

# Rethinking Overcriminalization

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## *Abstract*

*If there is one thing American criminal law scholars agree on, it is that our justice system suffers from overcriminalization. Our codes criminalize too much conduct; outdated offenses remain too long on the books, and legislatures cannot resist adding new crimes and harsher punishments. This is so because criminal law is a distinctive issue for legislative debate and for democratic politics generally. Few lobby against crime creation; legislators respond to strong majoritarian preferences that make votes against crime creation—or votes to repeal antiquated crimes—politically implausible. Thus criminal law is “one-way ratchet”: it expands but doesn’t contract. On this account, criminal law is a challenge for democratic governance, because criminal law is the product of structural failures in political processes.*

*Yet this story fails to account for much of American criminal law policy and practice. In fact, legislatures decline to enact bills proposing new crimes or increased punishments every year. They repeal longstanding criminal statutes and reduce punishments. Interest groups and popular opinion often support and sometimes drive these reforms, which means both that democratic sentiment is not solely in favor of ever-increasing harshness and that democratic processes can accurately respond to that sentiment. Legislatures criminalize very little conduct that most people think should be completely unregulated, and unpopular or silly offenses left on the books are routinely nullified by democratically accountable prosecutors or narrowed by courts. As a result, criminal law’s reach into most citizens’ lives is almost surely less in most respects than in the past.*

*More than ninety percent of criminal law enforcement is state rather than federal, and state criminal justice systems on the whole more democratically responsive than the federal system. Many state legislatures recently have proven better at devising procedural frameworks to harness expertise in the reform of criminal law and punishment policy and to moderate risks of dysfunctional policymaking. Coupled with restraints from other branches, substantive overcriminalization, judged against a baseline of democratic preferences, is a modest problem in the states. And what overcriminalization exists has little effect on criminal justice’s well recognized problems such as excessive plea bargaining, racial disparities, and high incarceration rates.*

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## Rethinking Overcriminalization

If there is one thing American criminal law scholars agree on, it is that our justice system suffers from overcriminalization. Our codes criminalize too much conduct; outdated offenses remain too long on the books, and legislatures cannot resist adding new crimes and harsher punishments. There is also broad agreement on the reasons for this pattern. Criminal law is a distinctive issue for legislative debate and for democratic politics more generally. New offenses are cost-free, and few plausible groups lobby against crime creation; legislators respond to strong majoritarian preferences that make votes against crime creation and punishment increases—or votes to repeal antiquated crimes—politically implausible. Thus criminal law, in the recurrent metaphor, is “one-way ratchet”: it expands but doesn’t contract. As a consequence we are moving “ever closer to a world in which the law on the books makes everyone a felon.”<sup>1</sup> This story poses a challenge to democratic governance, because it suggests that criminal law is the product of structural failures in political processes. Legislative processes not only cannot cool the passions of the electorate in the service of rational social policy,<sup>2</sup> they may exaggerate those passions. A considerable body of prominent criminal law scholarship in the last decade has either focused on this problem or taken it for granted and explored its causes and implications.<sup>3</sup>

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<sup>1</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505, 511 (2001), quoted in Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 *Hastings L.J.* 633, 638 (2005) (hereafter *Degradation*), and in Douglas Husak, *Is the Criminal Law Important?*, 1 *Ohio St. J. Crim. L.* 261, 267-68 (2003) (suggesting “[t]his allegation may be understated”), and in Douglas Husak, *Crimes Outside the Core*, 32 *Tulsa L. Rev.* 755, 769 (2004) (hereinafter *Crimes*).

<sup>2</sup> See, e.g., *Federalist 10* (Madison) in *The Federalist Papers* 83 (Clinton Rossiter ed. 1961).

<sup>3</sup> See Symposium: *Overcriminalization: The Politics of Crime*, 54 *Am. U. L. Rev.* 541 (2005) (articles by Ellen S. Podgor, John S. Baker, John Hasnas, Peter J. Henning, Erik Luna, Sara Sun Beale, Geraldine Szott Moohr and Paul Rosenzweig); Donald Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 *Penn. St. L. Rev.* 1155 (2005); Robinson & Cahill, *Degradation*, supra note 1; Douglas Husak, *Crimes*, supra note 1, at 769; *Go Directly to Jail: The Criminalization of Almost Everything* (Gene Healy ed. 2004); Stuntz, supra note 1; Robinson & Cahill, supra note 1; Paul Rosenzweig, *The Overcriminalization of Social and Economic Conduct* (Heritage Foundation Legal Memorandum 2003); John S. Baker, *Measuring the Explosive Growth of Federal Criminal Legislation* (2004) (report sponsored by Federalist Society) available at [www.fed-soc.org](http://www.fed-soc.org); Am. Bar Ass’n, *The Federalization of Criminal Law 7-11* (1997) (concluding that more than 40% of federal criminal statutes were enacted in the last thirty years); 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 (1997); David A.J. Richards, *Sex, Drugs, Death and the Law: An Essay on Human Rights and Overcriminalization* (1982). This complaint has some history. See, e.g., Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 *Annals Am Acad. Pol. & Soc. Sci.* 157 (1967).

