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## The Pathological Politics of Criminal Law

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# THE PATHOLOGICAL POLITICS OF CRIMINAL LAW

William J. Stuntz\*

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## INTRODUCTION

Substantive criminal law defines the conduct that the state punishes. Or does it? If the answer is yes, it should be possible, by reading criminal codes (perhaps with a few case annotations thrown in), to tell what conduct will land you in prison. Most discussions of criminal law, whether in law reviews, law school classrooms, or the popular press, proceed on the premise that the answer *is* yes.<sup>1</sup> Law reform movements regularly seek to broaden or narrow the scope of some set of criminal liability rules, always on the assumption that by doing so they will broaden or narrow the range of behavior that is punished. Opponents of these movements operate on the same assumption — that the law determines who goes to prison and who doesn't, that the distribution of criminal punishment tracks criminal law as it is defined by code books and case reports. Of course, participants in these debates understand that the law does not *by itself* determine who is and isn't punished. Some criminals evade detection, police and prosecutors frequently decline to arrest or charge, and juries sometimes refuse to convict. Still, if the literature on criminal law is an accurate gauge, all that is just a gloss on the basic picture, a modification but not a negation of the claim that criminal law drives criminal punishment.

But criminal law does not drive criminal punishment. It would be closer to the truth to say that criminal punishment drives criminal law. The definition of crimes and defenses plays a different and much smaller role in the allocation of criminal punishment than we usually suppose. In general, the role it plays is to empower prosecutors, who are the criminal justice system's real lawmakers. Anyone who reads

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1. For a fascinating recent example, see Paul Robinson's comparative study of American criminal codes. Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1 (2000). Robinson emphasizes both the comprehensiveness and the clarity of criminal codes' descriptions of prohibited conduct, on the ground that clearly defined crimes send better signals to the public at large than ambiguously defined crimes. See *id.* at 6-11; see also Paul H. Robinson, *Structuring Criminal Codes to Perform Their Function*, 4 BUFF. CRIM. L. REV. 1 (2000) [hereinafter Robinson, *Structuring Criminal Codes*] (defending the use of criminal codes to educate the public as to its legal obligations). These criteria make sense only if the codes' descriptions in fact capture the conduct that the state punishes.

criminal codes in search of a picture of what conduct leads to a prison term, or who reads sentencing rules in order to discover how severely different sorts of crimes are punished, will be seriously misled.

The reason is that American criminal law, federal and state, is very broad; it covers far more conduct than any jurisdiction could possibly punish. The federal code alone has thousands of criminal prohibitions covering an enormous range of behavior, from the heinous to the trivial. State codes are a little narrower, but not much. And federal and state codes alike are filled with overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions. Lax double jeopardy doctrine generally permits the government to charge all these violations rather than selecting among them. Since all change in criminal law seems to push in the same direction — toward more liability — this state of affairs is growing worse: legislatures regularly add to criminal codes, but rarely subtract from them. In a world like that, lists of crimes in statute books must bear only a slight relation to the conduct that leads to a stay in the local house of corrections.

Of course, criminal law's breadth is old news. It has long been a source of academic complaint;<sup>2</sup> indeed, it has long been the starting point for virtually all the scholarship in this field, which (with the important exception of sexual assault) consistently argues that existing criminal liability rules are too broad and ought to be narrowed. Yet the implications of this piece of old news are not well understood.

Consider two defining features of criminal law's large literature. First, it is relentlessly normative. Almost all writing about American criminal law argues that some set of criminal liability rules is morally wrong or socially destructive, and that a different (usually narrower) set of rules would be better.<sup>3</sup> Second, these normative arguments al-

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2. For the classic treatments, see HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 249-364 (1968); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort / Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991) [hereinafter Coffee, *Tort/Crime Distinction*]; Henry Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); Sanford H. Kadish, *The Crisis of Overcriminalization*, ANNALS AM. ACAD. POL. & SOC. SCI., Nov. 1967, at 157; Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963).

It is not simply coincidence that most of this literature dates from a generation or more ago. The literature just cited argues, for the most part, that particular crimes or classes of crimes are inappropriate as a matter of principle. The most commonly invoked principle, which dates from John Stuart Mill, holds that harmless wrongdoing is not a proper subject of criminalization. As Bernard Harcourt has shown, that argument has mostly collapsed over the course of the past generation, as our ideas about "harm" have become sufficiently capacious to take in almost anything legislators might wish to criminalize. See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

3. For two recent examples by two of the field's leading lights, see MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997); PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* (1997). For a recent example of normative scholarship concerning sexual assault, where the conventional academic wisdom

most always presuppose that changing the liability rules would change the behavior the system punishes — again, the assumption is that criminal law drives criminal punishment, not the other way around.<sup>4</sup>

Both features are at odds with the way American criminal law actually works. Normative legal argument makes sense on the assumption that lawmakers care about the merits, that the side with the better policy position has a better chance of getting its preferred rule adopted. But the legislators who vote on criminal statutes appear to be uninterested in normative arguments.<sup>5</sup> To take an obvious example: for the past generation, virtually everyone who has written about federal criminal law has bemoaned its expansion.<sup>6</sup> But the expansion has continued apace, under very different sorts of Congresses and Presidents. Normative argument does not seem to have mattered. One can put the point more generally: American criminal law's historical development has borne no relation to any plausible normative theory — unless "more" counts as a normative theory. Criminal law scholars may be talking to each other (and to a few judges),<sup>7</sup> but they do not appear to be talking to anyone else.

And changes in criminal liability rules do not necessarily mean changes in the scope or nature of behavior the system punishes. In a system structured as ours is, the law on the street may remain unchanged even as the law on the books changes dramatically. Rather, broader substantive criminal law chiefly affects the *process*, the way law-on-the-street is made and the way guilt or innocence is deter-

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argues for broader liability, see STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998). For a still more recent example focused on morals crime, see Harcourt, *supra* note 2.

4. Erik Luna's work is a rare and welcome exception to this tendency. See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515 (2000) [hereinafter Luna, *Principled Enforcement*]. In the two articles just cited, Luna notes that enforcement discretion, particularly for vice crimes, makes law enforcers into lawmakers; he responds by seeking to develop ways for law enforcers to make their lawmaking both more transparent and more regular — that is, more lawlike. Luna's focus on law *enforcement* as the key to understanding how criminal law works is welcome, though I doubt that American law enforcement can be regularized in the ways he suggests. See *infra* notes 117-135 and accompanying text.

5. Perhaps it would be more accurate to say that, with rare exceptions, legislators listen only to arguments that favor broader liability rules. That would account for, e.g., the (partial) success of the rape reform movement. It also seems consistent with the claim that criminal law, at least to the extent legislatures define it, adheres to no normative theory save that more is always better.

6. The examples are too many to cite. For the leading (almost the only) exception, see Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 251 & n.19 (1997). And even Stacy and Dayton argue not that federal criminal law needs expanding, but that federal criminal law *enforcement* does.

7. For reasons explored below, see *infra* notes 191-227 and accompanying text, judges play less of a role in criminal lawmaking than they play in shaping the law in other areas — even areas that are primarily statutory. Thus, to the extent scholars aim their arguments at judges, they are probably hitting the wrong target.

mined. As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long. The end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys' offices and police departments. We have not reached that point yet; substantive criminal law has not wholly ceased to operate. But we are closer than we used to be — the movement is very much in that direction. In a criminal justice system that incarcerates two million people, criminal law is becoming a sideshow. It seems like, and is, an unhealthy state of affairs.

Which raises an obvious question: How did all this happen? How did criminal law come to be a one-way ratchet that makes an ever larger slice of the population felons, and that turns real felons into felons several times over? The conventional answer is politics.<sup>8</sup> Voters demand harsh treatment of criminals; politicians respond with tougher sentences (overlapping crimes are one way to make sentences harsher) and more criminal prohibitions. This dynamic has been particularly powerful the past two decades, as both major parties have participated in a kind of bidding war to see who can appropriate the label "tough on crime." Congress's enactment of the famous hundred-to-one crack sentencing provision in 1986<sup>9</sup> is the best-known example — that ratio rose steadily as the relevant legislation wound its way through Congress, with members vying with one another to see who could propose the toughest crack penalties.<sup>10</sup>

This explanation has a good deal of power, but it is incomplete. Criminal defendants have not always been the political bogey they are today, nor has crime always been such a salient national issue. Criminal law's expansion, though, is a constant, going back (at least) to the mid-1800s. And while it is easy to see how public opinion would push toward harsher sentences (as with the 1986 drug legislation), it is hard to see how it would produce broad criminal codes that cover a range of ordinary, fairly innocuous behavior. The more natural assumption is that the public would want to criminalize only the kinds of things criminals, understood in the ordinary sense of that word, do. Yet contemporary criminal codes cover a good deal of marginal middle-class misbehavior — a very odd state of affairs, politically speaking. The

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8. Though conventional, this answer has not received much sustained attention in the literature. For the best treatment to date, see Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997).

9. The original legislation was the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986); the relevant portion is codified at 21 U.S.C. § 841(b)(1)(A) (1994).

10. For the best account, see David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995).

question remains: Why are criminal codes so broad, and why are they always getting broader?

A large part of the answer involves not the politics of ideology and public opinion, but the politics of institutional design and incentives. Begin with the basic allocation of power over criminal law: legislators make it, prosecutors enforce it, and judges interpret it. In this system of separated powers, each branch is supposed to check the others. That does not happen. Instead, the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones. This dynamic does not arise out of any particular ideological stance, and does not depend on the partisan tilt of the relevant actors. Criminal law seems to expand as much, and as fast, under Democrats as under Republicans. Rather, it arises out of the incentives of the various actors in the system. Prosecutors are better off when criminal law is broad than when it is narrow. Legislators are better off when prosecutors are better off. The potential for alliance is strong, and obvious. And given legislative supremacy — meaning legislatures control crime definition — and prosecutorial discretion — meaning prosecutors decide whom to charge, and for what — judges cannot separate these natural allies.

So two kinds of politics drive criminal law. Surface politics, the sphere in which public opinion and partisan argument operate, ebb and flow, just as crime rates ebb and flow. Usually these conventional political forces push toward broader liability, but not always, and not always to the same degree. A deeper politics, a politics of institutional competition and cooperation, *always* pushes toward broader liability rules, and toward harsher sentences as well. The current tough-on-crime phase of our national politics will someday end; indeed it seems to be ending already, as the current controversies over the death penalty and racial profiling suggest.<sup>11</sup> (The war on terrorism may reverse this trend.) But the deeper politics of criminal law — the set of institutional arrangements that are steadily making criminal law both larger and less relevant — shows no signs of changing. The solution, if there is one, lies not in arguing about the merits of different rules, but in

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11. On the death penalty, the key event was the moratorium on executions declared by Governor George Ryan of Illinois, a step that would have been politically unimaginable a short time ago. See Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty; Illinois First State to Impose Moratorium on Executions*, CHI. TRIB., Jan. 31, 2000, at A1. On racial profiling, the change is not neatly captured by any one salient event; rather, the key is the “almost universal condemnation” of the practice by political and legal elites. See, e.g., David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 364 (2001) (expressing some cause for optimism based on this change). These phenomena show a willingness on the part of elected officials to take stands hostile to the interests of law enforcement — something rarely seen during the past two decades.

changing the way those rules are defined and enforced. Until such changes happen, we are likely to come ever closer to a world in which the law on the books makes everyone a felon, and in which prosecutors and the police both define the law on the street and decide who has violated it.

This Article proceeds as follows. Part I looks briefly at criminal law's breadth, past and present. Steady expansion of criminal liability is no new thing; on the contrary, criminal codes have continually broadened throughout the past century and a half. This broadening reflects certain patterns, with state codes growing faster earlier in the century and the federal code growing faster more recently, and with state legislatures and Congress tending to add different sorts of crimes. In state and federal jurisdictions alike, though, the end result is criminal codes that cover more conduct than anyone really wishes to punish, and cover core crimes many times over.

Part II is the heart of the Article; it examines the criminal law-making process and the incentives that process creates. The central idea is that prosecutorial discretion leads legislatures to expand criminal law's net, and discretion plus legislative supremacy prevents courts from reining in that tendency. That tendency will of course be more pronounced at some times (and in some areas) than others, but it is always present, a necessary feature of any system that allocates power among legislators, judges, and prosecutors as our system does. The tendency to add crimes is also more pronounced at the federal level than in the states.

Part III asks what steps would be necessary to solve the problems that attend criminal lawmaking. There are two sorts of answers. One is to abolish enforcement discretion, to require that the crimes legislatures create are actually punished. This solution is as impossible as it is familiar. The other answer is to abolish legislative supremacy over criminal law, to end legislatures' ability to decide how far criminal law's net should extend. This answer in turn breaks down into two possible approaches. The first would depoliticize criminal law, leaving legislators nominally in control but vesting real lawmaking power in other bodies. The Model Penal Code was, in a sense, the product of such a process, and it is widely (though not universally, and perhaps not correctly) regarded as a great success.<sup>12</sup> But so too is the Federal Sentencing Commission, whose work is universally criticized.<sup>13</sup> Based on our experience with expert commissions and sentencing over the

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12. For a good example of the dominant, more favorable reaction, see Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943 (1999). For an example of the less common, more critical view, see Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53 (2000).

13. For the most thorough criticism, see KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).



last twenty years, depoliticizing criminal law seems at best unpromising; it is as likely to aggravate the system's current pathologies as it is to mitigate them.

The second approach would constitutionalize a great deal of ordinary criminal law, turning its boundaries over to courts rather than legislators and prosecutors. That need not mean a vast constitutional criminal code (though it could mean that); there are other, less radical possibilities. But it *would* mean a huge addition of power to courts that are, in many eyes, already seen as having more power than they should. For that reason alone, it seems unlikely that criminal law's structural problem will be solved, or even addressed, anytime soon.

## I. CRIMINAL LAW'S BREADTH

### A. *Breadth and Depth*

Criminal law is both broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over. I believe these propositions would be accepted by anyone who read an American criminal code, state or federal. Explaining them might therefore seem like belaboring the obvious. But the propositions are perhaps not so obvious as they might seem, since American criminal codes are rarely read, even by those who teach, litigate, and interpret them. A brief explanation is therefore in order.

Begin with the proposition that criminal law is not one field but two. The first consists of a few core crimes, the sort that are used to compile the FBI's crime index — murder, manslaughter, rape, robbery, arson, assault, kidnapping, burglary, larceny, and auto theft.<sup>14</sup> The second consists of everything else. Criminal law courses, criminal law literature, and popular conversation about crime focus heavily on the first. The second dominates criminal codes.

These two fields have dramatically different histories. The law that defines core crimes derives from the common law of England. Save for auto theft, everything in the list of FBI index crimes was a crime in Blackstone's day.<sup>15</sup> Along with the rest of criminal law, these crimes were all codified during the course of the nineteenth century, but their basic structure still bears the mark of their common law origins. Thus, while definitions of core crimes of violence and theft have changed over time, those definitions are not substantially broader today than

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14. *E.g.*, FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1998: UNIFORM CRIME REPORTS 1 (1999).

15. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*191-94 (1769) (manslaughter); *id.* at \*194-201 (murder); *id.* at \*210-12 (rape); *id.* at \*216-17 (assault); *id.* at \*219 (kidnapping); *id.* at \*220-22 (arson); *id.* at \*223-28 (burglary); *id.* at \*229-34 (larceny); *id.* at \*241-42 (robbery).

they were generations or even centuries ago.<sup>16</sup> (Rape may be an exception, depending on how one sees the consequences of the rape reform movement of the past two decades.)<sup>17</sup> Indeed, some crimes are narrower: changes in the felony murder doctrine have limited the class of killings labeled murder,<sup>18</sup> and developments in the law of criminal defenses — especially self-defense<sup>19</sup> — have had the effect, at some times, of reducing the scope of murder, manslaughter, and assault.<sup>20</sup>

Given this history, it comes as no surprise that criminal law's literature, which is almost entirely about crimes of this first sort, paints the picture of a field that ebbs and flows, with expansions in the law of defenses here and contractions over there, tougher mens rea standards then, more lax ones now. That picture is roughly accurate for a few core crimes. But when we turn our attention to the rest of criminal law, a very different picture emerges. For the most part, *this* criminal law was the product of legislation, not judicial decision. And the central feature of its history is growth.

Numbers of offenses give some hint of the magnitude of the phenomenon. In 1856, Illinois's criminal code contained 131 separate

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16. Compare, e.g., *id.* at \*220 (defining arson as "the malicious and wilful burning of the house or out-house of another man"), with MODEL PENAL CODE § 220.1(1)(a) (1980) (defining arson as "start[ing] a fire or caus[ing] an explosion with the purpose of . . . destroying a building or occupied structure of another"). The Model Penal Code goes on to add to that definition a provision covering the destruction of any structure, even if owned by the offender, for the purpose of collecting insurance — a crime that must have been rare in Blackstone's day. *Id.* § 220.1(1)(b).

17. The classical common law definition of rape was "the carnal knowledge of a woman forcibly and against her will." 4 BLACKSTONE, *supra* note 15, at \*210. In one sense, that definition has had a great deal of staying power; in another, it has changed substantially over the past generation. For the best and most balanced discussion of developments in the law of rape, and of the distance that still needs to be travelled, see SCHULHOFER, *supra* note 3. For the best analysis of the common law definition and its relationship to the broader regulation of sex, see Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1 (1998).

18. Compare FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 997 (5th ed. 1861) (stating that all killings "done in prosecution of a felonious intent" are murder), with CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 150 (15th ed. 1993) (stating that felony murder rule applies only to homicides committed during the course of a rape, arson, kidnapping, burglary, larceny, or robbery).

19. The most important changes have arisen out of cases in which battered women assaulted or killed their batterers. In such cases, a number of courts and a few legislatures have permitted defendants to use "battered woman's syndrome" evidence to extend the bounds of the classical requirements of an imminent threat to which the defendant reasonably responded — the two primary hurdles self-defense doctrine places on defendants. For a good discussion (though now a bit dated), see *Developments in the Law — Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1580-86 (1993) [hereinafter *Domestic Violence*].

20. Of course, defenses are transsubstantive: they apply to all crimes, not simply to the ones mentioned in the text. But as a practical matter, most defenses are specific to a small set of crimes — indeed, judging from the case law, it is only a slight exaggeration to say that criminal defenses are adjuncts to the law of homicide and assault.

crimes.<sup>21</sup> In 1874, the number had grown to 220.<sup>22</sup> By 1899 it was 305;<sup>23</sup> it reached 460 in 1951.<sup>24</sup> The reform of the state's criminal code in 1961, influenced by the Model Penal Code project then underway, reduced this number substantially.<sup>25</sup> But the increases soon began again; today the number is back up to 421.<sup>26</sup> These figures seriously understate the growth in the number of separate offenses because they include only provisions in the criminal code, do not count as separate crimes the long list of prohibited drugs, and count laundry-list crimes — sections titled “Prohibitions” or “Offenses” — as each defining a single offense. Each of these conventions disproportionately reduces the current number of crimes; without them, that number would probably double. And Illinois's numbers are fairly representative. In the past century and a half, Virginia's criminal code grew from 170 offenses to 495 (the gap is misleadingly small, since the earlier code included a large number of slavery-related crimes that have no analogue in today's code);<sup>27</sup> Massachusetts went from 214 crimes (in 1860 as today, Massachusetts was a more regulated place than most) to 535.<sup>28</sup>

The past century and a quarter has seen even greater increases in the number of crimes listed in the relevant title of the federal code. In the version of the Revised Statutes passed in December 1873, the title on federal crimes included 183 separate offenses.<sup>29</sup> By 2000, 643 separate sections of Title 18 of the United States Code defined crimes;<sup>30</sup> since some of those sections defined a number of offenses,<sup>31</sup> the number of distinct crimes in Title 18 is almost certainly over one thousand. And even that larger number is much less than half the total number

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21. A COMPILATION OF THE STATUTES OF THE STATE OF ILLINOIS 358-415 (N.H. Purple ed., 1856). I should offer an explanation as to method. Some statutory sections define more than one crime; identifying the right number can be a subjective exercise. In order to minimize subjectivity, I counted only separate sections of the criminal code, and excluded those sections that did not define any criminal offense. This explanation applies to all the crime “counts” cited below, save where otherwise noted.

22. ILL. REV. STAT. ch. 38 (1874).

23. ILL. REV. STAT. ch. 38 (1899).

24. ILL. REV. STAT. ch. 38 (1951).

25. Illinois's criminal code is divided into two parts: the 1961 Criminal Code, as amended, and everything else. As of 1996, the 1961 criminal code contained 263 separate offenses, only slightly more than half the number in 1951. 720 ILL. COMP. STAT. 5 (1996).

26. 720 ILL. COMP. STAT. (2000).

27. Compare VA. CODE tit. 54. (Ritchie 1849), with VA. CODE ANN. § 18.2 (1996).

28. Compare MASS. GEN. STAT. chs. 158-168 (1860), with MASS. GEN. LAWS chs. 264-274 (1998).

29. 70 REV. STAT. (2d ed. 1878).

30. 18 U.S.C. §§ 1-2725 (1997).

31. See, e.g., 18 U.S.C. § 922. Section 922, the centerpiece of the law defining federal gun crimes, has twenty-five lettered subsections, most of which are themselves divided into several sub-subsections. The great majority of these subsections define separate gun crimes.

of federal offenses.<sup>32</sup> As with the expansion of state criminal codes, these federal crimes cover a wide subject-matter spectrum, though expansion of federal criminal law generally focused on vice in the first third of the twentieth century,<sup>33</sup> regulatory crimes and racketeering in the second third,<sup>34</sup> and violence and drugs (plus yet more white-collar offenses) in the last third.<sup>35</sup>

Of course, these numbers do not prove that criminal law is broad. Even if one starts with a given set of behavior that is to be criminalized, there is no obviously right number of criminal offenses: the number depends on the specificity with which crimes are defined and the degree to which they overlap. Still, anyone who studies contemporary state or federal criminal codes is likely to be struck by their scope, by the sheer amount of conduct they render punishable.

Consider some scattered examples (all of which involve offenses for which incarceration is permissible). Florida criminalizes selling untested sparklers, or altering tested ones;<sup>36</sup> it also bans the exhibition of deformed animals.<sup>37</sup> (Interestingly, Florida repealed its ban on the exhibition of deformed *people* in 1979;<sup>38</sup> one wonders at the policy be-

32. On one recent estimate, the total number of offenses exceeds three thousand. Stacy & Dayton, *supra* note 6, at 251 & n.19.

33. The two obvious examples are the White Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (1997)), and the Volstead Act, ch. 85, 41 Stat. 305 (1919) (repealed 1935).

34. The New Deal produced a raft of new regulatory crimes, some of which are still in widespread use (by prosecutors, that is) today. *See, e.g.*, Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (1997)); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78jj (1997)). As for racketeering, one of the major stories in federal criminal law during the forty years following the repeal of Prohibition was the focus on classical, Mafia-style organized crime. The major statutes that came out of that focus, in chronological order, were the Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979, the Hobbs Act, 18 U.S.C. § 1951, the Travel Act, 18 U.S.C. § 1952, and RICO, 18 U.S.C. §§ 1961-1964.

35. The past few decades have seen a steady and substantial increase in the scope of federal gun crimes; the trend is summarized in SARAH N. WELLING ET AL., *FEDERAL CRIMINAL LAW AND RELATED ACTIONS* § 11 (1998). More recently, Congress has expanded the number and range of violent crimes covered in the federal code. *See, e.g.*, Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384.

With respect to drug crime, change has taken the form of heightened sentences (or, what is much the same thing, overlapping crimes that can be used to raise sentences). For a discussion of the most famous example — the 1986 legislation that fixed sentences for crack offenses — see Sklansky, *supra* note 10. Finally, with respect to white-collar crime, the list of regulatory offenses continues to grow, but most of the new crimes have only a slight impact on actual criminal litigation. The biggest exception to that rule is the intangible rights statute, which considerably broadened the scope of federal mail and wire fraud. 18 U.S.C. § 1346; *see also* Coffee, *Tort/Crime Distinction*, *supra* note 2.

36. FLA. STAT. ch. 791.013 (2000).

37. FLA. STAT. ch. 877.16.

38. *See* FLA. STAT. ch. 867.01 (repealed 1979).

hind retaining the one ban but dispensing with the other.) California criminalizes knowingly allowing the carcass of a dead animal “to be put, or to remain, within 100 feet of any street, alley, public highway, or road . . . .”<sup>39</sup> It also criminalizes the sale of alcohol to any “common drunkard”<sup>40</sup> and cheating at cards.<sup>41</sup> Ohio criminalizes homosexual propositions<sup>42</sup> and “ethnic intimidation.”<sup>43</sup> Texas criminalizes overworking animals,<sup>44</sup> causing two dogs to fight,<sup>45</sup> and violation of rules concerning recruitment of college athletes.<sup>46</sup> Massachusetts criminally punishes frightening pigeons away from “beds which have been made for the purpose of taking them in nets.”<sup>47</sup>

Most of these examples sound both trivial and exotic, but state codes contain many broad crimes of a more ordinary sort. A number of states criminalize negligent assault, which amounts to nothing more than an ordinary tort.<sup>48</sup> Some states go farther, criminalizing negligent *endangerment*,<sup>49</sup> which requires neither injury nor the materialization of risk, but only risk creation. Possession of burglars’ tools, which may mean no more than possession of a screwdriver, is routinely criminalized,<sup>50</sup> as is possession of various sorts of “drug paraphernalia” (e.g., bowls and spoons) other than the banned drugs themselves.<sup>51</sup> As these

39. CAL. PENAL CODE § 374d (2000).

40. CAL. BUS. & PROF. CODE § 25602 (2000).

41. CAL. PENAL CODE § 332.

42. OHIO REV. CODE ANN. § 2907.07 (2000). The Ohio legislature amended this statute in December 2000 but left the homosexual proposition section untouched. *See* 2000 OHIO LAWS 288.

43. OHIO REV. CODE ANN. § 2927.12.

44. TEX. PENAL CODE ANN. § 42.09 (1999).

45. TEX. PENAL CODE ANN. § 42.10.

46. TEX. PENAL CODE ANN. § 32.441.

47. MASS. GEN. LAWS ANN. ch. 266, § 132 (2000).

48. *See, e.g.*, ALA. CODE § 13A-6-22 (2000); ALASKA STAT. § 11.41.230 (2000); OHIO REV. CODE ANN. § 2903.14 (2000).

49. *See, e.g.*, MONT. CODE ANN. § 45-5-208 (2000).

50. *See, e.g.*, CAL. PENAL CODE § 466 (West 2000) (specifically defining crowbars and screwdrivers as burglars’ tools). Convictions have been upheld under more generally worded statutes based on combinations of these and other common household implements. *See, e.g.*, Commonwealth v. Calderon, 681 N.E.2d 1246 (Mass. App. Ct. 1997) (screwdrivers, pliers, and a knife); Dotson v. State, 260 So. 2d 839 (Miss. 1972) (screwdriver and a large bolt); People v. Diaz, 244 N.E.2d 878 (N.Y. 1969) (screwdriver wrapped in a newspaper). As these cases suggest, burglars’ tools statutes seem in practice to boil down to bans on possessing screwdrivers, perhaps with an implicit additional term requiring that the possession seem suspicious.

51. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3415 (West 2000); FLA. STAT. ANN. §§ 893.145-.147 (West 2000); MD. ANN. CODE art. 27, § 287A (2000); MASS. GEN. LAWS ch. 94C, §§ 1, 32I (2000). Many such statutes expressly define “drug paraphernalia” to include “[b]lenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.” *E.g.*, FLA. STAT. ANN. § 893.145(8).

examples show, criminal law is in many respects broader than tort law — the opposite of the usual picture.

The preceding examples all come from state codes. The natural assumption would be that the federal criminal code is much narrower. After all, federal criminal law has limited jurisdiction, and crime control is primarily the business of state and local governments,<sup>52</sup> so there is presumably little need for broad criminal liability rules at the federal level. The reality is otherwise. Federal criminal law probably covers more conduct — and a good deal more innocuous conduct — than any state criminal code. A host of federal crimes involve breaches of minor regulatory norms — a famous example is the ban on the unauthorized use of the image of “Woodsy Owl,” one of the most commonly cited instances of a trivial federal crime.<sup>53</sup> But the more practically important examples come from the federal law of fraud and misrepresentation. Federal mail and wire fraud cover fraudulent deprivations of “the intangible right of honest services.”<sup>54</sup> Such “intangible rights” fraud requires neither misrepresentation nor reliance and covers a great many mere breaches of fiduciary duty.<sup>55</sup> And the federal criminal code includes 100 separate misrepresentation offenses,<sup>56</sup> some of which criminalize not only lying but concealing or misleading as well,<sup>57</sup> and many of which do not require that the dishonesty be about a matter of any importance.<sup>58</sup> Taken together, these misrepresentation crimes cover most lies (and, as just noted, almost-but-not-quite-lies) one might tell during the course of any financial transaction or transaction involving the government. It is often said that ordinary lying is not a crime — a comment usually made by way of explaining the narrow-

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52. See, e.g., *United States v. Lopez*, 514 U.S. 549, 564 (1995) (noting that states have “historically been sovereign” in criminal law enforcement).

53. 18 U.S.C. § 711a (1994). The leading competition is tearing the tag off a mattress. For a discussion of that offense and its limits, see Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1610 & n.264 (1997). For a strong defense of that and other, similar regulatory crimes, see *id. passim*.

54. 18 U.S.C. § 1346.

55. For a case that nicely captures the breadth of mail fraud liability, see *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997). In *Frost*, the lead defendant, an engineering professor at the University of Tennessee, awarded graduate degrees to students who did sloppy, and sometimes plagiarized, work. That was enough for a mail fraud conviction; the idea was that Frost breached his duty, owed to the University, to grade students fairly and honestly.

