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## THE PERILS OF PUBLIC OPINION

Deborah W. Denno\*

Societies have always determined what conduct should be criminal.<sup>1</sup> The key questions are, who in society should make that determination? How much voice should laypeople have? Should some public voices be louder than others?

*Justice, Liability, and Blame: Community Views and the Criminal Law*<sup>2</sup> (“*Justice*”) is a rich, creative, and intriguing book with an ambitious goal: to examine the extent to which laypersons’ views of justice (their “moral intuitions”) are reflected in current criminal codes.<sup>3</sup> This goal is fueled in part by two beliefs: (1) public opinion can help determine the nature and extent to which certain behavior warrants retribution,<sup>4</sup> and (2) individuals seem more likely to respect and obey laws that they view are morally right.<sup>5</sup> The book’s authors demonstrate the value of interdisciplinary research by producing a superb work that brings out

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\* Professor, Fordham University School of Law. B.A., University of Virginia, 1974; M.A., University of Toronto, 1975; Ph.D., 1982, J.D., 1989, University of Pennsylvania. I presented an earlier version of this Article at the 2000 Annual Meeting of the Association of American Law Schools, Joint Program between the Section on Criminal Justice and the Law and the Section on Social Sciences. At the Annual Meeting I very much benefited from questions and discussion. I am most grateful to William Bowers and Lawrence Fleischer for comments and suggestions; however, they are not responsible for my mistakes. I give special thanks to Juan Fernandez for his characteristically superb work in locating, collecting, and tabulating all the data that this Article analyzes, as well as for creating this Article’s tables and figures. Jennifer Burns was a very helpful research assistant. For generous research support, I thank Fordham Law School and Vanderbilt Law School, where I was a Visiting Professor of Law when I wrote this Article.

1. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 1-2 (2d ed. 1995); 1 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW 14-15 (1986).

2. PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995).

3. See *id.* at xv.

4. See *id.* at 4-5.

5. See *id.* at 6-7. See generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) (concluding from research that people are much more apt to obey laws that they view as morally just and much more apt to break laws that they believe are morally incongruent).

the best in their respective fields (law and psychology), and which illuminates in a way that neither field could do alone.<sup>6</sup>

*Justice* measures the link between public belief and legal reality by analyzing eighteen original studies of selected individuals' perceptions of a wide array of disputed legal issues<sup>7</sup> concerning three main questions in the criminal law: (1) what conduct should be considered criminal? (for example, in the case of omissions liability);<sup>8</sup> (2) when should conduct that is typically considered criminal become lawful? (for example, the use of deadly force in self-defense);<sup>9</sup> and (3) what degree of punishment is appropriate within and between offenses? (for example, the grading of different levels of homicide, and the grading of homicide relative to other offenses).<sup>10</sup> Given this depth and interdisciplinarity, *Justice* represents the redeeming but rare effort to assess public opinion in terms of "thoughtful, considered judgments" rather than the "top-of-the-mind, offhand views" reflected in most public opinion polls.<sup>11</sup>

Attempts to glean the public's views of justice are particularly critical now. Opinion polls show that crime remains among the most important problems in the United States.<sup>12</sup> Moreover, a substantial proportion of Americans continue to express limited confidence in the criminal justice system.<sup>13</sup> Americans also believe that courts are exces-

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6. Professors Paul Robinson and John Darley are each renowned for conducting groundbreaking work in their respective fields of law and psychology. I agree with Professor Christopher Slobogin's view that *Justice, Liability, and Blame: Community Views and the Law* ("*Justice*") is "a model for interdisciplinary work." Christopher Slobogin, *Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law*, 87 J. CRIM. L. & CRIMINOLOGY 315, 316 (1996) (reviewing PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995)).

7. See *infra* app. tbl.1 (summarizing the 18 studies and legal issues). The 18 issues are, in order of presentation in the book: attempt, criminal risk, complicity, omissions, use of deadly force in self-defense, use of force in defense of property, citizens' law enforcement authority, culpability and mistake/accident defenses, culpability and complicity, voluntary intoxication, negligence, insanity, immaturity and involuntary intoxication, duress and entrapment, sexual offenses, felony murder, causation, and punishment for multiple offenses. See *id.*; ROBINSON & DARLEY, *supra* note 2, at 14-197.

8. See ROBINSON & DARLEY, *supra* note 2, at 13.

9. See *id.* at 53.

10. See *id.* at 157.

11. DANIEL YANKELOVICH, *COMING TO PUBLIC JUDGMENT: MAKING DEMOCRACY WORK IN A COMPLEX WORLD* xii (1991) ("Most public opinion polls are misleading because they fail to distinguish between people's top-of-the-mind, offhand views (mass opinion) and their thoughtful, considered judgments (public judgment)."). *Id.*

12. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1997, 100, tbls.2.1, 2.2 (Kathleen Maguire & Ann L. Pastore eds., 1998) [hereinafter BUREAU OF JUSTICE STATISTICS].

13. See *id.* at 106, tbls.2.15, 2.16.

sively lenient.<sup>14</sup> Media coverage of crime explains much of the public's interest in, and criticism of, the criminal justice system.<sup>15</sup> Regardless, one trend is clear: public opinion has a marked effect on criminal justice policymaking on every level.<sup>16</sup>

This Article discusses the significance of *Justice*'s approach to understanding law and why the book is an excellent springboard for further research comparing community standards and legal codes.<sup>17</sup> However, this Article particularly emphasizes the perils of incorporating public opinion into the law based upon three major sources: (1) this Article's own study of national and New Jersey demographic and political affiliation data, (2) the results presented in *Justice*, and (3) the results of public opinion research.

Part I of this Article reviews and critiques *Justice*'s methodology and sample selection procedures. Discussion focuses in particular on a comparison between the demographic characteristics of *Justice*'s sample and this Article's own analyses of United States Census Bureau and New Jersey demographic and political affiliation data for 1990, the year the *Justice* sample was selected in New Jersey. Part I concludes that *Justice*'s sample is "extraordinary," not "ordinary," in the way that *Justice* characterizes it. *Justice*'s respondents are far wealthier, more highly educated than the rest of the country, and include a disproportionate number of individuals affiliated with either the Republican or independent parties. Although *Justice* does not report race and ethnicity, it appears that minorities may have been underrepresented. In turn, females are somewhat overrepresented.

Part II discusses briefly the importance of a sample's demographic make-up, as well as a study's measurement instrument, in the context of the following problems that are associated with much public opinion research: (1) the public does not hold a singular view of crime and criminals; (2) the public lacks knowledge about crime and the law; (3) individuals' views about crime and criminals are often offense-specific and influenced by demographics and media exposure; (4) individuals' demographic characteristics impact on their attitudes toward the police,

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14. See *id.* at 135-36, tbl.2.50.

15. See JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 4 (1997) ("Although attitudes are formed and modified by direct and indirect experiences, in the area of crime and justice, the news media are predominant.").

16. See *infra* notes 137-48 and accompanying text.

17. Prior reviews of *Justice* have provided a superb foundation for this discussion. See Slobogin, *supra* note 6; Tom R. Tyler, *Public Attitudes on Criminal Justice*, 7 CRIM. L.F. 697 (1996) (reviewing PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995)).

courts, and legislative definitions of crimes; (5) most laws do reflect community standards and those that do not are morally justified; and (6) a marked community consensus exists about the seriousness of crimes, suggesting that it is on this level that "moral intuitions" can be more precisely gauged and determined.

This Article suggests that public opinion research may fail to measure accurately the public's fundamental values or "moral intuitions." Rather, it may be far more successful in reflecting individuals' erroneous knowledge and distorted attitudes, which can range enormously depending on demographics and personal experiences. This Article considers whether the goal of incorporating community standards into the law at the level *Justice* recommends can be achieved with any accuracy under even the most ideal empirical circumstances. This Article also questions whether the attempt is worth the effort in light of the potential measurement problems. Lastly, this Article points to research showing that public opinion already has a marked effect on police, courts, legislatures, and politicians. It seems the public can be quite successful in achieving the goal *Justice* has proposed for it, at least in the areas and on the levels the public believes significant. Given the public's influence, it may be a worthy effort to educate the public more about how the law actually operates in order to correct the distorted impressions the public currently holds. Therefore, whatever impact individuals do have can better reflect a reasoned, educated, judgment rather than personal experience.

# I. THE PROBLEMS WITH MEASURING COMMUNITY CONSENSUS AND "ORDINARY" PEOPLE

*Justice* contends that laypersons typically derive their views of justice not from moral philosophy but rather from "intuitive notions" that people think are "shared by the community of moral individuals."<sup>18</sup> *Justice* attempts to examine these "moral intuitions" that "ordinary people" embrace by "testing the belief of many individuals that their moral intuitions reflect a community consensus."<sup>19</sup> By investigating whether shared standards do in fact exist, the book depicts "at least the beginnings of the outlines of 'community standards'—those views that are held by ordinary members of our communities about criminal liability and punishment."<sup>20</sup> On the basis of its study, *Justice* concludes that

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18. ROBINSON & DARLEY, *supra* note 2, at 1.

19. *Id.*

20. *Id.*

legal codes and community standards do not always share similar rules.<sup>21</sup> The authors express the modest hope that these results will “generate debate on criminal codes.”<sup>22</sup>

*Justice* does not define what it means by “moral intuitions,” and does not elaborate specifically on the term “ordinary people.” The book also does not empirically support its contention that individuals believe their intuitions “reflect a community consensus.” Regardless of these drawbacks, a first step in analyzing *Justice*’s results is to examine two sources: (1) the make-up of the “ordinary people” whose views underlie much of the book’s discussions and conclusions, as well as (2) the book’s measures of moral intuitions.

### A. *Justice*’s Approach to Measuring “Community”

#### 1. The Selection of “Ordinary” People

Who are the “ordinary” people comprising the “community consensus?” *Webster’s Dictionary* defines “ordinary” as “not uncommon or exceptional: not remarkable: routine, normal . . . lacking in excellence, superior merit, uncommon appeal, or distinctive characteristics.”<sup>23</sup>

*Justice* is somewhat vague and contradictory about describing the “ordinary” people who constitute its sample. The authors concede that the procedures used in selecting their respondents were problematic: “Putting it inelegantly, we grabbed whomever we could get our hands on. Typically, the subjects were neighbors, family, or friends of the students”<sup>24</sup> who helped the authors with their study, that is, Rutgers-Camden law students or Princeton University psychology students.<sup>25</sup> The authors note that they excluded two groups: (1) “those familiar samples of convenience, such as college sophomores,”<sup>26</sup> and (2) individuals involved in or familiar with the criminal justice system because their opinions could be influenced by their knowledge of the legal codes.<sup>27</sup>

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21. *See id.* at 2.

22. *Id.*

23. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1589 (1993).

24. ROBINSON & DARLEY, *supra* note 2, at 222.

25. *See id.* at 10.

26. *Id.* at 8.

27. *See id.* Specifically, the authors barred “[l]aw students, lawyers, and persons involved in the criminal justice process, such as police officers” because the authors believed “that their re-

The individuals included in *Justice's* sample are characterized in conflicting ways. On the one hand, the authors state forthrightly that their "accidental samples"<sup>28</sup> of subjects "were not selected to represent the population of the United States or even of a particular state or jurisdiction. They were individuals whom [they] contacted who were willing to participate."<sup>29</sup> Moreover, for future research, the authors recommend that "it may be useful to turn to more self-consciously drawn samples that are constructed to be demonstrably representative of various populations that are defined by the code-drafting conditions as central."<sup>30</sup> On the other hand, the authors conclude that their subjects' "demographic distributions" were "sufficiently broad" to provide "the beginnings of a set of demonstrations of the judgment patterns of *typical citizens of the United States* on liability and punishment issues."<sup>31</sup> Does this mean that although the authors "grabbed whomever [they] could," they fortunately ended up with a group of individuals who were "sufficiently" diverse demographically and representative of "typical citizens of the United States?" It is difficult to tell.

## 2. The Testing Procedure

*Justice's* study was "designed and executed" at Rutgers University School of Law at Camden in seminars held during the Fall 1990 and Spring 1991 semesters.<sup>32</sup> Faculty and graduate students from the Princeton University Department of Psychology assisted.<sup>33</sup> After the subjects agreed to participate in the study, the authors asked for the subjects' views on the "appropriate" liability level—criminal sentence—to give perpetrators for different crime scenarios that reflected one of eighteen legal issues. As the summary in Table 1 shows,<sup>34</sup> these crime scenarios "usually" shared core identical elements and varied only with respect to particular factors the authors believed would influence the subjects' perceptions of liability.<sup>35</sup> The subjects were to indicate their liability assessments on a continuum scale, shown in Table 2,<sup>36</sup> that consisted of the following thirteen choices: N (no criminal liability); 0 (criminal li-

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sponses might be driven by their knowledge of the details of the legal codes." *Id.* at 222.