This story contains some truth, but it also fails to account for much of American criminal law policy and practice. In fact, legislatures decline to enact bills proposing new crimes or increased punishments every year, for reasons familiar to students of legislative process. Legislators sometimes repeal longstanding criminal statutes, reduce punishments, reduce offense severity, and occasionally convert crimes to civil infractions. Moreover, interest groups and popular opinion often support and sometimes drive these reforms, which means both that democratic sentiment is not solely in favor of ever-increasing harshness and that democratic processes can accurately respond to that sentiment—even when, as in the case of consensual sex crimes, popular sentiment is not uniform. Legislatures criminalize very little conduct that most people think should be completely unregulated, and they sometimes reduce punishments for widely endorsed offenses. And what offenses legislatures leave on the books, democratically accountable prosecutors often nullify in practice: many of the crimes scholars complain about are rarely prosecuted.

Part I of the article unpacks the overcriminalization literature to identify several distinct complaints—duplicate offenses, prohibition of trivial or innocuous conduct, federalization of state crime, and the related problem of excessive punishment. Despite these facts, however, there is little criminalization of wholly innocent conduct, save for (a) trivial offenses that are almost never enforced and (b) pockets of federal practice. Further, criminal law’s substantive scope is almost surely narrower in most respects than in the past, at least in its effect on most citizens. Part II maps the biggest reasons for this: legislatures have long histories and continuing practices of abolishing crimes, narrowing offense definitions and moderating punishments that contrast with their creation of new offenses and harsher sanctions. Legislators also routinely decline proposals for new crimes or greater punishments; in criminal law as in other policy areas, most bills fail. On this account, criminal law is not a one-way ratchet of ever-increasing severity driven by law-and-order politics or flawed democratic institutions. It looks instead more like other policy debates that often have high public salience—tax policy, for example—but on which public and interest-group pressures occasionally shift and legislators have multiple means of response or avoidance.

Documenting this pattern generates a revised account of how well democratic processes structure and execute criminal law, and it brings to light an important distinction. State legislatures are, on the whole, better at criminal law than Congress. And state prosecutors are much more politically accountable than their federal counterparts. Those facts make state criminal justice systems on the whole more democratically responsive than the federal system. That matters because more than ninety percent of criminal law enforcement is state rather than federal.<sup>4</sup> Overcriminalization concerns focused on federal law paint a misleading picture: the problem is worse in the federal realm than in most states. Part III draws on legislation scholarship to explain why. State legislatures operate under very different procedures and norms than Congress, and recently many have proven better at devising procedural frameworks to harness expertise in the reform of criminal law and punishment policy. All policymaking faces familiar risks of translating public preferences into policy, of majorities trampling minority interests, and of concentrated interests that succeed over broad, diffuse interests. But in many state legislatures, procedural frameworks— analogous to those Congress devised for a range of issues but never for substantive criminal law reform<sup>5</sup>—moderate the greatest risks of dysfunctional criminal policymaking. Part IV extends the picture of criminal law’s democratic structure. Direct election of most state prosecutors additionally checks criminal law’s reach: even statutes that legislatures ill-advisedly pass (or fail to repeal once antiquated) are functionally nullified by local prosecutors whose priorities are governed by local politics and tight budgets. Courts supplement this constraint, especially in the area of speech and expressive-conduct crimes. These constraints explain why substantive overcriminalization is a modest problem in the states, and why it is a bigger problem in a small subset of federal criminal law.

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<sup>4</sup> Less than 5 percent of all prosecutions are federal and less than 10 percent of all inmates are in federal prisons or jails. In 2003, the federal prisons and jails held 165,800 inmates, while state prisons and jails held 1,912,800. On those numbers, federal prisoners account for about 8 percent of the nation’s inmates in 2003. Bureau of Justice Statistics, U.S. Dep’t of Justice, *Sourcebook for Criminal Justice Statistics—2003*, at tbl. 6.2. As for prosecutions, there were 66,452 *federal criminal cases* filed in 2002, while there were 1,051,000 *felony convictions* in state courts the same year; federal cases equal 6.3 of that state figure, which excludes misdemeanors and felony charges not yielding conviction. *Id.* at tbls. 5.10 & 5.44.

<sup>5</sup> An arguable exception is the unsuccessful National Commission on Reform of Federal Criminal Laws (a.k.a. the Brown Commission), which issued its report on overhauling the federal code in 1971 to no effect.

The upshot of this account is, first, that it is not clear there is much *overcriminalization* at all. Overcriminalization is a normative judgment, and the baseline for judgments about excessive offense definitions and sentencing levels, I argue, should be democratic preferences. Judged by that standard, the patterns of substantive criminal law contraction and expansion in recent decades reflect a plausible set of preferences we could roughly describe as favoring expanded personal freedom combined with harsher sanctions for harmful or risky conduct. America's singularly severe punishment policies can be criticized on many grounds but on the whole accord roughly with majoritarian preferences, qualified by the recognition that preferences are dependent on imperfect information and the cognitive frames of prevailing practices, and that particular applications may be outside those preferences.<sup>6</sup> Second, democratic governance works surprisingly well in many respects for defining criminal law, roughly as well as it does for most other areas of social policy. Finally, and as discussed in the concluding Part, what overcriminalization exists has relatively little to do with many of criminal justice's most pressing problems, such as excessive plea bargaining, racial disparities, and high incarceration rates.

