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## From the Legal Literature: Undemocratic Crimes

Francesca Laguardia

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# From the Legal Literature Undemocratic Crimes

Francesca Laguardia\*

## I. INTRODUCTION

Although criminal punishment serves several goals, including crime reduction via deterrence and incapacitation, for the last half century retributivism has taken over criminal justice policy.<sup>1</sup> In essence, retributivism may be described as the theory that punishment is justified, and even necessary, because offenders deserve it.<sup>2</sup> Versions of this theory suggest that it is necessary to cause pain to offenders, in order to equalize offender and victim.<sup>3</sup> This goal of causing pain and satisfying victims (and the public's interest in it) has become so ubiquitous that even prison abolitionists and restorative justice advocates continue to value the goal of punishing offenders.<sup>4</sup>

More contemporary retributivist theorists also emphasize that retributivism can play a limiting role in criminal justice. While retributivism describes a moral duty to punish those who are guilty, it also contains a moral duty never to punish anyone who is innocent.<sup>5</sup> Additionally, as punishment is only justified to the extent that it is

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\*Associate Professor, Justice Studies at Montclair State University in New Jersey. J.D. from New York University School of Law, and Ph.D. from New York University's Institute for Law and Society.

<sup>1</sup>See, e.g., Stephen R. Galoob, *Retributivism and Criminal Procedure*, 20 *NEW CRIM. L. REV.* 465, 466 (2017); Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: from Retribution and Adversarialism to Preventative Justice and Hybrid-Inquisitorialism*, 57 *WM. & MARY L. REV.* 1505, 1509–10 (2015); Sara Steen & Rachel Bandy, *When the Policy Becomes the Problem: Criminal Justice in the New Millennium*, 9 *PUNISHMENT & SOC'Y* 5, 6 (2007); Michael Tonry, *Introduction: Thinking about Punishment*, in *WHY PUNISH? HOW MUCH? A READER ON PUNISHMENT* 3, 6 (Michael Tonry ed., 2011).

<sup>2</sup>R.A. Duff, *Political Retributivism and Legal Moralism*, 1 *VA. J. CRIM. L.* 179, 183 (2012); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 *J. CRIM. L. & CRIMINOLOGY* 1293, 1300 (2006).

<sup>3</sup>Benjamin L. Apt, *Do We Know How to Punish?*, 19 *NEW CRIM. L. REV.* 437, 440 (2016); Ristophe, *supra* note 2, at 1299.

<sup>4</sup>Francesca Laguardia, *From the Legal Literature: Disentangling Prison and Punishment*, 56 *CRIM. L. BULL.* 754 (2020) (reviewing Rafi Reznik, *Retributive Abolitionism* 24 *BERKELEY J. CRIM. L.* 123, 130–32 (2019)).

<sup>5</sup>Michael T. Cahill, *Retributive Justice in the Real World*, 85 *WASH. U. L. REV.* 815, 848 (2007); Brittany L. Deitch, *Retributivist Theories' Conjoined Twins Problems*, 87 *U. CIN. L. REV.* 139, 141 (2018).

deserved, punishments must be *only* as harsh as is deserved, setting an upper limit to the amount of punishment that is morally justified.<sup>6</sup>

But this need for perfect proportionality leads to difficult (perhaps unresolvable) problems for punishment theorists.<sup>7</sup> Theorists disagree on questions of how much punishment is deserved, on what bases should levels of punishment be based, and how we are to measure such an issue.<sup>8</sup> And who should decide how much punishment is deserved? Public opinion, while often blamed for increasingly harsh criminal sentences, appears to be generally misunderstood and not nearly as supportive of these policies as policy makers seem to assume.<sup>9</sup>

In *Undemocratic Crimes*, Professor Paul Robinson and Jonathan Wilt make an argument that public opinions about criminal justice have been misrepresented and misunderstood.<sup>10</sup> They suggest that public opinion is not only a good source of guidelines for retributivist punishment policies, but that following public opinion is necessary to respect democratic principles.<sup>11</sup> Their argument is discussed below.

## II. PAUL H. ROBINSON AND JONATHAN C. WILT, *UNDEMOCRATIC CRIMES*

Robinson and Wilt begin with an argument as to why crimes and punishment should reflect public opinion.<sup>12</sup> They argue that writing criminal law and punishment to reflect public opinion is both morally superior, as it is more democratic, and that it is likely to be more successful in regards to the standard accepted purposes of criminal punishment.<sup>13</sup> From the perspective of democracy and democratic values, they argue that a truly democratic criminal law should be “the People’s law,” and therefore it should “reflect[] the People’s

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<sup>6</sup>Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 Nw. U. L. REV. 843, 869 (2002); Deitch, *supra* note 5, 169; R. Antony Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1, 7 (1996).