28. *Id.* at 223.

29. *Id.* at 220.

30. *Id.* at 223.

31. *Id.* at 8 (emphasis added).

32. *See id.* at 10, 219.

33. *See id.*

34. *See infra* app. tbl.1.

35. *See* ROBINSON & DARLEY, *supra* note 2, at 218.

36. *See infra* app. tbl.2.

ability, but no punishment); or choices 1 through 11, which reflected prison sentences spanning respectively from one day (1) to the death penalty (11).<sup>37</sup> As this Article notes later, the truncated nature of this scale may have influenced the study's results.<sup>38</sup>

According to *Justice*, more than seven hundred individuals participated in the authors' studies.<sup>39</sup> However, it is not entirely clear how many individuals participated in the particular eighteen studies the book analyzes.<sup>40</sup> For unknown reasons, *Justice* reports demographic characteristics for only the 307 subjects examined in the first semester's sample.<sup>41</sup> Regrettably, the tables of results on individual scenarios fail to specify either the sample size or the demographic composition of the subjects responding. The authors explain that "more than thirty people"<sup>42</sup> participated in each study and that "[f]orty subjects per study is typical";<sup>43</sup> however, it is not clear how many, if any, of those subjects participated in more than one study or scenario. The demographic breakdown for each study is also critical to know because factors such as sex, race, age, income, etc. substantially influence individuals' perceptions.<sup>44</sup>

Commendably, the authors clearly emphasize the limitations of their research and remind the reader of its preliminary nature.<sup>45</sup> At the same time, however, the authors refer to their subjects as "ordinary people"<sup>46</sup> and "ordinary members of our communities."<sup>47</sup> Who are these ordinary people and how diverse are they compared to residents of New Jersey and the United States? A brief attempt to examine this question reveals some of the perils and problems with measuring "community" views in general.

### B. Justice's "Extraordinary" People

An analysis of census and political affiliation data shows that the *Justice* subjects are "extraordinary," not "ordinary," based upon the

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37. See ROBINSON & DARLEY, *supra* note 2, at 223.

38. See *infra* notes 134-36 and accompanying text.

39. See ROBINSON & DARLEY, *supra* note 2, at 220.

40. The authors explain that they "conducted upward of twenty different studies," although the book does not report all of them. *Id.* at 10.

41. See *id.* at 223.

42. *Id.* at 1.

43. *Id.* at 223.

44. See *infra* notes 48-74, 80-89 and accompanying text.

45. ROBINSON & DARLEY, *supra* note 2, at 10-11.

46. *Id.* at xv.

47. *Id.* at 1.



demographics *Justice* reports, which are replicated in Table 3.<sup>48</sup> Notably, Table 3 does not report: (1) race and ethnicity, or (2) cross tabulations to determine if there are interaction effects among the demographic factors that it does present (age, income, education, sex, and political affiliation). For example, if Republicans are more heavily represented in the higher incomes, it is unclear how much "being a Republican" is symbolic of a political view or of an income level. Preferably, these factors should be examined simultaneously as predictors (in a regression equation, for example) to control for these possible kinds of interaction effects.

It is helpful to compare the *Justice* data with the 1990 United States Census Bureau data and New Jersey statistics, keeping in mind that all three sources use different demographic category cut-off points that hamper a more precise examination.<sup>49</sup> First, with regard to age, Table 3 shows that over one-third of the *Justice* respondents are less than thirty years of age (37.9%), over one-half are less than forty years of age (55.7%), and 80% (79.9%) are less than fifty years of age; only 9.7% are over sixty years of age.<sup>50</sup> This relatively youthful distribution comports with the fact that most respondents were selected by students. Moreover, New Jersey residents are relatively younger than the United States population as a whole if one focuses on the age group of sixty-five and over.<sup>51</sup> As Tables 4 and 5 show, for example, although the Census Bureau includes individuals age fifteen and older (the approximate cut-off point for *Justice* was age twenty),<sup>52</sup> the 1990 United States population is considerably older than both the New Jersey residents and the *Justice* respondents.<sup>53</sup> Over one-quarter of the United States population (27.7%) are over fifty-five years of age and 16.5% are over sixty-five years of age; in contrast, the twenty-five to thirty-four age group constitutes less than a quarter (22.6%) of the sample.<sup>54</sup>

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48. See *infra* app. tbl.3. It is presumed that the subjects in the "high school" and "college" categories obtained their high school and college degrees, although the authors do not make that clear.

49. Comparisons are hampered in part by the different demographic categories that *Justice*, the United States Census Bureau, and the New Jersey statistics use. Table 4 attempts to comport with the demographic breakdowns in *Justice* as much as possible, while Table 5 presents the Census Bureau's actual category breakdowns.

50. See *infra* app. tbl.3.

51. See *infra* app. tbls.4, 5, 10.

52. See *infra* app. tbl.3.

53. See *infra* app. tbls.3, 4, 5, 10.

54. See *infra* app. tbls.4, 5.

Demographics show more clearly that the *Justice* respondents have substantially higher incomes compared to New Jersey residents and the United States as a whole.<sup>55</sup> One-third (33.5%) of the *Justice* sample earned over \$54,000, nearly one-fifth (18%) earned over \$70,000, and slightly more than 6% (6.4%) earned more than \$100,000.<sup>56</sup> In contrast, only 11.5% of New Jersey residents earned over \$50,000 (approximately two-thirds fewer individuals than *Justice*), and 4.1% earned more than \$75,000, the highest income category available.<sup>57</sup> Even more striking are the income differences for the United States population: only 6.6% earned over \$50,000 and only 2.2% earned over \$75,000.<sup>58</sup>

The *Justice* respondents also have markedly higher educational levels compared to New Jersey residents and the United States as a whole.<sup>59</sup> Nearly three-quarters of the *Justice* respondents (73.6%) had at least a college degree and over one-quarter (26.4%) had some sort of graduate degree.<sup>60</sup> In contrast, slightly over one-quarter of the New Jersey residents had at least a college degree (27.2%) and only 11.1% had a postgraduate or professional degree.<sup>61</sup> As would be expected, however, United States population education levels were even lower: 22% had four or more years of college and 9% had five years or more of college (and not necessarily a graduate degree).<sup>62</sup>

Presumably, the relatively higher income and educational levels among the *Justice* respondents accounted for their substantial divergence in political affiliation. The *Justice* sample was nearly equally distributed among three affiliations: Democrat (32.3%), independent (31.1%), and Republican (36.6%).<sup>63</sup>

A range of different sources of political affiliation data<sup>64</sup> show that, in general, there is a higher proportion of Democrats than Republicans

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55. See *infra* app. tbl.19.

56. See *infra* app. tbl.3.

57. See *infra* app. tbl.11.

58. See *infra* app. tbls.4, 5.

59. See *infra* app. tbl.20. See also *supra* note 48 (discussing categories of educational level).

60. See *infra* app. tbl.3.

61. See *infra* app. tbl.11.

62. See *infra* app. tbls.4, 5.

63. See *infra* app. tbl.3.

64. This Article's political affiliation data are based upon voting trends in the Presidential and House of Representatives elections during the 1990s. Data on actual political party enrollment are difficult to retrieve. Most states are only recently releasing this type of information in an accessible manner, usually in the form of a page within a State Department or Secretary of State web site. See, e.g., Federal Election Commission, *Combined Federal/State Disclosure and Election Directory 2000* (visited May 7, 2000) <<http://www.fec.gov/pubrec/cfsdd.htm>> (a portal site that

in both New Jersey and the United States population.<sup>65</sup> Furthermore, independents typically constitute a very small proportion of the voting population depending, of course, on how "independent" is defined. In Table 16, for example, 43% of the 1992 presidential votes in the United States and New Jersey were Democratic relative, respectively, to Republican (37.4%, 40.6%) and Perot (18.9%, 15.6%); in striking contrast, less than one percent were "other" (0.64%, 0.86%).<sup>66</sup> The differences are even more striking in the 1996 results when the Perot category disappears: There is a substantially higher percentage of Democrats in both the United States population total (49.2%) and particularly the New Jersey total (53.7%).<sup>67</sup> These figures are in sharp contrast to the respective percentages of Republicans (40.7%, 35.9%), Reform (8.4%, 8.5%), and "other" (1.7%, 1.9%).<sup>68</sup> Even if one were to add the Reform and "other" categories together, they would still constitute only approximately 10% of the vote in both the United States and New Jersey. The House of Representatives election results for 1990-1998 in Table 17 show, in 1990, a smaller percentage of Democrats than Republicans in New Jersey (45.8% and 49.9% respectively) compared to the total United States population (52.9% and 44.9% respectively).<sup>69</sup> Regardless, in both New Jersey and the total United States population, respectively, the percentage of "other" is less than 5% (4.3%, 2.1%).<sup>70</sup>

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leads to the various state web pages that report election and voting data). The web sites usually report recent years' data; earlier years' data are reported either in state yearbooks or not at all. This Article rejected other sources, such as the occasional table in the annual STATISTICAL ABSTRACT, for two reasons: (1) small sample sizes; or (2) incompatible data presentation. *See e.g.*, STATISTICAL ABSTRACT OF THE UNITED STATES 1999, 299, at tbl. no. 486 (1999).

65. *See infra* app. tbls.16-18. The exception to this distribution is political affiliation based on the House of Representatives election results, where there are more Republicans than Democrats in many of the categories. *See infra* note 69 and accompanying text.

66. *See infra* app. tbl.16. Recent voting trends in New Jersey suggest a growing number of unaffiliated voters in formerly Republican controlled townships. These voters are responsive to "Clinton" Democrats, but consider themselves independent of the major parties. *See* Laura Mansnerus, *Those Hills Are Filling Up, But Not With Republicans*, N.Y. TIMES, Apr. 2, 2000, at 14NJ2; *see also* *State Judge Invalidates New Jersey's Voter Registration Law*, N.Y. TIMES, Mar. 22, 2000, at B4; Ronal Smothers, *Ruling Will Let Third Parties Share in the State's Largess*, N.Y. TIMES, Mar. 26, 2000, at 14NJ2 (articles reporting on a recent New Jersey Superior Court decision that overturned a state law that limited voters to register only as Democrats, Republicans, or independents, suggesting that in the past a number of New Jersey voters who registered as belonging to the "Independent" Party really considered themselves independent from the two major political parties).

67. *See infra* app. tbl.16.

68. *See infra* app. tbl.16.

69. *See infra* app. tbl.17. Notably, 1998 statistics show this trend is starting to reverse. *See id.*

70. *See id.*

The *Justice* sample's income, educational, and political affiliation data suggest that minorities were underrepresented, even though in 1990, New Jersey had a higher proportion of Black and Hispanic individuals relative to the United States population.<sup>71</sup> In contrast, the *Justice* sample included a somewhat higher proportion of female subjects (56.4%)<sup>72</sup> relative to New Jersey (51.2%)<sup>73</sup> and the United States population (51.1%),<sup>74</sup> both of which showed a more symmetrical sex distribution.

Overall, *Justice*'s respondents are far wealthier and more highly educated than the rest of the country. They also include a disproportionate number of individuals affiliated with Republican and independent parties. Although *Justice* does not report race and ethnicity, it appears that minorities may have been underrepresented. In turn, females are somewhat overrepresented.

### C. Who Are the "Ordinary" People?

The 1990 United States and New Jersey census data show a wide range of age, income, educational, and political affiliation. While the *Justice* sample also shows some diversity in these demographic categories, it is far more representative of wealthier, more educated, and more politically conservative individuals. Research suggests that this kind of demographic make-up could substantially impact on *Justice*'s results.<sup>75</sup>

Demographic categories are not static. As would be expected, 1998 data show that individuals are becoming older and more educated in the total United States population.<sup>76</sup> In New Jersey, however, they are becoming slightly younger and more educated.<sup>77</sup> Moreover, political affiliation data show that New Jersey residents are becoming somewhat more Democratic over time relative to the United States population,<sup>78</sup> although the proportion of independents in the United States and New Jersey remains small.<sup>79</sup>

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71. See *infra* app. tbls.6, 12.

72. See *infra* app. tbl.3.

73. See *infra* app. tbl.10.

74. See *infra* app. tbls.4, 5.

75. See *infra* notes 80-89 and accompanying text; see also Tyler, *supra* note 17, at 701 (noting that Robinson and Darley "do not consider whether the background of their respondents may have influenced the results").

