# ARIZONA CRIMINAL CODE REVISION: TWENTY YEARS LATER

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> The ordinary administration of criminal... justice...contributes, more than any other circumstance, to impressing upon the minds of the people affection, esteem, and reverence towards the government.[1]

In 1978, Arizona adopted a major new criminal code ("Code"),[2] the product of six years of research and public meetings by the Arizona Criminal Code Commission ("Commission"). The passage of twenty years makes it timely to now review that code in the light of the purposes that motivated its revision.

Any review of a criminal code raises serious questions about the scope of criminalization as well as about legislative responsibility for enlightened crime policy. Oliver Wendell Holmes once opined that about half of the criminal law might well do more harm than good[3]—a sobering caution with which to look at the Arizona Code.

In 1972, the Arizona Legislature received a substantial grant from the Law Enforcement Assistance Administration to redo its substantive criminal laws, many of which dated to territorial days. The purposes for this expansive effort—apart from the political aspirations of some legislators—were to (1) modernize statutes; (2) reduce redundant coverage; (3) standardize penalties for similar

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1. THE FEDERALIST NO. 17 (Alexander Hamilton).

2. 1977 Ariz. Sess. Laws ch. 142, § 1–178 (effective Oct. 1, 1978); 1978 Ariz. Sess. Laws ch. 200, § 3 (effective Oct. 1, 1978).

3. OLIVER WENDELL HOLMES, *Learning and Science, in* COLLECTED LEGAL PAPERS 138, 139 (1920).

crimes; (4) reduce special interest protections; and (5) adopt as statutory definitions the best conceptual thinking available.[4]

The last of these purposes, and others to a lesser extent, reflected the Commission's judgment that the Model Penal Code, which had published its polished draft in 1962,[5] would be the Code's primary reference if not prototype. Though the Commission's sentencing proposals differed markedly from those of the Model Penal Code, the Commission's proposed definitions for the majority of substantive crimes closely followed the Model Penal Code.

However, in 1976, when draft proposals were in the final stages of legislative review, leaders in the Legislature thought the likelihood of passage would improve by grafting existing statutory language onto the Commission's recommendations.[6] The final form of the Code was, thus, a hybrid: many statutes reflected both Model Penal Code recommendations and inconsistent language transposed from the old territorial code. Were our laws reformed or deformed?

As this article demonstrates, it is questionable whether the Code has achieved the original purposes for its revision.

## I. UNCONSTITUTIONALITY

Some Arizona Legislatures have enacted statutes that were known to be unconstitutional at the time of adoption. For example, abortion is prohibited in three statutes[7] enacted subsequent to *Roe v. Wade*.[8] These statutes prohibit abortion, its solicitation or inducement, and the use of contraceptives.[9] These statutes were unconstitutional when the Legislature reenacted them in 1978. In 1993, the Legislature amended another statute, section 13–3407, yet retained language explicitly held unconstitutional three years prior.[10]

## II. THE BEGGING-THE-QUESTION FALLACY

Obviously the most elementary purpose of any criminal code is to define behavior so that the public knows what is prohibited. At its simplest, defining a crime involves stating elements that constitute illegal conduct. In a number of important statutes, Arizona's Code falls short of this elementary need. These

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4. *See* ARIZONA CRIMINAL CODE COMM'N, ARIZONA REVISED CRIMINAL CODE v–vi (1975) (commenting, in general, on the purposes of the criminal code revisions).

5. MODEL PENAL CODE (Proposed Official Draft 1962).

6. *Compare* 1977 Ariz. Sess. Laws ch. 142, § 1–178, *with* ARIZ. REV. CRIM. CODE (1975).

7. ARIZ. REV. STAT. ANN. §§ 13–3603 to 13–3605 (West 1989).

8. 410 U.S. 113 (1973).

9. ARIZ. REV. STAT. ANN. §§ 13–3603 to 13–3605.

10. ARIZ. REV. STAT. ANN. § 13–3407(B)(1) (West Supp. 1997) (allowing courts to designate a lesser punishment only "on the state's motion" held unconstitutional in *State v. Dykes*, 163 Ariz. 581, 585, 789 P.2d 1082, 1086 (App. 1990)).

deficiencies fall into three varieties of the logical fallacy of "begging the question"—one of the most illogical of Aristotle's dozen or so instances of faulty reasoning.

Some statutes, notably harassment in Arizona Revised Statutes ("A.R.S.") section 13–2921, define the central term circularly, viz., "harassment" occurs "with intent to harass" coupled with "an act or acts that harass another person."[11] The crucial term requiring definition, "harassment," is conduct which causes another person "to be seriously alarmed, annoyed or harassed."[12] Defining the key term by itself hardly advances its comprehension.

A second instance of question-begging occurs in statutes that define crimes as acting "without lawful authority" or "unlawfully."[13] The latter terms—the concepts needing explication—beg the question in the grossest sense for it is the illegality itself that requires definition or description in terms other than itself. Defining a crime such as arson as acting "unlawfully" is like defining "prohibited" as "forbidden": it does not convey what constitutes the illegality.

A third variety of begging the question appears in bribery-related statutes that criminalize influencing others "with corrupt intent."[14] Like defining crime as "unlawful," the phrase "with corrupt intent" presupposes some unstated idea of "corrupt" that invites arbitrary and subjective description. A person who offers money to a public official may justify such conduct as countering opposing offers made by competitors. "Corrupt" hardly reveals to the actor or to the courts

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11. ARIZ. REV. STAT. ANN. § 13–2921(A) (West Supp. 1997). A.R.S. section 13–2921(A) reads:

> A person commits harassment if, with intent to harass or with knowledge that the person is harassing another person, the person:
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> 1. Anonymously or otherwise communicates or causes a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses.
>
> 2. Continues to follow another person in or about a public place for no legitimate purpose after being asked to desist.
>
> 3. Repeatedly commits an act or acts that harass another person.

12. *Id.* § 2921(E) (West 1997). A.R.S. section 13–2921(E) reads:

> For the purposes of this section, "harassment" means conduct directed at a specific person which would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person.

13. *See, e.g., id.* § 13–1704(A) (West 1989) ("A person commits arson of an occupied structure by knowingly and unlawfully damaging an occupied structure by knowingly causing a fire or explosion."); *see also id.* § 13–1501 (West Supp. 1997) (defining "enter or remain unlawfully"); *id.* § 13–1603(A) (West Supp. 1997) ("without lawful authority"); *id.* § 13–1703(A) (West 1989) ("unlawfully"); *id.* § 13–3008 (West 1989) ("unlawfully").

14. *See id.* § 13–2602(A) (West 1989) ("A person commits bribery of a public servant or party officer if with corrupt intent..."); *id.* § 2603(A) (West 1989) ("A person commits trading in public office if with corrupt intent...").

whether such a claim should exculpate him. Similarly, when a benefit to a public official is intended to influence a decision bound to occur in any event, the actor may contend that the benefit served the public interest and therefore should not be regarded as corrupt. The Model Penal Code explains the problem with "corrupt":

> Description of the law of bribery in this manner also obscures the policy that should apply to cases where the alleged bribe is a response to threats by a public official that adverse action will be taken unless payments are made. It is not at all clear whether accession to extortionate demands by public officials implies corruption on the part of the payor. There is in addition a whole range of political activity that may or may not be regarded as "corrupt." The offer of political support or allegiance, or perhaps a campaign contribution, in exchange for a promise of appointment or promotion in the public service is one situation that could arise.[15]

Bargains for legislative votes and promises to support a bill in return for political gain are ambiguous to the point where "corrupt" offers no help in deciding illegality. Defining bribery as "corrupt intent" delegates to the courts the primary responsibility for determining, subjectively and ad hoc, the essence of illegality.

The Model Penal Code's avoidance of paralogisms such as "illegal" and "corrupt" has been followed in the great majority of recently enacted codes. Despite Model Penal Code criticism,[16] Arizona, along with four other states,[17] employs the question-begging "corrupt" language rather than the Model Penal Code recommendation.

## III. INCONSISTENCY ON DEADLY FORCE

Like the Model Penal Code, Arizona's Code continues the common law prohibition on use of deadly force to protect property.[18] As stated by the Model Penal Code, "preservation of life has such moral and ethical standing in our culture and society that the deliberate sacrifice of life merely for the protection of

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15. MODEL PENAL CODE § 240.1, cmt. 1, at 8 (1980).

16. *Id.* § 240.1, cmt. 1, at 9.

17. ALA. CODE § 13A–10–61(a) (1994); FLA. STAT. ANN. § 838.015(1) (West Supp. 1998); OHIO REV. CODE ANN. § 2921.02 (Anderson 1996); OKLA. STAT. ANN. tit. 21, § 381 (West Supp. 1998).