<sup>7</sup>Galoob, *supra* note 1, at 466.

<sup>8</sup>Galoob, *supra* note 1, at 466; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 15 (1988).

<sup>9</sup>Alice Ristrophe, *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 2–3 (2000).

<sup>10</sup>Paul H. Robinson & Jonathan C. Wilt, *Undemocratic Crimes*, 2022 U. ILL. L. REV. 485, 487.

<sup>11</sup>Robinson & Wilt, *supra* note 10, at 486–87.

<sup>12</sup>Robinson & Wilt, *supra* note 10, at 488–99.

<sup>13</sup>Robinson & Wilt, *supra* note 10, at 488–99.

values.”<sup>14</sup> For this, Robinson and Wilt rely heavily on Joshua Kleinfeld, who argues that true democracy requires that the public see itself in, and as authors of, the law.<sup>15</sup>

More specifically, in order for the public to be actual “authors of the law,” public views have to be reflected in the law—meaning the actual opinions of the public on specific legal questions must be represented.<sup>16</sup> Academic and bureaucratic interpretations of public responses to vague principles do not suffice to create a law that is truly democratic.<sup>17</sup> Instead, the details of criminal law and sentencing should reflect public choices.<sup>18</sup> Which actions are criminal, the seriousness of those crimes, and the level of punishment associated with the crimes should all be determined by public opinion, according to Robinson and Wilt.<sup>19</sup> They argue that the public does have exceedingly nuanced views about comparative harm and criminalization, and that, therefore, determinations by elites based on broad principles are inadequate to reflect the public’s more specific views.<sup>20</sup>

This nuance of public opinion is where the real meat of Robinson’s and Wilt’s argument lies. Robinson and Wilt offer a series of examples of circumstances where public opinion conflicts with criminal law.<sup>21</sup> Most of these examples do show the type of nuance they describe.<sup>22</sup> For instance, public opinion diverges regarding three strikes statutes in criminal punishment, whereby repeat offenders receive harsher penalties as they continue to offend, potentially resulting in extremely harsh sentences for low level crimes.<sup>23</sup> Robinson and Wilt refer to social scientific studies that go beyond public opinion polling, to ask the public how they would sentence specific offenders.<sup>24</sup> They find that, while the public generally approves of these statutes when discussing them broadly, when given specific vignettes they do not sentence in accordance with those principles.<sup>25</sup> As a specific example they point to an Ohio survey that showed public support for Ohio’s three strikes law at a level of 88%

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<sup>14</sup>Robinson & Wilt, *supra* note 10, at 488–89.

<sup>15</sup>Robinson & Wilt, *supra* note 10, at 488–89 (citing Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 Nw. U. L. Rev. 1455 (2017)).

<sup>16</sup>Robinson & Wilt, *supra* note 10, at 490–91.

<sup>17</sup>Robinson & Wilt, *supra* note 10, at 490–91.

<sup>18</sup>Robinson & Wilt, *supra* note 10, at 490–91.

<sup>19</sup>Robinson & Wilt, *supra* note 10, at 490–91.

<sup>20</sup>Robinson & Wilt, *supra* note 10, at 490–91.

<sup>21</sup>Robinson & Wilt, *supra* note 10, at 499–508.

<sup>22</sup>Robinson & Wilt, *supra* note 10, at 499–508.

<sup>23</sup>Robinson & Wilt, *supra* note 10, at 501.

<sup>24</sup>Robinson & Wilt, *supra* note 10, at 501.