76. See *infra* app. tbl.8.

77. See *infra* app. tbls.13-14.

78. See *infra* app. tbls.16-17.

79. See *infra* app. tbls.16-18.

An examination of these distributions and changes therefore raises the following question: Who are the “ordinary” people? If, as *Justice* suggests, such individuals are not expected to represent the United States or any particular region, who are they expected to represent? Part II considers briefly a few of the factors that should determine who should have a voice in deciding what our laws should be.

## II. THE PROBLEMS WITH INCORPORATING “ORDINARY” PEOPLE’S VIEWS OF JUSTICE INTO CRIMINAL CODES

Many variables impact on how individuals view the law.<sup>80</sup> This Part examines briefly a few of these variables<sup>81</sup> and how they contribute to problems with incorporating “ordinary” people’s views of justice into criminal codes. This Part also considers how some of these variables may have influenced the results in *Justice*.

### A. *The Public Holds Diverse Views of Crime and Criminals*

When can the “ordinary” person’s “intuitive morals” ever rise above the impact of that person’s particular background, life experiences, demographic characteristics, or even emotions?<sup>82</sup> *Justice* does not try to answer that question, although it is key to understanding how the public views crime and the criminal justice system. Researchers need to go beyond survey results and investigate the ways people cognitively approach information and rely on their pre-existing beliefs and attitudes when making decisions. Otherwise, what may appear to be a person’s fundamental value or “moral intuition” may actually reflect, for example, the media’s reporting of faulty information on a certain issue.<sup>83</sup>

Substantial research and recent cases show that individuals hold diverse views of crime and criminal justice based on their backgrounds and demographics.<sup>84</sup> A striking demographic influence is race. When Bernard Goetz was convicted only on the charge of carrying an unli-

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80. *Justice* rightly pays homage to some of the research on these influences. See ROBINSON & DARLEY, *supra* note 2, at 1-3.

81. In particular, this Part turns to ROBERTS & STALANS, *supra* note 15, which provides an excellent and very thorough analysis of the public’s attitudes toward crime and criminals in the context of the surge of new polling and public opinion research.

82. See, e.g., THE PASSIONS OF LAW (Susan A. Bandes ed., 1999) (examining the role that emotions play in the decision-making capabilities of different actors in the criminal justice system and considering which emotions are appropriate in a legal context).

83. See ROBERTS & STALANS, *supra* note 15, at 3-4.

84. See *id.* at 8.

censed concealed weapon, and was acquitted of all other charges resulting from the shooting of four black youths in a New York City subway, surveys showed that the great majority (83%) of whites supported the verdict relative to less than half (45%) of blacks.<sup>85</sup> Likewise, a deep racial split existed in polls taken at various times before, during, and after the O.J. Simpson trial: Substantially more blacks than whites were sympathetic to Simpson, believed that the charges against him were untrue, that he was not guilty, and that he would not receive a fair trial.<sup>86</sup> Such attitudes are not surprising given that far more blacks than whites in Los Angeles reported having experienced (or known people who had experienced) discourteous and even brutal police behavior.<sup>87</sup> This level of distrust is mirrored in national statistics.<sup>88</sup> Lastly, how individuals viewed the highly publicized rape trials of William Kennedy Smith and Mike Tyson, and the comparisons between them, often cut across both race and gender lines of experiences.<sup>89</sup>

*B. The Public Lacks Knowledge About Crime,  
Crime Rates, Offender Characteristics, and  
Legal Reforms*

*Justice* strives to test the perceptions of “ordinary” people outside the criminal justice system so that their responses will be devoid of knowledge of the legal code.<sup>90</sup> On the one hand, this approach appears commendable because it attempts to control individuals’ experiential bias. Yet, there are reasons why this screen illustrates a strong argument for limiting the public’s contributions to criminal codes: Most people are simply uninformed about matters significant to criminal justice policy.<sup>91</sup>

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85. See GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 199 (1988).

86. See GILBERT GEIS & LEIGH B. BIENEN, *CRIMES OF THE CENTURY: FROM LEOPOLD AND LOEB TO O.J. SIMPSON* 186 (1998).

87. See *id.*

88. See *infra* app. tbl.23.

89. See Deborah W. Denno, *Why Rape is Different*, 63 *FORDHAM L. REV.* 125, 129-30, 131 n.24 (1994) (discussing the stereotyping and stigma surrounding the occurrence of a rape, as well as the consequences of reporting a rape).

90. See *supra* notes 23-27 and accompanying text.

91. See Slobogin, *supra* note 6, at 324 (noting that the community of individuals tested in *Justice* “is generally uninformed—both in the sense that it has not thought deeply about the relevant issues, and in the sense that it does not know the legal context in which a given legal provision operates”).

Opinion polls in the United States and other countries show that the public has little knowledge of the nature and extent of crime.<sup>92</sup> Moreover, what little knowledge the public has is substantially distorted. As Table 21 shows, for example, a common public misperception is that crime rates are increasing, particularly rates of violent crime, when in fact they are declining or stabilizing.<sup>93</sup> Likewise, the great majority of offenders and parolees do not become repeat offenders, in contrast to widespread public beliefs that they do.<sup>94</sup>

In general, then, the growth in public concern over crime appears unrelated to any escalation in crime rates or the proportion of crimes involving violence. At the same time, fear of and concern about crime is unevenly distributed across the country. Generally, such fear represents an inverse relationship with the amount of crime victimization experience. For example, Asian Americans, who are least apt to be victimized, are far more likely to identify crime as a problem facing their community than African Americans, who are most apt to be victimized.<sup>95</sup>

Opinion polls also show that people have limited or poor knowledge of their basic legal rights, or of particular pieces of legislation, even highly publicized legal reforms.<sup>96</sup> The general public evidences "very little" knowledge of sentencing structure or of the severity of punishments that the legal system actually imposes.<sup>97</sup>

These findings prompt several concerns about interpreting *Justice's* results. First, *Justice's* extraordinary people are probably going to be among those who fear crime the greatest but, given their demographic make-up, actually experience it the least. Next, if the *Justice* respondents' views are consistent with the public's, their overestimate of crime rates and re-offending, as well as their underestimate of the criminal justice system's sentencing severity, could influence their perceptions of certain legal doctrines. For example, according to *Justice's*

92. See *infra* notes 93-94.

93. See *infra* app. tbl.21.

94. See BUREAU OF JUSTICE STATISTICS, *supra* note 12, at 520 tbl.6.68. Despite the even greater decline in crime since 1997, the year that Table 21 was created, see *infra* tbl.21, individuals still believe there is more crime now than a year ago. See ROBERTS & STALANS, *supra* note 15, at 8.

95. See ROBERT & STALANS, *supra* note 15, at 2; BUREAU OF JUSTICE STATISTICS, *supra* note 12, at 179 tbl.3.2 (the category "Other" in this table is composed of Asians, Pacific Islanders, American Indians, Aleuts, and Eskimos). *Id.* at 596. In 1998, of the total number of murder victims, about 49% were white, 47% were black, and 2% were Asians, Pacific Islanders, and Native Americans. U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS—CRIME IN THE UNITED STATES 1998, 14, at tbl.2.4 (1999).

96. See ROBERTS & STALANS, *supra* note 15, at 35-40.

97. See *id.* at 43-47.

authors, the *Justice* sample is far more lenient than the law about allowing citizens to act in self-defense, in part because the sample distrusts the legal system's effectiveness.<sup>98</sup> However, if it is known that such beliefs are distorted, inaccurate, or exaggerated, is it still wise to rely on them to change the criminal code? *Justice* acknowledges the problems with this dilemma,<sup>99</sup> but has difficulty resolving it.

*C. The Public's Views About Crime and Criminals  
Are Often Offense-Specific and Influenced by  
Demographics and Media Exposure*

*Justice* uses particular offenses—seemingly arbitrarily—as a vehicle for studying people's perceptions of key criminal law issues. For example, the book's study of "attempt" involves a rather banal account of a series of steps that Ray, a locksmith, goes through in an effort to steal from a safe in a coin shop.<sup>100</sup> In contrast, the study of "complicity" concerns a rather sordid arrangement in which John attempts to help the unhappily married and evil Catherine kill her husband so that she can be a rich widow.<sup>101</sup> These offense designations are arbitrary because the study of "attempt" could have involved a more sordid fact scenario in which the evil Catherine attempts to kill her husband for money, and the study of "complicity" could have involved a more banal scenario in which Tom attempts to help his friend Ray steal from a coin shop safe.

Did the inflammatory or neutral nature of the respective fact scenarios and parties involved affect how the *Justice* sample responded? In particular, did the respondents view the attempt steps that Ray took far more leniently than the Model Penal Code ("MPC") because Ray was engaging in an act that, even if completed, would never have resulted in physical harm (much less death) to anyone?<sup>102</sup> Did the respondents view the attempt steps more leniently because Ray, in contrast to Catherine, did not appear to be a dangerous, evil, or immoral person? Did the respondents view the attempt steps more leniently because Ray was a male and was acting far more consistently with his gender role than a

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98. See ROBINSON & DARLEY, *supra* note 2, at 80.

99. See *id.*

100. See *infra* app. tbl.1.

101. See *infra* app. tbl.1.

102. See ROBINSON & DARLEY, *supra* note 2, at 14-28 (discussing the Model Penal Code's ("MPC") approach to attempt liability and comparing it to the respondents' views on the subject); see also *infra* note 126 and accompanying text (noting that 77% of the *Justice* subjects would not punish in cases where the defendant took a substantial step, in contrast to the MPC).



female would have been?<sup>103</sup> These questions are unanswerable. However, research suggests that such differences could have been influential, thereby pinpointing the weaknesses of any kind of empirical research proposing to measure individuals' perceptions of the criminal law.

Not surprisingly, individuals' views about crime and criminals are often offense-specific. Such views are also influenced by respondents' background characteristics and the degree of their exposure to mass media.<sup>104</sup> For example, research indicates that individuals have stereotypical visual images of what "an offender" looks like (young, male, physically unattractive) and that both blacks and whites are more likely to link criminality to racial minorities.<sup>105</sup> Moreover, individuals disproportionately associate minorities with crimes of violence. In one study, for example, respondents were more likely to attribute assaults, thefts, and muggings to blacks, but attribute fraud, embezzlement, and counterfeiting to whites.<sup>106</sup>

As would be expected, stereotypes about rape offenders and victims are strongly influenced by gender.<sup>107</sup> Research shows that across ethnic groups, women are less likely than men to subscribe to widely held myths about rape,<sup>108</sup> including myths about male rape victims.<sup>109</sup> *Justice* notes that the respondents did not support the MPC's provisions on rape.<sup>110</sup> Such divergence would be expected because the MPC provisions on rape are so dated. However, it is not unlikely that the disproportionate number of females in *Justice*'s sample also affected these results. Even a slight gender imbalance in the sample could be significant because the study sample sizes were so small, and because the gender split (if any exists) is quite predictable. Such offense-specific biases provide yet one more reason to control for possible demographic influences in such research.

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103. See Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 86 (1994) (noting that "because crime and violence are associated with maleness, society deems women who engage in crime to be 'doubly deviant'—defying both the law and their gender role").

104. See ROBERTS & STALANS, *supra* note 15, at 125.

105. See *id.* at 111-13.

106. See *id.* at 114.

107. See DRESSLER, *supra* note 1, at 534-37; HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 63 (1980).

108. See *infra* app. tbl.22 (listing various myths about rape).

109. See ROBERTS & STALANS, *supra* note 15, at 121.

110. See ROBINSON & DARLEY, *supra* note 2, at 204.

*D. The Public's Views on Criminal Justice  
Policies or Constitutional Issues Can Be  
Affected by Different Cognitive Styles of  
Information Processing*

The nature and type of an individual's prior knowledge can influence how that individual processes and selects information, makes decisions, and changes beliefs in different contexts.<sup>111</sup> For example, a substantial amount of research has demonstrated associations between judicial behavior and complexity of thought processing in the context of judges' different political affiliations, social classes, ages, religions, legal educations, and ethnic backgrounds.<sup>112</sup> Yet, all individuals use "cognitive heuristics" (mental short cuts) as an efficient and pragmatic means of processing information, irrespective of the consistency or complexity of their prior beliefs.<sup>113</sup> Such heuristics include: (1) simulation (carryover of recently recalled information to give context to the problem or hypothetical provided), (2) availability (forming a response based on information about a topic that is easily recalled), and (3) representativeness (when memory of a specific event or individual is applied to a whole group).<sup>114</sup>

Simply because an individual uses a heuristic, however, does not mean that person's decision is biased. The nature and extent of any existing bias depends upon whether the beliefs guiding the individual's decision are distorted, inaccurate, or irrelevant to the decision the individual makes.<sup>115</sup> For example, the decision to adopt a particular criminal justice policy or constitutional reform frequently requires an individual to make a choice between one or more of several conflicting values that the individual may possess (for example, conflicting values concerning when a search is reasonable). Research indicates that people with conflicting values are more likely to incorporate community sentiments in their decision-making as compared to people who have consistent values and well-informed beliefs.<sup>116</sup> Those with more consistent beliefs ap-

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111. See ROBERTS & STALANS, *supra* note 15, at 77-81, 104.