### I. Criminalization Complaints

Criticisms of overcriminalization capture several distinct complaints about the general growth of substantive criminal law. One is simply that codes have grown. Studies of the federal code document its dramatic growth in the last four decades,<sup>7</sup> and nearly every state code has expanded as well. As a rough measure of representative growth in state codes, Paul Robinson and Michael Cahill note that the Illinois Code went from less than 24,000 words in 1961 to 136,000 in 2003—a six-fold increase.<sup>8</sup> Bill

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<sup>6</sup> For insightful, contrasting accounts of American cultural preferences for harsh sanctions, see James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (2003); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001). For evidence and arguments that some sentencing policies depart from majoritarian preferences, see, e.g., Paul H. Robinson & John Darley, *Justice, Liability and Blame* (presenting empirical data on public views of appropriate sentencing levels); Tom R. Tyler & Robert Boeckmann, *Three Strikes and You are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 *L. & Society Rev.* 237 (1997); Stuntz, *supra* note 1, at 549 & 595.

<sup>7</sup> See Baker, *supra* note 3; Am. Bar Ass'n, *supra* note 3.

<sup>8</sup> Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 *Ohio St. J. Crim. L.* 169, 172 & n.16 (2003).

Stuntz found that, over the past 150 years, Virginia’s code grew from 170 to 495 offenses, and Massachusetts’ from 214 to 535.<sup>9</sup>

Those numbers are suggestive but tell us little about the merits of that expansion. Some may be good; circumstances change, and law must adjust—we had little need for computer crimes forty years ago. Scholars mainly stress two detrimental types of criminal law growth. One is redundancy—multiple statutes that criminalize the same conduct in slightly different or more specific ways, often with varying punishments. Specific statutes within a jurisdiction are often redundant of moral general ones, and much federal law is redundant of state offenses (over-federalization). The federal carjacking statute is a frequently cited example,<sup>10</sup> though scholars have cited many others—offenses of damaging specific kinds of property that duplicate a general property-damage statute,<sup>11</sup> specific theft offenses that duplicate a general theft definition,<sup>12</sup> and perhaps hundreds of federal fraud and false-statement offenses.<sup>13</sup>

Other overcriminalization arguments complain of overbreadth—statutes that criminalize conduct that most people believe to be innocent, innocuous or trivial. Frequent examples of this type include the federal misdemeanors against unauthorized use of Smokey the Bear’s image or against disturbing mud in a cave on federal land and a long list of obscure, often comical state misdemeanors.<sup>14</sup> Outdated morals offenses

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<sup>9</sup> Stuntz, *supra* note 1, at 514.

<sup>10</sup> 18 U.S.C. § 2119 (2000) (felony of taking a motor vehicle by force or intimidation “with the intent to cause death or serious bodily injury”). See Erik Luna, *The Overcriminalization Phenomenon*, 54 *Am. U. L. Rev.* 703, 708 (2005) (calling this statute “superfluous” because it “deal[s] with conduct addressed by existing provisions”); Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 *Colum. L. Rev.* 583, 610 & n.88 (2005) (noting carjacking statute); Sara Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 *Am. U. L. Rev.* 747, 755-56 & n.31 (2005) (noting carjacking statute); Robinson & Cahill, *supra* note 8, at 171 (same). Robinson and Cahill, who have spent more time than anyone analyzing state criminal codes, note other examples of redundancy. In addition to a general theft offense, for example, the Illinois legislature (like others) has specific theft offenses for theft of delivery containers, library materials, and other specified forms of property. See *id.* at 170 & nn.4-6 (citing 720 Ill. Comp. Stat. 5/16-1 (general theft), 5/16E-3(a) (retail theft), 5/16B-2(a) (library) (1993)).

<sup>11</sup> Robinson & Cahill, *supra* note 8, at 170 (citing Illinois statutes barring damage to library materials, animal facilities, delivery containers and “anhydrous ammonia equipment”).

<sup>12</sup> Robinson & Cahill, *Degradation*, *supra* note 1, at 637 & n.16 (citing duplicative theft provisions in Illinois and Kentucky).

<sup>13</sup> Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 *Buff. Crim. L. Rev.* 249, 289 (1998) (counting 325 federal fraud or misrepresentation offenses); Stuntz, *supra* note 1, at 517 (noting “100 separate misrepresentation offenses” in the federal code).

<sup>14</sup> See, e.g., 16 U.S.C. §§ 4302(1), 4302(5), 4306(a)(1), 4306(b) (2000); 18 U.S.C. § 711 (2000) (misdemeanor for unauthorized use of “Smokey the Bear” name); see also Douglas Husak, *Retribution in*

against adultery, fornication, and sodomy fit this category, as well as some gambling and alcohol offenses<sup>15</sup> and crimes targeting outdated social problems such as railroad trespass.<sup>16</sup> Especially in federal law, some such crimes are more serious and carry substantial penalties. Expansive use of federal mail and wire fraud statutes to cover even breaches of fiduciary duty are notable examples.<sup>17</sup>

Complaints about these two main types of crime expansion are related to other, ancillary concerns, such as code disorganization—many new provisions are scattered throughout statute books, outside of the criminal code. They are sometimes poorly drafted, which can lead to doctrinal incoherence such as inconsistent use of mens rea terms, and to distributive injustice when comparable conduct is charged under similar statutes that yield different sentences.<sup>18</sup> Finally, a separate but related complaint addresses not crimes but sentences: even for appropriately defined crimes, punishment levels can be excessive. Interestingly, complaints about overcriminalization extend back at least to the 1960s (versions of the argument occur even earlier),<sup>19</sup> when incarceration rates were a fraction of current levels,<sup>20</sup> the death penalty was in full desuetude, and federal criminal law not yet expanded in narcotics and other state-regulated offenses

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Criminal Theory, 37 *San Diego L. Rev.* 959, 962-63 (2000) (citing these two statutes). See also 18 U.S.C. § 711a (2000) (unauthorized use of Woodsy Owl image); 18 U.S.C. § 706 (2000) (unauthorized use of Red Cross emblem). See Green, *supra* note 3, at 1610-14 (describing and defending the federal crime, created by statute and regulation, that punishes sellers who remove mattress tags before sale). For lists of odd state offenses, see Luna, *supra* note 10, at 704; Stuntz, *supra* note 1, at 516-17.

