

Monica K. Miller · Jeremy A. Blumenthal
Jared Chamberlain *Editors*

Handbook of Community Sentiment

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 Springer

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*For my colleagues and friends at the University
of Nebraska-Lincoln, past and present, who helped
me become who I am today. Without you,
this book is not possible*

M.M.

Dedicated to my family

J.B.

*To Jaclyn, Maelyn, and Callie. I always care
what you guys think*

J.C.

Acknowledgments

In a way, this book is the result of three “generations” of scholars’ shared interest in community sentiment. Jeremy published his article “Who Decides? Privileging Public Sentiment about Justice and the Substantive Law” in 2003. That article, along with Norman Finkel’s seminal book “Commonsense Justice: Jurors’ Notion of the Law” (2001), sparked Monica’s interest in including a section on community sentiment in her graduate course. Eventually, the notion of community sentiment took hold of that course and became a recurring theme. Students were drawn to the notion of if, when, and how the public’s sentiment shapes—and is shaped by—the law. As one of Monica’s students, Jared learned about community sentiment while taking Monica’s graduate course. He went on to design a dissertation which, among other things, measured how social cognitive processes change sentiment toward gay rights. This furthered Monica’s interest in community sentiment, and how it can be measured, changed, and interact with justice principles. Soon, the desire for a “one stop” book on community sentiment was born. A few dozen emails later, a book proposal was born.

As editors, we were fortunate enough to secure contributions from many fine scholars who study community sentiment in one form or another—on a variety of topics, using a variety of methodologies. Our thanks go to these chapter authors who made this book a reality. Our hope is that this book will provide an all-encompassing overview of community sentiment research that will help scholars in a variety of fields better understand community sentiment and its relationship with law.

Monica was on sabbatical for a portion of the development of this book and thus would like to thank the University of Nevada, Reno; the College of Liberal Arts; the department of Criminal Justice, the Interdisciplinary Ph.D. Program in Social Psychology; and all of her colleagues, family, and friends who were so supportive along the way.

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As with any project of this magnitude, it was a roller coaster ride. Through the twists and turns, the book took shape and was a fun adventure that gave us a good excuse to keep in touch. In all, this was a fun project to work on and an accomplishment that all the editors and chapter authors are proud to have produced. We hope readers have as positive sentiment about this book as we do!

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Part I

An Introduction to Community Sentiment

“There Ought to Be a Law!”: Understanding Community Sentiment

Monica K. Miller and Jared Chamberlain

“Public sentiment is everything. With public sentiment, nothing can fail; without it nothing can succeed. Consequently he who moulds public sentiment, goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed.”

—President Abraham Lincoln (from Angle, 1991)

Whether it is the results of a national poll, a public demonstration, a Facebook post, or an op-ed article in the newspaper, it is difficult to go through a day and not be exposed to some form of community sentiment. At the very basic level, sentiment is one’s attitude toward or opinion about some attitude object, whether it is sentiment toward the president’s performance, whether laws should be enacted to restrict guns, or what should be included in school curriculum. Most people have opinions about a wide variety of issues, people, and things in their environment. Although the concept of community sentiment is very broad, this book is an attempt at consolidating knowledge about sentiment into one place. To narrow the focus of the book, we have chosen to focus on community sentiment toward laws and

policies that affect children and families. The book first tackles some basic issues in this introduction chapter: What is a community? What is sentiment, how is it measured, and what influences it? Does—and should—sentiment affect laws and policies? After this introductory chapter, several chapters discuss how sentiment is measured and how it can change. Next, the book offers perspectives on how legal actions that conform with sentiment promote positive and negative perceptions of justice. Other chapters discuss how laws that have received positive sentiment can sometimes have negative and unintended outcomes. The book closes with a summary of the common themes and directions for future research in community sentiment.

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Scope of the Book: Laws Affecting Family and Children

Community sentiment, which we define as collective attitudes or opinions of a given population, has long played a role in influencing legal actions (see Sigillo & Sicafuse; Chamberlain & Shelton, Chaps. 2 and 3, this

volume). The political system was founded on the notion that the general public can influence the legal system: lawmakers represent the people in their jurisdiction, many issues are put to popular vote, and juries made of community members are asked to apply the law to determine criminal guilt and civil liability. Because the public has a voice in the legal system, it is inevitable that people will use that voice to express their sentiment, giving rise to the need to study community sentiment. While most researchers study community sentiment by sampling from the general population (ideally in a random fashion), others study the sentiment of subgroups (e.g., victims). Of particular import is the sentiment of those who enforce the laws or are affected by the law. Law enforcement officers might not enforce a law as strictly if they have negative sentiment toward the law or believe that the law is ineffective (see Brank, Hoetger, Wylie, & Scott, Chap. 7, this volume); individuals who feel they did not receive fair treatment in one part of the legal system might lose faith in the system as a whole. These examples illustrate the importance of community sentiment to shaping the law and society as a whole. As such, a variety of disciplines (e.g., psychology, law, political science, sociology) study community sentiment.

This volume focuses on defining, measuring, and investigating the effects of community sentiment. One can have sentiment about anything—laws, social issues, fashion, education, and vehicles—the list is endless. We have chosen laws and policies as the focus of community sentiment, largely because it is the area of interest of all three editors but also because there has been much scholarship in this area from which to use as a foundation. Sentiment toward laws is a special kind of sentiment—because it affects everyone, because it sometimes affects some groups more than others, and because it can have significant consequences for society. Thus, we chose laws and policies as the secondary focus of the book. However, the principles of sentiment (e.g., how sentiment changes and is influenced) are general principles that could apply to any of a number of objects of sentiment other than laws and policies.