112. See generally JOHN HOGARTH, SENTENCING AS A HUMAN PROCESS (1971) (explaining the results of a study on the sentencing behavior of magistrates).

113. See ROBERTS & STALANS, *supra* note 15, at 104; see also Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1313 (1999) (discussing, within the context of the dangers of using anecdotes to help promote certain laws, "the 'representativeness heuristic' [which] is one of a set of legitimate and absolutely essential cognitive tools, which permit people to think beyond the information given; to form inferences").

114. See ROBERTS & STALANS, *supra* note 15, at 77-81.

115. See *id.* at 105.

116. See *id.*

pear far less likely to consider all the information presented before them, and will therefore be too closed-minded.<sup>117</sup> Moreover, prior knowledge and different modes of information processing can influence how individuals respond to detailed stories as well as abstract questions.<sup>118</sup> These findings suggest that researchers should ask their subjects whether they have conflicting values about the topic for which they are being tested, and whether they believe the topic is important.<sup>119</sup>

The make-up of the study instruments also could affect individuals' responses. For example, a respondent in *Justice* could have judged a property crime more leniently if, before reading about it, the respondent read about a gruesome murder case rather than another type of property crime.<sup>120</sup> Likewise, respondents may be affected by the particular age, occupation, gender, etc. of the defendants and victims portrayed in all the fact scenarios. Looking at Table 1,<sup>121</sup> a researcher can only wonder if respondents would be as sympathetic to Suzanne and William Smith (issue seven) if both were young, lived together in an apartment, and had different occupations, such as a dancer or a bartender. Would it make a difference if Joe (issue seven) was a CEO and arrived home from work to find a man attempting to steal his Rolex watch? Preferably, *Justice*, or studies like it, would devise an instrument with identical or very similar underlying fact scenarios for each of the issues being tested so that the potential effect of such underlying identifiers could be controlled.

### E. Most Laws Do Reflect Community Standards

Research suggests that the public has a substantial influence on lawmaking, either directly or indirectly, in ways that *Justice* does not acknowledge explicitly.<sup>122</sup> This Section looks more closely at this issue by examining the results in *Justice*, as well as recent studies showing the public's effect on courts, legislatures, and politicians. This Section also considers the substantial concordance between the public's and the law's views of crime severity, suggesting that it may be in this realm that "moral intuitions" could more strongly appear.

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117. *See id.*

118. *See id.* at 104-05.

119. *See id.* at 106.

120. *See* Tyler, *supra* note 17, at 701.

121. *See infra* app. tbl.1.

122. *See infra* notes 137-42 and accompanying text.

### 1. *Justice's* Results

According to *Justice*, some areas of agreement between the respondents and the MPC include the following: (1) the degree of liability for a violation should depend to a considerable extent on the person's culpability level; (2) "excusing conditions" in legal codes should be granted and validated; (3) there should be support for justification defenses and support in general for the felony-murder rule; (4) negligence should trigger liability in intoxication cases; and (5) the degree of control and cognitive dysfunction in insanity cases should be evaluated.<sup>123</sup>

Some areas of disagreement pertained to the different issues studied:

*Sexual offenses:* The *Justice* subjects do not treat consensual intercourse with an underage partner as seriously as the MPC, and do not give significant mitigation to forcible rape between parties familiar with one another.<sup>124</sup>

*Liability grading:* The *Justice* subjects assigned greater punishment with heightened culpability, whereas codes typically define only minimum culpability for an offense. The *Justice* study suggests that codes should include multiple grades according to culpability level.<sup>125</sup>

*Attempt:* Seventy-seven percent of the *Justice* subjects would impose no punishment in cases where the defendant took a substantial step, whereas the codes impose immediate liability. The subjects generally supported the common law approach to attempt and the majority rule of giving a discounted liability for attempt, as opposed to equal punishment with the perpetrator. The responses suggest that codes ought to distinguish and punish more severely instances where the harm actually occurs or the prohibited conduct is consummated.<sup>126</sup>

*Felony Murder:* The *Justice* subjects tended to punish mere accidental killings during a robbery as less serious than manslaughter, although most codes would punish those killings as murder. A "felony-manslaughter" rule may be more appropriate.<sup>127</sup>

*Justification:* The *Justice* subjects seemed to desire more grading in justification defenses. According to the subjects, if a mistake as to justification does not give a defense, it at least mitigates. Moreover, the

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123. See ROBINSON & DARLEY, *supra* note 2, at 203-04.

124. See *id.* at 204.

125. See *id.* at 204-05.

126. See *id.* at 205.

127. See *id.* at 205-06.

subjects were more willing to allow force in defense of self or property, or in exercising their law enforcement role.<sup>128</sup>

*Omissions:* The *Justice* subjects seemed to desire criminalization or more serious treatment of some actions than the code gave. Studies suggest new offenses should be created or liability expanded.<sup>129</sup>

Upon reading the areas of disagreement between the MPC and the *Justice* subjects, a criminal law professor may see strong similarities between the *Justice* subjects' impressions and the typical views of first semester law students. With time, training, and explanation, however, criminal law professors find that law students begin to understand the reasons why certain laws operate, and therefore start to alter their impressions.<sup>130</sup> Moreover, legal education guides students to examine how all the issues and MPC provisions interrelate; in contrast, the *Justice* respondents only read a series of selected and seemingly independent fact scenarios.

Law school education is a global, interconnected enterprise in the way that participating in a study could never be. This is why we *train* lawyers. Asked another way: Would we ever consider it acceptable to give laypersons a strong voice in determining how medical procedures should be conducted during surgery? Even though laypeople are being operated on, and could suffer severely if the procedures are faulty, would the medical community be warranted in following laypeople's views? In sum, the *Justice* authors "do not discuss the question of how lawmakers might decide when to follow public opinion and when to keep formal laws that are discrepant with public views, out of deference to the special knowledge and expertise of legal authorities."<sup>131</sup>

## 2. Laypersons' Views of Crime Severity

Estimating crime severity is the one area where laypersons' views seem most concordant, for several reasons: (1) survey respondents show more agreement than disagreement in the seriousness rankings of most crimes; (2) there is a "significant degree of consensus" in crime seriousness rankings across different social groups; (3) there is a "fair degree"

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128. See *id.* at 206-07.

129. See *id.* at 208.

130. See Slobogin, *supra* note 6, at 324. Professor Slobogin reported the results of an informal study he conducted with new law students showing that on the first day of class the students believed the penalty for attempt should not be the same as for the completed crime. However, when the students were asked again seven weeks into the semester, approximately 75% of the class believed the penalty for attempt should be the same as for the completed crime presumably due to their understanding that "luck and fortuity do not diminish culpability." See *id.*

131. Tyler, *supra* note 17, at 700.

of concordance in crime seriousness rankings across different countries; (4) the strongest degree of social consensus appears in crime seriousness rankings for the most serious and least serious crimes; (5) individuals rate crimes of violence highest on the crime severity scale; and (6) the least amount of social consensus exists for crimes between the two extremes of seriousness.<sup>132</sup> Moreover, some research suggests that public views concerning the severity of crimes “exhibit a high degree of subtlety, nuance, and ethical reasoning.”<sup>133</sup>

Unfortunately, *Justice*’s thirteen-point liability scale contains unequal time increments that disproportionately reflect light penalties.<sup>134</sup> Apart from the methodological problems associated with this type of scale,<sup>135</sup> it may underestimate the extent to which the subjects demonstrate concordance on crime seriousness rankings. Preferably, a crime seriousness scale would provide the subjects with a starting anchor of some sort (for example, a score of ten for stealing a bicycle),<sup>136</sup> but then otherwise allow them to provide their own numerical rank unconstrained by legal or sentencing structures. This way, moral intuitions can be tapped apart from institutional rules.

### 3. The Public’s Effect on Legal Institutions

Recent research suggests that public opinion does influence the public policies carried out by the House, Senate, President, and the Supreme Court.<sup>137</sup> Moreover, this influence exists at a level and speed that would be expected from constitutional design.<sup>138</sup> For example, “politicians constantly and immediately process public opinion changes in order to stay ahead of the political curve”,<sup>139</sup> in contrast, public opin-

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132. See ROBERTS & STALANS, *supra* note 15, at 71-72; see also MARVIN E. WOLFGANG ET AL., U.S. DEP’T OF JUSTICE, THE NATIONAL SURVEY OF CRIME SEVERITY v (1985) (explaining the results of a 60,000 person survey on the seriousness of various crimes).

133. Mark Warr, *The Polls—Poll Trends: Public Opinion on Crime and Punishment*, 59 PUB. OPINION Q. 296, 296 (1995) (citation omitted).

134. See *infra* app. tbl.2.

135. See Slobogin, *supra* note 6, at 330-31.

136. See WOLFGANG ET AL., *supra* note 132, at vi-x (listing the severity scores, ranging from 72.1 to 0.2, and the respective offenses used in the survey).

137. See James A. Stimson et al., *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 543 (1995); see also William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 96 (1993) (analyzing empirical data suggesting that “public opinion exercises important influence on the decisions of the Court even in the absence of changes in the composition of the Court or in the partisan and ideological make-up of Congress and the presidency”).

138. See Stimson et al., *supra* note 137, at 543, 560.

139. *Id.* at 560. Describing an extreme example of a politician immediately processing public opinion polls, one writer notes:

ion has a relatively slower but still substantial effect on the Supreme Court.<sup>140</sup> As one study concluded: "Understanding politics well, the constitutional framers were correct in expecting short-term politics to be a fundamental part of dynamic representation."<sup>141</sup>

The swift reforms in the insanity defense following the John Hinckley, Not Guilty by Reason of Insanity, verdict provide a classic example of the strong and fast impact of public opinion. Polls conducted the day after the verdict was announced showed so much public indignation that legislative and presidential reaction and change was immediate.<sup>142</sup>

A current concern is that public opinion not only has too much influence, but that refusal rates among potential respondents are extremely high.<sup>143</sup> For this reason, pollsters and social scientists are beginning to doubt the validity of many of the surveys gathered for politicians and the media.<sup>144</sup> Increasingly, public opinion polls fail to reflect the kinds of diverse demographics that should constitute the "community consensus."<sup>145</sup> Once again, the question arises: Who are the "ordinary" people whose views now guide society's decision-makers?

Alternative ways of incorporating community opinions into the legal system have proved controversial and problematic. There are split views, for example, on the value and feasibility of jury nullification.<sup>146</sup>

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President Clinton is such a devoted student of public opinion polls that his aides say he can recite, from memory, the American people's double-digit tastes on a wide array of issues. Besides using survey data to help shape some of the most important decisions of his presidency, Mr. Clinton has also consulted polls before deciding whether his family should go to the beach or the mountains on their summer vacations.

Don Van Natta, Jr., *Silent Majorities: Polling's 'Dirty Little Secret': No Response*, N.Y. TIMES, Nov. 21, 1999, § 4 (Week in Review), at 1.

140. See Stimson et al., *supra* note 137, at 560.

141. *Id.*

142. See Valerie P. Hans & Dan Slater, *John Hinckley, Jr. and the Insanity Defense: The Public's Verdict*, 47 PUB. OPINION Q. 202, 202-03 (1983). For example, Delaware passed new legislation a day after the verdict was announced. *See id.*

143. As one article explains: "Pollsters say response rates have fallen as low as 20 percent in some recent polls, which means that as many as 8 out of 10 people initially asked to participate in a poll refused to be interviewed. Ten years ago, polling response rates were typically at least 50 percent." Van Natta, Jr., *supra* note 139, at 1.

144. *See id.*

145. *See id.* (noting the concern voiced by some scholars "that the public's diverse demographics aren't being reflected in poll results").

