⁶

Act 33 reflected poll results indicating mass public support for trying juveniles 14 and older accused of violent crimes as adults.¹³⁷ State politicians who supported Act 33 apparently believed such national results accurately reflected the attitude of their own constituents and acted accordingly in ensuring the law’s passage. Senator Fisher, for example, one of the co-sponsors and 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

¹²⁹ See Robinson, *Disutility of Injustice*, 1953.

¹³⁰ *Id.*; see also Nicole Scialabba, *Should Juveniles Be Charged as Adults in the Criminal Justice System?* American Bar Association (2016)(<https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/should-juveniles-be-charged-as-adults/>); <https://www.nycourts.gov/CourtHelp/Criminal/RTA.shtml>); https://www.ojjdp.gov/ojstatbb/structure_process/qa04105.asp. For extensive analysis of the history and varieties of juvenile justice in the United States, see generally ROSENHEIM, MARGARET K. AND FRANKLIN ZIMRING, *A CENTURY OF JUVENILE JUSTICE*, Chicago: University of Chicago Press (2002).

¹³¹ See *Allen v. United States*, 150 U.S. 551, 14 S. Ct. 196, 37 L. Ed. 1179 (1893); see also https://us.sagepub.com/sites/default/files/upm-binaries/19434_Section_1.pdf.

¹³² See *id.* at 24-33.

¹³³ *Id.* at 33.

¹³⁴ 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 (2004).

¹³⁵ 42 Pa. Cons. Stat. § 6301(b)(2) (emphasis added).

¹³⁶ See Holtzman..

¹³⁷ *Attitudes Toward the Treatment of Juveniles Who Commit Violent Crimes*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, at <http://www.albany.edu/sourcebook/>.

committed in this Commonwealth by juveniles.”¹³⁸ 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.”¹³⁹ Fisher described his perception of public demands: “I believe that is what the people of Pennsylvania have been telling us ... If 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.”¹⁴⁰

Juvenile justice is also the backdrop for a new trend in conflict point legislation: crafting 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. However, some new proposals keep conflict alive through overcorrection. For example, Vermont legislators in 2016 passed a law allowing offenders up to age 20 to be tried in the juvenile system.¹⁴¹ Similar proposals have appeared in Massachusetts, Connecticut, New York, and Illinois, but thus far have had little success.¹⁴² New proposals continue to appear.¹⁴³ A more extreme version of this idea has recently been considered in the Colorado legislature; the bill there would permit defendants as old as 25 to potentially be placed under the jurisdiction of the juvenile justice system.¹⁴⁴ 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.¹⁴⁵ Scott, et. al.’s research reveals that a majority of American adults believe the minimum age for adult criminal prosecution generally should be about 16.¹⁴⁶ The study results also suggest that public judgment does not agree with raise-the-age advocate’s argument that 20-year-olds have comparable psychosocial maturity and culpability levels to 15-year-olds.¹⁴⁷

Distortion Effects. Why is it that legislators make these errors about the content of public judgment? Or, put another way: How do we resolve the apparent conflict between the social

¹³⁸ Pa. Legis. J. June 19, 1995 (<https://www.legis.state.pa.us/WU01/LI/SJ/1995/1/Sj19950619.pdf#page=3>).

¹³⁹ *Id.* 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.

¹⁴⁰ Pa. Legis. J. October 25, 1995 (<https://www.legis.state.pa.us/WU01/LI/SJ/1995/1/Sj19951025.pdf#page=2>).

¹⁴¹ Aidan Ryan, *Crime bill would redefine juveniles as up to age 21*, BOSTON GLOBE (July 9, 2019)

(<https://www.bostonglobe.com/metro/2019/07/09/crime-bill-would-redefine-juveniles-age/maHshbBT6QaaX9ooVDVidN/story.html>).

¹⁴² *Id.*

¹⁴³ *See, e.g.*, SB-889 Juveniles: Juvenile court jurisdiction (2019-2020)

(https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB889) (CA bill that would raise the age of juvenile jurisdiction to 19).

¹⁴⁴ Michael Karlik, *Legislative committee advances criminal justice reform package*, COLORADO POLITICS (October 31, 2019) (https://www.coloradopolitics.com/news/legislative-committee-advances-criminal-justice-reform-package/article_ad49744a-fb77-11e9-bd07-43c207545f11.html).