The study of community sentiment is not limited to sentiment about existing law but also encompasses sentiment toward potential laws, laws in other states or countries, or laws that people believe should exist but do not. This book includes laws in each category. Chamberlain and colleagues surveyed gay parents about laws they wish existed; Evans and colleagues (Chap. 5, this volume) focus on employment policies that consider family need when determining income, which is done in other countries, but not the USA; Miller and Thomas measure sentiment about hypothetical laws regulating the behavior of pregnant women, most of which do not exist; Chomos and Miller study sentiment toward Safe Haven laws, which only exist in some states; Chaney studies sentiment toward marriage promotion laws among a sample of participants who *are* affected by these laws and a sample of participants who *are not*; and Barth and Huffman investigate factors that influence sentiment toward same-sex divorce, which only exists in a few jurisdictions. Measuring sentiment about existing laws can be as important as studying sentiment about potential, past, or proposed laws because it is important to know whether individuals *would* vote for a law if it would be on the ballot or if they think a nonexistent law *should* be adopted. For instance, Kwiatkowski and Miller (Chap. 11, this volume) examine sentiment about laws that regulate social media outlets. Although this proposed law did not pass in Missouri, similar laws might emerge in the future, given that these media outlets can facilitate various forms of abuse (e.g., sexual abuse and bullying). Even though a law is not currently in existence or being enforced, it is still important to study; the benefits of considering community sentiment in lawmaking are discussed below.

This introduction chapter addresses some of the major issues surrounding community sentiment. It begins with the basic question: what is a community?

What Is a Community?

As a whole, community sentiment studies have a broad variety of definitions of “community.” Even in this book, chapter authors define

community differently. Often, this depends on the topic of study, the research question, and the legal application.

Sometimes, the community can be worldwide, as is the case in Evans and colleagues' (Chap. 5, this volume). These authors use a secondary data source: a survey called *Social Inequality IV* which is collected by the International Social Survey Programme. This survey contains a representative sample of people from over 30 countries. Such a broad sample is not always necessary or possible, however. For some studies, the community of interest is limited to a much more specific location. For example, Barth and Huffmon chose South Carolina because this state is typically unfriendly to gay rights—the topic of their chapter.

Some community sentiment studies use proxies for the broader population. For instance, Chomos and Miller and Reed and Bornstein (Chaps. 4 and 6, this volume) use students to represent the population more broadly. When students are an accurate and appropriate proxy for the community in general is a topic that has received an increasing amount of attention from researchers in recent years (e.g., Wiener, Krauss, & Lieberman, 2011). This debate is reviewed in Chomos and Miller's (Chap. 6, this volume). Note, however, that students are not always merely a convenience sample. Kwiatkowski and Miller intentionally chose students as a "community" in their study of a law forbidding teachers from contacting minors through social media. This sample was chosen because these participants were recently minors (a group affected by the law being studied) and because they are among the most frequent users of social media.

Sometimes, the community is policymakers, law enforcement officers, or other legal actors that affect whether and how laws are enacted or enforced. Brank and colleagues surveyed law enforcement officers and attorneys about their sentiment toward parental involvement laws that hold parents legally responsible for the actions of their children. Other chapters discuss how legislators often express overwhelmingly positive sentiment toward sex offender laws (Armstrong and colleagues), laws allowing for civil commitment of pregnant drug users (Cook and Walsh),

and Silver Alert programs designed to protect and find elders who wander off (Petonito and Muschert). In these chapters, the sentiment of the lawmakers themselves is under investigation.

Sometimes, the community is the people affected by the law. Chaney surveyed both people who are and people who are not targets of marriage promotion programs, which are the government's attempts to encourage low-income African Americans to marry. Chamberlain and colleagues surveyed and interviewed same-sex couples with children to measure their sentiment about their perceived and desired parental rights. Sigillo discusses how children can express sentiment about their living preferences after their parents' divorce.

No matter what the definition of "community," it is rare that the entire community can be sampled (see Chap. 3 for an in-depth discussion of sampling error). Occasionally, the entire list of the entire community is available and thus a random sample could be achieved. However, more commonly, there is not a list of every person in the community, and non-probability sampling techniques are used. Sometimes, convenience sampling is needed because a community is particularly small or difficult to reach. Chamberlain et al. had a particularly hard sample to reach: same-sex parents. Often, snowball sampling or other nonrandom methods are needed just to get a large enough sample. This of course means that the sample of participants may differ in important ways from the larger community they are intended to represent. Another sampling issue is response bias, which occurs when subsections of the population decline to respond or are unreachable. While measures such as repeated requests for participation (Brank et al., Chap. 7, this volume) and random digit dialing (Barth and Huffmon, Chap. 9, this volume) attempt to address the issue of response bias, it is nearly impossible to obtain a 100 % response rate, either because the entire community cannot be reached or participants decline to respond. These sampling issues are discussed in depth by Chamberlain and Shelton (Chap. 3, this volume) and below as one of the criticisms of using community sentiment studies as a basis for lawmaking.

Defining and reaching the "community" is but one complexity of community sentiment

research. A second challenge is defining and measuring sentiment, as discussed next.

What Is Sentiment? How Can It Be Measured?

Just as “community” can be defined in a wide variety of ways, so too can “sentiment.” Krippendorff (2005) suggests that the term “public sentiment” is socially constructed. Despite the seemingly simplistic term, it is difficult to define, having 50 or more definitions. Researchers provide definitions of terms and what response options are available. They determine how both qualitative and quantitative data are presented. They determine how and where questions are asked (e.g., privately online or by an interviewer) and whether individuals or groups (recognizing the difficulty of calling a poll of individuals a “public”) are studied. In this sense, “community sentiment” is a concept that is constructed by the researchers. With that in mind, this chapter investigates some of the many ways that researchers in this book and beyond have conceptualized the term “sentiment.”