18. ARIZ. REV. STAT. ANN. § 13–408 (West 1989). A.R.S. section 13–408 reads:

> A person is justified in using physical force against another when and to the extent that a reasonable person would believe it necessary to prevent what a reasonable person would believe is an attempt or commission by the other person of theft or criminal damage involving tangible movable property under his possession or control, but such person may use deadly physical force under these circumstances as provided in §§ 13–405, 13–406, and 13–411.

property ought not to be sanctioned by law."[19] Accordingly, deadly force may not be used to defend property against caption or trespass. An actor may use such force only when immediately necessary to prevent life-threatening crimes.[20] The Model Penal Code states as the standard "peril to life or serious injury," rather than "the abstract concept of prevention of a felony."[21]

Arizona's statutory policy violates these principles regarding the use of deadly force in several respects. Under A.R.S. section 13–408, a property owner confronted with a trespasser or thief may only use physical force short of death to protect property[22]—a policy accurately reflecting both the common law and the Model Penal Code. However, in a burst of enthusiasm for civilian police powers, the Legislature has listed in another statute, A.R.S. section 13–411, a broad variety of crimes that any undeputized civilian may prevent by deadly force, i.e., by killing the perpetrator.[23] These crimes include property crimes—first and second degree burglary[24]—as well as noninherently dangerous crimes such as child molestation and sexual conduct, including consensual sexual conduct, with a minor.[25] Use of deadly physical force for prevention of property crimes and nondeadly sexual crimes violates the principle underlying A.R.S. section 13–408. Allowing deadly force to prevent crimes such as child molestation and sexual conduct with a minor empowers any self-styled crime fighter to kill anyone making prohibited sexual contact, even contact that is consensual.

## IV. LEGISLATIVE INTENT

The Arizona Legislature's penchant for issuing declarations of its intent as guides to judicial interpretation can cause problems. For example, two separate

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19. MODEL PENAL CODE § 3.06, cmt. 1, at 72 (1985).
20. *Id.*
21. *Id.* § 3.07, cmt. 6, at 133 (1985).
22. ARIZ. REV. STAT. ANN. § 13–408 (West 1989).
23. *Id.* § 13–411 (West 1989). A.R.S. section 13–411 reads:

> A person is justified in threatening or using both physical force and deadly physical force against another if and to the extent the person reasonably believes that physical force or deadly physical force is immediately necessary to prevent the other's commission of arson of an occupied structure under § 13–1704, burglary in the second or first degree under § 13–1507 or 13–1508, kidnapping under § 13–1304, manslaughter under § 13–1103, second or first degree murder under § 13–1104 or 13–1105, sexual conduct with a minor under § 13–1405, sexual assault under § 13–1406, child molestation under § 13–1410, armed robbery under § 13–1904, or aggravated assault under § 13–1204, subsection A, paragraphs 1 and 2.

The broad permission to kill to prevent sex and property crimes may be inconsistent with Supreme Court standards in *Tennessee v. Garner*, 471 U.S. 1 (1985).

24. ARIZ. REV. STAT. ANN. §§ 13–1507, 13–1508 (West 1989).
25. *Id.* §§ 13–1405, 13–1410 (West Supp. 1997).

such proclamations[26] have been issued regarding the purpose of the crime prevention statute, A.R.S. section 13–411. Both proclamations address protecting the "total sanctity of the home" from crime, particularly domestic violence. Crimes of domestic violence are adequately covered elsewhere in the Code.[27] More fundamentally, however, the prevention of domestic violence appears nowhere in the codified language of A.R.S. section 13–411, and the broad statutory list of predicate crimes justifying deadly force exceeds home protection motives. The statute's scope far exceeds the narrow purpose stated in the Legislature's two declarations, which raises the prospect that the statute is more accurately read without its hortatory legislative interpretations.

## V. REDUNDANCY

One of the primary reasons for the Code revision twenty years ago was to eliminate redundant statutes. Before the revision, redundancy caused two problems: (1) statutes addressing the same or similar conduct required prosecutors to prove individual facts rather than the generic elements of a crime, and (2) defendants falling under different prohibitions of the same conduct received arbitrary and differing charges and punishments.

The revised Code presents new problems of redundancy.[28] For example, the present core statutes on simple and aggravated assault[29] now compete with various specialized statutes separately defining and punishing fact-intensive kinds of assault. These specialized statutes include endangerment, a class 6 felony;[30] threatening and intimidating, a class 1 misdemeanor;[31] harassment, a class 1

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26. 1990 Ariz. Sess. Laws ch. 410, § 3; 1983 Ariz. Sess. Laws ch. 255, § 1.

27. Domestic violence falls under the generic assault provisions in A.R.S. sections 13–1203 and 13–1204.

28. In addition to those discussed in this Article's text, see also A.R.S. sections 13–1801 to 13–1812, sections 13–2101 to 13–2109, and section 13–2311.

29. ARIZ. REV. STAT. ANN. §§ 13–1203 (West 1989), 13–1204 (West Supp. 1997).

30. *Id.* § 13–1201 (West 1989). A.R.S. § 13–1201 reads:

> **A.** A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury.
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> **B.** Endangerment involving a substantial risk of imminent death is a class 6 felony. In all other cases, it is a class 1 misdemeanor.

31. *Id.* § 13–1202 (West Supp. 1997). A.R.S. section 13–1202 reads:

> **A.** A person commits threatening or intimidating if such person threatens or intimidates by word or conduct:
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> 1. To cause physical injury to another person or serious damage to the property of another; or
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> 2. To cause, or in reckless disregard to causing, serious public inconvenience including, but not limited to, evacuation of a building, place of assembly, or transportation facility; or

misdemeanor;[32] stalking, a class 4 or 5 felony;[33] drive-by shooting, a class 2 felony;[34] discharging a weapon at a structure, a class 2 felony,[35] terrorism, another class 2 felony;[36] and using a telephone to instill fear, a class 1 misdemeanor.[37] For

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3. To cause physical injury to another person or damage to the property of another in order to promote, further or assist in the interests of or to cause, induce or solicit another person to participate in a criminal street gang, a criminal syndicate or a racketeering enterprise.

**B.** Threatening or intimidating pursuant to subsection A, paragraph 1 or 2 is a class 1 misdemeanor. Threatening or intimidating pursuant to subsection A, paragraph 3 is a class 4 felony.

32. *Id.* § 13–2921 (West Supp. 1997). For the text of A.R.S. section 13–2921(A), see *supra* note 11.

33. *Id.* § 2923 (West Supp. 1997). A.R.S. section 13–2923 reads:

**A.** A person commits stalking if the person intentionally or knowingly engages in a course of conduct that is directed toward another person if that conduct either:

1. Would cause a reasonable person to fear for the person's safety or the safety of that person's immediate family and that person in fact fears for their safety or the safety of that person's immediate family.

2. Would cause a reasonable person to fear imminent physical injury or death to that person or that person's immediate family and that person in fact fears imminent physical injury or death to that person or that person's immediate family.

**B.** Stalking under subsection A, paragraph 1 of this section is a class 5 felony. Stalking under subsection A, paragraph 2 is a class 4 felony.

34. *Id.* § 13–1209 (West Supp. 1997). A.R.S. section 13–1209(A)–(D) reads:

**A.** A person commits drive by shooting by intentionally discharging a weapon from a motor vehicle at a person, another occupied motor vehicle or an occupied structure.

**B.** Motor vehicles that are used in violation of this section are subject to seizure for forfeiture in the manner provided for in chapter 39 of this title.

**C.** Notwithstanding title 28, chapter 8, the judge shall order the surrender to the judge of any driver license of the convicted person and, on surrender of the license, shall invalidate or destroy the license and forward the abstract of conviction to the department of transportation with an order of the court revoking the driving privilege of the person for a period of at least one year but not more than five years. On receipt of the abstract of conviction and order, the department of transportation shall revoke the driving privilege of the person for the period of time ordered by the judge.

**D.** Drive by shooting is a class 2 felony.

35. *Id.* § 13–1211 (West Supp. 1997). A.R.S. section 13–1211(A)–(B) reads:

**A.** A person who knowingly discharges a firearm at a residential structure is guilty of a class 2 felony.

**B.** A person who knowingly discharges a firearm at a non-residential structure is guilty of a class 3 felony.

36. *Id.* § 13–2308.01 (West Supp. 1997). A.R.S. section 13–2308.01 reads:

the most part, these specific assault crimes differ only in the means the actor uses to cause fear or injury. They do not differ except minimally regarding the actor's mental state or the victim's degree of fear or injury.

At common law, in the Model Penal Code and in Arizona's core assault statutes, the essence of assault is the causing of fear or injury. A more efficient and intelligible treatment of the actor's instrumentalities and the victim's fear and injuries would be to use them as sentencing considerations, not to make them the basis of new assault crimes. Instead, the Legislature has started down a mazelike alley of codifying specialized instances of assaultive manners, means and circumstances, a practice that impairs the efficiency, uniformity, and equality of result inherent in generic statutes.

## VI. PENALTY INCONSISTENCIES

Another problem presented in the revised Code is that many statutes require different penalties for identical conduct. One statute mandates a general rule of concurrent sentences; another appears to mandate consecutive sentences.[38] Arson of an ordinary residence, even if unoccupied, is a class 2 felony; arson of a prison filled with prisoners is two grades less severe, a class 4 felony, suggesting a legislative attitude about imprisoned human beings.[39] Escape requires a consecutive sentence in one statute but a nonconsecutive sentence in another

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A. It is unlawful for a person to do any of the following:

1. Intentionally engage in an act of terrorism; or

2. Intentionally organize, manage, direct, supervise or finance acts of terrorism; or

3. Intentionally incite or induce others to promote or further acts of terrorism; or

4. Intentionally furnish advice, assistance or direction in the conduct, financing or management of acts of terrorism.

B. Terrorism is a class 2 felony, except...

37. *Id.* § 13–2916 (West 1989). A.R.S. section 13–2916(A), (D) reads:

A. It shall be unlawful for any person, with intent to terrify, intimidate, threaten, harass, annoy or offend, to use a telephone and use any obscene, lewd or profane language or suggest any lewd or lascivious act, or threaten to inflict injury or physical harm to the person or property of any person. It shall also be unlawful to extort money or other thing of value from any person, or to otherwise disturb by repeated anonymous telephone calls the peace, quiet or right of privacy of any person at the place where the telephone call or calls were received.