146. *See generally* CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* (1998) (defending the jury's right and power to diverge from judicial instructions); Slobogin, *supra* note 6, at 332-33 (recommending using the jury and sentencing structure "as occasional safety valves"). *But see* ROBINSON & DARLEY, *supra* note 2, at 213 (contending that jury nullification contravenes the principle of legality); Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 474-77 (1998) (arguing that rec-

Moreover, even without the extreme measure of nullification, there are difficulties with garnering representative juries<sup>147</sup> who are able to comprehend complicated legal proceedings.<sup>148</sup> In essence, this Article agrees with prior recommendations that educating the public about the law is a preferred route for enhancing the chances that when the public does influence, it does so wisely.<sup>149</sup>

### III. CONCLUSION

This Article discusses the potential for incorporating public opinion into the law by way of reviewing the wonderfully written book, *Justice, Liability, and Blame: Community Views and the Criminal Law*. *Justice* analyzes eighteen original studies of individuals' perceptions of disputed legal issues and reports that laypersons' views of justice (their "moral intuitions") are reflected in some legal doctrines (e.g., the felony-murder rule) but not others (e.g., the punishment for attempt). *Justice*'s authors believe that public opinion can help determine the nature and extent to which certain behavior should be penalized, and that individuals are more likely to obey laws that they think are morally appropriate.

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ognizing a constitutional right to nullify would conflict with a defendant's constitutional right to independent fact finding and legal finality).

147. See *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1409, 1452-54 (1997); see also Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673, 2700-05 (1996) (describing the difficulties encountered by criminal court judges in preventing jury duty avoidance by veniremembers who lie during *voir dire*); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 80-99 (1993) (reviewing how and when the racial background of jurors affect jury deliberations); Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 769-70 (1993) (noting how *voir dire* procedures that promote equal racial representation may alienate jurors and create distrust of jury deliberations).

148. See *Developments in the Law—The Civil Jury*, *supra* note 147, at 1490-93; see also SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 144-56 (1988) (discussing the sometimes convoluted manner in which jury instructions are communicated and juries' difficulties in interpreting them); Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 LAW & HUM. BEHAV. 117, 126 (1999) (noting jurors' lack of comprehension concerning instructions on the insanity defense); David E. Rovella, *Poll Elicits Fear of Rogue Jury*, NAT'L J., Nov. 2, 1998 at A25 (responding to a poll, 42% of potential jurors stated an unwillingness to accept a defendant's right to the Fifth Amendment protection from self-incrimination).

149. See SAMUEL LOCK, *CRIME, PUBLIC OPINION, AND CIVIL LIBERTIES: THE TOLERANT PUBLIC* 1 (1999) (explaining the importance of educating the public in order to safeguard civil liberties); Slobogin, *supra* note 6, at 324-27 (promoting the value of educating the public about the law).



*Justice* contributes an invaluable interdisciplinary approach to understanding the law. Yet, this Article concludes that there are more perils than positives linked to serious reliance on laypersons' views of legal doctrines. This conclusion is based upon this Article's analysis of three major sources of information: (1) this Article's own examination of United States Census Bureau and New Jersey demographic and political affiliation data for 1990, the year the *Justice* sample was selected in New Jersey; (2) the empirical results that *Justice* reports; and (3) the results presented in other public opinion research. In sum, this Article questions whether measurements of laypersons' "moral intuitions" can ever be free from the effects of individuals' demographic characteristics and life experiences. The perils of public opinion are discussed briefly below.

*A. The Problems with Public Opinion  
Research Methodology and Sample  
Selection Procedures*

It is difficult to acquire a representative sample of "ordinary people" for assessing public opinion, or even to know what such a sample should look like demographically. For example, this Article's comparison of the demographic and political affiliation differences between *Justice*'s sample and the United States and New Jersey census bureaus' samples suggests that *Justice*'s sample is "extraordinary," not ordinary, in the way that *Justice* characterizes it. *Justice*'s sample is substantially wealthier, more highly educated, more female, and more apt to be affiliated with either the Republican or independent political parties as compared to sample respondents in the rest of the country. *Justice*'s sample also may have underrepresented minorities (*Justice* does not report the race and ethnicity of its sample). However, this Article recognizes that creating a "representative" sample is problematic, particularly in light of the declining numbers of people who are willing to participate in public opinion surveys.

*B. The Substantial Impact of a Sample's  
Demographic Make-up on Public Opinion  
Research Results*

A sample's demographic make-up is critical for evaluating the validity and reliability of public opinion research for a number of reasons:

1. The public holds diverse views of crime and criminals that oftentimes vary according to the respondents' demographic characteristics and methods of cognitively approaching information. In light of this variance, *Justice* does not attempt to answer a key question that goes to the heart of understanding the public's views of crime and criminals: When can an individual's "intuitive morals" ever be independent of that individual's demographic make-up or personal life experiences?
2. A wide range of survey research indicates that the public lacks knowledge about crime, crime rates, offender characteristics, and legal reforms. In turn, these misconceptions could influence the "ordinary" person's perceptions of certain legal doctrines. *Justice* acknowledges the problems with relying on laypersons' distorted, inaccurate, or exaggerated beliefs, but does not propose adequate solutions for how those problems should be resolved.
3. The public's views about crime and criminals are often offense-specific and influenced by demographics and media exposure. For example, research indicates that individuals have stereotypical images of how an offender should look demographically. These images vary according to the type of crime being analyzed (e.g., violent vs. non-violent crimes) and the type of person being questioned (e.g., females vs. males). *Justice* does not consider how these factors could influence its sample's views on the fact scenarios detailed in *Justice*'s research instrument, particularly given the variations in the types of crimes and actors who are presented.
4. The public's views on criminal justice policies or constitutional issues can be affected by how individuals cognitively process information. For example, an individual's prior knowledge and life experience can influence how that individual processes and selects information, makes decisions, or is swayed by different circumstances. With regard to an individual's decision to adopt a particular criminal justice policy or constitutional reform, for instance, research indicates that people with conflicting values are more likely to incorporate community sentiments in their decision-making as

compared to people who have consistent values and well informed beliefs. Moreover, the make-up of a study's instrument could affect subjects' responses depending upon the different order in which crimes are presented (e.g., a property crime may look less serious if it is followed by a gruesome murder case), or the issues being tested.

5. Most laws do reflect community standards. This Article reaches this conclusion based upon three sources of information: (1) the results in *Justice* showing a range of areas of agreement between the study respondents and the MPC's provisions; (2) research indicating the substantial degree of homogeneity among different laypersons' estimates of crime severity; and (3) recent research demonstrating the marked effect of public opinion on the policies and decisions carried out by the House, Senate, President, and Supreme Court. Such research has prompted concerns that some public opinion may have too much influence particularly in light of the very high refusal rates among those individuals who are solicited and the corresponding doubts among pollsters and social scientists concerning the validity of the surveys gathered for politicians and the media.

*Justice* is enormously enlightening on a wide range of topics. Future research could focus on two additional issues: (1) how to educate an already highly influential public about the intricacies of legal doctrine so that they can make more informed decisions, and (2) how to ensure that this influential public bears some semblance to the "ordinary" person. If ordinary individuals are more apt to respect and obey laws that they believe are morally just, it seems likely that they will be more apt to respect and obey laws that they more fully understand.

## APPENDIX

TABLE 1.

A SUMMARY OF THE EIGHTEEN CRIMINAL LAW ISSUES AND FACT SCENARIOS STUDIED IN *JUSTICE, LIABILITY, AND BLAME*

ISSUES	FACT SCENARIOS
1. Objective requirements of attempt	Ray, a locksmith, goes through several steps in his attempt to steal from a safe in a coin shop. The steps range from "thought only" to "completed offense – renounces but unable to 'undo.'"
2. Creating a criminal risk	Mary, unhappy in her fifteen-year marriage to Tom, decides to kill Tom with poison to inherit his money and avoid a messy divorce. Tom's injuries from the poison range from "slight injury" to "high injury."
3. Objective requirements of complicity	John knows that Catherine is unhappily married and he wonders if she wants her husband dead, which would make her a rich widow. John perceives Catherine as a woman quite capable of murder and he thinks of approaching her with a plan in which he would be willing to help her kill her husband. Before he can approach her about the plan, however, Catherine shoots her husband dead. John's attempts to help Catherine range from "only thinks of helping" to "masterminds."
4. Omission liability	Walt, age 38, and Vic, age 16, are strangers on a pier built over a deep body of water. Suddenly, Pete, also a stranger, intentionally pushes Vic into the water, and then immediately runs away. Both Pete and Walt are practically certain that Vic will drown. Walt cannot swim and he does not want Vic to drown. However, Walt does not throw Vic a lifesaving flotation device that is on the pier even though he knows the device will save Vic. Vic drowns and Walt later explains he "just didn't want to get too involved." Walt and Vic's relationship ranges from "stranger" to "parent," to "high" and "low danger," to "high" and "low inconvenience."
5. Use of deadly force in self-defense	Paul works in the city and legally carries a gun for protection. He is walking down a deserted city street on his way back home one night when a man comes up and asks for money. The man continues to pester Paul and Paul then shoots and kills the man. Paul's perceived degree of self-defense ranges from "killing, no self-defense" to "believes deadly force is not necessary but mistakenly believes deadly force legal."

6. Use of force in defense of property	Joe arrives home from work and finds a man attempting to steal his motorcycle. When the man does not respond to Joe's protests, Joe grabs the man's arm and then hits him in the face. Apparently in pain, the man runs off and is later apprehended by the police. Joe's perceived degree of necessary force ranges from "necessary force" to "deadly force, believing it lawful."
7. Citizens' law enforcement authority	Suzanne and William Smith are a middle-aged married couple living in a two-story home. Suzanne, a secretary, works a day shift and William works an evening shift at a local car manufacturing company. Suzanne, who is typically home alone at night, keeps a weapon next to her bed in case there is an emergency when she goes to sleep. The series of events that occur when Suzanne goes to sleep range from "rape: deadly force—actual offender" to "property destruction: nondeadly force—mistaken identity."
8. Offense culpability requirements and mistake/accident defenses	A series of scenarios concerning different individuals' awareness of property damage or consent during sexual intercourse, ranging from "as to causing damage to house," to "as to causing damage to unimproved property," to "as to house belonging to another," to "unimproved property belonging to another," to "victim's lack of consent in rape," to "victim being underage in statutory rape."
9. Culpability requirements for complicity	Mark and Gregory drive to the plant where they work. Mark, who has not been drinking, drives because Gregory has been drinking. After they park, Gregory asks Mark for the car keys because Gregory wants to drive home to change before work. The series of events that then occur range from "purposeful as to assisting driving, knowing as to causing death" to "reckless as to assisting driving, reckless as to causing death."
10. Voluntary intoxication	Brian wants to kill his roommate because his roommate stole Brian's girlfriend. Brian starts beating his roommate, who later dies. Brian's desire either to injure or kill his roommate, and Brian's various states of intoxication while beating, range from "purposeful killing—control" to "pre-intoxication faultless killing—negligent intoxication."
11. Individualization of the objective standard of negligence	Sam decides that he wants to go hunting by himself in a very remote area where he believes there are no people but a lot of wildlife, including bears. One morning he hears a noise in the brush and he quickly fires his gun in the direction of the noise, only to discover he has killed another hunter. Sam's physical, cultural, and experiential characteristics which could give some context to why he fired the shot range from "cultural norms" (he is an American Indian following a tribal custom of hunting alone) to "substandard education" (Sam had never been hunting before) to "old age" (he is 82) to "recent upset" (he was mugged only two nights ago) to "above-normal intelligence." These same standards are then also applied to a fact pattern on omissions.

12. Insanity	This issue involves a series of scenarios examining insanity under a wide range of circumstances, such as "murder," "self-defense," and variations on degrees of control and cognition.
13. Immaturity and involuntary intoxication	Mike, age 30, is playing poker with his brother Joe late one evening while both are visiting their grandmother. There has always been some dislike between the brothers, which is particularly strong that night. The next series of events involve Mike setting Joe on fire and killing him under circumstances ranging from "control – murder," to "low control and cognitive," to scenarios where Mike is 10, 14, or 18 years-old.
14. Duress and entrapment defenses	Chris, a Navy veteran with no prior criminal record, knows Tom, a local drug dealer. The next series of events concern the circumstances under which Chris makes a delivery of eight ounces of cocaine for Tom. While making the delivery, Chris is stopped for a motor vehicle violation. After a lawful search of the car, the police arrest Chris and charge him with possession of cocaine with the intent to distribute. The circumstances range from "control – no duress or inducement" to "no prior record – buddy."
15. The seriousness of the offense – sexual offenses	Two people have sexual intercourse together under a range of different circumstances in which their sexes, occupations, ages, mental statuses, and degree of acquaintance with one another vary. Circumstances range from "Forcible intercourse — straight (i.e., they are strangers)," to "forcible intercourse – married," to "consensual intercourse — mentally handicapped female," to "consensual intercourse — female in jail."
16. The culpability of the person – felony murder	Mark ends up killing someone under a series of circumstances in which a felony is involved, ranging from a "purposeful killing," to a "purposeful shooter, purposeful co-felon, owner victim," to a "negligent but innocent shooter, purposeful co-felon, owner victim."
17. The strength of the person's connection with the prohibited result — causation requirements	Luman and Alma decide to kill Smith because Smith made disparaging remarks about them. They go to Smith's house. While Alma serves as a watchman, Luman kills or attempts to kill Smith. Luman and Alma flee but are subsequently apprehended. Causation is tested under a series of circumstances involving a "subsequent killer," "careless nurse," and "accident on way to the hospital."
18. Punishment for Multiple Offenses	One person ends up killing or stealing under series of circumstances involving one or more victims (killing) or items (stealing).