Finkel (2001) suggests four ways of measuring public sentiment in the legal domain: legislative enactments, jury decisions, public opinion polls, and mock jury research (see also Chamberlain and Shelton, Chap. 3, this volume). This book takes a somewhat broader approach. Sentiment can be expressed through attitudes (positive or negative evaluations of an object), opinions (beliefs), election results, jury verdicts, legislators’ votes, media content, and so on. All of these measure sentiment toward a particular law, policy, or similar construct. By voting for a law, a voter indicates positive sentiment toward that law. By posting a criticism on social media, one indicates negative sentiment. For the purposes of this book, sentiment can be measured in any way that communicates a negative or positive position (attitude, opinion, vote) concerning some law or policy.

Although this book does not cover all the (possibly countless) ways to measure sentiment, it provides many examples. Some chapters study

the strength of community sentiment. For instance, Evans and colleagues (Chap. 5, this volume) used a secondary data survey which asked participants if an employee’s pay should be based on whether the person has children to support. Reed and Bornstein asked mock jurors to provide a verdict and their perceptions about child sex abusers. Brank and colleagues asked law enforcement officers and attorneys how effective they think parental responsibility laws are, while Chomos and Miller asked participants whether they support a law allowing for legal abandonment of children. Such survey measures are the most basic methods of measuring attitudes, opinions, or, as conceptualized in this book, sentiment.

In addition to attitudes and opinions, there are other methods available to measure sentiment that is specific to laws and policies. Kwiatkowski and Miller asked participants to indicate whether they would *vote* for a law that would forbid teachers from communicating with students on social media. Miller and Thomas asked participants to *assign punishment* to a wrongdoer. Petonito and Muschert and Cook and Walsh both measure sentiment by whether *legislators vote* for a law. Using a mock jury approach, Reed and Bornstein studied how perpetrator qualities (i.e., the relationship they had with the child) impact *juror verdicts and perceptions* in child sexual abuse cases. All of these are ways to measure sentiment.

It is fairly easy for researchers to measure agreement with statements and voting preference. Likert scales asking participants to indicate agreement on a numerical scale and categorical measures asking participants to “vote for” or “vote against” a particular policy or law are fairly easy to collect and assess. However, sentiment is not always measured by using closed-ended questions like scales or categorical responses. In addition to employing closed-ended questions, Chamberlain and colleagues asked open-ended questions that allowed participants to express themselves outside the confines of predetermined response categories or scales.

There is no particular methodology that is used to measure community sentiment. Sentiment studies can be surveys conducted by

professional survey companies or other entities (Evans et al., Chap. 5, this volume), mail surveys (Brank et al., Chap. 7, this volume), phone surveys (Barth and Huffmon, Chap. 9, this volume), online surveys (Chamberlain et al.; Reed and Bornstein; Kwiatkowski and Miller, Chaps. 13, 4, and 11, all in this volume), interviews conducted either in person (Chamberlain et al., Chap. 13, this volume) or by email (Chaney, Chap. 13, this volume), or content analysis of Internet blogs (Sicafuse & Miller, 2014), and countless other methods.

Just as methodologies are diverse, the research questions addressed in community sentiment studies are diverse. Some studies ask a straightforward research question: what percentage of the public is in favor of a policy (Evans et al., Chap. 5, this volume)? Others ask whether there has been a *change* in sentiment. Sentiment can change over time (e.g., sentiment about divorce; Barth and Huffmon, Chap. 9, this volume) and can depend on the context of a situation (e.g., the type of drug a defendant is accused of using can affect the sentence a juror recommends; Miller and Thomas, Chap. 8, this volume). Sentiment also can vary based on the amount of information available. Kwiatkowski and Miller (Chap. 11, this volume) find that receiving information about a law can reduce support for that law. Other researchers might ask about the *bases* of sentiment; for example, Sicafuse and Miller (2014) determined that sentiment about mandatory HPV vaccinations was often based on morality, emotions, and cognitive biases. All these research questions are part of the broad body of "community sentiment" research.

In the absence of properly conducted research, it is difficult to measure community sentiment accurately. Some voices in the public sphere or media sometimes claim to represent the community, but it is often unclear whether the messages actually represent sentiment accurately. For instance, the Occupy movement claimed to represent community when they adopted the slogan "we are the 99 %" and Arab protesters chanted slogans starting with "the people want..." during protests about a variety of social and economic problems. These examples illustrate publicized

voices that garnered a lot of attention as they claimed to represent the people.

More narrowly, daily op-ed articles proclaim to represent community sentiment, and countless Facebook timelines communicate the sentiment of one's Facebook friends. Sometimes, the media (traditional and social) create the impression that "everyone" has a particular opinion, simply because those messages are easily available. Without accurate measures used to gauge the opinions of representative samples, it is impossible to know the community's actual sentiment; yet many people likely believe the available (and possibly false) plurality presented by any given media source.

A related issue is that of "loud" (and often powerful) voices in the community having more influence than others. Ideally, all citizens have the same amount of influence on what laws are adopted; however, it would not be surprising if the sentiment of some had more weight than others. Sometimes, money buys influence. Community members who can afford to hire lobbyists and pay for advertisements to try to garner followers might be more influential than those who cannot afford such measures. In 2014, the Supreme Court ruling in *McCutcheon v. Federal Election Commission* lifted limits on the total amount any private person can donate to political candidates in an election year (however, there is still a limit on how much a donor can contribute to any single candidate). Some critics are concerned that this will allow the voices of wealthy community members to be heard more than the voices of less wealthy community members (Mears & Cohen, 2014).

These examples illustrate another complexity of community sentiment: how to hear all the voices, not just the loud ones, when measuring sentiment. Chamberlain and Shelton (Chap. 3, this volume) and all the studies in Section II specifically address the issue of measurement in community sentiment studies, though other chapters also illustrate a variety of methods of measuring sentiment, often listing some of the limitations of that particular method. As a whole, the book highlights many of the methods used to conceptualize and measure sentiment.

What Shapes Community Sentiment?