<sup>25</sup>Robinson & Wilt, *supra* note 10, at 501.

approval, but fewer than 17% of that group chose to sentence an offender in accordance with the statute when given a vignette describing the type of case that might result in a harsh third sentence.<sup>26</sup> It is this level of detail in public opinion that Robinson and Wilt desire to see reflected in criminal laws. This is because, they suggest, these studies prove that reported views on broad principles of criminal punishment do not reflect “people’s *true* justice judgments.”<sup>27</sup>

Robinson and Wilt offer several other areas where studies using criminal justice vignettes have shown a significantly more nuanced view among the public than is offered in the criminal law.<sup>28</sup> Such vignettes, they report, have shown that people in general favor dramatically lowered sentences for juvenile offenders, in contrast to nationwide legal acceptance of adult prosecution of juveniles.<sup>29</sup> Studies presenting vignettes also suggest that the public would punish felony murder at a lower level than manslaughter, if given the opportunity.<sup>30</sup> As much as 88% of the public may be opposed to the existence of most strict liability crimes.<sup>31</sup> While most states have significantly reduced the parameters of the insanity defense, between 66% and 92% of lay people would prefer a more robust defense.<sup>32</sup> And the public in general seems to deem most drug offenses to be a level of criminal harm most similar to property offenses; this contradicts federal and state sentences that bring some drug offenses to a sentence that approaches the sentence for homicide.<sup>33</sup> And the former examples are only the specific issues to which Robinson and Wilt offer significant description; they further list the following examples of areas in which public opinion significantly differs from criminal law:

[G]rading complicity equal to the principle offense, imputing recklessness to the voluntarily intoxicated, forbidding individualization of the reasonable person standard, forbidding a legal ignorance defense, refusing to recognize a broad lesser-evils defense, the use of the substantial step test for attempt liability, and treating proximate cause and self-defense in all-or-nothing terms, rather than along graded continuums.<sup>34</sup>

The logical next question is why these disconnects occur between

<sup>26</sup>Robinson & Wilt, *supra* note 10, at 501.

<sup>27</sup>Robinson & Wilt, *supra* note 10, at 502.

<sup>28</sup>Robinson & Wilt, *supra* note 10, at 499–508.

<sup>29</sup>Robinson & Wilt, *supra* note 10, at 503–04.

<sup>30</sup>Robinson & Wilt, *supra* note 10, at 504–05.

<sup>31</sup>Robinson & Wilt, *supra* note 10, at 505–06.

<sup>32</sup>Robinson & Wilt, *supra* note 10, at 500–01.

<sup>33</sup>Robinson & Wilt, *supra* note 10, at 507.

<sup>34</sup>Robinson & Wilt, *supra* note 10, at 508.

ostensibly popular legal policies, or policies ostensibly created in order to satisfy the public, and actual public (dis)approval. Robinson and Wilt offer several possible answers.<sup>35</sup> First, they acknowledge that at times legislators simply may be mistaken.<sup>36</sup> In the cases of three strikes laws and juvenile offender laws, the public appears to be mistaken about its own views and, therefore, offers contradictory answers when asked about specific circumstances as opposed to broad policy questions.<sup>37</sup> The public also tends to believe incorrect myths about the “typical” criminal situation, and might come to broad policy beliefs based on those myths while believing that more realistic situations deserve different treatment (but failing to realize how often they occur).<sup>38</sup> News media misrepresent the frequency of certain types of crime, while entirely ignoring other types of crime, thereby biasing public opinion and encouraging inaccuracies in the assumptions that underlie these opinions.<sup>39</sup>

Improper or mistaken legislative purposes have only increased this problem.<sup>40</sup> First, politicians purposefully encourage public misconceptions as a way to excite voters and increase voter turnout in their favor.<sup>41</sup> Relatedly, legislators in general have latched onto harsh criminal justice policies including three strikes laws and targeted incapacitation.<sup>42</sup> Robinson and Wilt refer to this trend as “prioritizing coercive crime control.”<sup>43</sup>

Additionally, Robinson and Wilt look to bureaucratic, institutional interests and practices as explanations for these disconnects. Due to the prevalence of industry lobbying, special interests and criminal justice professionals are louder voices in discussions over policy, and may drown out the public’s opinion.<sup>44</sup> Special interest groups have clear, instrumental interests in criminal justice policy.<sup>45</sup> As examples, Robinson and Wilt cite laws criminalizing downloading and sharing music,<sup>46</sup> the harshness of copyright laws,<sup>47</sup> and criminal-

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<sup>35</sup>Robinson & Wilt, *supra* note 10, at 508–36.

<sup>36</sup>Robinson & Wilt, *supra* note 10, at 512–17.

<sup>37</sup>Robinson & Wilt, *supra* note 10, at 513–17.

<sup>38</sup>Robinson & Wilt, *supra* note 10, at 512–15.

<sup>39</sup>Robinson & Wilt, *supra* note 10, at 518–19.

<sup>40</sup>Robinson & Wilt, *supra* note 10, at 519, 524–32.

<sup>41</sup>Robinson & Wilt, *supra* note 10, at 519.