56. This was Justice Stevens's count, current as of four years ago. *United States v. Wells*, 519 U.S. 482, 505 (1997). Presumably the list is longer now.

57. See, e.g., 18 U.S.C. § 1001 (covering anyone who, “in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact . . .”).

58. In Justice Stevens's dissent in *Wells*, he counts 54 (out of “at least 100”) federal misrepresentation statutes that have no materiality requirement. *Wells*, 519 U.S. at 505-06 & nn. 8-10.

ness of the definition of perjury — but the statement is wrong: a good deal of ordinary lying fits within the definition of one or another federal felony. One odd consequence is that criminal law treats dishonesty in court proceedings (perjury requires a material false statement<sup>59</sup>) less harshly than dishonesty in a wide range of other situations (many misrepresentation statutes cover immaterial statements and statements that are misleading but not false<sup>60</sup>).

As the sheer number of federal misrepresentation crimes illustrates, criminal codes are deep as well as broad: that which they cover, they cover repeatedly. Separate criminal offenses are rarely completely separate; the more common pattern is a few general offenses with a host of more targeted crimes, and the targeted crimes themselves overlap. Thus, the federal criminal code has a generic false statements statute that bans lies told in the course of any matter that falls, directly or indirectly, within the jurisdiction of a federal agency.<sup>61</sup> The code also has a seemingly endless list of statutes banning lies or concealment in particular settings.<sup>62</sup> Prosecutors can and do charge both false statements and one or more of the specific prohibitions.<sup>63</sup> State codes are similar in this respect, though not quite as extreme. Illinois has ten kidnapping offenses,<sup>64</sup> thirty sex offenses,<sup>65</sup> and a staggering forty-eight separate assault crimes.<sup>66</sup> Virginia has twelve distinct forms of arson and attempted arson,<sup>67</sup> sixteen forms of larceny and receiving stolen goods,<sup>68</sup> and seventeen trespass crimes.<sup>69</sup> In Massachusetts, the section of the code labeled “Crimes Against Property” contains 169 separate offenses.<sup>70</sup>

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59. On the materiality requirement, see, e.g., 18 U.S.C. § 1621 (1994). On the requirement of a false statement — a false implication is not enough — see *Bronston v. United States*, 409 U.S. 352 (1973).

60. See *supra* notes 57-58.

61. 18 U.S.C. § 1001.

62. According to Jeffrey Standen, there are 325 separate prohibitions of fraud, misrepresentation, or both in the federal code. Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 289 (1998). For a recent criticism of this congressional tendency toward both repetition and excessive specificity, see Ellen S. Podgor, *Do We Need a “Beanie Baby” Fraud Statute?*, 49 AM. U. L. REV. 1031 (2000).

63. See, e.g., *United States v. Woodward*, 469 U.S. 105 (1985) (per curiam).

64. 720 ILL. COMP. STAT. 5/10 (2000).

65. 720 ILL. COMP. STAT. 5/11 (2000).

66. 720 ILL. COMP. STAT. 5/12 (2000). Compare the Model Penal Code, which contains four separate assault crimes. MODEL PENAL CODE § 211 (1999). For an intermediate example, see Erik Luna’s discussion of assault crimes in the New York Penal Law. Luna, *Principled Enforcement*, *supra* note 4, at 527 & nn. 46-51.

67. VA. CODE ANN. §§ 18.2-77 to -88 (Michie 2000).

68. See, e.g., VA. CODE ANN. §§ 18.2-95, -96, -98, -108, -108.1, -109, -111, -111.1, -152.3.

69. VA. CODE ANN. §§ 18.2-119 to -136.1.

70. MASS. GEN. LAWS ANN. ch. 266 (2000).

Few of these separate offenses are lesser-included versions of each other. Criminal codes do, of course, contain a healthy number of greater and lesser-included offenses, like murder and manslaughter or aggravated assault and simple assault. But the examples cited in the preceding paragraph are mostly crimes that overlap without either being a subset of the other. To put this pattern in geometric terms, criminal codes consist of a great many more sets of overlapping circles than concentric circles. Which is to say that defendants who commit what is, in ordinary terminology, a single crime can be treated as though they committed many different crimes — and that state of affairs is not the exception, but the rule.<sup>71</sup>

### B. *The Consequences of Breadth and Depth*

These features of criminal codes have at least three important consequences. First, they shift lawmaking from courts to law enforcers. Because criminal law is broad, prosecutors cannot possibly enforce the law as written: there are too many violators. Broad criminal law thus means that the law as enforced will differ from the law on the books. And the former will be defined by law enforcers, by prosecutors' decisions to prosecute and police decisions to arrest.

Second, they give prosecutors the power to adjudicate. Suppose a given criminal statute contains elements *ABC*; suppose further that *C* is hard to prove, but prosecutors believe they know when it exists. Legislatures can make it easier to convict offenders by adding new crime *AB*, leaving it to prosecutors to decide when *C* is present and when it is not. Or, legislatures can create new crime *DEF*, where those elements correlate with *ABC* but are substantially easier to prove. Prosecutors can continue to enforce the original crime, but more cheaply, by enforcing the substitutes. When they do this, prosecutors are engaging in informal adjudication: they are not so much redefining criminal law (the real crime remains *ABC*) as deciding whether its requirements are met, case by case.<sup>72</sup>

This second effect — this transfer of adjudication from courts to prosecutors — also flows from criminal law's depth, from its tendency to cover the same conduct many times over. Suppose a given criminal episode can be charged as assault, robbery, kidnapping, auto theft, or any combination of the four. By threatening all four charges, prosecutors can, even in discretionary sentencing systems, significantly raise

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71. The reference is to the familiar double jeopardy rule that a defendant may be convicted of two overlapping crimes for a given criminal incident, but may not be convicted of greater- and lesser-included offenses for the same incident. See *United States v. Dixon*, 509 U.S. 688 (1993).

72. For elaboration of this argument, see William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996).



the defendant's maximum sentence, and often raise the minimum sentence as well. The higher threatened sentence can then be used as a bargaining chip, an inducement to plead guilty. The odds of conviction are therefore higher if the four charges can be brought together than if prosecutors must choose a single charge and stick with it — even though the odds that the defendant did any or all of the four crimes may be the same. This gain (from the government's point of view) exists whenever overlapping criminal prohibitions cover a single chain of events.

For both these reasons, adding new crimes lowers the cost of convicting criminal defendants. Substituting an easy-to-prove crime for one that is harder to establish obviously makes criminal litigation cheaper for the government. And the cost saving is large, since guilty pleas are much cheaper than trials, and defendants often respond to easily proved charges by pleading guilty. Charge-stacking, the process of charging defendants with several crimes for a single criminal episode, likewise induces guilty pleas, not by raising the odds of conviction at trial but by raising the threatened sentence. Again, the effect is to make convictions cheaper.

Transferring lawmaking and adjudication to prosecutors leads to the third consequence, which may be the most important of all. The past few years have seen a growing interest in the expressive potential of criminal law — the use of the criminal justice system not primarily to make and carry out threats, but to send signals.<sup>73</sup> On one increasingly widely held view, this signal-sending is the most important thing criminal law does. It communicates with the regulated population (and particularly with those portions of the population who are most in-

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73. This scholarly trend grows out of the larger trend of exploring expressive theories of law more generally. For a sampling of the leading efforts, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUDIES 725 (1998); and Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

The leading figure in the turn toward expressivism in criminal law theory is Dan Kahan. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999) [hereinafter Kahan, *Secret Ambition*]; Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996). For an interesting discussion of what that turn means for criminal law scholarship, see Bernard E. Harcourt, *After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 LAW & SOC'Y REV. 179 (2000). For a classic discussion of expressivism and its significance for criminal law and punishment, see JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95 (1970).

clined to do things the rest of us find bad or dangerous), and thereby seeks to reinforce good conduct norms and attack bad ones.<sup>74</sup>

If that is criminal law's primary job, its breadth and depth ensure that the job will be done badly. As any parent knows, sending messages requires consistency. The signal must be the same today as it was yesterday, and the same coming from one parent as from the other. Broad criminal codes ensure *inconsistency*. Broad codes cannot be enforced as written; thus, the definition of the law-on-the-street necessarily differs, and may differ a lot, from the law-on-the-books. Expressive theories of criminal law have not yet taken good account of this problem, and the problem is severe, maybe devastating. What, after all, does expressive criminal law express? Is the message the law that the legislature passes? Or is it the sum of the arrest and prosecution decisions of individual police officers and prosecutors?

In practice, the second message will often undermine the first. On the one hand, the criminal provisions of the Violence Against Women Act<sup>75</sup> might send a message to would-be batterers that our society takes domestic violence very seriously, much more so than it used to. On the other hand, the tiny number of prosecutions under the Act (only a handful per year nationwide)<sup>76</sup> might send precisely the opposite message: that domestic violence is a subject for political posturing, the sort of thing politicians decry but prosecutors do not punish. At the least, the absence of prosecution must indicate that the federal government is not really interested in the subject, which would seem to take away much of the expressive benefit of having the Act in the first place.

This is bound to be a recurring problem when it comes to carrying out criminal law's expressive function. Legislators speak, but police and prosecutors control the volume. Or perhaps a better way to put it is this: once legislators speak, once a crime is formally defined, police and prosecutors face the following choice — *reinforce* the message by enforcing the new law, *negate* the message by leaving the law unen-

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74. For a good example of this view of criminal law and its implications for some major substantive debates, see Kahan, *Secret Ambition*, *supra* note 73.

75. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 18 U.S.C.); *see also* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, §§ 1001-1603, 114 Stat. 1464 (incorporating the Violence Against Women Act of 2000 ("VAWA")). The Supreme Court invalidated the civil provisions of VAWA in *United States v. Morrison*, 120 S.Ct. 1740 (2000), but did not address the Act's criminal provisions. *See id.* at 1743-44. All of the Circuits that have addressed the issue have found the criminal provisions constitutional. *See, e.g.*, *United States v. Lankford*, 196 F.3d 563, 572 (5th Cir. 1999); *United States v. Page*, 167 F.3d 325, 334 (6th Cir. 1999); *United States v. Bailey*, 112 F.3d 758, 766 (4th Cir. 1997); *United States v. Wright*, 128 F.3d 1274, 1276 (8th Cir. 1997).

76. In fiscal year 1997 only five defendants were sentenced under VAWA's provisions. TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOCIATION, REPORT ON THE FEDERALIZATION OF CRIMINAL LAW 21 (1998).

forced, or *revise* the message by enforcing it only in certain kinds of cases or against certain kinds of defendants. The first option is usually impossible: How can a new criminal statute be enforced across the board when so many existing statutes go unenforced? Which means that, with rare exceptions, the legislative message cannot make it through the enforcement filter unscathed.

And there is another problem for criminal law's expressive function. Good expression is worthless if no one can hear it. Or to use the visual metaphor, a signal that cannot be seen is a very poor signal. Law-on-the-street, the sum of millions of arrest and prosecution decisions by thousands of police officers and prosecutors, seems designed to minimize visibility. Those of us who try to find out how different sorts of crimes are enforced are familiar with this phenomenon: no one knows how any given criminal statute is enforced in any given state. Even in a single locality, only a few cops and a handful of prosecutors may know. (Or may not: any given police officer may know only what happens in her precinct.) The recent report on stops and frisks by New York City police<sup>77</sup> has already received a lot of attention in the literature, precisely because it is an almost unheard-of example of data about what crimes police are enforcing and how serious the enforcement is. Comparable information about local prosecutors — which statutes lead to prosecutions, in what sorts of cases, with what results — does not exist anywhere.<sup>78</sup> The absence of the kind of record-keeping and reporting requirements that would change this state of affairs makes sending signals through decisions to arrest and prosecute very costly indeed.<sup>79</sup> And the decentralization of prosecution and police, both of which are controlled locally, not at the state level, ensures that such signals will be surrounded by what statisticians call “noise”: variations from place to place that make it costly or impossible to hear what the legal system is trying to say.

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77. CIVIL RIGHTS BUREAU, OFFICE OF THE ATTORNEY GEN. OF THE STATE OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT'S “STOP & FRISK” PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK (1999).

78. Blanket statements of negative propositions are dangerous. Perhaps I should say, comparable information does not exist anywhere that I have been able to find. Federal prosecution is different, at least to some degree, because of the detail of the annual publication by the Administrative Office of U.S. Courts. Even so, there is no source (again, no source of which I am aware) that tracks federal prosecutions by statute rather than by category, much less a source that allows one to determine what fact patterns do and do not lead to prosecution.

79. The point is not so much that the reports themselves would serve as a signal to would-be criminals, though some of that might happen: one can easily imagine news coverage of major changes in the pattern of enforcing, say, gun or drug laws. Rather, the point is that such reports would likely lead to convergence, and convergence would strengthen the signal. As law enforcers discover the enforcement patterns in neighboring jurisdictions, their own enforcement patterns are likely to conform more closely to their neighbors' patterns. That convergence in turn makes it easier for would-be criminals to “hear” the message being sent by the enforcement patterns, because it eliminates much of the background noise.

In short, some combination of two things is true about a world where criminal law-as-written differs substantially from criminal law-as-enforced. First, the law's messages are likely to be very different from the messages one would infer from a look at the statute books.<sup>80</sup> That alone ought to alarm expressivists, but the second possibility is worse: the law's messages are likely to be buried, swamped by local variation and hard-to-discern arrest patterns, by low-visibility guilty pleas and even lower-visibility decisions to decline prosecution. If expressive criminal law is an ideal, the ideal is at odds with the system of law and law enforcement we now have.

## II. THE POLITICAL ECONOMY OF CRIME DEFINITION

### A. *Surface Politics and Deep Politics*

Formal, written-down criminal law is shaped by a variety of forces. Ideological conviction matters: Prohibition arose out of a moral crusade, not out of self-interested lobbying by groups with a large financial stake in the outcome.<sup>81</sup> (Those groups opposed criminalizing alcohol.<sup>82</sup>) Public opinion obviously matters, too: the public cared more about crime in the 1990s than it did in the 1950s,<sup>83</sup> which is partly why criminal codes seemed to expand more rapidly in the later decade than in the earlier one. Changes in the incidence of crime matter, if only

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80. Not only different, but perhaps contradictory. For an argument that large chunks of criminal law — vice crimes, much of white-collar crime, and morals offenses — may actually send messages that undermine the law's own norms, see William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871 (2000).

81. The best discussion of the movement that led to Prohibition appears in RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920* (1995).

82. The most obvious interest group with a large financial stake in retaining legal alcohol sales was the alcoholic beverage industry. But, as Donald Boudreaux and Adam Pritchard point out, there was another, equally important financial interest hostile to Prohibition: Congress stood to lose a great deal of federal revenue if Prohibition passed. Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 148-49 (1993). That interest shrank in importance after World War I, when the enormous revenue potential of the income tax had become clear. *Id.* Fourteen years later, when the Depression had caused a steep drop in income tax revenues, Prohibition must have seemed much more costly to Congress; Boudreaux and Pritchard argue that this Depression-prompted revenue loss helped produce Prohibition's repeal. *Id.* at 149-50.

83. In October 1951, only one percent of respondents thought crime was the most important issue facing the United States. In April 1954, the number was two percent. By contrast, in January 1994, forty-nine percent of respondents ranked crime the most important noneconomic problem facing the United States. (Economic issues were treated separately in the latter poll; for what it's worth, the most important issue in both the 1951 and 1954 polls were noneconomic — specifically, the Cold War.) The percentage had declined to twenty-three percent by January 1997 — still a good deal higher than the level of concern expressed in 1951 or 1954. Search of Gallup Poll Public Opinion Database, Scholarly Resources, Wilmington, DE (Mar. 31, 2001).

because crime rates may tend to drive public opinion. Crime was a low-level political issue in the 1950s in part because crime rates were low; crime rates skyrocketed in the 1960s<sup>84</sup> and crime became a major feature of state and even national political campaigns.<sup>85</sup> On most issues, one or another of these forces plays a large role in shaping criminal law's development.

Thus, one needs no theory to explain why criminal codes are expanding — we have an abundance of explanations already. But these explanations are weaker than they appear at first blush. Consider the federal mail and wire fraud statutes. Those statutes criminalize, basically, all serious breaches of fiduciary duty.<sup>86</sup> Given the inevitable disagreement about what is and isn't serious, that means federal fraud statutes criminalize an enormous amount of wrongful but not paradigmatically criminal behavior. Professors who award degrees based on plagiarized work, and the students who do the work, are guilty.<sup>87</sup> College applicants who lie on their applications are guilty.<sup>88</sup> Political powerbrokers who use their influence to get government jobs for friends are guilty, even if the powerbrokers are not themselves government employees.<sup>89</sup> These are cases of marginal middle-class dishonesty; they are hardly the sorts of cases that generate public outrage or provide fodder for ideological crusades. And in ordinary political terms, one would think borderline dishonesty by middle-class offenders would be the last thing any popularly elected legislature would

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84. To say that crime rates were low or high assumes a baseline, of course, and no obvious baseline exists. Still, it seems clear enough that crime was vastly higher after the 1960s than before. In 1960, the FBI reported 2,019,600 index crimes; by 1972 the number was 5,891,924. FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1972: UNIFORM CRIME REPORTS 61 tbl.1 (1973).

85. A good measure of the changing role crime played in American politics in the 1960s is the treatment of crime in Theodore H. White's series of books about presidential elections in that decade. In White's book about the 1960 election, "crime" does not even appear in the index; nothing in the book suggests that it played any role at all in that campaign. See THEODORE H. WHITE, THE MAKING OF THE PRESIDENT: 1960 (1961). In the 1968 book, there is an entire chapter on Richard Nixon's and George Wallace's successful use of the crime issue, which was central to that election. See THEODORE H. WHITE, THE MAKING OF THE PRESIDENT: 1968, at 188-223 (1969).

86. The best discussions, though now a little dated, appear in a pair of articles by John Coffee. See Coffee, *Tort/Crime Distinction*, *supra* note 2; John C. Coffee, Jr., *From Tort to Crime: Reflections on the Criminalization of Fiduciary Duties and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981).

87. *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997).

88. This statement extrapolates from the rule that employees are criminally liable for lying on their job applications. See *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990).

89. See *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982). For an insightful (and critical) discussion of this case, see John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 234-42 (1985).

want to criminalize. Yet Congress did criminalize it, and did so without any apparent opposition.<sup>90</sup>

More broadly, consider where criminal law expanded most through the 1970s and 1980s. During this time, federal criminal law expanded much faster than its state counterparts. The areas of biggest expansion involved white-collar crime and organized crime: the enactment of RICO,<sup>91</sup> designed to target the Mafia, and the expansion of federal fraud doctrine,<sup>92</sup> designed to target political corruption, were the leading examples. In ordinary political terms this seems strange. The 1960s saw a huge increase in both street crime and drug crime, and that increase prompted a strong public demand for some kind of action by political leaders. But street crime and drugs are dealt with largely by local police and prosecutors under state law; if criminal liability rules were to change, the changes should have been in state codes, not the federal code. And the changes should have involved robbery and heroin trafficking, not mail fraud and the Mafia. "Law and order" politics ought to have produced a different mix of changes in criminal codes than the ones we actually saw.

And "law and order" politics cannot easily explain the consistent expansion of criminal codes over time. The contemporary politics of crime dates to the mid-1960s. Before that, crime's role in electoral politics fluctuated. But expansion of criminal liability, state and federal, is a constant, going back for a century and a half.<sup>93</sup>

Finally, it is not clear why "law and order" politics should produce concern with the content of criminal law in the first place. Public concern about crime and public demand that something be done about it are natural. There are two natural legislative responses: harsher punishment and larger law enforcement budgets. One can readily imagine why legislatures are slow to seize on the second of these options — it costs money. (The deeper reason has to do with institutional structure.

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90. As one Fifth Circuit panel noted, the legislative history of the intangible rights statute is sparse, because the bill was added to omnibus drug legislation on the same day the latter legislation was passed. See *United States v. Brumley*, 79 F.3d 1430, 1434 (5th Cir. 1996). The speed with which Congress acted — the legislation was passed only a year after *McNally v. United States*, 483 U.S. 350 (1987), the decision it overruled — suggests an absence of strong opposition.

91. 18 U.S.C. §§ 1961-1968 (2000). For much the best discussion of RICO's origin and early development, see Gerard E. Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661, 664-713 (1987).

92. The key statutory development was the passage of 18 U.S.C. § 1346 (2000).

93. There are only two major exceptions. Repealing Prohibition is one, and that is an instance of electoral politics forcing a *reduction* in the scope of criminal law. The Model Penal Code (or, rather, the widespread adoption of large portions of the Code's general provisions) is the other. There, the reduction in liability came through a process that was, relatively speaking, apolitical and technocratic. Neither exception supports the proposition that expanding criminal codes are primarily a consequence of contemporary public concern with street crime.

Police and prosecutors work for local governments, and consequently are mostly paid for by local governments. State legislators are more likely to expand state law enforcement bureaucracies, over which they have some control and for which they can more easily take credit, than they are to expand local police departments and district attorneys' offices.<sup>94</sup>) Which leaves harsher punishment, always a politically popular stance in times of great public concern about crime. Notice that legislators can take this approach without having to pay for it, by raising nominal sentences but not building the prisons needed to house more inmates — roughly the tack many state legislatures took in the 1970s and early 1980s.<sup>95</sup>

Expanding criminal liability is *not* a natural response. Again, public concern about crime has largely focused on street crime — theft plus street violence — and drugs. Save for a few items that needed to be added to the controlled substances list, all the relevant behavior was already criminalized by the late 1960s; indeed, most of it had been criminalized for centuries. There was (and is) no obvious need for more murder statutes, or auto theft prohibitions, or laws criminalizing the sale of heroin. And criminalizing *other* conduct seems an odd way to reduce the amount of conduct that is already criminal.

To see the point, imagine that criminal law had been largely stable for the past thirty years, save for the occasional addition of some new drugs to the prohibited list. Imagine further that other developments — the rise in street crime and drugs between 1960 and 1990, the rise in sentencing levels of the 1980s and 1990s — had still taken place. No one would find this combination surprising. Times of rising crime of course tend to generate increased political activity in the sphere of crime control. But that political activity ought to focus on the front and back ends of the criminal justice system — on policing and punishment — because those are the places that leave the most room for innovation, and those are the places where discretion plays the largest role. Even in a world where crime is a major political issue, criminal law shouldn't be, or so one might think.

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94. There is some evidence for this proposition. Between 1971 and 1990 — a period of great expansion in the criminal justice system, as dockets and prison populations grew sharply — *state* expenditures on criminal justice rose 848% in nominal dollars, 193% in inflation-adjusted dollars. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1993, at 3 tb. 1.3 (Kathleen Maguire & Ann L. Pastore eds., 1994); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 483 (1996) (showing that inflation during the relevant period was 223%). During the same period, *local* expenditures rose 497% in nominal dollars, and only 85% in constant dollars BUREAU OF JUSTICE STATISTICS, *supra*, at 3 tbl.1.3; BUREAU OF THE CENSUS, *supra*, at 483.

95. The strength of this pattern is reflected in what was, until recently, the standard line about tougher sentencing statutes: no matter what legislatures did with sentencing *law*, actual *sentences* remained fairly constant. For a good example, see MICHAEL TONRY, SENTENCING MATTERS 147-48 (1996).

None of this is to say that criminal law is somehow apolitical by nature; that could hardly be farther from the truth.<sup>96</sup> Nor is it to say that there is something surprising in the periodic left-right battles that break out over issues like rape reform<sup>97</sup> or the insanity defense,<sup>98</sup> or in the public interest in substantive issues raised by high-profile prosecutions like Jack Kevorkian's<sup>99</sup> or Louise Woodward's.<sup>100</sup> Criminal law involves choices about what conduct is bad or harmful enough to deserve punishment. Voters will often feel strongly about those choices, and politicians will naturally tend to respond to those feelings. Too, politicians and voters alike — not to mention prosecutors and judges — will have their own ideological convictions, both about particular crimes and about the enterprise of defining crime more generally, and those convictions surely affect how criminal statutes are drafted, interpreted, and enforced.

Still, two things are true about both public opinion and ideological commitments. First, they are likely to push in different directions on different issues at different times and places. If ordinary politics drives criminal law, it will drive it toward more liability here and less there, more liability now but less then. One sees some of that variability in the history of American criminal law, but not much. The more accurate generalization is that criminal law expands in different areas at

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96. This is an important point in favor of those who defend legislative supremacy over criminal law: If criminal law is inescapably political, both in the sense that it rests on contestable value judgments and in the sense that it embodies tradeoffs between different values, it seems natural to assign responsibility for it to the most politically accountable actors. For the best argument along these lines see Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269 (1998).

My response to that argument is not to deny its premise. Rather, I seek to show that legislators' political incentives are to criminalize too much — with "too much" defined by the preferences of the very constituents whose wishes legislators are supposed to represent. Once one understands those incentives, one may conclude that courts are more likely than legislatures to capture social value judgments accurately.

97. "Rape reform" generally means broader definitions of criminal sexual assault. For the most developed argument in favor of rape reform, see SCHULHOFER, *supra* note 3. For an interesting argument in favor of something closer to the status quo, see Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992).

98. For a good argument for a broader insanity defense, see Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992). For the classic argument against a broad version of the defense, see Stephen J. Morse, *Crazy Behavior, Law, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978).

99. Kevorkian, who acknowledged assisting dozens of patients to commit suicide, was convicted of second-degree murder after a series of failed prosecutions. For a good account of the saga, see Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J. L. & PUB. POL'Y 599 (2000).

100. Woodward, an English teenager serving an American couple as an au pair, was charged with murdering an infant left in her care. For a good account of the case and the ideological issues it raised, see Diane Purkiss, *The Children of Medea: Euripides, Louise Woodward, and Deborah Eappen*, 11 CARDOZO STUD. L. & LITERATURE 53 (1999).



different times and places, but it always expands. Second, public opinion and ideological commitments ought to operate at the margins of the criminal justice system, not at its core. Of the universe of crimes for which people are in prison today, the large majority involve behavior that was criminal in Blackstone's day. The most natural expectation is that political attention would focus on areas where the relevant behavior changes more rapidly — policing, or perhaps sentencing — leaving crime definition fairly stable.

All of which suggests that, beneath the currents of ordinary politics, other, deeper forces are at work. Criminal law is not just the product of politics; it is the product of a political *system*, a set of institutional arrangements by which power over the law and its application is dispersed among a set of actors with varying degrees of political accountability.<sup>101</sup> Those institutional arrangements give those actors certain baseline incentives. One need not believe all politicians are at all times seeking to please the median voter, or get campaign contributions, or add to their power, to believe that those incentives are likely to have some effect on behavior.

At least that is so if the incentives of the system's key players — legislators, prosecutors, and appellate judges — push in a particular direction. They do. Legislators gain when they write criminal statutes in ways that benefit prosecutors. Prosecutors gain from statutes that enable them more easily to induce guilty pleas. Appellate courts lack the doctrinal tools to combat those tendencies.

To see why, one must examine the relationships among criminal law's three lawmakers. The most important is the relationship between prosecutors and legislatures: discretionary enforcement frees legislators from having to worry about criminalizing too much, since not everything that is criminalized will be prosecuted; likewise, legislative power liberates prosecutors, widening their range of charging opportunities. Next is the relationship between legislatures and courts: the accumulation of criminal statutes constrains courts, both by taking away lawmaking opportunities and by blunting the effect of judicial tools like vagueness doctrine and the rule of lenity. Last comes the relationship between prosecutors and courts: prosecutors keep courts at bay by using the charging opportunities legislators give them to generate guilty pleas. Guilty pleas, of course, avoid adjudication altogether; they leave courts very little role to play. Notice the nature of these relationships: prosecutorial and legislative power reinforce each other, and together both these powers push courts to the periphery.

If this account is correct, criminal law will always be broader than ordinary majoritarian politics would suggest, and the tendency will always — or at least until something in the lawmaking process changes

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101. For a rare and insightful discussion of this point, see Bilionis, *supra* note 96, at 1299-309 (characterizing criminal law as "a process," not a set of substantive principles).

— be toward more breadth. It seems a useful exercise, then, to see whether the account *is* correct — to look at the baseline incentives the current institutional arrangements create and see whether, at least in rough outline, the behavior of the relevant actors seems to correspond with those incentives.

### B. *Lawmakers' Incentives*

It is best to begin with a simple account of what the system's three major players seek to do. This account is no more than a baseline, and a rough one at that. Ideological differences, public-interested goals, the reigning institutional culture — all these things powerfully affect, sometimes dominate, the behavior of legislators, prosecutors, and judges. Still, the baseline matters; political and institutional incentives have real world effects. All of us tend to pursue selfish goals along with more high-minded ones, and all of us tend to respond to price changes: we do more of something when it becomes cheaper and less when it becomes more expensive. And when trying to understand a system inhabited by people whose ideologies and cultural backgrounds differ, it is helpful to understand the incentives those people share.

#### 1. *Legislators*

Legislators presumably want to stay in office, and perhaps to position themselves for higher office. To do those things, legislators must please their constituents. The presence and distribution of concentrated interest groups changes this incentive somewhat, but for most of criminal law, the effect of private interest groups is small: the most important interest groups are usually other government actors, chiefly police and prosecutors.<sup>102</sup> Consequently, for most of criminal law, no private intermediaries are well positioned to monitor the law's content and mobilize interested voters on one or another side of contested issues. Here more than most places, politicians (legislators, elected prosecutors, or both) deal with voters directly. And crime is one of those matters about which most voters care a great deal. Today it is regularly a major issue in elections at all levels of government, and it has been an issue in local elections for more than a century.<sup>103</sup> If there

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102. The role of interest groups in criminal lawmaking has not been the subject of much study. What literature there is focuses on federal criminal law — and, especially, on federal criminal law *enforcement* — and on the power of law enforcement agencies. See, e.g., Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. Rev. 757 (1999).