The question of where community sentiment comes from is a complicated one. On one level, sentiment comes from within the individual. A person's personality, preferences, beliefs, emotions, values, and experiences all shape attitudes. For instance, liberal values and conservative values are related to differences in support for a host of legal attitudes ranging from in vitro fertilization (Sigillo, Miller, & Weiser, 2012), to abortion (Lindsey, Sigillo, & Miller, 2013), to drilling for oil, to immigration policies (Druckman, Peterson, & Slothuus, 2013). The person's environment can influence their attitudes as well, including messages sent by parents, friends, educators, and one's community. Classic studies have revealed how education is related to liberal values (although this varies by country; Weil, 1985) and how political values are transmitted from parent to child (Jennings & Niemi, 1968).

But "community sentiment" is also broader than just one individual's attitude—it represents a collective attitude. Thus, what drives an entire community's sentiment is typically a broad, sweeping social movement capable of capturing the attention of a large group of people—especially lawmakers. Social movements can involve protests, rallies, sit-ins, media campaigns, and other efforts designed to bring attention to their issue. Social movements can affect law through dramatic events (e.g., protests) and/or changing community sentiment—both can get the attention of lawmakers (Agnone, 2007).

The media is another significant influence on community sentiment. The media shapes the community's sentiment by sending messages about what is important, right, wrong, or in need of addressing. The Campbell chapter (Chap. 14, this volume) discusses how the media pressures lawmakers and college officials to "do something" about violence on campuses. This pressure is communicated to the community which often adopts these sentiments. This pressure often does result in changes on campuses, but, as the authors point out, these media-driven changes may not ultimately be therapeutic.

In addition to the media, lawmakers are also "agenda setters," meaning that they play an important role in defining what social issues get attention (and indeed it is often difficult to untangle the influence of the media and lawmakers, as noted in Sigillo and Sicafuse, Chap. 2, this volume). What qualifies as an "issue" is socially constructed—that is, society and its leaders decide what is worthy of our attention and what is not, and, by communicating to the public (primarily via the media), they help to construct sociopolitical issues (see Petonito and Muschert, Chap. 18, this volume). After all, it is hard to have a sentiment about an issue that one does not know exists. Sigillo and Sicafuse discuss the case of "Octomom," a single mother of four who was transplanted with 12 embryos through in vitro fertilization and gave birth to eight more children, leading to her alleged reliance on public assistance. Before this event, most Americans likely knew very little about in vitro fertilization procedures, let alone legislation that would regulate its use. But, after being bombarded with news of this story, many Americans developed strong sentiment about the issue. Lawmakers also spoke up about the issue, and new regulations were adopted. This case illustrates how an attitude can be nonexistent, or possibly latent, and then suddenly leap into existence when one is confronted with new information. By framing the issue in a certain manner, the media and lawmakers construct a socially appropriate (normative) response, indicating not only that the public should care, but also what the public attitude *should* be about the issue. The "Octomom" case was presented as an immoral outrage, a theft of public resources, and an irresponsible parental action (rather than as a woman longing to have children). Not surprisingly, this media bent influenced attitudes in that direction.

As the "Octomom" case demonstrates, an extreme event can bring a problem to light, prompting legal action and public outcry. Kingdon (1995) visualizes this process as a "stream" containing countless potential social issues; an extreme event can open a "window" and allow an issue to get attention from policymakers. One example of this occurred in 1996

when Amber Hagerman was abducted from outside her Texas home. After her dead body was discovered, many lamented her loss and wondered if something could have been done. Nearly overnight, the concept of the AMBER Alert system was born. AMBER Alerts provide the community with information about abducted children and the abductor in hopes that a citizen will provide a tip that will lead to the child's safe rescue (see generally Sicafuse & Miller, 2010). Child abduction has been an issue for decades, centuries, or perhaps since the beginning of time, but media attention and the loud voices of Amber Hagerman's parents and supporters made this case special and capable of prompting legal change. The first AMBER Alert system was adopted in 2002, and within 3 years, all 50 states had AMBER Alert systems. In Kingdon's analogy, child abduction was an issue in the policy stream and Amber Hagerman's abduction opened a policy window which prompted policy change.

There are many examples of policy streams and windows in the chapters in this book. One example highlighted in the Miller and Thomas chapter is the "war on drugs" (Chap. 8, this volume). In the 1980s, the media published extreme stories telling of the dangers and victims of illegal drug use. Lawmakers focused on the issue because the "tough on crime" approach that accompanied the war on drugs was popular and would garner votes. While drug use had been a social issue for decades, it suddenly attracted an increase in attention and action during this time. As discussed by Miller and Thomas, the war on drugs fueled the legal debate about drug use during pregnancy. As a result, lawmakers are faced with the question of what to do about the problem of pregnant drug users. Cook and Walsh (Chap. 14, this volume) address many of these legal responses, including civil commitment. The war on drugs also led to a dramatic increase in female incarceration, which led to other legal issues, such as how to deal with "prison mothers" and their children (Miller & Miller, 2014). As this example illustrates, the media and legal actions can shape sentiment, law, and the lives of countless individuals by identifying what issues are important and how they should be addressed.

As these examples illustrate, the media helps open "policy windows" (Kingdon, 1995) through presentation of information. But not all information is created equal—some is much more attractive and motivating than others. One way to attract attention and motivate the public to act is to create or promote a moral panic. The notion of moral panic, widely thought to have been named by Cohen (1972), occurs when society deems a condition, behavior, or person/group of people to be a threat. Zgoba (2004) lists a myriad of panics including child abduction, sex offenders, satanic cults, cyberporn, and school shootings; Reed and Bornstein (Chap. 4, this volume) discuss the moral panic surrounding child sexual abuse. The media—along with legal actors and other community leaders—sensationalizes the threat, raising emotions and a sense that "something should be done." Collective outrage leads to action—socially constructed responses to socially constructed threats. The adoption of the AMBER Alert system and stricter drug policies are reactions to moral panics of child abduction and drug abuse.

