Criminal Law's Trajectory: Marquis de Sade, Betty Davis, Tina Turner, and John Hinckley

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How would some of the bad actors of the past—such as Betty Davis's stalker, Alexander Ross—be dealt with today? How would some of the well-known characters of recent times—John Hinckley, or Tina Turner's manager and husband, Ike—have been dealt with in earlier times? Would some colorful characters of the past—such as the Marquis de Sade—be dealt with as criminals today? This brief Essay examines a pair of matched cases—one old, one recent—on a wide range of criminal law subjects to compare how differently the cases were dealt with, and to draw from those comparisons some broader insights about the criminal law's trajectory.

In these times of political clashes, it is easy to think of criminal law as being pushed left and right depending upon the political party in power. But in a broader historical perspective, today's skirmishes are often minor and temporary. Several foundational trends have extended over centuries and seem likely to continue: an increase in the nuance with which criminal law judges an offender's blameworthiness, an increased willingness in a changing world to intrude in public and private activities previously thought beyond the proper reach of criminal law, and a continuing devotion to tracking societal norms as they change. The Essay concludes with a few thoughts about what these long-standing trends mean for the future.

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INTRODUCTION

In the modern era of extreme political clashes, it is easy to think of criminal law as being pushed left or right depending upon the political party in power. And to be fair, there certainly has been some of that. But if one steps back to gain the larger perspective of decades and centuries, the current activity we see in news headlines is comparatively minor, often trivial, and frequently temporary. There are, however, foundational and lasting shifts in the nature and scope of criminal law that become apparent over the longer span of history. The most striking of these shifts are the three broad trends examined here, with pairs of matched old and recent cases to illustrate each trend.

I. A TREND TOWARD INCREASED NUANCE IN JUDGING AN OFFENDER'S BLAMEWORTHINESS

Criminal law's trajectory is increasingly nuanced in assessing the extent of an offender's culpability. Before the twelfth century, English criminal law distinguished primarily between willful and accidental offenses. In the twelfth century, however, criminal practitioners began refining their assessments more minutely, distinguishing accidental offenses that were careless from those that were faultless. Later in the eighteenth century, case law began distinguishing between careless accidents that were reckless and those that were merely negligent.[1] That same pattern of increased nuance appears in a wide variety of criminal law doctrines. Consider, for example, the changes in three common and important criminal law doctrines: the provocation mitigation in homicide, the insanity defense, and the common law's felony-murder rule.

Mitigation in Homicide.[2] In 1849, John Webster is a popular and socially connected professor at Harvard.[3] He is also someone who is chronically in debt due to his desire to stay in a social group that his salary does not justify. He has recently borrowed money from George Parkman, a Harvard graduate and one of the wealthiest men in Boston. Webster has secured the loan with goods that he had already used to secure a different loan. He has no means of paying Parkman back. Angered by Webster's duplicity, Parkman begins harassing Webster, even

1. Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 U.C.L.J. (815, 852 (1980).

2. For background on mitigation in homicide, see PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW 538 (Wolters Kluwer, 2d ed. 2012).

3. This case narrative is drawn from the following sources: E.C. Watson, *Some Early Tools of American Science*, 18 AM. J. PHYS. 583, 583 (1950) (reviewing I. BERNARD COHEN, SOME EARLY TOOLS OF AMERICAN SCIENCE (1950)); Robert L. Gale, *Webster, John White (20 May 1793—30 August 1850)*, AM. NAT'L BIOGRAPHY ONLINE (Feb. 1, 2000), http://www.anb.org/articles/20/20-01097.html; Stewart Holbrook, *Murder at Harvard*, 14 AM. SCHOLAR 425, 427 (1945); Kevin R. Loughlin, *The Notorious John White Webster: Guilty or Innocent?*, 195 J. AM. COLL. SURGEONS 234, 234 (2002); *Professor John White Webster*, CHRISTIAN REG., Sep. 7, 1850, at 143; Tom Quirk, *The Judge Dragged to the Bar: Melville, Shaw, and the Webster Murder Trial*, MELVILLE SOC'Y EXTRACTS, Feb. 1991, at 1, 2; Robert Wilhelm, *Dr. George Parkman–"The Pedestrian*,*"* MURDER BY GASLIGHT COMPENDIUM (Mar. 13, 2010), http://www.murderbygaslight.com/2010/02/murder-at-harvard.html; GEORGE BEMIS, REPORT OF THE CASE OF JOHN W. WEBSTER 19 (1850).

showing up at Webster's classes to berate him in front of his students. When Parkman comes to Webster's home to collect the debt, angrily screaming in his face and threatening further public humiliation, an infuriated Webster grabs a stick of firewood close at hand and strikes Parkman in the head, killing him. Webster was charged with murder. Provocation was raised at trial as a mitigating factor—and the jury was instructed on the manslaughter possibility—but the judge stated that words alone cannot qualify as provocation. He is found guilty of murder and executed.