103. The literature on the contemporary politics of crime, see *infra* note 105, suggests that politicians took an interest in crime only in the 1960s. See, e.g., STUART A. SCHEINGOLD, *THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY* 37-

is any sphere in which politicians would have an incentive simply to please the majority of voters, it's criminal law.

For legislators, pleasing voters might mean producing *rules* the voters want. But this requires that the rules be simple and understandable, the sort of thing politicians can use in campaign speeches and advertisements. Sentencing offers some examples. Mandatory minimum sentences for drug or gun crimes and "three strikes" laws are simple rules that voters can comprehend and politicians can use in stump speeches. Criminal law, however, contains few such rules. Variations in *actus reus* elements or *mens rea* standards are sufficiently complicated that they make poor applause lines in political speeches. Which explains why legislative candidates frequently refer to sentencing policy in their campaigns — a broader death penalty, more prison time for drug dealers — but rarely take such public positions on issues of crime definition.<sup>104</sup>

When defining crimes and defenses, appealing to the median voter is more likely to mean some combination of two things: generating *outcomes* (not rules) the median voter wants, and taking *symbolic stands* the median voter finds attractive. Take these two legislative goals one at a time.

Voters may know little about criminal law doctrine, but they presumably have some idea of the set of results they would like to see: conviction and punishment of people who commit the kinds of offenses that voters fear. Legislators, one can fairly hypothesize, have an interest in producing those results (or at least taking credit for them), so that voters will continue to support them.<sup>105</sup> At first blush, changing the contours of substantive criminal law would seem irrelevant to this

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57 (1984). But crime was central to urban politics as early as Reconstruction. For a good example, see Joel Best, *Keeping the Peace in St. Paul: Crime, Vice, and Police Work, 1869-1874*, in 5 CRIME AND JUSTICE IN AMERICAN HISTORY: POLICING AND CRIME CONTROL, pt. 1, at 60 (Eric H. Monkkonen ed., 1992). For a more general discussion, see ERIC H. MONKKONEN, *POLICE IN URBAN AMERICA, 1860-1920* (1981). As the titles of the preceding two works suggest, the politics of crime historically had more to do with policing than with criminal legislation.

104. The most obvious recent exception to this pattern — hate crime laws — is really not an exception after all. Hate crime statutes cover conduct that is already criminalized; their only practical consequence is to enhance sentences for covered crimes, much the same as mandatory minima and three strikes laws.

105. The literature on the politics of criminal legislation is, to put it mildly, underdeveloped. For the leading pieces, see LORD WINDLESHAM, *POLITICS, PUNISHMENT, AND POPULISM* (1998); Beale, *supra* note 8. Because both of the works just cited deal with *federal* criminal legislation, their accounts of legislative incentives do not apply to legislatures generally, and I do not rely heavily on them in this discussion.

The proposition in the text, though, emerges clearly enough from the large literature on the politics of crime more generally. That literature tends to be both descriptive and somewhat journalistic; it also focuses primarily on policing and sentencing initiatives, and pays less attention to crime definition. For the best of these accounts, see KATHERINE BECKETT, *MAKING CRIME PAY* (1997); WILLIAM J. CHAMBLISS, *POWER, POLITICS AND CRIME* (1999); SCHEINGOLD, *supra* note 103.

goal. Those crimes voters care most about have long been covered by criminal codes; adding new crimes thus has nothing to do with convicting rapists, burglars, or drug dealers — or so one would think.

The truth is more complicated. Legislatures *can* raise the odds of conviction — and lower the cost of getting one — by changing criminal liability rules, even for conduct long since criminalized. Recall the algebraic example from the last section: a given crime is defined by elements *ABC*; *A* and *B* are easy to prove, but *C* is much harder. Criminalizing *AB*, with the understanding that prosecutors will determine for themselves whether *C* is satisfied, raises the odds of conviction and reduces enforcement costs. The same result holds if the legislature creates new crime *DEF*, where those elements tend to follow *ABC* but are easier to establish in court. Or if the legislature creates new crimes *ABD*, *ABE*, and *ABF*, again assuming elements *D*, *E*, and *F* correlate with *ABC*. The last strategy works even if *D*, *E*, and *F* are themselves hard to prove. In that event, prosecutors can charge all four offenses (double jeopardy doctrine permits charging of overlapping crimes<sup>106</sup>), thereby raising the potential sentence if the defendant is convicted. Raising the threatened sentence raises the cost of going to trial just as effectively as raising the likelihood of conviction. Whenever the state increases either or both of those factors, it increases the threat value of trial, which in turn increases the incentive for the defendant to plead guilty. And guilty pleas raise the likelihood of conviction to one hundred percent.

Now consider the second legislative goal: taking popular symbolic stands. Sometimes a new crime problem emerges, but legislatures can do little about it. In 1992, a Maryland woman and her one-year-old daughter had their car hijacked; the mother was killed in the course of the theft.<sup>107</sup> The story made national headlines and created the (mistaken) impression that these “carjacking” cases were common.<sup>108</sup> The public demanded that politicians solve this new problem, notwithstanding that existing criminal laws — auto theft, robbery, assault, kidnapping, and homicide — already covered the relevant behavior. Given any combination of those crimes, offenders could be both con-

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106. As long as each offense requires proof of a fact the other does not, the government may charge, and punish, both offenses. *E.g.*, *United States v. Dixon*, 509 U.S. 688 (1993). This is so even if the evidence used to prove the two offenses is identical.

107. *E.g.*, Don Terry, *Carjacking: New Name for Old Crime*, N.Y. TIMES, Dec. 9, 1992, at A18.

108. It is at least as plausible to suppose that carjacking became more common as a result of the publicity surrounding the Maryland case. *See id.* (discussing “wave” of carjacking cases occurring since Pamela Basu’s murder). Either such cases were a regular occurrence but had attracted no notice, or “thrill-seeking youths,” prompted by the Basu story, were engaging in copycat crimes. *See* Charles D. Bonner, Comment, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 915 (1998). The latter seems as likely as the former.

victed and given very severe sentences. In such cases, legislatures tend to create new crimes not to solve the problem, but to give voters the sense that they are doing something about it. This happened with carjacking at both the state and federal levels;<sup>109</sup> the result was a series of new criminal statutes that are almost never invoked, but that served as means of making politically valuable symbolic statements to voters.<sup>110</sup>

Two significant patterns emerge from these sorts of symbolic crimes. First, they tend to arise more often as crime becomes more of a public concern. Such offenses have mushroomed in the past few decades, a natural response to the sharp rise in crime rates of the 1960s, early 1970s, and late 1980s. Rising crime generates demands from voters for legislative action, and often there is little in the way of legislative action that would be productive in the near term. Symbolic criminalization is an obvious, and cheap, political response. Second, though such crimes exist at all levels of government, they are especially common in the federal system. Generating political returns from symbolic legislation depends in part on the ability to generate media interest, and that is easier for members of Congress than for state legislators. This second pattern is longstanding: the first great wave of expansion of federal criminal liability was inaugurated by the Mann Act,<sup>111</sup> which was basically Congress's attempt to be seen as acting on the "white slave" traffic, the great public crime concern of the day.<sup>112</sup> And it continues today: the criminal portion of the Violence Against Women Act

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109. The federal statute appears at 18 U.S.C. § 2119 (2000). For examples of state statutes, see FLA. STAT. ANN. § 812.133 (2000); LA. REV. STAT. ANN. § 14:64.2 (2000); MICH. STAT. ANN. 28.797(a) (2000); N.J. STAT. ANN. § 2C:15-2 (2000). Like the federal statute, these state laws simply re-criminalized conduct already covered elsewhere in their criminal codes. Louisiana went farther, specifically authorizing victims of carjackings to kill perpetrators. See Susan Michelle Gerling, Note, *Louisiana's New "Kill the Carjacker" Statute: Self-Defense or Instant Injustice?*, 55 WASH. U. J. URB. & CONTEMP. L. 109 (1999).

110. There is a less cynical explanation for statutes like those that criminalized carjacking. It may be that where legislatures lack the capacity to take concrete anti-crime action, they can still signal a change in social norms. Such signals might have some effect on the behavior of either criminals, law enforcement officials, or both. Carjacking laws might be a means of saying to local police and prosecutors that these crimes deserve an extra measure of law enforcement attention (and of saying to potential carjackers, your odds of apprehension will be higher in the future than they have been in the past). Whether or not this is true of carjacking (I'm skeptical), it probably is true of some other kinds of symbolic criminal legislation. One possible example might be the Violence Against Women Act, which coincides with and perhaps accelerated a widespread change in posture by police agencies toward domestic violence. For an argument that this signaling strategy is likely to fail, see *supra* notes 73-80 and accompanying text.

111. 18 U.S.C. §§ 2421-2424 (2000).

112. For a brilliant analysis and comparison of the arguments that led to the Mann Act and, much more recently, to the Violence Against Women Act, see Anne M. Coughlin, *Of White Slaves and Domestic Hostages*, 1 BUFF. CRIM. L. REV. 109 (1997).

is a prominent recent example;<sup>113</sup> pending federal hate crime legislation is another.<sup>114</sup>

Put these two patterns together, and one sees an explanation for an odd phenomenon. Crime has not simply played a larger role in electoral politics over the last generation. Crime's politics have become increasingly nationalized, with an ever greater focus on federal law-making.<sup>115</sup> Meanwhile, measured as a percentage of arrests and convictions, law enforcement has grown increasingly *local*; the federal share is falling, not rising.<sup>116</sup> Those two trends sound strange, but they are natural responses to growing demand for (1) symbolic legislative action, which is more easily supplied by the federal government than by the states, and (2) more law enforcement on the streets, which, under current institutional arrangements, is best supplied by local governments.

## 2. Prosecutors (and the Police)

Like legislators, local prosecutors are likely to seek to produce the range of outcomes the public desires. The large majority of local district attorneys are elected.<sup>117</sup> Elected district attorneys, like legislators, presumably wish to keep their jobs, move up to higher office, or both. Insofar as that is true, their incentive is to generate the level and distribution of prosecutions the public wants, subject to the resource constraints of their offices.<sup>118</sup>

113. See *supra* notes 75-76 and accompanying text.

114. As of spring 2001, there were at least three pending hate crime bills in Congress: the Hate Crime Prevention Act, H.R. 74 (introduced Jan. 3, 2001); the Protecting Civil Rights for All Americans Act, S. 19 (introduced Jan. 22, 2001); and the Local Law Enforcement Enhancement Act of 2001, S. 625 (introduced Mar. 27, 2001). Eric Holder's testimony in support of similar hate crime legislation in an earlier Congress nicely captures the symbolic nature of these bills. Holder, then Deputy Attorney General for the Justice Department's Criminal Division, noted that the most closely analogous federal crime yields "an average of fewer than six" federal prosecutions per year. He added: "We predict that the enactment of [the hate crime bill] would result in only a modest increase in the number of hate crimes prosecutions brought each year by the Federal Government." *The Hate Crimes Prevention Act of 1998: Hearing on S. 1529 Before the S. Comm. on the Judiciary*, 105th Cong. 4-19 (1999) (statement of Eric Holder, Deputy Att'y Gen.).

115. See generally Beale, *supra* note 8; NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES: 1960-1993 (1994) [hereinafter MARION, CRIME CONTROL]. For a discussion of the way federal officials respond to this kind of politics, see Nancy E. Marion, *Symbolic Policies in Clinton's Crime Agenda*, 1 BUFF. CRIM. L. REV. 67 (1997).

116. Stacy & Dayton, *supra* note 6.

117. More than ninety-five percent, according to one government report. See John M. Dawson *et al.*, U.S. Dep't of Justice, *Prosecutors in State Courts — 1992*, at 2 (1993).

118. This is, of course, an oversimplification. Prosecutors and legislators alike engage in a variety of tasks, some of which are highly visible to the public, and many of which are not. The incentive to please voters must operate much more powerfully on the more visible tasks than on the less visible ones. Thus, legislators are more likely to mirror voter preferences when voting on a much-publicized piece of legislation than when engaged in backroom ne-

Presumably the public seeks not only prosecutions, but convictions; if so, prosecutors have a substantial incentive to win the cases they bring. One piece of evidence for this fairly obvious proposition is the frequency with which elected prosecutors cite conviction rates in their campaigns. This political need is no doubt reinforced by a kind of consumption preference — all litigators prefer winning to losing, and one must assume prosecutors share that preference.<sup>119</sup>

Thus, it seems reasonable to begin with the hypothesis that prosecutors wish (1) to prosecute the range of cases the public wants prosecuted, and (2) to win the cases they bring. Notice that these goals are essentially the same as the goals legislators are likely to have. Legislative and prosecutorial incentives do diverge in some respects. Legislators will sometimes want to use criminal law to make symbolic statements, for reasons discussed above, and prosecutors will want to save themselves time and effort, about which more below. But at the most basic level, elected legislators and elected prosecutors are natural allies. Both need to please voters in order to survive, and for both, pleasing voters means essentially the same thing: punishing people voters want to see punished.

That natural alliance should make prosecutors (along with police) a very powerful lobby on criminal law issues. If police and prosecutors want some new criminal prohibition, they likely want it because it would advance their goals. Advancing police and prosecutors' goals usually means advancing legislators' goals as well. Thus, legislators have good reason to listen when prosecutors urge some statutory change. This point is worth emphasizing, for it may be the single most important feature of the existing system for defining criminal law. Lawmaking and law enforcement are given to different institutions, in part to diffuse power, but the institutions are usually seeking the same

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gotiations over the language of an obscure bill. And prosecutors are more likely to care about the public's wishes when pursuing high-profile cases — the kind that attract heavy media attention — than when plea bargaining with low-level (and unknown) defendants.

Notice that this qualification applies to both prosecutors and legislators — that is, both must please voters in some general sense, and for both, that need is felt more keenly in some contexts than in others.

119. This preference for victory is likely to vary depending on some basic characteristics of the criminal process. If criminal trials are frequent and cheap, prosecutors are likely to tolerate a fairly high level of acquittals. When defeats are common, as they probably will be if trials are frequent enough, no one defeat is terribly salient, either to the losing prosecutor or to the public. And where trials are cheap, the opportunity cost of any given trial is low. On the other hand, if trials are rare and expensive, the preference for victory is likely to be fairly strong. When defeats are less common, any one defeat is more likely to attract notice. And when trials are expensive, any one case taken to trial may represent a large number of guilty pleas forgone. If this account is correct, the preference for victory may be significantly stronger today than, say, a half-century ago. Changes in the law of criminal procedure, combined with the spread of appointed defense counsel, have made criminal trials much more elaborate affairs, and hence much more costly to prosecutors. That change plus growth in crime rates (which gives prosecutors more cases to choose from than they used to have) means the opportunity cost of a single blown trial is much higher than it used to be.

ends. Since the institutions can also communicate — prosecutors can tell legislatures what legislation they need — the separation of crime definition and enforcement is less important, and less substantial, than one would think.<sup>120</sup>

Of course, there is *some* separation, some divergence of interest. The largest divergence flows from the fact that while most heads of prosecutors' offices are elected, most prosecutors are not. Nearly ninety percent of prosecutors in local district attorneys' offices work for elected district attorneys, but do not run for election themselves.<sup>121</sup> The distinction matters. District attorneys are politicians. Line prosecutors are a combination of bureaucrats and litigators (but a peculiar brand of litigators, since they basically have no clients<sup>122</sup>). District attorneys are likely to seek to manage their offices in ways that win them public support. To some degree, line prosecutors will seek to do that too, because that is their bosses' goal, and they must satisfy their bosses in order to keep their jobs. But line prosecutors, like other employees, are likely also to seek to order their jobs in ways that make those jobs more pleasant.

That means pursuing something that may cut against the goal of punishing people the voters want punished: cost reduction. Like most of us, line prosecutors are likely to seek to make their jobs easier, to reduce or limit their workload where possible.<sup>123</sup> That inclination means two things: limiting the number of cases on their dockets, and limiting the cost of the process per case.

That prosecutors (and police) have some incentive to keep a low ceiling on their dockets follows naturally from the way they are paid. Prosecutors and police are paid salary; their paychecks do not rise, at least not directly, with the number of arrests made or convictions obtained. This is surely a good thing; were it otherwise, prosecutors and police would find it in their interest to trump up charges in order to inflate their pay. But note the problem it creates. Because prosecutors are not paid by the case, they can work less — or fail to work more

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120. For a contrary argument, suggesting that there is more divergence than meets the eye, see Richman, *supra* note 102.

121. See Dawson et al., *supra* note 117.

122. In a truly wonderful essay, then-Professor, now-Judge Lynch emphasizes the way this absence of a client makes prosecutors into a mix of litigants and adjudicators. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998). I use "bureaucrats" to capture the point, which Lynch also emphasizes, that the adjudication is quite different from the kind courts do.

123. A recent doctoral dissertation finds substantial evidence of this effect; the author associates it with a rise in the number of career prosecutors. See Todd Ryan Lochner, *Dilemmas of Accountability: Prosecutorial Agenda-Setting in United States Attorneys' Offices* 141-46 (2001) (unpublished Ph.D. dissertation, Univ. of Cal. at Berkeley) (on file with author).



where circumstances seem to demand doing so — while keeping pay constant.

In the current environment, where prosecutors are generally seen as a hard-working lot, this point may seem hard to credit. But it may have had a substantial impact on the course of criminal law enforcement in recent decades. Crime levels rose dramatically in the 1960s. The number of arrests during that time rose, but much more slowly than crime levels.<sup>124</sup> And the prison population — a good, albeit lagging, indicator of the number of felony prosecutions — did not rise at all; it actually *fell* twelve percent during the 1960s.<sup>125</sup> By the late 1970s, that had changed; felony prosecutions were then rising steeply<sup>126</sup> — much faster than growth in personnel in prosecutors' offices,<sup>127</sup> and much faster than growth in crime rates (by the late 1970s, crime rates were holding steady).<sup>128</sup> The natural explanation is that public demand for more law enforcement caught up with the prosecutors' offices. But the catching up took time. The incentive to keep workloads low delayed the inevitable rise in felony prosecutions, perhaps for as much as a decade and a half.

In the end, political incentives won out. But there is more than one way to hold costs down: if the number of cases cannot be reduced, the incentive is to reduce the time and energy spent on each case. The best way to do *that* is to convert potential trials into guilty pleas. Hence the rise in the felony plea rate as the number of felony prosecutions increased.<sup>129</sup> Guilty pleas are not simply cheaper than trials; they are

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124. "For the period 1960-1970, police arrests for all criminal acts, except traffic offenses, increased 31 percent." FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1970: UNIFORM CRIME REPORTS 35 (1971). The number of index crimes nearly tripled during the same period. *See supra* note 84.

125. In 1960, federal and state prisons housed 226,344 inmates; in 1970 the number was 198,831. MARGARET WERNER CAHALAN, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984, at 29 tbl.3-2 (1986). If one includes inmates of local jails, the figures are 346,015 inmates in 1960 and 328,020 in 1970 — a decline of five percent. *Id.* at 29 tbl.3-2, 76 tbl.4-1.

126. State court felony filings increased thirty-six percent between 1978 and 1984. NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1984, at 189-90 tbl.35 (1986). The increase accelerated in the 1980s: Between 1985 and 1991, felony filings rose by more than fifty percent. NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1991, at 37 tbl.1.25 (1993).

127. The number of state and local assistant prosecutors rose from 17,000 in 1974 to 20,000 in 1990 — a gain of only eighteen percent. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 1990, at 1-2 (1992). During roughly the same period, the number of felony prosecutions more than doubled. *See supra* note 126.

128. On this point, the FBI's Uniform Crime Reports and the National Victimization Survey are in agreement. *See* FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1981: UNIFORM CRIME REPORTS 39 tbl.2; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES: 1973-90 TRENDS 9 tbl.1 (1992).

129. In the mid-1970s, the guilty plea rate was in the neighborhood of eighty percent. *See* DAVID A. JONES, CRIME WITHOUT PUNISHMENT 44 tbl.4-1 (1979). By 1992, the plea

enormously cheaper. And prosecutors' bargaining strategies tend to ensure that this remains so. The literature on plea bargaining suggests that most prosecutors insist on bargains very early in the process, and punish defendants who resist settlement until shortly before trial.<sup>130</sup>

So prosecutors have some incentive to keep costs down, which they can do either by limiting the number of cases filed or by limiting the amount of time and energy expended per case. In this choice between greater efficiency and lower output, line prosecutors may have no strong preference, but legislators and elected district attorneys will prefer efficiency — more prosecutions and convictions are, from voters' standpoint, a good thing, and elected officials will want to please the voters. Recall that legislatures can push toward greater efficiency by expanding criminal law, thereby making it easier for prosecutors to obtain guilty pleas. If crimes are defined in ways that make guilt hard to prove, the threat of trial will be less serious to many defendants, and the inducements to plead will be accordingly less substantial. If, on the other hand, crimes are defined so as to make conviction easy, the threat value of trial is increased. And if prosecutors are able to threaten defendants who take their cases to trial with a range of overlapping charges that produce a severe sentence, the ability to induce a plea is magnified still more.

Legislators can help prosecutors pursue guilty pleas, then, both by creating new crimes and by creating overlapping crimes that allow for charge-stacking. To the extent those things help prosecutors charge and convict people at lower cost, that is to legislators' advantage. Reducing the cost of policing and prosecution means getting more law enforcement for the dollar, something that legislators should find politically rewarding.

So prosecutors are likely to seek (and legislatures likely to support) two sorts of criminal legislation. The first is legislation that permits them to punish whom they want — meaning, usually, punishing those whom the public wants punished, since local prosecutors must satisfy local public demands. If undercover “stings” can't generate convictions (because criminal attempt is too hard to prove), solicitation statutes may be a solution.<sup>131</sup> The second type of legislation makes

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rate in felony cases was ninety-two percent. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1995, at 498 tbl.5.47 (Kathleen Maguire & Ann L. Pastore eds., 1996).

130. See, e.g., MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 61-69 (1978).

131. On the historical link between attempt and solicitation, see Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy, Part I*, 61 COLUM. L. REV. 571, 621-628 (1961). Though Wechsler noted that general solicitation statutes are not common, *id.* at 623, they were hardly unknown in 1961, see *id.* at 623 n.301 (citing eight such statutes), and have become more common since. And the statutes that do exist seem to have arisen out of judicial hostility to broader attempt liability. See *id.* at 623-25.

it cheaper for prosecutors to do their job. Proving burglaries may be costly; proving possession of burglars' tools will be much easier (and the latter charge will therefore tend to generate more guilty pleas).<sup>132</sup> Local prosecutors have too many cases and too little time; anything that converts contested trials into guilty pleas is valuable to them.

The first kind of legislation converts defeats into victories; the second makes the victories cheaper. The two goals tend to merge. Anything that broadens criminal liability adds to the range of cases prosecutors can win. Likewise, broadening criminal liability makes it easier, across a range of cases, to induce a guilty plea — precisely because the prosecution is so likely to win if the case goes to trial. And more prosecutorial victories at lower cost advances not only prosecutors' welfare, but legislators' as well.

What about the interests of the police? To some degree, they are likely to be congruent with prosecutors' interest, and thus are captured, at least roughly, by the preceding discussion. But only to some degree. Police differ from prosecutors in (at least) two critical ways. Their focus is on a different stage of criminal proceedings. With some qualifications, prosecutors maximize convictions; police are more likely to maximize arrests.<sup>133</sup> And they are more culturally distinct from the rest of the population than are prosecutors, so that departmental culture is a more powerful force in police conduct than it is in prosecutorial behavior.<sup>134</sup> Add to these differences a key complication:

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132. On the ease of proving possession of burglars' tools, see *supra* note 50 and accompanying text.

133. Of course, the police utility function is not as simple as maximizing arrests. Some officers seek arrests more than others, and all officers seek arrests more for some crimes than for others. See, e.g., William F. Walsh, *Patrol Officer Arrest Rates: A Study of the Social Organization of Police Work*, in THINKING ABOUT POLICE 352-64 (Carl B. Klockars & Stephen D. Mastrofski eds., 2d ed. 1991). Rather, the point is that arrests, not convictions, are the most obvious objective measure of police performance, because arrests are within police control, while convictions are not. For a good, though dated, discussion of the implications of using arrests to measure police performance, see JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR 172-99, 291-92 (2d ed. 1978) (discussing and evaluating what Wilson called "legalistic" police departments — that is, departments that emphasized arrest rates). For examples of how the focus on arrests pervades not only police departments but also the policing literature, see Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, in WHAT WORKS IN POLICING 227-45 (David H. Bayley ed., 1998); Walsh, *supra*.

Good accounts of what police *do* maximize are hard to come by. For the best discussion in the literature to date, see DAVID H. BAYLEY, POLICE FOR THE FUTURE 15-75 (1994).

134. For a good discussion of the way departmental cultures affect the level of police violence, see PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* (1995).

The distinctiveness of police culture has large implications for the way police are regulated. In particular, it suggests that the American legal system's focus on incident-specific litigation may be misplaced — that a focus on identifying and correcting bad *departments* would be more productive than identifying and correcting bad *officers*. The best legal tool for regulation at the department level is neither the exclusionary rule nor damages — the two remedies whose merits are so extensively debated in the law reviews — but injunctions. That is why the passage of 42 U.S.C. § 14141 (1994), which authorizes the Justice Depart-

it is difficult, maybe impossible, to determine how much influence police have over prosecutors' case selection.<sup>135</sup>

But these complications do not alter the basic picture. Prosecutors benefit from broader criminal liability rules. So do police — though the benefit is isolated in a particular area of criminal law. To the extent that police seek to make arrests, or to exercise coercive power short of arrest, they need criminal law to enable them to do those things. The Fourth Amendment requires that arrests be supported by probable cause to believe the arrestee has committed a crime.<sup>136</sup> Street stops must be supported by reasonable suspicion of crime.<sup>137</sup> In both instances, the operative word is "crime." If that word includes enough behavior, if crime is defined broadly enough, police can stop or arrest whomever they wish.

Thus, police benefit from laws that criminalize street behavior that no one wishes actually to punish, solely as a means of empowering them to seize suspects. This is the force that drives much of the current movement to expand the range of so-called "quality of life" offenses,<sup>138</sup> crimes that cover low-level street behavior that will only rarely be prosecuted, but that often serve as a convenient basis for an arrest and, perhaps, a search.<sup>139</sup> Such crimes make policing cheaper, because they permit searches and arrests with less investigative work. Just as cheaper prosecution helps not only prosecutors but legislators too, cheaper policing should be a boon to police and legislators alike.

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ment to seek injunctive relief against departments with a pattern of unconstitutional conduct, may be more significant, in the long run, than *Mapp v. Ohio*, 367 U.S. 643 (1961), which mandated the exclusion of evidence obtained in violation of the Fourth Amendment. For a good discussion of the early litigation under § 14141, see Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 842 (1999).

135. No good work has been done on police officers' effect on local prosecutors' case selection. The scholarship on the parallel phenomenon at the federal level is thin; by far the best piece is Richman, *supra* note 102, which maintains that federal agents have a great deal of power over the cases Assistant United States Attorneys prosecute.

136. *E.g.*, *United States v. Watson*, 423 U.S. 411 (1976).

137. *United States v. Hensley*, 469 U.S. 221 (1985).

138. For the best discussion of that movement, see Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

139. For example, before it was held to be unconstitutional, police made over 42,000 arrests for violations of Chicago's gang loitering ordinance. *Chicago v. Morales*, 527 U.S. 41, 49 n.7 (1999). I am unaware of data on the number of prosecutions under the ordinance, but it is surely a small fraction of 42,000.

This is not to say that police discretion of the sort seen in *Morales* is a bad thing. For a strong and persuasive argument to the contrary, see Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141. It is only to say that the discretion derives its legal authority from criminal statutes that the legislature probably does not intend to be the subject of criminal punishment.

### 3. Appellate Judges

Appellate judges are the other significant player in criminal law-making, and their institutional incentives are hardest to categorize. In most jurisdictions these judges are elected, and hence are likely to be responsive to the popular will.<sup>140</sup> But even elected judges are much less politically accountable than legislators or elected prosecutors. Contested judicial elections are less common than contested elections for legislative seats, and bar associations and other professional groups typically play a large role in judicial nominations, at least by custom.<sup>141</sup>

And the public is less likely to blame judges for local crime rates than to blame either of the other two actors. Political constraints probably work powerfully in a few high-publicity cases — after Rose Bird, a good many appellate judges may calculate their reversal rate in capital murder cases<sup>142</sup> — but that is a small slice of the criminal docket.<sup>143</sup> That leaves judges much more free to respond to their own ideological leanings, or to the pull of the legal culture in which they find themselves. That last point may be especially significant. Though judges, even elected ones, may not have the same need to please a set of voters that legislators and prosecutors have, it does not follow that judges have no constituency. Rather, their constituency is more complicated, and more tilted toward the professional community in which

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140. More than eighty percent of state judges stand for election of some kind. Kathryn Abrams, *Some Realism About Electoralism: Rethinking Judicial Campaign Finance*, 72 S. CAL. L. REV. 505, 512 (1999). The result, at least on some accounts, is judges who “behave . . . like politicians.” Note, *Federal Court Involvement in Redistricting Litigation*, 114 HARV. L. REV. 878, 887 (2001). I do not mean to contest that point, save to suggest that politician-like behavior comes in many forms, and that judges are not — at least not yet — the political equivalent of elected legislators or district attorneys.