<sup>15</sup> See, e.g., Beale, *supra* note 10, at 750-53 (describing state morals legislation a form of overcriminalization). Morals offenses are the focus of David A.J. Richards' book-length critique of overcriminalization, *Sex Drugs and Death: An Essay on Human Rights and Overcriminalization* (1982). This complaint is at least a generation old. See Kadish, *supra* note 3, at 159-65 (criticizing morals legislation).

<sup>16</sup> See Stuntz, *supra* note 1, at 556 & n.185 (citing Virginia's many railroad-specific crimes). The failure of legislatures to repeal outdated statutes was a central concern of Guido Calabresi, *A Common Law for the Age of Statutes* (1982).

<sup>17</sup> See John C. Coffee Jr., *Modern Mail Fraud: Restoration of the Public-Private Distinction*, 35 *Am. Crim. L. Rev.* 427 (1995); John C. Coffee Jr., *Paradigms Lost: The Blurring of the Civil and Criminal Models and What Can be Done About It*, 101 *Yale L.J.* 1875 (1992) (hereafter *Paradigms Lost*); 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 *Tort/Crime*).

<sup>18</sup> See Robinson & Cahill, *Degradation*, *supra* note 1; Paul H. Robinson et al., *Five Worst (and Five Best) American Criminal Codes*, 95 *Nw. L. Rev.* 1 (2000).

<sup>19</sup> See *infra* text at nn. 208-13.

<sup>20</sup> But see Bernard E. Harcourt, *Should We Aggregate Mental Hospitalization and Prison Population Rates in Empirical Research?*, (January 2006 draft) available at [ssrn.com/abstract\\_id=880129](http://ssrn.com/abstract_id=880129) (suggesting "confinement" rates have held steady over the last century if we aggregate prison and mental hospital populations).

central to current overcriminalization critiques.<sup>21</sup> Nonetheless, there is much to this punishment criticism. Every state and the federal government have added severe mandatory minimum punishments in recent decades,<sup>22</sup> federal sentencing guidelines increased sentences for many crimes,<sup>23</sup> and some jurisdictions eliminated parole or restricted other mechanisms for early release.<sup>24</sup> As a result, American incarceration rates skyrocketed over the last three decades to levels that now far outpace those in any other western or democratic nation.<sup>25</sup>

Redundancy and overbreadth have several potential ill effects, but they are largely distinct effects. Overbreadth inappropriately criminalizes normatively legitimate conduct. That unnecessarily infringes liberty, and it increases police and prosecutorial power by providing more grounds for arrest and conviction. Redundancy, by definition, does not expand criminal law's scope; it "re-criminalizes" conduct already prohibited, and most examples point to conduct that is appropriately barred—theft, assault, fraud and the like.<sup>26</sup> Courts have a few means to control prosecutor manipulation of the charge options created by overlapping offenses, through concurrent sentencing, merging offenses, and rules mandating that specific statutes supercede general ones or those with

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<sup>21</sup> See Kadish, *supra* note 3; Herbert Packer, *The Limits of Criminal Sanction* 249-95 (1968); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 *Univ. Chi. L. Rev.* 423 (1963).

<sup>22</sup> For description and criticism, see, e.g., Paul Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of the Federal Mandatory Minimums)*, 56 *Stan. L. Rev.* 1017 (2004); Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 *Stan. L. & Pol'y Rev.* 9, 11 (1999); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 *Cal. L.Rev.* 61 (1993).

<sup>23</sup> See U.S. Sent. Commission, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration and Prosecutorial Discretion and Plea Bargaining* 378-81 (1991) (reporting that federal sentences nearly doubled between 1984 and 1990 with the adoption of the guidelines and the Anti-Drug Abuse Act of 1986); 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, 24 (1997).

<sup>24</sup> A majority of states still have parole in some form. For a comprehensive list of state parole laws, see Taylor Menlove, *Parole and Truth-in-Sentencing State Survey* (memo on file with the author).

<sup>25</sup> American incarceration levels now stand at about 700 inmates per 100,000 population. From 1900 to 1970, the U.S. rate was about 110 per 100,000, a rate roughly equal to the current highest national incarceration rates in Western Europe. See Roy Walmsley, *United Kingdom Home Office Research, Development and Statistics Directorate, World Prison Population List 1*, 5 (3d ed. 2002). Yet U.S. prison populations rose as mental hospital confinements declined, so overall involuntary confinement has held fairly constant. See Harcourt, *supra* note 20.