129 years later, in 1978, Daniel White and Harvey Milk are both new members of the San Francisco Board of Supervisors.[4] White has union backing, and Milk is one of the first openly gay candidates to win office in America. White starts to become overwhelmed with frustration at a system that he sees as corrupt. He supports Milk in a variety of issues but feels betrayed when Milk does not follow through on returning the favors. In frustration, White resigns from office. Four days later, he goes to the mayor, George Moscone, asking to be reinstated. Moscone refuses. Now unemployed, frustrated, and feeling deeply wronged, White goes to Moscone's office with a gun and, during a heated argument, pulls it out and shoots the Mayor. Upon leaving the Mayor's office, White runs into Milk, and another heated argument erupts, ending in White shooting and killing Milk. White turns himself in to the police and confesses to both killings, claiming that he has been suffering from severe depression and other mental instabilities. At trial, the jury accepts White's claim for a diminished capacity mitigation, holding him liable for manslaughter rather than murder. He spends five years in prison and is released.

Clearly, mitigation in homicide has broadened dramatically in the 129 years between the two cases.

Insanity. Charles Julius Guiteau survives a steamboat wreck in 1880 and decides this means God has selected him for greatness.[5] The following year,

4. This case narrative is drawn from the following sources: Cindi Ernst, *The Dan White (Harvey Milk Murder) Trial (1979): Selected Links & Bibliography*, FAMOUS TRIALS BLOG, http://www.famous-trials.com/danwhite/587-bibliography (last visited Apr. 20, 2026); CHARLES P. EWING & JOSEPH T. MCCANN, MINDS ON TRIAL: GREAT CASES IN LAW AND PSYCHOLOGY 70 (2006); *Dan White's Motive More About Betrayal Than Homophobia*, SF WKLY. (Jan. 30, 2008), https://archives.sfweekly.com/sanfrancisco/dan-whites-motive-more-about-betrayal-than-homophobia/Content?oid=2166110; Carol Pogash, *Myth of the 'Twinkie Defense'/ The Verdict in the Dan White Case Wasn't Based on His Ingestion of Junk Food*, SFGATE (Nov. 23, 2003), http://www.sfgate.com/health/article/Myth-of-the-Twinkie-defense-The-verdict-in-2511152.php; Nancy Skelton & Mark A. Stein, *For Dan White, Death Ended 2 Years of Fear and Haunted Dreams*, L.A. TIMES (Oct. 23, 1985, at 00:00 PT), http://articles.latimes.com/1985-10-23/news/mn-13835_1_friends; Wallace Turner, *Suspect Sought Job*, N.Y. TIMES (Nov. 28, 1978), http://www.nytimes.com/1978/11/28/archives/suspect-sought-job-moscone-had-been-asked-to-reappoint-him-as-a.html?_r=0; MIKE WEISS, DOUBLE PLAY: THE SAN FRANCISCO CITY HALL KILLINGS 109 (1984).

5. This case narrative is drawn from the following sources: MURDER OF A PRESIDENT, Amazon Prime (PBS Am. Experience Series 2016); CHARLES E. ROSENBERG, THE TRIAL OF THE ASSASSIN GUITEAU: PSYCHIATRY AND LAW IN THE GILDED AGE 20–21 (1968); Carole Bos, *Charles Guiteau: Erstwhile Lawyer*, AWESOME STORIES BLOG (Nov. 1, 2004), http://www.awesomestories.com/asset/view/CHARLES-GUITEAU-ERSTWHILE-LAWYER-Guiteau-and-the-Assassination-of-President-Garfield; ALLAN PESKIN, GARFIELD: A BIOGRAPHY (1978); SARAH VOWELL, ASSASSINATION VACATION 110 (2005); Justus Doenecke, *James A.*

James Garfield is elected president. Guiteau believes that killing Garfield is the mission God has spared him for. He picks a gun that he feels will look nice in a museum when the world celebrates his deed, and he shoots the President as he leaves for a summer holiday. Despite his genuine God-directed motivation, he is denied an insanity defense, convicted of murder, and sentenced to be hanged. He nonetheless remains confident that God will allow others to see the righteousness of his act. He writes to President Chester Arthur, expecting a pardon, but allows that he is willing to stay in jail for a few months to help Arthur out. He receives no such pardon. A smiling Guiteau dances on his way to the gallows.

Almost exactly a century later, John Hinckley, struggling with adult life, fantasizes that actress Jodie Foster is his soul mate.[6] When he arranges to meet her, she makes clear she has no interest in him, but Hinckley repeatedly writes to her and calls her, to no avail. To get her attention, he decides to kill the President. Jimmy Carter is his first target, but Hinckley is unable to come up with a plan before Carter's term ends. He then attempts to assassinate President Reagan in 1981. Hinckley avoids criminal liability with a successful insanity defense, and is civilly committed, then later released.

