

ABSTRACT RISK AND THE POLITICS OF THE CRIMINAL LAW

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ABSTRACT

Much of the criminal law contains what theorists call “abstract endangerment” statutes—laws that punish not actual, but hypothetical, creation of risk. For example, consider the criminalization of underage alcohol possession, ostensibly targeting the risk of irresponsible overconsumption: age does not necessarily imply immaturity, and possession does not necessarily lead to consumption. The crime is therefore doubly “abstract”: many violations will create no risk of harm at all but the conduct is nevertheless prohibited. Theoretical defenses of these overinclusive laws mainly emphasize the deficiencies of individuals in assessing their own risk. What these defenses implicitly assume, though, is that the entity the individual must defer to—the legislature—is itself superior at risk assessment. This Article attacks this supposition, and discusses the problematic features of legislative deliberation regarding risk in the criminal law. Many extraneous considerations often enter in, and certain inherent features of these bodies make them especially problematic. Defenders of abstract endangerment statutes, then, should not simply assume that the legislature is epistemically superior to the individual, and they bear a greater justificatory burden than they have satisfied thus far.

INTRODUCTION

A large swath of the contemporary criminal law consists of what are called “abstract endangerment” statutes—laws that punish not the creation of risk, but the *potential* creation of risk. These statutes prohibit certain conduct that, when undertaken, is usually dangerous to oneself or others in a certain way. One example is the speed limit: in many cases a violation creates risk of harm, but in many it is entirely safe. The primary intuitive and theoretical problem with these statutes, then, is their overinclusion.

Various eminent scholars have wrestled with these laws—how can they be justified if all crimes must somehow be seen as *wrongful*, yet many violations of these kinds of statutes will create no risk of harm at all?¹ For deterrence theorists this is easy: these rules reduce risk on the whole, and therefore violations thwart the achievement of the greater good. For retributivists, overinclusion is defended because even those who create no risk of harm still act in a blameworthy

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1. See *infra* Part II.

manner—they are arrogant or selfish. Wrongfulness is thus established by both theories. These scholarly defenses focus on the possible deficiencies of an individual's ability to assess risk in his own case, and the resultant problems and their implications.² For various reasons, it is argued that it is better to entrust judgments about riskiness to the legislature.³

Implicit in both the retributive and the deterrent defenses of abstract endangerment, though, is an assumption that the subject of comparison with the faulty individual—the *legislature*—is itself superior, and will have fewer or less egregious deficiencies. However, theoretical responses to these statutes have failed to investigate this proposition, and have uncritically accepted that the legislature will be better at assessing risks. This Article is an attempt to address this issue, and it refuses to accept that legislative wisdom can be safely assumed. In fact, further inquiry shows that many of the same deficiencies that taint individual risk assessments are also present (and are often more aggravated) when a collective political body makes risk determinations.

Because epistemic deficiency is similarly a problem with respect to *legislative* risk assessments in the criminal law, the theoretical defenses of abstract endangerment statutes require far more support for their implicit claims. Deference to the legislature (in the form of an abstract endangerment statute) based upon any supposedly superior knowledge cannot simply be assumed. Rather, the legislature's superiority at risk assessment must be demonstrated in the specific case.

I. BACKGROUND

A. *The Concept of Abstract Risk, and its Place in Criminalization Theory*

An abstract endangerment statute prohibits conduct that creates a risk of harm only “in the abstract”—that is, *actual* endangerment or creation of risk is not an element of the crime, and certain non-risky tokens of the crime type are still included.⁴ Another helpful label is that of “proxy crime,” in that the conduct that *is* included as a statutory element is but a proxy for the risk that said conduct is expected to create in the majority of cases.⁵ The most common examples used in

2. *See id.*

3. *See id.*

4. *See* Andrew Ashworth & Lucia Zedner, *Prevention and Criminalization: Justifications and Limits*, 15 *NEW CRIM. L. REV.* 542, 560–61 (2012); A.P. SIMESTER & ANDREAS VON HIRSCH, *CRIMES, HARMS, AND WRONGS* 57 (2011). On types and tokens in philosophy, see *Types & Tokens*, *STANFORD ENCYCLOPEDIA PHIL.* (Apr. 28, 2006), available at <http://plato.stanford.edu/entries/types-tokens/> (“Types are generally said to be abstract and unique; tokens are concrete particulars . . .”).

5. This term is used by Alexander and Ferzan. *See* LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 309 (2009). The phenomenon has been described by other names by various theorists. *See* DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF CRIMINAL LAW* 103 (2008) (calling them “hybrid offenses,” in that they cover both *mala in se* and *mala prohibita* instantiations); R.A. DUFF, *ANSWERING FOR CRIME* 166 (2007) (call them “implicit endangerment” crimes, as the risk is implied by the

the literature are drunk driving statutes and sexual consent age minimums.⁶ In both, there will usually be a risk of harm created when one engages in the prohibited conduct, but non-risky cases are imaginable: a driver with a very high tolerance, or the unusually mature teenager. As Markus Dubber writes, “the point of these offenses is the identification and neutralization of *sources of danger*, that is, threats of threats.”⁷ Harm itself is not directly prohibited, nor is risk of the harm—instead it is the expected or potential cause of the risk.

What connects the background goal of harm prevention to the actual statute is the judgment that the conduct so often creates the risk that, even though this is not *always* the case, no instances of the conduct should be permitted. This type of reasoning is consequentialist, and accepts the overinclusiveness of the prohibitions.⁸ For deterrence theorists, overinclusion is acceptable because it leads to a net reduction of harm—the greater good.

Overinclusion is clearly more problematic for retributivists, though (these theorists allow for punishment of conduct only when conduct gives rise to personal desert).⁹ This is easy to posit when the conduct creates *harm* (or risk of harm),¹⁰ but with our non-endangering outlier cases, it is stipulated that no risk of harm is created. With no harm, how can these be seen as wrong? This is the central retributive question regarding abstract endangerment and is the cause of its somewhat ambiguous place in criminalization theory. Before turning to scholarly responses to this problem, it will be helpful to consider more closely how this phenomenon works in the actual criminal law.

B. Examples & Typology

Prior commentators, while recognizing the phenomenon of abstract endangerment, underestimate its prevalence.¹¹ Discussions mostly focus on the examples of drunk driving and sexual consent, but these kinds of statutes are far more widespread: they come in many forms and protect diverse societal interests.

By far the most common abstract endangerment statutes today are those that

specified conduct); JOEL FEINBERG, HARM TO OTHERS 193 (1984) (calling them “aggregative harms,” because statistical reasoning is used to justify them).

6. See, e.g., Ashworth & Zedner, *supra* note 4, at 560–61.

7. MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME 21 (2002) (emphasis added). He warns of the extreme of this reasoning: legislative projects targeting abstract endangerment can employ “an infinite regress along the causal chain toward the origin of threats, the heart of darkness.” *Id.* at 20.

8. See generally Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legislation*, 1 BUFF. CRIM. L. REV. 599 (1998).

9. See, e.g., HUSAK, *supra* note 5, at 167.

10. Most accept that the harm principle includes “risk” of harm. See FEINBERG, *supra* note 5, at 190–91; see generally Claire Finkelstein, *Is Risk A Harm?*, 151 U. PA. L. REV. 963, 971–74 (2003) (giving an elaborate argument for precisely why risk is harmful); see Ashworth & Zedner, *supra* note 4, at 560.

11. See, e.g., DUFF, *supra* note 5, at 166 (discussing standard examples of drunk driving and sexual consent).

prohibit specific conduct (as opposed to generalized prohibitions on risk).¹² These so-called “ad hoc” endangerment statutes—both of a concrete and an abstract form—have long proliferated in American criminal law, and it was their supposed randomness that made them a target of reform by the American Law Institute.¹³

C. Numerical Rules

A very popular form of the abstract endangerment crime involves the specification of a numerical floor or ceiling. The quantity delineated represents a feature inhering in certain conduct, with risk of harm expected to increase or decrease as the conduct strays further or stays closer to a given number.

Many of these numerical rules function as thresholds proscribing conduct for people beneath¹⁴ a certain age: consumption and possession of alcohol by those under twenty-one,¹⁵ sexual activity by or with someone under sixteen,¹⁶ possession of aerosol spray-paint by those under eighteen,¹⁷ or, recently, text-messaging of explicit images while under sixteen.¹⁸ Age-based abstract endangerment crimes implicitly rely upon a calculation that certain conduct is more risky when it is undertaken by those who are more youthful, but this is not always the case. Obviously, many mature twenty year olds will be able to drink alcohol as (or more) responsibly than those who are twenty-one.

Other numerical rules delineate between acceptable and unacceptable *physiological* states. Most ubiquitous is the prohibition of driving while “intoxicated,” defined as having a blood alcohol content of .08.¹⁹ Alcohol-related limitations are

12. There are still some versions of generalized abstract endangerment statutes, though: these usually punish hypothetical risk creation where victims turn out to be absent or the harm impossible. Take the most illustrious example, the Model Penal Code: “A person commits a misdemeanor if he recklessly engages in conduct which places or *may* place another person in danger of death or serious bodily injury.” MODEL PENAL CODE § 211.2 (1980) (emphasis added). I read this to require only the hypothetical creation of risk, and the commentaries explicitly endorse this interpretation. “Section 211.2 requires that the actor engage in conduct ‘which places or may place another person in danger of death or serious bodily injury.’ This formulation applies to risk creation regardless of injury and regardless of whether anyone is actually endangered by the actor’s conduct.” MODEL PENAL CODE § 211.2 cmt. 3 (1980). There are examples of this actually taking effect in the states. In Vermont, the state high court first interpreted the reckless endangerment statute as requiring the creation of actual risk, but this was then explicitly superseded by an amendment to the statute, allowing for liability even when risk is impossible. *State v. Longley*, 939 A.2d 1028, 1031 (Vt. 2007). North Dakota also interprets its statute as one of abstract endangerment. *State v. Meier*, 422 N.W.2d 381, 383 (N.D. 1988). The same idea was proposed for Federal Criminal Law. “It would not be necessary that the defendant actually place another in danger in order to be guilty of reckless endangerment. The proposed statute deals with prospective risks . . .” 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 836–837 (1970).

13. See MODEL PENAL CODE § 211.2 cmt. 2 (1980).

14. Rarely do laws prohibit activity “above” a certain age. No examples were found during my investigation.

15. See, e.g., N.Y. ALCO. BEV. CONT. LAW § 65-c (McKinney 2011).

16. See, e.g., GA. CODE ANN. § 16-6-3 (2011 & Supp. 2013).

17. CAL. PENAL CODE. § 594.1(a)(1) (Deering 2008 & Supp. 2014).

18. HAW. REV. STAT. § 712-1215.6 (West, WestLaw through 2013 Special Sess.).

19. See, e.g., OHIO REV. CODE ANN. § 4511.19(a)(1)(b) (West 2008 & Supp. 2013).

also common in the operation of other machinery and the piloting of airplanes.²⁰ Here, the risk comes from the approach one makes towards a certain physiological “state” that has no clear ending or beginning point—many will be “intoxicated” at .08, but many will not be.