141. On the low salience of judicial elections, see, for example, Richard L. Hasen, “*High Court Wrongly Elected*”: A Public Choice Model of Judging and its Implications for the Voting Rights Act, 75 N.C. L. REV. 1305, 1315-20 (1997).

142. For a good account of the use of the death penalty issue in judicial elections, including the famous Rose Bird election in California, see Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187 (1996).

143. There is another, indirect sense in which political constraints may matter to appellate judging in criminal cases. In states where appellate judges are elected, they must collect campaign contributions. Naturally, lawyers’ groups often dominate that market. Plaintiffs’ lawyers’ incomes probably vary more based on the content of common law rules than the incomes of other classes of lawyers. Consequently, the plaintiffs’ bar has become the leading contributor in judicial elections in a number of states.

Historically, there is a substantial relationship between the civil plaintiffs’ bar and the criminal defense bar. Until recently, criminal defense was a very unusual specialty; the near-universal norm until the past generation or so was for criminal defense lawyers to be general litigators, typically at the lower end of the legal services market. That tended to mean doing a wide range of plaintiffs’ work in addition to sporadic criminal defense work. In some places that pattern still holds. Thus, there may be a natural tendency toward pro-defendant stands in criminal cases by judges prone to take pro-plaintiff stands in, say, personal injury litigation.

the judges work. Appellate judges produce opinions; lawyers and other judges read those opinions, and the readers form opinions, good or bad, about the opinions they read. The desire for that kind of professional esteem is likely to be as strong a force working on appellate judges as raw politics.<sup>144</sup>

Which means that appellate judges are much more likely than legislators or prosecutors to take the interests of defendants into account. Their decisionmaking process reinforces this natural tendency. Prosecutors are free to charge without listening and responding to defendants' arguments.<sup>145</sup> Legislators are free to legislate without seeking the views of the legislation's opponents. But appellate judges can make law only in the context of cases, and, with rare exceptions, they decide cases — at least the sort of cases that involve published opinions — only after hearing (and reading) arguments from both sides.

So appellate judges, relative to legislators and prosecutors, are likely to tilt somewhat in defendants' favor. The importance of that tilt is limited by two other factors. First, appellate judges cannot easily set their own agenda; they are more reactive than the other two groups. Legislators can define new crimes when they wish. Prosecutors can choose which cases to pursue and how aggressively to pursue them. Certiorari jurisdiction gives the highest appellate courts some of the same leeway, but most reported criminal cases are decided by appellate courts that *must* hear criminal appeals. The range of cases those courts see is determined not by the courts themselves, but by the laws legislators write and the cases prosecutors bring.

Second, judges dislike reversal. The reasons for this phenomenon are complicated (and the relevant scholarship is thin), but its existence is fairly clear.<sup>146</sup> Judges perceive the overturning of their decisions as a public declaration of error, so that reversals tend to be stigmatizing to the one whose decision is reversed. And to the extent that judges seek to enshrine their own policy preferences in doctrine, reversal must represent a salient failure. For these and other reasons, most courts on

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144. For a rare discussion of how judicial reputations are made and how much some judges may value them, see RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990). Though Cardozo was an elected state judge for much of his career, and though he actively sought judicial appointments that were in the hands of elected politicians, the best biography of him suggests his ambitions were more for reputation than for political status or office. See generally ANDREW L. KAUFMAN, *CARDOZO* (1998).

145. See Lynch, *supra* note 122, at 2124. Of course, as Lynch notes, prosecutors have some incentive to listen to arguments defense counsel wish to raise. *Id.* at 2125-27.

146. Anyone who knows trial judges knows that the phenomenon exists. In the literature, its existence is generally assumed, and only occasionally examined. For a rare (and brief) examination, see Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEXAS L. REV. 1, 77-78 (1994). For an even rarer discussion of *why* the phenomenon exists (along with a dismissal of some wrong explanations), see Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129 (1980).

most issues will behave in ways that minimize the likelihood that superior legal authorities will reject their decisions.

This point is usually made with respect to trial judges' risk of reversal by appellate courts, but it applies more broadly. William Eskridge's study of congressional overrides of Supreme Court statutory interpretation decisions suggests strongly that Supreme Court justices try to avoid having their decisions overruled by legislation;<sup>147</sup> the same is presumably true of lower federal courts, and of state appellate judges' relationships with their state legislatures. Of course, appellate courts are more than wet fingers testing legislative winds. But if two competing interpretations of criminal statutes are at issue, and one is much more likely to attract hostile legislative attention than the other, Eskridge's work suggests, unsurprisingly, that appellate judges will tend to avoid conflict and follow the (perceived) legislative will.

#### 4. *A Special Case: Federal Prosecutors and Congress*

To this point, the discussion has been generic, with no distinctions drawn between local prosecutors and their federal counterparts, or between state legislators and Congress. Much of the picture painted above applies to all of the actors just mentioned. But it applies differently to federal officials. A brief detour is in order.

Begin with federal prosecutors' incentives. United States Attorneys are appointed, not elected, and the appointment process is not designed to make them politically accountable to the local population in the way district attorneys are.<sup>148</sup> That means local community priorities are not likely to translate into federal enforcement priorities. And federal prosecutors are not responsible for ordinary criminal law enforcement; they are backstops in a system where the primary enforcers, district attorneys and local police, work for another sovereign. If a given murder or robbery goes unpunished, no federal official's neck is on the line. There are a few important offenses over which federal prosecutors have exclusive jurisdiction, but those offenses are a small portion of federal criminal dockets.<sup>149</sup>

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147. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 390 (1991). One of Eskridge's major claims is that the Court interprets statutes in light of the (perceived) intent of the current Congress, not the enacting Congress. See *id.* at 390-404. That is the obviously right approach if one's goal is to avoid congressional overrides.

148. See *Lochner*, *supra* note 123, at 109-18. As *Lochner* emphasizes, U.S. Attorneys are selected through a political process, but the process does not emphasize their local constituency. And the fact that they are accountable to competing masters — the Justice Department and their states' Senators — gives them considerable independence.

149. In 1998, federal prosecutors filed 47,277 cases, out of which 31,851 fell into one of the following categories: assimilative crimes (i.e., state-law crimes being tried in federal court), theft offenses, drug offenses, violent crimes, and fraud-type crimes. Virtually all of these are crimes at the federal and state levels alike. Of the remaining 15,426 offenses, more

To put the point more simply, there is an enormous amount that federal prosecutors *can* do — the federal criminal code covers most of the ground state criminal codes cover — but very little that they *must* do. Far more than is true of local prosecutors, United States Attorneys' offices, together with enforcement agencies like the FBI, have the power to set their own agendas, to decide what cases they wish to spend time on and what cases they wish to ignore.

Couple that agenda control with the absence of direct political accountability, and one can see why federal prosecutors are likely, relative to their local counterparts, to care less about pleasing the electorate and more about personal and professional gain and growth.<sup>150</sup> Personal gain does not, in this setting, mean corruption. More commonly, it means prosecutions that further the prosecutor's own professional development, or prosecutions that are especially interesting or fun. Local prosecutors have less leeway to indulge these preferences because their dockets tend to be filled with politically necessary cases. The electorate would not tolerate a district attorney's office that lets murder cases slide in order to pursue an interesting fraud investigation. But federal agents and federal prosecutors *are* free to indulge such preferences, both because there is no electorate to vote them out of office, and because murder cases (and robberies, and burglaries, and assaults, and drug deals) are universally assumed to be primarily the job of local officials.

The data confirm the intuition that federal prosecutors pursue a different agenda than do local prosecutors, and that federal prosecutors' agenda is consistent with the pursuit of professional advancement. Start with the reasonable assumption that local prosecutors pursue the mix of cases the public would choose, given their constrained resources. If federal prosecutors pursue the same goal, their dockets should look similar. That isn't the case. Relative to state-court criminal defendants, "[f]ederal criminals are more likely to be white, married, richer, better educated, more likely to hire an attorney, less likely to break the rules, and less likely to have prior offenses."<sup>151</sup> These tendencies do not fit the pattern of seeking to maximize victories and minimize cost, a pattern that seems to explain a great deal of behavior by local prosecutors. Nor do they follow from public preferences — the public's priority is violent crime, but such crimes are a small minority of federal cases. But they do fit two other patterns: attaining valuable litigation experience and advancing professional reputation.

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than 10,000 were immigration cases. Nonimmigration crimes that might plausibly be exclusively federal constituted only eleven percent of all federal criminal cases. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1998, at 387-88 tbl.5.6 (Kathleen Maguire & Ann L. Pastore eds., 1999).

150. See Lochner, *supra* note 123, at 131-46.

151. Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 273 (2000).



So while local prosecutors gain from prosecuting those the public wants prosecuted, federal prosecutors gain from prosecuting those whose cases are professionally rewarding. Frauds by the rich and famous may take precedence over robberies, even if the public cares more about the robberies.

At first blush, that would seem to undermine the power of federal agents and prosecutors as lobbyists. Why, after all, should Congress care about advancing the careers of federal prosecutors? Yet federal agents and federal prosecutors *are* powerful forces in federal criminal legislation; federal criminal legislation often begins with the Justice Department and responds to pressure from that department and from U.S. Attorneys' offices.<sup>152</sup> Why does Congress so often yield to that pressure?

The answer may lie in the charging patterns of *local* prosecutors. Local district attorneys charge murders and rapes and robberies and drug deals because the local population demands it. If they charge a range of other crimes — small-time frauds, for example — it seems safe to assume that the public at least approves of, and perhaps demands, that as well. In short, defendants in ordinary local prosecutions are likely to be the sort of people a majority of the citizenry thinks *ought* to be defendants. (If that ceases to be true, the local district attorney risks being out of a job.) Naturally, then, being charged with a crime is stigmatizing — every local criminal defendant is, simply by being a defendant, singled out as the sort of person the citizenry as a whole thinks ought to be punished.

That may not apply to federal prosecutions, but then federal prosecutions are less than five percent of total prosecutions.<sup>153</sup> The public is likely to generalize — if most criminal defendants are seriously bad actors, all must be. “All” is likely to include federal and local defendants alike; the cost to the public of differentiating between federal and state cases outweighs the gains. Indeed, the public may think federal defendants are worse. In other fields, federal intervention often signals that a case is particularly important; hence the common locution that to “make a federal case” of something is to puff up its importance. It would be natural for the public to think that, if the federal government prosecutes five percent of all felonies, they are probably the worst five percent. That inference is quite wrong: federal prosecutors' incentives being what they are, federal defendants may well be, on average, *less* culpable than local defendants. But the public impression matters. It means that if the Justice Department says fed-

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152. For an otherwise good account that tends to overlook the role of the U.S. Attorneys' offices in lobbying for legislation, see MARION, CRIME CONTROL, *supra* note 115.

153. In 1996, 47,889 criminal cases were filed in federal court. 1998 SOURCEBOOK, *supra* note 149, at 388 tbl.5.7. The same year, there were 997,970 *felony convictions* in state court; the number of criminal cases must have been much greater. *Id.* at 431 tbl.5.40.

eral prosecutors need a given statute in order to punish serious criminals, the claim will have immediate credibility with the public — more credibility than it deserves. Just as a state legislature risks being seen as soft on drug dealers if it refuses to pass new drug laws that are strongly supported by police and prosecutors, Congress bears the same risk if it too readily spurns Justice Department requests for new crimes. And this is so even if the Justice Department's requests are little more than efforts to increase the range of high-profile cases federal prosecutors can charge.

Thus, oddly, Congress is likely to give great weight to the demands of federal prosecutors, even though those demands may not advance goals the public cares about. Consider a pair of examples. In 1970 Congress passed the RICO statute, in part due to pressure from the Justice Department.<sup>154</sup> RICO was designed to target the Mafia and Mafia-like organizations. It passed at a time when the Mafia was in decline,<sup>155</sup> but serious thefts and violent crimes were rising steeply. Anti-Mafia legislation in this climate made little political sense — which is why *state* legislatures were not passing RICO-like legislation; their focus was much more on drugs and street crime, which were the focus of public concern. But RICO responded to a strong demand from the federal law enforcement bureaucracy. Something similar occurred in 1987 with the passage of the “intangible rights” statute.<sup>156</sup> That statute reinstated a broad theory of liability under federal fraud statutes; it was passed barely a year after the Supreme Court decision that rejected that theory.<sup>157</sup> And Congress passed it at a time when crack-related violence was sweeping large cities across the country and was the focus of intense public concern.<sup>158</sup> Like RICO, the intangible rights statute seemed politically strange; like RICO, it had no parallels in contemporaneous state legislation; and like RICO, it was prompted

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154. See MARION, CRIME CONTROL, *supra* note 115, at 83-84. Gerard Lynch's treatment of RICO's history emphasizes the role of the President's Crime Commission rather than the Justice Department. See Lynch, *supra* note 91, at 666-73 (noting, however, that the Commission did not itself recommend a RICO-like statute).

155. There is no good detailed history of the Mafia's rise and fall. Most contemporary discussions credit government prosecutions in the 1980s and 1990s for its recent sharp decline. For the best of these, see James B. Jacobs & Lauryn P. Gouldin, *Cosa Nostra: The Final Chapter?*, in 25 CRIME AND JUSTICE: A REVIEW OF RESEARCH 129 (Michael Tonry ed., 1999). But two other developments must have played a large role as well: the decline of industrial labor unions and the rise of small, widely dispersed drug dealing organizations. Both developments were already well underway by the time RICO was passed.

156. 18 U.S.C. § 1346 (1994).

157. See *McNally v. United States*, 483 U.S. 350 (1987); *supra* notes 86-90 and accompanying text.

158. Of course, Congress reacted to the rise of crack as well. See Sklansky, *supra* note 10, for the best account. My point is only that the political returns from passing the intangible rights statute seem, at first glance, low — especially when compared with legislation concerning other, more salient crime issues.

by the demands of the Justice Department and U.S. Attorneys' offices.<sup>159</sup>

Note what this means for congressional incentives, and for the broader picture of federal criminal law. When making criminal law, Congress has the same two incentives as state legislatures — to pay attention to the needs and wants of prosecutors and the police, and to make popular symbolic statements. As I have already noted, Congress will tend to do more of the second than state legislatures, since Congress can more readily generate publicity, without which symbolic statements are politically worthless. Unsurprisingly, then, federal criminal law is filled with examples of what one might call the “carjacking strategy” — superfluous statutes that criminalize some outrageous conduct that caught the public eye at some particular time. Also unsurprisingly, since these federal crimes are symbolic, they generate very few federal prosecutions.

The other large part of the federal criminal code, the part that *does* generate prosecutions, consists mostly of crimes that law enforcers want.<sup>160</sup> These need not involve outrageous conduct — indeed, they may involve conduct that is close to innocuous, as with the broad reach of current federal fraud statutes. This part of federal criminal law is likely to be very broad in part because federal prosecutors will want it to be so, in order to help them go after high-profile or otherwise professionally rewarding cases. And federal prosecutors' voice will carry great weight in Congress largely because of public attitudes toward anyone whom prosecutors target — that such people must deserve punishment. Those attitudes in turn flow from the politics of *local* prosecution.

### C. *Lawmakers' Relationships*

#### 1. *Legislators and Prosecutors*

With this brief tour of the relevant actors' incentives in mind, consider the basic horizontal relationships that shape criminal law and criminal sentencing. The most important of those relationships is not

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159. On the source and progress of the intangible rights bill, see *infra* note 182.

160. Federal drug prohibitions may belong in a third category. In a sense they are symbolic — an effort by Congress to appropriate the political gains that go to elected officials who are tough on drugs. But unlike classic symbolic crimes, federal drug laws do generate lots of prosecutions. The reason is not that federal prosecutors like drug cases — often they don't. The more likely reason is that federal prosecutors, even though they are not as politically accountable as local district attorneys, nevertheless are subject to some political pressures. Drugs have been so politically important that if U.S. Attorneys in large cities ignored them, the Administration might pay a political price. Thus, U.S. Attorneys must make them a priority to get and keep their jobs — something that is not true of carjacking cases, or prosecutions under the Violence Against Women Act, or other cases arising under classically symbolic federal crimes.

between legislators and judges (the one law professors usually focus on), but between legislators and prosecutors. Enforcement discretion dramatically changes the trade-offs legislators face when defining crimes. Indeed, it almost eliminates trade-offs. Where prosecutors can be selective, legislators will tend to see criminal law as a one-way ratchet.

There are three basic reasons why this is so. First, prosecutorial discretion makes the risks from crime definition one-sided, and thereby pushes legislators to err on the side of too much rather than too little. Second, prosecutorial discretion creates agency costs that legislators can reduce by adding crimes. Third, prosecutorial discretion tends to alter the interest-group forces at work in criminal lawmaking; the biggest effect is probably to disable groups that might push against broader criminalization.

*a. The Political Imbalance.* Legislators define crimes prospectively. Consequently, they do not know the precise mix of cases that will be brought under a given statute at the time they must vote on that statute. They also cannot be certain how courts will construe particular statutory terms. The upshot is that, in criminal law as elsewhere, legislatures are constantly trading off risks: a given piece of legislation may cover either too much or too little; the legislature cannot count on its coverage turning out to be exactly right.

To make those risks concrete, imagine a legislature that must decide between two versions of a criminal fraud statute. One would cover something like classical common law fraud with a substantial threshold loss requirement.<sup>161</sup> Everyone whom the government could prove guilty under this statute would deserve punishment, for common law fraud is fairly narrowly defined; it is hard to imagine satisfying its elements unless one is behaving very badly. But this version has an important downside. By their nature, frauds are often subtle, and some kinds of serious dishonesty do not satisfy the elements of common law fraud, so some seriously bad actors would not be covered by this version of the statute. The second version fixes this problem — it covers all the bad actors a sensible legislature might want to punish. But it does so by covering, potentially, a lot of only marginally bad actors whom neither the legislature nor the public would wish to see punished.

The first version of the statute risks letting off some subtle frauds who deserve worse. The second version risks punishing some trivially dishonest defendants who deserve better. Each, one might suppose,

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161. The elements of classical common law crime of fraud or false pretenses were: “(1) a false representation of a material present or past fact (2) which causes the victim (3) to pass title to (4) his property to the wrongdoer, (5) who (a) knows his representation to be false and (b) intends thereby to defraud the victim.” 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 8.7, at 382-83 (1986).

creates a politically troubling scenario for legislators. If the first version is passed, legislators might fear the cheat who is exposed but unconvictable; more precisely, they might fear the prosecutor's press conference blaming the legislature for not providing the legal tools necessary to send such an obvious cheat to prison. If the second version is passed, legislators might fear the trivially dishonest but sympathetic defendant whose plight captures the public's imagination. Which scenario is likely to seem more troubling?

In a world where prosecutors have the freedom *not* to prosecute, the second risk, the risk of the sympathetic defendant, disappears. That risk can materialize only if the prosecutor decides to file charges, which, if the defendant is sympathetic (or is likely to become so), the prosecutor has every incentive not to do. At least that is so for local prosecutors, who are both politically accountable and constrained by limited budgets (meaning that the opportunity cost of an unpopular prosecution is high), and local prosecutors bring the huge majority of criminal prosecutions.<sup>162</sup> This is not to say that politically accountable prosecutors will *never* charge sympathetic defendants — only that they will not do so often. And because prosecutors will rarely charge sympathetic defendants, when they do, and when the case becomes known to the public, the public is likely to blame not the overbroad statute but the overaggressive prosecutor. That would seem to be the lesson to draw from the public's reaction to Kenneth Starr's investigation of President Clinton, which produced a good deal of hostility toward Starr but none at all toward Congress for the scope of federal perjury and obstruction of justice laws.<sup>163</sup> (Hostility toward Congress for impeachment is consistent with this story: the public turned on Congress only when Congress took over the prosecutor's role.) Nor can the prosecutor shift blame to legislators: the public seems to understand that Starr could have chosen to leave Lewinsky and the President alone. So sympathetic defendants will be rare, and blaming legislators for them will be even rarer.

The first risk — the cheat who falls through the cracks of the carefully drawn fraud statute — seems at least slightly more serious. From legislators' point of view, politically accountable prosecutors make

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162. To get a sense of how huge that majority is, see *supra* note 153 (showing that the number of state court felony convictions is more than twenty times the total number of criminal cases filed in federal court).

163. In September 1998, at what may have been Clinton's most vulnerable moment, a CBS/*New York Times* poll found that sixty-four percent of the population believed Starr's investigation was partisan. Richard L. Berke & Janet Elder, *Poll Finds Clinton in Strong Rebound Since Video Airing*, N.Y. TIMES, Sept. 25, 1998, at A1. I am aware of no polling data on the public view of the laws Starr's team was seeking to enforce; in this case, the absence of data probably stems from the assumption that while many people saw the *prosecution* as problematic, almost no one saw the substantive *law* as problematic. Disapproval of the independent counsel statute is, of course, consistent with this proposition.

that risk worse. If an obvious cheat is getting away with his cheating in a way the public does not like, the prosecutor has good reason to try to blame someone else. The most logical target is the legislature, which failed to give the prosecutor the law he needed to nail the cheat. Though the public blamed Starr for overaggressively pursuing Clinton, they might well have blamed Congress if they thought Clinton deserved punishment but escaped it because the federal criminal code did not cover his conduct.<sup>164</sup>

Notice two aspects of this balance. First, lawmakers' incentives are weak in *both* directions. Crime definition usually carries low political returns; it is hardly a surprise that legislators spend relatively little time on it. For most issues most of the time, the political gains from legislating cannot overcome even mild legislative inertia. That point is important; it explains why many proposed criminal statutes do not pass. Second, once an issue is over the threshold that must be reached to prompt legislative action, too little criminalization tends to be riskier than too much. The political cost of the narrower fraud statute is low, but the political cost of the broader statute approaches zero.

If so, there is no reason to suppose that any given crime definition accurately reflects majoritarian preferences. The public may wish to punish "core" fraud, and legislators and prosecutors may share that preference, yet the statute books may (and do) criminalize a great deal more. This is at once obvious and easily overlooked. The imbalance of legislative incentives does not only mean that criminal legislation will tend to be tilted in the government's favor. That would hardly be surprising; the public often *demand*s criminal legislation tilted in the government's favor. The imbalance means that criminal legislation will tend to be *more* tilted than the public would demand. Criminal lawmakers, or most of them, are elected officials, and there is every reason to believe that they take voters' preferences seriously. But criminal law is not democratic.

*b. Agency Costs.* Criminal statutes are a grant of power to police and prosecutors, who can choose how aggressively and in what cases to exercise that power. Anytime a principal grants power to an agent, there is a risk that the agent will not use the power in the way the principal would like. That risk is plainly present in criminal lawmaking, for prosecutors may charge differently than legislators would wish. If the difference is large enough, the legislature presumably will find it worthwhile to narrow prosecutors' discretion — to narrow the scope of criminal liability rather than to broaden it.

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164. On the other hand, the public might take the position that if the law was not violated, the cheat was not really a cheat; that is, public opinion might equate wrongdoing with illegality. In this event, the risk from *undercriminalizing* also disappears.

Yet in this setting, agency costs actually push in the other direction.<sup>165</sup> Consider the ways in which prosecutors' charging decisions are likely to diverge from legislative preferences. One obvious possibility is that prosecutors will charge defendants whom legislators would prefer be left alone. This risk is likely to be small, for the pair of reasons explored above. First, the same political forces that lead legislators to prefer a given defendant be left alone also work on prosecutors — at least on local prosecutors. (Much less so for U.S. Attorneys, and still less for independent counsels.<sup>166</sup>) Second, public displeasure toward overaggressive prosecution is more likely to be visited on the prosecutorial agent than on the legislative principal.

The more serious risk is that, from legislators' point of view, prosecutors will simply prosecute too little. Prosecutors, remember, are paid salary, not by the case; while they have good reason to want to satisfy the public's desires, they also have good reason to want to limit their workload. They can do so in either of two ways — by reducing the number of cases they handle, or by reducing the cost of handling each case. Prosecutors may actually prefer the first strategy. Like other litigators, prosecutors enjoy trying cases; courtroom work is more fun than the more bureaucratic work of handling guilty pleas and dismissals. But legislators would surely prefer the second. Cheaper case processing means a higher volume of criminal convictions; to the extent the public wants more convictions rather than fewer, legislatures are likely to have the same preference.

How can legislators combat the tendency toward underenforcement, and how can they steer prosecutors toward cheaper case processing and away from smaller dockets? Given current institutional arrangements, direct supervision is very hard. State legislatures have no supervisory authority over local district attorneys' offices, which makes ordinary monitoring somewhere between difficult and impossible. Congress would seem better positioned in that regard, but congressional oversight of U.S. Attorneys' offices is slight at best. As Daniel Richman has noted, federal prosecutors have found it easy to thwart most efforts at congressional oversight by characterizing oversight as improper interference with the criminal process.<sup>167</sup>

If supervision fails, the next best option is to reduce the cost of enforcement. The idea is simple: if the risk is that prosecutors will prosecute too little, making prosecution cheaper will tend to reduce the risk.

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165. The argument in the next few paragraphs is drawn from Stuntz, *supra* note 72, at 15-19.

166. Which is why abusive prosecution is probably a greater risk in the federal system than in the states. For the link between this argument and the need for greater regulation of the subpoena power, see William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 861-69 (2001).

167. Richman, *supra* note 102, at 776-78.

Broadening criminal liability and raising nominal sentences make prosecution cheaper. Burglary is sometimes hard to prove; proving possession of burglars' tools or stolen goods is easier. The possession offense allows cheaper prosecution of burglars. Proving the elements of traditional fraud is likewise hard, and those elements rule out some important kinds of dishonesty. Satisfying the muddier "intangible rights" standard that applies to federal fraud statutes is usually easier. Consent is often contested in sexual assault litigation. If sodomy is a crime, some sexual assaults that are otherwise hard cases become enormously easier for the government. Each of these examples is of a criminal statute that nominally authorizes the government to punish an additional category of conduct, and the statutes may sometimes be so used. But their primary effect is probably to reduce the cost of punishing conduct that is already a crime by removing a contested issue from the offense.

Broader liability rules lower enforcement costs in another way. Suppose police and prosecutors have good reason to believe a given suspect has committed a given crime or series of crimes; suppose further that regardless of the details of how those crimes are defined, the government is unlikely to be able to prove the suspect guilty save at great expense. A capacious criminal code is a great help in such cases. If an Al Capone cannot be convicted of homicide or large-scale liquor law violations, tax evasion offers a useful alternative. And while tax evasion may be the sort of crime for which people other than Al Capone are prosecuted, that need not always be the case, as Justice Ginsburg's concurrence in *Brogan v. United States*<sup>168</sup> emphasizes. Ginsburg's summary of the facts in *Brogan* makes the point:

Two federal investigators paid an unannounced visit one evening to James Brogan's home. The investigators already possessed records indicating that Brogan, a union officer, had received cash from a company that employed members of the union Brogan served. (The agents gave no advance warning, one later testified, because they wanted to retain the element of surprise. . . .) When the agents asked Brogan whether he had received any money or gifts from the company, Brogan responded "No." The agents asked no further questions. *After* Brogan just said "No," however, the agents told him: (1) the Government had in hand the records indicating that his answer was false; and (2) lying to federal agents in the course of an investigation is a crime. . . . [W]hen the interview ended, a federal offense had been completed — even though, for all we can tell, Brogan's unadorned denial misled no one.<sup>169</sup>

Brogan could be, and was, charged with illegally accepting the money, but that crime required proof that the money fell outside the long list of permissible payments to union officials provided by federal

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168. 522 U.S. 398 (1998).

169. *Id.* at 409-10 (Ginsburg, J., concurring).



statute.<sup>170</sup> It was quite a convenience, then, to be able to charge him with a violation of the federal false statements statute<sup>171</sup> based on his “unadorned denial” in a brief, noncustodial conversation. Indeed, as Ginsburg noted, quoting the Solicitor General’s oral argument in *Brogan*, the false statements statute “could even be used to ‘escalate completely innocent conduct into a felony.’”<sup>172</sup>

Such crimes can make criminal trials low-risk affairs for the government. At the same time (and for the same reason), they substantially enhance prosecutors’ ability to induce guilty pleas. That is the heart of the cost saving from broader liability rules. It is also a saving legislatures can obtain by raising nominal sentences. Suppose prosecutors and legislators believe five years is the right sentence for a given crime. The best way to achieve that sentence may be to threaten fifteen years if the defendant takes his case to trial and offer five years in return for a guilty plea. That is part of the attraction to legislatures of three-strikes laws: they give prosecutors an extra card to play in bargaining with defendants.<sup>173</sup> But legislatures can do the same thing by creating a laundry list of overlapping crimes. Even under the federal sentencing guidelines, which purport to base sentences on “real offense” factors rather than purely on the crimes charged, varying the charges has an enormous effect on the sentencing range.<sup>174</sup> The false statement charge in *Brogan* raised the odds of conviction; the effect would have been the same had it instead raised the sentence Brogan would suffer if he lost. Both factors tend to push the Brogans of the world to plead.

The point can be generalized. Broader criminal liability rules raise the threat value of trial, by raising both the odds the government will win and the sentence the defendant might receive if he loses. That allows the government to get more guilty pleas. Making guilty pleas easier to obtain in turn lowers the cost of prosecution. And lowering the cost of prosecution is, from legislators’ perspective, a useful counter to prosecutors’ tendency to prosecute too little.

c. *Interest Groups*. One standard way to account for legislative output is to focus on the strength of the private interest groups arrayed on either side of a given issue. In some areas of criminal law,

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170. See 29 U.S.C. § 186(c) (1994).

171. 18 U.S.C. § 1001 (1994), which covers anyone who, “in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact . . . .”

