
Conflict Between Community Views and Criminal Codes

We now return to the question, which we raised at the beginning of the book, of the implications of discrepancies between legal codes and community standards, using the specific cases on which we have gathered evidence to illuminate the possible meanings of those discrepancies.

Recall our discussion in Chapter 1 regarding the importance of taking account of community views in formulating liability rules. Certainly, one cannot claim that the community's view is necessarily the morally correct view. As moral philosophers would note, the members of the community may well express views about proper punishment that they would find unfair if they themselves were to be judged by such views or that are in some other way unfair when examined from some rational moral perspective. Nonetheless, the community's disagreement with a liability rule may, at the very least, suggest that philosophers should scrutinize the analysis that leads them to a different formulation of the liability rule than community intuitions expect.

Community views have a more direct relevance, we argued, under a utilitarian justification for criminal-law rules, where the primary goal is the reduction of crime rather than the imposition of deserved punishment. The fear of the shame and stigmatization of criminal conviction is a powerful yet inexpensive deterrent, but its effectiveness depends on the established condemnatory value of conviction. The more past convictions correlate in the community's collective consciousness with morally condemnable conduct, the more likely that condemnation will attach with the conviction at hand. Thus, discrepancies between the criminal code and the community tend to undercut the condemnation of conviction and thereby lessen the effectiveness of condemnation as a deterrent threat.

Perhaps more important, recent empirical evidence suggests that the law's most powerful mechanism for gaining compliance lies not with the negative force of the deterrent threat but rather with the positive force of the law as arbiter of proper conduct. Most people obey the law not because they fear punishment but because they see themselves as persons who want to do the right thing. Again, discrepancies between the criminal code and the community tend to undercut the law's moral credibility and this, in turn, weakens the law's ability to dictate proper

conduct. As the law's moral credibility decreases, so too does its power to set authoritative standards of conduct to which people are willing to conform.

Finally, the perceived "justice" of the system also is crucial to gaining the cooperation and acquiescence of those persons involved in the process (such as offenders, potential offenders, witnesses, and jurors). Greatest cooperation will be elicited in that situation where the system has greatest moral credibility. A system that is perceived as unjust is in danger of being subverted and ignored. On the one hand, it risks jury nullification and martyrdom that rallies resistance to its commands. On the other, it risks vigilantism.

Our conclusion is that the moral credibility of the criminal law is its single most important asset. Discrepancies between the code and the community have the potential to undercut the law's moral credibility and thereby its effectiveness. This can occur in either of two ways: by convicting morally blameless persons and by failing to convict morally blameworthy persons. The former may be more detrimental than the latter. That is, each time the criminal law convicts a blameless person, it calls into question, in some small way, the legitimacy of every other criminal conviction. As the number of blameless convictions increases, the credibility of each subsequent conviction decreases.

Where the criminal law fails to convict a blameworthy person, it may earn a reputation as being ineffective, but it does not as directly undercut the credibility of the convictions that do result. However, the criminal law's failure to criminalize certain conduct, which the community finds morally offensive, does call into question the moral judgment of the code drafters, which in turn may undercut the law's moral voice. Imagine for a moment that bestiality was decriminalized on the basis that no individual was harmed and that the prohibition infringed upon the individual's right of privacy (following the arguments that led to the decriminalization of consensual sodomy in many codes). A similar dynamic may occur where the law criminalizes the repugnant conduct but fails to punish violators of the prohibition, for reasons other than a lack of blameworthiness. One could conceive of many people losing faith in the moral judgment of the criminal law generally and reacting to it merely as a collection of rules rather than as a statement of moral wrongs. And this, in turn, we speculate, might reduce the criminal law's compliance power.

In the studies we have discussed in this book, we have sought out evidence for code-community discrepancies and frequently found it. However, we have not shown whether those discrepancies have the undercutting consequences we have suggested here. Is there any evidence that these discrepancies have the sorts of effects we suggest?

A number of studies have confirmed the existence of one of the relationships that we suggest, the one between an individual's disbelief in the morality of a particular law and his or her unwillingness to obey that law. Studies show that the

degree to which people report that they have obeyed a law in the past and plan to obey it in the future correlates with the degree to which they judge that law to be morally valid (Grasmick and Green, 1980; Jacob, 1980; Meier and Johnson, 1977; Silberman, 1976; and Tittle, 1980).