Unlike Guiteau, Hinckley clearly knew that what he was doing was wrong. Indeed, it was the serious wrongness of it that he believed would get him the attention of Jodie Foster that he so desired. Yet Guiteau is executed, and a century later Hinckley gets a complete defense.

Felony Murder. In 1929, Homer Simpson is an unemployed former police chief when he is told by a friend, Morrow, that Morrow has work for him.[7] Simpson has done work for him before, delivering illegal liquor in violation of

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Garfield: Death of The President, https://millercenter.org/president/garfield/death-of-the-president (last visited Apr. 22, 2026); CANDICE MILLARD, DESTINY OF THE REPUBLIC: A TALE OF MADNESS, MEDICINE, AND THE MURDER OF A PRESIDENT 11 (2012); Jay Bellamy, *A Stalwart of Stalwarts: Garfield's Assassin Sees Deed as a Special Duty*, 48 PROLOGUE 36 (2016).

6. This case narrative is drawn from the following sources: RICHARD J. BONNIE, JOHN C. JEFFRIES, JR. & PETER W. LOW, A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY, JR. 25, 31 (2d ed. 2000); Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 L. & HUM. BEHAV. 375, 381 (1999); Lincoln Caplan, *The Insanity Defense*, NEW YORKER (June 25, 1984), http://www.newyorker.com/magazine/1984/07/02/the-insanity-defense; LINCOLN CAPLAN, THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR. (1984); Kimberley Collins, Gabe Hinkebein & Staci Schorgl, *The John Hinckley Trial & Its Effect on the Insanity Defense*, https://famous-trials.com/johnhinckley/540-insanity (last visited July 17, 2020); *Insanity Defense*, CORN. L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/insanity_defense (last visited Apr. 22, 2026); Paul L. Montgomery, *Lennon Murder Suspect Preparing Insanity Defense*, N.Y. TIMES (Feb. 9, 1981), http://www.nytimes.com/1981/02/09/nyregion/lennon-murder-suspect-preparing-insanity-defense.html; *Shock and Anger Flash Through the United States*, PALM BEACH POST (Mar. 31, 1981).

7. This case narrative is drawn from the following sources: Headsman, *1929: Homer Simpson*, EXECUTED TODAY (Sep. 11, 2014), http://www.executedtoday.com/2014/09/11/1929-homer-simpson; TARA D. FIELDS, THE GRAVE: MURDER IN THE DEEP SOUTH (2011) (ebook), http://www.camdencounty.org; Randall Higgins, *Seeking the Truth on an 83-Year-Old Murder*, TIMES FREE PRESS (Jan. 10, 2011, at 01:02 ET), https://www.timesfreepress.com/news/2011/jan/10/seeking-truth-83-year-old-murder; William Wright, *"The Real Homer Simpson" Is a Haunting Search for Justice*, CLEVE. DAILY BANNER (Feb. 15, 2015), http://clevelandbanner.com/stories/the-real-homer-simpson-is-a-haunting-search-for-justice,2566.

Prohibition laws. In this instance, however, Simpson does not know that his friend is plotting a bank robbery. He makes the long trip to Florida by train and, after arriving, learns that he is to pose as a land buyer to lure the victim, a bank official, to an isolated location where the others can force him to give them the combination to the bank's safe. All goes as planned until the victim responds to the confrontation by pulling a knife, at which point Morrow pulls a gun. Simpson tells him not to shoot and does his best to protect the victim, but to no avail. After the victim is shot, Simpson tries to persuade the others to take him to a hospital, but the bleeding man is simply dumped by the roadside and later dies. Along with the others, Simpson is found guilty of murder under the felony-murder rule and executed.

In a more recent case in England—where the felony-murder rule was first created—David Smith is seventeen and married when he starts hanging out with his wife's older sister Myra Hindley and her boyfriend Ian Brady.[8] Smith is drawn by the older man's stories of the Marquis de Sade and rough sex. Brady invites Smith to join in "rolling a queer" (robbing a gay man), and Smith agrees. Brady then says they can kill their victim as part of the fun, but Smith insists that he wants no part in any killing. It is agreed that the amusement will be limited to robbery. They lure the intended victim to Brady's house. When Smith and Hindley leave the room, Brady kills the victim with an ax. When Smith discovers the killing, he is horrified but nonetheless helps clean up the mess out of fear of Smith, then leaves and goes to the police to report what happened. (The police later discover that Hindley and Brady are, in fact, the "Moors Child Killers" and have been killing children for months.) Smith is never charged with any crime.[9] By this time, the felony-murder rule had been abolished in England and has been and continues to be either abolished or seriously limited in the U.S.