<sup>26</sup> One exception is offense definitions, such as the federal mail fraud statute, that are broad enough to capture both clear wrongdoing and more marginal or morally ambiguous conduct. See Coffee, *Tort/Crime*, *supra* note 17.

lesser punishments for the same conduct trump more severe ones.<sup>27</sup> But those doctrines are fairly weak, and redundant crimes, especially if coupled with sentencing variations for similar offenses, can also increase enforcement officials' power. Expansive substantive law undermines criminal procedure restrictions, because more crimes mean more bases for police to find probable cause to stop and arrest, and redundant crimes give prosecutors more power to choose statutes with easier proof requirements, to punish the same conduct multiple times, to effectively choose punishments when similar statutes carry different penalties, and thereby to gain bargaining leverage by increasing risks of trial.<sup>28</sup> That bargaining leverage leads to plea bargains inappropriately replacing trials and may play a role in wrongful convictions.<sup>29</sup> Specifying these alleged effects of overcriminalization is important, because I argue in the final Part that overbreadth—criminalizing innocent or innocuous conduct—has little effect in practice, save for small subsets of federal prosecution; most claims of excessive criminalization relate to offenses that are trivial and rarely enforced. Likewise, redundancy probably plays a lesser role in adding to prosecutorial power and plea bargains than commonly assumed.

One feature of this debate merits emphasis. While many complaints about overcriminalization point to state codes, much critical literature focuses on federal

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<sup>27</sup> See, e.g., *Dixon v. State*, 278 Ga. 4, 596 S.E.2d 147 (2004) (holding defendant could be punished only under statute for misdemeanor statutory rape, not felony child molestation, due to lenity doctrines dictating that specific statutes trump general ones and lesser punishments prevail over greater ones). Such doctrines are of limited reach; prosecutors can sometimes avoid court supervision of this type by charging only the more severe offense, rather than multiple, overlapping offenses.

<sup>28</sup> William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *Yale L.J.* 1 (1997); William J. Stuntz, *Substance, Process and the Civil-Criminal Line*, 7 *J. Contemp. Legal Issues* 1 (1996) (hereafter *Civil-Criminal Line*). The recognition that wide-ranging criminal laws encourage and facilitate abusive enforcement discretion is not entirely new; scholars and activists raised similar arguments against morals crimes in the first several decades of the twentieth century. See, e.g., Edwin M. Schur, *Crimes Without Victims: Deviant Behavior and Public Policy: Abortion, Homosexuality and Drug Addiction* 79-80 (1965) (arguing antihomosexuality laws “encourage[] ... police corruption and repressive enforcement procedures”); William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 *Yale J.L. & Hum.* 265, 280 (1993); Packer, *supra* note 21, at 328-31 (“police corruptions is closely associated with ... vice control” and arguing use of police “decoys” as an enforcement strategy against prostitution is “disgusting”).

<sup>29</sup> Cf. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 *U. Pa. L. Rev.* 79 (2005) (proposing a measure of excessive plea bargaining, discussing wrongful conviction risks and attributing causal effect to prosecutorial power but not overcriminalization); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 *Harv. L. Rev.* 2548 (2004).

criminal law. A few critiques focus exclusively on federal criminal law,<sup>30</sup> and nearly all include federal law as dominant (often recurrent) examples of each form of the problem,<sup>31</sup> whether it be excessive punishment or criminalization of the trivial behavior and conduct best left to civil regulation.<sup>32</sup> This distinction is important, because overcriminalization is worse in the federal context: its costs are greater there and its amelioration less likely.

Scholars explain overcriminalization largely with an account of legislative failure and democratic process dysfunction. Legislatures treat criminal law differently from most other topics of public policy—proposals for new crimes and increased punishments pass legislatures more easily than other types of legislation, while repeal or reform of crimes and punishment face unusually long odds for enactment. This is so, scholars argue, for understandable reasons: majority preferences lean strongly and consistently in favor of expanded offenses and more severe punishment. Interest group influences work strongly in one direction: prosecutors are especially effective lobbyists for criminal law expansion<sup>33</sup> and other interest groups lobby for specific crimes; shippers, for instance, seek a special theft-of-delivery-container offense for conduct covered by a general theft definition.<sup>34</sup> High-profile crimes prompt legislatures to react with redundant statutes, and there is little downside to doing so. Rarely does an interest group of significant influence emerge to counter the influence of prosecutors, and legislatures can enact new crimes cost-free—they need not repeal old ones or appropriate tax dollars. (Importantly, that is not true with sentencing increases; incarceration costs a lot of money, and that constrains

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<sup>30</sup> See, e.g., Rosenzweig, *supra* note 3; Baker, *supra* note 3; ABA Report, *supra* note 3; Green, *supra* note 3; cf. Richman & Stuntz, *supra* note 10 (arguing expansive federal criminal law is a key factor in making pretextual prosecutions a bigger problem in federal than state law enforcement).

<sup>31</sup> See, e.g., Stuntz, *supra* note 1, at 555-65; Luna, *supra* note 10; Beale, *supra* note 10, at 753-73. Paul Robinson's work is an exception; he has devoted much exclusive attention to state criminal codes. See, e.g., Robinson, *supra* note 18.

<sup>32</sup> For arguments about the appropriateness of non-criminal regulation for conduct governed by criminal statutes, see, e.g., Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 *Yale L.J.* 1795, 1802 (1992) (arguing for "the shrinking of the criminal law in order to fit it into its proper role in the law of sanctions, next to an expanding arena of punitive civil sanctions."); Green, *supra* note 3, at 1610; Stuntz, *Civil-Criminal Line*, *supra* note 28; Coffee, *Paradigms Lost*, *supra* note 17; Coffee, *Tort/Crime*, *supra* note 17; Packer, *supra* note 21, at 249-95.