....

D. Any person who violates the provisions of this section is guilty of a class 1 misdemeanor.

38. *Compare id.* § 13–116 (West 1989) (concurrent sentences), *with id.* § 13–708 (West 1989) (consecutive sentences).

39. *Compare id.* § 13–1704 (West 1989) (occupied structure), *with id.* §13–1705 (West 1989) (prison).

statute.[40] Failure to report a sex crime conviction to an employer that sponsors activities with children is a class 5 felony; failing to report a sex crime conviction to a sheriff is a class 6 felony.[41] Using explosives to terrify can be punished under four statutes, with four different penalties ranging from class 1 misdemeanor to class 2 felony.[42] Using obscene language on a telephone to harass or terrify falls under three statues.[43] Kidnapping is a class 2 felony, but kidnapping by putting the minor victim in a house of prostitution drops to a class 4 felony, thus giving kidnappers incentive to place their minor victims into prostitution.[44] Introducing a weapon or drugs into a prison is a class 2 felony in one statute but a class 5 felony in two other statutes.[45] Damaging or defacing caves appears in two statutes with differing penalties.[46] Giving cancer-causing cigarettes to a minor is an unenforced petty offense, whereas giving prohibited but less medically fatal drugs such as marijuana can be punished by life in prison.[47]

Consensual fornication among relatives is a class 4 felony in a surviving 1901 statute;[48] for nonrelatives fornication is not a crime, but only if their sexual activity is potentially procreative.[49] Damage to a cable television, a utility, is covered in two statutes with different penalties, both of which exceed the penalty

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40. *Compare id.* § 13–2503 (West Supp. 1997), *with id.* § 31–233(D) (West 1996).

41. *Compare id.* § 13–3716 (West Supp. 1997) (employer), *with id.* § 13–3824 (West Supp. 1997) (sheriff).

42. *Compare id.* § 13–1202 (West Supp. 1997) (class 1 misdemeanor), *with id.* § 13–1703 (West 1989) (sentence based on property damage), *with id.* § 13–3104 (West 1989) (class 4 felony), *with id.* § 13–2308.01 (West Supp. 1997) (class 2 felony).

43. *See id.* §§ 13–1202, 13–2916 (West 1989), 13–2921 (West Supp. 1997).

44. *Compare id.* § 13–1304(A) (West 1989), *with id.* § 13–3206 (West 1989) (taking child for purpose of prostitution a class 4 felony).

45. *Compare id.* § 13–2505 (West Supp. 1997) (class 2 felony), *with id.* § 13–3708 (West Supp. 1997) (class 5 felony), *and* § 31–129 (West 1996) (class 5 felony).

46. *Compare id.* § 13–1602 (West Supp. 1997) (sentence based on property damage), *with id.* § 13–3702 (West 1989) (class 2 misdemeanor).

47. Compare A.R.S. section 13–3622 (West 1989) with chapter 34 of the Arizona Revised Criminal Code, where penalties for marijuana may exceed murder penalties. The mortality rate for tobacco users is estimated to be more than a hundred times the mortality rate for cocaine users. Campaign for Effective Criminal Policy, Anti-Drug Policy for the 1990s, at 3 (Washington, D.C., 1992) (unpublished position paper); *see also* VICTOR E. KAPPELER ET AL., THE MYTHOLOGY OF CRIME AND CRIMINAL JUSTICE 154 (1993) (stating deaths caused by tobacco use are nearly a hundred times as great as deaths caused by all illegal drug use); Richard J. Dennis, *The Economics of Legalizing Drugs*, ATLANTIC MONTHLY, Nov. 1990, at 126, 127 (stating some researchers estimate that mortality rate from tobacco is a hundred times greater than that for cocaine).

48. ARIZ. REV. STAT. ANN. § 13–3608 (West 1989).

49. *Id.* § 13–1412 (West 1989) (appearing to criminalize nonprocreative sexual activity).

for the generic offense of damaging utilities.[50] Similarly, fraud or theft committed on the Arizona Health Care Cost Containment System falls under generic theft and fraud sections as well as under specific statutes with different penalties.[51] Endangerment, a class 1 misdemeanor, also appears as a felony in a racketeering context.[52] Criminal nuisances (smells, noises) appear in two separate statutes with two different penalties.[53]

Cruelty to dogs falls under four statutes, with penalties ranging from class 5 felony to class 2 misdemeanor.[54] Cruelty to greyhounds, however, is a class 6 felony.[55] Killing dogs in the name of training is exempt from any penalty.[56]

Child molestation can fall under four statutes, with penalties ranging from class 2 to class 6 felony.[57] Threatening another is covered by four separate statues.[58] False advertising appears in three separate statutes with different elements and three different penalties.[59] The five separate statutes criminalizing interference with police work contain penalties ranging from misdemeanors to serious felonies.[60]

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50. *Compare id.* § 13–1602 (West Supp. 1997) (classifying as a felony criminal damage of greater than $250), *with id.* § 13–3712 (West 1989) (tampering with a cable television system a class 2 misdemeanor).

51. *Compare id.* §§ 13–1801 to 13–1812 (West 1989 & Supp. 1997) (generic theft statutes), *and id.* §§ 13–2001 to 13–2007 (West 1989 & Supp. 1997) (generic fraud statutes), *with id.* § 13–3713 (West Supp. 1997) (health care fraud).

52. *Compare id.* § 13–1201 (West 1989) (endangerment), *with id.* § 13–2308 (West Supp. 1997) (criminal syndication a class 2 felony and assisting criminal syndication a class 4 felony).

53. *Compare id.* § 13–2908 (West 1989) (class 3 misdemeanor), *with id.* § 13–2917 (West 1989) (class 2 misdemeanor).

54. *Compare id.* § 13–2910 (West Supp. 1997) (class 1 misdemeanor), *with id.* § 13–2910.01 (West 1989) (class 5 felony), *with id.* § 13–3702(A)(2) (West 1989) (class 2 misdemeanor).

55. *Id.* § 5–115(F) (West 1994 & Supp. 1997).

56. *Id.* § 13–2910.04 (West 1989) (exempting training from cruelty to animals).

57. *Id.* §§ 13–1403 (West 1989), 13–1404 (West Supp. 1997) (class 5 felony unless under 15 years of age, then class 3 felony), 13–1405 (West Supp. 1997) (class 2 or 6 felony depending on age of victim and relationship of defendant and victim), 13–1410 (West Supp. 1997) (class 2 felony).

58. *Id.* §§ 13–1202 (West Supp. 1997), 13–2921 (West Supp. 1997), 13–1203 (West 1989), 13–2308.1 (West Supp. 1997).

59. *Compare id.* § 13–2203 (West 1989) (class 1 misdemeanor), *with id.* § 13–2311(A) (West 1989) (class 5 felony), *with id.* § 44–1481 (West 1994) (class 3 misdemeanor).

60. *Compare id.* § 13–2402 (West 1989) (class 1 misdemeanor), *with id.* § 13–2405 (West 1989) (class 6 felony), *with id.* § 13–2907 (West 1989) (class 1 misdemeanor), *with id.* § 13–2907.01 (West 1989) (class 1 misdemeanor), *with id.* § 13–3005 (West 1989) (class 5 felony).

Penalty inconsistencies, which may seem unimportant in the abstract, become vastly significant when prosecutors can choose from a lengthy charging list ranging from misdemeanor to felony consequences for the same conduct.

## VII. DESUETUDE

The Code includes many statutes that are rarely enforced either because they cannot be understood or because contemporary morals have shifted to the point where the conduct no longer appears to be a public affront. For example, ticket scalping,[61] though prohibited, occurs regularly at public events in full view of law enforcement officials. Other unenforced statutes include adultery,[62] cohabitation;[63] the "infamous crime against nature" (possibly sodomy);[64] contributing to the delinquency of a minor by allowing the minor to smoke cigarettes, to enter a pool or billiard hall unaccompanied by a parent or guardian, or to lead an "idle life";[65] giving cigarettes to minors;[66] and bigamy[67] (also covered by fraud on public records and adultery). Sending an anonymous letter complaining about another's conduct or crime (*e.g.*, to Ann Landers or to the police) has been a crime since 1901, was reenacted in the 1978 revision, but does not appear to have been enforced since its inception in territorial days.[68]

## VIII. SPECIAL INTERESTS

Before 1978, the Code contained many statutes protecting the special interests of prominent officials and the railroad, mining and communication industries. Consistent with the Model Penal Code, the Commission proposed that special interests did not deserve extraordinary protection.[69] The Commission recommended that all victims of the same crime be viewed equally, with severity of punishment reflecting not the victim's status but the mode and degree of injury.[70] Whatever merit that conviction enjoys in the Model Penal Code[71] is lost in Arizona.