One popular conception of moral panic poses that it has five criteria (Goode & Ben-Yehuda, 1994, but see David, Rohloff, Petley, & Hughes, 2011, for other conceptions of moral panic): concern, hostility, consensus, disproportionality, and volatility. The media, legal actors, community members, or a loud group of citizens expresses *concern* and *hostility* over some event or group of individuals that is interpreted as a threat. Largely because there are few voices in opposition (e.g., few people opposed the adoption of AMBER Alerts that would supposedly rescue abducted children), a *consensus* develops among the public that this threat is indeed a problem that needs to be addressed. Because this alarm is largely fueled by emotion (indeed it is a "panic"), the reaction is often *disproportionate* to the actual threat posed. This concern and reaction is sudden and *volatile*. Often, panic arises over social issues that have been around for long periods of time but suddenly attract attention. In the words of Kingdon (1995), an issue in the policy stream gets attention when a policy window opens. Eventually, the panic often subsides (i.e., after a "solution" is

constructed). For instance, Reichert and Richardson (2012) note the rise of the Satanism scare in the 1980s that led to biased legal decisions against those allegedly or admittedly involved in Satanism. Eventually, the media reduced its attention toward Satanism and the legal system became more discerning in their treatment of claims involving Satanism. Sometimes, however, moral panic rises again if something (e.g., an extreme event) catches the media's attention (Zgoba, 2004).

There are countless influences on community sentiment. Some are personal, some are environmental. Some influences are subtle, while other influences are intentional, directed messages meant to influence the community's sentiment and drive legal change. Community sentiment exists about countless legal and policy topics. Whether sentiment actually affects legal decision-making is somewhat of an open question, which is addressed next.

Does Community Sentiment Influence Law?

The question "does community sentiment influence the law?" is somewhat of a difficult question to answer. There are many definitions of "law" and many ways to measure "influence." The research indicates that there are some "yes" answers and some "no" answers, as discussed below.

Community Sentiment Is Sometimes Ignored

Blumenthal's (2003) review of the research revealed important deviations between community sentiment and the law. For example, Robinson and Darley (1995) presented 18 studies which measured whether the sentiment of the community differed from the actual law stated in the Model Penal Code (MPC). Participants were asked their sentiment toward a variety of scenarios that varied in context (e.g., the perpetrator's level of involvement in the crime). Participants

largely indicated that a perpetrator who actually completed a robbery should be held responsible. In contrast, participants were less likely to find a perpetrator who only took a "substantial step" toward committing the robbery to be responsible. This perception is in sharp contrast to the MPC, which holds both of these perpetrators equally responsible for the crime. Robinson and Darley illustrate how community sentiment differs from the actual law on a wide variety of legal issues, thus providing an example of how community sentiment can be ignored.

Sometimes, community sentiment is ignored because of other legal considerations. For example, a large proportion of people are in favor of regulating children's access to violent or sexual video games. A 2010 national survey of 1,000 adults by Rasmussen Reports found that 65 % of respondents favored restricting the sale of violent games to children; 25 % disagreed and 9 % were unsure (New Poll Shows, 2010). Another Rasmussen poll finds the public is more evenly split: 44 % favored restrictions, while 45 % were opposed (44 % favor, 2013) and a third finds that 60 % of adults support such regulation (Hatfield, 2007). While the surveys are not all in agreement, there is at least some evidence that many Americans are willing to restrict games. Even so, laws designed to restrict access to such games conflict with the First Amendment rights of video game manufacturers and game players. In *American Amusement Machine Association v. Kendrick* (2001), the city of Indianapolis provided justices with a number of studies that suggested that playing violent video games is associated with antisocial and aggressive behavior, and thus the city should be allowed to ban minors from *playing* such dangerous games. The Court disagreed. Similarly, a California law that banned the *sale or rental* of games that portray certain forms of extreme violence against a human image was struck down by the US Supreme Court in 2011 (*Brown v. Entertainment Merchants Associations*, 2011). The Court in both cases cited First Amendment concerns and doubted the social science research. Community sentiment favoring these laws was not a concern in either case.

As these examples illustrate, community sentiment is often ignored or not considered. As Robinson and Darley demonstrate, sometimes sentiment can conflict with the actual law. In the case of video games, other considerations are weighed more heavily than sentiment. In other situations, sentiment *is* considered, as is discussed next.

Community Sentiment Is Sometimes Influential

Despite the evidence that community sentiment is sometimes ignored or uninfluential in policy-making, there is much evidence to the contrary. Sentiment affects lawmaking in four distinct areas. These include decisions made by lawmakers, presidents, judges, and jurors.

Lawmakers. Two chapters in this volume (Chamberlain and Shelton; Sigillo and Sicafuse, Chaps. 3 and 2) review the literature that addresses the question of whether community sentiment influences lawmaking. Both chapters conclude that there is a strong, positive relationship between community sentiment and both national and state policies. Burstein reviews the substantial body of research and concludes that public opinion has a strong effect on public policy (2003) especially on issues of particular importance to the public (2006). Oldmixon and Calfano (2007) agree that lawmakers consider the sentiment of their constituency when voting—especially the religious and political ideologies of their voters.

President. Similar to legislators, the president is the elected representative of the American people who makes critical legal decisions that affect the entire nation. Thus, it is possible that presidents might listen to the sentiment of the American people who voted them into office. As the head of the executive branch, the president is charged with handling foreign affairs and national security.

Research investigating whether the president listens to community sentiment is somewhat mixed. Canes-Wrone and Shotts (2004) suggest

that presidents tend to listen to community sentiment, but not necessarily in a uniform way. Presidents tend to adhere to sentiment more toward the end of a term in which they are seeking reelection or when their approval rating is average (rather than high or low). Further, the president listens to community sentiment more on some issues than others. When the issue is one that is familiar to citizens (e.g., social security, health, or crime), presidents' actions are highly in agreement with the community's sentiment, but when the issue is one that is less familiar to the public (e.g., foreign policy or military spending), presidents' actions are less consistent with community sentiment. In contrast to the Canes et al. findings, other researchers suggest that presidents do not adhere to community sentiment (e.g., Wood & Lee, 2009).