Numbers proscribe or permit conduct in many other areas as well. The speed limit for driving a car is really an abstract endangerment statute, as expert handlers could exceed sixty-five miles per hour without creating any risk, and many of us do so on a regular basis.²¹ Environmental crimes are often triggered by a certain numerical limit on “parts per million” in a given emission, even though this may not map cleanly onto the risk of actual environmental harm.²² Financial crimes are also often aimed at risk, which is in turn approximated by a numerical indicator—the new Dodd-Frank Act is almost entirely preoccupied with recognizing financial risk and preventing its actualization. Some important provisions include a prohibition on banks owning more than three percent of a hedge fund and a prohibition on mergers if the acquiring entity is more than ten percent in debt.²³ Finally, we could think of the various crimes that limit the amount of campaign donations that can be given in an election, or the limitations on gifts to sitting officials—these specify a ceiling, but corruption or improper influence clearly do not precisely correlate with a given dollar amount.²⁴ Numbers also criminalize conduct in many industrial or workplace safety contexts. Two older (but still valid) examples will suffice. In New York, “ice cutters” are required to erect fences around their cuttings until the ice reaches three inches in thickness.²⁵ In California, it is a

20. 10 U.S.C. § 911(a)(2) (2012).

21. See William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 872 (2001) (“[E]veryone violates the traffic laws. As anyone who drives on American highways knows, speed limits are not limits at all: they ordinarily represent the minimum speed for reasonable drivers, not the maximum.”); see also JOHN BOYLE ET AL., U.S. DEP’T OF TRANSP., NATIONAL SURVEY OF SPEEDING AND OTHER UNSAFE DRIVING ACTIVITIES: DRIVER ATTITUDES & BEHAVIORS 57 (1998) available at <http://ntl.bts.gov/lib/25000/25900/25979/DOT-HS-808-749.pdf> (giving data).

22. See, e.g., 42 U.S.C.A. § 7412 (West 2006); CAL. HEALTH & SAFETY CODE ANN. § 42400 (Deering 2012). This may be a more complicated case, though, if any pollution is considered not risk but actual harm. One area where abstract endangerment seems most apposite is nuclear radiation, though—there, the “pollution” is always creating at most a risk.

23. See 12 U.S.C. §§ 1851–52 (2012). This is backed by criminal penalties. See 12 U.S.C. § 1847 (2012).

24. See, e.g., MASS. GEN. LAWS ANN. ch. 55, § 9 (2013) (“No individual, candidate or political committee, or person acting on behalf of said individual, candidate, or political committee, shall accept a contribution of money from any one person or political committee if the aggregate amount contributed in a calendar year exceeds \$50”); IDAHO CODE ANN. § 67-6610(a) (2006) (“[A]ggregate contributions for a primary election or a general election made by a corporation, political committee, other recognized legal entity or an individual, other than the candidate, to a candidate for the state legislature, and political committees organized on the candidate’s behalf shall be limited to an amount not to exceed one thousand dollars (\$1,000) for the primary election and an amount not to exceed one thousand dollars (\$1,000) for the general election.”); LA. REV. STAT. ANN. § 18:1505.2 (2004 & Supp. 2014) (\$80,000); N.Y. ELEC. LAW § 14-116 (McKinney 2009) (\$5,000); OKLA. STAT. ANN. tit. 21, § 187.1 (West 2002 & Supp. 2012) (\$5,000).

25. N.Y. GEN. BUS. LAW § 265 (McKinney 2012).

crime to place any equipment or material within six feet of an overhead electric wire.²⁶

D. Possession

While numerical rules make up perhaps the greatest quantity of abstract endangerment statutes, the type that has the most important effects in practice are crimes of *possession*. As Dubber writes, possession is the “paradigmatic abstract endangerment offense,” in that it punishes “the relation between an object and its possessor, often without regard to the possessor’s awareness of the particular nature of the object, solely on the ground that this relation has been declared ‘unlawful’ by the state.”²⁷ Possession, on its own, creates no results, and at most gives rise to risk, but such risk is double-layered—first, risk that the object will be used or implemented, and second, risk that the implementation will actually cause harm. Neither are necessary occurrences, and therefore possession offenses are always abstract.

There are many famous examples of these crimes. Possession of narcotics and other “dangerous” substances is the most prevalent, but so too is the possession of “dangerous” instrumentalities, such as guns.²⁸ In other statutes, ostensibly innocent instruments can also give rise to liability when they are possessed under certain circumstances, such as possession of “burglary tools” or “instruments of crime.”²⁹ Another interesting family of statutes prohibits possession of open alcohol containers in a vehicle.³⁰ Not only must the driver refrain from possessing it, so too must passengers, and it goes without saying that possession does not require consumption.

E. Zone/Area

Another important category of abstract endangerment offenses are *zone or area* restrictions. These often overlap with earlier categories, in that the conduct specified is frequently possession, and the “zone” is usually defined in terms of a numerical radius, but this need not be the case. With these statutes, it is implied that engaging in the given conduct in a certain area creates a heightened risk

26. CAL. PENAL CODE ANN. § 385 (Deering 2008 & Supp. 2014).

27. Markus Dirk Dubber, *A Political Theory of Criminal Law: Autonomy and the Legitimacy of State Punishment*, U. TORONTO FAC. L. REV. 1, 38 (2004), available at <http://ssrn.com/abstract=529522>.

28. See DUBBER, *supra* note 7, at 32–33.

29. See, e.g., MISS. CODE ANN. § 97-17-35 (2006); N.M. STAT. ANN. § 30-16-5 (2011); OHIO REV. CODE ANN. § 2923.24 (West 2006); 18 PA. CONS. STAT. § 907 (2012); MODEL PENAL CODE § 5.06 (1985). Even when these statutes have a mens rea requirement of “criminal intent,” though, they still push the threshold for liability further from the actual crime than do the requirements of attempt. See DUBBER, *supra* note 7, at 21.

30. See, e.g., GA. CODE ANN. § 40-6-253 (2011); IOWA CODE § 321.284A (2009 & Supp. 2011); NEV. REV. STAT. § 484B.150 (2011); N.J. STAT. ANN. § 39:4-51a (West 2012); N.M. STAT. ANN. § 66-8-138 (2011 & Supp. 2011); OHIO REV. CODE ANN. § 4301.62 (West 2008); OR. REV. STAT. § 811.170 (2011); VA. CODE ANN. § 18.2-323.1 (2009).

(or a risk that would otherwise not even exist) because of some special features of the delineated zone, but this is not always true.

A famous example of a zone offense is the Gun Free School Zones Act.³¹ While this law is circumspect in its exceptions³²—themselves aimed at reducing overinclusiveness—it is still an abstract endangerment statute. Risk of gun violence is not automatically, in all cases, created by the possession of a gun on school grounds. Another example of zone-based endangerment crimes is that of electioneering at a polling place.³³ Here, it is expected that the close proximity of the political activity to the ballot-place creates a risk of voter intimidation, but the 150-foot boundary is arbitrary. Of course, some actions outside of the boundary are intimidating, and some inside of it will often be ignored (depending upon the type of the solicitation and the disposition of the voter). Both of these zone-based endangerment crimes aim to protect something of value inside the zone: children and the election process, respectively.

Zone-based endangerment crimes can also serve paternalistic ends by keeping people out of areas that contain threats to their own interests. Mandatory evacuations (and their criminal enforcement provisions) can be thought of in this way: even though no risk of harm may ever come to fruition for a certain citizen (say, through his special precautions or location), the state promulgates a blanket order believing that remaining in place is, on the whole, risky conduct.³⁴

F. Active, Particular Conduct

For lack of a better label, the final category to discuss is that of active, particular conduct. These constitute the large number of ad hoc statutes that are not based on

31. 18 U.S.C. § 922 (2012).

32. § 922(q)(2)(B): “Subparagraph (A) does not apply to the possession of a firearm—

- (i) on private property not part of school grounds;
- (ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;
- (iii) that is—
 - (I) not loaded; and
 - (II) in a locked container, or a locked firearms rack that is on a motor vehicle;
- (iv) by an individual for use in a program approved by a school in the school zone;
- (v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;
- (vi) by a law enforcement officer acting in his or her official capacity; or
- (vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.”

33. *See, e.g.*, TEX. ELEC. CODE ANN. § 61.003 (West 2010 & Supp. 2013).

34. *See, e.g.*, KAN. STAT. ANN. § 48-925 (2005 & Supp. 2011); KY. REV. STAT. ANN. § 39A.100 (LexisNexis 1999 & Supp. 2011); OR. REV. STAT. § 401.309 (2011).

any quantitative limits, and require something more than the passive “conduct” of possession. Interestingly, many of these statutes lack a mens rea element entirely. In each, the legislative reasoning seems to be that the conduct is so risky in so many cases (and perhaps that the conduct is basically valueless), that wholesale prohibition is desirable.³⁵

These types of statutes abound. In California and Washington, it is a crime to allow someone to body surf behind a boat while holding the stern board (“teak surfing”), primarily because of the risk of carbon dioxide poisoning.³⁶ In Michigan, it is a crime to swim beyond the buoys at a swimming area, and jumping from bridges into rivers is also prohibited.³⁷ Certain types of bungee jumping are also banned in some states.³⁸ The American Law Institute’s description of California laws (still current today) provides a good smattering of examples.³⁹

G. Summary

Having surveyed the multiple examples of abstract endangerment statutes in the contemporary criminal law, we can be satisfied that our theoretical discussion is no mere academic debate, nor is it isolated to some rare outlier cases—this type of legislative reasoning has had⁴⁰ and continues to have an enormous impact upon the criminal law and American life more generally.⁴¹ Moreover, it is prevalent across

35. Some of these laws prohibit conduct that is so egregious that it can be understood to create risk in every case. These are not properly considered alongside the others. However, where to draw this line is very difficult. While accepting that such a category does indeed exist (say, when one shoots into a crowd), I assume that in most cases precautions and extenuating circumstance can eliminate risk, and so long as risk creation is not a textual *element* of the crime, the statute is one of abstract endangerment.

36. See CAL. HARB. & NAV. CODE § 681 (Deering 1996 & Supp. 2014); WASH. REV. CODE § 79A.60.660 (2010).

37. MICH. COMP. LAWS ANN. § 324.80198b (West 2009) (swimming beyond the buoys); MICH. COMP. LAWS ANN. § 750.493e (West 2004) (jumping from bridges).

38. See, e.g., ARK. CODE ANN. § 23-89-512 (2004) (prohibiting certain type of bungee jumping); S.C. CODE ANN. § 52-19-30 (1992 & Supp. 2011) (prohibiting certain type of bungee jumping).