II. A TREND IN A CHANGING WORLD: INCREASED WILLINGNESS OF ALLOWING CRIMINAL LAW TO INTRUDE INTO WHAT HAD PREVIOUSLY BEEN CONSIDERED "BEYOND" ITS APPROPRIATE REACH

A second trend that has emerged within criminal law is an increased willingness to allow the law to encroach on what had previously been seen as "beyond" criminal law's reach. These changes often come about because of shifts in technology or societal institutions that create a need—or an

8. This case narrative is drawn from the following sources: *Ian Brady and Myra Hindley*, FANDOM: CRIM. MINDS, http://criminalminds.wikia.com/wiki/Ian_Brady_and_Myra_Hindley (last visited Apr. 22, 2026); *Galway Man Who Turned in the Moors Murderers*, GOOGLE GRPS., https://groups.google.com/forum/#!topic/alt.true-crime/7NeAEIgw4zY (last visited Apr. 22, 2026); Amisha Padnani, *The Moors Murders: A Notorious Couple and Their Young Prey*, N.Y. TIMES (May 24, 2024), https://www.nytimes.com/2017/05/17/world/europe/moors-murders-ian-brady-myra-hindley-victims.html; Elisabeth Sherman, *The Strange Story of Myra Hindley and the Moors Murders*, ALL THAT'S INTERESTING (May 24, 2024), http://all-that-is-interesting.com/myra-hindley-moors-murders; DAVID SMITH & CAROL ANN LEE, WITNESS: THE STORY OF DAVID SMITH CHIEF PROSECUTION WITNESS IN THE MOORS MURDERS CASE (2011).

9. The police later discovered that Hindley and Brady are, in fact, the "Moors Child Killers" and have been killing children for months.

opportunity—for governmental intervention. For example, the increasing complexity and growing risks of serious harms in our complex interconnected modern lives have pushed criminal law to change its treatment of risk-taking, as well as to redefine criminal attempt (applying it earlier in the path of conduct leading to a completed crime). Additionally, the increase in commercial activity in society has led criminal law to expand its rate of criminalization in that realm.

Endangerment. In 1879, the South Fork Hunting and Fishing Club is a very exclusive body of fifty members, including Andrew Carnegie.[10] The Club buys a property with a lake that was formed by damming the Little Conemaugh River in Pennsylvania. The members know the dam is in poor condition and make some repairs but are repeatedly warned that the danger remains a serious risk to those who live downriver. When a weak spot in the dam creates a waterfall, the members see it as creating a more picturesque picnic spot. On May 31,1889, the dam gives way, and the water rushes down into the valley, flooding four square miles and killing more than 2,000 people. The Club members had not intended such a disaster but were certainly aware it was possible. The courts rule that the Club and its members are not to be held criminally liable.

A century later, in 1990, Lachan Russell is fourteen years-old and living in Pittsburgh when her friend asks for help in getting rid of her grandmother's annoying dog.[11] Russell agrees, and the pair pour kerosene on the dog while it is tied to the grandmother's porch. They set the animal on fire and leave. The burning animal is rescued, but only after its smoldering fur catches the house on fire, killing two young children. When the cause of the fire and deaths is discovered, Russell is charged and convicted of, among other things, recklessly causing a catastrophe. She is sentenced to eighteen to sixty months in prison.

After the flood hundreds of people were dead and towns were destroyed, but no criminal liability was charged. In the tragic death of the two young children, the courts saw culpability. Clearly in the intervening century, criminal law has shifted to impose criminal liability for risk creation (and in this case, the prosecutor may have used the offense beyond what the legislature intended).

Criminal Attempt. In 1916, H.M. Wooldridge watches as a friend commits statutory rape with a fourteen-year-old girl. He plans to have sex with her next,

10. This case narrative is drawn from the following sources: Uldis Kaktins, Carrie Davis Todd, Stephanie Wojno & Neil Coleman, *Revisiting the Timing and Events Leading to and Causing the Johnston Flood of 1889*, 80 PA. HIST.: J. MID-ATLANTIC STUD. 335, 342 (2013); Emily Godbey, *Disaster Tourism and the Melodrama of Authenticity: Revisiting the 1889 Johnstown Flood*, 73 PA. HIST.: J. MID-ATLANTIC STUD. 274, 274 (2006); J.J. McIntyre, *Johnstown Flood (1889)*, *in* ENCYCLOPEDIA OF DISASTER RELIEF 370 (K. Bradley Penuel & Matt Statler eds., 2011); Warren Winkelstein, Jr., *The Johnstown Flood: An Unnatural Disaster*, 19 EPIDEMIOLOGY 163, 163 (2008).