¹⁴⁵ Scott, et. al., *Public Attitudes About the Culpability and Punishment of Young Offenders*, Columbia Law School Public Law & Legal Theory Working Paper Group, Paper Number 07-135 (https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2457&context=faculty_scholarship).

¹⁴⁶ *Id.* at 16.]

¹⁴⁷ *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 (October 3, 2019) (<https://www.wbur.org/news/2019/10/03/juvenile-court-age-vermont-massachusetts>) (“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.”)

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, sufficient groundwork has been laid elsewhere that we can sketch out an analysis that will help contextualize our argument.¹⁴⁸

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?').¹⁴⁹ 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.¹⁵⁰ 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. When a citizen thinks about the appropriate sentence for a crime, she 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. For example, when asked about capital punishment, most citizens would think about deliberate murder, and not the cases that would require qualifying descriptions. 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. 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.¹⁵¹

Further, when the media reports on particular crimes, they are apt to present an incomplete--and thus misleading portrait--of the events examined. This distortion may lead citizens to conclude that a criminal has been sentenced too leniently, because the media simply did not report on the facts that 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.¹⁵² 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). Importantly, the summary included much information that 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. 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.¹⁵³

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.¹⁵⁴ [Beckett has connected this

¹⁴⁸ For a much more thorough analysis of these issues, see generally Robinson, *Disutility of Injustice* at 1981-1994. See also Beale, *What's Law Got To Do With It?*

¹⁴⁹ See Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 6-7 (2000).

¹⁵⁰ See, e.g., Paul H. Robinson and Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007).

¹⁵¹ Roberts & Doob, *News Media Influences on Public Views of Sentencing*, 14 L. & HUM. BEHAV. 451, at 464-65.

¹⁵² *Id.* at 461.

¹⁵³ *Id.* at 462-63.

¹⁵⁴ *Supra* Beckett, *Making Crime Pay*, at 65.

fact to the possibility that 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.¹⁵⁵ This hypothesis receives support from the lack of clear relationship between the crime rate and expressed public concern about crime.¹⁵⁶ 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%.¹⁵⁷ Amazingly, this increase contradicted the crime trends at the time, which showed a decreased over that period.¹⁵⁸ However, then President Clinton's January 1994 State of the Union address spent significant time addressing the 'crime problem' in the country,¹⁵⁹ and— most importantly—one of the country's most significant crime-control bills, the Violent Crime Control and Law Enforcement Act of 1994, was debated in Congress and passed that year. There is no doubt 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 and 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 is actually represented at congressional hearings on criminal justice topics. Lisa Miller conducted research on witnesses at Congressional hearings on crime for the period between 1947-1998.¹⁶⁰ 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."¹⁶¹ 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."¹⁶² (Social science researchers on community justice judgments are never called as witnesses at legislative hearings, as far as we know.) 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. One of us has argued that "the 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

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 21

¹⁵⁷ *Id.* at 25.

¹⁵⁸ *Id.*

¹⁵⁹ President William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union 126, 127, 133-35 (Jan. 25, 1994), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=1994_public_papers_vol1_text&docid=pap_text-64.pdf]

¹⁶⁰ See Miller, *Re-Thinking Bureaucrats in the National Policy Process* (2004).

¹⁶¹ *Id.* at 1.

¹⁶² *Id.* at 582 (citing Beckett).

decipher prevailing lay beliefs.”¹⁶³ 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.¹⁶⁴

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. 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.¹⁶⁵ 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.¹⁶⁶ Effectively, the prosecutor’s judgment may come to be seen by the legislator as an expression of the community judgment, when in reality it often is not.

B. Interest Group Pressure

It has long been taken as 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.¹⁶⁷ 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.¹⁶⁸

The legislator faces the need to raise money for increasingly expensive re-election campaigns and to take legislative stands that will attract voter support in later elections. Therefore, 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 that the interest group can mobilize for the candidate, or implicit promises of future campaign contributions (and sometimes—a current favorite—a promise of a lobbying position in the interest group organization or in lobbying firms the interest group controls after the politician leaves office).¹⁶⁹

In the context of criminal law, this legislative incentive structure has given rise to a panoply of criminal code provisions that sacrifice doing justice in the service of a particular interest group’s lobbying demands. We discuss a number of examples below. In some cases, we present specific evidence of the lobbying group’s efforts to create the law in question, but in others the linkage is frankly self-evident.