There is less evidence for our other claim, which is that disbelief in the morality of one law eventually causes contempt for the legal code in general, or more accurately, those areas of the code that are concerned with the prohibition of activities that are not immediately and intuitively regarded as wrong. Tyler's recent (1990) Chicago panel study provides some indirect evidence on this point. The degree to which Tyler's subjects saw the legal authorities as having legitimate power predicted their willingness to obey various laws promulgated by those authorities. Thus, if people believe in the legitimacy of the authorities making the law, they are willing to believe that the laws that those authorities promulgate should be obeyed. Other studies find that a person's views about the legitimacy of the legal system and obligations to obey its laws correlate with that person's reports of engaging in lawbreaking activity (Sarat, 1977; Tittle, 1980). We would argue from this that when authorities promulgate what individuals consider an unjust law, individuals lose respect for the authorities and regard with suspicion the whole system of laws. When people report that they do not trust the "governmental system" or grant relatively little legitimacy to authorities, the evidence suggests that they are more willing to engage in violent social protest, rioting, aggressive political behavior, and use of violence for political ends. See Tyler's 1990 review of this evidence, pp. 33-35.

WHEN CODE AND COMMUNITY AGREE

With this introduction, one may ask whether we found cases in which any sort of code-community discrepancy exists. We did. But we also found many cases in which the code and the community seemed in harmony, and we begin by marking those cases.

The results of the studies confirm many aspects of current doctrine, including several important foundational principles upon which the doctrine is based. The legal system consistently asserts that the degree to which liability should follow a violation depends to a considerable extent on the culpability level of the person in violating the law. With this principle, stated at this broad level, our subjects were in agreement. The degree of a person's culpability for a violation, ranging from negligent through purposeful commission, made a difference in the penalties that our subjects assigned. This emerges most clearly from our Study 8, concerning offense culpability requirements, but also emerges indirectly in many other studies as well.

Further, our subjects recognized and granted validity to the various "excusing conditions" that are recognized in legal codes. For instance, debilitating abnor-

malities in an offender's capacities (from mental illness, for example) can indeed serve to exculpate a person, even for the most serious offense. Still further, the studies found broad support for the recognition of justification defenses. If the person's conduct is justified in any of several ways that the law now recognizes, the subjects do not punish what normally would be an offense.

The studies also support many specific aspects of current doctrine, including provisions that have been criticized by some commentators. Causing a death during a felony is treated by the subjects as more blameworthy than causing the same death under otherwise similar circumstances. Negligence as to becoming intoxicated is accepted by the subjects as an adequate basis to impose liability for many offenses committed while intoxicated, as it is in many legal codes. When faced with a possibly insane person, people evaluate the degree to which that person shows both control and cognitive dysfunction, which are the two dimensions that the legal codes mark as important. Further in accordance with the standards of judgment that the codes use, respondents make their liability judgments based on their perceptions of these dysfunctions.

WHEN CODE AND COMMUNITY DISAGREE

We turn next to the second set of cases, those in which the subjects' views conflict with current law. How can we characterize these differences in general? What issues do these differences raise for code formulation?

Our empirical research suggests factors currently used by the doctrine that are not relevant to the community's assessment of blameworthiness. The sexual offenses study, for example, reveals instances in which the Model Penal Code, which was drafted in the 1950s (and promulgated in 1962), no longer reflects community social mores. The subjects do not treat consensual intercourse with an underage partner as the very serious offense that the Code treats it as; they give no mitigation because of prior promiscuity of an underage partner, though the Code does; they do not give the significant mitigation to forcible rape that the Code gives where the victim is a voluntary social companion. Recall that if subjects see the violated individual as the nonconsenting victim of a sexual assault, they regard the act as incurring approximately equal liability whether or not a previous sexual relationship existed and the woman was on this occasion a voluntary social companion. This strikes us as an area in which the opinions of society have genuinely changed. In fact, current state codes now reflect this change in public opinion; most have recently dropped the spousal exclusion, voluntary social companion mitigation, and so on.