\*ROBINSON & DARLEY, *supra* note 2, at 229-81.

TABLE 2.  
THE LIABILITY-PUNISHMENT SCALE USED IN JUSTICE, LIABILITY, AND BLAME\*

Criminal liability and sentence for \_\_\_\_\_ ?

N	0	1	2	3	4	5	6	7	8	9	10	11
no liability	liability, no punishment	1 day	2 weeks	2 months	6 months	1 year	3 years	7 years	15 years	30 years	life imprisonment	death

\*ROBINSON & DARLEY, *supra* note 2, at 223.

**TABLE 3.**  
**DEMOGRAPHIC INFORMATION COLLECTED ON 307 SUBJECTS STUDIED IN**  
**JUSTICE, LIABILITY, AND BLAME\***

<i>Age</i>	<i>%</i>	<i>Sex</i>	<i>%</i>	<i>Income (U.S. dollars)</i>	<i>%</i>	<i>Education</i>	<i>%</i>	<i>Political Affiliation</i>	<i>%</i>
Less than 20	0.7	Female	56.4	Less than 10,000	3.0	High School	26.4	Democrat	32.3
20-29	37.2	Male	43.6	10,000-24,000	14.2	College	47.2	Independent	31.1
30-39	17.8			25,000-39,000	28.3	Graduate degree	26.4	Republican	36.6
40-49	24.2			40,000-54,000	21.0				
50-59	10.4			55,000-69,000	15.5				
60-69	5.7			70,000-95,000	11.6				
70-79	3.7			More than 100,000	6.4				
80 or more	0.3								

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\*ROBINSON & DARLEY, *supra* note 2, at 223.



TABLE 4.

**UNITED STATES CENSUS BUREAU DEMOGRAPHIC INFORMATION FOR 1990: DEMOGRAPHIC CATEGORIES  
ALTERED TO COMPORT WITH JUSTICE, LIABILITY, AND BLAME\***

Age	Total	%	Income (U.S. dollars)	Total	%	Educational Attainment†	Total (152,740)	%	Sex	Total	%
15-24	27,725	15.4	Less than 10,000	68,032	37.7	Less than four years of High School	31,664	20.7	Female	92,245	51.11
25-34	40,891	22.6	10,000-24,999	61,501	34.1	Four years of High School	58,901	38.6	Male	88,220	48.89
35-44	37,301	20.7	25,000-34,999	22,892	12.7	Less than four years of college	28,568	18.7			
45-54	24,487	13.6	35,000-49,999	16,061	8.9	Four years of college	19,834	13.0			
55-64	20,328	11.3	50,000-74,999	7,968	4.4	Five years or more of college	13,774	9.0			
65-74	18,011	9.9	75,000 and over	4,011	2.2						
75 and over	11,722	6.5									

\*U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-174, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1990 Table 25, at 108-111, (1991). All data are based on the total number of people with income. The total number of people in thousands is 180,465. The numbers in this table are identical to those presented by the United States Census Bureau. However, the Census Bureau's numbers within each separate demographic category do not always equal precisely the population total the Census Bureau reports, i.e., 180,465. Presumably, this discrepancy is due to the Census Bureau's rounding procedure. For this reason, the percentages in this table do not always total precisely to 100%. The United States Census Bureau's information on political affiliation is incomplete for 1990 and is not presented in this table.

†Education statistics are based on the total number of people who are 25 years of age or older with income. The total is rounded in thousands to 152,740.

*Id.*

**TABLE 5.**  
**UNITED STATES CENSUS BUREAU DEMOGRAPHIC INFORMATION FOR 1990\***

Age	Male (%)	Female (%)	Total (%)	Income	Male (%)	Female (%)	Total (%)	Educational Attainment*	Male (%)	Female (%)	Total (%)
15-24	13,976 (7.7)	13,749 (7.6)	27,725 (15.4)	\$1-\$4,999	10,820 (6.0)	26,337 (14.6)	37,157 (20.6)	8 years or less	7,974 (5.2)	7,508 (4.9)	15,482 (10.1)
25-34	20,856 (11.6)	20,035 (11.1)	40,891 (22.7)	\$5,000-\$9,999	11,312 (6.3)	19,563 (10.9)	30,875 (17.1)	High School: 1 to 3 years	7,616 (5.0)	8,566 (5.6)	16,182 (10.6)
35-44	18,755 (10.4)	18,546 (10.3)	37,301 (20.7)	\$10,000-\$14,999	11,253 (6.2)	13,566 (7.5)	24,819 (13.7)	High School: 4 years	26,779 (17.5)	32,122 (21.0)	58,901 (38.6)
45-54	12,209 (6.8)	12,278 (6.8)	24,487 (13.6)	\$15,000-\$24,999	19,166 (10.6)	17,516 (9.7)	36,682 (20.3)	College: 1 to 3 years	13,625 (8.9)	14,943 (9.8)	28,568 (18.7)
55-64	9,974 (5.5)	10,354 (5.7)	20,328 (11.2)	\$25,000-\$34,999	14,185 (7.9)	8,707 (4.8)	22,892 (12.7)	College: 4 years	10,166 (6.7)	9,668 (6.3)	19,834 (13.0)
65-74	8,097 (4.5)	9,914 (5.5)	18,011 (10)	\$35,000-\$49,999	11,604 (6.4)	4,457 (2.5)	16,061 (8.9)	College: 5 years or more	8,084 (5.3)	5,690 (3.7)	13,774 (9.0)
Over 75	4,352 (2.4)	7,370 (4.1)	11,722 (6.5)	\$50,000-\$74,999	6,433 (3.6)	1,535 (.85)	7,968 (4.4)	Total Education	74,244 (48.6)	78,496 (51.4)	152,740 (100)
Sex Total	88,220 (48.9)	92,245 (51.1)	180,465 (100)	\$75,000 and over	3,446 (1.9)	565 (.3)	4,011 (2.2)				

\*U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-174, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1990 Table 25, at 108-111, (1991). All data are based on the total number of people with income. The total number of people in thousands is 180,465. The numbers in this table are identical to those presented by the United States Census Bureau. However, the Census Bureau's numbers within each separate demographic category do not always equal precisely the population total the Census Bureau reports, i.e., 180,465. Presumably, this discrepancy is due to the Census Bureau's rounding procedure. For this reason, the percentages in this table do not always total precisely to 100%. The United States Census Bureau's information on political affiliation is incomplete for 1990 and is not presented in this table.

\*Education statistics are based on the total number of people who are 25 years of age or older with income. The total is rounded in thousands to 152,740.

*Id.*

TABLE 6.

## UNITED STATES CENSUS BUREAU DEMOGRAPHIC INFORMATION FOR 1990: RACE AND HISPANIC ORIGIN\*

Race	Male	%	Female	%	Total	%
White	76,480	42.4	78,566	43.5	155,046	85.9
Black	8,820	4.9	10,687	5.9	19,507	10.8
Hispanic Origin†	6,767	3.7	5,903	3.3	12,670	7.0

\*U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-174, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1990 Table 25, at 108-111, (1991). All data are based on the total number of people with income. The total number of people in thousands is 180,465. The numbers in this table are identical to those presented by the United States Census Bureau. However, the Census Bureau's numbers within each separate demographic category do not always equal precisely the population total the Census Bureau reports, i.e., 180,465. Presumably, this discrepancy is due to the Census Bureau's rounding procedure. For this reason, the percentages in this table do not always total precisely to 100%.

†Persons of Hispanic origin may be of any race. *Id.*

TABLE 7.

**UNITED STATES CENSUS BUREAU DEMOGRAPHIC INFORMATION FOR 1998: DEMOGRAPHIC CATEGORIES  
ALTERED TO COMPORT WITH JUSTICE, LIABILITY, AND BLAME\***

Age	Total	%	Income (U.S. dollars)	Total	%	Educational Attainment*	Total (165,688)	%	Sex	Total	%
15-24	27,954	14.4	Less than 10,000	54,111	27.9	Less than High School Diploma	25,985	15.7	Male	94,948	49.03
25-34	36,103	18.6	10,000-24,999	60,299	31.1	High School	54,966	33.2	Female	98,694	50.97
35-44	42,509	22.0	25,000-34,999	27,222	14.1	Some college, no degree	29,108	17.6			
45-54	33,736	17.4	35,000-49,999	24,383	12.6	College (Associate & Bachelor's)	41,529	25.1			
55-64	21,646	11.2	50,000-74,999	16,857	8.7	Graduate	14,102	8.5			
65-74	17,447	9.0	75,000 and over	10,770	5.6						
75 and over	14,247	7.4									

\*U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-206, MONEY INCOME IN THE UNITED STATES, 1998 Table 8, at 30-33, (1999). All data are based on the total number of people with income. The total number of people in thousands is 193,642. The numbers in this table are identical to those presented by the United States Census Bureau. However, the Census Bureau's numbers within each separate demographic category do not always equal precisely the population total the Census Bureau reports, i.e., 193,642. Presumably, this discrepancy is due to the Census Bureau's rounding procedure. For this reason, the percentages in this table do not always total precisely to 100%. This table does not present information on political affiliation for 1998 because the United States Census Bureau has not yet reported it.

\*Education statistics are based on the total number of people in the population who are 25 years of age or older with income. The label, "Graduate," includes the total number of individuals with Master's, Professional, and Doctorate degrees. *Id.*

TABLE 8.  
UNITED STATES CENSUS BUREAU DEMOGRAPHIC INFORMATION FOR 1998\*

Age	Male (%)	Female (%)	Total (%)	Income	Male (%)	Female (%)	Total (%)	Educational Attainment*	Male (%)	Female (%)	Total (%)
15-24	14,079 (7.3)	13,875 (7.2)	27,954 (14.4)	\$1- \$4,999	8,360 (4.3)	18,146 (9.4)	26,506 (13.7)	Less than 9 <sup>th</sup> grade	5,641 (3.4)	5,419 (3.3)	11,060 (6.7)
25-34	18,330 (9.5)	17,773 (9.2)	36,103 (18.6)	\$5,000- \$9,999	9,142 (4.7)	18,463 (9.5)	27,605 (14.3)	9 <sup>th</sup> to 12 <sup>th</sup> grade, (no diploma)	7,366 (4.4)	7,559 (4.6)	14,925 (9)
35-44	21,539 (11.1)	20,970 (10.8)	42,509 (22)	\$10,000- \$14,999	9,548 (4.9)	14,113 (7.3)	23,661 (12.2)	High school graduate	25,636 (15.5)	29,330 (17.7)	54,966 (33.2)
45-54	16,821 (8.69)	16,915 (8.73)	33,736 (17.4)	\$15,000- \$24,999	17,620 (9.1)	19,018 (9.8)	36,638 (18.9)	Some college, no degree	13,935 (8.4)	15,173 (9.2)	29,108 (17.6)
55-64	10,678 (5.5)	10,968 (5.7)	21,646 (11.2)	\$25,000- \$34,999	14,718 (7.6)	12,504 (6.5)	27,222 (14.1)	Associate degree	5,766 (3.5)	6,931 (4.2)	12,697 (7.7)
65-74	7,902 (4.1)	9,545 (4.9)	17,447 (9)	\$35,000- \$49,999	15,234 (7.9)	9,149 (4.7)	24,383 (12.6)	Bachelor's degree	14,614 (8.8)	14,218 (8.6)	28,832 (17.4)
Over 75	5,599 (2.9)	8,648 (4.5)	14,247 (7.4)	\$50,000- \$74,999	11,763 (6.1)	5,094 (2.6)	16,857 (8.7)	Graduate degree	7,910 (4.8)	6,192 (3.7)	14,102 (8.5)
Sex Total	94,948 (49.03)	98,694 (50.97)	193,642 (100)	\$75,000 and over	8,562 (4.4)	2,208 (1.1)	10,770 (5.6)	Totals Education	80,869 (48.8)	84,819 (51.2)	165,688 (100)

\*U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-206, MONEY INCOME IN THE UNITED STATES: 1998 Table 8, at 30-33, (1999). All data are based on the total number of people with income. The total number of people in thousands is 193,642. The numbers in this table are identical to those presented by the United States Census Bureau. However, the Census Bureau's numbers within each separate demographic category do not always equal precisely the population total the Census Bureau reports, i.e., 193,642. Presumably, this discrepancy is due to the Census Bureau's rounding procedure. For this reason, the percentages in this table do not always total precisely to 100%. This table does not present information on political affiliation for 1998 because the United States Census Bureau has not yet reported it.