39. MODEL PENAL CODE § 211.2 cmt. 1 (1980) (“Beyond that, the states maintained a host of quite particularistic statutes dealing with risk to personal safety. Such laws are still found in jurisdictions that have not enacted comprehensive revisions of their penal codes California has provisions against throwing objects at common carriers, dropping objects from toll bridges . . . shooting at an unoccupied building, shooting at an aircraft, placing an obstruction on railway tracks, tampering with a railroad safety appliance, and throwing substances likely to injure persons on public highways.”).

40. One historical example is notable enough to mention—this is the most momentous abstract endangerment project ever undertaken: prohibition. Prohibition was a paradigmatic example of abstract endangerment because a multiplicity of basic social harms (public disorder, domestic violence, poverty, etc.) were traced further and further back to a single alleged wellspring (alcohol), and *this* itself was criminalized. A great breadth of risk was targeted for eradication, and in doing so great depth of causality was posited. Prohibition represents the logical extreme of abstract endangerment, and it is raised here to reinforce the concreteness and the implications of our discussion: much is at stake. For a relatively recent study of the era, see generally MICHAEL A. LERNER, DRY MANHATTAN: PROHIBITION IN NEW YORK CITY (2007).

41. Not only do these laws exist “on the books,” so too do they have effect in practice. A small sample of statistics will prove illustrative of this point. In 2008, New York’s notorious “Rockefeller Drug Laws” led to the indictment of 14,029 people of felony drug possession. See N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., NEW YORK STATE FELONY DRUG ARREST, INDICTMENT AND COMMITMENT TRENDS 1973–2008, at 10 (2010),

different types of conduct, protecting a vast and diverse number of societal interests.

II. THEORETICAL RESPONSES

It is now appropriate to return to the theoretical problem raised earlier: How can the non-risk-creating cases (the overinclusiveness) be tolerated when all conduct that is criminalized must be *wrongful*? In what follows, various scholarly responses to this problem will be laid out, concluding with a summary of the main parameters of the debate.

A. *Prima Facie Duty to Obey the Law*

The first response—and the simplest—is that all violations of any promulgated law are inherently “wrongful,” as there is a prima facie duty to obey the law absent considerations of its content. This has come up mostly in the context of the debate surrounding *mala prohibita*.

Where there is scholarly consensus against any prima facie duty to obey law more generally,⁴² in the specific context of *mala prohibita* crimes (those that are not inherently wrongful) Stuart Green attempts to posit a theory in which these

available at http://www.criminaljustice.ny.gov/pio/annualreport/baseline_trends_report.pdf. Misdemeanor arrests would total 100,771 for the same type of offenses in 2011. *See* N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., ADULT ARRESTS: 2003–2012, *available at* <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYorkState.pdf>. At the Federal level, drug and weapon possession would account for 49,470 arrests in 2009, the vast majority of which would result in prosecution (76.7% for drugs, 69% for weapons). *See* MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2009, at 7 (2011), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf>. Returning to New York, there were 6,218 felony arrests in that state during 2011 for the crime of driving while intoxicated. *See* N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., ADULT ARRESTS: 2003–2012, *supra* note 37. New Jersey reported in late 2012 that 13,967 sex offenders were registered under its “Megan’s Law,” and that prosecutors decided to notify communities in over 6,000 of those cases. *See* ADMIN. OFFICE OF THE COURTS, CRIMINAL PRACTICE DIV., REPORT ON IMPLEMENTATION OF MEGAN’S LAW 12, 17 (2012). It is also a common myth that statutory rape, while “technically” illegal, is rarely prosecuted. This doesn’t bare out in reality, though. For example, even in the small state of Connecticut, almost 350 cases of statutory rape were prosecuted from 1999–2002. *See* SANDRA NORMAN-EADY, STATUTORY RAPE ARRESTS AND PROSECUTIONS 2 (2003), *available at* <http://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-R-0375.htm>. The speeding laws are more obvious: in 2008, of the 17,151 people stopped by police in the United States while driving their vehicles, 50.2% of those were stopped for speeding, with 1.3% arrested and 68.6% ticketed. *See* CHRISTINE EITH & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 9 (2011), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpp08.pdf>. One final example is that of environmental emission limits: in 1997, the DOJ reported that 446 defendants (some corporate, some individual) were charged with an environmental crime, and 47% of these were for unlawful emissions. *See* JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL ENFORCEMENT OF ENVIRONMENTAL LAWS, 1997, at 1 (1999), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/feel97.pdf>. Hopefully, this cross section of some abstract endangerment crimes will show that the many statutes “on the books” have not fallen into desuetude.

42. The various essays in the following compilation are illustrative of this. *See generally* THE DUTY TO OBEY THE LAW (William A. Edmundson ed., 1999). Green admits that this is the “modern view.” Stuart P. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1581 (1997).

laws give rise to moral obligations.⁴³ He applies the idea of promissory obligation and the duty of fair play (limited to the context of regulatory crimes), and notes that many regulated industry actors have either explicitly or impliedly agreed to be bound by statutes in the area, and that violating them is also a form of “cheating” that allows for unfair advantages to be obtained.⁴⁴ Green’s theory is only applicable to those statutes that apply in an industry setting, though: he admits that when speaking of individuals, and not companies, the theory makes less sense.⁴⁵ The idea of an individual cheating against an agreement to cooperate *does* seem to apply in the context of “coordination problems,”⁴⁶ but criminal statutes responding to these problems are different from those that address endangerment.⁴⁷

43. See Stuart P. Green, *Cheating*, 23 LAW & PHIL. 137 (2004).

44. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, *supra* note 42, at 1586–90. This article is about “pure” *mala prohibita*, and not the “hybrids” involved in abstract endangerment offenses, but his theory should work equally well to justify the pure *mala prohibita* instantiations of the hybrid offenses (which is the question at issue in this article).

45. *Id.* at 1591. When at last confronted with the problem head on, from the standpoint of an individual who had not granted any sort of implied consent by participating in a regulated market, he writes:

There are two ways in which the answer to this question could be in the affirmative. One possibility is that such acts involve other, previously unidentified forms of moral wrongdoing, such as lying or stealing. Another possibility is that disobedience itself is an irreducible form of wrongdoing. Unless one of these statements is true, one would have to conclude that such noncheating, nonpromise-breaking acts of disobedience would not be morally wrongful.

Id.

46. “Coordination problems” arise when, because of the nature of individuals and their decision-making, no common solution to given dilemmas will arise without the imposition of authority—importantly, though, in the case of coordination problems the interests of every party within the collective are entirely in alignment, with no one harmed by any choice for one solution or the other. For a more detailed description see Leslie Green, *Law, Coordination, and the Common Good*, 3 OXFORD J. LEGAL STUD. 299 (1983). The most common example is the choice about which side of the road one must drive on: we need an authority to choose *one* side, even though that choice is arbitrary.

47. Simester and Von Hirsch refer to this justification, and attempt to rationalize abstract endangerment laws as “scheme[s] of reciprocal protection,” thus creating a duty to obey from the attendant benefit. “All participants have an interest in the efficacy of the scheme, and that interest grounds responsibility in each of us for its compliance. The regime is a package deal,” they write. SIMESTER & VON HIRSCH, *supra* note 4, at 78. “Once the standard rule is in place, it is typically no longer fully safe, even for [superior people]” to violate these statutes, and “no man is an island . . . [because] others predictably and permissibly rely on those terms . . .” *Id.*

It is precisely because violations of the coordination problem carry such problematic social harms *in all cases*, though, that they ought not be seen as *mala prohibita* or endangerment offenses at all. An error of conflation has occurred, and one that has been noticed by others. HUSAK, *supra* note 5, at 113–14; *see also* DUFF, *supra* note 5, at 172. First, coordination offenses have an all or nothing character, whereas abstract endangerment offenses exist along a spectrum. Driving at a certain speed may or may not create risk (and in different magnitudes) according to a whole host of different factors, while driving on the correct side of the road admits of only one safe possibility. Some tokens of coordination crime types seem very much like the overinclusive tokens of abstract endangerment statutes: say, the driver who drives on the wrong side of the road in the middle of the night. It is not that the driver is “creating no risk of harm” in his specific circumstances, though, but that his circumstances exhibit a rare case where coordination itself is no longer necessary—namely, because the “social” context of the driver’s conduct has ceased. Only in these rare, outlier cases of an isolated individual do coordination offenses seem problematic to the retributivist. Second, many of the kinds of abstract endangerment offenses we discussed do not seem to be about

In sum, scholarly discussions about the prima facie duty to obey the law are inapposite—they mostly deal with companies and not individuals, and when they do it is in the context of coordination problems, which are distinct from the subject matter at issue. Beyond this, the creation of a prima facie duty to obey cannot solve the wrongfulness problem in any meaningful way—it simply collapses the category of wrongfulness into that of legality, draining it of any usefulness as a requirement for criminalization.

B. Legality & Efficiency, Therefore Deference

Another theme running throughout the discussion, especially the writings of A.P. Simester and Andrew von Hirsch, involves consequentialist reasoning. These observations flow from the problems of implementation that attend to the alternative to abstract endangerment: concrete endangerment. Concrete endangerment statutes include an “endangerment” element, and therefore a fact finder must conclude that risk was actually created in order for liability to attach.

Ex ante, concrete endangerment means that no clear rule is promulgated in advance, and that the individual alone must gauge his conduct according to standards of reasonable risk creation. This is problematic mostly from the standpoint of the citizen.⁴⁸ It vitiates “legality,” which demands prospective and clear notice of what is required to avoid liability; legality, by stabilizing expectations, allows for a more robust preservation of individual freedom of action.⁴⁹ This efficiency and uncertainty for the citizen is also mirrored by the position of the State—any attempt to accurately specify areas of prohibited risk for all types of people in all types of circumstances would be tremendously burdensome.⁵⁰ Overall, a system of concrete endangerment seems to give such primacy to backward looking retribution that it forgoes the social good that would come from increased deterrence of the generally risky conduct.⁵¹

After the fact, too, there will be inefficiencies and problems (mostly for the state). Ex post, it means that all violations must be determined by costly and

the “reciprocal” protection that is characteristic of a coordination scheme. Take the case of New York’s “three inches of ice” requirement, or California’s “six feet from a wire” law—these protect only *us* from negligent companies, and no reciprocity is involved.

48. As Simester and Von Hirsch argue, citizens “would constantly be required to exercise discretionary judgment about whether the conditions of endangerment are present.” SIMESTER & VON HIRSCH, *supra* note 4, at 77.

49. Ashworth writes, “[Overinclusion is] the price of giving clear guidance to citizens about the limits of permissible behavior and thereby leaving more space for individual autonomy to flourish.” Ashworth & Zedner, *supra* note 4, at 561.