Research also can suggest factors that should be added to a code's assessment of liability. The culpability requirements study, for example, revealed that subjects impose significant increases in liability for a person's increased culpability over the minimum required for the offense by most legal codes. As the person moves

from negligent to purposeful commission of the same offense conduct, our subjects assign greater punishment in response to this heightened culpability. Yet, with the exception of homicide and a few other offenses, most codes typically define each kind of criminal conduct as an offense with a single grade, defined only by certain minimum culpability requirements, usually recklessness. If the code is to mirror community views, the culpability study suggests that offenses be defined to include multiple grades according to the person's culpability level. The specific suggestion here is that code drafters consider increasing the grade of the crime as a function of the culpability of the perpetrator—rather than using recklessness as the trigger for a single grade of offense.

Empirical studies have the potential to not only identify when an additional offense element is needed but also to guide drafters in formulating the element, as in selecting the level of culpability to require as to which element. The culpability study illustrates that the subjects have specific views on what the minimum level of culpability ought to be and how much liability ought to increase for increases in a person's culpability. Recall that this judgment was a relatively complex one, with culpability as to different elements—for example, "core" elements versus "collateral" elements—having different effects.

In addition to identifying needed elements or setting culpability levels, empirical research can help choose between alternative formulations of an offense or even suggest new formulations or criteria. The attempt study, for example, challenges the Model Penal Code's formulation of the objective requirement for attempt. Though modern doctrine imposes attempt liability as soon as a person takes a substantial step toward commission of an offense, 77 percent of the subjects would impose no punishment in such a case. Instead, the subjects generally support the older common-law tests for attempt: All respondents would impose liability and punishment when a person has come close to committing the offense. The code-community discrepancy here is an interesting one, and one that raises pertinent issues in the debate. It may be that, given the current climate of worry about increased criminal activity, the code is moving in the direction of criminalizing relatively small steps toward the commission of crimes. Here, those interested in retaining the system's integrity should carry out this debate with maximal involvement of the public, so that the public can be put on notice that the code criminalizes conduct at an earlier point than the community intuitively would. This is important to protect the code's moral credibility; code drafters ought to make clear their reasons when their formulation conflicts with the community's views.

Earlier in this chapter, we remarked that, in Study 16, our respondents agreed with the code's tendency to treat a killing that occurs in the course of a felony as deserving more blame than the killing would in nonfelonious circumstances. Although this generally is true, our felony-murder study reveals that the common

formulations of the rule do not reflect popular intuition. (Subjects tended to punish most accidental killings during a robbery as less serious than manslaughter, though many codes would punish those killings as murder.) This makes all the more puzzling the rule's continuing political vitality despite its extensive criticism by scholars. Some aspects of the rule are clearly less popular with the subjects than others, suggesting a means by which the rule could be reformed. For instance, subjects do not follow the logic of assigning murder to the surviving robber when, during the course of the robbery, the wife of the store owner shoots and kills one of the robbers. A reconstruction of the rules to reflect this would be possible. Felony-murder could be retained for killings that directly result from the action of the perpetrator and perhaps his accomplices, given the utility of holding participants in the crime responsible for the actions of their fellow culprits. Alternatively, some might use the results to support abolition of the special rule in favor of reliance upon the usual homicide doctrines with the addition of certain evidentiary presumptions, as the Model Penal Code does but which most states have rejected. That is, if a death occurs during the course of a felony, the perpetrators would be presumed to have caused that death in a way that warrants a murder penalty, and it would be the task of the defense to rebut this presumption with evidence showing that the defendants' conduct, while reckless, did not manifest extreme indifference to the value of human life.

Another use of empirical research is to set or adjust the grades of offenses. For example, if the felony-murder doctrine is not to be abolished or reformulated, the research suggests that, at the very least, its liability grades should be reduced. A "felony-manslaughter rule" might be more appropriate.