\*Education statistics are based on the total number of people in the population who are 25 years of age or older with income. The label, "Graduate," includes the total number of individuals with Master's, Professional, and Doctorate degrees. *Id.*

TABLE 9.

## UNITED STATES CENSUS BUREAU DEMOGRAPHIC INFORMATION FOR 1998: RACE AND HISPANIC ORIGIN\*

<i>Race</i>	<i>Male</i>	<i>%</i>	<i>Female</i>	<i>%</i>	<i>Total</i>	<i>%</i>
White	80,896	41.8	82,063	42.4	162,959	84.2
Black	9,776	5.0	12,272	6.3	22,048	11.3
Hispanic Origin*	9,617	4.9	8,405	4.3	18,022	9.3

\*U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-206, MONEY INCOME IN THE UNITED STATES: 1998 Table 8, at 30-33, (1999). All data are based on the total number of people with income. The total number of people in thousands is 193,642. The numbers in this table are identical to those presented by the United States Census Bureau. However, the Census Bureau's numbers within each separate demographic category do not always equal precisely the population total the Census Bureau reports, i.e., 193,642. Presumably, this discrepancy is due to the Census Bureau's rounding procedure. For this reason, the percentages in this table do not always total precisely to 100%.

\*Persons of Hispanic origin may be of any race. *Id.*

TABLE 10.  
DEMOGRAPHIC INFORMATION FOR NEW JERSEY  
TOTAL POPULATION, 1990-1991\*

1990-1991 (Two-year Moving Average)*				
Sex	Total	%	Age	Total
Male	3,752	48.8	Under 18	1,822
Female	3,937	51.2	18-64	4,883
Total	7,689	100	65 and over	984
				12.8

\*New Jersey Department of Labor, Division of Labor Market & Demographic Research, *Annual Demographic Profile for New Jersey, Table S1, Characteristics of Persons in New Jersey: 1990-1999* (Nov. 1999) <<http://www.wnjin.state.nj.us/OneStopCareerCenter/LaborMarketInformation/im19/Tables1.html>>.

\*Person totals are in thousands. The numbers in this table represent a two-year average ("Two-year Moving Average"). For this reason, the totals in each demographic category do not equal the numbers provided for the total population.

**TABLE 11.**  
**DEMOGRAPHIC INFORMATION FOR NEW JERSEY:**  
**EDUCATIONAL ATTAINMENT AND PERSONAL INCOME FOR PERSONS 25 YEARS AND OVER**  
**1990-1991\***

Sex	Total	%	Educational Attainment	Total	%	Income	Total	%
Male	2,383,900	47.4	Less than High School	914,700	18.2	Less than 10,000	1,469,081	29.2
Female	2,647,200	52.6	High School Diploma	1,948,400	38.7	10,000-24,999	1,534,486	30.5
Total	5,031,100	100	Some college/ Associate Degree	801,00	15.9	25,000-49,999	1,448,957	28.8
			Bachelor's Degree	809,300	16.1	50,000-74,999	372,301	7.4
			Postgraduate or Professional Degree	557,700	11.1	75,000 and over	206,275	4.1

\*New Jersey Department of Labor, Division of Labor Market & Demographic Research, *Annual Demographic Profile for New Jersey, Table A5. Educational Attainment for Persons 25 Years Old and Over by Race and Sex: New Jersey, 1990-1999* (Nov. 1999) <<http://www.wnjin.state.nj.us/OneStopCareerCenter/LaborMarketInformation/Imi19/TableA5.htm>>; New Jersey Department of Labor, Division of Labor Market & Demographic Research, *Annual Demographic Profile for New Jersey, Table A6. Personal Income by Educational Attainment for Persons 25 Years Old and Over: New Jersey, 1990-1999* (Nov. 1999) <<http://www.wnjin.state.nj.us/OneStopCareerCenter/LaborMarketInformation/Imi19/TableA6.htm>>. The numbers in this table represent a two-year average ("Two-year Moving Average"). For this reason, the totals in each demographic category do not equal the numbers provided for the total population.



TABLE 12.

## DEMOGRAPHIC INFORMATION FOR NEW JERSEY, 1990-91: RACE AND HISPANIC ORIGIN\*

Total Population (7,689)	White	Black	Other Races	Hispanic Origin <sup>†</sup>	Non-Hispanic
Numbers	6,290	1,084	315	623	7,066
Percent	81.8%	14.1%	4.1%	8.1%	91.9%
Persons 25 Years and Over with Educational Attainment (5,031,100)					
	White	Black	Other Races	Hispanic Origin <sup>†</sup>	Non-Hispanic
Numbers	4,260,100	599,900	171,100	359,800	4,666,000
Percent	84.7%	11.9%	3.4%	7.2%	92.7%

\*New Jersey Department of Labor, Division of Labor Market & Demographic Research, *Annual Demographic Profile for New Jersey, Table SI. Characteristics of Persons in New Jersey: 1990-1999* (Nov. 1999) <<http://www.wnjin.state.nj.us/OneStopCareerCenter/LaborMarketInformation/lmi19/TableS1.html>>; New Jersey Department of Labor, Division of Labor Market & Demographic Research, *Annual Demographic Profile for New Jersey, Table A5. Educational Attainment for Persons 25 Years Old and Over by Race and Sex: New Jersey, 1990-1999* (Nov. 1999) <<http://www.wnjin.state.nj.us/OneStopCareerCenter/LaborMarketInformation/lmi19/TableA5.htm>>. Total population numbers are in thousands, while educational attainment numbers are whole numbers.

<sup>†</sup>Persons of Hispanic origin may be of any race. *Id.*

**TABLE 13.**  
**DEMOGRAPHIC INFORMATION FOR NEW JERSEY:**  
**TOTAL POPULATION, 1998-1999\***

1998-1999 (Two-year Moving Average)*				
Sex	Total	%	Age	Total
Male	3,817	47.5	Under 18	2,009
Female	4,218	52.5	18-64	5,134
Total	8,035	100	65 and over	900
				11.2

\*New Jersey Department of Labor, Division of Labor Market & Demographic Research, *Annual Demographic Profile for New Jersey, Table S1. Characteristics of Persons in New Jersey: 1990-1999* (Nov. 1999) <<http://www.wnjin.state.nj.us/OneStopCareerCenter/LaborMarketInformation/lmi19/Tables1.html>>.

\*Person totals are in thousands. The numbers in this table represent a two-year average ("Two-year Moving Average"). For this reason, the totals in each demographic category do not equal the numbers provided for the total population.

TABLE 14.  
 DEMOGRAPHIC INFORMATION FOR NEW JERSEY:  
 EDUCATIONAL ATTAINMENT AND PERSONAL INCOME FOR PERSONS 25 YEARS AND OVER  
 1998-1999\*

Sex	Total	%	Educational Attainment	Total	%	Income	Total	%
Male	2,455,000	46.8	Less than High School	683,400	13.0	Less than 10,000	1,296,601	24.7
Female	2,794,300	53.2	High School Diploma	1,855,800	35.4	10,000-24,999	1,349,096	25.7
Total	5,249,400	100	Some college/ Associate Degree	1,118,100	21.3	25,000-49,999	1,459,333	27.8
			Bachelor's Degree	1,121,500	21.4	50,000-74,999	661,424	12.6
			Postgraduate or Professional Degree	470,600	9.0	75,000 and over	488,194	9.3

\*New Jersey Department of Labor, Division of Labor Market & Demographic Research, *Annual Demographic Profile for New Jersey, Table A5, Educational Attainment for Persons 25 Years Old and Over by Race and Sex: New Jersey, 1990-1999* (Nov. 1999) <<http://www.wjpin.state.nj.us/OneStopCareerCenter/LaborMarketInformation/lni19/TableA5.htm>>; New Jersey Department of Labor, Division of Labor Market & Demographic Research, *Annual Demographic Profile for New Jersey, Table A6, Personal Income by Educational Attainment for Persons 25 Years Old and Over: New Jersey, 1990-1999* (Nov. 1999) <<http://www.wjpin.state.nj.us/OneStopCareerCenter/LaborMarketInformation/lni19/TableA6.htm>>. The numbers in this table represent a two-year average ("Two-year Moving Average"). For this reason, the totals in each demographic category do not equal the numbers provided for the total population.

**TABLE 15.**  
**DEMOGRAPHIC INFORMATION FOR NEW JERSEY, 1998-99: RACE AND HISPANIC ORIGIN\***

<i>Total Population (8,035)</i>	<i>White</i>	<i>Black</i>	<i>Other Races</i>	<i>Hispanic Origin*</i>	<i>Non-Hispanic</i>
<i>Numbers</i>	6,380	1,270	394	980	7,055
<i>Percent</i>	79.4%	15.8%	4.9%	12.2%	87.8%
<i>Persons 25 Years and Over with Educational Attainment (5,249,400)</i>	<i>White</i>	<i>Black</i>	<i>Other Races</i>	<i>Hispanic Origin*</i>	<i>Non-Hispanic</i>
<i>Numbers</i>	4,286,500	723,900	239,100	583,600	4,626,000
<i>Percent</i>	81.7%	13.8%	4.6%	11.1%	88.1%

\*New Jersey Department of Labor, Division of Labor Market & Demographic Research, *Annual Demographic Profile for New Jersey, Table S1. Characteristics of Persons in New Jersey: 1990-1999* (Nov. 1999) <<http://www.wnjin.state.nj.us/OneStopCareerCenter/LaborMarketInformation/Im119/Im119TableS1.html>>; New Jersey Department of Labor, Division of Labor Market & Demographic Research, *Annual Demographic Profile for New Jersey, Table A5. Educational Attainment for Persons 25 Years Old and Over by Race and Sex: New Jersey, 1990-1999* (Nov. 1999) <<http://www.wnjin.state.nj.us/OneStopCareerCenter/LaborMarketInformation/Im119/Im119TableA5.htm>>. Total population numbers are in thousands, while educational attainment numbers are whole numbers.

\*Persons of Hispanic origin may be of any race. *Id.*

TABLE 16.  
POLITICAL AFFILIATION: PRESIDENTIAL ELECTION RESULTS FOR 1992 & 1996  
UNITED STATES & NEW JERSEY\*

1992	Total Votes	Republican	Democratic	Perot	Other
United States	104,425,014	39,103,882	44,909,326	19,741,657	670,149
		37.4%	43.0%	18.9%	.64%
New Jersey	3,343,594	1,356,865	1,436,206	521,892	28,694
		40.6%	43.0%	15.6%	.86%
1996	Total Votes	Republican	Democratic	Reform	Other
United States	96,277,872	39,198,755	47,402,357	8,085,402	1,591,358
		40.7%	49.2%	8.4%	1.7%
New Jersey	3,075,807	1,103,078	1,652,329	262,134	58,266
		35.9%	53.7%	8.5%	1.9%

\* AMERICA VOTES 20: A HANDBOOK OF CONTEMPORARY AMERICAN ELECTION STATISTICS 1992, 7 (1993); AMERICA VOTES 22: A HANDBOOK OF CONTEMPORARY AMERICAN ELECTION STATISTICS 1996, 9 (1998).