11. This case narrative is drawn from the following sources: Commonwealth v. Newsome, No. 322 WDA 2015, 2015 WL 6442013, at *3 (Pa. Super. Ct. Oct. 22, 2015); Commonwealth v. Russell, 938 A.2d 1082, 1085 (Pa. Super. Ct. 2007); Joe Mandak, *Pennsylvania Woman Charged in 15-Year-Old Pet Arson That Killed Her Children*, FIREHOUSE (Feb. 16, 2005), http://www.firehouse.com/news/10511706/pennsylvania-woman-charged-in-15-year-old-pet-arson-that-killed-her-children; Anya Sostek, *Mom Gets 2 Life Sentences for 1990 Deaths of Son, 2, Daughter 3*, PITT. POST-GAZETTE (Oct. 20, 2005), https://www.post-gazette.com/local/city/2005/10/20/mom-gets-2-life-sentences-for-1990-deaths-of-son-2-daughter-3/stories/200510200455.

but the pair is apprehended.[12] Wooldridge is not prosecuted for attempted statutory rape, because prosecutors are concerned that there is insufficient evidence to convict him under the demands of the existing attempted rape statute. In the hope of successfully prosecuting him, the police tell the victim that if Wooldridge approaches her again, she should agree to meet him and let them know. Wooldridge does arrange to meet the victim again and tells a friend that he plans to have sex with her. Wooldridge enters the victim's bedroom and tells her to get into the bed, but before things go further, Wooldridge is warned that authorities are watching. He is then arrested and convicted of attempted statutory rape. However, on appeal, the conviction is reversed because the court rules that Wooldridge had not gone far enough towards commission of the offense.

In 2012, just short of a century later, Blaec James Lammers is twenty years old when he goes to Walmart and buys two guns.[13] He has a friend teach him how to use the guns and gives the guns to the father of his friend for safekeeping. Lammers' mother finds the receipt for the guns and, fearing her son might be suicidal, contacts the police. When the police talk to Lammers, he tells them several stories that they dismiss before mentioning that at one time, he had imagined shooting people at the Walmart where he bought the guns. Based upon this conversation, Lammers is convicted of attempted first-degree assault and attempted armed criminal action. He is sentenced to two concurrent fifteen-year terms of imprisonment.

In the century between the two cases, the criminal law's demands for the conduct that constitutes criminal attempt have dramatically reduced.

Deceptive Business Practices. By 1907, thousands of infant deaths have been caused by Mrs. Winslow's Soothing Syrup.[14] The product has been known

12. This case narrative is drawn from the following sources: LAEL MORGAN, GOOD TIME GIRLS OF THE ALASKA-YUKON GOLD RUSH 241–50 (1998); Wooldridge v. United States, 237 F. 775, 775 (9th Cir. 1916).

13. This case narrative is drawn from the following sources: Todd C. Frankel, *No Good Option: Parents Called Police on Mentally Ill Son, but He Got Prison, Not Help*, WASH. POST (May 28, 2014), https://www.washingtonpost.com/business/economy/no-good-option-parents-called-police-on-mentally-ill-son-but-he-got-prison-not-help/2014/05/28/d15e6fba-e6a7-11e3-a86b-362fd5443d19_story.html?utm_term=.1880aed841f7; *Police: Mo. Man Planned Aurora-Type Attack*, UPI (Nov. 16, 2012, at 17:43 GT), http://www.upi.com/Top_News/US/2012/11/16/Police-Mo-man-planned-Aurora-type-attack/UPI-87411353105804/?spt=su; State v. Lammers, 479 S.W.3d 624, 627–28 (Mo. 2016).

14. This case narrative is drawn from the following sources: SAMUEL HOPKINS ADAMS, THE GREAT AMERICAN FRAUD 40 (1906); SAMUEL HOPKINS ADAMS, THE GREAT AMERICAN FRAUD: A SERIES OF ARTICLES ON THE PATENT MEDICINE EVIL, *reprinted in* PROJECT GUTENBERG 40 (2013); Arden G. Christen & Joan A. Christen, *Sozodont Powder Dentifrice and Mrs. Winslow's Soothing Syrup: Dental Nostrums*, 48 J. HIST. DENTISTRY 99, 104 (2000); Ferdinand Meyer V, *Mrs. Winslow's Soothing Syrup–Oooh So Soothing*, PEACHRIDGE (Jan. 5, 2013), http://www.peachridgeglass.com/2013/01/mrs-winslows-soothing-syrup-oooh-so-soothing; *Mrs. Winslow's Soothing Syrup*, DEA MUSEUM, https://museum.dea.gov/museum-collection/collection-spotlight/artifact/soothing-syrup (last visited Apr. 22, 2026); *Patent Medicine*, MED. DISCOVERIES, http://www.discoveriesinmedicine.com/Ni-Ra/Patent-Medicine.html (last visited Apr. 22, 2026); *Pharmacology*, 45 J. AM. MED. ASS'N 934, 936 (1905); *A Post Office Exposure*, 44 J. AM. MED. ASS'N 1391, 1396 (1905); Marty Stempniak, *TBT: In the 1800s, One Opium-Laced Drug Helped Moms Soothe the Pains of Teething Children*, HOSPS. & HEALTH NETWORKS (Mar. 31, 2016), https://web.archive.org/web/20161003030413/

to kill children for nearly forty years, as the opium in the syrup depresses the breathing of infants, yet it remains available to the public. This product—and hundreds of other nostrums that contain alcohol, morphine, and other undisclosed dangerous ingredients—are marketed to consumers as ways to relieve discomfort and cure ills. Despite their known dangers, the government does nothing to stop the sale of these medicines.