Industry Protections. This may well be the single 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 that the public views as basically non-criminal; second, by singling out behavior that is already criminalized for sentencing enhancement, solely on the ground that it harms a particular industry. The latter treatment is usually achieved by creating a

¹⁶³ Joshua Bowers and Paul H Robinson, *Perceptions of Fairness and Justice*, 263.

¹⁶⁴ If bureaucrats have become too institutionalized to tap common intuitive judgment, than a similar effect may well operate on legislators internally, who consistently approach criminal justice matters from a standpoint radically differing from that of the average lay person.

¹⁶⁵ Stuntz, *Pathological Politics*, 544-45.

¹⁶⁶ *Id.* (“...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.”)

¹⁶⁷ see Brian Z. Tamanaha, *Law As A Means To An End: Threat To The Rule Of Law* 193-95 (2006). As Tamanaha remarks: “The primary objective of politicians is to ensure their own reelection.” *Id.* at 193.

¹⁶⁸ *Id.* at 194.

¹⁶⁹ *Id.* at 193-94

redundant offense provision, which can then be charge-stacked with the more generic offense (e.g. criminal mischief and agricultural vandalism in Pennsylvania¹⁷⁰).

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 level¹⁷¹ and many states have comparable classifications.¹⁷² But it seems unlikely that these criminal provisions are a reflection of 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.”¹⁷³ 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.¹⁷⁴ But according to a study of Pennsylvania residents, the people of the Commonwealth view CD duplication as equivalent to a mere summary offense.¹⁷⁵ The obvious reason then for the draconian offense grading here is legislative “susceptibility to the influence of moneyed lobbyists.”¹⁷⁶ 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 actually criminally sanctioned.¹⁷⁷

Or take an example from our second category: the unauthorized use of milk crates.¹⁷⁸ 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 30 days imprisonment for a first offense.¹⁷⁹ This law is redundant, as larceny and possessing and receiving stolen goods are already codified offenses in North Carolina.¹⁸⁰ The situation in Pennsylvania is similar, but the law sweeps more broadly and punishes more harshly, doling out as much as 90 days imprisonment to the criminal milk-crate-user.¹⁸¹ 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.¹⁸² And yet the state codes consistently single out milk crates for special punishment. The reason for this conflict is industry lobbying; the dairy industry

¹⁷⁰ 18 PA 3304; 18 PA 3309.

¹⁷¹ See 17 U.S.C. § 506 (2012); 18 U.S.C. § 2319 (2012) (penalties as harsh as 10 years for a repeat offender).

¹⁷² See, e.g., 18 Pa.C.S.A. 4116; N.J.S.A. 2C:21-21. For a fifty state survey see 5 Lindey on Entertainment, Publ. & the Arts § 9:67 (3d ed.).]

¹⁷³ See Kleinfeld, *Reconstructivism* at 1554 (citing 1 JOE KARAGANIS & LENNART RENKEMA, AM. ASSEMBLY, COLUMBIA UNIV., COPY CULTURE IN THE US & GERMANY 30-31, 40-41 (2013))

¹⁷⁴ 18 Pa.C.S.A. 4116.

¹⁷⁵ See Robinson, *Modern Irrationalities* at 719.

¹⁷⁶ See Kleinfeld, *Reconstructivism* at 1554 (citing See LAWRENCE LESSIG, LESTERLAND: THE CORRUPTION OF CONGRESS AND HOW TO END IT (2013) (ebook).)

¹⁷⁷ See *infra* Pt. IV(D).

¹⁷⁸ Examples of such laws can be found in many state criminal codes, see, e.g., 4 A.L.R.4th 581.

¹⁷⁹ NC ST 14-72.4; 15A-1340.23.

¹⁸⁰ NC ST 14-72.

¹⁸¹ 18 PA 6712.