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61. *Id.* § 13–3718 (West 1989).
62. *Id.* § 13–1408 (West 1989).
63. *Id.* § 13–1409 (West 1989). In *Cook v. Cook*, 142 Ariz. 573, 577, 691 P.2d 664, 668 (1984), and *Carroll v. Lee*, 148 Ariz. 10, 15–16, 712 P.2d 923, 928–29 (1986), the supreme court severed the sexual aspect of cohabitation in order to enforce the parties' partnership-like contract to share resources.
64. *Id.* § 13–1411 (West 1989).
65. *Id.* §§ 13–3612(m), (o) (West Supp. 1997), 13–3613 (West 1989).
66. *Id.* §§ 13–3622 (West 1989), 13–3612(n) (West Supp. 1997).
67. *Id.* § 13–3606 (West 1989).
68. *Id.* § 13–3001 (West 1989).
69. *See* ARIZONA REVISED CRIMINAL CODE COMM'N, *supra* note 4, at i–vi.
70. *See id.*
71. MODEL PENAL CODE § 211, cmt. 2, at 185 (1980).

Every several years since the 1978 revision, the Legislature has responded to special interests with individualized statutes. These statutes tacitly create two classes of crime victims: the general population of victims and those victims the Legislature thinks important enough to single out for heightened protection. Thus, third degree trespass now includes any entry onto "the tracks or right of way of a railroad."[72] A companion trespass statute singles out "mining claims" and religious property for special protection.[73] The criminal damage statute, which offers adequate generic coverage for all real acts of damage, now treats as criminal damage the act of "parking a vehicle in such a way as to block livestock access to water,"[74] a ranching offense that, oddly, constitutes criminal damage even though the prohibited conduct causes no damage.

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72. ARIZ. REV. STAT. ANN. § 13–1502 (West 1989). A.R.S. section 13–1502 reads:

> **A.** A person commits criminal trespass in the third degree by:
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> 1. Knowingly entering or remaining unlawfully on any real property after a reasonable request to leave by the owner or any other person having lawful control over such property, or reasonable notice prohibiting entry.
>
> 2. Knowingly entering or remaining unlawfully on the right-of-way for tracks, or the storage or switching yards or rolling stock of a railroad company.
>
> **B.** Criminal trespass in the third degree is a class 3 misdemeanor.

73. *Id.* § 13–1504 (West 1989). A.R.S. section 13–1504 reads:

> **A.** A person commits criminal trespass in the first degree by knowingly:
>
> 1. Entering or remaining unlawfully in or on a residential structure or in a fenced residential yard; or
>
> 2. Entering any residential yard and, without lawful authority, looking into the residential structure thereon in reckless disregard of infringing on the inhabitant's right of privacy.
>
> 3. Entering unlawfully on real property subject to a valid mineral claim or lease with the intent to hold, work, take or explore for minerals on such claim or lease.
>
> 4. Entering or remaining unlawfully on the property of another and burning, defacing, mutilating or otherwise desecrating a religious symbol or other religious property of another without the express permission of the owner of the property.
>
> **B.** Criminal trespass in the first degree is a class 6 felony if it is committed by entering or remaining unlawfully in or on a residential structure or committed pursuant to subsection A, paragraph 4. Criminal trespass in the first degree is a class 1 misdemeanor if it is committed by entering or remaining unlawfully in a fenced residential yard or committed pursuant to subsection A, paragraph 2 or 3.

74. *Id.* § 13–1602 (West Supp. 1997). A.R.S. section 13–1602 reads:

> **A.** A person commits criminal damage by recklessly:
>
> 1. Defacing or damaging property of another person; or

In the same vein, aggravated criminal damage envisions damage to religious property and cemeteries, places already protected from defacement by generic statutes.[75] Utility crime statutes, enacted in territorial days regarding misuse of a telephone or telegraph, specially protect communication companies—entities also adequately covered by generic theft and fraud statutes.[76] The crime of aggravated assault offers greater protection for broad classes of special victims, including police, fire fighters, nurses, health practitioners, and school and correctional officials.[77] First degree murder can be charged for the killing of any

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2. Tampering with property of another person so as substantially to impair its function or value; or

3. Tampering with the property of a utility.

4. Parking any vehicle in such a manner as to deprive livestock of access to the only reasonably available water.

5. Drawing or inscribing a message, slogan, sign or symbol that is made on any public or private building, structure or surface, except the ground, and that is made without permission of the owner.

**B.** Criminal damage is punished as follows:

1. Criminal damage is a class 4 felony if the person recklessly damages property of another in an amount of ten thousand dollars or more, or if the person recklessly causes impairment of the functioning of any utility.

2. Criminal damage is a class 5 felony if the person recklessly damages property of another in an amount of two thousand dollars or more but less than ten thousand dollars.

3. Criminal damage is a class 5 felony if the person recklessly damages property of another in an amount of more than two hundred fifty dollars but less than two thousand dollars.

4. In all other cases criminal damage is a class 2 misdemeanor.

75. *Id.* § 13–1604 (West Supp. 1997). A.R.S. section 13–1604(A) reads:

A person commits aggravated criminal damage by intentionally or recklessly without the express permission of the owner:

1. Defacing, damaging or in any way changing the appearance of any building, structure, personal property or place used for worship or any religious purpose.

2. Defacing or damaging any building, structure or place used as a school or as an educational facility.

3. Defacing, damaging or tampering with any cemetery, mortuary or personal property of the cemetery or mortuary or other facility used for the purpose of burial or memorializing the dead.

76. *See id.* §§ 13–3001 to 13–3008 (West 1989 & Supp. 1997).

77. *Id.* § 13–1204 (West Supp. 1997). A.R.S. section 13–1204(A)(5)–(7), (9)–(10) reads:

A person commits aggravated assault if the person commits assault as defined in [A.R.S.] § 12–1203 under any of the following circumstances:

....

5. If the person commits the assault knowing or having reason to know that the victim is a peace officer....

law enforcement officer, without mention of other related officials such as correctional or probation officers.[78]

As the Model Penal Code notes, these favored groups do not warrant special mention or aggravated punishments beyond that offered other victims.[79] Singling them out from generic coverage not only creates special proof requirements but also promotes similar protection demands from parallel groups. It also announces that the universe of crime victims divides into those who are important and those who are less so.[80]

## IX. SEXUAL CRIMES

Despite the recommendations of the Model Penal Code and the Commission, the 1977 Arizona Legislature reenacted a wide variety of sexual offenses that create language and enforcement problems. The most notable of these offenses are the prohibitions against adultery,[81] the "infamous" crime against nature,[82] "lewd and lascivious conduct,"[83] and cohabitation.[84]

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6. If the person commits the assault knowing or having reason to know that the victim is a [school official]....

7. If the person commits the assault knowing or having reason to know that the victim is a [corrections officer]....

....

9. If the person commits the assault knowing or having reason to know that the victim is a [fire official]....

10. If the person commits the assault knowing or having reason to know that the victim is a [health care provider]....

78. *Id.* § 13–1105(A)(3) (West Supp. 1997). A.R.S. section 13–1105(A)(3) reads:

A person commits first degree murder if:

....

3. Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.

79. MODEL PENAL CODE § 211.1, cmt. 2, at 185 (1980).

80. *Id.*

81. ARIZ. REV. STAT. ANN. § 13–1408 (West 1989). A.R.S. section 13–1408 reads:

A. A married person who has sexual intercourse with another than his or her spouse, and an unmarried person who has sexual intercourse with a married person not his or her spouse, commits adultery and is guilty of a class 3 misdemeanor. When the act is committed between parties only one of whom is married, both shall be punished.

B. No prosecution for adultery shall be commenced except upon complaint of the husband or wife.

82. *Id.* § 13–1411 (West 1989). A.R.S. section 13–1411 reads:

The problems with the statutes begin with their language. Their dowdy words alone raise serious interpretative problems; "crime against nature" and "infamous" hardly inform today's public of the obscure natural law concepts underlying these statutes. The "lewd and lascivious" prohibition broadly penalizes all nonprocreative sexual contact even between spouses. The cohabitation prohibition could not possibly begin to reach the burgeoning number of unmarried adults living together, including those in law enforcement and in the legislature. Not surprisingly, the Model Penal Code again cites Arizona as a bad example.

Read together, these statutes confine sex to marriage and sexual activity to procreation. Such an approach is not likely to have popular support today. As the Model Penal Code states:

> The point here is only to emphasize that there is no reason to distinguish among styles of sexual intimacy for the purpose of imposing criminal sanctions on relations out of wedlock. Whatever policy governs traditional heterosexual intercourse between unmarried persons should also extend to other forms of sexual gratification by those same persons.[85]

Like other minimalist statutes, underenforced laws against sexual conduct engender abuse. They may be invoked only in certain circumstances such as liaisons involving a political figure or relationships between different races. These statutes reach a few individuals selected for reasons unrelated to the conduct for which they are prosecuted and thereby debase the uniformity of the Code by delegating to law enforcement the unilateral power to determine who is actually subject to the criminal law.[86]

These kinds of moral offenses also invite discovery abuse because such conduct, difficult to detect other than by self-admission, prompts surveillance techniques that are unseemly if not unconstitutional. The offenses generate private blackmail and official extortion that may be used to coerce a party in divorce proceedings and settlements.