A more fundamental grading issue is illuminated by the attempt study. Some codes, like the Model Penal Code, impose the same level of liability for an attempt as for the offense that is attempted;¹ but a majority of codes provides a standard discount for attempt liability. The subjects support the majority rule here.² This sheds some light on a dispute in the literature over people's intuitive notions as to whether actual resulting harm should increase liability.³ The attempt study also suggests that resulting harm does increase a person's deserved punishment—in the subjects' view—but that even liability for a completed offense sometimes is reduced if the person is able to undo the harm that has been done. This evidence has implications for the formulation and grading of all offenses, as well as doctrines of liability such as complicity; it suggests that codes ought to distinguish and punish more severely instances where the prohibited harm actually occurs or the prohibited conduct is actually consummated, as compared to instances where the harm or evil is only intended (but not carried to completion).

The studies also suggest different grading than current law for most of the doctrines that concern errors in justification. If a mistake as to a justification does not give a defense, it ought to at least mitigate liability, according to our subjects.

The general area of justification for actions otherwise prohibited is an interesting one from the perspective of code-community clashes. Review for a moment our findings on the degree of force that the community finds appropriate to use in defense of self or property or to bring about a citizen's arrest. The shared theme here is the degree to which the average citizen can take the law into his or her own hands. Recall that our subjects were willing to approve the use of a good deal more force than the legal codes would permit, and the use of force in a good many more cases than the codes would allow.

We see several possible explanations for this. First, many of our subjects may see the criminal justice system as failing to keep its side of the social contract—failing either to apprehend criminals or to get them convicted when they are arrested or to keep them in jail when they are convicted. If this is the case, have they, therefore, reverted to a vigilante notion of justice, in which any individual is entitled to take almost any step to protect his or her property or person? To the degree that this is the case, it represents a complex problem for code drafters. To what degree can or should the code be formulated to represent people's views about a perceived or actual breakdown of the criminal justice system? This seems a particularly acute question for the case of force allowable in carrying out a citizen's arrest. Our subjects seem to be trying to convey the message that a person who uses a high degree of force in these circumstances, even unnecessary or disproportionate force, should receive only relatively minor punishment for doing so (in contrast to the codes' dichotomous, all-or-nothing assignment of liability). Again, what may be going on here is that subjects may perceive the existence of crisis within the criminal justice system. People may believe that our overtaxed police departments have a very low likelihood of apprehending a thief or that our court system has a very low likelihood of appropriately punishing the thief if apprehended. If respondents are thinking along these lines, they may believe that the violent acts of the theft victims are the only punishment a perpetrator is ever likely to receive and, therefore, that victims are appropriately empowered to deliver this punishment.

A second explanation of the results is this: People may rely on a different set of principles than those that we articulated from the legal code for judging appropriate defensive force. For instance, the legal code formulation seems to require some apparently complex calculations—on the part of the attacked person—about exactly what an attacker intends and about the minimum force sufficient to thwart those intentions. People may regard it as inappropriate to require such judgments of an attacked individual in what they perceive as a rapidly occurring and emotionally terrifying situation (such as an assault or a robbery).

The above cases raise the possibility that subjects would approve of alterations in the legal codes that decriminalize certain acts or reduce the liability assigned to those acts. However, we would remind the reader that, in other cases, our subjects

seem to be calling for the criminalization or more serious treatment of actions that the codes do not criminalize or to which the codes assign relatively minor penalties. These studies suggest that new offenses be created or that liability be expanded from its current scope. The omission study, for example, reveals that about 80 percent of the subjects would impose liability for a person's failure to rescue a stranger when such can be done with no danger to the rescuer. Current doctrine, recall, imposes no duty to rescue in such a case and, therefore, imposes no liability for failing to do so, no matter how minor the inconvenience to the potential rescuer.

LIABILITY REQUIREMENTS VERSUS LIABILITY FACTORS AND DICHOTOMOUS FUNCTIONS VERSUS CONTINUOUS FUNCTIONS

Perhaps more dramatic than the comparison with any particular aspect of current doctrine are the rather clear findings that the process by which our subjects assess liability is different from the way in which the drafters of current doctrine conceptualize the issue. Where the doctrine treats a factor as setting a fixed minimum requirement for full liability, the subjects frequently see the same factor as aggravating or mitigating the degree of a person's liability and punishment. For example, while the doctrine treats complicity as a means of establishing full liability for the substantive offense, the subjects generally consider an accomplice to be less blameworthy than the principal and reduce the accomplice's liability accordingly.⁴ A similar general "discount" in liability is seen in cases of omission. Though the doctrine holds a person fully liable for the substantive offense if he or she satisfies the requirements of omission liability, the subjects significantly reduce a person's liability if he or she commits an offense by omission from what it would be if he or she committed the same offense by commission.⁵ Reacting intuitively, the community's views seem to us to be more rational than the code treatment here. In a failure to rescue case, the codes' assignment of no penalty to the stranger who fails to rescue and of a penalty equivalent to murder or manslaughter if certain complex conditions about the assumption of duty are met seem, respectively, too lenient and then too harsh.