¹⁸² Anyone who has spent any length of time in an urban area knows that milk crates are commonly used as cargo attachments by bikers.

apparently takes milk crate theft very seriously and expends substantial capital to ensure such laws are passed to protect its interests.¹⁸³

Examples like the above could spill on for pages. Legislatures are clearly open to attempts by particular industries 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 that became dominant over legislative thinking in the late twentieth century are general deterrence and incapacitation of the dangerous.¹⁸⁴ Three Strikes, harsh drug offenses, 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 that has not only deontological costs, but also the consequentialist crime control cost of undermining the law's moral credibility with the community and thereby its crime-control effectiveness, as discussed in 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" that comes with maximizing the criminal law's moral credibility.)

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 was 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, that she really (though mistakenly) believed that assertion. Here, we will remain agnostic as to whether legislators passing coercive crime-control laws understood they were spitting on the blameworthiness-proportionality thinking so dear to 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 that 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. 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).¹⁸⁵ 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.¹⁸⁶ Some estimated that "as few as 5 percent of all offenders may account for

¹⁸³ <https://modernfarmer.com/2013/08/illegal-use-milk-crates-anything-besides-milk/> In 2019 alone the dairy industry expended nearly 8 million dollars in lobbying costs nationwide. 2020 Dairy Lobbying Statistics, Center for Responsive Politics (<https://www.opensecrets.org/industries/lobbying.php?ind=A04++>).

¹⁸⁴ See generally CRIME AND JUSTICE ENCYCLOPEDIA: *Deterrent Effect of Imprisonment*; Zimring, *Incapacitation: Penal Confinement and the Restrain of Crime* 14 (1997) (arguing that incapacitation has had a much stronger policy influence than general deterrence).

¹⁸⁵ See, e.g., Sklansky, *Race, Cocaine and Equal Protection*, 47 STANFORD L. REV. 1283, 1297 n. 69 (congressional determination of drug offense penalties was completely arbitrary); Smita Ghosh, *Congressional Administration During the Crack Wars: A Study of the Sentencing Guidelines*, U. Pa. J. L. & Soc. Change 144-146 (2020) (describing congressional reaction to sentencing commission proposal to lower mandatory crack sentencing guidelines).

¹⁸⁶ Schultz, *No Joy In Mudville* at 567.

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.”¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹ 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 of blameworthiness proportionality are difficult to demonstrate. As for the conflict, we laid the evidence out in Part III, showing that ordinary people do not support such dramatic enhancement of criminal punishment on the basis of prior offense history. The public still believes in blameworthiness proportionality, despite the long-standing academic critiques of the concept.¹⁹⁰ This faith leads them to gasp at the notion of giving a man like Rummel life in prison for his minor air conditioner fraud and undermines the explanatory power of polling results showing public support for three strikes laws.

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.”¹⁹¹ 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.”¹⁹² 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, then-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.¹⁹³ Other California lawmakers echoed a cold, coercive crime-control logic. Assemblyman Curt Pringle, for example, stated “It’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.”¹⁹⁴ 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

¹⁸⁷ *Id.* (citing Lawrence W. Sherman, *Patrol Strategies for Police*, in CRIME AND PUBLIC POLICY 145, 160 (James Q. Wilson ed. 1983).

¹⁸⁸ See CRIME AND JUSTICE ENCYCLOPEDIA, *Crime Preventative Effects of Incapacitation*.

¹⁸⁹ Schultz, *id.*

¹⁹⁰ See, e.g., Pincoffs, Edmund, *Are Questions of Desert Decidable?* in J. B. Cederblom and William Blizek (eds.), JUSTICE AND PUNISHMENT, Cambridge, MA: Ballinger, 75-88 (1975).

¹⁹¹ Zimring, Incapacitation at 18.

¹⁹² *Id.* at 16. (emphasis added)

¹⁹³ See Daniel Weintraub, ‘3 Strikes’ Law Goes Into Effect, L.A. TIMES (March 8, 1994) (<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>).

¹⁹⁴ *Id.* See also Lungren, Dan. 1997, February 24. “Our Tough Law Works.”; “‘Three Strikes’ Law Truly Makes California Safer” Los Angeles Daily News, Gov. Wilson.

able to turn around and who have proven they are going to continue to commit violent crimes.”¹⁹⁵ Even years after the passage of three strikes, the justifications emanating from the state government would remain strictly consequentialist.¹⁹⁶

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 dear by the community.¹⁹⁷

Felony Murder/Strict Liability. The Model Penal Code effectively did away with the traditional felony murder doctrine.¹⁹⁸ 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.¹⁹⁹ This situation continues despite the conflict between these criminal provisions and public judgment.²⁰⁰ Evidence from legislative history suggests that here too, legislatures maintain traditional felony murder doctrines on strictly consequentialist rationales. Whereas three strikes justification center on incapacitation, here general deterrence is primary.