Supreme Court Judges. Because legislators are elected representatives assumed to vote in response to the community's sentiment, it is unsurprising that studies revealed that this is the case. Unlike legislators, Supreme Court justices serve a lifetime appointment and thus might not be as motivated to listen to community sentiment. However, McGuire and Stimson (2004) reviewed four decades of Supreme Court decisions and determined that the Court is very responsive to community sentiment. The authors conclude that even though the justices do not directly answer to the populace (as legislators do), they recognize that if their rulings are to be carried out effectively, they must be in line with community sentiment. Without the support of the community and leaders who carry out the Court's rulings, the ruling will not be strongly followed (for relevant discussions, see Brank et al.; Miller & Thomas; Sigillo, Chaps. 7 and 8, this volume).

Perhaps the area of law that has relied the most on community sentiment is the death penalty. Supreme Court justices in *Furman v. Georgia* (1972) declared the importance of determining "whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment acceptable" (p. 278). In deciding what is "cruel and unusual punishment," the Court has often relied on com-

munity sentiment. In the death penalty context, this is typically called the “evolving standards of decency” (*Stanford v. Kentucky*, 1989). This standard is not set by the justices but is based on objective measures such as state laws (*Penry v. Lynaugh*, 1989) and verdicts of juries, which should reflect the sentiment of society as a whole (*Thompson v. Oklahoma*, 1988; for a review, see Garlitz, 2006). The *Thompson* justices relied on community sentiment to inform their decision, as they reviewed: (1) state statutes which would reveal how many states allowed the death penalty for defendants who were 15 years old or younger at the time of the crime, (2) jury statistics which would reveal how often juries chose the death penalty for juveniles, and (3) the positions of national and international organizations.

In contrast, the Court in *Stanford v. Kentucky* (1989) adopted a different approach. While determining the appropriateness of measures of evolving standard of decency, the justices (led by Justice Scalia) specifically noted that sentiment measured by public opinion polls, the opinions of interest groups or professional associations, and the views of any international group are irrelevant.¹

Scalia is not the only justice who has expressed the desire to limit the use of community sentiment. In *Atkins v. Virginia* (2002), Justice Rehnquist (dissenting) stated:

the work product of legislatures and sentencing jury determinations ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments. (p. 324)

Essentially, Scalia and Rehnquist agree with the Court in *Gregg v. Georgia* (1976), which stated that legislatures and not judges are given the responsibility to respond to community sentiment (e.g., the will and values of the constituents). From their perspective, international opinions are irrelevant, public opinion polls are often biased, and opinions of those who write briefs are biased by the political stance that draws them together for that cause. If legislators have not deemed polls and opinions of interest groups important enough to use as basis for their law-making, the Court should not either.

More recently, the *Roper v. Simmons* (2005) Court reaffirmed the need to assess the evolving standards of decency in order to determine whether the juvenile death penalty is cruel and unusual and thus violates the Eighth Amendment. The justices were split 5-4, but the majority ruled that society’s standards of decency had changed since the *Stanford* Court determined (in 1989) that execution of offenders who were at least 16 at the time of the crime did not contradict the community’s standard of decency. Because community sentiment is now unsupportive of the death penalty for offenders who were minors at the time of the crime, it was held to be unconstitutional (*Roper v. Simmons*, 2005).

In 2008, the Supreme Court considered the case of *Kennedy v. Louisiana* in which a defendant claimed that it was cruel and unusual punishment to execute a defendant for the rape of a child under 12. At the time, only a handful of states allowed the penalty for such defendants, but the Louisiana Supreme Court determined that this was enough to consider there to be a national consensus supporting the penalty for these offenders. The Supreme Court disagreed, finding that there was not enough of a national consensus. Shortly after the Court’s decision, the Court was asked to reconsider their decision because of a factual error. Neither of the parties nor the many brief writers had reported that, in 2006, the Uniform Code of Military Justice had added child rape to their list of crimes punishable by death. The Court declined to reconsider whether this would have changed their decision. Justice Scalia, rarely a supporter of using community sentiment, concurred with the denial of the petition for

¹ The American Bar Association, the American Society for Adolescent Psychiatry, Amnesty International, and the International Human Rights Group, among others, had provided amicus briefs.

rehearing, stating that "the views of the American people on the death penalty for child rape were, to tell the truth, irrelevant to the majority's decision in this case [...] and there is no reason to believe that absence of a national consensus would provoke second thoughts" (*Kennedy v. Louisiana*, 2008, p. 1).

In sum, the Supreme Court has provided mixed support for the role of community sentiment in death penalty jurisprudence. Decisions in *Furman*, *Roper*, and *Kennedy* affirm the use of community sentiment to inform decisions, whereas decisions in *Stanford* and *Gregg* deny or minimize such a notion.

Abortion is another area of law in which justices have considered community sentiment. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Court discussed how community sentiment about abortion had changed since *Roe v. Wade* (1973). The majority opinion stated that the

pressure to overturn (*Roe v. Wade*) has grown only more intense. A decision to overrule *Roe*'s essential holding would [be at] the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law. (p. 869)

Here the Court explicitly notes that they must adhere to the community sentiment regarding what the "rule of law" should be or risk of losing legitimacy.

Not all justices believe sentiment should influence Supreme Court decisions, however. Consistent with his general view of community sentiment (and its impact on the Supreme Court), Justice Scalia strongly disagreed, stating:

I am appalled by the Court's suggestion that the decision must be strongly influenced....by the substantial and continuing public opposition the [*Roe*] decision has generated....the notion that we could decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening. (p. 998)

Scalia (and other judges) rejects the role of community sentiment in the Court's decision-making, instead favoring a literal interpretation of the Constitution. For traditionalists like Scalia, who read the Constitution literally, there is no

right to abortion because the Constitution does not literally grant that right. For such people, the Constitution cannot be interpreted to give rights that are not specifically stated. Thus, there is no place for community sentiment—only the literal words on the Constitution can dictate a decision (but see his opinion in *Stanford v. Kentucky* (1989) discussed above for an exception).