50. It would be “uneconomic to frame and administer laws that take into account the particularities of every person’s situation.” SIMESTER & VON HIRSCH, *supra* note 4, at 46.

51. ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 38 (6th ed. 2009); SIMESTER & VON HIRSCH, *supra* note 4, at 77 (“[A] pre-emptive, abstract-endangerment rule safeguards against concrete endangerment.”).

somewhat subjective litigation over the creation of the risk.⁵² Moreover, concrete endangerment's comportment with retributivism relies on a rather naïve trust in the workings of the jury and judge.⁵³ This is not only inefficient, then, but is unfair in its inconsistency.

Overall, these arguments are very persuasive. They touch upon a certain common sense attraction to the clear, easy tool of abstract endangerment. They are surely right—it is more efficient and more practicable. Still, though, these arguments suffer from the weakness that they do little to comfort the non-risk-creating violator. They have not taken retributivism head on. As R.A. Duff notes, “These attractions . . . do not speak to their *justice*.”⁵⁴

C. Knowledge & Arrogance, Therefore Deference

This challenge is taken up by Duff himself. He argues that violations, even when they create no risk of harm, can⁵⁵ be wrong as forms of civic arrogance.⁵⁶ At least with respect to certain abstract endangerment cases (like speeding, drunk driving, and sexual consent) this is the case because the claim to “epistemic privilege”⁵⁷ or superiority—that is, sufficient awareness of one's circumstances such that one can accurately claim to create no risk of harm—is always an inherently dubious one. Human fallibility in certain areas of self-assessment militates against allowing it:

[The violator] arrogantly claims to be an exception to that rule. He claims that he can trust himself, and that we should therefore trust him, to make such judgments; but he has no adequate basis for that claim. He might know that his conduct is safe—that it does not endanger the relevant interests: but he does not *know* that he knows this, and therefore cannot justifiably claim to be sure that he is not endangering any such interest.⁵⁸

If the problem is skewed self-assessment in the first place, then we cannot rely on a self-assessment to determine when the rule against self-assessment should or should not apply: precisely because of drunkenness, the drunk can never really know when he is drunk.

In later discussions, Duff expands his argument to cover even those cases in

52. SIMESTER & VON HIRSCH, *supra* note 4, at 77 (“Proof that conduct was in fact dangerous may impose unworkable difficulties and costs of law enforcement, and may require monitoring mechanisms that are themselves unduly intrusive.”).

53. Duff cautions “unless we can rely on some quite specific shared understandings of what counts as ‘unreasonable risk’, . . . courts will apply not the polity's shared standards, but the individual standards of each (set of) fact finder(s)” DUFF, *supra* note 5, at 167.

54. *Id.* at 167 (emphasis added).

55. Duff is measured in his defense, and says that categorical approval or disapproval is not in order, and that we must look at each statute case by case. He only offers a defense for *some* of these statutes. *Id.* at 169–70.

56. R.A. Duff, *Crime, Prohibition, and Punishment*, 19 J. APPLIED PHIL. 97, 104 (2002).

57. Husak coined this term. See HUSAK, *supra* note 5, at 155–56.

58. Duff, *supra* note 56, at 104.

which he stipulates that the self-assessment is accurate.⁵⁹ Even when not fallible, we owe it to “assure” others that we are not creating risk, and only obedience to the rule can do that.⁶⁰ Finally, claims of epistemic superiority translate into claims of civic superiority and “denial[s] of civic fellowship”; “it is a matter of civic duty to accept this modest burden,” as one should understand that, on the whole, allowing for exemptions to the law will undermine the system.⁶¹

D. Critiques

So far we have focused on scholarly responses that are sympathetic to abstract endangerment, but it must be noted that there are some commentators who have spoken out against this widely used criminal tool. Because this Article is a response to the concept’s defenders, however, less needs to be said here.

Earliest of these critics is Joel Feinberg, who calls these crimes “aggregative harms” that rely upon “statistical reasoning” for their justification.⁶² Feinberg seems mostly concerned with the possibility of a loose nexus between prohibited activity and creation of risk: blanket prohibition of guns and alcohol is illegitimate despite statistics showing reduction of harm.⁶³

Next are Larry Alexander and Kimberly Ferzan.⁶⁴ A “proxy crime,” they argue, is not justifiable so as to “ease the prosecutorial burden” or as a “prediction of what [an actor] might do.” Only when the statutes “give actors significant epistemic guidance . . . in circumstances where agents are particularly prone to rationality errors” are they acceptable (and even then, Alexander and Ferzan would provide a panoply of defenses).⁶⁵ Thus, they accept the case of sexual consent laws, but reject speed limits.⁶⁶

Finally, we turn to Douglas Husak. Most problematic for him is that the logic of abstract endangerment provides no lower limit as to when “enough” cases of risk creation are sufficient to trigger the justification of blanket prohibition. Husak suggests that the argument must be for something greater than half—the “majori-

59. DUFF, *supra* note 5, at 170.

60. *Id.*

61. *Id.* at 171–72. By the end, Duff’s answer looks suspiciously similar to Simester and Von Hirsch’s resort to coordination problems. We cannot be arrogant, but must recognize our “fellow citizenship (and . . . the dangers of allowing exemptions to the law).” *Id.* at 171. The legal system as a whole, it appears, is a solution to a coordination problem, and *any* legal disobedience undermines this. This echoes Finnis’s understanding of the nature of law. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 232–33 (1980).

62. FEINBERG, *supra* note 5, at 193.

63. *Id.* at 194, 201. While the “direct appeal to statistical harm is indeed a forceful one,” Feinberg argues that “it cannot always carry the day”—not unless “a genuine *causal* connection” is made between dangerousness and the trait that is the object of the statistics. *Id.* at 200–01 (emphasis added). Legislatures should “legislate directly against that trait, no matter which group it is found in.” *Id.* at 201.

64. See generally ALEXANDER & FERZAN, *supra* note 5.

65. *Id.* at 310. Thus, they accept Duff’s case of sexual consent laws. On their defenses (such as mistake of law), see *id.* at 312.

66. *Id.* at 305–06, 310.

tarian condition”—and that it therefore tethers wrongfulness onto some sort of empirical statistic: “[But a] person’s act is not wrongful,” Husak replies, “because it tokens a type that is wrongful when performed by the majority of agents.”⁶⁷ In the end, he accepts that some abstract endangerment offenses are justifiable, but only in limited cases.⁶⁸

E. The Centrality of Legislative Superiority

Having surveyed the debate about the “wrongfulness” of overinclusive abstract endangerment statutes, it is clear that the central question regards two actors or decision-makers—the individual and the legislature—and their respective abilities to accurately assess risk. This assessment requires qualities like knowledge and will, and the absence of these can lead to a solid case for deference to another decision-maker. Thus, the efficiency and deterrence response emphasizes that it is more practical or efficient to use a legislative rule (abstract endangerment) as opposed to a standard for individuals to judge (concrete endangerment). Moreover, this is expected, on the whole, to lead to a net reduction in risk—the “greater good” trumps the concern about the individual violators who might make the statute seem overinclusive.⁶⁹ Similarly, the retributivist response answers the overinclusion problem by positing that even those non-risk-creating violators act wrongfully (arrogantly and selfishly) in that they fail to defer to the collective deliberative body that governs all.⁷⁰

What is apparent is that both of these arguments, while perhaps not explicitly, must *implicitly* posit a legislature that is itself superior to the individual in risk-assessment.

For deterrence or efficiency theorists, if it is expected that deference to the legislature will, on the whole, maximize utility in a way impossible through private ordering, this in turn presumes a somewhat capable political body. Surely Simester and Von Hirsch would agree that concrete endangerment statutes would be preferable if they actually resulted in less aggregate risk:⁷¹ if individuals (or the “market”) could reduce the harm more effectively than a legislative rule, this would be better. It is assumed that the legislative rule will be *more* effective. The second concern—that the State cannot practically or efficiently lay down rules that

67. HUSAK, *supra* note 5, at 111.

68. This would be where it is impossible to reliably distinguish between what he calls the “epistemically privileged” (those who violate but create no risk of harm, and actually have the information to make such an assessment) and the “epistemically fortunate” (those who violate but create no risk of harm, but who lack adequate information and are just lucky). *Id.* at 155–56.

69. Some aspects of what we call the “efficiency” or “deterrent” response, though, do not seem to depend on legislative superiority. The legality principle, for example, seems more like one of the values that attends the solution of a coordination problem than a risk-reduction measure. In any event, the major thrust of the deterrence argument is that the rule *actually does* reduce risk more effectively.

70. *See supra* Part C.

71. *See* SIMESTER & VON HIRSCH, *supra* note 4.

fit all types of people in all circumstances—is similarly valid only if the promulgated rule actually works (it may be cheap or efficient to create a simple blanket rule, reducing legislative transaction costs, but if the rule is ill-advised then net efficiency is not achieved). Finally, the concern about concrete endangerment’s costly and inefficient need for ex post litigation only seems problematic if these costs would not themselves be trumped by any costs imposed by a bad rule. If individuals on the whole assessed (and therefore reduced) risk more accurately than the rule, the annoyances of litigation would be acceptable. Overall, the background presumption is that the legislative rule will be better at reducing risk, and this in turn implies a legislature that is somehow superior in knowledge, will, or other qualities.

Legislative superiority is even more obviously a requirement for the retributive response noted above. For retributivists, the overinclusion of these statutes can be justified because even those who create no risk of harm are still independently blameworthy: they selfishly and arrogantly deny equality and friendship with their fellow citizens and snub their noses at the rules promulgated by their elected representatives.⁷² This is true mostly because there are many cases where they cannot really be sure that they have enough information to assess their own risk, and even when they do, it is their civic duty to assure others of their non-risky behavior (through obedience). This clearly depends upon an asymmetry between the decision-making ability of the individual vis-à-vis the legislature: the former is worse than the latter, and therefore disobedience wrongfully replaces the valuable cooperative scheme with one of individual judgment that is often fallible. It is only because the legislative deliberation (and the final rule) is expected to be superior that obedience to it either (1) supplements deficient information, or (2) assures others of safe conduct.

Although the superiority of the legislature is central to their arguments, the major theoretical responses to abstract endangerment statutes leave out any elaborate discussions of the legislature. Instead, their discussion focuses excessively on one party (the individual and his deficiencies), and practically ignores the other.⁷³ It only seems “arrogant” or “inefficient” to allow individuals to assess cases of risk, however, when there is the presumed alternative of an objective, wise legislature that is the basis of comparison. How correct is this assumption? Don’t problems of knowledge and will also inhere in legislative decision-making? In what follows, I will discuss this assumption in depth, helping to bring the other party in the equation back into the debate. This will flesh out the skepticism first voiced by Husak (but unelaborated): “[W]hy should we concede that the legislature is better suited than the defendant to draw lines in the right place?”⁷⁴

72. See *supra* Part C.

73. See *supra* Parts B–D.

74. HUSAK, *supra* note 5, at 110. One notable commentator not discussed above is Bernard Harcourt. He does not directly address abstract endangerment statutes in his work on the “actuarial” model of policing, but his

III. LEGISLATIVE RISK ASSESSMENT

While an empirical comparison of the two assessment alternatives—individual or legislative—is impossible, the following discussion will show that there is considerable cause to doubt that the legislature is an appropriate body for deference. At the very least, it should muddy the assumption that has worked in the background of these debates. Once the problems of legislative risk assessment are brought to the fore, it becomes clear that the defenders of these statutes cannot rely solely on an assumption of epistemic superiority: they bear a far greater justificatory burden, and must demonstrate that superiority not generally but in the specific case.