<sup>42</sup>Robinson & Wilt, *supra* note 10, at 524–25.

<sup>43</sup>Robinson & Wilt, *supra* note 10, at 524.

<sup>44</sup>Robinson & Wilt, *supra* note 10, at 521.

<sup>45</sup>Robinson & Wilt, *supra* note 10, at 522–24.

<sup>46</sup>Robinson & Wilt, *supra* note 10, at 522.

izing the unauthorized use of milk crates.<sup>48</sup> A constant need for campaign funding increases the influence of wealthy special interest donors.<sup>49</sup> In addition to purely capitalistic interests, the institutional interests and training of criminal justice professionals carry undue weight in legislators' analyses of crime.<sup>50</sup> Politicians may turn to criminal justice professionals as "experts" and as informers, but these professionals are biased by their training and view of the criminal justice system.<sup>51</sup> For these reasons, their description of the public's interest may be far removed from actual public opinion.<sup>52</sup>

On top of coercive crime control, and following the line of criminal justice professionals' interests and domination of criminal justice practice, Robinson and Wilt identify a second overall trend in criminal justice policy.<sup>53</sup> They point to a trend towards criminal law delegation, creating exceptionally broad criminal statutes and relying on judges and prosecutors to interpret those statutes.<sup>54</sup> These statutes may originate in concerns about harms that are in accordance with public opinion, but the breadth of conduct reached by the statutes far exceeds public desires.<sup>55</sup>

As examples, Robinson and Wilt offer the Sarbanes-Oxley Act, created in the interests of prosecuting white collar crime, but written so broadly that in 2007 it was used to prosecute a fisherman who threw "three undersized red grouper into the sea, rather than hand them over to federal authorities."<sup>56</sup> At the state level they cite a Pennsylvania statute that is broad enough to reach both "chaining a fourteen-year-old to a wall for a month and illegally locking a seventeen-year-old in her room for a half an hour,"<sup>57</sup> and a New Jersey statute that reaches waiters who do not declare a few hundred dollars in tips as well as corporate executives who use offshore accounts to hide a hundred thousand dollars.<sup>58</sup> Robinson and Wilt acknowledge that such broad statutes can be useful in order to reach creative criminals who use statutory specificity to

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<sup>47</sup>Robinson & Wilt, *supra* note 10, at 523.

<sup>48</sup>Robinson & Wilt, *supra* note 10, at 523–24.

<sup>49</sup>Robinson & Wilt, *supra* note 10, at 521–22.

<sup>50</sup>Robinson & Wilt, *supra* note 10, at 520.

<sup>51</sup>Robinson & Wilt, *supra* note 10, at 520.

<sup>52</sup>Robinson & Wilt, *supra* note 10, at 520.

<sup>53</sup>Robinson & Wilt, *supra* note 10, at 532.

<sup>54</sup>Robinson & Wilt, *supra* note 10, at 532.

<sup>55</sup>Robinson & Wilt, *supra* note 10, at 532–34.

<sup>56</sup>Robinson & Wilt, *supra* note 10, at 533.

<sup>57</sup>Robinson & Wilt, *supra* note 10, at 534.

<sup>58</sup>Robinson & Wilt, *supra* note 10, at 535.



break the spirit of laws while adhering to the letter, and that Congress can still constrain prosecutors through budgetary controls.<sup>59</sup> But still, these statutes lead to outcomes that are clearly contrary to public opinion regarding the harm of various actions and the appropriate punishment for those actions, as evidenced by studies of the public which offer more specific case vignettes.<sup>60</sup>

And this gap is important, Robinson and Wilt argue, both for the democratic reasons described above and for philosophical purposes of punishment.<sup>61</sup> They first note that the most recent research suggests that both deterrence and incapacitation are ineffective.<sup>62</sup> Instead, they argue, the gap matters from a consequentialist perspective because the effectiveness of criminal law relies, at bottom, on the community's acceptance of and agreement with its principles.<sup>63</sup> They state, "[a] criminal justice system with a good reputation for reliably doing justice and avoiding injustice is one that will inspire cooperation, support, deference, and the internalization of its norms."<sup>64</sup> In contrast, periods of significant departure from public opinion have resulted in public "resistance and subversion."<sup>65</sup> As examples they cite broad disillusionment and lawlessness during the Prohibition Era, and the Watts Riots as responses to unduly harsh criminal justice policies in Los Angeles in the 1960s.<sup>66</sup> Additionally, they note that social psychological studies have supported this idea that moral credibility is necessary for the public to comply with the law, and that disillusionment with law is associated with losses in compliance.<sup>67</sup> Thus, they argue, in order to reduce crime, it is imperative that criminal laws remain close to public values.<sup>68</sup> But the primary reason the gap matters is still fundamentally democratic.<sup>69</sup> Robinson and Wilt argue for a primarily retributive model of criminal punishment, because (they assert), this is the moral basis of punishment as understood by the general public.<sup>70</sup> They highlight studies that suggest retributivist information is more important to the general public when people are asked to determine