For example, consider the New Jersey code, which contains a very broad felony murder provision.²⁰¹ It treats felony murder as a strict liability offense and extends liability to deaths caused by non-participants in the underlying crime. It then provides a fairly narrow affirmative defense.²⁰²

¹⁹⁵ 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 (January 31, 1994) (<https://www.latimes.com/archives/la-xpm-1994-01-31-mn-17349-story.html>).

¹⁹⁶ See 1995 Report of the CA Legislative Analyst’s Office (https://lao.ca.gov/analysis_1995/3strikes.html); CA AG Report from 1997 on law’s impact on the crime rate (“‘Three Strikes and You’re Out’—Its Impact on the California Criminal Justice System After Four Years.”).

¹⁹⁷ See *supra*.

¹⁹⁸ 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. . . .

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.

¹⁹⁹ See ROBINSON, *MAPPING AMERICAN CRIMINAL LAW V* (2018).

²⁰⁰ See *supra* Pt. III.

²⁰¹ It is codified at NJ ST 2C:11-3(a)(3):

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....

²⁰² The only safety valve to the New Jersey felony murder offense is an affirmative defense:

New Jersey undertook to recodify its criminal law in the 1970s, and based its new code primarily on the MPC's reforms. 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."²⁰³ The draft floated, as an alternative, the New York approach: retaining felony murder, but a limited affirmative defense.²⁰⁴ Ultimately, it was this latter proposal that was adopted, with the commission declaring explicitly 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 imposition of strict liability without regard to the intent to kill serves to deter the commission of serious crimes."²⁰⁵

As we pointed out above, the New Jersey provision is cribbed from New York's felony murder law, and several other states (Connecticut, Maine, Washington) have comparable provisions.²⁰⁶ 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.²⁰⁷

The affirmative defense only exists because of recognition that a traditional felony murder rule is likely to sweep too broadly. It is an *ex-post* attempt to reduce the number of unjust felony murder convictions, while maintaining the full deterrent force of the doctrine. 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.

Other serious criminal code provisions resemble this felony murder variant in operating as strict liability offenses.²⁰⁸ 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.²⁰⁹ In the Drug Reform Act of 1987, the state legislature declared "that any person who manufactures,

...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.

²⁰³ *State v. Martin*, (citing (Tentative Draft at 310 (Jan. 1971)).

²⁰⁴ *Id.*

²⁰⁵ *Id.* (citing II N.J.Code § 2C:11-3 commentary at 157). 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. [AL Code commentary]

²⁰⁶ CGS § 53a-54c, 17-A Me. Rev. Stat. Sec. 202, Wash. Rev. Code. Sec. 9A:32.030.

²⁰⁷ *See also (People v. Miller*, NY: 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.)

²⁰⁸ Of course, not all states have strict liability forms of felony murder. *See* ROBINSON, MAPPING AMERICAN CRIMINAL LAW, V.

²⁰⁹ N.J.S.A. 2C:35-1 to :35-23

distributes, or dispenses a controlled dangerous substance “is strictly liable for a death which results from the injection, inhalation or ingestion of that substance. . . .”²¹⁰

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.²¹¹ 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.”²¹² Other legislators echoed this militarist and alarmist theme. Sen. 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.”²¹³ Representative Wright stated that “It is time to declare an all-out war, to mobilize our forces . . . in a total coordinated assault upon this menace.”²¹⁴ 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.²¹⁵ 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 of being deterred. . . . This will be a very strong deterrent to the next generation of dangerous drugs in their tracks.”²¹⁶ 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

²¹⁰ *State v. Martin* (citing N.J.S.A. 2C:35-9a.) Michigan has a comparable provision. Mich. Comp. Laws Ann. § 750.317a. See generally Drug Policy Alliance Report: *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; Darryl Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L. J. 285 (2012).

²¹¹ Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs: Draconian Sentences Hurt Small Offenders More Than Kingpins*, WASHINGTON POST, Nov. 4, 1990, at C1, C2 (quoting Sterling).