The grading of attempt conduct further demonstrates this difference between the codes' and the respondents' treatment of liability. The codes define a particular point, during the preparation and conduct toward an offense, as the moment when liability attaches. The subjects, in contrast, see increasing liability as the person gets closer to committing the offense.

From the subjects' perspective, the codes' tendency to dichotomize signals a serious and pervasive flaw in current law. The doctrine more often than not sees a fact as either establishing liability or not or as giving a mitigation (or an aggravation) or not; a relevant fact in the case typically triggers application of a particular rule or subrule. The subjects, in contrast, frequently see a continuum of blame-

worthiness and liability. A fact more frequently contributes to an increment or decrement in liability judgment than produces a complete assignment of liability or total escape from liability.

The notion of a liability continuum for some factors is acknowledged by current doctrine in some contexts. Codes typically are structured to impose greater liability for greater harm done, all other things being equal. Codes sometimes—too rarely from the subjects' perspective—vary the degree of a person's liability with his or her level of culpability. The codes' culpability spectrum is not a strictly continuous one, at least as it is defined in modern codes, with four discrete levels of culpability. It is, however, a practical and useful approximation of a continuum.

In most other instances, however, current doctrine fails to acknowledge continuums that the subjects clearly support. In complicity, for example, not only do the subjects give a liability discount to the accomplice, which the codes do not, but the respondents vary the extent of the discount with the extent of the accomplice's contribution to the offense. Similarly, in attempts, the extent of the attempter's discount will depend in part on how far he or she has gone toward completion of the offense. In omissions, the extent of liability depends on the degree of danger or inconvenience to the person who is to undertake the rescue.

In causation, liability varies with the strength of the causal connection between the person's conduct and the result. The law, in contrast, sets a maximum degree of tolerable remoteness between the person's conduct and the result—for instance, in time, place, or strength of causal chain. If this maximum amount is not exceeded, the person is fully accountable for the result. The subjects, in contrast, see degrees of liability according to the degree of remoteness.

Obviously, a criminal code cannot take account of the infinite continuum over which many factors may range.⁶ It is not unrealistic, however, to expect a code to recognize that these factors are relevant to determining liability—that is, to recognize some kind of discount—and to attempt a rough approximation of their varying effect. This can be done in the same way that modern codes approximate the harm and culpability continuums—by defining a few large categories for each of the most relevant factors. Such a rough approximation of a continuum generally is sufficient for the criminal code's role of indicating a range for the extent of punishment. More refined distinctions can be made in the sentencing process.

Is it not the case that all such distinctions could be reserved for the sentencing process? We suggest that it would be a mistake to push over to the sentencing process the responsibility to make such rough approximations of highly relevant factors, especially when such determinations can effectively be made by a code. First, as a matter of principle, the purposes supporting the legality principle, as well as modern notions of due process, prefer that the most significant determinants of liability be considered at the liability stage, where the jury can make the determination under the normal rules of trial procedure. To leave such determinations to the more discretionary sentencing stage is to devalue legality, the jury system, and

due process unnecessarily.⁷ Second, at the level of practice, jurors are more likely to abide by their legal instructions to the extent that those instructions reach results that they regard as fair outcomes. To fail to have verdicts that match the general range of punishment deserved is to invite jury dissatisfaction and resistance.

CRIMINAL LIABILITY WITHOUT PUNISHMENT

In many of our studies, the subjects impose criminal liability on a person but then impose little or no punishment.⁸ Such is the subjects' view: (1) where the person is intent on crime but his conduct falls short of dangerous proximity of commission; (2) where the person satisfies the objective elements of an offense but is faultless as to one or another element; (3) where the person fails to rescue the stranger because of danger (or inconvenience); and (4) where the person mistakenly or improperly uses deadly force in self-defense, unnecessary force in protection of property, or excessive force or force against the wrong person in attempting to detain an offender.