<sup>33</sup> See Stuntz, *supra* note 1; Rachel Barkow, *Administering Crime*, 52 *U.C.L.A.* 715, 728-29 (2005); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 *N.Y.U. L. Rev.* 575, 587- 88 (2002) (describing prosecutors' strong lobbying influence in Congress on criminal justice legislation).

<sup>34</sup> See Robinson & Cahill, *supra* note 1, at 637 & n.16 (citing this example in Illinois).

sentencing policy.) All these elements make criminal justice a singular case in legislative process: criminal law expands unusually easily, and its contraction is unusually difficult.

The growth in raw numbers of offenses-on-the-books is undeniable, but this story leaves out much about criminal law's substantive evolution in recent decades, and it conflicts with much of what we know about legislative process. Criminal law has *contracted* in important respects in the last century thanks in large part to legislatures, and small-scale reforms continually occur in contemporary legislatures. That record reveals a picture of criminal law as a topic of much more ordinary fate in legislatures than scholars often suggest. And legislative adjustments are supplemented by prosecutorial and judicial restraints on criminal law's reach that bring criminal law in closer alignment with democratic preferences. Code expansion occurs at the same time, but the combination of these effects is fairly viewed not so much as overcriminalization as an ongoing reformulation of criminal justice policy that roughly tracks changes in majoritarian preferences or social movement influence, overlaid with ordinary amounts (relative to other public policy topics) of legislative imperfection in defining and abiding by those preferences.

## II. Legislatures and Criminal Law

### A. *Criminal law's stability.*

One expects the core of substantive criminal law to remain fairly static. Core crimes against persons, property, and the state are nearly universally criminalized over time. These include varieties of battery, homicide, intimidation, trespass, theft, robbery and fraud as well as bribery, perjury and other conduct that undermines public institutions. But we also expect change outside this core, and to some degree within it, with technological and social change. Treating horse theft especially harshly made sense when horses were more socially valuable; later, we expect to see offenses tailored for auto theft. Offenses must be updated for harassment by telephone and trespass via computer networks. Batteries that were once not criminalized—against spouses and children, for instance—become criminalized with changes in social mores that condemn domestic violence. Odd offenses—against organized cock fighting or dog fighting, say—may be plausible when those practices arise but majorities disapprove. Moreover,

punishment policies vary over time as social beliefs in deterrence, rehabilitation, dignitary interests or alternative sanctions change.<sup>35</sup> In England, all felons once faced the death penalty;<sup>36</sup> many non-murderers formerly did in the United States.

Those shifts notwithstanding, more criminal law change occurs with respect to conduct for which the harm is more diffuse or contestable (especially when the victim is a voluntary participant), and when society has other, clear policy options for addressing disfavored conduct beyond criminal law. Examples here include consensual sex crimes, alcohol policy, gambling regulation, drug usage, sexually explicit media, the time and place of market transactions, and speech against state policies or officials.

These kinds of criminal law reform are not merely sporadic examples scattered over two centuries of history. Contemporary legislatures abolish crimes, reduce punishments, and decline to enact new criminal statutes with some regularity. Of course, the first two moves should be less common than the third; it is always harder for legislatures to pass bills than to fail to do so. Inaction is nonetheless suggestive, because one premise of overcriminalization scholarship is that crime creation and punishment increases have a distinctly easy time overcoming familiar hurdles to legislative success.

*B. The evolution of substantive criminal law.*

A long view of criminal law's evolution reveals a dramatic contraction of its scope, even as it has expanded in some areas. Colonial criminal law had a breadth and severity unimaginable now. A son who disobeyed his parents could face the death penalty; failing to attend church, working on Sundays (or even kissing one's spouse on the Sabbath) were all crimes, as were the familiar range of consensual sexual offenses, bearing children out of wedlock, cursing, or failing to work on other days other than Sunday.<sup>37</sup> The more relevant comparisons, however, are to more recent history. Taking as a baseline the period around the turn of the twentieth century, we find both widespread patterns of decriminalization throughout the last several decades and thereby a strong argument that criminal law's reach into citizens' lives is substantially less than it was less than a century ago, in large part due to legislative action.

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<sup>35</sup> See Garland, *supra* note 6; Whitman, *supra* note 6.

<sup>36</sup> See generally Frank McLynn, *Crime and Punishment in Eighteenth Century England* (1991).

<sup>37</sup> See Lawrence Friedman, *Crime and Punishment in American History* 31-58 (1993).