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<sup>59</sup>Robinson & Wilt, *supra* note 10, at 535–36.

<sup>60</sup>Robinson & Wilt, *supra* note 10, at 534–35.

<sup>61</sup>Robinson & Wilt, *supra* note 10, at 491–99.

<sup>62</sup>Robinson & Wilt, *supra* note 10, at 494.

<sup>63</sup>Robinson & Wilt, *supra* note 10, at 494.

<sup>64</sup>Robinson & Wilt, *supra* note 10, at 494.

<sup>65</sup>Robinson & Wilt, *supra* note 10, at 494.

<sup>66</sup>Robinson & Wilt, *supra* note 10, at 494–95.

<sup>67</sup>Robinson & Wilt, *supra* note 10, at 495–96.

<sup>68</sup>Robinson & Wilt, *supra* note 10, at 494–96.

<sup>69</sup>Robinson & Wilt, *supra* note 10, at 497–98.

<sup>70</sup>Robinson & Wilt, *supra* note 10, at 497–98.



punishments, and that the public generally agrees about moral blameworthiness of various acts.<sup>71</sup>

This all leads, of course, to the question of how the government can adjust in order to create criminal law that more accurately reflects public desires, and Robinson and Wilt offer several suggestions.<sup>72</sup> First, they suggest educating legislators about general public opinion polls and how unreliable they are.<sup>73</sup> They also recommend that governments should create a standing reform commission to evaluate public opinion, which, they note, already exists in some states, and that legislatures should be required to justify laws that conflict with the community judgment.<sup>74</sup> But their most significant recommendation, and the one upon which the others hinge, is that social science studies should be used to evaluate public opinion, rather than public opinion polls.<sup>75</sup> They maintain that the public's more nuanced views cannot be reached without disciplined research using vignettes to better represent the issue to the public.<sup>76</sup> They argue that criminal codes have developed to a level of detail and specificity where they can easily accommodate these nuances, and that the increased public approval of criminal law would make the effort worthwhile for governments and legislators.<sup>77</sup>

### III. CONCLUSION

Robinson and Wilt make a compelling case that current criminal law fails to reflect public opinion and that this failure is a significant problem from a moral and a practical perspective. Their evidence on the extent to which public opinion is more nuanced and forgiving than contemporary criminal law is fascinating, and compelling, and makes their answer of serious social scientific investigation into *true* public opinion quite attractive.

But some serious questions remain. As these authors note, there are multiple areas where public opinion diverges from criminal law. The criminal law is overwhelmingly broad, consisting of thousands of statutes in the federal law alone, and there is an overabundance of types of cases that might arise under many of those statutes, as Robinson and Wilt themselves point out. Is it really possible to outline vignettes for each of these circumstances? Even if it were, to go through the process of amending the criminal code for every

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<sup>71</sup>Robinson & Wilt, *supra* note 10, at 497–98.

<sup>72</sup>Robinson & Wilt, *supra* note 10, at 487, 536–37.

<sup>73</sup>Robinson & Wilt, *supra* note 10, at 536.

<sup>74</sup>Robinson & Wilt, *supra* note 10, at 537.

<sup>75</sup>Robinson & Wilt, *supra* note 10, at 537.

<sup>76</sup>Robinson & Wilt, *supra* note 10, at 517–20.

<sup>77</sup>Robinson & Wilt, *supra* note 10, at 539–40.

individual possible criminal violation would seem to be prohibitively time consuming.

Nevertheless, the opinion research Robinson and Wilt describe would likely be worthwhile, if only to set goals for the system, adjust legislators' assumptions, clarify issues for the public, and motivate efforts at reform. Certainly, their description of the conflicts between perceived public opinion and actual public values, and their concern for the legitimacy of the criminal law, are significant. Both legislators and activists in criminal justice reform would do well to consider their arguments and their research.