This practice by subjects may seem somewhat odd. If the person's conduct is serious enough to merit the condemnation of criminal conviction, why should the person escape punishment? One explanation is that the subjects want to express their disapproval of the person's conduct but feel that the person is not sufficiently blameworthy to be punished for the conduct. If one takes a once-popular view among academics that the only role of the criminal law is one of deterring criminal behavior, this response by the subjects makes very little sense. Liability is taken as a judgment that application of deterrent punishment is appropriate, yet no such application is made.⁹ However, if one sees the criminal law as having dual roles (of both announcing rules of proper conduct and adjudicating violations of those rules) and, further, sees desert as the primary guide for assessing punishment, then this sort of judgment of "improper conduct, no punishment" makes more sense. It is the mechanism by which the subjects seek to achieve the sometimes conflicting functions of law: judging the propriety of the conduct as a signal to others in the future and judging the blameworthiness of the defendant at hand for his past violation.

Notice that, in each instance that "liability but no punishment" is given as a response, the person's *conduct* is arguably inappropriate although the *actor* is not held to be terribly blameworthy. In the omission cases, for example, in which an individual fails to rescue a drowning man although he could do so without great danger, our subjects often assign a verdict of "liability but no punishment." Here the subjects seem to be saying that this is conduct that they want to disapprove of, but the individual does not deserve a term in jail. The subjects use the condemnatory function of the legal system in a way that makes perfect sense if one sees that ordinary people take the legal code as having moral force to exert on the citizen. The respondents also seem to be saying that these sorts of behaviors are morally inappropriate, without feeling that the person is to be punished for the conduct.

In doing so, they are acknowledging what has become one of the major messages of our discussion: that the legal code is seen as having moral force by the citizens of the state, and the legal code's moral force operates independently of its coercive force. For this reason, we suggest that code-community discrepancies have far more importance than the previous rather scant attention to the topic has given them.

Still, imposing criminal liability in such a verdict, in one sense, perverts the function of criminal conviction. If the person is not sufficiently blameworthy, why should he or she suffer the condemnation of a criminal conviction? The answer may be found in the limited options available in the criminal law. The law provides no opportunity, other than through criminal conviction, for a person's criminal conduct to be disapproved. The subjects are caught in a difficult situation. On the one hand, to decline to impose liability is to seemingly approve of conduct of which they in fact disapprove. On the other hand, to impose liability is to blame a person whom they see as not warranting the blame they hand out. The liability-but-no-punishment option may seem an attractive compromise in such a situation.

In the end, however, the liability-but-no-punishment option is just that—a compromise—rather than an accurate expression of the subjects' or jurors' feelings. The fact is that such a practice imposes criminal liability, albeit without punishment, on persons who do not deserve it. This is not only unfair to the person and unsatisfying to the subjects and jurors but also undercuts the effective operation of the criminal law. If the law's role is to exact justice, it fails in that function when an insufficiently blameworthy person is convicted. That no punishment is imposed only minimizes the extent of the injustice. Also, of course, when juries convict, they cannot control whether the judge will exercise the no-punishment option.

The difficult situation and the undesirable compromise arise because the criminal law has two important but distinct functions, each of which has its own special demands. These two functions—announcing public rules of conduct and assessing individual blame in adjudication of a violation—have very different doctrinal foundations. The rules-of-conduct function gives the general population ex-ante direction as to what they can, must, and must not do. The principles-of-adjudication function gives decision-makers (i.e., prosecutors, juries, and judges) guidance in assessing ex post the blameworthiness of an individual's violation of the rules. When the doctrine tries to serve both of these functions with the same provisions, one or the other of the functions suffers. In this instance, an offender is convicted to assure that the proper signals are sent to disapprove of the conduct—the rules-of-conduct function is satisfied—yet a blameless or insufficiently blameworthy offender suffers the condemnation of conviction—the adjudication-of-blame function is perverted. In other instances, the reverse perversion occurs.¹⁰

The solution to the subjects' dilemma and to the "perversion" of the law is to allow subjects and jurors to disapprove of the person's conduct without condemning the person. This requires the use of trial verdicts that allow a distinction between an acquittal based on approval of the person's conduct and an acquittal based on a person's blamelessness for admittedly improper conduct. The available trial verdicts might be: "no violation," "blameless violation," and "guilty" or "blameworthy violation" (see Robinson, 1990, pp. 766–767). In future research, one could allow for such verdicts from subjects and test the conditions under which they would use each.