The oft-cited "symbolic" justification for these statutes produces a conundrum; a purely symbolic statute aggravates rather than diminishes the

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> A person who knowingly and without force commits the infamous crime against nature with an adult is guilty of a class 3 misdemeanor.

83. *Id.* § 13–1412 (West 1989). A.R.S. section 13–1412 reads:

> A person who knowingly and without force commits, in any unnatural manner, any lewd or lascivious act upon or with the body or any part or member thereof of a male or female adult, with the intent of arousing, appealing to or gratifying the lust, passion or sexual desires of either of such persons, is guilty of a class 3 misdemeanor.

84. *Id.* § 13–1409 (West 1989). A.R.S. section 13–1409 reads:

> A person who lives in a state of open and notorious cohabitation or adultery is guilty of a class 3 misdemeanor.

85. MODEL PENAL CODE § 213.2, cmt. 2, at 365 (1980).

86. *Id.* art. 213, note 2, at 435 (1980).

enforcement problem because, short of a system of italics or asterisks, the concerned public has no way to distinguish purely symbolic statutes from those that are enforced. Juxtaposing symbolic with enforced statutes diminishes the seriousness of the latter by announcing that some parts of the criminal law are not to be taken seriously.

Such laws are useless against the protection of disease, as some may argue, because they neither distinguish between healthy and infected actors nor differentiate between an enduring relationship and short-lived promiscuity. Further, some claim that criminal penalties for sexual morals offenses prevent violence by affronted spouses and parents.[87] In fact, such statutes offer no real prospect of effective suppression of extramarital relations, and problems of assault fall more easily under that statute.[88]

Taken literally, these morals offenses constitute an enormous legislative chastity belt girding the Arizona population, including married couples. They proscribe everything but "natural" procreative coitus inside wedlock. For good or ill, that is no longer the world in which we live. If it is a desideratum, more conservative sexual behavior may result from fundamental shifts in value-transmitting institutions like churches, schools, and families rather than via such statutory machinations. Criminal statutes properly seek not only to protect children from sexual depredations of adults but also to protect adults and children from force, the threat of force, fraud in sexual relations, and sexual activity that constitutes a nuisance. But beyond this, the criminal law is impotent to change victimless sexual mores. By trying to change this kind of sexual conduct, the criminal law may engender unusual disrespect.[89]

In their legislative origins, these sexual conformity statutes reveal covert as well as overt purposes. Rather than looking like guardians of sexual morals, the Legislature and courts become purveyors of hypocrisy. These behaviors are prohibited on the books in order to protect our virtue and are not enforced on the streets in order to protect our behaviors.

The latest edition of the Model Penal Code notes that whereas the majority of modern codes have seen the wisdom of discarding these kinds of statutes, a small number of states have retained them. Arizona is again mentioned.[90]

## X. THE FELONY MURDER RULE

Despite contrary recommendations from the Commission, the Legislature fashioned a felony murder rule that may well be the broadest and most contrary in

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87. *Id.* art 213, note 3, at 439 (1980).

88. *Id.*; *see also* ARIZ. REV. STAT. ANN. § 13–1203 (West 1989) (assault).

89. NORVAL MORRIS & GORDON HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 15–16 (1970).

90. MODEL PENAL CODE art. 213, note 3, at 439 n.32 (1980).

the United States. The Legislature ignored the widespread trend, both in the Model Penal Code and in other states, to abolish or narrow a rule universally viewed as unprincipled.[91]

The classic formulation of the felony murder rule makes a felon guilty of murder for any death that occurs during the commission or attempted commission of an inherently dangerous felony. Arizona broadly defines felony murder as first degree murder, subject to the death penalty, when anyone, including a nonparticipant, dies, even accidentally, during the commission or attempt of any of the felonies listed in the statute.[92]

The list of these underlying felonies has grown beyond the common law's limitation to inherently dangerous felonies. Offenses subject to the felony murder rule now include the sale or importation of drugs, including marijuana; sexual conduct with a minor, which includes consensual conduct; arson of any object; escape; any degree of burglary; and inducing a minor to violate drug laws.[93]

Inclusion of these nonviolent felonies in the rule marks a vast departure from even the sternest common law felony murder rule, which justified its severity only by restricting the underlying felonies to those necessarily involving an immediate threat to life. The felonies included in the Arizona Code go well beyond this category of danger.

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91. *Id.* § 210.2, cmt. 6, at 30–31 (1980).

92. *Id.* § 13–1105(A)(2), (B) (West Supp. 1997). A.R.S. section 13–1105(A)(2), (B) reads:

> A. A person commits first degree murder if:
>
> ....
>
> 2. Acting either alone or with one or more other persons such person commits or attempts to commit sexual conduct with a minor under § 13–1405, sexual assault under § 13–1406, molestation of a child under § 13–1410, marijuana offenses under § 13–3405, subsection A, paragraph 4, dangerous drug offenses under § 13–3407, subsection A, paragraph 7, narcotics offenses under § 13–3408, subsection A, paragraph 7 that equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses under § 13–3409, kidnapping under § 13–1304, burglary under § 13–1506, 13–1507 or 13–1508, arson under § 13–1703 or 13–1704, robbery under § 13–1902, 13–1903 or 13–1904, escape under § 13–2503 or 13–2504, child abuse under § 13–3623, subsection B, paragraph 1, or unlawful flight from a pursuing law enforcement vehicle under § 28–622.01 and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.
>
> ....
>
> B. Homicide, as defined in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.

93. *Id.*

The felony murder statute significantly dilutes causality, another common law protection, by covering the death of any person, by whatever cause, during the commission, attempted commission, or flight from the underlying felony.[94] Case law reflects this overbreadth of causality. In *State v. Lopez*, defendant Lopez suffered a felony murder conviction despite evidence that he had been arrested, handcuffed, and subdued before police shot and killed his accomplice.[95]

The felony murder rule may have made some minimal sense at common law when mens rea referred to a general criminal disposition rather than a specific attitude of the defendant toward each element of an offense. The rule also reflected, with some modest justification, the earlier common law where the few felonies that existed were all punished with death.

In modern times, however, legislatures across the country have created a wide variety of felonies that are not inherently dangerous. Application of ancient felony murder rigor to such felonies yields startling results. Felony murder can occur in Arizona for an unforeseen heart attack[96] as well as for an unexpected death resulting from a narcotics transaction.[97] Similar results could occur in both the drug and sexual areas where the underlying felony is far removed geographically and temporally from the fatality.[98]

The Model Penal Code's unwavering position is that the rule is so contrary to criminal law principles that it should be abandoned as an independent basis for homicide.[99] The majority of states that lack the political courage to abolish it have at least limited it. Arizona, to the contrary, seems to be the only state to have broadened its felony murder rule.

Even enlightened limitations do not resolve the rule's essential illogic. The criminal law does not otherwise predicate liability simply on conduct causing death. Punishment for homicide in A.R.S. sections 13–1103 and 13–1104 obtains only for conduct committed with a homicidal state of mind that makes the result reprehensible as well as unfortunate. Murder is punished as a capital offense precisely for its premeditative forethought—the very mental state lacking in capital felony murder.[100]

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94. *Id.*

95. State v. Lopez, 173 Ariz. 552, 554–56, 845 P.2d 478, 480–82 (App. 1992).

96. State v. Edwards, 136 Ariz. 177, 186, 665 P.2d 59, 68 (1983) (en banc).

97. *See* State v. Medina, 172 Ariz. 287, 836 P.2d 997 (Ct. App. 1992) (discussing, in general, felony murder for narcotics transactions).

98. In *State v. Dixon*, 109 Ariz. 441, 511 P.2d 623 (1973), the Arizona Supreme Court held that a heroin sale was too far removed for felony murder when the buyer overdosed, but the Legislature reversed this holding by enacting A.R.S. section 13–1105(B).

99. MODEL PENAL CODE § 210.2, cmt. 6, at 30 (1980).

100. ARIZ. REV. STAT. ANN. § 13–1105(A)(2) (West Supp. 1997) (felony murder).

Criminal liability attaches to individuals rather than to generalities. It is a weak rejoinder to a complaint of unjust conviction for first degree murder to say that some felony murderers deserve that result. Criminal punishment should rest on something more than a generalized probability of guilt fitting some or most actors. Requiring that the underlying felony create a foreseeable risk to human life limits felony murder to cases of negligent homicide, which adequately covers all felony murder deaths.[101] This worthwhile reform would limit extreme applications of the rule in instances where the actor would not otherwise be guilty of any homicide at all. Nevertheless, first-degree murder in A.R.S. section 13–1105 and negligent homicide in A.R.S. section 13–1102 are not interchangeable; they carry vastly different sanctions that reflect differing mental states. Punishment for the greater offense on proof only of the lesser mental state wreaks the same essential violence to accepted principles of criminal liability as does the unqualified rule.[102]

Virtually all recent codifications retaining the felony murder rule limit it to felonies of inherent violence. Some jurisdictions have enacted defenses when death was not a reasonably foreseeable consequence of the actor's conduct.[103] Some other statues have reduced the grade of the offense to a degree less than first degree murder, such as negligence.[104]

Why would the Arizona Legislature broaden this illogical rule when principled jurisdictions narrow or abolish it? Perhaps the Legislature, nurtured in frontier populism, sees the rule differently than do scholars. Both the Legislature and legal scholars would agree that an innocent driver whose vehicle malfunctions and kills someone accidentally should escape criminal liability. Legal scholars would say the same of the felon whose conduct results in unintentional death.[105] A populist legislature, on the other hand, would disagree if it believed "accidental"

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101. *Id.* § 13–1102 (West 1989).