**TABLE 17.**  
**POLITICAL AFFILIATION: HOUSE OF REPRESENTATIVES ELECTION RESULTS FOR 1990-1998**  
**UNITED STATES & NEW JERSEY\***

1990	Total Votes	Republican	%	Democratic	%	Other	%
United States	61,513	27,648	44.9%	32,565	52.9%	1,300	2.1%
New Jersey	1,827	911	49.9%	837	45.8%	79	4.3%
1992	Total Votes	Republican	%	Democratic	%	Other	%
United States	96,239	43,833	45.5	48,964	50.9	3,442	3.6
New Jersey	2,992	1,503	50.2	1,355	45.3	134	4.5%
1994	Total Votes	Republican	%	Democratic	%	Other	%
United States	70,781	37,009	52.3	32,227	45.5	1,545	2.2
New Jersey	2,005	1,091	54.4	880	43.9	34	1.7
1996	Total Votes	Republican	%	Democratic	%	Other	%
United States	89,863	43,902	48.9	43,626	48.5	2,334	2.6%
New Jersey	2,823	1,399	49.6	1,352	47.9	72	2.5%
1998	Total Votes	Republican	%	Democratic	%	Other	%
United States	65,897	32,255	48.9	31,482	47.8	2,160	3.3
New Jersey	1,815	858	47.3	902	49.7	55	3.0

\* STATISTICAL ABSTRACT OF THE UNITED STATES 1996, 273 (covering 1990 & 1992; the numbers in the 'Other' column for these years are derived by subtracting the votes cast for both Republicans and Democrats from the total of number of votes); AMERICA VOTES 21: A HANDBOOK OF CONTEMPORARY AMERICAN ELECTION STATISTICS 1994, 4 (1995); AMERICA VOTES 22: A HANDBOOK OF CONTEMPORARY AMERICAN ELECTION STATISTICS 1996, 4 (1998); AMERICA VOTES 23: A HANDBOOK OF CONTEMPORARY AMERICAN ELECTION STATISTICS 1998, 4 (1999). All numbers are in thousands. The 1994 numbers are derived from AMERICA VOTES 21 and are slightly different than the numbers reported in the STATISTICAL ABSTRACT; the numbers for all other years are consistent among the sources listed in this note.

TABLE 18.

## POLITICAL AFFILIATION: REGISTERED VOTERS FOR NEW JERSEY, 1998-99\*

Year	Democratic		Republican		Unaffiliated		Independents		Total	
1998	1,141,593	25.0%	872,349	19.0%	2,513,962	55.0%	11,040	.24%	4,538,944	100%
1999	1,110,259	24.9%	843,534	19.0%	2,486,141	55.9%	11,402	.2%	4,451,366	100%

\*State of New Jersey Department of Law & Public Safety: Division of Elections, **\*\*Unofficial\*\*** Registered Voters By Party Affiliation General Election November 3, 1998 (issued Oct. 27, 1998) <<http://www.state.nj.us/ps/elections/elec98/regis.htm>>; and, State of New Jersey Department of Law & Public Safety: Division of Elections, **\*\*Unofficial\*\*** Registered Voters By Party Affiliation General Election November 2, 1999 (issued Nov. 1, 1999) <[http://www.state.nj.us/ps/elections/elec1999/gen\\_reg\\_cty\\_1999.html](http://www.state.nj.us/ps/elections/elec1999/gen_reg_cty_1999.html)>.

TABLE 19.  
INCOME LEVEL COMPARISONS AMONG THE *JUSTICE* SAMPLE, THE UNITED STATES POPULATION,  
AND THE NEW JERSEY POPULATION

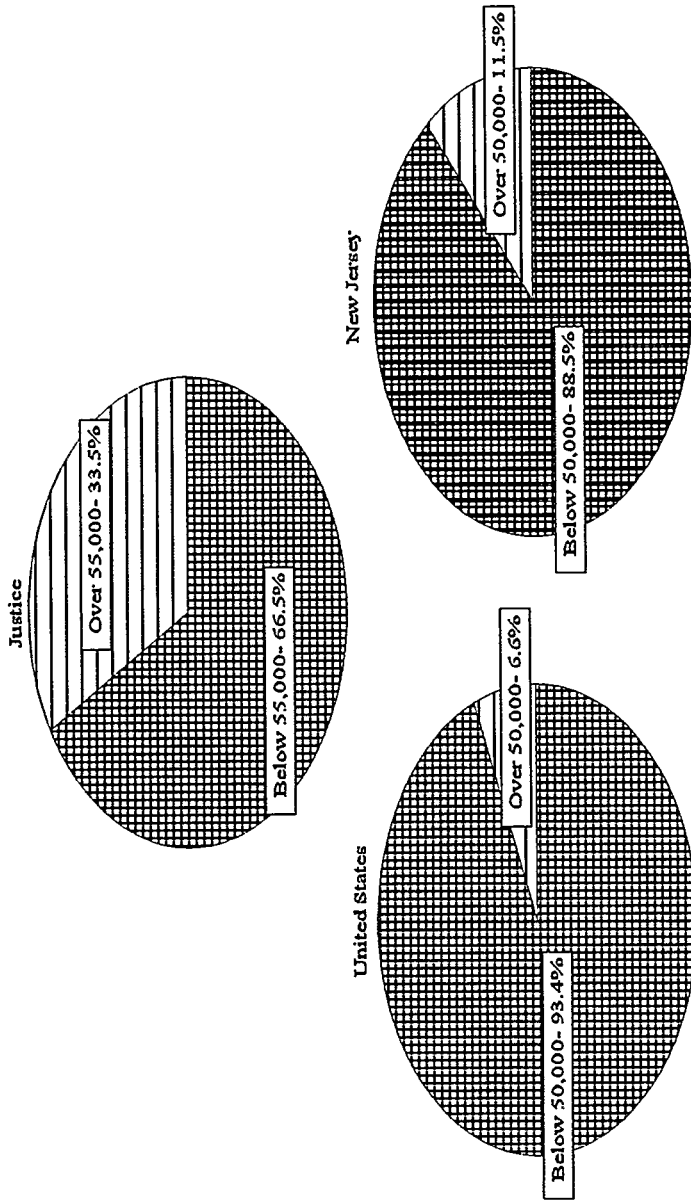




TABLE 20.

EDUCATIONAL LEVEL COMPARISONS AMONG THE JUSTICE SAMPLE, THE UNITED STATES POPULATION, AND THE NEW JERSEY POPULATION

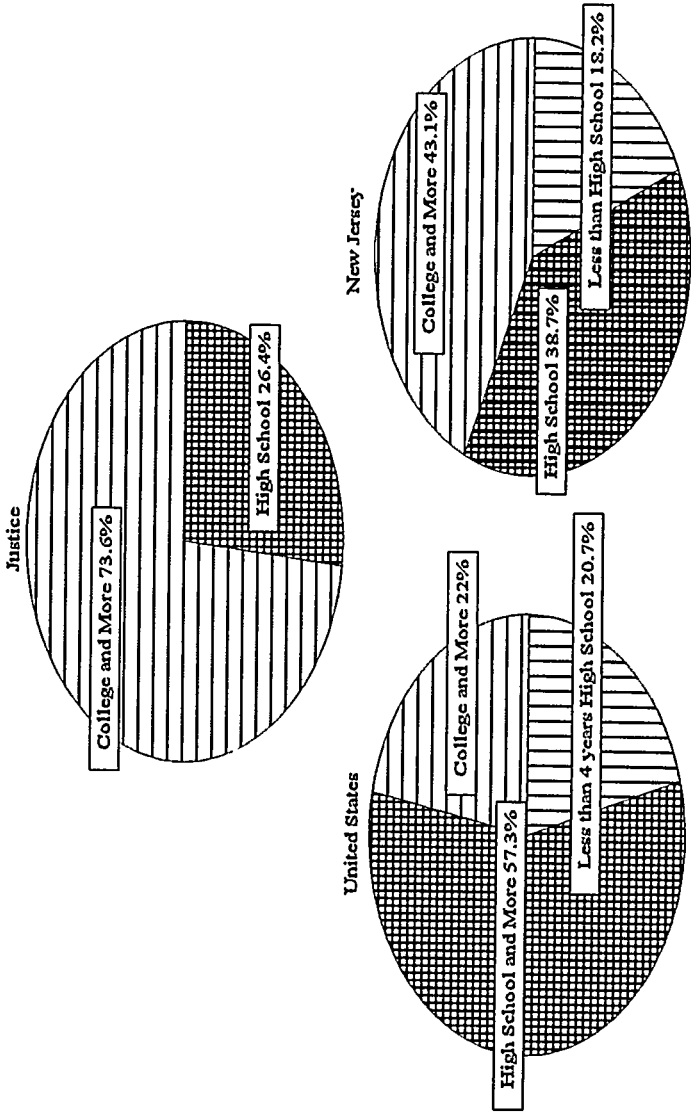


TABLE 21.

## EXAMPLES OF PUBLIC MISPERCEPTIONS OF CRIME-RELATED STATISTICS\*

<i>Public Misperception</i>	<i>Reality</i>
Crime rates constantly increasing	Crime rates decline or stable over period 1990-1995
Violent crime rate increasing faster than any other kind of crime	Violent crime rate increasing no faster than property crime
Murder rate increasing	Murder rate stable or declining in Canada, Australia and US
The murder rate increased in Canada after abolition of death penalty	Murder rate has declined since abolition of death penalty
Violent crime accounts for approximately half all crime recorded by the police	Violent crime accounts for approximately 10 percent of crimes recorded by police; smaller percent of all crimes committed
Crime committed by a small, easily identifiable part of population	Crime committed by a wide range of offender
Most offenders re-offend, and commit same kind of crime over and over again	Most offenders not re-convicted. Little specialization in terms of criminal careers
Most offenders on parole re-offend	Most parolees do not re-offend
Burglary rates increasing faster than other crimes	Burglary rates stable or declining

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\*JULIAN V. ROBERTS & LORETTA J. STALANS, *supra* note 15, at 33.

TABLE 22.

## CATEGORIES OF MYTHS ABOUT RAPE AND EXAMPLES OF ATTITUDINAL STATEMENTS\*

Category	Items
Cannot Happen/ Victim is Responsible for Prevention	<ul style="list-style-type: none"> <li>• It is impossible for a woman to rape a man.</li> <li>• Even a big strong man can be raped by another man.</li> <li>• A woman can be raped against her will.</li> <li>• 'Nice' women do not get raped.</li> <li>• A raped woman is a responsible victim not an innocent one.</li> </ul>
Blaming the Victim	<ul style="list-style-type: none"> <li>• Most men who are raped by a woman are somewhat to blame for not being more careful.</li> <li>• In forcible rape, the victim never caused the rape.</li> <li>• Women provoke rape by their appearance.</li> </ul>
Women Fantasize about Rape	<ul style="list-style-type: none"> <li>• Many women really want to be raped.</li> <li>• Most women secretly desire to be raped.</li> </ul>
Rape is About Power	<ul style="list-style-type: none"> <li>• All rape is a male exercise in power over women.</li> <li>• Women are trained by society to be rape victims.</li> </ul>
Rape is About Sex	<ul style="list-style-type: none"> <li>• Most rapes occur because the rapist desires sex.</li> <li>• Most rapists are oversexed.</li> <li>• Rape is a sex crime.</li> </ul>
Delay in Reporting	<ul style="list-style-type: none"> <li>• A charge of rape two days after the act has occurred is probably not rape.</li> <li>• Victims who wait several days to report the crime probably are seeking revenge or attention.</li> </ul>
Resistance is a Woman's Role	<ul style="list-style-type: none"> <li>• During a rape, a woman should do everything in her power to resist.</li> </ul>
Trauma of Being Raped	<ul style="list-style-type: none"> <li>• Victims are not upset about being raped.</li> </ul>
Normality of Rapists	<ul style="list-style-type: none"> <li>• All rapists are mentally sick.</li> <li>• Rapists are 'normal' men.</li> </ul>

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\*JULIAN V. ROBERTS & LORETTA J. STALANS, *supra* note 15, at 118 (1997).

TABLE 23.

## PUBLIC PERCEPTIONS OF FAIRNESS AND ETHICAL STANDARDS OF POLICE OFFICERS\*

Dimension	Caucasian-American	Hispanic-American	African-American
Honesty and ethical standards (1991) <sup>a</sup>	45%	30%	30%
1992 Gallup poll	43%	NA	29%
1993 Gallup poll	53%	NA	28%
Harris Poll (1992) <sup>b</sup>			
Great deal of respect	68%	51%	51%
Treating people fairly <sup>c</sup>	68%	54%	38%
Helpful and friendly <sup>c</sup>	78%	71%	58%
Solving crimes <sup>d</sup>	61%	57%	43%
Responding quickly to calls for assistance <sup>d</sup>	73%	60%	50%
Preventing crimes <sup>d</sup>	59%	56%	55%

\*Data are based on the 1991, 1992, and 1993 Gallup Polls nationwide surveys of United States residents. The percentages are those who indicated either "very high" or "high." Data were compiled from the 1990, 1992, and 1993 Sourcebooks of criminal justice statistics.

<sup>b</sup>For all dimensions below [note b in table 23], data were obtained from tables in the 1992 Sourcebook of criminal justice statistics and are based on the 1992 Harris Poll nationwide survey of United States residents.

<sup>c</sup>The percentages are those who indicated either "excellent" or "very good."

<sup>d</sup>The percentages are those who indicated either "excellent" or "pretty good."

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\*JULIAN V. ROBERTS & LORETTA J. STALANS, *supra* note 15, at 132 (1997).

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