172. *Brogan*, 522 U.S. at 411 (Ginsburg, J., concurring).

173. For an analysis of the way overbroad recidivist statutes can be used to achieve plea bargains that prosecutors might otherwise be unable to get, see Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1962-66 (1992).

174. For a nice demonstration of this point, see Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1506-08 (1993).

that approach seems helpful: the power of gun owners over gun-related criminal statutes is famous, or infamous.<sup>175</sup> But in criminal law, interest groups tend to operate only on one side. A variety of groups may seek to broaden criminal liability, to add new crimes or expand the reach of old ones. But organized interest group pressure to *narrow* criminal liability is rare. The result is that interest group pressure only aggravates the tendency toward ever broader liability rules.

Begin with groups that favor new crimes. Sometimes market actors will seek to criminalize their competitors. Paul Mahoney has shown that something like this may have happened with the passage of federal securities laws in the 1930s.<sup>176</sup> Sometimes political actors wish to criminalize opposition to their cause; laws forbidding some kinds of abortion protest may fit this category. Ideologically motivated groups may find criminal law a useful means of enforcing their views; the criminal portions of environmental law come naturally to mind. And, of course, various groups may wish to gain the government's symbolic embrace in the form of a new criminal statute.

This last category is particularly important in criminal lawmaking. To see why, consider a recent example of the phenomenon: the passage of hate crime statutes in most states and its likely passage in Congress.<sup>177</sup> These statutes typically criminalize violent offenses committed because of animus toward some population group. Some laws go farther, covering all violent offenses in which the victim was selected because of his or her race, sex, religion, and the like.<sup>178</sup> (Criminals may pay attention to victims' demographics for reasons other than animus. For instance, a black victim in a white neighborhood or a white victim in a black neighborhood may seem vulnerable to would-be robbers, less able to call on help from nearby residents or pedestrians. Likewise, women may be selected for victimization because they are less likely than men to carry weapons. The "because of" formulation captures these crimes as well as more conventional hate crimes.) A wave of these statutes have been enacted during the course of the past decade; Congress is currently considering a federal version that adopts the broader "because of" formulation.<sup>179</sup>

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175. For a good treatment, see OSHA GREY DAVIDSON, *UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL* (1998).

176. See Paul G. Mahoney, *The Political Economy of the Securities Act of 1933*, 30 J. LEGAL STUD. 1 (2001).

177. For the two leading works on this phenomenon — one decrying it, the other applauding it — see JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS* (1998); FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* (1999).

178. For a state-by-state breakdown, see LAWRENCE, *supra* note 177, at 178-89.

179. All three of the bills pending in the 107th Congress use the "because of" formulation. Hate Crimes Prevention Act of 2001, H.R. 74, 107th Cong. § 4 (2001); Protecting Civil

Hate crime laws have attracted a good deal of support from civil rights groups, women's groups, and, at the federal level, gay rights groups.<sup>180</sup> That support does not stem from the laws' concrete effects. In Senate testimony concerning the federal hate crime bill, representatives of the Justice Department testified that there would be only a handful of prosecutions per year under the bill if it were passed.<sup>181</sup> Rather, the groups supporting hate crime laws seek symbolic victories, legislative affirmations of their groups' importance and protected status. These symbolic victories may be valuable in themselves; they also may be valuable opportunities for lobbies to trumpet their legislative clout to their membership, which may be unaware of the limited practical effect of the laws.

Criminal statutes are a perfect vehicle for that kind of lobbying strategy, because the victories tend to be cheap, relative to other sorts of legislation. Legislative inertia is famously powerful; in other areas it can be very costly to achieve even symbolic legislative victories, because powerful groups so often have some stake in preserving the status quo. Inertia matters in criminal legislation as well — remember that the returns from criminal legislation are usually low, so a little inertia can go a long way — but it probably matters less than elsewhere. A few criminal defendants aside, hate crime statutes impose tangible costs on no one. Police and prosecutors are likely either to be indifferent to their existence or to find them a mild convenience. And there may be no organized interest group on the other side: no one is likely to lobby against a statute that ratchets up sentences for violent bigots.

Actually, the point is even stronger. Recall that in any regime in which politically accountable prosecutors can pick their cases, their primary political incentive is to charge people the public wants charged. Of course, prosecutors might also charge people for other reasons — to harass them, to settle scores, to impose costs on political opponents. But those sorts of charging decisions become more costly as prosecutorial budgets become more constrained. It is one thing to settle a personal score when the opportunity cost of the prosecution is leisure, quite another when score settling means dropping robbery or drug cases from the docket because there are not enough prosecutors

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Rights for All Americans Act, S. 19, 107th Cong. § 107 (2001); Local Law Enforcement Enhancement Act of 2001, S. 625, 107th Cong. § 7 (2001).

180. The three pending bills cited in the preceding note all cover acts of violence committed because of the actual or perceived sexual orientation of the victims.

181. See *supra* note 114 (citing, and quoting, testimony of Eric Holder, then Deputy Attorney General for the Criminal Division, at a Senate Judiciary Committee hearing in July 1998). Infrequency of prosecution aside, there is some evidence that the hate crime phenomenon is both small and declining. See JACOBS & POTTER, *supra* note 177; Christopher Chorba, Note, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319, 341 (2001).

to handle all the serious crimes that come to them. Local responsibility for prosecution means that budget constraints will be severe when crime rates are high, as they have been for the past generation.

It follows that being charged with crime will tend to be stigmatizing. But if being charged with crime is stigmatizing, it is difficult for interest groups opposed to criminal statutes to organize. Their very existence harms their members' reputations. One who seeks to lobby against expanded mail fraud liability is identifying herself (or her client) as one who fears indictment, which, if indictment is stigmatizing, significantly raises the cost of lobbying. This might explain why there was so little lobbying activity when the intangible rights statute, which dramatically expanded federal mail and wire fraud liability, was enacted in the late 1980s.<sup>182</sup> That statute poses large risks for a wide variety of white-collar personnel, including, importantly, politicians. One would expect these groups to have substantial power in Congress. But organizing and advocating their position would have large reputational costs: who wants to be the Congressman famous for arguing that federal law should give dishonest politicians a wider berth?<sup>183</sup>

All this would be very different in a world where prosecutors had to prosecute, where enforcement was in some sense mandatory. Were that the case, becoming a defendant might be less stigmatizing, so lobbying on both sides might be more common. And law enforcement groups would themselves tend to appear on both sides of criminal li-

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182. It might also explain why the opposition worked behind the scenes; public opposition was notably absent. Consider Adam Kurland's account of the passage of the intangible rights bill:

Anti-Corruption legislation intended to overrule *McNally* was originally introduced in the Senate as a separate bill on June 17, 1988. . . . This bill only covered official corruption and was virtually identical to the Justice Department proposal set forth by [the then-Assistant Attorney General] . . . With virtually no public debate, this version of S. 2793 passed the Senate on October 14, 1988 as part of a package of amendments to a highly publicized drug bill . . . . [T]he House leadership apparently balked at approving such a broad bill without giving the new provisions adequate consideration. The final form of the anti-corruption provisions, much more limited than its original form (but still part of an amendment to the election year drug bill), emerged as a product of eleventh hour reconciliation deliberations with House and Senate leaders.

Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 488 n. 450 (1989).

183. For a partial exception that tends to prove the rule, consider the McDade Amendment, 28 U.S.C. § 530B (1998). The McDade Amendment does not narrow criminal liability, but it does something almost as surprising: it restricts the ability of prosecutors to get information from suspects, by banning prosecutors from having contact with represented parties outside the presence of counsel. It seems much more than coincidence that the author (and, in Robert Weisberg's words, the "poster child") of the McDade Amendment, Representative Joseph McDade of Pennsylvania, was charged with (and acquitted of) bribery. See Robert Weisberg, *Foreword: A New Agenda for Criminal Procedure*, 2 BUFF. CRIM. L. REV. 367, 382-84 (1999). Having already been stigmatized by the law enforcement bureaucracy, the marginal cost to McDade of opposing the interests of that bureaucracy must have been small, and perhaps negative: pushing for corrective legislation tends to validate claims of past victimization. For the many members of Congress who have, unlike McDade, managed to avoid indictment, the cost structure is very different.

ability issues; indeed, those groups might actually have a tendency to argue for *narrower* liability rules,<sup>184</sup> because broader rules would mean more work. Given enforcement discretion, broader liability rules give prosecutors more options, not more work. Given budget constraints and politically accountable prosecutors, opposing such rules tends to harm the one doing the opposing.

This dynamic makes criminal statutes not only more numerous, but longer-lived as well. The same factors that make it hard for interest groups to organize in opposition to new criminal legislation also make it hard to organize in support of narrowing or repealing existing statutes. The result is that once crimes are in place, they tend to be permanent.

Every American criminal code is filled with evidence of this phenomenon. Though it sounds odd to twenty-first century ears, in mid-to late-nineteenth century cities, juggling was associated with fraud and street disorder. As recently as 1972, the Supreme Court dealt with a statute that targeted jugglers;<sup>184</sup> scattered local ordinances probably still criminalize such behavior. Just as crimes associated with cars — auto theft, joyriding, and carjacking — are among the most salient and feared crimes in a society that relies so heavily on the automobile, a century ago crimes associated with railroads were a source of great public concern. Today, Virginia's criminal code has a substantial separate section (among the code's largest) devoted to railroad crime,<sup>185</sup> though one suspects the problems that prompted that section of the code are long forgotten.<sup>186</sup>

Anti-juggling laws and railroad offenses are likely to be historical curiosities only; they generate almost no prosecutions and figure in very few plea bargains. That is not so of other statutes that outlive the forces that spawned them. Sodomy remains a crime in about a third of the states.<sup>187</sup> A few of those states have civil statutes protecting gays against discrimination in various settings<sup>188</sup> — a fairly clear signal that

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184. The vagrancy law at issue in *Papachristou v. City of Jacksonville* included a ban on "persons who use juggling or [other] unlawful games or plays . . . ." 405 U.S. 156, 156 n.1 (1972).

185. VA. CODE ANN. §§ 18.2-153 to 18.2-167.1 (Michie 1996).

186. See, e.g., § 18.2-156 (criminalizing taking or removing waste or packing from journal boxes).

187. As of early 2000, sodomy was a crime in nineteen states. Alvin C. Lin, Note, *Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 GEO. L.J. 719, 737 n.129 (2001). That number is declining: a half-decade earlier, it was twenty-eight. See RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 66-71 (1996).

188. Compare FLA. STAT. ch. 800.02 (2000) (criminalizing indecent acts, including sodomy), MD. CODE ANN. art. 27, §§ 553-554 (1996) (criminalizing sodomy), and MASS. GEN. LAWS ch. 272, § 34 (2000) (criminalizing crimes against nature, including sodomy), with FLA. STAT. ch. 641.3007 (2000) (proscribing discrimination by Health Maintenance Organizations on the basis of sexual orientation), MD. CODE ANN., HEALTH OCC. § 19-311 (2000) (penal-

criminal sodomy laws no longer have majority support. The statutes have nevertheless survived, in large part because gay rights groups have found it easier to lobby for favorable civil regulation than for narrower criminal liability. And the survival of sodomy statutes is no mere curiosity. Those statutes are used as a device for obtaining guilty pleas in sexual assault cases,<sup>189</sup> presumably where the government either has a weak case or wishes to avoid trial for other reasons.

One should not overstate the point. Sodomy statutes have been repealed in most states.<sup>190</sup> But repeal has come slowly, and the groups that are most inclined to favor it have often sought other legislative favors instead. This highlights an important feature of criminal law. Legislative inertia is always a powerful force, but when it comes to adding crimes it is probably less powerful than elsewhere, because interest groups have a substantial disincentive to oppose extensions of liability. When the issue is subtracting crimes rather than adding them, legislative inertia is probably *stronger* in criminal law than elsewhere, since even groups with good reason to seek decriminalization hesitate to do so.

## 2. Legislators and Judges

Given prosecutorial discretion, legislatures have a natural bias toward overcriminalization. Courts are a good deal less prone to that bias. One can see this in the two areas of criminal law that are still largely judge-made: the law of mens rea and the law of defenses. In these areas, doctrinal development sometimes works to defendants' advantage, and when that happens, courts are almost always the doctrine's authors. For a number of white-collar offenses, federal courts have defined mens rea standards so as to require the government to prove knowledge of illegality.<sup>191</sup> Congress has ignored some of these

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izing licensed social workers who deny services based on sexual orientation), and MASS. GEN. LAWS ch. 151B, § 4 (2000) (banning employment discrimination on the basis of sexual orientation).

189. See POSNER & SILBAUGH, *supra* note 187, at 66; *Developments in the Law: — Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1520 (1989).

190. According to the Supreme Court, all fifty states criminalized sodomy in 1961. *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986). By 2000, only nineteen states still did so. Lin, *supra* note 187, at 737 n.129.

191. For a sampling of the relevant cases, see *Bryan v. United States*, 524 U.S. 184 (1998) (unlicensed sale of firearms); *Ratzlaf v. United States*, 510 U.S. 135 (1994) (evading currency reporting requirements); *Liparota v. United States*, 471 U.S. 419 (1985) (unauthorized sale of food stamps); *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir. 1989) (election law violations).

There is a mushrooming literature on these cases. For the best discussions, see J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 HASTINGS L.J. 1199 (1999); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999).

decisions and overturned others;<sup>192</sup> to my knowledge, it has embraced none and enacted no comparable rules on its own. Before 1981, federal and state court decisions alike drove toward a broader (more pro-defendant) definition of insanity;<sup>193</sup> after John Hinckley's acquittal,<sup>194</sup> Congress and a number of state legislatures intervened to cabin the defense,<sup>195</sup> and a few legislatures abolished it.<sup>196</sup> More recently, arguments for a broadening of self-defense in cases where battered women killed their batterers won significant successes in the courts.<sup>197</sup> Those arguments were notably less successful in state legislatures (though there were a few victories there), and most of the favorable legislation simply ratified previous court decisions.<sup>198</sup> Meanwhile, in the realm of legislatively defined crime, change is almost entirely one-directional. New crimes are regularly added to criminal codes. Old ones are rarely taken away, and legislatures almost never change definitions of offenses in ways that make violations harder to prove.

So it is natural to see legislative crime definition as something in need of restraint, and it is natural to see courts as good candidates for doing the restraining. But the degree of restraint is limited by the range of tools courts have. And the tools themselves are limited by the system's two central commitments: to legislative supremacy in crime definition, and to prosecutorial power over charging decisions. The commitment to legislative supremacy rules out aggressive constitutional review of criminal statutes. The commitment to prosecutorial discretion rules out aggressive equal protection review of charging decisions, the kind of review that would seek out and correct enforcement disparities among different population groups and would bar irregular and sporadic enforcement altogether.

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192. For the leading example of congressional overruling, see *Ratzlaf*, 510 U.S. 135, overruled in a matter of months by Section 411 of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160 (1994). The Act amended 31 U.S.C. § 5321, removing "willfully" from the definition of the anti-structuring crime at issue in *Ratzlaf*.

193. For a good recent account, see Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1210-14 (2000).

194. Hinckley attempted to assassinate President Reagan; he was charged with attempted murder, pled not guilty by reason of insanity, and was acquitted. His trial is excerpted and discussed in PETER W. LOW ET AL., *THE TRIAL OF JOHN W. HINCKLEY, JR.: A CASE STUDY IN THE INSANITY DEFENSE* (1986).

195. See 18 U.S.C. § 17 (1994) (doing away with the "control prong" of the test for insanity, and placing the burden of proof on the defendant). For a good survey of post-Hinckley developments in state law, see Lisa Callahan et al., *Insanity Defense Reform in the United States — Post-Hinckley*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54 (1987).

196. See IDAHO CODE § 18-207 (Michie 1997); KAN. STAT. ANN. § 22-3220 (1995); NEV. REV. STAT. ANN. § 174.035 (Michie 2001); UTAH CODE ANN. § 76-2-305 (1999).

197. See *Domestic Violence*, *supra* note 19, at 1579-85.

198. See *id.* at 1585-86 (noting that such legislation "primarily codified the courtroom victories won by battered women's advocates and defense attorneys").

Two major judicial tools remain. The first is vagueness doctrine, a requirement that legislatures specify crimes rather than simply delegate their definition. The second is a close cousin of vagueness doctrine — the rule of lenity, which authorizes courts to resolve statutory uncertainties in defendants' favor, seemingly a useful corrective to legislatures' tendency to err on the government's side when defining crimes. Neither of these tools, though, can accomplish much, for both are easily evaded. Indeed, it is possible that each makes overcriminalization worse rather than better.

a. *Vagueness Doctrine.* Vagueness doctrine requires that legislatures be reasonably specific when defining crimes. (Actually, the doctrine goes beyond criminal law, but its primary use has been there.) It thus prevents legislatures from creating all-encompassing crimes like the infamous vagrancy ordinance in *Papachristou v. Jacksonville*,<sup>199</sup> or the not-so-infamous gang loitering law in *Chicago v. Morales*.<sup>200</sup> The clear goal is to prevent the state from criminalizing everything, and thereby delegating the real work of defining crimes to prosecutors.

But vagueness doctrine cannot accomplish that goal, for legislatures can achieve breadth and specificity at the same time. The history of the post-*Papachristou* law of street disorder proves the point. Old-style loitering and vagrancy statutes used language broad enough to encompass almost anything people (or at least people whom the police perceive as troublesome) might do in public. *Papachristou* itself is a good example; in that case the ostensibly criminal conduct consisted of two mixed-race couples driving down one of Jacksonville's main thoroughfares.<sup>201</sup> Courts invalidated most of those loitering and vagrancy statutes in the late 1960s and early 1970s.<sup>202</sup> Ever since, legislatures,

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199. 405 U.S. 156 (1972). The ordinance read:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

*Id.* at 156-57 n.1 (quoting JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1965)).

200. 527 U.S. 41 (1999). The law provided, in part:

Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

*Id.* (quoting CHICAGO, ILL., MUNICIPAL CODE § 8-4-015(a) (1992)).

201. *Papachristou*, 405 U.S. at 158-59.

202. For the best account, see Livingston, *supra* note 138, at 595-608.



state and local, have been replacing them with a series of more carefully defined offenses: anti-cruising ordinances, anti-noise ordinances, loitering-with-intent statutes, and youth curfew laws are all examples.<sup>203</sup> At the same time, police have been reviving small-scale (and specific) prohibitions that had been dormant. A well-known case from Illinois, *People v. Kail*,<sup>204</sup> involved a suspected prostitute arrested for riding a bicycle without a bell, under an explicit police department policy requiring officers to enforce any prohibitions they could find against vice suspects.<sup>205</sup>

*Kail* and contemporary street disorder statutes show why *Papachristou* could not eliminate catch-all crimes. The real problem with old-style vagrancy and loitering laws was not their vagueness, but their breadth. Barring vague statutes does little about breadth. And breadth is much harder for courts to regulate, for it is a function not of particular criminal statutes but of the whole criminal code. The problem with *Kail* is not the unfairness of barring bell-less bicycles, but the unfairness of barring that plus a couple dozen other sorts of ordinary street behavior, which, taken together, criminalize everything and everyone the police and prosecutors might wish to punish.

Vagueness doctrine may still have a non-trivial impact on the shape of criminal law, though the impact is not the one the doctrine seeks. Vagueness doctrine rules out enacting all-encompassing crimes, but it permits the creation of many smaller, more tightly defined offenses. It thus pushes legislatures to expand criminal law by accumulation, by adding ever more distinct acts to the criminal code.

To some degree, of course, legislatures already have some incentive to prefer many specific crimes to a few general ones. A legislature seeking credit for doing something about carjacking will want a fairly targeted statute — like the federal carjacking law, which requires proof of intent to cause death or serious bodily injury and a taking accompanied by violence or intimidation.<sup>206</sup> General theft or assault crimes would be harder to use to make the appropriate symbolic statement (not to mention that those crimes already exist). But there are forces pushing the other way, toward generality rather than specificity. Police and prosecutors, the interest group that most commonly pushes for criminal legislation, gain from minimizing the limits on criminal liability; fewer specific elements means fewer limits. In the absence of some constraint like vagueness doctrine (along with the rule of lenity, which raises the risk that broad and undefined prohibi-

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203. For a survey of these laws and courts' treatment of them, along with a discussion of how vagueness cases like *Papachristou* generated them, see *id.* at 608-34.

204. 501 N.E.2d 979 (1986).

205. See *id.* at 981.

206. 18 U.S.C. § 2119 (1994 & Supp. 1997).

tions will be construed to defendants' advantage), criminal law might well contain fewer targeted, carjacking-style crimes, and more RICO-style omnibus offenses. That kind of omnibus legislation is, after all, common outside the criminal sphere. Vagueness doctrine makes that path at least somewhat risky in criminal law, while posing no risks at all for targeted new criminal acts. As a relative matter, then, it makes targeted new crimes cheaper.

In other words, vagueness doctrine actually accents the tendency to create more crimes. Creating more crimes, in turn, makes it harder for courts to play a significant role in criminal lawmaking. An omnibus crime like RICO will require substantial judicial interpretation (as RICO has).<sup>207</sup> Carjacking statutes will not. More to the point, if prosecutors can choose among carjacking, auto theft, assault, armed robbery, and kidnapping, they will find it easy to avoid presenting courts with interpretive issues. In any given case, some of those crimes will be easier to establish than others, and prosecutors can simply gravitate toward the easier ones. The more criminal law consists of a long list of overlapping, reasonably specific prohibitions, the less law courts will be called on to make. If vagueness doctrine is designed to rein in legislatures, it fails. Its real effect, if it has an effect, is to add slightly to the proliferation of crimes, which in turn restricts not legislatures, but courts.<sup>208</sup>

*b. The Rule of Lenity.* The second source of judicial restraint is the rule of lenity, which appears to require one-sided interpretation of criminal statutes, with ambiguities resolved in the defendant's favor.<sup>209</sup> This seems a perfect antidote to overbroad criminal laws, since it authorizes courts to rewrite such laws to make them narrower.

But like its cousin vagueness doctrine, the rule of lenity might cause more overcriminalization than it prevents. If a strong rule of lenity existed (it doesn't),<sup>210</sup> legislators would know about it, and

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207. Though, as Dan Kahan rightly notes, courts have been slow to seize the authority to limit RICO's scope. See Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 LAW & CONTEMP. PROBS. 47, 51-52 (1998).

208. Perhaps this means vagueness doctrine *succeeds*: it causes legislatures to define crimes more specifically than they might otherwise do. There is a good deal of truth to this more optimistic claim. Its problem lies in the value of the "success." Put simply, it is not clear why we should value specificity. Its chief effect, after all, is to shift lawmaking power from courts (the system's resolvers of statutory ambiguity) to legislatures, and, for reasons explored above, there is every reason to suppose that legislatures are the system's worst law-makers. Unlike courts, legislatures are not likely to consider the interests of those likely to be prosecuted. Unlike prosecutors, legislatures do not have good information about the range of cases the system deals with. In a system with these features, empowering legislatures is a strange goal.

209. For the two best discussions (both fairly critical of the rule), see Jeffries, *supra* note 89; Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345.

210. As both the sources cited in the preceding note demonstrate, the "rule" is followed only occasionally.

would therefore take it into account when drafting criminal statutes. Far from giving *courts* power to resolve contested issues of crime definition, a strong rule of lenity raises the incentive for *legislators* to resolve those issues — to eliminate doubts about the crime's coverage in advance. Doubts are likely to be resolved in the government's favor.

There is a more basic problem with the rule of lenity as a device for reining in overbroad crimes. Narrowing judicial interpretations, once made, can be overturned. And just as trial courts dislike being reversed on appeal, appellate courts dislike having their decisions overturned by statute.<sup>211</sup> As Eskridge has shown, that creates a natural tendency for courts to internalize legislative preferences when construing statutes.<sup>212</sup> And legislatures tend to prefer broader rather than narrower criminal liability rules.

That might not be a problem if legislatures rarely overruled narrowing interpretations of criminal statutes. But the best study of the issue (unfortunately limited to Congress) showed that interpretations of criminal statutes were overruled frequently — more so, by a large margin, than any other class of statutory decisions.<sup>213</sup> The same study showed that these legislative overrulings were virtually all on one side: only interpretations that favored defendants prompted legislative action.<sup>214</sup> This stands to reason, given the interest group configuration discussed earlier. Groups wishing to overturn some objectionable statutory interpretation rarely face much opposition, and an unfavorable court decision provides a salient opportunity for legislative change. The upshot is that the rule of lenity is likely to exist only in occasional spurts; when courts become too aggressive, legislatures should find it easy to restrain them.

Roughly speaking, that seems to describe the much-studied relationship between Congress and the Supreme Court in writing and construing federal criminal statutes.<sup>215</sup> The past three decades have seen

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211. See *supra* notes 146-147 and accompanying text.

212. See Eskridge, *supra* note 147, at 390-404.

213. Eskridge found that between 1967 and 1990, Congress overrode eighteen Supreme Court decisions interpreting federal criminal statutes; this represented fifteen percent of the statutory overrides during that period. *Id.* at 344 tbl.4.

214. The criminal cases in Eskridge's study largely explain why the United States was the most common beneficiary of congressional overrides (twenty-five percent of the cases), while criminal defendants were among the least common beneficiaries (two percent of the cases). See *id.* at 348 tbl.7. Another measure of the one-sidedness of congressional supervision of federal criminal law is this: between 1978 and 1984, the Supreme Court decided thirty-four cases interpreting criminal statutes unfavorably to criminal defendants. Congress overturned only one of those cases. See *id.* at 351 tbl.9. Meanwhile, during the same period, Congress overturned five of twenty-four decisions unfavorable to the federal government. *Id.*

215. Most of the literature focuses on the Court's side of the relationship. For the best pieces in this vein, see Strader, *supra* note 191, and Wiley, *supra* note 191. On Congress's side, the best work — though it covers much more than federal criminal law — remains Eskridge, *supra* note 147.

enormous growth in the number and scope of federal crimes. Predictably, the Court has, on occasion, reached out to cabin some of the broader offenses. Equally predictably, Congress has, on occasion, slapped it down. In 1987, *McNally v. United States* invalidated the “intangible rights” theory of mail fraud, which had extended federal fraud statutes to cover breaches of fiduciary duties that caused no tangible injury to their victims.<sup>216</sup> In 1994, *Ratzlaf v. United States* required the government to prove knowledge of illegality in a currency restructuring case;<sup>217</sup> the defendant in *Ratzlaf* had broken up a large cash deposit into smaller chunks in order to avoid having banks report the transactions.<sup>218</sup> Congress overruled both *McNally* and *Ratzlaf* — each within a year, each with virtually no opposition.<sup>219</sup>

*McNally* and *Ratzlaf* nicely capture what the rule of lenity would mean in practice were it taken seriously. The problem in *McNally* was a vague *actus reus*; the intangible rights theory permitted the government to prosecute behavior that might seem fairly innocuous to the relevant actors. In *Ratzlaf*, the criminal act was clear enough, but intent was not. And if the currency restructuring statute’s intent term were construed as the government argued it should be, defendants could be convicted for purposely altering their behavior to *comply with* the government’s reporting requirements — not the sort of thing one would expect would lead to a prison sentence. In both cases, the Court resolved the ambiguity in a way that limited the government’s ability to charge and convict people who might not realize that their conduct could subject them to serious sanctions. In both cases, the end result was to enshrine the *government’s* argument in the federal criminal code.

Incidents like these might be expected to send a fairly strong signal.<sup>220</sup> A Court attentive to legislative preference in statutory construction cases might be expected to respond by moderating its stance, giving a little more ground to the government in close cases.

Generally speaking, that is what the Court has done. Decisions like *McNally* and *Ratzlaf* have not spawned a sustained judicial effort to rein in overbroad federal crimes. Rather, the pattern has been judicial acquiescence punctuated by occasional conflict, with the conflicts ending in a legislative victory for the government.

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216. 483 U.S. 350, 356-61 (1987).

217. 510 U.S. 135, 137 (1994).

218. *Id.* at 137-38.

219. See *supra* notes 90, 182, 192 and accompanying text.

220. There were others: Eskridge counts eighteen congressional overrides of Supreme Court decisions on federal criminal law between 1967 and 1990, about one-seventh of the total number of congressional overrides during that period. Eskridge, *supra* note 147, at 344 tbl.4.

The normal, more acquiescent posture is well captured by a half-dozen decisions the Court issued in 1997 and 1998. *United States v. Wells* found no materiality requirement in the federal crime of making false statements to federally insured banks.<sup>221</sup> In *Brogan v. United States*, the Court overruled a long series of lower federal court decisions establishing an exception to the federal false statements statute for “exculpatory no’s” — false denials of an embarrassing or incriminating fact.<sup>222</sup> *Bates v. United States* declined to read a fraudulent intent requirement into the federal statute barring misapplication of student loan receipts.<sup>223</sup> *Muscarello v. United States* involved the federal mandatory minimum sentence for one who “carries a firearm” during a drug trafficking crime; the Court concluded that “carries” includes not just possession on the defendant’s person but possession in a locked compartment of a nearby car as well.<sup>224</sup> *Bryan v. United States* was a prosecution for selling unlicensed firearms; the Court permitted conviction without knowledge of the licensing requirement (though it did require proof that the defendant knew he was behaving illegally in some general sense).<sup>225</sup> And in an inverted echo of *McNally*, *O’Hagan v. United States* sustained criminal insider trading prosecutions based on the defendant’s breach of a fiduciary duty to the source of the information, whether or not the other transacting party was harmed.<sup>226</sup>

Each of these cases involves its own statutory language, and the defendants’ arguments were stronger in some cases than in others. Still, the pattern is fairly striking. These decisions cannot be squared with a strong rule of lenity. That is not surprising: when the Court does take the rule seriously (as in *McNally* and *Ratzlaf*), Congress reacts, and the Court is likely to find the reaction embarrassing.<sup>227</sup>

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221. 519 U.S. 482, 495-99 (1997).