The somewhat deficient consideration of the legislature in abstract endangerment debates actually mirrors a larger problem in the state of punishment theory that has only recently begun to be rectified. It is too often the case that theorists assessing criminalization look only at the moral aspects of conduct that is criminalized, and from the standpoint of the individual. This ignores the fact that punishment is really a political institution. As George Fletcher writes, “[p]unishing is an exercise of state power, and therefore the justification for punishing a particular individual must be located in a general theory of the state and its purposes.”⁷⁵ Because of this, Guyora Binder concludes that punishment’s legitimacy is inextricably bound up with “the legitimacy of the *norm* it enforces and of the *institutions* promulgating the norm”⁷⁶ These, too, must be scrutinized along with the position of the individual citizen. At the norm-creation stage, this means that the legislature must act according to certain standards of deliberation. Both utilitarians and retributivists expect legislative deliberations aimed at maximizing their respective values (utility and autonomy) will be done in good faith, and with the given principles constantly at the forefront guiding decision-making.

Given this requirement, we can return to the topic of abstract endangerment. When a legislature deliberates about rules governing risk in the criminal law, does it act in good faith, using existing information and evidence to make a determination with respect to the specific subject at issue: existence and magnitude of risk? In cases of abstract endangerment the legislative task at hand is the assessment of risk, and not its toleration. While the ultimate stipulation of a proxy for risk will always involve the latter move, it necessarily depends upon the former—we can

research is certainly informative to anyone interested in the use of statistics in the criminal law. See BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2007).

75. GEORGE P. FLETCHER, 1 *THE GRAMMAR OF CRIMINAL LAW* 181 (2007); see also Guyora Binder, *Punishment Theory: Moral or Political?*, 5 *BUFF. CRIM. L. REV.* 321, 322, 333 (2002) (“[I]t makes more sense to think of the justification of punishment as a problem of political theory than as a problem of ethics,” and punishment’s legitimacy is inextricably bound up with “the legitimacy of the norm it enforces and of the institutions promulgating the norm.”).

76. Binder, *supra* note 75, at 322 (emphasis added).

only make a choice about what risk we will tolerate if we know what is or is not risky. Moreover, it seems that this prior, descriptive (or empirical) endeavor does most of the justificatory heavy lifting. Defenses of abstract endangerment wager all on the factual claim, and for this reason it is risk *assessment* (and not toleration) that will be discussed below. As will be shown, the assumption that a legislature is a wise, dispassionate, and expert assessor of risk does not bear itself out in reality—at least not in a great many cases.

A. *Public Choice: Economic Theory of Legislation & the Influences of Money*

One variant of public choice theory—the economic theory of legislation—posits that all legislative deliberation is really a farce, and that legislators act according to their self-interest (in re-election), with this in turn reflecting constituents' financial self-interest.⁷⁷ Without subscribing to this as a unifying theory of politics or legislation, surely there are lessons to be learned for legislatures' assessments of risk in the criminal law.

Take the example of the speed limit. Even here, economic influences can impact the rule and skew it from an accurate assessment of risk. The phenomenon of the “speed trap” is well known: a speed limit abruptly decreases (often with little notice), but road conditions remain unchanged.⁷⁸ The change is not motivated by any new assessment of risk, but is instead done in an effort to raise municipal funding through ticketing.⁷⁹ One Ohio community became famous for issuing over 10,000 traffic violations in a single month, even though its population was only 9,000.⁸⁰ In Randolph, Missouri, a town of forty-seven people managed to procure nearly three-quarters of its \$270,000 annual budget entirely from traffic citations.⁸¹ With both of these cases, the motivation for the crime is not risk, but the shifting of economic burdens from the residents to hapless passers-by.

Other cases of economic influence on legislation are more complex. Public choice theory describes a phenomenon known as “Bootleggers and Baptists.”⁸² This is when the “bad guys” hope to benefit from continued illegality, or from a strategic manipulation of regulations, so as to financially benefit themselves.⁸³ This most often occurs when there is the creation of a black market, as with the

77. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 22 (1991).

78. See Margaret Raymond, *Penumbra Crimes*, 39 AM. CRIM. L. REV. 1395, 1407 (2002).

79. Here, public choice would assume that this effort in turn is in the self-interest of the legislature, in that it balances the budget by shifting costs to those who are travelling through, and not the local residents who are aware of the trap.

80. Noel Brinkerhoff, *America's Worst Speed Trap: 10,000 Tickets in 4 Weeks*, ALLGOV.COM (Aug. 5, 2009), <http://www.allgov.com/news/unusual-news/americas-worst-speed-trap-10000-tickets-in-4-weeks?news=839326>.

81. Karen Aho, *The Town that Lived Off Speeding Tickets*, INSURANCE.COM (Oct. 19, 2011), <http://www.insurance.com/auto-insurance/saving-money/auto-speeding-ticket-laws.html>.

82. See Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, 7 REG. 12, 13 (1983).

83. *Id.* at 13–14.

historical case of the Bootleggers and the great abstract endangerment project of Prohibition: there, continued prohibition was supported even by those who took a morally opposite stance (the bootleggers), all because they reaped the monetary rewards of the illegality. Thus, Bootleggers and Baptists worked in tandem to skew legislative deliberation away from risk.⁸⁴

This also takes place in non-black-market contexts. First, consider environmental regulations. Paradoxically, firms that would seem to be negatively impacted by a stricter regulation nevertheless can, and will, advocate for it out of economic self-interest. This is because regulations can be strategically manipulated, and can lead to “raising rivals’ relative cost, expanding one’s market through subsidies and regulation, or . . . impos[ing] barriers to entry by competitors.”⁸⁵ A similar phenomenon was noticed with the federal securities laws of the 1930s (themselves aimed at risk): “market actors will seek to criminalize their competitors.”⁸⁶ A more modern example involves the recent marijuana de-criminalization debate: in what may have been an effort to maintain supremacy over the domain of mind-altering substances, a political action committee representing the beer and alcohol industry donated money in opposition to de-criminalization.⁸⁷ Needless to say, all this takes us far afield indeed from the assessment of risk.

B. Ideology & Moralism

Private financial interests are not the only extraneous considerations that will enter into legislative deliberation—so too do moralism and ideology.⁸⁸ Ideology can be seen as a larger worldview, with moralism but a subset of it (but also its most prevalent instantiation). While morals and worldviews are clearly not “extraneous” when legislative debate takes place along avowedly moral parameters, they clearly *are* extraneous when the proffered subject of the discussion is risk

84. *See id.*

85. Todd J. Zywicki, *Baptists? The Political Economy of Political Environmental Interest Groups* 1 (George Mason Univ. Sch. of Law, Law & Economics Working Paper Series, Paper No. 02-23, 2002), available at <http://ssrn.com/abstract=334341>; *see also* Yandle, *supra* note 82, at 12–13; *see* BRUCE YANDLE, *THE POLITICAL LIMITS OF ENVIRONMENTAL REGULATION: TRACKING THE UNICORN* (1989); BRUCE YANDLE, *COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT: CREATING WEALTH IN HUMMINGBIRD ECONOMIES* (1997); Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 856–74 (1999); James M. Buchanan & Gordon Tullock, *Polluters’ Profits and Political Response: Direct Controls Versus Taxes*, 66 AM. ECON. REV. 139 (1976).

86. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 553 (2001); *see also* Paul G. Mahoney, *The Political Economy of the Securities Act of 1933*, 30 J. LEGAL STUD. 1 (2001).

87. J. Patrick Coolican, *Beer Lobby Gives \$10,000 To “No” on Proposition 19 Pot Legalization*, LAWEEKLY (Sept. 21, 2010, 7:25 AM), http://blogs.laweekly.com/informer/2010/09/beer_lobby_gives_10000_to_no_o.php.

88. *See* FARBER & FRICKEY, *supra* note 77, at 30 (noting the limits of the economic model). Clearly ideology is also a factor. Public choice literature has long taken note of the influence of ideology in legislation, and accepts that the purely economic theory does not seem to hold water—values and ideas can often trump pecuniary interests of constituents, and these will be conveyed to legislators. *Id.*

assessment,⁸⁹ and all too often the ideological or moral commitments of constituents and legislators are consciously or subconsciously imported into this context. Michael Tonry takes note of a “moralistic excess predicated on religious certainties,” itself a driving force in criminalization: many risk-prevention measures (such as the “wars” on drugs and crime, or Megan’s Law) “are at least as important for the moral messages they express . . . as for any effects they might have.”⁹⁰

Take one of our canonical examples of abstract endangerment: sexual consent laws. At the surface, the delineation between prohibited and permissible ages is about capacity—it is really a quasi-scientific or psychological question regarding the development of the human mind. Still, it is obvious that moralistic conceptions of chastity have also played an important role in setting these thresholds. Many scholars have noted that while the age thresholds have steadily risen, the justifications have changed depending upon the period: the first period of reform (1890s–1910s) was led by social and religious crusaders hoping to preserve purity and punish promiscuity, the second (1970s–80s) by feminists aiming to liberate youthful sex through the introduction of age-span requirements, and the final period (1990s) by conservative politicians and welfare reformists concerned with societal harm resulting from overpopulation and poverty (purportedly aggravated by pre-teen pregnancy).⁹¹ What is obvious is that risk of immaturity is never at the forefront—instead, it is morality (both puritanical and liberationist), and ultimately some amorphous risk of harm to taxpayers.

Another case where morality and ideology infiltrate risk assessments is our familiar case of the speed limit. Recent scholarship has shown that the variation in speed limits across the states has a highly statistically significant relationship with the majority political ideology of that state: Republican states favor higher limits, Democratic states lower.⁹² Not just endangerment or road conditions, but also a view of the “role of government” (or the desire for more “freedom”), can determine these rules.

C. System-based Interest Groups

Sometimes groups that pressure legislators are not representative of ideological or moral positions, nor are they neatly understood as having financial motivations: these groups are interested in the system, mostly because of their profession or vocation. System-based interest groups can be more disruptive than others,

89. As mentioned above, we are not talking about the *toleration* of risk—here, to be sure, morals and ideology would not be extraneous.

90. MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* 117 (2011).

91. See Kay L. Levine, *The External Evolution of Criminal Law*, 45 *AM. CRIM. L. REV.* 1039, 1060–62 (2008); Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 *J. CRIM. L. & CRIMINOLOGY* 15, 31–32 (1994); Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, 22 *YALE J.L. & FEMINISM* 279, 288–91 (2010).

92. Daniel Albalade & Germà Bel, *Speed Limit Laws in America: Economics, Politics and Geography* (Research Inst. of Applied Econ., Working Paper No. 2010/02), available at http://www.ub.edu/irea/working_papers/2010/201002.pdf.

because in many cases their self-interest will appear to legislators and to the public as “expertise” or “experience.”

One study has taken note of the frequency and extent of interactions that the American Bar Association has had with Congress in enacting its crime policies,⁹³ while another lists twelve repeat players at the national level.⁹⁴ Very prominent are police groups, and thus Jonathan Simon concludes that one aspect of the “War on Crime” is that police take on a “privileged status” with respect to inputs for legislation.⁹⁵ The Violent Crime Control and Law Enforcement Act of 1994 is his example.⁹⁶ Clearly, police and lawyers will have a systemic interest in appearing to be needed, and overinclusive statutes help to enable that goal. William Stuntz goes so far as to elevate these groups as *the* most influential in crime legislation: “for most of criminal law, the effect of private interest groups is small: the most important interest groups are usually other government actors, chiefly police and prosecutors.”⁹⁷

Whether or not this is true, their influence is still very great. We need look no further than the ubiquitous gun and drug possession offenses that make up the “War on Crime.” If we peek behind the rhetoric, we find that police and prison-based interest groups took an active part in advocating for the expansion or preservation of these endangerment statutes.⁹⁸ Even today, a brief look at recent lobbying disclosures of the National Fraternal Order of the Police reveals a preoccupation with possession offenses.⁹⁹ More direct is a statement made by a private prison company in a disclosure to the Securities and Exchange Commission about “risks” to its business: “The demand for our facilities and services could be adversely affected by . . . any changes with respect to drugs and controlled substances or illegal immigration”¹⁰⁰

93. See A.P. Melone, *Criminal Code Reform and the Interest Group Politics of the American Bar Association*, in *POLITICS OF CRIME AND CRIMINAL JUSTICE* 37 (Erika S. Fairchild & Vincent J. Webb eds., 1985).

94. See Albert P. Melone & Robert Slagter, *Interest Group Politics and the Reform of the Federal Criminal Code*, in *THE POLITICAL SCIENCE OF CRIMINAL JUSTICE* 41, 49–53 (Stuart Nagel et al. eds., 1983); see also RANDALL G. SHELDEN, CENTER ON JUV. & CRIM. JUST., *INTEREST GROUPS AND CRIMINAL JUSTICE POLICY* 3–4 (2011), available at http://www.cjcr.org/uploads/cjcr/documents/interest_groups_and_criminal_justice_policy.pdf (describing California-based interest groups, many of which are police or corrections officer lobbies).

95. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 97 (2007).

96. *Id.* at 103.

97. Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 86, at 529; *id.* at 553 (“But in criminal law, interest groups tend to operate only on one side. A variety of groups may seek to broaden criminal liability, to add new crimes or expand the reach of old ones. But organized interest group pressure to *narrow* criminal liability is rare. The result is that interest group pressure only aggravates the tendency toward ever broader liability rules.”).

98. SIMON, *supra* note 95, at 96–97.

99. *Bills Lobbied, 2008*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/clientbills.php?id=D000027848&year=2008> (last visited Feb. 22, 2014) (listing bills lobbied in House and Senate including Saving Kids from Dangerous Drug Act of 2008 and Crack-Cocaine Equitable Sentencing Act of 2007).

100. CORRECTIONS CORP. OF AM., FORM 10-K 28 (2013); see generally Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197 (2008) (discussing effects of public and private sector prison-related lobbying with respect to the substantive criminal law).

D. Subconscious Bias

Even when legislatures are deliberating in good faith, though, there is still a problem that subconscious biases and prejudices will also skew their assessment of risks. Obviously, this has played itself out mostly with respect to classes of people based upon immutable characteristics, and, in the context of abstract endangerment statutes, with possession offenses. Certain substances become associated with certain types of individuals, and the subconscious causal nexus to dangerousness is purportedly established—at least in one’s mind.

The scholarship of Michael Tonry is most salient here. Tonry shows that various facially neutral endangerment laws were motivated by subconscious bias against certain minorities.¹⁰¹ Earliest was our paradigm of abstract endangerment: Prohibition. Here the debate was, on the surface, couched in terms of the “dangers of alcohol,” but bubbling beneath were “social and status conflicts between Protestant descendants of earlier waves of British and German settlers, anxious to protect their newly acquired social status and political power, and newly arrived Irish Catholics.”¹⁰² Knowing stereotypes, the result seems obvious: “Many of the earlier settlers were teetotalers; many of the bibulous Irish were enthusiastic drinkers.”¹⁰³ Thus, “dangerousness” served as a proxy for ethnic bias and the desire to preserve social standing, even if those in power did not consciously intend it.¹⁰⁴

The same pattern of risk masking bias also played itself out with the prohibition of heroin (Chinese immigrants) and cocaine (African-Americans) in 1914,¹⁰⁵ and marijuana (Mexican migrant laborers) in 1937.¹⁰⁶ Later, when the “War on Drugs” was launched, a similar attempt at subversion took place by the older, alcohol-using generation against the younger, psychedelic-using generation—all this was ostensibly in order to “protect young people” and ensure “safety and responsibility,” but underneath was “protection of [established] views of the world and of the places in it of [established] people.”¹⁰⁷ This is no revisionist history—the criminalizers may not have always known what they were doing, but sometimes they actually admitted it. On review of a habeas petition for a state opium law, a federal district judge noted candidly,

On the other hand, the use of opium, otherwise than as this act allows, as a medicine, has but little, if any, place in the experience or habits of the people of this country, save among a few aliens. Smoking opium is not *our* vice, and

101. TONRY, *supra* note 90, 79–80.

102. *Id.* at 102.

103. *Id.*

104. *Id.* (The crusades against alcohol were sometimes “unacknowledged or unrecognized by the prohibitionists themselves”).

105. *Id.*

106. *Id.*; see also DUBBER, *supra* note 7, at 111.

107. TONRY, *supra* note 90, at 103.

therefore it may be that this legislation proceeds more from a desire to vex and annoy the “Heathen Chinese” in this respect, than to protect the people from the evil habit.¹⁰⁸

The real goal is not to protect from risk, but to reduce annoyance from outsiders.

Most egregiously, the famous sentencing disparity between crack and powder cocaine has long been thought to reflect subconscious bias against African Americans, who are known to more frequently use the latter—still, the disparity is talked of in terms of “dangerousness” by those in the legislature.¹⁰⁹ As the Sentencing Commission reported in 1995, “Congress had concluded that crack cocaine was more dangerous than powder cocaine and . . . this conclusion drove its decision to treat crack cocaine differently from powder cocaine.”¹¹⁰ An American Civil Liberties Union report notes, though, “[f]ew hearings were held in the House on the enhanced penalties for crack offenders, and the Senate conducted only a single hearing on the 100:1 ratio, which only lasted a few hours.”¹¹¹ For twenty-four years, the 100:1 disparity persisted, purportedly based on this justification of risk.¹¹² After being directed by Congress in the Violent Crime Control and Law Enforcement Act of 1994 to study the potentially greater harm of crack, the Commission returned with a proposal in 1995 to eliminate the disparity entirely based upon the evidence it had obtained, but Congress rejected this change.¹¹³ In 2008, though, it was finally reduced to 18:1 but not eliminated.¹¹⁴

This back-and-forth between expert commission and political legislature illustrates well that accurate and dispassionate assessments of risk, themselves based on scientific methods, are not enough to be determinative, and can often be overborne by extraneous factors. If Tonry and others are correct, this is subconscious racism—statistical discrimination that attributes group traits to the individuals within that group (the same reasoning lamented by Feinberg).¹¹⁵

108. *Ex parte Yung Jon*, 28 F. 308, 311–12 (D. Or. 1886) (emphasis added).

109. See TONRY, *supra* note 90, at 79.

110. UNITED STATES SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 117 (1995), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/index.cfm.

111. AM. CIVIL LIBERTIES UNION, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 2 (2006), available at http://www.aclu.org/pdfs/drugpolicy/cracksinsystem_20061025.pdf.

112. TONRY, *supra* note 90, at 79.

113. UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1 (1997), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/19970429_RtC_Cocaine_Sentencing_Policy.PDF.

114. Pub. L. No. 111-220, 124 Stat. 2372; TONRY, *supra* note 90, at 79.

115. TONRY, *supra* note 90, at 83.

E. Fear & Vengeance

Perhaps the greatest cause of legislative miscalculations of risk in the criminal law is fear and the constellation of emotions that surround it. Primarily, these include (1) fear of becoming a future victim, and (2) vindication or vengeance on behalf of past victims. These emotions can be directly felt by legislators, or exerted as pressure upon them (also, exploited by them), but in any case they will have effects.

Fear is obviously an important human emotion, but in most cases it works to defeat rational decision-making. The same is true of vengeance. Simon writes of a “unifying framework of ‘fearing crime,’”¹¹⁶ and Tonry of “paranoia.”¹¹⁷ David Garland echoes these sentiments, stressing the emotional tone surrounding discussions of crime, with the theoretical rise of retributivism and expressivism in academic circles mirroring or facilitating a similar change in practice.¹¹⁸ Fear has emerged “as a prominent cultural theme,” and people often believe that crime is getting worse even absent statistics confirming such an assumption.¹¹⁹ Of course, legislators and other political actors cannot afford to ignore this phenomenon, and the law has come to reflect it:

This sense of a fearful, angry public has had a large impact upon the style and content of policy making The background affect of policy is now more frequently a collective anger and a righteous demand for retribution The emotional temperature of policy-making has shifted from cool to hot.¹²⁰

While we would hope that rationality would determine assessments of risk, clearly emotions can often carry the day.

Along with this character of the emotive inputs of criminal legislation, we should add the rise of and presence of the idea of the “victim.” The “victim’s rights” movement has succeeded in reorienting the criminal law (and its perception) from being the representative of the “public interest” to the representative of the criminal victim; while victims are not named parties to a criminal litigation, their absence ends there.¹²¹ Criminal laws are now named after victims—think of “Megan’s Law” or the “Brady Bill.”¹²² Simon goes so far as to say that the crime victim is now the “idealized subject of legislation,” the paradigmatic citizen in need of representation and action by the legislature.¹²³ “To the extent that activist

116. SIMON, *supra* note 95, at 77.

117. TONRY, *supra* note 90, at 128.

118. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 8–9 (2001).