About a century later, Samuel Girod, an Amish man with twelve children, has long made a living by making hand creams.[15] In 2001, Girod comes under the watchful eye of the FDA, which requires him to make many changes to the descriptions of his products. For example, the FDA objects to his naming his product "Chickweed Healing Salve," compelling him to change the name to "Original Chickweed," despite his customers' reports that the salve does in fact have a healing effect. In response, Girod complies with every FDA demand. But in 2016, the FDA files an injunction to prevent any further sales of Girod's products because an FDA agent claims a product similar to Girod's hurt a customer, although there have been no reports that Girod's product ever caused harm. When Girod fails to comply with the injunction, he is charged and convicted of a variety of offenses, including distributing misbranded drugs, and is consequently given a six-year sentence.

Over the century between the two cases, the law has moved dramatically into the business of controlling commercial products through criminalization.

III. A CONTINUING COMMITMENT TO TRACK CHANGES IN SOCIETAL NORMS

The final trend we examine is not so much a specific change in criminal law's perspective, but rather a continuing commitment to change as necessary to track the evolution in the community's shared intuitions of what is and is not conduct sufficiently condemnable to deserve a criminal conviction and subsequent punishment. Over time, societal norms have significantly changed regarding a wide range of conduct including, for example, consensual serious bodily injury, domestic violence, sexual harassment, and stalking.

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http:/www.hhnmag.com/articles/7085-tbt-in-the--s-one-opium-laced-drug-helped-moms-soothe-the-pains-of-teething-children; JAMES HARVEY YOUNG, AMERICAN HEALTH QUACKERY: COLLECTED ESSAYS OF JAMES HARVEY YOUNG 118 (2014).

15. This case narrative is drawn from the following sources: WKYT Newsroom, *Convicted Amish Farmer Sentenced to Six Years in Prison* (June 30, 2017, at 05:28 PT), http://www.wkyt.com/content/news/Convicted-Amish-farmer-to-be-sentenced-Friday-in-Lexington-431745623.html; Bill Estep, *Amish Man Convicted of Selling Improperly Labeled Health Products*, LEXINGTON HERALD LEADER (Mar. 3, 2017, at 10:10 ET), http://www.kentucky.com/news/state/article135986318.html; Greg Kocher, *Amish Farmer Sold Herbal Health Products. He's Going to Prison for 6 Years.*, LEXINGTON HERALD LEADER (July 2, 2017, at 06:33 ET), http://www.kentucky.com/news/local/crime/article159031869.html; Sally Oh, *This is the Story of the FDA's Persecution of Samuel Girod*, KY. FREE PRESS (Mar. 1, 2017), https://web.archive.org/web/20170307084735/http:/www.kyfreepress.com:80/2017/03/fda-v-sam-girod-complete-story-video; Hillary Thornton, *WKYT Investigation: Amish Farmer in Jail Awaiting Trial, Facing Time in Federal Prison* (Jan. 26, 2017, at 14:10 PT), http://www.wkyt.com/content/news/WKYT-Investigation-Amish-farmer-in-jail-awaiting-trial-facing-time-in-federal-prison-411915635.html.

Consent to Serious Bodily Injury. For most of his life, the Marquis de Sade has engaged in consensual sexual activities that leave the participants bleeding and wounded. The harms are not always minor.[16] In one instance, Sade whips a woman and then asks her to whip him using a red-hot iron whip. In 1768, he is arrested for crimes committed during a consensual sexual encounter, but not for the physical harm. Rather, Sade is convicted because, while having sex on Easter Sunday, he tells his paid partner that there is no God. The authorities have little interest in prosecuting the serious injuries and sexual orgies but are highly indignant at Sade's religious offenses of blasphemy and heresy. For this and other such offenses, Sade is repeatedly imprisoned, spending much of his adult life in jail, during which he produces the writings for which he is famous.

Two centuries later, in 1964, Marvin Samuels, an optometrist, is well known within a select community for making high-quality pornographic films showing sadomasochistic sex between consenting men.[17] Within this community, would-be participants seek out Samuels for the opportunity to perform. The Kinsey Institute frequently purchases Samuels' movies for its ongoing research. Unknown to his employer, a Kinsey employee gives a new film to a private camera shop for developing. Because the participants are seen to be bleeding, the film is brought to the attention of the authorities, and Samuels is arrested and prosecuted. He is found guilty on charges of complicity in aggravated assault. The court imposes a suspended prison sentence, fines Samuels $3,000, and places him on probation for ten years.