Consensual sex was a topic of widespread criminalization in the Progressive era around the turn of the twentieth century.<sup>38</sup> In that era every state criminalized sodomy and many criminalized non-marital, consensual sex and adultery, sometimes at the felony level, and even some sexual conduct by married couples.<sup>39</sup> But consensual sex has been an equally active topic for *decriminalization* since the early 1970s, largely by legislative repeal. Illinois repealed its sodomy law in 1962. Connecticut did so in 1967<sup>40</sup> (two years after it unsuccessfully argued for the constitutionality of its criminal ban on contraception distribution in *Griswold v. Connecticut*). Between 1971 and 2001, legislatures in twenty-five states and the District of Columbia followed suit.<sup>41</sup> (In another ten states, state supreme courts held that sodomy statutes violated state constitutions.<sup>42</sup> In none of those states did legislatures succeed in amending state constitutions to allow sodomy prohibitions.) That widespread trend toward decriminalization left only 15 jurisdictions with sodomy statutes on the books at the time *Lawrence v. Texas*<sup>43</sup> declared such statutes unconstitutional. And that trend occurred despite the statutes' rare use against consensual sex (which might generate public disapproval) and despite their utility for prosecutors in sexual assault cases that are difficult to prove under more appropriate rape or assault statutes.<sup>44</sup>

Comparably, Congress, states and localities in the late nineteenth and early twentieth centuries also widely criminalized expressive conduct, especially when

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<sup>38</sup> See William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 328-51 (1999) (collecting early state and local criminal laws regulating sexual conduct, many of which were enacted in the years before and after the turn of the twentieth century); Joanna Grossman *Separated Spouses*, 53 *Stan. L. Rev.* 1613, 1625-26 (2001); see also Robert W. Haney, *Comstockery in America* (1960) (history of the movement for censorship and other morals legislation).

<sup>39</sup> See, Eskridge, *supra* note 38, at 328-37 (listing state sodomy laws); Richard A. Posner & Katharine B. Silbaugh, *A Guide to America's Sex Laws* 65-71 & 98-110 (1996) (listing state sodomy, fornication and adultery laws as of 1996); see, e.g., Va. Code § 18.2-361 (defining oral and anal sex as felonies without regard to marital status of offenders).

<sup>40</sup> Friedman, *supra* note 37, at 345, citing *Laws Conn.* 1967, p.1618.

<sup>41</sup> American Civil Liberties Union, *Crime and Punishment in America: State-by-State Breakdown of Existing Laws and Repeals* (June 2003), available at <http://www.aclu.org/lgbt/crimjustice/11982res20030609.html>. See also W. Eskridge, *supra* note 38, at 328-51 (listing dates of repeal of sodomy and other sexual-conduct crimes); Posner & Silbaugh, *supra* note 39, at 65-71 (listing all states' statute, or lack of statute, governing sodomy). Nevada proved particularly amenable to change in this period: it enacted its sodomy statute in 1977 and repealed it in 1993. See *id.*; 1977 Nev. Stats. p. 1632, Nev. Rev. Stat. §201.193 (sodomy statute enacted in 1977); see also 1993 Nev. Stats. p. 518 (repealing Nev. Rev. Stat. §201.193).

<sup>42</sup> ACLU, *Crime and Punishment in America*, *supra* note 41.

<sup>43</sup> 539 U.S. 558 (2003).

<sup>44</sup> See *Developments in the Law: Sexual Orientation and the Law*, 102 *Harv. L. Rev.* 1508, 1520 (1989).

sexually suggestive (including lewd dress and cross-dressing) but also when overtly political. At the height of World War I, Congress severely criminalized speech critical of the U.S. government with the Espionage Act of 1917 and the Sedition Act of 1918.<sup>45</sup> The statutes made it a felony offense to, among other things, use “disloyal, profane, scurrilous, or abusive language” about the United States government, flag, or armed forces.<sup>46</sup> Yet in the wake of the war’s end, Congress repealed most of the statutes’ provisions.<sup>47</sup> Congress and federal officials also barred explicit or obscene publications. Film and book censorship, mostly focused on obscene and immoral content, was aggressively enforced in many jurisdictions in the 1920s and 1930s through criminal prosecutions as well as civil actions; targets famously included such novels as *Lady Chatterley’s Lover*, *An American Tragedy*, and *Candide*.<sup>48</sup> Those activities were also decriminalized in the latter part of the twentieth century through a mix of legislative and judicial action. Contemporary examples of jurisdictions seeking to regulate obscene and explicit conduct or media—especially outside of child pornography—pale in comparison to such regulation 75 years ago, even though First Amendment doctrine provides some (much diminished) basis for such restrictions.<sup>49</sup>

One finds the same pattern with respect to criminalization of contraception, which was prohibited or restricted by federal law and in a patchwork of states a century ago.<sup>50</sup> (Merely advocating repeal of laws restricting contraception could result in criminal conviction for “breach of the peace.”)<sup>51</sup> But by the time of *Griswold v. Connecticut*, most

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<sup>45</sup> Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 217, 219.

<sup>46</sup> Eugene Debs, among others, was famously sentenced to ten years in prison under these provisions. The statute’s constitutionality was affirmed in *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>47</sup> Portions of the statute remain at 18 U.S.C. §§ 793, 794.

<sup>48</sup> See Paul S. Boyer, *Purity in Print: The Vice-Society Movement and Book Censorship in America* (1968); Nelson, *supra* note 28, at 266-75; Friedman, *supra* note 37, at 350-54 (recounting examples of works that were bases of obscenity prosecutions or bans).

<sup>49</sup> See Friedman, *supra* note 37, at 350-54 (describing changes in obscenity regulation and attributing liberalization to popular culture shifts); W. Eskridge, *supra* note 38, at 338-41 (collecting municipal sex offense ordinances 1850-1950); *id.* at 174-204 (describing evolution of First Amendment jurisprudence that broadened conceptions of protected liberty and autonomy).