²¹² 132 CONG. REC. 26,436 (1986); see generally Sklansky, *Cocaine*, *supra*.

²¹³ 132 CONG. REC. 8289 (1986) (remarks of Sen. Chiles).

²¹⁴ 132 Cong. Rec. 22,659 (1986)

²¹⁵ https://www.aclu.org/sites/default/files/field_document/cracksinsystem_20061025.pdf

²¹⁶ See Indexed Legislative History of the “Anti-Drug Abuse Act of 1986” at s14295 (available at <https://www.ncjrs.gov/pdffiles1/Digitization/126728NCJRS.pdf>) (describing the rehabilitative aspects of the law). See also Kalstein, et al, *Calculating Injustice*, HARVARD CIVIL RIGHTS & CIVIL LIBERTIES REV. (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.”)

from committing further crimes”²¹⁷ Likewise, the follow-up Anti-Drug Abuse Act of 1988 contained a variety of provisions that were explicitly justified by a deterrence rationale. 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.”²¹⁸ 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.”²¹⁹ Further, the 1988 Act’s provisions for fining drug users were similarly intended to act as “a deterrent for [drug] users.”²²⁰

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.²²¹ A review of such legislation by the Drug Policy Alliance found that legislators are again deploying the language of deterrence, just as they had in the 80s and 90s.²²² For example, “In support of Senate Bill 639 in Illinois (which expands the state’s 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 . . . Because [dealers are] the ones bringing it into the streets. And then maybe when we get one dealer, we can get someone above them.’”²²³ 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 phenomenon²²⁴ and clear illustrative examples can be exhibited.

The core problem is that American legislatures, especially the United States Congress, routinely pass criminal laws that are of absurd scope—they theoretically criminalize an incredible variety of behavior.²²⁵ 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. This dynamic is problematic

²¹⁷ Handbook on the Anti Drug Abuse Act of 1986 at 96 (March 1987)

(<https://www.ncjrs.gov/pdffiles1/Photocopy/157817NCJRS.pdf>) (describing incapacitation as a secondary purpose in case deterrence fails).

²¹⁸ Cong Rec 32634, (Oct. 21 1988).

²¹⁹ Cong Rec 33296 (Oct. 21, 1988).

²²⁰ 134 CONG. REC. H11,233 (daily ed. Oct. 21, 1988) (statement of Rep. Whitten).

²²¹ See *supra* n. 211 (https://drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf) at 15 (listing new states considering such laws as of 2017).

²²² *Id.*

²²³ *Id.*

²²⁴ See, e.g., Daniel Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*; Dan Kahan, *Is "Chevron" Relevant to Federal Criminal Law?*; Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345.

²²⁵ See, e.g., 18 U.S.C. SECTION 1341 (mail fraud); 18 U.S. Code § 1956 (money laundering).

for ensuring criminal law's consistency with popular judgment. The law may in part 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.

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.²²⁶ 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, falsif[y], 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 States²²⁷

Section 1519 creates a felony, punishable by up to 20 years imprisonment.²²⁸

Commercial fisherman John Yates was unaware of this provision when, on August 23rd, 2007, he chose to fling three undersized red grouper into the sea, rather than hand them over to federal authorities.²²⁹ Yates was indicted and convicted for violating Section 1519, on the logic that the groupers were “tangible objects” within the law’s definition.²³⁰ He was sentenced to 30 days imprisonment and three years of supervised release.²³¹ 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.²³² Four Justices would have upheld the conviction.

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,²³³ or arson²³⁴—and yet Yates was exposed to a comparable sentence length of twenty years. 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 Justices of the Supreme Court and to the 11th Circuit. 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. 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 too. One of us has undertaken extensive studies of the Pennsylvania and New Jersey criminal codes. These studies reveal a consistent issue: the legislature’s failure to distinguish offense seriousness within a single offense grade. 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

²²⁶ Lucas, Nance (2004). "Sarbanes Interview".

²²⁷ 18 USC 1519; *Yates v. United States*, 574 U.S. 528, 531 (2015).

²²⁸ *Yates*, at 541.

²²⁹ *Id.* at 532-33.

²³⁰ *Id.* at 534-35.

²³¹ *Id.*

²³² *Id.* at 542, 547-48.

²³³ 18 U.S.C. § 2252.