In the two centuries between the two cases, societal norms regarding consent to serious bodily harm—and concerning blasphemy and heresy—have changed, and criminal law has changed with them.

Domestic Violence. Ike Turner is famous for his musical savvy and his seeming inability to control his behavior.[18] By 1960, most of his worst behavior is directed at those closest to him: his band members, his girlfriends, and his spouse, Tina Turner. His regular beatings of Tina are no secret. She is hospitalized on multiple occasions. The autobiographical movie, for which Ike Turner is a paid consultant, contains scenes of Ike brutally beating and raping Tina. Ike is never charged with any form of domestic violence for beating Tina.

16. This case narrative is drawn from the following sources: NEIL SCHAEFFER, THE MARQUIS DE SADE: A LIFE 58 (2001); DONALD THOMAS, THE MARQUIS DE SADE: A NEW BIOGRAPHY 77 (1998).

17. This case narrative is drawn from the following sources: People v. Samuels, 250 Cal. App. 2d 501, 504 (1967).

18. This case narrative is drawn from the following sources: Christian John Wikane, *Ike & Tina Turner–The Ike & Tina Turner Story (1960-1975)*, POPMATTERS (Dec. 12, 2007), http://www.popmatters.com/review/ike-tina-turner-the-ike-tina-turner-story; Clarence Waldron, *Tina Turner's Book Tells of Beatings, Sex Abuse and Why She Tried to End Her Life*, JET, Sep. 22, 1986, at 54, 54–55; Elizabeth Christine Thompson, *Tina Turner: Where to Now?*, ANGEL FIRE, https://web.archive.org/web/20140408050008/http:/www.angelfire.com/ca2/spicegirlsfreak/tina.html; MARK BEGO, TINA TURNER: BREAK EVERY RULE 41 (2003); BOB GULLA: ICONS OF R&B AND SOUL: AN ENCYCLOPEDIA OF THE ARTISTS WHO REVOLUTIONIZED RHYTHM 167–90 (2008).

Six decades later, Cody Latimer, a wide receiver for the Denver Broncos, is hosting a party.[19] His girlfriend, Jaimee Rando, who is the mother of his son, is at the party and has had too much to drink. As the party winds down, the couple gets into an argument. Rando announces that she is taking the baby and going to her mother's home. Latimer says she cannot go because she is too drunk to drive. Rando then strikes Latimer. To prevent her from driving, Latimer calls the police. When the police arrive, Rando is arrested and charged with domestic violence—as is required by the law—and taken to jail.

In just a matter of decades, societal views on domestic violence have dramatically changed and the criminal law has changed with them.

Sexual Harassment and Stalking. Alexander Ross, an elegant, smooth-talking New York actor, is signed by Warner Brothers in 1934 and, shortly after moving to Hollywood, develops an obsession with the studio's biggest star, Bette Davis.[20] Ross constantly makes unwanted visits to Davis, even going into her dressing room when she is not there. Ross spies on her, repeatedly calls her, and tells anyone who will listen that he and Davis are meant to be together. Ross claims that he is the answer to all her inner desires. Davis is married and repeatedly tells Ross she is not interested. Davis's husband tells Ross to stop harassing and stalking Davis, and the two get into a fistfight over a love letter Ross has left for Davis in her dressing room. No criminal charges of any kind are ever filed against Ross.

Eight decades later, thirty-nine-year-old Joshua Corbett is a big fan of Sandra Bullock. He has a history of odd behavior.[21] On several occasions, he knocks at the door of Bullock's California home but finds she is not home. On one morning at 6:30 am, Corbett rings the doorbell because he sees Bullock is

19. This case narrative is drawn from the following sources: Janet Oravetz, *Cody Latimer's 911 Call Released*, 9NEWS (June 3, 2016, at 17:28 MT), http://www.9news.com/news/local/cody-latimers-911-call-released/230556780; Jesse Paul, *Broncos' Cody Latimer Said He Was Wearing GoPro Camera During Fight with Girlfriend*, DENV. POST (July 7, 2016, at 10:44 MT), http://www.denverpost.com/2016/06/02/cody-latimer-said-he-was-wearing-gopro-camera-during-fight-with-girlfriend; Nicole Vap, *GoPro Caught Broncos Domestic Incident on Tape*, 9NEWS (June 2, 2016, at 15:25 MT), http://www.9news.com/news/crime/gopro-caught-broncos-domestic-incident-on-tape/228581042.