102. MODEL PENAL CODE § 210.2, cmt. 6, at 37.

103. Hawaii and Kentucky have abolished felony murder completely. HAW. REV. STAT. § 707–701 (1993); KY. REV. STAT. ANN. § 507.020 (Michie 1990). New York adopted an affirmative defense to felony murder for an unarmed defendant who did not commit the homicidal act or aid in its commission and who had no reasonable ground to believe that any other participant was armed with a weapon or intended to engage in conduct creating a grave risk of serious injury or death. N.Y. PENAL LAW § 125.25(3) (McKinney 1998). Arkansas, Connecticut, Oregon, and Washington, among others, have adopted similar affirmative defenses. ARK. CODE ANN. § 5–10–101(b) (Michie 1997); CONN. GEN. STAT. ANN. § 53a–54c (West Supp. 1997); OR. REV. STAT. § 163.115(3) (1995); WASH. REV. CODE ANN. § 9A–32.030(1)(c) (West Supp. 1998).

104. Minnesota and Wisconsin have created third degree murder statutes, less punitive than first degree, for felony murder involving specific felonies. MINN. STAT. ANN. § 609.195 (West Supp. 1998) (for drug transactions); WIS. STAT. ANN. § 940.03 (West Supp. 1998). Indiana, Iowa, and other states treat felony murder based on some lesser felonies as a lesser degree of manslaughter. IND. CODE ANN. § 35–42–1–4 (Michie 1994); IOWA CODE ANN. § 707.5 (West 1993).

105. James J. Tomkovicz, *The Endurance of the Felony-Murder Rule*, 51 WASH. & LEE L. REV. 1429, 1473–74 (1994).

meant innocent and innocent meant without fault. A populist legislature does not perceive a nonnegligent killing during a felony as without fault. A criminal is not innocent of any results, even distant unintended ones; but for the willing choice to engage in the criminal act, death would never have occurred. Because the felon created the factual scenario, the felon is answerable for any ensuing death. Such seems the tacit legislative supposition.

Arizona lawmakers see a marked difference between an innocent person and a felon who both kill without negligence. Legislative logic considers it irrational to treat the "innocent" and the felonious actors alike when the fatal accident was set in motion by a felon.[106] Scholarly logic, on the other hand, considers it irrational to treat these two groups differently because the deaths in both situations are truly accidental in the sense of being unplanned and unforeseen.[107]

While a legislature may well accept the general premise behind mens rea—moral fault as a prerequisite for criminal liability—it can just as easily disavow its understanding. After all, for rare regulatory offenses such as littering, the Legislature dispenses with mens rea.[108] For felony murder, the Legislature similarly assumes it may dispense with the culpable mental state otherwise universally required for nonregulatory crimes. Unlike littering, felony murder can bring a death sentence.

The typical legislator probably does not perceive the disproportionality of the felony murder rule. Such a legislator may view a felon who kills with culpable or gross negligence as different from a nonfelon who kills with the same mental state. The culpability associated with the felony joins with the legislator's disdain for the death. The inconsistency in results is of little import to a lawmaker with a "tough on crime" mentality in which mental state is disregarded for the felons convicted criminally but retained for the nonfelons acquitted civilly.[109]

## XI. MANDATORY SENTENCES

Since the mid-1970s, the politicization of criminal justice in Arizona and elsewhere appears most clearly in the repeated calls for enactment of mandatory sentences. Originally conceived to ensure equality of sentence for similar offenders and as a means to control supposedly lenient judicial sentences, the mandatory sentences that now dominate felony treatment in the Arizona Code have caused subtle but serious problems. These problems, only summarized here, are as follows: (a) increased severity of sentences; (b) reduction in trials; (c) prosecutorial rather than judicial control of sentencing; (d) lack of individualization of sentences; and (e) deterrence issues.

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106. *Id.* at 1473.

107. *Id.*

108. ARIZ. REV. STAT. ANN. § 13–1603 (West 1989 & Supp. 1997) and historical note thereto.

109. *Id.*; MODEL PENAL CODE § 210.2, cmt. 6, at 30–31.

### *A. Increased Severity*

According to one leading commentator, "the law-and-order politics of the last two decades have...produced a penal system of a severity unmatched in the Western world."[110] The United States has the second highest rate of incarceration in the world, incarcerating 427 per every 100,000 persons, barely behind Russia and five to ten times that of most other industrialized nations.[111] Arizona is even more punitive than the national average. Arizona incarcerates 484 per every 100,000 persons, the eighth highest incarceration rate in this country and an increase of 139% over its incarceration rate ten years ago.[112]

In 1993, the National Academy of Sciences Panel on Understanding and Control of Violent Behavior, initiated by the Reagan Administration's Department of Justice, noted that the average prison time per violent crime had *tripled* between 1975 and 1989.[113] In 1994, political scientist James Q. Wilson, America's leading conservative scholar on crime and punishment, acknowledged that "[m]any (probably most) criminologists think we use prison too much and at too great a cost and that this excessive use has had little beneficial effect on the crime rate."[114]

Arizona sentences have matched the national trend. The cost to taxpayers is an average of $25,000 per inmate per year.[115] This astounding sum is all the more exorbitant and fruitless when aging inmates are kept in prison into incipient old age as criminal propensity drops dramatically after the crime-prone years between sixteen and thirty.[116]

### *B. Reduction in Trials*

Severe mandatory sentencing has promoted plea bargaining and, in tandem, decreased the realistic chance of a defendant's right to trial.

In 1976, the Legislature passed a typical charge-based mandatory sentence enhancement law.[117] This law permitted prosecutors to induce guilty

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110. MICHAEL TONRY, SENTENCING MATTERS 24 (1996).

111. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 1996 (1997) [hereinafter PRISONERS IN 1996]; Cassandra Burrell, *Populations of Prisons, Jails Climb 6%*, ARIZ. REPUBLIC, Jan. 19, 1998, at A3. Arizona's incarceration rate in 1982 was the twelfth in the United States. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS AT MIDYEAR 1982, at 2 (1982). Its incarceration rate has moved steadily upward over the past decade. *See* PRISONERS IN 1996, *supra*, at 3.

112. PRISONERS IN 1996, *supra* note 111, at 3.

113. TONRY, *supra* note 110, at 137.

114. James Q. Wilson, *Crime and Public Policy*, *in* CRIME 489, 499 (James Q. Wilson & Joan Petersilia eds., 1995).

115. Telephone Interview with Arizona Department of Corrections (Oct. 1997).

116. *See* TONRY, *supra* note 110, at 139. As of October, 1997, the Arizona Department of Corrections had custody of 1778 prisoners over the age of 50. Telephone Interview with Arizona Department of Corrections, *supra* note 115.

117. 1976 Ariz. Sess. Laws ch. 111, §§ 1–12.

pleas by charging a firearm possession whenever a defendant was eligible and then dismissing the charge in return for a plea to the underlying crime. Immediately after the statute went into effect, the guilty plea rate in the Maricopa County Superior Court system increased significantly. In 1976, the calendar year immediately preceding the effective date of the new law, 10.4% of criminal cases proceeded to trial.[118] In the following two years, while the new law was in effect, the trial rate fell to an average of 8.74%.[119] The average percentage of cases going to trial dropped to 5.73% during the first three full years of sentencing under the 1978 Code.[120]

A 1982 law further increased the sentencing of persons convicted of felonies while on probation or parole.[121] This statute, still in effect, requires a sentence for the new offense of life imprisonment without release for twenty-five years. After this law was enacted in 1982, the percentage of cases going to trial in Maricopa County declined sharply. In the three years immediately preceding the implementation of the mandatory 1982 law, the trial rate had been 5.73%.[122] This figure fell to 4.27% during the four years immediately after the 1982 law went into effect.[123] While the 1982 statute may not have been the sole cause of this decline in the trial rate, the bargaining leverage it granted prosecutors suggests that it was an important cause.

Overall, in less than a decade the criminal trial rate fell from 10.40% to 3.77%.[124] During the same period, judicial, prosecutorial, and public defender resources increased at a greater rate than the court's caseload. This increase in resources suggests that the decline in the trial rate cannot be attributed to caseload pressure but rather to prosecutors' use of the hammer of mandatory penal enhancements to coerce pleas. Prosecutors then drop the enhancements in return for the defendant giving up the right to trial.[125] Mandatory sentences effectively make the right to trial too risky to be exercised, even for an innocent defendant.