While abortion and the death penalty are the two major areas of law in which community sentiment plays a role vis-à-vis the Supreme Court, there are other instances as well. While some uses of community sentiment are broad and sweeping (e.g., whether the death penalty is constitutional), others are limited, case-specific considerations of sentiment. Sigillo (Chap. 12, this volume) discusses how judges often allow children to have a voice in where they live after their parents' divorce. Thus, sentiment matters in both broad, general ways (Supreme Court decisions) and case-by-case decisions (divorce).

Jurors. Jurors can represent the community, not only because they are by definition members of the community, but because that is their intended role within the legal system. The Constitution provides anyone who is accused of a crime or sued in civil court a jury trial (with some exceptions). In general, this jury is to be drawn from a pool that is representative of one's community (e.g., *Lockhart v. McCree*, 1986).

In some instances, jurors are sometimes specifically instructed to weigh community's perceptions. The clearest example of this is in obscenity cases. The standard for determination of whether material is obscene was set in *Miller v. California* (1973). In these cases, the jury's job is to determine whether the community would deem the material to appeal to prurient interest; depict sexual activity that the legislature has deemed offensive; and lack any artistic, scientific, literary, or political value (see Reed and Bornstein, Chap. 4, this volume). The important element (for the discussion in this chapter) is that the jury has to determine what the *community* feels is obscene—not the jurors themselves. Thus, obscenity cases almost always include experts to testify about results of research

designed to measure the community's sentiment toward sexual material (see generally Summers & Miller, 2009).

Sometimes, jurors make verdicts or sentences that reflect their sentiment rather than the law (Finkel, 2001; Robinson & Darley, 2007). Often, this jury discretion is intentional and (arguably) a positive aspect of the court system. Juries can express their disagreement with laws by "nullifying" the law. Nullification occurs when a jury intentionally treats a known guilty party more leniently than the law would prescribe. This is the jury's way of communicating that they do not agree with the law's prescription and instead want to show mercy. For instance, a man who acts in a way that leads to the death of his terminally ill wife has legally committed homicide. However, a jury may nullify the law and be lenient to the man at trial because he had good intentions of relieving his wife of her misery. It is difficult to know exactly how many cases of nullification occur, but Finkel, Hurabiell, and Hughes (1993) reports that it could happen most frequently in contexts—such as euthanasia—in which the community's sentiment is not aligned with the law (see Reed & Bornstein, Chap. 4, this volume, for more on nullification).

Sometimes, the jury's discretion is inappropriate, however, such as an attractive defendant getting a lighter sentence than an unattractive defendant (Patry, 2008) or a verdict that is heavily influenced by emotions rather than the facts. Horowitz and colleagues (2006) found that jurors who are aware that they can nullify the law are sensitive to biased emotionally charged information. This supports the "chaos" theory which holds that jurors will rely on their emotions and biases rather than the law if they are told they have the power to nullify.

More broadly, jurors do express their personal sentiment through their verdicts (e.g., in civil cases deciding how much an injury is worth; whether a plaintiff is liable). Hans and Vadino (2000) find that many people are skeptical of whiplash injuries and thus could deny the plaintiff's claim of injury or request for damages.

As this section demonstrated, there are many instances in which lawmakers, judges, and jurors

rely on community sentiment in their legal decision-making. But there are other instances in which community sentiment does not play a role in lawmaking. This discussion leads to the next—and more subjective—question of whether community sentiment *should* influence the law.

Should Community Sentiment Influence Law?

In this section, we address some of the arguments supporting both the "yes" and the "no" answers to the question "should sentiment influence the law?" As with other questions, the answer is not particularly simple.

No, Community Sentiment Should Not Influence Law

There are a number of reasons we should be hesitant to let community sentiment influence law. Some relate to the quality of the research measuring sentiment and some relate to the abilities and biases of the community. Other reasons relate to the negative outcomes that sometimes result from adoption of popular laws.

Polls Are Poorly Conducted. There are many intricacies involved in creating a useful and accurate poll. These include poor sampling, vague questions, wording and order of questions, and response options.

Poor Sampling. When measuring community sentiment, researchers want to measure the sentiment of a sample that represents the entire population. This is quite difficult to do at times. Sometimes, convenience samples are used (see Chaney Chap. 10 and Chomos and Miller Chap. 6, both in this volume) which necessarily do not represent the population as a whole because they represent only one subsection of one community (for further discussion, see Chomos and Miller, Chap. 6, this volume). Snowball sampling (see Chaney Chap. 10 and Chamberlain and colleagues Chap. 13, both in this volume) creates

homogeneous samples because the participants know each other. Because individual differences are often related to legal attitudes (Chomos and Miller, Chap. 6, this volume), this type of sampling is clearly problematic. Chamberlain and Shelton (Chap. 3, this volume) provide an in-depth discussion of the difficulty of choosing a sample and also discuss the previously mentioned problem of response bias.

Vague Questions. Polling questions are often overly general questions which provide no context or specific stimuli and require the respondent to express sentiment based on a vague concept rather than objective stimuli. If a poll asks respondents, "do you favor prison for pregnant women who use drugs?," the answer will depend on what exemplar the participants bring to mind. Miller and Thomas (Chap. 8, this volume) provide objective stimuli and illustrate that different stimuli produce different responses. For instance, responses were more punitive if the child was harmed or if the drug was cocaine rather than marijuana. Thus, the response to a vague question is likely to depend on the exemplar that first comes to mind.