²³⁴ 18 U.S.C. § 844.

elected within structures that do not respond to popular moral judgment.²³⁵ 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.²³⁶ 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,²³⁷ and the second as a third degree misdemeanor, carrying a maximum of one year.²³⁸ 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.

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.²³⁹ Under current law, both courses of conduct are graded as 3rd degree crimes, with a maximum sentence of 5 years,²⁴⁰ but New Jersey residents graded the first scenario as a disorderly persons offense, with a maximum sentence of 6 months,²⁴¹ and the second scenario as a 3rd degree crime, with a maximum sentence of 5 years.²⁴²

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 legislator, for example, added “hundreds of new offenses” to their state code between 1961 and 2003²⁴³—so it is not as though legislators are uninterested in the subject. What can explain this delegation phenomenon then?

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.²⁴⁴ 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.²⁴⁵ 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 will rarely

²³⁵ See generally Steven Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

²³⁶ 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.

²³⁷ Mean=7.22, Mode=7, SD=1.143.

²³⁸ Mean=2.17, Mode=0, SD=1.143, p<0.005.

²³⁹ See Robinson, *Report on Offense Grading in NJ.*; 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).

²⁴⁰ *Id.*

²⁴¹ Mean = 2.63, Median = 3, SD = 1.21

²⁴² Mean = 4.55, Median = 5, SD = 1.17

²⁴⁴ 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)).

²⁴⁵ *Id.* at 771-73. See also Stuntz, *Pathological Politics*.

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.”²⁴⁶ 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.²⁴⁷

In sum, the phenomenon of legislative delegation in criminal lawmaking is far from well-understood, but it is 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 so as to build the criminal law’s moral credibility with the community. 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. 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 simply 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.²⁴⁸ 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. 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.²⁴⁹

A second reform proposal stems from this question: if the legislators knows that the proposed rule conflicts with community justice judgments, shouldn’t they 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 would seem to follow that some special justification is needed for enacting such a conflicting rule. 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

²⁴⁶ Stuntz, *Pathological Politics*, at 548.

²⁴⁷ Richman, *Federal Criminal Law*, at 789-804.

²⁴⁸ See *supra* Pt. IV(A) (discussing so-called ‘distortion effects’).

²⁴⁹ For a discussion of a reliable methodology, see, for example, Robinson, *IJUD*, pages 120-128.

already have such commissions or bodies that perform this function.²⁵⁰ 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 rulemaking process with others can provide not only a better ultimate result but also provide some level of insulation from storms of public criticism. Note, 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.²⁵¹

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.

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, in order to reap the interest group's proffered rewards, but legislators' willingness to go along may be conditional on their ignorance of true community views. Once the use of reliable empirical studies reveals the truth, however, 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

²⁵⁰ Such bodies currently exist in Kentucky, Kansas, Illinois, [how broadly are we defining this concept?]

²⁵¹ 28 U.S.C.A. §§ 991-998.

conflict is obscured. A more active program of empirical study is poised to reduce or eliminate the existing obfuscation.

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. However, the choice 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. 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.²⁵² 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. Modern American codes now typically contain an enormous number of offense grading distinctions.²⁵³ And advances in drafting techniques have suggested that such nuance can be easily accommodated and even extended.²⁵⁴

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. Although the Model Penal Code drafters in 1962 were content with essentially five offense grades²⁵⁵—giving judges (and prosecutors) broad discretion—modern American criminal codes typically have more than a dozen offense grades.²⁵⁶ And, while the Model Code commonly provided only the minimum requirements for liability for an offense, modern codes, as noted above, have introduced an enormous number of grading factors. 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. 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.

²⁵² PAUL H ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW* (Oxford); Paul H Robinson and Lindsay Holcomb, *In Defense of Moral Credibility* (forthcoming 2021).

²⁵³ *Id.*

²⁵⁴ Robinson, Kusmaul, and Sarahne, *How Criminal Code Drafting Form Can Restrain Prosecutorial and Legislative Excesses: Consolidated Offense Drafting*, HARV. J. LEGIS. (2020).

²⁵⁵ The Model Penal Code has three degrees of felony plus categories of misdemeanor and petty misdemeanor. See MPC Art. 5.

²⁵⁶ [several PHR writings on criminal codes document this point.]