222. 522 U.S. 398, 400-06 (1998).

223. 522 U.S. 23, 29-33 (1997).

224. 524 U.S. 125, 126-27 (1998).

225. 524 U.S. 184, 191-96 (1998).

226. 521 U.S. 642, 647 (1997).

227. The Court’s reaction is key. If legislative overruling is perceived as natural, even positive, it will not be a deterrent to narrowing judicial interpretations. This could happen if, for example, the Court invoked the rule of lenity as a prod to legislative clarification, in which case overruling would be seen as success, not failure. My colleague Einer Elhauge argues that this is precisely what the Court’s rule-of-lenity decisions represent. See Einer Elhauge, Preference-Eliciting Statutory Defaults 16-29 (Nov. 2001) (article draft, on file with author).

Elhauge’s argument is interesting and powerful. But I doubt it explains cases like *McNally* and *Ratzlaf*. There are cases in which courts explicitly invite congressional action, decisions whose authors expressly disapprove of the outcome they feel compelled to reach under the governing statutes. *E.g.*, *TVA v. Hill*, 437 U.S. 153 (1978) (holding that Endangered Species Act barred construction of a dam that risked endangering snail darters); see Elhauge, *supra*, at 40-42 (discussing *Hill*). *McNally* and *Ratzlaf* do not read like *Hill*; on the contrary, the Court’s opinions in its rule-of-lenity cases *defend* their results as sound policy, which seems odd if the goal is to seek congressional reversal. See, *e.g.*, *Ratzlaf*, 510 U.S. at

In such a system, doctrines like the rule of lenity are unlikely to have important consequences. In other areas, competing interest groups make legislative revision of court decisions hard to accomplish. Where that is so, judges enjoy substantial lawmaking power. The legislature-court dialogue is just that — a dialogue, with each side having a say in the composition of the relevant legal rules. In criminal law, the interest groups tend to be all on one side, making revision of court decisions that cut against that side relatively easy. That leaves judges with no good mechanism for forcing legislatures to internalize the judges' preferences. Legislatures, on the other hand, are well equipped to get the judges to act on *their* preferences. In this law-making dialogue, only one side of the conversation need listen.

### 3. *Prosecutors and Judges*

Courts make criminal law, when they do so, by interpreting criminal statutes in the context of criminal cases. Not all cases present interpretive opportunities. Few criminal cases go to trial, and of those that do, few raise serious questions about the meaning of the relevant criminal act or intent, or of some criminal defense. (The most common defense argument at trial is that the government has the wrong defendant, not that the defendant's behavior fails to satisfy the legal definition of the crime.) Courts' influence over the content of criminal law depends on the frequency and range of cases that do raise such issues.

To see the point, imagine a criminal statute as a box. The cases in the middle of the box pose no interpretive problems — legally, they are easy cases. The cases on the box's borders, on the other hand, raise the question how, precisely, those borders are to be defined: How far does the *actus reus* extend? What does the *mens rea* standard encompass? There will always be more cases in the middle than on the borders; in any area of law, easy cases outnumber hard ones. But the hard cases still happen, and they provide the opportunity for fine-tuning of the relevant legal definitions.

As we have already seen, one way legislators can make prosecutors' job easier is to enlarge the box, to make boundary cases — cases that fall near the statute's borders — into interior cases, cases that fall in the middle of the box and hence raise no interpretive issues. One effect of this tactic is to remove boundary definition from the courts. Given a sufficiently large box, there will be *no* cases at the borders — all cases will be in the interior, since the interior covers so much territory.

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144-46 (arguing that a contrary result would subject people to criminal liability for innocent mistakes). In short, if the Court was inviting congressional action in these decisions, the invitation was exceptionally well hidden.

In one sense, criminal legislation does not fit this pattern, though in a larger sense it does. As I noted earlier, one effect of vagueness doctrine and the rule of lenity is to encourage the creation of relatively targeted crimes — of carjacking-type statutes, rather than RICO-style omnibus crimes. The expansion of criminal law has not been a matter of a few ever-expanding boxes; rather, the boxes have multiplied. In theory, this might mean more opportunities for judicial lawmaking: more crimes, with more boundary rules that courts must define.

The actual effect is different. A criminal code with large numbers of fairly specific, overlapping crimes presents prosecutors with many options. A given violent criminal episode can easily satisfy the terms of a half-dozen or more felonies. Current double jeopardy doctrine permits the government to charge all such offenses, and to convict for as many as have at least one distinct element.<sup>228</sup> Thus, prosecutors should generally be able to identify one or more charges that do not raise difficult legal issues. To return to the metaphor, if a given criminal episode falls close to the boundary of one box, it nevertheless likely fits in the interior of another. Prosecutors' incentive is to avoid the boundaries. Legislatures' incentive is to create the kinds of criminal codes that make avoiding the boundaries easy.

This process is cumulative. Recall legislatures' tendency to add crimes but not to subtract them: new crimes are common; removal of old ones is rare. Over time, prosecutors' range of options only grows. With it grows prosecutors' ability to avoid giving courts the opportunity to place a judicial gloss on criminal statutes.

There is some rough evidence that this dynamic is at work, and powerfully so. Over the course of the past century the number of criminal charges filed has increased very substantially,<sup>229</sup> and notwithstanding a parallel increase in guilty plea rates,<sup>230</sup> so has the number of

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228. See *United States v. Dixon*, 509 U.S. 688 (1993).

229. I cannot prove this proposition directly, because nationwide data on the number of criminal charges filed do not exist for most of the relevant period. But the size of the prison population tends to correlate with the number of criminal prosecutions, and there are nationwide data on the number of prisoners, going back to the middle of the nineteenth century. Unsurprisingly, that number has grown, steadily and substantially. From 1880 to 1980, the number of federal and state prisoners increased nearly ten-fold; from 30,659 to 302,377, with substantial increases in every decade except the 1960s. CAHALAN, *supra* note 125, at 29 tbl.3-2. After 1980, we have more direct evidence of the number of criminal prosecutions; between the late 1970s and the early 1990s that number doubled. See *infra* note 231.

230. In 1962, a sample of twenty-eight counties found a guilty plea rate of seventy-four percent for indigent defendants and forty-eight percent for defendants who retained counsel themselves. See 1 LEE SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT* 22-23 tbl.3 (1965). A dozen years later, the overall guilty plea rate had risen to slightly over eighty percent. See DAVID A. JONES, *CRIME WITHOUT PUNISHMENT* 44 tbl.4-1 (1979). Another dozen years later, the rate for felonies alone exceeded ninety percent. See BARBARA BOLAND ET AL., *U.S. DEPT OF JUSTICE, THE PROSECUTION OF FELONY ARRESTS — 1987*, at 3 (1990). It seems fair to assume that misdemeanors plead out at an even higher rate.

criminal trials.<sup>231</sup> The number of criminal appeals has no doubt grown even more substantially, due in part to the expansion of defendants' right to appointed counsel on appeal. All of which ought to mean a large increase in judicial lawmaking opportunities.

That hasn't happened. Instead, as the number of reported criminal cases has exploded, the number of reported decisions that take seriously some argument about the definition of crimes or defenses may actually have shrunk, at least at the state level. Homicide and rape are exceptions; both continue to be the subject of frequent interpretive disputes. And federal criminal law is a special case, for reasons having to do with federal prosecutors' charging incentives. But for the bulk of state criminal law, the judicial role in crime definition has steadily faded during the course of a century when criminal appeals steadily grew. Appellate criminal litigation used to be primarily substantive; the focus was on either the sufficiency of the evidence or the definition of crimes or defenses. Today it is overwhelmingly procedural; Fourth, Fifth, and Sixth Amendment claims have taken the place of substantive claims. Part of the explanation for this phenomenon lies in the explosion of constitutional criminal procedure in the 1960s and 1970s.<sup>232</sup> But part lies in the growing ease, in a world of expanding criminal codes, of filing charges that capture the defendant's conduct unambiguously.

To some degree, this dynamic applies to a variety of non-criminal law regimes. Whenever an executive agency monopolizes enforcement of a regulatory statute, the legislature tends to delegate broad power to the agency, leaving the agency and legislature to handle the law-making and cutting courts out of the process.<sup>233</sup> In most regulatory settings, though, courts can combat this tendency to deal them out. Ex-

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231. I am not aware of good data on the nationwide number of criminal trials; that number must be inferred from other numbers. In that light, consider the following statistic: between 1978 and 1991, state court felony filings more than doubled. See NATIONAL CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1984, at 189-90 tbl.35 (1986) (showing a thirty-six percent increase from 1978 to 1984); NATIONAL CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1991, at 37 tbl.1.25 (1993) (showing a fifty-one percent increase in felony filings from 1985 to 1991). If filings were constant from 1984 to 1985, the cumulative increase was 105%. The actual increase was almost certainly greater, since the number of filings was growing rapidly during the mid-1980s.

Prior to 1978, the prison statistics cited at note 229 tell the story. Though it cannot be proved, the most natural conclusion is that everything — trials, guilty pleas, appeals, prison sentences — grew throughout the twentieth century.

232. I have advanced this position elsewhere. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

233. This is a gross simplification of a complicated reality. For good discussions that emphasize the downsides of delegation to agencies, see THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979), and DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993). For a more positive view of delegation, see D. RODERICK KIEWET & MATTHEW MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* (1991).



ecutive agencies often exercise their power through some sort of explicit rulemaking.<sup>234</sup> Courts can review those rules, and determine whether they conform to the authorizing statute and whether the agency adopted them in a reasoned manner.<sup>235</sup> And courts can be fairly aggressive in reviewing all sorts of agency action, including rules, administrative adjudications, and decisions that do not fit neatly into either of those categories.<sup>236</sup> Legislative overruling may be a risk, but it will often be a small risk, for powerful interest groups tend to be on both sides of regulatory disputes, making legislative inertia a powerful force. More to the point, those conflicting interest groups raise the likelihood that the authorizing legislation will itself present interpretive opportunities — that key issues will be left unresolved, with opponents agreeing to fight it out before the agency and the courts.

Notice how different the executive-judicial relationship is in criminal law. Prosecutors rarely exercise their power through rulemaking; there is no incentive to do so in a system where criminal prosecution is as decentralized as in the United States.<sup>237</sup> Criminal statutes are rarely the result of interest-group compromise, with important issues left for later judicial resolution.<sup>238</sup> Since there are usually no interest groups on defendants' side, compromise is unnecessary. Legislatures' incentive is not to leave issues unresolved but to resolve them in the government's favor. And if courts rewrite (translate: narrow) criminal statutes, legislatures will overturn their decisions. All of which serves to keep courts' role in criminal lawmaking to a minimum.

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234. See, e.g., 5 U.S.C. § 553 (1996) (setting forth procedures for notice-and-comment rulemaking).

235. The iconic cases are *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

236. See, e.g., 5 U.S.C. § 706 (1994) (authorizing judicial review of agency action); *Overton Park*, 401 U.S. 402 (adopting broad view of agency action for purposes of judicial review); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983) (affirming practice of judicial "hard look" at agency action); *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359 (1998) (overturning agency adjudication on the ground that it was unsupported by substantial evidence). *Chevron*, 467 U.S. 837, is not at odds with this proposition. *Chevron* requires deference to reasonable interpretations by the agency of its authorizing statute, but only where the statute is ambiguous — and courts decide whether the statute is ambiguous. *Id.* at 842-43.

237. Kahan, *supra* note 102, argues that such rulemaking would be a good thing, a means of promoting standardization in a sprawling federal criminal justice system. Whether or not that is true (I am skeptical), analogous sorts of rulemaking are inconceivable at the state level, if only because prosecutors and lawmakers work for different levels of government — a large obstacle to any kind of centralized supervision.

238. There are exceptions. See *id.* at 472-75 (discussing RICO in this connection). But the exceptions are just that. To see criminal law generally, or federal criminal law in particular, as fields involving a large-scale delegation of lawmaking from legislatures to courts is to miss the larger picture. The real delegation is not to courts, but to prosecutors.

#### D. *The Consequences of Criminal Law's Breadth (Reprise)*

The preceding sections explain why, given prosecutorial discretion, legislatures have a natural bias toward overcriminalizing, and why courts find it difficult to attack that bias. But criminal statutes are not ends in themselves; they are means of reaching a desired set of outcomes. If the outcomes are good, it may be foolish to worry that the legal rules that generate them are, in some abstract sense, too harsh. And perhaps the outcomes *are* good — or at least as good as can be expected given public preferences. To put the point another way, there are two keys to legislative incentives in this area — prosecutors' ability to decline to charge, and prosecutors' incentive to charge only those whom the public wishes to see charged. The question is whether those prosecutorial tendencies cure any ills that overcriminalization might otherwise produce.

The answer is no. In the first place, enforcement discretion necessarily undermines, and maybe destroys, criminal law's ability to send normatively attractive messages, to signal potential violators that this or that behavior is bad and ought to be condemned. A just pattern of prosecutions may be better than an unjust criminal statute, but it must be inferior, as a means of sending signals, to a just statute that is enforced as written.<sup>239</sup>

Even if one rejects expressive theories of criminal law, the answer remains no. Legislatures' incentive to expand criminal liability has important procedural effects: it reduces prosecutors' incentive to separate guilty defendants from innocent ones. It also has at least one important substantive effect: it lowers the cost to legislatures of criminalizing consensual behavior that some sizeable portion of the citizenry wants to engage in.

##### 1. *Sorting*

Prosecutors have three major reasons for avoiding unjust prosecutions. The first is conscience. Few prosecutors want to think of themselves as the kind of people who send undeserving men and women to prison. The second is politics. Were Kenneth Starr an elected district attorney he would have been out of a job by now; the public does not like prosecutorial overreaching. The third is litigation. One hopes that

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239. See *supra* notes 73-80 and accompanying text. This is true even if the statute itself sends no signal at all (because would-be violators do not read it). Enforcement of the criminal law as written means enforcement according to the same standards everywhere. Consistency breeds salience; the sameness of the enforcement patterns across jurisdictional lines tends to reinforce the signal those patterns send. Even generally just enforcement patterns will vary across jurisdictional lines if law enforcers are allowed to pick and choose which cases to prosecute and which to leave alone. Of course, the point in the text is still more true if, as Paul Robinson argues, statutes send signals directly. See sources cited *supra* note 1.

innocent defendants win at trial more often than guilty ones. The more true that is, the more costly it is for prosecutors to make sorting errors — doing so will lead to a rise in acquittals and, probably, a fall in the guilty plea rate. Broad criminal liability rules dilute that third incentive significantly, and in doing so undermine the first two incentives as well.

Begin with a more careful definition of that third incentive. Defeats at trial are costly for prosecutors, both because *trials* are costly, and because defeats are salient — they are relatively rare (the government wins five-sixths of felony trials,<sup>240</sup> and trials are less than one-tenth of adjudicated felony cases<sup>241</sup>) and hence vivid, both to prosecutors and to the public. If innocence correlates with success at trial, prosecutors who charge more innocent defendants will lose more often. Their incentive to avoid losing will lead them to try harder to avoid bringing weak cases. That, in turn, should lead them to avoid prosecuting innocents.

Two conditions must be satisfied for that sorting process to work. Criminal procedure must be structured to ensure that innocent defendants are much more likely to win than guilty defendants. (It is not so much the odds that an innocent defendant will win that matter. Rather, it is the gap between those odds and the odds that a guilty defendant will win — that gap defines the price prosecutors pay for mistakenly charging the wrong person.) And substantive criminal law must do a good job of defining innocence — of marking out the set of defendants whom it would be unjust to convict. I have elsewhere argued that the first condition is not satisfied; the criminal process as it is currently constructed tends to *narrow* the gap between the odds of convicting the guilty and the odds of convicting the innocent.<sup>242</sup> The criminal lawmaking dynamic ensures that the second condition is not met either. Legislators have good reason to criminalize more than they (or the public) would want punished, in order to increase the likeli-

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240. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1993, at 546 tbl.5.73 (Kathleen Maguire & Ann L. Pastore eds., 1994).

241. See, e.g., *id.* at 536 tbl.5.57.

242. More precisely, the interaction of criminal procedure and legislative funding of appointed defense counsel has this effect. The law of criminal procedure creates a range of claims defendants can raise at various points in the process, and those claims tend to be cheaper to investigate and litigate than claims bearing on defendants' factual guilt. Legislatures, meanwhile, fund appointed defense counsel at levels that require an enormous amount of selectivity — counsel can contest only a very small fraction of the cases on their dockets, and can investigate only a small fraction of the claims their clients might have. This effect applies to the mass of criminal litigation, since roughly eighty percent of criminal defendants receive appointed counsel. The consequence is to steer criminal litigation away from the facts, and toward more cheaply raised constitutional claims. Those claims tend not to correlate with innocence; or if they do, the correlation may be perverse. The argument is elaborated in Stuntz, *supra* note 232.

hood and reduce the cost of punishing the conduct they (and the public) do want punished. There is no reason to believe criminal law, *on its face*, accurately captures the range of behavior the public thinks worthy of serious sanction. Indeed, there is good reason to believe the opposite.

To put the point differently, by criminalizing more than it means to enforce, the system transfers adjudication from courts and juries to prosecutors. The real crime may be *ABC*; the nominal crime *AB*, with prosecutors adjudicating the presence or absence of *C*. This informal adjudication, this prosecutor's decision that separates the many "crimes" not worth prosecuting from the few that are, is grounded not in a legal or evidentiary process, but in a political one. Prosecutors' evidentiary sorting — their separation of homicide arrestees who are guilty of some form of homicide from those who aren't — is checked by the legal process that backs it up. If such decisions are made badly enough and if the process works as it should, the acquittal rate in homicide trials will be embarrassingly high. But when prosecutors sort based on unwritten elements rather than written ones, the legal process offers almost no protection against screening errors.<sup>243</sup>

The effect is to lower the cost of charging the wrong people. The real crime in *Brogan* involved fraud on Brogan's union, but the prosecutor did not need to establish that; it was enough to prove that Brogan denied something embarrassing in a brief conversation with a federal agent.<sup>244</sup> That makes the prosecutor the effective adjudicator of the fraud offense — and if she adjudicates badly, the legal system will impose no penalty on her.

Of course, prosecutors still have the other two reasons to sort well, to charge the people who ought to be charged and leave the rest alone. Political constraints still operate, as does conscience. But in a world where litigation is a poor check, political constraints will be also. The key effect of broadening liability is to ease the task of generating guilty pleas. Guilty pleas tend to be invisible, and invisibility makes it hard for political checks to operate effectively.<sup>245</sup> A well-functioning system tends to generate lots of trials in hard cases. Where that is so, the public sees the kinds of hard cases prosecutors prosecute, and if it

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243. Juries may occasionally nullify, but the system is designed to minimize the chances that they will do so. They are not told that they may acquit for any reason — on the contrary, they may be told that if they find the elements of the crime proved, they "must convict" — and the evidence and argument at criminal trials are usually limited to legally relevant matters, meaning that many arguments for nonlegal acquittals cannot be made.

244. See *supra* notes 168-174 and accompanying text.

245. There is one major qualification to this statement: when defendants have access to the media, both guilty pleas and, for that matter, criminal investigations are visible to the public, and political checks *do* operate. That may describe a significant fraction of federal criminal litigation, at least in large cities. For an excellent, nuanced discussion, see Lynch, *supra* note 122.

disapproves, the public can bring its disapproval to bear. The existing system makes it fairly easy for prosecutors to generate pleas even in hard cases. The public never sees these cases, so no one knows what its reaction would be were they brought to light.

Something similar may be true of prosecutorial conscience. It seems perfectly fair to assume that the large majority of prosecutors want to punish only those who deserve it. It also seems fair to assume that there will be more mistakes made in a system that allows prosecutors to make those decisions quickly and invisibly.

This is no small problem. Whether prosecutors sort well determines whether the system allocates punishment well, or even decently. Nationwide, twenty-eight percent of all felony arrestees are never convicted of anything, usually because prosecutors voluntarily dismissed charges (or failed to file charges in the first place).<sup>246</sup> Another twenty-three percent are convicted but not incarcerated,<sup>247</sup> again mostly because of favorable prosecutorial charging decisions. These numbers dwarf the tiny cohort of defendants who are charged, tried, and acquitted.<sup>248</sup> The prime mechanism by which undeserving defendants are cleared, or let off with only nominal punishment, is the prosecutor's screening process. Anything that dilutes prosecutors' incentive to screen well is likely to have seriously bad effects.

Notice the nature of the problem. One standard line about broad prosecutorial discretion is that it permits prosecutors to go off on larks, to prosecute people because the prosecutors don't like them, or for no understandable reason at all. For reasons explored earlier, that may be a significant problem in the federal system. But not for local prosecutors, who are constrained both politically and financially. For them, the problem is simpler: unless the trial system imposes costs on them for making mistakes, they will make too many. Broader liability rules are a way of evading the adjudication system, and therefore of making mistakes cheaper.

## 2. *Criminalizing Vice*

The other large effect of the way the system makes criminal law is substantive. Relative to other Western legal systems, America's criminal justice system has long had a strong focus on vice — prostitution and gambling a century ago, alcohol in the 1920s, and drugs more re-

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246. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1997, at 437 tbl.5.70 (Kathleen Maguire & Ann L. Pastore eds., 1998).

247. *See id.* at 437 tbl.5.70, 439 tbl.5.72.

248. The Justice Department's most recent annual report on outcomes for felony arrestees, nationwide, found that one percent were acquitted at trial. BARBARA BOLAND ET AL., U.S. DEP'T OF JUSTICE, THE PROSECUTION OF FELONY ARRESTS, 1988, at 3 (1992).

cently. That focus is usually attributed to America's moralism. It is also a consequence of the interacting incentives of law enforcers and legislators.

Most criminal litigation deals with crimes that nearly all non-offenders believe should be crimes. Prosecutors may make sorting errors in burglary cases, and criminalizing the possession of burglars' tools may make those sorting errors more likely. But there will be no dispute about whether burglars should be punished. The huge majority of the population thinks the relevant behavior wrong and, importantly, the huge majority of the population has no desire to engage in the relevant behavior themselves. For crimes like these, the lawmaking dynamic yields broader liability rules but does not change the nature of the behavior the system is seeking to punish.

With vice, the story is different.<sup>249</sup> Gambling, sex for hire, and intoxicants are all things that a large portion of the public wants, and these goods and services are sufficiently cheap, at least in some forms, that people of all social classes can afford them. At the same time, these things generate both intense disapproval among another large slice of the population, and substantial social costs that tend to concentrate in poor communities. The result is complicated: anti-vice crusades tend to have strong public support, but only so long as the crusades are targeted at a fairly small subset of the population. Our tradition of giving police and prosecutors basically unregulated enforcement discretion makes that targeting easy. Which in turn permits legislatures to define criminal liability in ways that might otherwise be politically impossible.

One sees hints of this dynamic with each of the major vice crimes that have occupied the criminal justice system over the past century. Begin with prostitution. Before the late nineteenth century, most jurisdictions had no prostitution statutes; the relevant crime was running a "disorderly house," a more circumscribed offense.<sup>250</sup> The period after about 1880 saw the growth of a powerful urban reform movement that led first to prostitution statutes, and then to broader solicitation and procurement statutes.<sup>251</sup> But when some urban police forces tried to enforce those laws generally — when they actually tried to shut down prostitution, across neighborhoods and classes — they generated a significant backlash, in Lawrence Friedman's words, from the "silent army" of middle-class customers who frequented the more upscale

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249. The argument in the rest of this section is developed in more detail in William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998).

250. See THOMAS C. MACKEY, *RED LIGHTS OUT: A LEGAL HISTORY OF PROSTITUTION, DISORDERLY HOUSES, AND VICE DISTRICTS, 1870-1917*, at 93-118 (1987).

251. See generally *id.*; MARK THOMAS CONNELLY, *THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA* (1980).

houses.<sup>252</sup> There were two typical results: non-enforcement coupled with graft, with the police using the prostitution laws as devices for extracting payoffs,<sup>253</sup> or enforcement targeted mostly at poor immigrant neighborhoods.<sup>254</sup>

The story with respect to gambling is similar. For a long time the market for illegal games tended to segment by class, with numbers businesses dominating the downscale market, and bookmaking and illegal casinos playing the same role in the upscale market.<sup>255</sup> Throughout this time, in most jurisdictions the criminal *law* of gambling was all-encompassing. Enforcement was not. In those times and places when police and prosecutors took gambling seriously, they almost always targeted numbers operations, which were in turn concentrated in poor urban neighborhoods.<sup>256</sup>

Prohibition was likewise legally all-encompassing, banning manufacture and sale of beer and wine as well as hard liquors. There, too, the illegal market tended to segment by class (there is some evidence that Prohibition made beer the working-class drink of choice, as liquor was priced out of reach for urban factory workers).<sup>257</sup> And there, too, enforcement was largely class-based: contemporaneous accounts report that blacks were the prime focus of alcohol enforcement and prosecution in the South;<sup>258</sup> in Northern cities, it was working-class white ethnics.<sup>259</sup>

Notice the pattern. For each of these three classic vice crimes, a majority of the population seems to have supported the ban, but a

252. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 331 (1993).

253. Sometimes the graft was straightforward. In turn-of-the-century Atlanta, several houses of prostitution were owned by "a prominent police commissioner." Eugene J. Watts, *The Police in Atlanta, 1890-1905*, in 5 *CRIME & JUSTICE IN AMERICAN HISTORY*, pt. 3, at 908, 917 (Eric H. Monkkenon ed., 1992). Sometimes it resembled taxation. In St. Paul, Minnesota, the leading house paid the city treasury thousands of dollars per year in exchange for lax enforcement. Best, *supra* note 103, at 73.

254. See, e.g., FRIEDMAN, *supra* note 252, at 226-28, 328-32; SIDNEY L. HARRING, *POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865-1915*, at 191-95 (1983).

255. For the different ways this pattern played out in the late nineteenth and late twentieth centuries, see DAVID R. JOHNSON, *POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE, 1800-1887*, at 158-69 (1979); FLOYD J. FOWLER, JR. ET AL., *GAMBLING LAW ENFORCEMENT IN MAJOR AMERICAN CITIES* 24-25 (1978).

256. See FOWLER ET AL, *supra* note 255, at 24-25 tbl.2.4.

257. See Stuntz, *supra* note 249, at 1805 & n.14, and sources cited therein.

258. See, e.g., MARTHA BENSLEY BRUERE, *DOES PROHIBITION WORK?* 112-13 (1927).

259. The comments of a social worker in one Ohio city are typical: "In the foreign districts there were raids and fines, but I never remember a single raid on an uptown cellar." *Id.* at 194 (internal quotation marks omitted); see also CLARK WARBURTON, *THE ECONOMIC RESULTS OF PROHIBITION* (1932) (concluding that Prohibition amounted to an attempt to "reduc[e] the consumption of beer by the wage-earning class").

sizeable minority, cutting across classes and ethnic groups, wished to participate in the illegal market. Given the size of that minority — and, consequently, the sheer number of illegal transactions — across-the-board enforcement of the ban was unsustainable. The solution was enforcement aimed primarily at lower-class markets: street prostitutes, numbers operations, and working-class beer distribution networks. That tended to be a relatively popular solution, at least for a time, for two reasons. First, the social harms associated with these transactions — violence, impoverishment, disease — tended to correlate not only with the illegal transactions but with class as well. Second, lower-class neighborhoods were often politically convenient targets. Hostility to blacks in the South and to working-class immigrants in Northern cities were strong themes of turn-of-the-century American politics.

Notice, too, how hard that solution would be to define legislatively. Had legislatures sought to capture the difference between downscale and upscale gambling, they probably would have banned some kinds of games but not others. But that strategy would have had limited effect, for the downscale market could simply have shifted from illegal games to legal ones. Had street solicitation but not prostitution been criminalized, prostitutes in poor neighborhoods could have retreated to fixed houses — as they did in most American cities through much of the nineteenth century.<sup>260</sup> Had beer but not liquor been banned, working-class consumption would have moved, perversely, toward products with a *higher* alcohol content. That kind of flexibility is probably in the nature of markets for pleasurable-but-sometimes-harmful goods and services. As a consequence, serious criminal enforcement of vice may depend on broad criminalization, coupled with equally broad law enforcement power to target particular neighborhoods and, inevitably, particular racial or ethnic groups. Without enforcement discretion, criminalization might be impossible.

Contemporary drug law and drug enforcement paint a complex picture, but one sees elements of the same pattern there as well. Not only are classically “hard” drugs like cocaine and heroin banned, but so are a wide variety of “softer” drugs like marijuana. Enforcement tends to be more aggressive than with past anti-vice crusades. Drug sentences are more severe than were sentences for gambling or illegal alcohol earlier this century, and the policing of upscale drug markets appears to be more persistent than policing of other upscale illegal markets over the course of the past hundred years. To that extent, the pattern breaks down; support for drug criminalization is probably both broader and deeper than support for earlier crusades against prostitutes, gamblers, or saloonkeepers. Yet class-based, and hence to some degree race-based, enforcement remains common. Thus, crack mar-

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260. See MACKEY, *supra* note 250, at 93-118.



kets in urban black neighborhoods are targeted, while more upscale, and whiter, drug markets receive less law enforcement attention.<sup>261</sup>

Once again, that type of enforcement strategy, and that type of criminal law, would be much harder in a regime with limited police and prosecutorial discretion. Perhaps one reason support for drug criminalization remains so high — and surely one reason why the scope of drug criminalization remains so broad — lies in legislatures' ability to prohibit without fear that the prohibition will be applied equally everywhere.