Salerno et al. (2014) review the research supporting their conclusion that community sentiment toward juvenile sex offender registry laws is generally positive when the question posed is in the abstract; however, sentiment is much more mixed when the question asks about specific, less severe, or consensual sexual activities. Further, when asked abstractly about registry laws, the community supports adult registries and juvenile registries equally—but when given specific cases, they support juvenile registries much less. This is because people tend to imagine extreme cases when asked in the abstract. This leads to more punitive responses. But, when given a more common case (a less severe juvenile sex offense), it reduces respondents' support (i.e., reduces punitiveness). Similarly, responses to the vague question "do you support the death penalty?" often trigger an extreme atypical exemplar and thus high support for the penalty. In contrast, a specific question such as "do you support the death penalty for a defendant who was an accomplice to murder?" is much lower (see, e.g., Finkel, 2001).

The media encourages distorted exemplars. For instance, the media's increased reporting of sensational "stranger" abductions leads to the perception that abductions are increasing. This is problematic because this does not reflect reality. Distorted perceptions of reality are problematic because they lead to positive sentiment toward "solutions" that address the *perceived* problem and not the *actual* problem. In reality, a child is much more likely to be abducted by a family member than a stranger (Griffin & Miller, 2008). Yet, more resources are used (e.g., AMBER Alert) for stranger abduction than familial abduction.

These examples illustrate the importance of using specific questions rather than abstract ones. Vague questions make it impossible to know what image the participant is using when responding. More specific questions can control for this and also measure whether certain conditions (e.g., drug type and baby injury in the Miller and Thomas chapter, Chap. 8, this volume) affect sentiment.

Wording and Order of Questions. As discussed in more detail in Chamberlain and Shelton (Chap. 3, this volume), the way questions are worded can influence responses (Tourangeau, Rips, & Rasinski, 2000). A classic example by Rugg (1941) suggests that a subtle word change in a question can drastically impact responses. One set of respondents was asked, "Do you think the USA should *forbid* public speeches against democracy?," while another was asked, "Do you think the USA should *allow* public speeches against democracy?" (both were yes/no responses). Those who responded to the "forbid" question were less in favor of the regulation (54 %) as compared to those who responded to the "allow" question (75 % favored the regulation). Similarly, Finkel (2001) reports that asking participants about their support for financial "assistance to the poor" results in much more positive sentiment than asking participants about their support for "welfare." Hans and Vadino (2000) note that jurors had different responses to the terms "whiplash" versus "soft tissue injury" versus "connective tissue injury." Specifically, jurors were skeptical of an injury called "whip-

lash,” often believing such injuries were faked in order to sue the wrongdoer. A “soft tissue injury” was seen as less severe than a “connective tissue injury.” Thus, researchers (and lawyers) should be careful about the terminology chosen in questions because it would likely influence responses.

Just as the wording of a question can affect responses, so too can the order of questions. A body of research has indicated that a person’s responses might be affected by the experiences they were immediately exposed to during the study. Priming research posits that cues provided by stimuli or previous questions serve as cues that affect responses. For instance, being primed with Christian words (rather than neutral words) increased participants’ covert racial prejudice and negative affect toward African Americans (Johnson, Rowatt, & Labouff, 2012). Similarly, participants primed with a reminder of their political affiliation expressed more extreme political sentiment than those not primed (Ledgerwood & Chaiken, 2007). These examples suggest that responses might be affected by the ordering of questions. Specifically, if participants are asked about their political or religious affiliation (or any number of other primes) before their sentiment about laws or policies, they may respond differently than if they are asked their sentiment before their affiliation.

Response Options. Often, the choices participants are given affect their responses. For instance, 42 % of participants supported mandatory Life Without Parole sentences for certain offenses, but when given an example of a juvenile offender and given six options to choose from, only 5 % chose the Life Without Parole in an adult facility option (Kubiak & Allen, 2008).

Similarly, the verdict options given to jurors in insanity cases affect mock jurors’ ultimate verdict: Poulson, Wuensch, and Brondino (1998) investigated whether the addition of a Guilty but Mentally Ill (GBMI) would affect jurors who otherwise would have to choose between a Not Guilty by Reason of Insanity (NGRI) and a Guilty verdict. They found that when the GBMI option was available, there was a reduction of about 66 % guilty verdicts and about 50 % of

NGRI verdicts. The authors concluded that the GBMI is seen as a “compromise” verdict that allows jurors to acknowledge the defendant’s illness but hold him legally responsible; it also avoids controversial NGRI verdicts.

As this section demonstrated, there are a number of problems with community sentiment polls. Thus, it might be easy to say that lawmakers should not rely on community sentiment simply because measuring it is so difficult; poorly conducted studies could produce erroneous results and lead lawmakers astray. However, this is too strong of a conclusion. The identification of problems is one way to make sure that community sentiment studies can be done well by addressing these problems. Identifying (and relying on) properly constructed studies is the key to building good laws based on properly measured community sentiment. But, even when a poll is conducted correctly, it still might not provide quality information about sentiment because of characteristics of the respondents, as discussed in the next several subsections.

People Are Ignorant of the Law and Its Consequences. Another criticism of using community sentiment as a basis of lawmaking rests on the notion that perhaps lawmakers are better equipped to make decisions than community members.

Many people simply are ignorant about issues related to criminal justice policy (Denno, 2000), including issues such as the death penalty (Haney, 1997), juvenile sex offender laws (Stevenson, Najdowski, & Wiley, 2013), laws prohibiting teacher/student contact on social media (Kwiatkowski & Miller, Chap. 11, this volume), and the insanity defense (Perlin, 1996). To highlight, people are generally ignorant about the insanity defense and its consequences. Some of the often believed myths include: the insanity defense is used often and is highly successful; defendants are able to “fake” insanity; and defendants found Not Guilty by Reason of Insanity are released from the mental institution quickly and spend less time in the mental institution than they would in prison (Perlin, 1996). Similarly, people are unaware that registration laws apply to