### *C. Prosecutorial Rather than Judicial Control of Sentencing*

Prosecutors use the dangerous and repetitive offender enhancements as plea bargaining chips by charging defendants with sentence enhancement allegations, only to dismiss them later as part of a plea bargain. In a recent year, for example, prosecutors dismissed repetitive offender allegations in 76% of all

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118. *See* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 79–81 (1993) (to which this analysis is indebted); *cf.* 1976 Ariz. Sess. Laws ch. 111, §§ 1–12.

119. Lowenthal, *supra* note 118, at 83.

120. *Id.*

121. 1982 Ariz. Sess. Laws ch. 322, § 1, as reflected in the present version of A.R.S. section 13–604.02(A) (West Supp. 1997).

122. Lowenthal, *supra* note 118, at 83.

123. *Id.* at 85.

124. *Id.*

125. *Id.* at 95.

cases in return for a guilty plea.[126] Plea bargaining may be a necessary evil, an essential lubricant without which the machinery of justice would break down, but it is utilized in arbitrary ways. Armed robbery is pled down to robbery, aggravated assault to assault, completed crimes to inchoate ones.

In Professor Tonry's words:

> Mandatory penalties elicit more devious forms of adaptation. When Michigan judges in the 1950s or the 1970s acquit factually guilty defendants, or when Arizona prosecutors in the 1980s permit people who have committed serious crimes to avoid mandatories by pleading guilty to attempt or conspiracy, or when prosecutors and judges fashion new patterns of plea bargaining solely to sidestep mandatories, important values are being sacrificed.[127]

Prosecutors now have more sentencing clout than judges. The prosecutor decides not only which offenses to charge but also whether to seek sentence enhancement and aggravation, whether to offer a plea, what that plea agreement will be, and whether there will be a stipulated sentence. These are the most significant decisions shaping a criminal case, and there is no judicial or legislative control over them. The decisions of prosecutors, typically deputy county attorneys recently graduated from law school, are discretionary, hidden from public scrutiny and judicially unreviewable. Ironically, the visible courtroom rulings of the more experienced judiciary are reviewable, but these rulings have less penal impact than the hidden, discretionary decisions of prosecutors.

Consequently, statutory overlap and mandatory penalty inconsistencies in the present Code effect a pervasive but subtle reversal of role and function. Vast unstructured and unreviewable discretion to charge, to enhance, to aggravate, to plea bargain, and to shape sentences resides in the least experienced, most hidden, least correctable, and least answerable sector of the justice system. At the same time, the Code tacitly divests the public's more experienced, more carefully chosen, and more responsive judiciary from any comparable role in supervising these decisions. This role reversal probably does not meet the public's expectations. Additionally, this reversal is inconsistent with the way these role-players are chosen and flatly incompatible with the different ways these officials are made responsive to the public.[128]

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126. *Id.*

127. TONRY, *supra* note 110, at 161.

128. In *State v. Barger*, 167 Ariz. 563, 810 P.2d 191 (App. 1990), the court of appeals of this state observed:

> Suffice it to say that today we express our concern that a junior officer in the executive branch of county government (deputy county attorney) is given great discretion and power to affect sentencing in a state court while denying to the judicial officer who presides over that court any discretion in what has traditionally and inherently been a function of the court.

### *D. Lack of Individuation in Sentencing*

Unlike the rehabilitative goals implied in the pre-1978 Criminal Code,[129] mandatory sentences require all those convicted of the same crime to receive essentially the same sentence. Individual differences among defendants are largely ignored; mandatory sentence statutes, in effect, assume that those committing the same crime are faceless generics, for example, that all first degree murderers are like each other. That assumption is false.

> Many...regularly recurring circumstances are situationally relevant to...sentencing but not universally relevant. Mental abnormality may be a mitigating circumstance when it makes the defendant susceptible to manipulation by others, but an aggravating circumstance when it reduces a defendant's ability to control aggressive impulses. Excess alcohol consumption may be a mitigating circumstance when a defendant convicted of manslaughter is an alcoholic, [but] an aggravating circumstance when the defendant was a social drinker who refused friends' pleas to drive him home.... Age may be a relevant circumstance when the defendant is seventeen and impressionable and when the defendant is seventy-five and infirm but irrelevant in distinguishing between twenty-five- and thirty-five-year-olds. Being an employed head of household may be irrelevant when the charge is stranger rape and relevant when the charge is embezzlement.[130]

As many of my judicial colleagues have observed, different sentencing considerations arise between an unprovoked, premeditated, gang-motivated murderer, on the one hand, and on the other, a premeditated murder by an abused spouse driven to kill after years of frightful spousal abuse. Both have committed first degree murder, but justice may require that the former receive a life sentence and the latter something approaching probation.[131] Mandatory sentences prevent

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*Id.* at 570, 810 P.2d at 198.

129. ARIZONA CRIMINAL CODE COMM'N, *supra* note 4.

130. TONRY, *supra* note 110, at 23.

131. *State v. Cocio*, 147 Ariz. 277, 709 P.2d 1336 (1985) (en banc), vividly illustrates the disparity in sentencing that can result from charge-based mandatory punishment when a defendant exercises his right to trial. Cocio's truck collided with a car driven by Rodriguez, killing a passenger in the Rodriguez vehicle. Both Cocio and Rodriguez were charged with manslaughter and driving under the influence of alcohol. The prosecution also charged both defendants with mandatory punishment allegations because the two vehicles qualified as "dangerous instruments," and each was on probation at the time of the fatal incident. Rodriguez entered into a plea agreement with the prosecution and was sentenced to two days in jail, a fine and a year of probation. Cocio, however, rejected an identical plea bargain offer and was convicted. Since he had committed a dangerous felony while on probation, Cocio received a mandatory life sentence with no possibility of parole for twenty-five years. Ironically, the evidence suggested that Rodriguez was the more culpable of the two drivers. Yet Cocio, because of the mandatory sentencing regime, received a punishment vastly harsher than Rodriguez. In effect, Cocio received a life sentence for going to trial. *See also* Cocio v. Bramlett, 872 F.2d 889, 890 (9th Cir. 1989)

that possibility because they assume that all those committing a given crime are like each other.

*E. Deterrence?*

Someone might well say that the foregoing ills are tolerable if mandatory sentences deter crime. Such is not the case.

After the most exhaustive examination of the question ever undertaken, the National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects concluded, "we cannot yet assert that the evidence warrants an affirmative conclusion regarding deterrence."[132] The panel's principal consultant on the subject, Professor Nagin was less cautious: "The evidence is woefully inadequate for providing a good estimate of the magnitude of whatever effect may exist.... Policymakers in the criminal justice system are done a disservice if they are left with the impression that the empirical evidence [regarding mandatory sentence deterrence]...strongly supports the deterrence hypothesis."[133]

The most recent examination of the evidence by the National Academy of Sciences Panel on Understanding and Control of Violent Behavior reached a similar conclusion in 1993. "After documenting that the average prison sentence per violent crime *tripled* between 1975 and 1989, the panel asked, 'What effect has increasing the prison population had on violent crime?' and answered, 'Apparently very little.'"[134]

> Ironically, most mandatory penalty provisions enacted during the 1980s and 1990s concerned drug crimes, behaviors...uniquely insensitive to...deterrent effects.... Despite risks of arrest, imprisonment, injury, and death, drug trafficking offers economic and other rewards to disadvantaged people that far outweigh any available in the legitimate economy. Market niches created by the arrest of dealers are...often refilled within hours.[135]

According to criminologist Alfred Blumstein:

> There is...no indication that...[harsh drug law enforcement policies] have been at all successful. Of course, that result is not at all surprising. Anyone who is removed from the street is likely to be

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(discussing these facts in the context of a denial of a habeas corpus petition made by Cocio).

132. Panel on Research on Deterrent and Incapacitative Effects, *Summary*, *in* DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 3, 7 (Alfred Blumstein et al. eds., 1978).

133. Daniel Nagin, *General Deterrence: A Review of the Empirical Evidence*, *in* DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES, *supra* note 132, at 95, 135–36.

134. TONRY, *supra* note 110, at 137 (citing UNDERSTANDING AND CONTROLLING VIOLENCE (Albert J. Reiss, Jr. & Jeffrey Roth eds., 1993)).

135. *Id.* at 141.

> replaced by someone drawn from the inevitable queue of replacement dealers ready to join the industry. It may take some time for recruitment and training, but experience shows that replacement is easy and rapid.[136]

At least one conservative scholar agrees. James Q. Wilson has observed that "significant reductions in drug abuse will come only from reducing demand for those drugs.... [T]he marginal product of further investment in supply reduction [law enforcement] is likely to be small."[137] He reports: "I know of no serious law enforcement official who disagrees with this conclusion. Typically, police officials tell interviewers that they are fighting a losing war or, at best, a holding action."[138]

One of the largest studies ever undertaken of the effects of mandatory penalties was an evaluation of New York's 1973 "Rockefeller Drug Laws."[139] These laws required severe mandatory minimum sentences for drug crimes and forbade plea bargaining to avoid the laws' application. The study found that these laws had no discernible effects on drug use or crime in New York. "The proliferation of mandatory penalties for drug crimes in the 1980s did not demonstrably reduce drug trafficking," and the same holds true for the 1990s, with even more counterproductive results.[140]

Mandatory sentences are lately being seen as an obstacle to crime control strategy. In an important recent study of federal and state prisoners, *Behind Bars: Substance Abuse and American's Prison Population*, the National Center on Addiction and Substance Abuse at Columbia University announced, on January 8, 1998, that mandatory sentences without mandatory rehabilitation result in returning inmates to society with the same problems as before they were incarcerated.[141] Joseph Califano, the Center's director, stated:

> If the objective of our criminal justice and prison system is to protect the public safety by incarcerating incorrigible offenders and rehabilitating as many others as possible, then the prevailing policy of prison only, with no treatment or preparation for return to the community, is insane. It makes absolutely no sense.[142]

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136. Alfred Blumstein, *Prisons, in* CRIME, *supra* note 114, at 387, 400.