#### E. *Conclusion: Legislated Crimes and Common Law Crimes*

One of the bedrock principles of criminal law is that legislatures, not courts, should be the primary definers of crimes.<sup>262</sup> The usual reason given is that judicial crime creation carries too big a risk of non-majoritarian crimes, which in turn creates too much of a risk that ordinary people won't know what behavior can get them into trouble. The image is of legislatures that faithfully represent popular norms, and hence accurately define the universe of serious norm-breakers, while prudish old judges seek to impose their unrepresentative values on an unfortunate population. This image suggests not only that judges might, if allowed to do so, criminalize too much, but also that the "too much" might tend to be located in the spaces where popular norms are most likely to differ from the mores of old men in black robes: vice. It is no coincidence that in criminal law casebooks, the norm of legislative supremacy is taught with reference to two English cases involving consensual sex where judges stretched to impose criminal liability.<sup>263</sup>

It turns out that both the argument and the image are backward. It is *legislators* who are likely to criminalize conduct ordinary people might innocently engage in — not in order to punish that conduct, but in order to take symbolic stands or to make punishment of other conduct easier. Courts' lawmaking tendencies are more balanced, less tilted in favor of broader liability. The places in criminal law where the scope of liability has expanded are almost all the product of legisla-

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261. For an account of this phenomenon that emphasizes class rather than race, see Stuntz, *supra* note 249. For accounts that emphasize race, see DAVID COLE, NO EQUAL JUSTICE 141-46 (1999); MICHAEL TONRY, MALIGN NEGLECT — RACE, CRIME, AND PUNISHMENT IN AMERICA 58-66 (1995). For an excellent discussion of the data on drug use and drug distribution, showing that law enforcement is even more racially tilted than is commonly thought, see Rudovsky, *supra* note 11, at 308-13.

262. For the best defense of this norm, see Bilionis, *supra* note 96.

263. The cases are *Kneller v. Director of Public Prosecutions*, [1973] A.C. 435, and *Shaw v. Director of Public Prosecutions*, [1962] A.C. 220. For casebook discussions, see RICHARD J. BONNIE ET AL., CRIMINAL LAW 34-35 (1997), and SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 294-306 (6th ed. 1995).

tion. The few places where liability has contracted find their source in judicial opinions.

And it is legislators who have given American criminal law its strong and sustained focus on vice. The Mann Act and other anti-prostitution laws of the late nineteenth and early twentieth centuries, Prohibition, and the plethora of drug bans — each of which, in turn, has occupied a substantial fraction of the criminal justice system's time and energy — all came from legislatures, not courts. Meanwhile, the real-world risk of inappropriate criminal liability for consensual sex comes from legislatures' tendency, once crimes are on the books, to leave them there.

All this is true because of enforcement discretion. Police and prosecutors can choose whom to target from among the universe of potential offenders. That reduces the cost to legislatures of expanding criminal law's scope. It also raises the threshold level of both law-breaking and political opposition needed to defeat the criminalization of a given kind of behavior.

There is no reason to believe anyone planned it this way. Legislative crime definition and prosecutorial discretion entered the system roughly contemporaneously (both over the course of the nineteenth century).<sup>264</sup> No one thought about the latter in connection with the former. Criminal codes were perceived as a means of rationalizing the law, a way to provide greater clarity than was possible from a cacophony of judicial voices.<sup>265</sup> So far as one can tell from the relevant historical literature, criminal codification was meant neither to expand nor to contract criminal liability. Codifiers were concerned with criminal law's indefiniteness, not with its narrowness or breadth.<sup>266</sup>

But criminal law's codifiers did not see how their work would change character when combined with the parallel growth in prosecutors' power. The move from common law to criminal statutes appeared to (and did) shift power from judges to legislators. But its larger and more lasting effect was to shift power from judges to prosecutors. The anti-vice statutes of the late nineteenth and early twentieth

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264. The best history of the rise of prosecutorial discretion is also the best history of the rise of plea bargaining. See George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000). The best account of the rise of criminal codes in nineteenth-century America (and in the British Empire) remains Sanford Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098 (1978).

265. See generally Kadish, *supra* note 264 at 1099-106 (discussing the Livingston Code in Louisiana); *id.* at 1130-38 (discussing the Field Code and its adoption in much of the western United States).

266. Certainly the statement in the text is true of Bentham, the codifiers' patron saint. See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 13-14 n.1 (Hafner Publishing Co., 1948) (complaining that common law decisions are based on no discernible principle); 3 JEREMY BENTHAM, THE COLLECTED WORKS OF JEREMY BENTHAM 206 (John Bowring, ed., 1843) ("[T]he grand utility of the law is certainty: unwritten law does not — it cannot — possess this quality.").

centuries made police and prosecutors not just enforcers of criminal statutes, but makers of vice policy, with the ability to target some vices, and some groups, more than others. The cumulation of criminal prohibitions that we have seen over the past half-century has made it ever easier for prosecutors to generate guilty pleas in street crime cases, making prosecutors the system's prime adjudicators in such cases. When it comes to vice — today, drugs — prosecutors are the system's real lawmakers. When it comes to a range of ordinary street crimes, prosecutors often function as judge and jury; they are the system's real adjudicators. That is how enforcement discretion changed criminal law: legislators took control, but could not keep it; the legislative (and judicial) power have increasingly passed into the hands of law enforcers.

All this sounds like the antithesis of the rule of law. Yet, oddly, these developments coincided with the triumph of rule of law norms, at least at a formal level. Still more oddly, that triumph has only aggravated the system's tendency to dissolve into lawlessness. In the criminal justice system, the rule of law produces three key norms: crimes must be defined legislatively, prospectively, and specifically.<sup>267</sup> For reasons explained earlier, the first norm is backward. Legislative crime definition has a natural tendency to become, in practice, prosecutorial crime definition, as legislatures define broad nominal liability rules, leaving prosecutors to determine what behavior actually leads to conviction and punishment. The second norm is just a way of restating the first. In our system, courts are (mostly) retroactive lawmakers; legislatures act prospectively. A strong ban on *ex post facto* criminalization just forces criminal lawmaking back to the legislature, which in turn delegates it to prosecutors.<sup>268</sup>

And the third norm — specificity — is perverse. To see why, return to the fraud example discussed in Part II. The legislature presumably

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267. For the best (by far) discussion of the meaning of the "rule of law" for criminal law, see Jeffries, *supra* note 89. Jeffries identifies the same three rules or norms, but he discusses prospectivity under the guise of the rule of lenity. That rule is one of the primary means by which the system guards against retroactive lawmaking, since it disables courts from expanding criminal liability rules by requiring that interpretive doubts be resolved in defendants' favor. See *supra* notes 210-227 and accompanying text.

268. Thus, *Rogers v. Tennessee*, 121 S. Ct. 1693 (2001), which tends to undermine the ban on retroactive lawmaking, actually makes criminal law *more* lawlike, not less. In *Rogers*, the victim of the defendant's assault died fifteen months after that assault. Under the traditional "year and a day" rule, which applied in Tennessee prior to *Rogers*, these facts would not permit a murder conviction. The Tennessee Supreme Court overturned the year-and-a-day rule and applied its decision to *Rogers*. The United States Supreme Court held that the Tennessee court's actions did not violate due process.

*Rogers* expands, slightly, courts' ability to make pro-government decisions in cases involving the construction of criminal statutes. That in turn reduces, again slightly, legislatures' incentive to define offenses as broadly as possible. And *that* raises the likelihood that the formal definition of crimes will bear a reasonable relationship to the prosecutors' charging decisions.

intends to ban seriously wrongful or seriously harmful dishonesty, no more and no less. But it cannot define "seriously wrongful" (nor "dishonesty," for that matter). A ban on vague crimes thus forces the legislature to criminalize either more or less than it wishes to punish. The predictable choice is more. This choice does not do away with the vague criminal liability rule. Prosecutors, one can safely expect, will tend to seek out (mostly) cases of serious wrong and serious harm. Law enforcers will draw the line that vagueness doctrine forbids legislators to draw. But courts will not. *That* is the real effect of a ban on vague crimes: instead of two decisionmakers deciding whether the defendant's conduct was bad enough to justify criminal punishment — a prosecutor and a judge — we have one, the prosecutor, who chooses whether to prosecute (and thereby generate a guilty plea) or not.

In the guise of protecting the rule of law, we have generated its opposite. Criminal law is nominally legislative, prospective, and specific. In practice, it is none of those things. Oddly, part of the reason why is that courts have required those things, and in the process disabled themselves from participating in the definition of crimes.

### III. SOLUTIONS

American criminal law is the product of a tacit partnership. Legislators and law enforcers have common interests. Pursuit of those common interests leads naturally to the strange regime we now have, a regime that suffers from both too much law and too much discretion — indeed, a system in which too much law *produces* too much discretion. If there is a way out of this box, it must begin by breaking up the partnership.

There are two possible ways to do that. The first is to end prosecutors' monopoly on enforcement: to abolish, or at least severely limit, prosecutorial discretion. The second is to end legislators' monopoly on crime definition. This second option in turn might take either of two forms. Criminal law could be depoliticized, with lawmaking assigned to institutions that are substantially less accountable to the electorate (and hence substantially less inclined to overcriminalize, at least in theory) than legislators. Or criminal law could be constitutionalized, with much more lawmaking power assigned to courts. For reasons explored below — in brief outline — the only one of these solutions that has any chance of working is the last.

#### A. *Abolishing Discretion*

The most obvious way to separate law enforcers from lawmakers is to regulate the former. Enforcement discretion permits overcriminalization, which in turn encourages more discretion. The result is an unwritten criminal "law" that consists only of enforcers' discretionary

decisions. Why not simply do away with the unwritten law and make police and prosecutors enforce the written one? That would go far toward eliminating not just discretion but discriminatory law enforcement as well. And it would, at a stroke, compel legislators to define crimes well: to criminalize only that which the citizenry is prepared to punish consistently.

But discretion is not so easily abolished, or even cabined. First, police and prosecutors are necessarily in the business of rough pre-adjudication screening, of separating the probably guilty from the probably innocent. That screening is bound to be unreviewable, or close to it. Unreviewable screening for probable guilt creates the opportunity for unreviewable screening on other grounds — perhaps because this law should be enforced more vigorously than that one. Second, some crimes — think of drugs — require law enforcers to look for the crime rather than wait for reports and investigate them. One cannot look everywhere, and the decision to look in some places but not others is, in effect, discretionary enforcement. Thus, any system that takes drug crime seriously must tolerate a lot of discretion.

Take these points one at a time. Police can arrest, and prosecutors can prosecute, only if they have probable cause to believe the arrestee or defendant has committed a crime.<sup>269</sup> One could imagine a different standard, but some such limit is essential. Even in a world where all crimes are to be enforced across the board, across-the-board enforcement cannot mean that everyone is arrested. Someone must identify the system's targets, and the identification must involve a kind of initial adjudication, a determination that the person targeted has likely committed the crime for which he is being arrested or charged.

In the nature of things, that initial "adjudication" must receive little or no review; the frontline decisionmaker must have the final say, at least in most cases. Anything else would cause the system to grind to a halt. (Consider: there are more than fifteen million arrests per year in the United States.<sup>270</sup> Imagine what careful review of each of those arrests would cost.) But if police officers and prosecutors can decide that a case is not strong enough to prosecute, and if no one can second-guess that decision, what is to stop them from deciding that, though legally strong enough, the case does not *deserve* prosecution? Discretion to screen cases out on the merits (i.e., because the evidence does not justify going forward) must be present in any system. And that discretion can all too easily morph into the kind of discretion the system tolerates now: decisions to let some cases slide because police

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269. The Supreme Court recently reaffirmed that this limit does not distinguish among crimes. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

270. See 1997 SOURCEBOOK, *supra* note 246, at 324 tbl.4.1 (showing a total of 15.2 million arrests for 1996).

officers and prosecutors believe some laws deserve less enforcement than others. Which in turn means law enforcers become lawmakers.

Even if the cost were not prohibitive, judicial review of charging decisions is probably unworkable,<sup>271</sup> because police and prosecutors could so easily evade it. At any given time, the great majority of the population is *not* being arrested or prosecuted. These non-arrests and non-prosecutions are overwhelmingly the result of non-decisions — it does not occur to anyone to arrest or prosecute most people. Non-decisions are unreviewable, because there is nothing to report to the reviewing authority; there is no event to trigger judicial scrutiny. Which gets to the key reason why decisions not to seek criminal punishment — even when they *are* genuine decisions — are inevitably made in conditions of low visibility, with little or no input from higher-ups. The higher-ups can intervene only when they know of a decision; they can only review when there is something to review. With choices not to arrest or prosecute, that can happen only if the frontline official volunteers that he has decided not to act. People rarely volunteer actions (much less omissions) that may lead to legal sanctions. Thus, no matter what rules we establish, it seems likely that most decisions not to go forward will be made quietly, without any attention from the formal legal system. So much for judicial review.<sup>272</sup>

This is not to say that the kind of prosecutorial discretion we have now is inevitable. Rather, the point is that reining in discretion requires tools that the legal system does not have. The most important factor in determining how law enforcers exercise their discretion is neither the law nor the existence of formal review mechanisms. The legal culture and police culture matter much more. A culture in which prosecutors are taught that it is unprofessional to decline to charge based on anything other than lack of evidence will lead to different charging patterns than one in which prosecutors are taught that they are czars of their dockets, dispensing justice as they see fit. American prosecutors, by and large, see themselves as czars.

Changing that self-perception is much harder than changing a few rules. Which leads to the second problem with reining in discretion: victimless crime. Any society that seeks to stamp out drugs, or gam-

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271. Needless to say, such review does not exist now. For the leading case, and still the best judicial discussion of the issue, see *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973).

272. To be sure, judicial review would matter in cases that have some public visibility, cases where action and inaction alike will attract public attention. *Inmates of Attica*, cited in the preceding note, was such a case. When prison guards murder inmates, or for that matter when prison inmates murder guards, prosecutors cannot quietly dispose of the case. The larger public will know. The same is true in cases in which crime victims have access either to the media or to the kind of legal assistance needed to bring lawsuits to force prosecution — like the suit in *Inmates of Attica*. My point is only that all the above-described cases taken together constitute a tiny fraction of potential criminal cases. Judicial review in those cases would therefore be little more than window dressing.

bling, or alcohol, or any other sort of behavior that involves consensual transactions, requires law enforcement that is proactive. The illegal transactions do not report themselves, so the police must go looking for them. Where they look determines what kinds of arrests they make, which in turn determines what kinds of cases prosecutors charge. Even if prosecutors had to charge everyone whom the police arrest, drug-type crime would involve an enormous amount of enforcement discretion by the police. That discretion cannot be dispensed with; it is a necessary consequence of the nature of the crime.

A natural response is to want someone other than the police to make those discretionary judgments. Enter prosecutors.<sup>273</sup> But as soon as prosecutors begin second-guessing the police decisions (by going forward with some cases but not others), prosecutors become policy-makers, deciding which drug laws should be enforced where. That kind of power is hard to cabin. So our society's desire to criminally punish the sale and possession of narcotics leads naturally to a kind of czarism among prosecutors, to the practice of substituting their own discretionary enforcement decisions for the decisions legislatures enshrine in criminal codes. Once prosecutors take that view of their job with respect to drug crime, it is hard to prevent them from taking a similar view of their job across the rest of their dockets.

It is not clear that we could seriously limit enforcement discretion even if we decriminalized the sale and use of drugs. It is clear that *unless* we do so, we are stuck with enforcement discretion. And we are not about to decriminalize drugs.

### B. *Abolishing Legislative Supremacy*

The better way to curb prosecutors' power is indirect — to do so by curbing legislators' power. As is always true, power taken from one place must flow someplace else. With the power of crime definition, there are two basic possibilities. One is to shift crime definition from elected legislators to unelected experts or bureaucrats. The second is to shift crime definition from legislators to courts.

#### 1. *Depoliticizing Criminal Law*

The first possibility is one we have already tried, both with the Model Penal Code ("MPC") and the Federal Sentencing Guidelines. The first of those experiments, or rather its conclusion, shows why de-

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273. Not that prosecutors are the only possible mechanism for reining in police discretion. On the contrary, doing a good job of policing the police may mean relying more on institutions other than prosecutors and courts. For two excellent discussions that emphasize a combination of political controls and administrative review of police misconduct, see Livingston, *supra* note 138, at 650-67; Luna, *Principled Enforcement*, *supra* note 4, at 590-623.

politicization is not a stable equilibrium. Politicians may delegate criminalization to experts for awhile, but the delegation will not last. The Guidelines, meanwhile, show why depoliticization may tend to produce bad outcomes.

Before looking at why these experiments failed, consider why they were undertaken in the first place. The history of American criminal law is a history of haphazard addition, with new offenses joined piecemeal to existing criminal codes. That is natural: for all the reasons explored in Part II, one should expect criminal lawmaking to have a bias toward too much liability, and one should *not* expect criminal legislation to follow any coherent theory. Hence the appeal of the Model Penal Code project to a generation of law reformers. Herbert Wechsler and company offered the promise of leaner, more coherent criminal codes — of a body of law that combined the specificity of legislation and the rationality of the common law.<sup>274</sup>

It is easy to understand why law professors and other reformers embraced that enterprise. Why did legislators? Nearly half of America's criminal codes were remodeled along the lines of the MPC.<sup>275</sup> This seems more than a bit strange. Why would elected politicians defer to Wechsler's expertise?

There is no good answer in the existing literature, and I can offer only two partial responses. First, the premise of the question is wrong. No state adopted the Model Penal Code wholesale. Many of the states that copied it did so very partially, modifying some of its central elements.<sup>276</sup> And, crucially, adoption of the MPC in no way restricted legislators' ability to add crimes later. They have continued to do so.<sup>277</sup>

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274. Putting the same thought in slightly different terms, Herbert Packer extolled the Model Penal Code's "principled pragmatism," a description Wechsler enthusiastically embraced. Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 594 (1963); Herbert Wechsler, *Foreword: Symposium on the Model Penal Code*, 63 COLUM. L. REV. 589, 590 (1963).

275. The Foreword to the Model Penal Code lists thirty-four states that revised their criminal codes between 1962 and 1983, MODEL PENAL CODE AND COMMENTARIES, at xi (Official Draft and Revised Comments 1985), a number that substantially overstates the MPC's influence. A better gauge is this: as of a few years ago, twenty-two states had adopted the MPC's basic culpability structure, and twenty states had adopted the MPC's rule with respect to mistakes of fact. Danny Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 236, 247 (1997).

276. Consider one telling example. By most accounts, the single most important rule in the MPC is the establishment of recklessness — a culpability level that involves subjective fault — as the default mens rea, the intent standard that applies when the relevant criminal statute is silent as to intent. Of the twenty-two states that adopt the MPC's culpability structure, see Holley, *supra* note 275, at 236, only eleven adopt this recklessness default rule. *Id.* at 243 & n.40. Six of the twenty-two states make *negligence* their default mens rea term. See *id.* at 243-44 & n.41.

277. See, e.g., *Model Penal Code Conference Banquet Remarks and Responses*, 19 RUTGERS L.J. 855, 864 (1988) (remarks of Herbert Wechsler) (complaining that the New York criminal code, "which in 1965 I think was a really quite distinguished integrated code,



At most, the MPC offered a convenient focal point for reform efforts, a means of temporarily paring down criminal codes. But it did nothing to ensure that the paring down would last, that the underbrush, once cleared away, would not grow back. In short, legislators did not cede control over criminal law to the experts at the American Law Institute. It would be more accurate to say that they (or some of them) adopted the ALI's terminology and a few of its substantive definitions and then returned to the same legislative patterns they had followed before.

Second, even that limited cession of power occurred at, or soon after, an historically unique moment. Crime rates dropped steadily and substantially from the late 1930s to the mid-1950s.<sup>278</sup> By the end of that period, crime was probably less of a political issue — a smaller source of political returns for elected legislators — than at any time in the past century and a half. A little deference to experts must not have seemed terribly costly; in 1960, criminal law's political returns were probably no greater than the returns from tinkering with the commercial code, another area where expert-driven reform swept state legislatures. To be sure, the MPC's legislative victories came not in the 1950s, when crime was at its low point, but in the late 1960s and early 1970s.<sup>279</sup> Yet there is often a lag time between important social developments and politicians' adaptation to those developments. Consider the crime drop of the 1990s, and the way politicians continued, until quite recently, to talk and act as though crime were still rising. Moreover, the crime rise of the 1960s was steep and unexpected; politicians may have assumed that they were seeing a temporary spike, not a permanent increase — much like what America saw several times in the nineteenth century, when murder rates both rose and declined suddenly.<sup>280</sup> If so, it probably took some time for that belief to disappear. Finally, the civil rights movement of the 1960s may have prevented some politicians from embracing tough-on-crime politics for

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has been slopped up. That's going to happen in every state in the union."'). Wechsler went on to discuss the need for "protective organizations in the legislature" to prevent creeping overcriminalization. *See id.* at 864-65. But it is not obvious what such organizations would look like, or how they can defeat the political incentives to add crimes.

278. Changes in homicide rates are generally taken as a reasonable surrogate for changes in overall crime rates. For a good, brief discussion of homicide rates over the course of American history, along with a showing that homicides fell sharply between the 1930s and the 1950s, see Eric Monkkonen, *Homicide Over the Centuries*, in *THE CRIME CONUNDRUM* 163, 166-69 (Lawrence M. Friedman & George Fisher eds., 1997).

279. Of the state code revisions mentioned in the MPC's Foreword, twenty-four occurred between 1962 and 1976. *MODEL PENAL CODE AND COMMENTARIES*, at xi (Official Draft and Revised Comments 1985). Of the twenty-two states Holley, *supra* note 275, identifies as having enacted the MPC's basic culpability structure, seventeen revised their codes in the same period. *See id.* at 236 n.21 for the list of states.

280. *See* Monkkonen, *supra* note 278, at 166 fig. 1 (showing a number of sharp spikes in homicides in New York City between 1800 and 1875).

awhile, lest they find themselves in league with segregationists. For all these reasons, a decade-long time lag is not terribly surprising in this context. In any event, by 1980 the time lag was over, and the MPC's victories had basically ceased.<sup>281</sup>

That last phrase will still hold true decades from now. Certainly there is no sign in legislative halls of a renewed interest in criminal code revision. Nor should that surprise anyone: though the nation's crime rate has fallen substantially in the last decade, it remains more than two and a half times as high as the crime rate of the early 1960s.<sup>282</sup> Crime would thus have to fall a great deal farther to reach the levels that led legislators to permit MPC-style experimentation. And in order for that legislative flexibility to reappear, crime would not only need to fall; it would need to stay low for a considerable period of time. The post-1960 crime waves have taught two generations of politicians that criminal legislation is politically valuable. Before another MPC-like project can take off, those same politicians or their successors will have to unlearn the lesson. That would take some time: at least a generation, and perhaps more. Only the most optimistic forecasters would predict crime rates that are both low and stable for that long.<sup>283</sup>

That much explains why expert-driven criminal law is a practical impossibility. The Federal Sentencing Guidelines show why expert-driven criminal law is also unattractive. Like the Model Penal Code, the Guidelines emerged out of chaos; they offered coherence where the existing system seemed arbitrary. Prior to the rise of guidelines systems, sentencing was little more than the exercise of case-specific, consider-all-the-circumstances judgment by trial judges. Law had al-

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281. By 1980, thirty-three of the thirty-four code revisions noted in the MPC's Foreword had occurred. MODEL PENAL CODE AND COMMENTARIES, at xi (Official Draft and Revised Comments 1985). By 1997, only two more state code revisions had taken place. Holley, *supra* note 275, at 229-30 n.2.

282. According to FBI figures, the number of index crimes per 100,000 population in 1960 was 1,126. FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1972: UNIFORM CRIME REPORTS 61 tbl.2 (1973). In the 1970s, the method used for calculating the number of index crimes was changed, FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1973: UNIFORM CRIME REPORTS 1 (1974); if one adjusts the 1960 figure accordingly, the rate rises to 1,614. In 1999, after a decade in which index crimes had fallen by more than a quarter, the figure was 4,267. FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1999: UNIFORM CRIME REPORTS 64 tbl.1 (2000).

283. Current reports indicate that the crime drop of the 1990s has ended. See Fox Butterfield, *U.S. Crime Figures Were Stable in '00 After 8-Year Drop*, N.Y. TIMES, May 31, 2001, at A1 (reporting on preliminary FBI index crime numbers for 2000). The open question now, according to Alfred Blumstein, perhaps the leading criminologist in America, is: "Is this just a flattening out of crime, or is it turning upward?" *Id.* (quoting Blumstein). For a pessimistic answer to that question, see John J. Donohue, *Understanding the Time Path of Crime*, 88 J. CRIM. L. & CRIMINOLOGY 1423 (1998).

most nothing to do with it.<sup>284</sup> Which produced all the complaints that lawless systems naturally generate. The Guidelines seemed an attractive way to fix things. And though the Guidelines were not crafted by an organization like the ALI, they *were* written by experts — a mix of judges and academics, the latter including a mix of social science and legal backgrounds.<sup>285</sup>

The results were not satisfying. This is not the place to explore the few pros and many cons of the Guidelines; a large body of literature is devoted to the subject. For now, it is enough to note that this literature is nearly unanimous on one point: the Guidelines have produced bad outcomes.<sup>286</sup> The bad outcomes take two forms. First, the Guidelines are arbitrary; morally similar cases yield very different sentences.<sup>287</sup> Second, the Guidelines are too harsh: they have contributed to a ratcheting up of sentencing levels that has gone much too far.<sup>288</sup> These propositions are, of course, contestable; they depend on what cases one sees as morally similar, or on what sentencing levels seem fair. But it is surely significant that these twin criticisms — arbitrariness and severity — are made by almost everyone familiar with the subject, with very little dissent and by people of quite different ideological stripes.

Likewise, it seems significant that these two problems are the natural consequence of an expert-driven sentencing code. Expert lawmakers are, almost by definition, separated both from electoral politics and from the world of live cases. The absence of political checks means there is no assurance that the lawmakers will share the norms of the populace. This is a built-in problem with technocracy: it may be expert, but it is not likely to be democratic. To the extent that criminal law deals with contestable, and contested, moral questions, one might imagine trading a good deal of expertise for a little democracy. The

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284. The most influential critique of pre-guidelines sentencing proceeded along precisely these lines. See Marvin Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

285. The initial seven Commissioners were three Court of Appeals judges (the chair, Judge William Wilkins, was a District Judge when the Commission was established, but was soon appointed to the Fourth Circuit), a member of the U.S. Parole Commission, and three professors. The professors included an economist and a sociologist. This information is taken from the Sentencing Commission's website, <http://www.ussc.gov/oldcomms.htm> (last visited Nov. 8, 2001).

It bears noting that only one of the three judges, Judge Wilkins, had served as a trial judge. In other words, only one member of the original Sentencing Commission had ever sentenced anyone; another of the judges — then-Judge, now-Justice Stephen Breyer — was a career academic before going on the bench. In short, the initial Sentencing Commission was heavy on academic expertise, and light on relevant experience.

286. Again, the relevant literature is too large to cite. For the most thorough treatment, see STITH & CABRANES, *supra* note 13.

287. For the best version of this argument, see Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

288. See, e.g., STITH & CABRANES, *supra* note 13, at 59-66; Michael Tonry, *The Failure of the U.S. Sentencing Commission's Guidelines*, 39 CRIME & DELINQUENCY 131 (1993).

absence of familiarity with live cases — though the Commission has more recently included a healthy number of trial judges,<sup>289</sup> the initial Commission consisted mostly of academics<sup>290</sup> — means lawmakers may not understand the practical effect of the rules they make. A given sentencing rule, or a given rule for crime definition, may have a good deal of logical force; its appeal in the abstract may be quite strong. The same rule, in the context of a particular defendant's conduct and history, may look very different. It hardly seems surprising that sentencing rules devised in the abstract lead to "tougher" sentencing practices. The abstraction means those devising the rules need not look hard at the individuals they are sending to prison.

These may be surmountable problems. Abstraction has virtues as well as vices, and it is always possible to leaven an expert commission with a few trial judges, to give it the benefit of some case-by-case decisionmaking experience. And electoral accountability is, after all, a mixed bag: after all, both legislators and prosecutors — the two groups that have made American criminal law what it is today — are elected. Finally, sentencing may be different from crime definition. Expertise and political detachment may be more useful in the latter enterprise than in the former.

Yet even if the built-in problems with technocracy can be overcome, the political obstacles seem insurmountable. Depoliticizing criminal law depends on legislative self-restraint. It can work only if legislatures voluntarily cede the authority they now have, and the cession has to be long-lasting. That will happen only if the relevant authority offers legislators no political benefit. Which will be true only if crime rates are, and remain, very low — vastly lower than they are now. The past forty years offer little hope that these conditions will ever be satisfied.

## 2. *Constitutionalizing Criminal Law*

The last, and probably best, solution is to increase judicial power over criminal law. The most obvious way to do that would be to recreate the system of criminal lawmaking that existed when courts, not legislatures, defined crimes. Though it is intellectual heresy to say so, that might be an improvement over the current regime. The common law of crimes was much more sensible than its Benthamite critics thought, and probably more sensible than any current American

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289. For example, as of November 1999, four of the seven Commissioners were federal district judges, and a fifth had served for fourteen years as a district judge. This information is taken from the Sentencing Commission's website, <http://www.ussc.gov/commbios99.htm> (last visited Nov. 8, 2001).