THE JURY AS A RESOLVER OF CODE-COMMUNITY CONFLICTS

Is it possible that our elaborate focus on code-community comparisons misses the point? One could argue that we misunderstand the functioning of the legal system and ignore the presence of a mechanism within it that modifies the results produced by a mechanical application of the legal code where community standards would be seriously violated by formulaic application of the code. The mechanism, of course, is the jury. Juries have been known to produce verdicts that seem far from the ones that would be required by an exact application of the legal code, choosing instead, for instance, to find an individual not guilty of the offense or guilty of a lesser offense that provides the reduced punishment that the jurors judge to be appropriate. Here we recall the case of "the subway shooter," Bernhard Goetz, who shot several persons whom he believed were beginning to mug him during his ride on the subway in New York. He was found not guilty of any serious charges even though his actions seemed to clearly violate what the code formulations allow in self-defense. Similarly, the rather inelastic code formulation of self-defense has been stretched to find persons innocent who would otherwise be found guilty under the code—for example, battered women who finally kill their abusive husbands.

Certainly, within the Anglo-Saxon legal system, the jury emerged with what is called "jury nullification" as one of their legitimate functions. Historically, this was not always the case; the jury was not always given leeway to make these sorts of adjustments. Early in the history of the emergence of the jury, there were cases in which the civil authorities, outraged at a particular verdict of a jury, threw the members of the jury in jail. But quite early in the development of the jury, jurors became immune from this kind of retrospective punitive evaluation of their verdicts (Green, 1985). This gave the jury the autonomy to refuse to find individuals guilty (even when the code would have found them guilty), or to find guilty unpopular individuals who were charged with offenses they might not have committed. Interestingly, Green's analysis of jury deliberations occurring in the twelfth century showed that jurors actually did use their nullification powers to find innocent various of their neighbors who had harmed or killed others in what

the jurors regarded as acts of self-defense, even though the acts did not meet the stringent requirements that the legal code set up for legal self-defense.

The code requirements at that time were not dissimilar to what they are now, requiring that the attacker be threatening injury at the moment and that retreat from the attack be impossible. Facts damaging to the claim of self-defense, therefore, were that the attacker was wounded in the side or the back (since it would follow then that the attack could not have been in progress) or that the incident took place in an open field or some other location from which it should have been possible to flee the attack. Coroner's reports often attested to the awkward presence of these facts in specific cases. But during the jury deliberations (as inferred from the facts as they were described in the jury reports), wounds that the coroner had described as located in the back or side of the attacker were mysteriously relocated to the front—creeping wounds—and what were described as open fields were found to contain ditches, dikes, hedges, or other obstacles that made retreat from the attack more plausibly impossible.¹¹ Juries have nullified the mechanical operation of the criminal code in the twelfth century, in the twentieth century, and no doubt every century in between. By doing so, they bring community standards to bear in a context that finally gives them no apparent role.

However, relying on the jury to nullify the normal operation of the legal code in cases of code-community discrepancies does not seem to us to be an entirely satisfactory mechanism for adjudicating differences. First, it is unlikely to consistently work in a way that provides fairness across cases. One jury, somehow aware of its power to nullify, does so. Another jury, unaware of its power to nullify, or more cowed by the authority of the court, does not. One of the accused goes to jail, the other goes free.¹² What frequently happens is that this discrepancy, now personalized in the form of two individuals, is publicized, drawing attention to the unfairness of the legal system in a vivid and personal way. Second, as we have discussed earlier, for the legal code to criminalize certain actions that people regard as morally acceptable (even though juries at least sometimes do not convict) is to give a signal that damages peoples' respect for the legal code and, thus, likely impairs what we have called its moral credibility. Third, as pointed out by Green, if juries systematically provide this kind of "safety valve" function for the legal code, they reduce pressure for a change in the code that would move it in the direction of better rendering community standards (and thereby enhance its moral credibility). In the extreme case, they stultify code change.