137. James Q. Wilson, *Drugs and Crime, in* 13 CRIME AND JUSTICE: A REVIEW OF RESEARCH 521, 534 (1990).

138. *Id.*

139. *See* JOINT COMM. ON N.Y. DRUG LAW EVALUATION, THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE (1978).

140. TONRY, *supra* note 110, at 141; *see also* JOINT COMM. ON N.Y. DRUG LAW EVALUATION, *supra* note 139. For current nonpartisan research, see JONATHAN P. CAULKINS ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? (1997).

141. *Press Conference*, FED. NEWS SERVICE, Jan. 8, 1998, *available in* LEXIS, News Library.

142. *Id.*

Califano's plea for an end to mandatory sentences was supported by William Murphy, president of the National District Attorneys Association, and by General Barry McCaffrey, White House Drug Policy Director, neither known for being soft on crime.[143]

Whether one looks at the general studies done regarding the "deterrent effect of criminal sanctions" or the more specific studies done regarding mandatory penalties, the conclusion remains that little basis exists to support the belief that "mandatory penalties have any significant effects on rates of serious crime."[144] Professor Tonry's lengthy research on mandatory sentences is especially bracing: "As instruments of public policy, they do little good and much harm. If America does sometime become a 'kinder, gentler place,' there will be little need for mandatory penalties and academics will have no need to propose 'reforms' premised on the inability of elected officials to make sensible decisions."[145]

## CONCLUSION

This choppy voyage through only a part of the Arizona Revised Criminal Code suggests several conclusions. One of the first is that the reasons requiring the Code's 1978 revision have reappeared in spades as though no lessons were learned in the lengthy and costly revision.

Some of Arizona's criminal law is capricious (because of overlapping coverage); some is inconsistent (because of differing elements of proof); some is unprincipled (because of differing punishments for the same conduct); and some is not to be taken seriously (because law enforcement has ceased enforcing a good part of it). The intended message of deterrence and respect for the law disappears in a thicket of competing, contrary messages. Deterrence is effective, if at all, when charges for the same conduct are uniform, penalties are certain, elements of proof are consistent, and statutory prohibitions are serious enough to be enforced. Arizona falls short in every respect.

The present Code shows the folly of drafting criminal statutes without regard for the Model Penal Code. Legislators who draft on the fly, independent of scholarly models, risk creating statutes fashioned for the crisis of the moment. Such knee-jerk reactions respond to the day's sensational crime with yet another statute or increased penalty. "Drive-by" legislation by newspaper headlines is not a principled approach to something as enduring and sensitive as a criminal code.

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143. *See id.*

144. TONRY, *supra* note 110, at 141. The recent reduction in crime rates and victimization appears to be due to demographic changes (e.g., a temporary diminution in juvenile population) and to a switch from personal property crime to drug dealing among juveniles. *See Crime Rate Lowest Since '73; Violence Down 10% in '96*, ARIZ. REPUBLIC, Nov. 16, 1997, at A1.

145. TONRY, *supra* note 110, at 164.

The Model Penal Code has blazed the path of criminal codification in this country traced earlier by Sir James Stephen in England and Lord Macauley in India.[146] The Model Penal Code demonstrates how statutory deadwood can be chopped away and sanctions made comprehensible to potential criminals and more suited to regulatory purposes. The Model Penal Code has been *the* standard for criminal law drafting for the past quarter century, and, as such, it has been carefully followed by many principled states.[147] Arizona lawmakers are almost alone in their disregard for it.

A further lesson gleaned from the present Code relates to the scope of criminality. A criminal conviction no longer inspires the awe it once did partly because of the tendency of legislatures, Zeus-like, to hurl penalty thunderbolts to express disapproval for any and all conduct, as if throwing a law at conduct will eliminate it. This thunderbolt tendency reveals two kinds of triviality: triviality of object and triviality of intention. Triviality of object refers to selecting behavior for which criminal punishment is disproportionate, such as including marijuana as one of the predicates for felony murder. Triviality of intent means an attitude of legislative indifference toward actual enforcement of their enactments, as in the sexual arena. A conscientious legislator would not vote to penalize conduct without knowing both that law enforcement had the resources to apprehend violators and, more fundamentally, that society truly needed such protection.[148]

Criminal justice legislation in this state is rarely motivated by aims loftier than appearing "tough on crime" and fueling political careers. Politicians rarely win constituent support for principled reform because some uninformed voters seem to demand toughness no matter the price to principle or taxes. Too often our crime legislation becomes political mulch intended to nurture political image rather than to improve the justice system. As in *Les Miserables*, political careers take flight on the pains of criminals.

One way to avoid impulse legislation is to create a standing criminal law commission, preferably outside the Legislature, to scrutinize proposed criminal legislation. This commission could counter the emotional support for escalating criminal sanctions and evaluate the real need for any proposed criminal legislation. Such a nonpartisan commission could determine alternatives to proposed legislation including whether the state is better off without any further legislation. In the long run, the alternative of avoiding more of the same may result in increased rather than diminished respect for the law.

Responsible criminal enactments also require a companion cost benefit analysis, particularly due to the ever-increasing expansion of sentence lengths. With prison beds costing over $20,000 per year in 1998 dollars, and nearly two of

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146. MORRIS & HAWKINS, *supra* note 89, at 27.
147. *Id.*
148. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 272 (1968).

every three inmates imprisoned only for nonviolent offenses,[149] it makes financial sense to ask whether more nonviolent criminals need to be housed and fed at the public's expense and whether most offenders need to be kept in prison beyond the crime-prone years between the ages of sixteen and thirty.

No internal mechanism currently acts as a brake on the Legislature's penchant to vote indiscriminately for ever tougher, longer, and more expensive penal sanctions. The proliferation of prisoners and prisons at taxpayer expense requires a more thoughtful response than more of the same, especially for nonviolent crimes.[150] A standing criminal law revision commission could attach a cost estimate to proposed criminal legislation with a view toward determining whether it is worth the taxpayers' money to incarcerate so many nonviolent and aging offenders.

A complex relationship exists between the vigorous enforcement of a criminal prohibition and its public acceptance. As demonstrated by voter support for Proposition 200, which legalized the medical uses of marijuana,[151] it is by no means clear that legislators and courts can persuade the public to view conduct as criminal simply by declaring it so. The criminal law is not that potent a weapon of social control. Alcohol prohibition and Proposition 200 both suggest that the reverse may be true: the indiscriminate application of overbroad criminal sanctions to every social ill devalues the rest of criminal law. If we make criminal what the public regards as acceptable or otherwise solvable, either nullification occurs or, more subtly, people's attitudes towards criminal law move toward disrespect.

Many legislators consider their primary purpose achieved when they appear to be tough on crime. They are deaf to scholarly arguments about penal effectiveness or normative arguments about injustice to offenders, about financial and human costs and about counterproductivity and about the fact that ninety percent of incarcerated prisoners eventually return to society. If penal policy is to become principled, we need to know, empirically, the extent to which our engorged sanctions effect public good. Without solid criminological research from

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149. Telephone Interview with Dr. Darrell Fisher of the Arizona Department of Corrections (Oct. 1997). As of that date, 57.8% of Arizona prisoners were classified as nonviolent. *Id.* The Department of Corrections has acknowledged releasing violent offenders early in order to make room for nonviolent drug offenders serving mandatory sentences. *See* Lowenthal, *supra* note 118, at 112.

150. Christopher Johns, *Lawmakers Ignore Public Will on Prisons*, ARIZ. REPUBLIC, Apr. 20, 1997, at H3 (citing public opinion survey released in the Spring of 1997 by the Northern Arizona University Social Research Laboratory and Criminal Justice Department) ("Just 12 percent of Arizonans think that the best way to deal with illegal marijuana users is by locking them up.... [E]ducation and treatment are overwhelmingly the preferred strategies to reduce drug abuse."). As of October, 1997, 4026 of a total prison population of 23,280 were drug offenders only. Telephone Interview with Dr. Darrell Fisher, *supra* note 149.

151. *See, e.g.*, Proposition 200, The Drug Medicalization, Prevention, and Control Act (Ariz. 1996).

leading scholars like Norval Morris, Michael Tonry, Frank Zimring, and James Q. Wilson, and statutory guidance from the Model Penal Code, the effort to strike a balance among social protection, expenditures, and politics becomes guesswork. The crime-fighting hyperbole of still more statutes, more police, more courts, more prisons, and ever-longer sentences reflects Humpty Dumpty thinking: "If all the King's horses and all the King's men can't put Humpty back together, well then we'll simply have to get even more horses and more men."