290. If one counts then-Judge Breyer, four of the seven initial Commissioners were career academics; three were appellate judges (Breyer fits in both categories), and one was a member of the federal Parole Commission. *See supra* note 285.

criminal code.<sup>291</sup> But the common law of crimes cannot be recreated. More to the point, it cannot be recreated *as common law*. Criminal legislation — lots of it — exists. For judges to displace that legislation, they must have some constitutional warrant. Any increase in judicial power over criminal law means an increase in constitutional power over criminal law.

Which leads to a variant of the common-law-of-crimes solution. Perhaps courts could create the judicial equivalent of new criminal codes, and insulate them from legislative override by pegging them to due process. This possibility seems absurd, but it does no more than replicate what the judiciary has done with criminal procedure, where federal constitutional law occupied whole fields that had previously been left to the states. Still, absurd or not, wholesale constitutionalization is impossible to imagine. What American appellate court would be willing to abolish its jurisdiction's criminal code?<sup>292</sup> And, even for one who embraces the virtues of common law crimes, it is probably inadvisable: some crime definition requires specialized information that courts cannot easily get.

But aggressive constitutional regulation of criminal law need not be so radical, or so bizarre. Courts could exert substantial control over criminal law's boundaries without overturning whole criminal codes or reestablishing a common law of crimes. Consider three hypothetical constitutional rules that, taken together, might go far toward reining in excessive criminal liability (and toward removing the incentive for legislatures to overcriminalize).

*a. Notice.* The first rule is one we already have, at least nominally: no one may be convicted of a crime without fair notice. The core idea is simple. A necessary condition of any free society is the ability to avoid going to prison; one has that ability only if one can know what behavior will lead to prosecution and punishment.<sup>293</sup> More than forty years ago, the Supreme Court (apparently) read this notice principle into the due process clause in *Lambert v. California*.<sup>294</sup> There, the Court overturned a conviction under a Los Angeles ordinance that re-

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291. Not in all its details, of course. The common law definition of rape was famously, or infamously, narrow. For the classic critique, see SUSAN ESTRICH, *REAL RAPE* 27-56 (1987).

292. This highlights an underrated feature of the constitutional revolution in criminal procedure. The vast bodies of constitutional law that attach to the Fourth, Fifth, and Sixth Amendments did not, for the most part, displace developed bodies of state law. In most areas, there was little state law to displace. Rather, constitutional law entered fields where, again for the most part, no law applied, where local police and prosecutors had previously done as they pleased, or where local custom governed. Perhaps that is why the criminal procedure revolution succeeded. It would be a very different enterprise to constitutionalize criminal law, where huge and elaborate bodies of nonconstitutional law already exist.

293. For much the best discussion of the notice principle in the literature, see Jeffries, *supra* note 89, at 205-12.

294. 355 U.S. 225 (1957).

quired felons residing in the area to register with the police.<sup>295</sup> As the Court noted, it was impossible for persons covered by the ordinance to comply with it unless they knew about it, and there was no reason to assume that such knowledge was widespread — at the least, there was no reason to assume that Lambert had it.<sup>296</sup>

Interestingly, *Lambert's* notice principle has never taken off. Few decisions rest on it, and the principle itself remains an unenforced norm, not a genuine constitutional rule. The likely reason is the seeming impossibility of enforcing the norm. At first blush, *Lambert* seems to require knowledge of the relevant criminal statute as a precondition to punishing any criminal defendant.<sup>297</sup> Such a blanket knowledge-of-the-law requirement would disable any criminal justice system. Like the rest of us, criminals do not read criminal codes,<sup>298</sup> so there must be many cases in which a criminal defendant could truthfully testify that he knew nothing about the particular statute under which he was charged. Yet that ignorance would hardly be exculpatory — most of the defendants who could so testify knew perfectly well that they were engaging in conduct that might get them in trouble with the law.<sup>299</sup> Which points up the central practical problem with imple-

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295. *Id.* at 226-30.

296. *See id.* at 226, 228-30. As those familiar with the case will recognize, the description in the text is misleadingly clear — at best, Justice Douglas's majority opinion in *Lambert* was translucent; at worst, it was opaque. For a good, rich discussion (albeit one that underemphasizes the notice argument), see Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 856-67 (1999).

297. The Court expressly requires "the probability of such knowledge" in *Lambert* itself. 355 U.S. at 229-30. Absent that requirement, the Court reasoned, punishment "would be too severe for [the] community to bear." *Id.* at 229 (internal quotation omitted). This unbearable severity, in turn, stemmed from "the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it." *Id.* The same logic would — again, at first blush — seem to apply to any criminal case, and any criminal statute.

298. Paul Robinson insists that, if the codes were better structured and drafted, they would be read, or — what amounts to the same thing — their contents would become widely known. *See* ROBINSON, *supra* note 3, at 185-95. Robinson acknowledges that, on this point, he is a voice in the wilderness; the conventional view is the one expressed in the text. *See* Robinson, *Structuring Criminal Codes*, *supra* note 1, at 7 ("Frankly, I think we have given up on expecting a criminal code to educate the public.").

299. For a classic example of this problem, see *Liparota v. United States*, 471 U.S. 419 (1985). The defendant in *Liparota* was charged with food stamp fraud. He argued, successfully, that the crime was of the sort that might be committed innocently unless the government were required to prove knowledge of the law as an element of the offense. *See id.* at 426 ("[T]o interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct."). On its own terms, the defense argument in *Liparota* was powerful: the statute criminalized any knowing violations of Department of Agriculture regulations, *id.* at 420, and it was more than plausible that any given defendant might be unaware of any given regulation.

Regardless of the state of his knowledge of the law, however, *Liparota* had notice. The owner of a sandwich shop in Chicago, he bought food stamps from an undercover agent for seventy percent of their face value. *Id.* at 421. Since the food stamps were, when used legally, the equivalent of cash, the mark-down only makes sense as compensation for the risk of

menting *Lambert*: the kind of notice that matters is functional, not formal; the question is not whether the defendant knew he was violating this particular statute, but rather whether the defendant knew that his behavior was, in some more general sense, out of line.<sup>300</sup>

Yet the law *can* protect this more functional kind of notice. In fact, it already does so, patchily. The defendant in *Bryan v. United States* was charged with selling firearms without a license and registration; he claimed he was, like *Lambert*, unaware of the registration requirement he had violated.<sup>301</sup> The Supreme Court rejected *Bryan's* claim, but in a way that protected the notice principle. The Court noted that *Bryan's* conduct demonstrated that he knew he was engaging in legally questionable behavior. *Bryan* used "straw purchasers" to buy guns that he could not have legally bought himself, and he promised these middlemen that he would shave off the guns' serial numbers.<sup>302</sup> As long as the government proved that kind of knowledge of generalized illegality, the Court held, it need not prove knowledge of any particular crime in order to convict.<sup>303</sup>

*Bryan* amounts to a requirement that the government prove functional notice where notice is not inherent in the crime charged. This is no more, and no less, than a faithful application of *Lambert*. With one critical qualification: *Bryan* is framed as an interpretation of the federal gun laws. It has no legal force in any state criminal prosecution. And if Congress wishes to overrule it — as Congress has done in the past when the Court has read knowledge-of-the-law requirements into federal crimes<sup>304</sup> — the Court must bow to the congressional will.

Suppose that qualification were abandoned. The Court could easily enough hold that *Bryan* was required not by statutory language, but by the due process clause. If it did so, the Court would go a substantial distance toward reining in the government's ability to prosecute people for trivial wrongs. Brogan, the defendant charged under the federal false statements statute for a simple exculpatory "no,"<sup>305</sup> would have a strong claim. Who hasn't denied some piece of embar-

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government intervention of some sort. Liparota may not have known which regulations he was violating, but he clearly knew he was doing something that might get him in trouble.

300. Hence the attraction of Lord Bramwell's definition of mens rea as the intention to do an immoral (not illegal) act. See *Regina v. Prince*, 2 L.R. - Cr. Cas. Res. 154 (1875). For the classic discussion of Bramwell's position and the classic explanation of its appeal, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 652-58 (1984).

301. 524 U.S. 184, 189-90 (1998).

302. *Id.* at 189.

303. *Id.* at 191-99. The preceding discussion of *Bryan* draws on Wiley, *supra* note 191, at 1133-36.

304. See *supra* notes 192, 217-219 and accompanying text (discussing the decision in, and overruling of, *Ratzlaf v. United States*, 510 U.S. 135 (1994)).

305. See *supra* notes 168-172 and accompanying text.

raising behavior, and who assumes that such denials, out of court and without any oaths or signatures, carry criminal penalties? So might a good many other white-collar defendants whom the government suspects of serious wrongdoing but who are charged with technical violations like Brogan's. Without the ability to threaten prosecution for trivial and unexpected crimes, the government would have to charge, and prove, the more serious crimes that prompted its investigations in such cases.

That would have two large benefits. First, it would mean that defendants like Brogan would have access to the regular, formal adjudication process. The ability to charge for the false denial permits the prosecutor to avoid trial on the more serious charge. Do away with the strategic charging power, and the power to avoid trial would disappear as well. Second, and equally important, it would add to courts' ability to define the boundaries of those more serious crimes. As things stand now, prosecutors can avoid judicial boundary definition by piling on enough charges to induce a guilty plea. The more such charges are barred by a *Bryan*-style notice requirement, the harder it would be to end-run the court system. All of which would introduce a little more law into the process by which crimes are defined.

b. *Desuetude*. The second constitutional rule follows naturally from the first. One of the pathologies of criminal lawmaking is the difficulty of repealing criminal statutes that once represented community norms but no longer do. There is good reason to believe that the level of legislative inertia in such cases — the cost of undoing that which would not be done today — is higher for criminal statutes than for other sorts of legislation.<sup>306</sup> Which means that the statute books contain a host of crimes that are not crimes at all in terms of popular understandings. Prosecutors' incentives being what they are, these crimes are likely to go largely unenforced. But they can still be useful in the way that any overbroad crimes can be useful: as means of inducing guilty pleas for other, more serious transgressions. The paradigmatic example is sodomy laws, which are sometimes used as fodder for plea bargains in sexual assault cases where the government may fear going to trial on the more serious assault charge.<sup>307</sup> And these no-longer-enforced crimes can also be used more straightforwardly, as means of harassing opponents or discriminated-against groups. Michael Hardwick's arrest, which led to the Supreme Court's decision in *Bowers v. Hardwick*,<sup>308</sup> is a fairly obvious instance.

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306. See *supra* notes 184-190 and accompanying text.

307. See *supra* note 189 and accompanying text.

308. 478 U.S. 186 (1986). For a chilling account of the arrest, see Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1437-40 (1992).



These used-to-be-real-crimes that remain on the books create obvious notice problems. In the oral argument in *Hardwick*, Georgia's representative admitted that the state never prosecuted cases of private sex between consenting adults.<sup>309</sup> That being so, *Hardwick* had no reason to assume that his sexual conduct would be the cause of any state intervention. And that notice problem exists even if *Hardwick* knew about Georgia's sodomy statute. Just as functional notice (knowledge that one's conduct is outside accepted boundaries) can exist without formal notice (knowledge that a particular criminal statute covers one's particular behavior), formal notice can exist without the functional kind.

The solution is familiar. Crimes that go unenforced for a substantial period of time should no longer be treated as crimes. Lack of enforcement constitutes fairly strong evidence for the proposition that the crime would not be a crime if the issue were to be resolved by majoritarian politics today. (If the prediction proved wrong, the legislature could always re-pass the statute; if prosecutors then enforced it regularly, courts could give way. Desuetude need not be a constitutional straightjacket.) And the unenforced crime's continued existence gives the government the same strategic power that all overbroad crimes give: the power to induce guilty pleas for other, more serious crimes that the government cannot prove. A constitutionalized desuetude doctrine would thus serve the same purposes as a constitutionalized notice requirement. Both doctrines would make criminal law and criminal adjudication more transparent — crimes the government prosecutes would more closely resemble crimes the government actually wishes to punish — and hence more lawlike.

There are of course complications and counter-arguments; this is not the place for a detailed discussion of them.<sup>310</sup> One objection, though, deserves comment here, if only because it highlights one of the central ironies of American criminal law. Just as more law has produced a fundamentally lawless system, re-imposing the rule of law on that system may require courts to behave in an un-lawlike fashion.

Consider how a desuetude doctrine might function in practice. Suppose a defendant is prosecuted for marijuana possession, under a statute that requires mandatory jail time for that offense. The defendant claims that the relevant jurisdiction hasn't enforced that crime for years, notwithstanding regular marijuana use by a sizeable fraction of the local population. Assume the defendant's claim is correct. The government can nevertheless rebut it, or appear to, by showing a sig-

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309. See 478 U.S. at 198 n.2 (Powell, J., concurring).

310. For a (slightly) more extended argument, see Stuntz, *supra* note 72, at 34-38. For the most thorough and best argument for the proposition that obsolete statutes should be ignored more generally, not just in the criminal sphere, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

nificant number of marijuana possession prosecutions — all, or almost all, in cases in which the marijuana offense was a stand-in for some other crime that, for one reason or another, the government did not wish to charge. The marijuana prosecutions will all be part of the public record. Their pretextual nature will not. If the government's response stands, desuetude doctrine does no work. It rules out only those stale criminal statutes the government never uses.

The only possible response to the government's argument involves a heavy dose of judicial intuition. Does the local population expect marijuana possession to be treated as a real crime, with jail time attached? If not, the possession statute no longer applies. But the question has no objectively verifiable answer (polling on such questions is too expensive if done well, and too manipulable if not). So a judge facing the issue would likely convert that question into another: Does marijuana possession merit jail time? Lacking hard information about what the public thinks, judges are likely to go with their own opinions about desert and proportionality. Those opinions will not seem terribly lawlike. If the Supreme Court's proportionality cases teach anything, they teach the impossibility of applying something that looks and feels like legal analysis to the question whether a given crime deserves a given sentence.<sup>311</sup> So it would be with the hypothetical marijuana case — or with Michael Hardwick's claim — in a world where a constitutional desuetude rule existed.

The same thing is true of a constitutional notice requirement. Some crimes (robbery, murder) are obviously crimes; other crimes (*Lambert's* registration requirement) aren't. In a world where notice is a rule and not merely an aspiration, courts would have to distinguish the two. And the distinction would sometimes be hard. Some crimes — fraud, for example — include both obviously criminal behavior and behavior for which few people would expect to go to prison. The distinction can only be drawn by courts making open-ended, ungrounded value judgments: this behavior merits punishment; that behavior doesn't, for no better reason than because I think so (and because I think and hope most of the local population will agree). It sounds like the antithesis of the rule of law.

Perhaps it is. But the alternative to this un-lawlike judging is even less lawlike prosecution. Under the current regime, the marijuana case is resolved as follows. Police arrest if and when they choose. Perhaps the local police believe in enforcing the ban on marijuana possession but only in some parts of town, or perhaps they believe in enforcing it only against people they don't like. The reasons are legally irrelevant. Because the ban exists in the statute books, the arrest will be legally

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311. See *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Solem v. Helm*, 463 U.S. 277 (1983); *Hutto v. Davis*, 454 U.S. 370 (1982); *Rummel v. Estelle*, 445 U.S. 263 (1980).

valid.<sup>312</sup> Likewise, prosecutors prosecute if and when they choose. Perhaps the local district attorney's office is enforcing some narrower version of the marijuana ban (e.g., punishing public use), or perhaps it uses the ban in cases where some other crime is suspected but unprovable. All these judgments are both invisible and unreviewable. The result is that police and prosecutors both define the crime and adjudicate violations, all outside the formal legal system. Open-ended constitutional review of the merits of criminal statutes would be a good deal more lawlike, and a good deal better, than *that*.

c. *Sentencing Discretion*. Constitutional notice and desuetude doctrines would make it harder to charge and convict for trivial misconduct. But they would not do much to rein in another, equally dangerous prosecutorial power: the power to stack charges, to charge a large number of overlapping crimes for a single course of conduct. Even if each of these offenses is narrowly defined to cover only serious misconduct, combining crimes enables prosecutors to get convictions in cases where there may be no misconduct at all. When deciding whether to plead guilty, any rational defendant (more to the point, any rational defense lawyer) takes account of the sentence the defendant may receive if he goes to trial and loses. That sentence is, always in part and sometimes in very large part, a function of the number and severity of the crimes charged. By stacking enough charges, prosecutors can jack up the threat value of trial and thereby induce a guilty plea, even if the government's case is weak. Thus, the ability to charge-stack seriously reduces the value of the defendant's right to force the government to prove its case. As with prosecutors' decisions to charge overbroad crimes, charge-stacking tends to transfer adjudication from the courthouse to the district attorney's office.

One could solve this problem in a variety of ways. The most obvious would be to reconfigure double jeopardy law or the nonconstitutional law of joinder to limit the power to pile on separate offenses. That task would not be easy. At the least, it would require courts to generate a body of common law devoted to defining a single course of criminal conduct, something that defies easy definition. Still, difficult is one thing; impossible is another — courts draw hard-to-define lines all the time.

A less obvious but perhaps better way to address charge-stacking is indirect. Suppose judges had the power — under the Eighth Amendment, the Due Process Clause, or both — to decline to impose any sentence that seemed unduly harsh. Prosecutors could still charge five or six offenses for a single criminal incident, but the added charges would not necessarily yield a higher sentence. If, in the judge's eyes, a given fact pattern merited no more than five years, the defendant

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312. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

would receive no more than five years, regardless of how the charges were packaged. Of course, he still might receive less. Statutory maxima would still apply, and prosecutors and defense lawyers could still strike bargains for less than the judicially favored sentence. But not for more. Judges, deciding case-by-case, would define maximum sentences; within these maxima legislatures and prosecutors would be free to determine the actual sentence. Charge-stacking would still be possible, but prosecutors would gain much less from it.<sup>313</sup>

This hypothetical rule is more radical than doctrines like desuetude or notice. Yet it is not quite so radical as it seems. Constitutionalized sentencing discretion would not mean the abolition of sentencing guidelines, much less the wholesale invalidation of the nonconstitutional law of sentencing. In that sense, it may be less radical than the path the Supreme Court is charting with respect to the burden of proving sentencing facts.<sup>314</sup> Constitutionally required sentencing discretion *would* mean the abolition of mandatory minimum sentences; guidelines could define ceilings but not floors. Yet abolishing mandatory minima would be a great gain, for all the same reasons that doing away with overbroad crimes would be a great gain. There is no more reason to believe mandatory minima accurately capture majoritarian sensibilities than there is to believe that Congress's definition of mail fraud accurately captures the range of deceptive conduct the public wishes to see punished. Just as crimes are defined against the backdrop of enforcement discretion, sentencing minima are fixed with the knowledge that some (most?) of those eligible for the minimum will not receive it, either because police fail to arrest or because prosecutors fail to charge the qualifying crime. And just as overbroad crimes give prosecutors the power to define a low-visibility law-on-the-street, harsh sentencing statutes give prosecutors the ability to define their own sentencing rules. The case for doing away with the second power is the same as the case for doing away with the first.

To be sure, the *legal* case is not as strong. There is no sentencing equivalent to *Lambert*, no line of cases that lays the doctrinal foundation for constitutionalizing judges' opportunity to show mercy to those

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313. The source of the basic idea is Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995). King first explained why the traditional debate about double jeopardy limits on prosecutors' charging power was misplaced — the key issue is not what charges the defendant faces, but what consequences flow from those charges. Limit the power to increase the defendant's sentence, and the manipulation of charges will cease to be attractive.

314. See *Apprendi v. New Jersey*, 530 U.S. 266 (2000). In *Apprendi*, the Court required proof beyond a reasonable doubt of any fact necessary to define the maximum sentence for the crime. Depending on how the Court defines "maximum sentence" (the statutory maximum? the top of the relevant guidelines range?), *Apprendi* could render a number of guidelines systems unconstitutional. For an early attempt by two scholars to give some meaning to the Court's decision without undoing sentencing guidelines, see Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467 (2001).

defendants who, in the judges' eyes, deserve it.<sup>315</sup> Still, constitutionalized sentencing discretion does have some roots in existing law. Juries are allowed to acquit in the teeth of overwhelming evidence of guilt, for no better reason than because they think the defendant does not deserve punishment, and the acquittals are final.<sup>316</sup> Nor is that power limited to juries: judges, too, can acquit for any reason or for no reason at all, and their acquittals are likewise unappealable.<sup>317</sup> Whatever principle underlies these rules, it applies equally to sentencing. It is hard to understand why constitutional law should make it impossible for legislatures to command that a given course of conduct be punished (the power to acquit for any reason does away with that legislative power, at least in theory), and yet leave legislatures free to require that, if behavior is to be punished, it should be punished at least so much. Logically, the greater mercy ought to include within it the lesser.

The real downside to constitutionally required sentencing discretion is neither its radicalism nor its weak doctrinal pedigree. The problem lies in the opposite direction: restoring judges' power to revise statutory or bargained-for sentences downward (though not upward) might not accomplish much in practice. Even when sentencing was everywhere discretionary, judges tended to defer to bargained-for sentencing recommendations.<sup>318</sup> And judges rarely use their power to acquit in the teeth of adverse law and adverse facts. Similar power over sentences might be used with similar infrequency.

In short, two changes are needed: a change in constitutional law, to grant judges the power to undo too-harsh sentencing decisions by legislatures and prosecutors, and a change in judicial culture, so that judges will exercise that power once they have it. Perhaps the first change would produce the second. But even if not — even if judges continue to defer to prosecutors, save for a few exceptional cases — we will be no worse off than we are now. At the least, the most extreme examples of overcharging, and the worst injustices that mandatory minima now produce, might be remedied.

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315. Something close exists in the body of Eighth Amendment law that restricts imposition of the death penalty: defendants are entitled to present, and to have the sentencer consider, any mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). Needless to say, there is no reason to assume any court would apply these cases outside the death penalty context.

316. For an excellent, though highly critical, discussion of this power, see Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996).

317. *See Fong Foo v. United States*, 369 U.S. 141 (1962).

318. *See, e.g., HEUMANN, supra* note 130, at 93-107.

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There are other ways to skin this particular cat, other means of giving courts substantial control over the bounds of criminal liability without overturning criminal codes wholesale. The three hypothetical rules discussed above are meant to be suggestive, not exhaustive.

It is worth noting a feature the three proposals share, for it is probably a necessary feature of any means of reasserting judicial power over criminal law. In each instance, discretion is used to check discretion. Notice and desuetude are probably not susceptible to detailed legal analysis. These doctrines, if they ever exist, will likely be little more than an accumulation of seat-of-the-pants judgments by particular trial judges and appellate panels. The same is still more true of a constitutional right to mercy in the discretion of the sentencing judge. These proposals do not so much put legal bounds on a discretionary system; rather, they make an already discretionary system more discretionary still. It seems an odd way to go about fixing a system suffering from a kind of lawlessness.

Yet it is not so odd as it seems. The existing system rests on open-ended, unbounded, essentially non-legal judgments about who deserves to go to prison and who doesn't. Law enforcers make those judgments. Courts review them only for their compliance with legal doctrine. Since the doctrine is designed to give law enforcers a great deal of flexibility, in practice the review is forgiving. The open-ended, non-legal judgments are, again in practice, both final and invisible. And those are the judgments that count.

If the hypothetical rules discussed above existed, the open-ended judgments would still be made, but they would be made by two decisionmakers, not one. And they would be made, at least sometimes, in open court, with adversarial argument, and with at least the possibility of public attention. Whether or not these changes would advance the rule of law as it is commonly defined, they would surely advance the values the rule of law is supposed to protect.

They would also make the formal doctrine a good deal more important than it is now. If notice and desuetude were constitutional claims with bite, stale crimes would cease to exist and overbroad crimes would, over time, acquire narrower definitions. The government would have to prove the elements of those narrower definitions; defendants could appeal convictions under them, and appellate courts would have the opportunity (where clearer definition is possible) to define them with greater precision. Judicial discretion to depart downward from legislative minimum sentences would reduce prosecutors' incentive to stack charges. With less charge-stacking, there might be more trials, where the boundaries of crimes might be the subject of litigation. Criminal law might again have something to do with who goes to prison, and for how long.

This may be the key to solving the system's problem with defining crimes. The current regime uses law to produce discretion. We need to reverse the process, to use discretion to produce better law. The reversal might work, as long as the discretion is exercised by someone other than police and prosecutors.

### CONCLUSION

The study of American criminal law is and always has been the study of the merits of different definitions of crimes and defenses. What kinds of threats should give rise to claims of self-defense?<sup>319</sup> What sorts of provocation should reduce the grade of homicides from murder to manslaughter?<sup>320</sup> Should the law of rape require force, or only the absence of consent?<sup>321</sup> Should the law of mens rea focus on cognition, or on something else?<sup>322</sup>

These questions matter. How they are answered has huge consequences for the lives of real people. But they matter less than lawyers tend to think, because the *number* of such people is fairly small — and even those few cases exist largely at the sufferance of prosecutors. A prosecutor who is willing to take a plea to involuntary manslaughter or assault has little to fear from a self-defense claim and nothing to fear from a claim of provocation. The growth of lesser-included sexual assault crimes means the boundaries of rape will matter only when prosecutors insist on going for the toughest possible sentence. The finer points of mens rea doctrine make no difference to a defendant facing a half-dozen felony counts, with an offer to dismiss the other five if the defendant will plead to one. In other words, even for the most serious crimes, criminal law matters less than one would think — and it is a bit of a mystery why it matters as often as it does.<sup>323</sup>

Aside from homicide, rape, and a few other crimes (and only partially there), criminal law serves not as a means of separating those who are to be punished from those who are not, but as a grant of

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319. For provocative discussions, see GEORGE P. FLETCHER, *A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 18-38 (1988); Kahan, *Secret Ambition*, *supra* note 73, at 428-35.

320. For the most interesting discussion, see Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 *YALE L.J.* 1331 (1997).

321. See SCHULHOFER, *supra* note 3 (arguing for nonconsent alone); Dripps, *supra* note 97 (arguing for force).

322. For the best case to date for "something else," see SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* (1998).

323. Part of the explanation must be that prosecutors are not simply maximizing convictions. This stands to reason, given that trial experience enhances prosecutors' career prospects, see Glaeser et al., *supra* note 151, and given that trials are more fun than plea bargains. If prosecutors were maximizing convictions, they would take better advantage of the menu of charging options criminal law gives them; we would then see many fewer trials, and guilty plea rates approaching one-hundred percent.

authority to prosecutors to do the separating. Criminal law is, in other words, not law at all, but a veil that hides a system that allocates criminal punishment discretionarily. Not quite — defendants can still go to trial, and sometimes win at trial, by arguing that someone else committed the crime charged, that the police arrested and the prosecution charged the wrong man. But rarely do defendants prevail, at trial or in any other setting, because the law does not criminalize their conduct. Prosecutors decide what is a crime, though juries occasionally — and *only* occasionally — get to decide whether defendants did the things prosecutors believe they did.

If that is the best that can be said of the existing system, it isn't good enough. Prosecutors are by and large reasonable and decent people, but even reasonable and decent people should not be given the power both to define the law and to adjudicate violations. Power is too concentrated. Which highlights another irony of criminal lawmaking. Both horizontally and vertically, our system of lawmaking and law enforcement seems to do a remarkably good job of *diffusing* power. States make criminal law, localities enforce it; the federal government does both, but only in a supplemental way. Legislatures write criminal statutes, but courts construe them (and enforce constitutional standards of specificity), and prosecutors have the discretion not to enforce when the laws are too harsh. It sounds like a perfect image of checks and balances in action. Giving judges the kind of power I suggest above would undo these checks and balances, and would create a kind of concentrated judicial power that seems dangerous.

Yet the dangerous power already exists in other hands, and the checks and balances are an illusion. The criminal justice system seems characterized by diffused power, but its real difficulty is that it concentrates power in prosecutors. Legislatures are no check on prosecutorial power, because legislators and prosecutors mostly share the same interests. Courts are no check, because they can do nothing that legislatures and prosecutors cannot together undo. Lastly, federal officials are no check on their local counterparts; on the contrary, federal criminal law and federal sentencing guidelines give local law enforcers even more leverage over the suspects with whom they deal.

The system by which we make criminal law has produced not the rule of law but its opposite. And the doctrines that aim to reinforce the rule of law only add to the lawlessness. Vagueness doctrine, the rule of lenity, and the ban on retroactive crime definition — the trio of doctrines that aim to ensure that criminal law is truly lawlike — all keep courts from exercising real power over crime definition. Ostensibly, this guards legislative supremacy. Actually, it protects prosecutorial discretion. Not only is the current system lawless, but the doctrines that aim to prevent that state of affairs instead ensure that it will continue to exist.



What is needed is genuine rule of law protection: a countervailing power, something that can check legislators' and prosecutors' power to define crimes and sentences as they wish. That point deserves emphasis. The conventional wisdom in the literature is that criminal law suffers from poor drafting, that the solution to bad criminal codes is for legislatures to write better ones. It would no doubt be a good thing if legislatures were to improve their drafting, even more so if they would make better normative judgments. But there is no reason to assume they will do so, given that it is in their interest to behave as they do now. Generally speaking, legislatures pass the kinds of criminal statutes we should expect, given the lawmaking system in which they act. In order to have better criminal law, we need to change that system. And the key to better lawmaking lies in some lawmaker other than legislatures or prosecutors.

The most plausible lawmakers are the courts. The most plausible vehicle is the federal constitution. And the lawmaking power itself must, in the nature of things, be fairly open-ended. It sounds radical, and in some ways it is. And there is no great public demand for this countervailing power. On the contrary, the way the system has evolved is, while certainly not dictated by public opinion, at least consistent with it. Criminal *law* is not democratic, but criminal law *enforcement* probably is. Never in our history has constitutional law taken so dramatic a step with so little support. Which suggests that criminal law will probably get worse before it gets better.