20. This case narrative is drawn from the following sources: John R. Allen Jr., *Ross Alexander*, CLASSIC IMAGES (Nov. 6, 2006), http://www.classicimages.com/people/article_2d4ddd12-a04b-5897-a873-7e300e34ed68.html; *Bette Davis* (Apr. 9, 2021, at 13:55 ET), https://www.biography.com/people/bette-davis-9267626#early-life; ED SIKOV, DARK VICTORY: THE LIFE OF BETTE DAVIS (2008).

21. This case narrative is drawn from the following sources: Anthony McCartney, *Man Arrested Inside Sandra Bullock's Home Convicted of Stalking*, USA TODAY (May 26, 2017, at 04:15 ET), https://www.usatoday.com/story/life/people/2017/05/24/sandra-bullock-stalker-arrest/102119712; Andrea Mandell, *Creepy Letter from Bullock's Stalker Released*, USA TODAY (Apr. 10, 2015, at 18:29 ET), https://www.usatoday.com/story/life/people/2015/04/10/creepy-letter-from-sandra-bullock-stalker-released/25599063; *Sandra Bullock Emergency Call as 'Stalker' Breaks into House Played in Court,* TELEGRAPH (Apr. 10, 2015, at 12:01 PT), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11527375/Sandra-Bullock-emergency-call-as-stalker-breaks-into-house-played-in-court.html; Richard Winton, *Lack of Search Warrant Damages Case Against Man Accused of Stalking Sandra Bullock*, L.A. TIMES (July 26, 2016, at 14:25 PT), http://www.latimes.com/local/lanow/la-me-ln-sandra-bullock-lapd-stalker-20160725-snap-story.html; People v. Superior Court (Corbett), 8 Cal. App. 5th 670, 674 (2017).

back. When she does not answer after several rings, he enters the house. Afraid, Bullock locks her bedroom door and calls the police. Corbett knocks on the bedroom door, and again, Bullock does not answer the door. When the police arrive and take him into custody, they find that Corbett is carrying a sexually explicit letter he has written to the actress. Corbett has no weapon and puts up no resistance. Corbett never physically interacts with Bullock. Corbett is charged with stalking and first-degree burglary, as well as weapons offenses for weapons found in his own house. Throughout the court proceedings, Corbett remains in the county jail on a $2.185 million bail. During a brief court appearance, Corbett pleads no contest to the charges.

In the intervening eight decades between the two cases, societal norms have changed dramatically regarding stalking and sexual harassment, and the criminal law has changed with them.

There is a good reason to cherish and encourage this pattern of having criminal law track shared community views of what is and is not criminal.[22] From empirical studies, we know that a criminal law system that is perceived by the community as a reliable moral authority will be more likely to gain compliance, assistance, acquiescence, and have its norms internalized than a criminal law that routinely imposes criminal liability and punishment that conflicts with shared community views. Naturally, conflicts between criminal law and community norms are likely to provoke resistance, subversion, and vigilante action.[23]

CONCLUSION: WHERE IS CRIMINAL LAW HEADED?

Given the impact these three trends have had on criminal law for several centuries, there seems little reason to think that they will not continue to evolve. The trend toward providing greater nuance in judging an offender's blameworthiness might play out, for example, in a refined assessment of mistakes in self-defense—providing a broader mitigation opportunity or excuse to battered spouses who kill their partners in circumstances that would normally be unjustified (such as when the longtime batterer is killed while partially incapacitated). The trend toward greater criminal law intrusion in a changing world might lead, for example, to a future in which the law criminalizes putting children by themselves in self-driving cars. Additionally, the trend of criminal law changes that track changes in societal norms might lead to the national decriminalization of marijuana use, for example, if that continues to be the social norm. At the same time, the uproar against the effective decriminalization of theft under $950 in California may foreshadow a stronger commitment to shared

22. *See, e.g.*, PAUL H. ROBINSON, INTUITIONS OF JUSTICE & THE UTILITY OF DESERT 534 (2013); Paul H Robinson & Lindsay Holcomb, *The Criminogenic Effects of Damaging Criminal Law's Moral Credibility*, 31 S. CAL. INTERDISC. L.J. 277, 304 (2022).

23. PAUL H. ROBINSON & SARAH M. ROBSINSON, SHADOW VIGILANTES: HOW DISTRUST IN THE JUSTICE SYSTEM BREEDS A NEW KIND OF LAWLESSNESS 196 (2013).

norms against decriminalization in general, thereby reducing the likelihood of other such decriminalizations in the future.

Whatever our immediate criminal law future turns out to be, we can be sure that society a century from now will have somewhat different criminal laws, and will view ours as sadly, and perhaps even humorously, missing the point. Some things today's criminal law does will no doubt seem to our successors as wildly inappropriate, as we now see past systems' criminalization of heresy and blasphemy or failure to criminalize sexual harassment and domestic violence. The larger lesson here is that we ought to have some modesty about whether our current criminal law is the final truth of what should and should not be criminal—a modesty commonly lacking.

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