119. *Id.* at 10.

120. *Id.* at 10–11.

121. *Id.* at 11 (describing the shift from the public to the victim: “The symbolic figure of the victim has taken on a life of its own”); *see also* DUBBER, *supra* note 7, at 173 (describing the success of movement).

122. N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 2005); Pub. L. No. 103-159, 107 Stat. 1536 (1993).

123. SIMON, *supra* note 95, at 75–89.

victims define the victim subject position more generally, lawmaking will systematically favor vengeance and ritualized rage over crime prevention and fear reduction,” Simon writes.¹²⁴

Deliberation is skewed, and legislative outputs are designed to respond to or gratify the fear and vindictiveness that pervades the climate of opinion—not to accurately assess and respond to risk. Faced with the overall powerlessness to eradicate crime or even make a major impact in lowering rates,¹²⁵ the easiest response by legislatures is to “act out.” This reaction “abandons reasoned, instrumental action and retreats into an *expressive* mode . . .—a mode that is concerned not so much with controlling crime as with expressing the anger and outrage that crime provokes.”¹²⁶ It is hastily conceived and executed, often in the wake of sensationalistic cases that have garnered public attention (think of the Newtown massacre), and is aimed at giving a false sense of security—“the very fact of acting providing its own form of relief and gratification.”¹²⁷ These are mere “symbolic” actions,¹²⁸ the “political uses of danger.”¹²⁹

Of course, the alternatives of either doing nothing or appearing “soft on crime” are political suicide. Political actors are “faced with the immediate pressures of public outrage, media criticism, and electoral challenges,” and the fear and vindictiveness noted above has but one valence: increased criminalization, increased penalties.¹³⁰ We could add to these observations Stuntz’s theory about the “pathological politics” of American criminal law.¹³¹ Legislators are incentivized to take symbolic popular stands that they might know are ineffective, and they hope to be viewed as upholding law and order against the purportedly permissive procedural innovations of the Supreme Court.¹³²

One example serves to illustrate well how fear and victimhood can dominate legislative deliberation purportedly about the assessment of risk: Mothers Against Drunk Driving (“MADD”) and their campaign to raise the drinking age. This case makes it clear that all of the phenomena described above are easily transposed to unintentional, “nonviolent” crimes aimed at increasing safety. Interestingly, it was less than a decade before the passage of the National Minimum Drinking Age

124. *Id.* at 106.

125. GARLAND, *supra* note 118, at 109–10.

126. *Id.* at 110.

127. *Id.* at 132–33 (calling this “expressive, cathartic actions,” reactive to sensationalistic outlier cases); *see generally* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999) (describing how public perception of risk can be aggravated by an increased focus on the given risk, the mere fact of its discussion, or persistence in public debate lending more plausibility to its occurrence or salience).

128. Crime legislation is a “symbolic way to signal to particular constituents . . .” SIMON, *supra* note 95, at 77.

129. GARLAND, *supra* note 118, at 135 (quoting Mary Douglas).

130. *Id.* at 134; *see also id.* at n.75 (noting that after Senator Al D’Amato conceded that his proposals would have little practical effect, he replied “But it does bring about a sense that we are serious”).

131. *See* Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 86, at 529.

132. *Id.* at 531–32.

Act that many states had *lowered* their minimum ages, mostly because an entire generation of “underage” young men was drafted into service during the Vietnam War.¹³³ In 1980, however, a woman named Candy Lightner lost her child to a drunk driver and founded MADD.¹³⁴ She began to vigorously advocate for change in the nation’s overall alcohol policy, including an increase of the drinking age from eighteen to twenty-one, and did so by appealing to herself and others as victims—both as the symbols of righteous anger, and as cautionary tales of what might befall others.¹³⁵ Within two years, a Presidential Commission was formed, and within only two more the law had been passed.¹³⁶

A few highlights reveal the connection between this emotively charged victim’s group and the character of the deliberation that ensued. Although statistics played an important role in the debate,¹³⁷ they were statistics wielded in the hands of victims, and emotion was always at the forefront. Statistics merely justified pre-existing rage, and seemed more like post-hoc rationalizations of an already pre-determined position—a position that itself was the result of emotion. The bill’s sponsor, Senator Lautenberg, stated the following in the senate hearings:

Those who support this bill are not high-paid lobbyists; they do not know all the tricks of the trade or the mysteries of the Senate rules. But they do know the pain of losing a child—a daughter or a son, or a niece or a nephew—to this senseless practice. They come to Washington not asking us the impossible, not asking us to bring back their children, but to help another mother or father avoid the same tragedy. We owe them a hearing and we owe them a bill.¹³⁸

One member of the House would ask prior to voting, “[h]ow do the mothers feel?”¹³⁹ When Reagan finally did sign it into law, Candy Lightner was in

133. Mary Pat Treuthart, *Lowering the Bar: Rethinking Underage Drinking*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 303, 308 (2006).

134. Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 BUFF. L. REV. 1, 13–14 (2010).

135. See, e.g., Treuthart, *supra* note 133, at 308–09; Christopher Calvert Johnson, *The Minimum Age to Possess Alcohol in South Carolina: Are State Statutes Prohibiting Individuals Eighteen to Twenty Years Old from Possessing Alcohol Unconstitutional?*, 4 CHARLESTON L. REV. 813, 816 (2010); Margie Bonnett Sellinger, *Already the Conscience of a Nation, Candy Lightner Prods Congress into Action Against Drunk Drivers*, PEOPLE (July 9, 1984, 1:00 AM), <http://www.people.com/people/article/0,,20088253,00.html>; Stephen Gettinger, *Congress Clears Drunk Driving Legislation*, CQ WEEKLY (June 30, 1984), <http://library.cqpress.com/cqweekly/document.php?id=wr098403007&type=hitlist&num=0>.

136. Exec. Order No. 12,358, 47 Fed. Reg. 16,311 (Apr. 16, 1982); 23 U.S.C. § 158 (2012).

137. Treuthart, *supra* note 133, at 311–12 (“The heart-wrenching narratives from the family members of drunk driving victims and the traffic-fatality statistics, limited though they might have been, ultimately held sway over federal lawmakers, resulting in passage of the bill.”).

138. *Examining the Tragedy of Alcohol-Related Auto Fatalities and Whether the Answer to This Problem Is to Increase the Minimum Drinking Age to 21 Years of Age: Hearing Before the Subcomm. on Alcoholism and Drug Abuse of the S. Comm. on Labor and Human Resources*, 98th Cong. 19–20 (1984) (statement of Sen. Frank R. Lautenberg).

139. Lynn Smith, *MADD at 20: Still A Force For Change*, L.A. TIMES, Apr. 2, 2000, <http://articles.latimes.com/2000/apr/02/news/cl-15045>.

attendance, and she pinned a MADD symbol on his blazer.¹⁴⁰ When the law was challenged in *South Dakota v. Dole*, Lautenberg and MADD jointly filed an amicus brief.¹⁴¹ This victim's group was instrumental in creating the impetus for the law, defining the terms of its deliberation, and justifying the end product.

Pain of loss, feeling of the mothers—these were what allowed for such a monumental shift to occur in only four years of lobbying, but what do they have to do with *risk*? One would hardly expect the same result were a group called the “Statisticians of Vehicular Risk” equally at the forefront. Of course, MADD also had statistics, but the numbers took on an exaggerated significance when wielded by victims, and became instruments or rationalizations of emotions rather than the primary motivators for action.

A nearly identical series of events led to the passage of the various state and federal “Megan’s Laws.” In late July, 1994, a previously convicted sex offender raped and killed seven-year-old Megan Kanka.¹⁴² Soon after, her parents began zealously advocating for a community notification law in New Jersey, appealing to their victimhood and the fear of hidden recidivist sex offenders secreted throughout America’s communities.¹⁴³ What can best be described as a “moral panic” ensued, and by the end of that same year both New Jersey and the United States Congress had passed community notification laws (and both unanimously).¹⁴⁴ Legislative debate primarily focused on sensationalistic recountings of anecdotal evidence, appealing both to sympathy for the victims (especially Megan herself) and to a dehumanization of the offenders.¹⁴⁵ Senators Feinstein and Gramm, for example, told long and detailed stories depicting the murders and molestations that took place in various cases,¹⁴⁶ while the offenders were described frequently as

140. Steven R. Weisman, *Reagan Signs Law Linking Federal Aid to Drinking Age*, N.Y. TIMES, July 18, 1984, <http://www.nytimes.com/1984/07/18/us/reagan-signs-law-linking-federal-aid-to-drinking-age.html>.

141. See Brief of Amici Curiae U.S. Senator Frank R. Lautenberg and Mothers Against Drunk Driving in Support of Respondent, *South Dakota v. Dole*, 483 U.S. 203 (1987) (No. 86-260).

142. John J. Goldman, *Sex Offender Guilty of Killing Megan Kanka*, L.A. TIMES, May 31, 1997, http://articles.latimes.com/1997-05-31/news/mn-64201_1_megan-kanka-killed.

143. Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 315 (2001).

144. *Id.* at 315–16.

145. *Id.* at 331, 339 (giving thorough description of debates).

146. Other cases were described in far greater detail. Senator Feinstein of California made particular use of this rhetorical tool. See 142 CONG. REC. 18764 (1996) (Statement of Sen. Feinstein) (“Many people throughout our Nation have come to know about this 12-year-old girl from Petaluma, CA, a small, close-knit community north of San Francisco,” who was “kidnapped from her bedroom on October 1, 1993, by a bearded, knife-wielding man who tied her up and threatened to slit her friends’ throats as her mother slept in a nearby room . . . [He] fled with Polly,” whose body was later “dumped beside a highway. Next to Polly’s body, police found a specialty condom identical to one [he] had bought at the adult novelty store Seductions a day or two before the kidnapping, according to the store’s former owner. Polly’s clothes were pushed up to her waist.”); *id.* (describing Amber Hagerman’s case: “Amber Hagerman, was visiting her grandparents on January 13 of this year, the day she was kidnapped. An eyewitness later told police that he saw a white or Hispanic man pull the child from her pink tricycle and drag her into a black pickup truck. She was found dead 4 days later—her clothes stolen from her lifeless little body—in a creek behind an apartment complex.”); see also 142 CONG. REC. 7747 (1996) (statement

“beasts,” “monsters,” and “predators.”¹⁴⁷

Like with the drinking age, statistics were also employed in the deliberation over Megan’s Law, but here, too, they were used merely as rationalizations of pre-conceived emotive conclusions. Take, for example, this statement by a Congressman:

There is no lesbian, no heterosexual woman who prays [sic] on children. We cannot even find statistical data. This is basically a male homosexual problem, and the child molesters of the heterosexual variety are usually drunken disgusting stepfathers who are dismissing their wife and going after her daughter from another marriage. Take out that chunk and take out the numbers and prorate these cohorts, since there is only about three-quarters of a percent of lesbians . . . and 1 percent male homosexuals, and the rate of male pedophilia, homosexual pedophilia one makes is 11 to 1 over heterosexual pedophiles.¹⁴⁸

Of course, other statistics about high rates of recidivism were undoubtedly true,¹⁴⁹ but again these seemed more like post-hoc rationalizations than the original motivations for the legislation. Tellingly, these statistics about recidivism were still extraneous to the question at issue—the risk-reduction efficacy of community notification. Numbers that were at most tangentially relevant were dredged up in support of a pre-determined outcome.