Further, the jury's nullification ability is effective only as far as their power extends—in the assignment of liability. The jury's power only works in one direction; they can with their verdict minimize the extent of punishment that a person can receive, but they cannot ensure that a judge will sentence a person to the full punishment that their verdict calls for. Finally, and relatedly, many of the code positions that we have shown to conflict with community views are instantiated in sentencing-guideline systems. Most of what we have said about "missing dis-

counts” and dichotomous rather than continuous treatment in codes applies equally to existing sentencing guidelines. Although judges who pronounce sentence might share the jury’s desire to deviate from the formal demands of the code and might regularly have done so through the exercise of sentencing discretion, that possibility is reduced when sentencing guidelines have been articulated that deviate from community views.¹³ For all of these reasons, then, it seems preferable to us to have community standards reflected in legal codes when it is appropriate to do so.

Our argument has been a long one, and it seems useful to draw some elements of it together as a conclusion. In doing so, we will emphasize what we think the implications are for those who are involved in legal code drafting.

Drawing on both empirical social science research and various theories of the justification of punishment, we suggested that code-community conflicts, if they are to exist, would have various corrosive consequences on the general respect that ordinary citizens have for the criminal justice system and, therefore, their willingness to obey the law. Next, via a set of scenario experiments, we demonstrated that, frequently, such discrepancies do exist. The moral intuitions of ordinary persons and the rules formulated in legal codes frequently clash in ways that seem very important to us.

We suggest that the implications of this for code-drafting groups are as follows. First, we would urge that various alternative formulations of code provisions under consideration by code drafters or legislators be subjected to the sort of empirical scrutiny represented by our experimental procedures. We suggest, specifically, that social science research of the sort we have illustrated in this work be an explicit part of a code-drafting process and that social scientists be included among the parties involved.

The research process need not be complex or time-consuming. Representative samples of subjects could be drawn in advance from the state or other jurisdiction that was to be governed by the proposed legal code. Once the specific alternate code provisions were clear, the social scientists could quickly design scenarios that would test the community intuitions about the alternative possibilities instantiated in the proposed versions.

Second, how would these empirical results play into the drafters’ deliberations? A number of possibilities exist. Frequently, if one examines the minutes of the deliberations of code-drafting groups, one finds that they intend to base the code provisions under discussion on the intuitive standards of justice of the community. If this is so, then disagreeing factions among the code-drafting group are often disagreeing about the moral intuitions of the community. Certainly, in that case, the empirical findings, particularly if they result from experimental designs that the disagreeing factions have agreed on in advance, should be of considerable utility in resolving the controversy. Nevertheless, one or more factions may be pressing for the consideration of other reasons for preferring a specific code for-

mulation than one reflecting the moral intuitions of the community. If so, suppose our sort of empirical research reveals that the proposed formulation is in some way at significant odds with the community’s view. Then, such conflict ought to be taken into account in debating the provision and, if the counter-intuitive provision is finally adopted, community education about the provision would be required.

In fact, two kinds of education are necessary. First, the community should be informed that the counterintuitive provision is the one that the lawmakers chose to adopt and therefore people should govern their behavior accordingly. Otherwise, since individuals generally tend to assume that code provisions match their moral intuitions, they will be uninformed about the possibilities of transgressing the law.¹⁴ Second, the public needs to be informed about the reasons why the code deviates from moral intuitions in order to avoid the lessening of respect for the criminal law that would otherwise result when some violation of it is publicized, causing the community to become aware of it in what could be explosive circumstances. In other words, when a counterintuitive provision of the legal code is put into effect, the community needs to be informed about the provision and persuaded of its validity.

Certainly, social science has a role to play here as well. Research could determine not only what sorts of explanations of the new code provision would make people most aware of the code, but also what sorts of explanations would make them most convinced of the necessity of the provision.

Our attempt, then, has been to persuade the reader of the value of a certain kind of research in the formulation of legal codes and to demonstrate what the beginnings of such research projects would entail.