F. “Common Sense” & the Absence of Expertise

Our next topic of discussion is not really an extraneous influence on legislative deliberation, but is one of its inherent features: the lay character of the institution. Garland laments the politicization and popularization of criminal legislation—what was once the province of penological experts and professionals, itself backed by research and data, has been turned over to the politicians and the parties, and data is scorned for common sense attitudes and arguments.¹⁵⁰

of Sen. Gramm) (“Three years ago, a 7-year-old girl named Ashley Estell went to a park in Plano, TX, which is an upscale suburb of Dallas, one of the finest communities in America, and certainly we would assume one of the safest. She went to the park that day to watch her brother play soccer. Ashley’s brother played in the second of three games to be played that day and while her parents stayed to watch the final game, Ashley went to play on a swing set. Although there were 2,000 people in the park that day, this little girl was, nevertheless, abducted, raped and brutally murdered.”).

147. See e.g., 142 CONG. REC. 10312 (1996) (statement of Rep. Schumer) (declaring that “we need to do all we can to stop these predators”); 142 CONG. REC. 7747–48 (1996) (statement of Sen. Gramm); 140 CONG. REC. 22700 (1994) (statement of Sen. Lautenberg); 140 CONG. REC. 21448 (1994) (statement of Sen. Dole) (warning of “the beast who committed this horrendous crime”); 142 CONG. REC. 18766 (1996) (statement of Sen. Hutchison); 143 CONG. REC. H7628 (1996) (statement of Rep. McCollum) (“[S]exual predators are remarkably clever and persistently transient.”).

148. 142 CONG. REC. 17114 (1996) (statement of Rep. Dornan).

149. Filler, *supra* note 143, at 335–38.

150. GARLAND, *supra* note 118, at 13, 112 (describing how crime legislation “ceased to be a bipartisan matter that can be devolved to professional experts . . .”); *id.* at 112–13 (“Common sense attitudes are often

While one could argue that in many cases the definition and sentencing of crime *is* properly a political and populist endeavor, with abstract endangerment the issue is not the political morality of the community, but the assessment of risk—here, politicization, populism, and the disdain for expert data is extremely problematic. Take the recent debate about control of assault weapons: the early New York law following the Newtown Massacre is instructive. Spurred on by the tragedy, it took the state legislature and governor only four weeks to draft a new assault weapons bill in which the definition of the item was broadened.¹⁵¹ Some of the items in the definition are somewhat dubious, and reflect more of a “common sense” approach than any evidentiary basis. For example, now a weapon that has a “pistol grip” or a “thumbhole stock” will be considered an assault weapon.¹⁵² Such cosmetic features of a weapon relate not to its dangerousness, but instead its intuitive appeal to the public’s conception of what a military-grade firearm looks like.

While the New York law was likely tracking the now-expired Federal definition, that definition has since been called into question by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”).¹⁵³ Specifically with respect to pistol grips, the ATF reported the following only six months before the New York Law (July 2012):

In discussing the forward pistol grip, the 2011 report noted that the feature allowed for “continued accuracy during sustained shooting over long periods of time.” The report concluded that this was not particularly advantageous for recognized sporting purposes based upon the fact that, in such activities, a few well-aimed shots are paramount. However, there is a convincing argument that this feature is generally recognized as particularly suitable for or readily adaptable to sporting purposes because it permits accuracy and maneuverability even for activities such as bird hunting or skeet shooting. The forward pistol grip permits a shooter to grip a shotgun at a more natural angle in that the shooter is not required to rotate the forward hand and cradle the firearm during firing. This ergonomic design provides for added comfort and more accurate engagement of fast-moving targets. Therefore, the 2011 report will be amended and this feature removed as a nonsporting feature.¹⁵⁴

An expert agency took time, considered arguments, and assessed the risk that a pistol grip would be attractive to potential mass murderers. In the end, it changed

characterized by an ‘absolutist’ conception based on front-stage appearances and ideological shibboleths The fact that there are serious incompatibilities between these ‘absolute’ imperatives, and that each shining public principle is routinely undermined by the backstage realities . . . means that the public is easily scandalized by many of the decisions that are routinely made.”)

151. S.B. 2230, 2013 Reg. Sess. (N.Y. 2013).

152. *Id.*

153. BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, U.S. DEP’T OF JUSTICE, REPORT ON THE IMPORTABILITY OF CERTAIN SHOTGUNS (2012), available at <http://www.atf.gov/files/firearms/industry/july-2012-importability-of-certain-shotguns.pdf>.

154. *Id.* at 3.

its initial conclusion in order to reflect that a great many tokens of this type of possession will create no risk of harm: valid sporting purpose makes it unlikely that this is solely (or mostly) a facilitator of murderers. All this was ignored by the New York legislature, which, in a hurried response to a catastrophic event, uncritically imported a common sense definition that had since been abandoned by an expert agency.

G. Legislative Free Rein

So far, all that has been said about the politics of abstract endangerment legislation is true with respect to all areas of criminal law. However, there is one consideration that counsels in favor of special suspicion when the crime is one of risk and not result. Risk always exists along a continuum—a continuum within which the legislature has *carte blanche* to operate. Unlike clear cases of result-crimes that are *mala in se*, the moral intuitions of the community do not constrain legislative innovations here. While the floor and the ceiling of obviously risky or non-risky conduct will in some sense act as outer limits upon permissible regulation, within these boundaries the choice is arbitrary (at least from the standpoint of a community's "moral" sense of risk). Thus, driving at ten miles per hour is so intuitively non-risky that its prohibition would cause outrage, but the choice between speed limits of fifty-five or sixty-five would provoke no public ire. Where there is no seemingly consequential moral difference is in these intermediate zones, and it is in these zones that abstract endangerment statutes operate—they do not usually deal with obvious cases. Thus, the community accountability features that might operate as a brake in many areas of criminal law are often absent in abstract endangerment crimes. The bad features of public influence are allowed to enter, but its redeeming ones are not.

IV. BURDEN, NOT PRESUMPTION

As the previous Part illustrates, a legislature's epistemic superiority in the assessment of criminal risk should be doubted in many cases. Instead of a deliberation focusing on the assessment of risk, it is often true that extraneous considerations enter in and decide the issue. This Article has highlighted six such influences: money, ideology and moralism, system-based interests, subconscious bias, and fear. Moreover, it has called attention to features of the deliberative body (a democratic legislature) and the subject of deliberation (risk in the criminal law) that especially aggravate these pernicious influences: (1) criminal lawmakers now understand themselves as legislating based on common-sense and not expertise, and (2) risk-debates exist along a continuum, with a vast middle-ground between what is obviously risky or not. This makes it such that the unhealthy aspects of populism (anti-expertise) have effect, but that the beneficial ones (checks against government overreaching) do not, and in turn, this allows for the extraneous influences mentioned to have more influence.

Despite these observations, academic defenses of abstract endangerment statutes implicitly rely on an across-the-board presumption of legislative epistemic superiority—superior with respect to the individual. It is simply assumed that deference will always result in better assessments and therefore better outcomes for the criminal law. While what has been said should not and cannot categorically defeat claims of legislative superiority in all cases—indeed, nothing has been said about why the individual would be better instead—it can and must defeat the categorical presumption that has operated in favor of these statutes. Just as individual risk assessment is fraught with problems, so too is legislative risk assessment—especially in the area of the criminal law.

This means that the only appropriate way to assess abstract endangerment statutes is on a case-by-case basis, with individual and legislative abilities compared in that specific context. No more presumptions should be granted in such a complicated area. A case-by-case approach is preferable because it allows for the nuances of the given subject matter to be explored and accounted for in full. For example, it might be true that in the environmental law context fear has little role in deliberations but that financial influences predominate. All this could be analyzed in depth when making the decision to defer to the legislature, and scholars and commentators would therefore be on firmer footing in advocating for (or against) that choice.

Still, it would not be enough to place the burdens of the defenders and the attackers of these statutes in equipoise, and this is because of a background principle that is always relevant: the idea that criminalization (here, deference to legislature) should be a last resort. As Husak writes, “[t]he criminal law is different and must be evaluated by a higher standard of justification because it burdens interests not implicated when other modes of social control are employed.”¹⁵⁵ In a liberal society there is a presumption of freedom, and therefore state-imposed restrictions must always be rationalized—punitive restrictions, moreover, should be employed only when all else fails.¹⁵⁶ Given all this, critics of abstract endangerment need not demonstrate that individual risk assessment is somehow equal to or better than legislative assessment (and this Article makes no attempt to do so). In debunking the wisdom of the latter, the case for criminalization—for deference to a prohibitory legislative rule—is already defeated.

Defenders of abstract endangerment, then, must (1) replace the presumption of legislative wisdom with which they have hitherto operated in exchange for an affirmative burden, and (2) show that the less restrictive alternative—individual

155. Douglas Husak, *The Criminal Law As Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 234 (2004); see generally Nils Jareborg, *Criminalization As Last Resort (Ultima Ratio)*, 2 OHIO ST. J. CRIM. L. 521 (2004).

156. Feinberg admonishes, “[f]or every criminal prohibition designed to prevent some social evil, there is a range of alternative techniques for achieving, at somewhat less drastic cost, the same purpose.” FEINBERG, *supra* note 5, at 22.

risk assessment through concrete endangerment statutes—is less feasible or beneficial. Far from a presumption, they have a double burden.

CONCLUSION

The overinclusiveness of abstract endangerment statutes has been justified by commentators who undermine the supposed alternative: individual risk assessment through concrete endangerment laws. These defenses, though, leave out a discussion of the other actor that the individual is ultimately compared to: the legislature. Such arguments rely upon an implicit assumption that these bodies are epistemically superior, but this should not be assumed away. Instead, there are a great many factors that counsel caution in deferring to legislative risk assessments. These mostly include extraneous influences that will skew deliberation, but also the nature of the legislature (as “political” and populist) and the subject of that deliberation (risk). Once the conceit of epistemic superiority is shattered, it becomes clear that no presumptions can operate in these debates. Instead, the relative risk-assessing abilities of both individuals and legislatures must be analyzed in the specific context of the conduct at issue. Categorical presumptions should be replaced with case-by-case conclusions, and, because criminal prohibition should always be a last resort, the burden of demonstrating the case for deference to the legislature—for abstract endangerment—lies with those who seek to defend the statutes.