<sup>50</sup> See Comment, *The History and Future of the Legal Battle Over Birth Control*, 39 Cornell L.Q. 275, 275-79 (1964) (collecting state and federal laws restricting contraception devices); Comstock Act, 18 U.S.C. §§ 1461-62 (1958), 38 Stat. 194 (1913), 19 U.S.C. § 1305 (1958) (criminalizing distribution of obscene materials and distribution of contraceptive devices in federal enclaves and through the mail).

<sup>51</sup> See *People v. Swasey*, 180 N.Y.S. 629 (Ct. Gen. Sessions N.Y. County 1920) (conviction for advocating repeal of anti-contraception laws overturned on other grounds). See also *People v. Morris*, 18 N.Y.S. 448 (App. Div. 2d Dept. 1940) (conviction for distributing literature on venereal disease cures sustained);

had been repealed; only Massachusetts restricted contraceptive use with anything like the severity of Connecticut's criminal statute barring use and distribution of contraceptives even to married couples.<sup>52</sup> A comparable story describes the history of criminal miscegenation statutes. Interracial marriage was criminalized in at least thirty states at the midpoint of the twentieth century. In the fifteen years before the Supreme Court declared such statutes unconstitutional in *Loving v. Virginia*,<sup>53</sup> half of those states repealed their miscegenation bans, a trend the Court noted in support of its decision.<sup>54</sup> (We will note this same pattern below with respect to restrictions on the use of capital punishment: state legislative reform led the way for constitutional interpretation restricting punishment.)<sup>55</sup>

Decriminalization in these areas manifests a trend in public culture that legislatures (and courts) often reflect through law reform. We see the same pattern in gaming regulation, which is regulated by a mix of criminal and civil statutes.<sup>56</sup> Nevada prohibited all gambling in 1909; it repealed that prohibition in 1931.<sup>57</sup> Others followed to lesser degrees. In the 1930s twenty-one states legalized race tracks and betting on races. In the 1940s and '50s, most states decriminalized pari-mutuel betting and low-stakes charity gaming. By 1996, forty states allowed pari-mutuel betting, thirty-eight states had state lotteries, and twenty-six had casinos.<sup>58</sup> Gambling is the kind of activity that standard theories of legislative process would predict to be a likely candidate for decriminalization. Strong interest groups exist to lobby for legalized gambling, and states stand to gain revenue from gaming activity. Gambling is voluntary, consensual conduct,

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People v. Vickers, 19 N.Y.S. 165 (App. Div. 2d Dept. 1940) (conviction for lewd dancing sustained). For a general survey and discussion, see Nelson, *supra* note 28.

<sup>52</sup> See Comment, *supra* note 50, at 277-79 (summarizing status of state contraception laws by the early 1960s); *Griswold v. Connecticut*, Appellant's Brief, at n.23 (noting contraceptive devices can be legally used and prescribed in 48 of 50 states).

<sup>53</sup> 388 U.S. 1 (1967).

<sup>54</sup> *Id.* at 6 & n.5 (listing states that abolished miscegenation crimes); see Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189 (1966) (only 16 states still had antimiscegenation laws in 1967).

<sup>55</sup> See *infra* notes \_\_\_ - \_\_\_ (discussing *Roper*, *Atkins* and *Coker* as well as earlier legislative constrictions of death penalty eligibility).

<sup>56</sup> See I. Nelson Rose, *Gambling and the Law: A Guide for Internet Gambling* (2001) available at <http://www.gamblingandthelaw.com/InternetAdsGuidelines.html> (describing civil and criminal regulations governing gambling promotion).

<sup>57</sup> American Gaming Association, [http://www.americangaming.org/Industry/factsheets/general\\_info\\_detail.cfv?id=12](http://www.americangaming.org/Industry/factsheets/general_info_detail.cfv?id=12)

<sup>58</sup> See *id.*

and government has other means to address the core criminal harms associated with gambling, such as control of gaming operations by organized crime groups.

National alcohol prohibition, instituted in 1919 with the passage of the Nineteenth Amendment and the Volstead Act (along with similar state statutes criminalizing alcohol distribution), was a sweeping criminalization that followed years of local moves to criminalize alcohol distribution.<sup>59</sup> It was followed, of course, by a sweeping legislative decriminalization in 1933 with the passage of the Twenty-First Amendment.<sup>60</sup> That repeal left alcohol regulation again as a state and local decision, and the trend since the 1930s has been a steady decline in criminalization, in most respects,<sup>61</sup> of alcohol sales and use.

One component of post-Prohibition alcohol law is “blue laws” that restrict alcohol sales, often along with other retail activity, and that are often enforced with low-level criminal penalties.<sup>62</sup> The trend here is similar, and for similar reasons. Legislative action on laws governing Sunday alcohol and retail sales have been uniformly in one direction in recent years: deregulation and decriminalization. Here again we find powerful interest groups—alcohol manufacturers and distributors and retail stores—lobbying on the side of decriminalization.<sup>63</sup> Another class of low-level crimes that some legislatures abandoned over the last two decades is minor traffic offenses; several states have rewritten those offenses as civil infractions instead of misdemeanors,<sup>64</sup> despite the Uniform Vehicle

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<sup>59</sup> For an overview, see Friedman, *supra* note 37, at 339-41.

<sup>60</sup> For a history of Prohibition, see David Musto, *Drugs in America: A Documentary History* (2002).

<sup>61</sup> The prominent exceptions are probably increases in the legal drinking age to 21 and more severe drunk driving sanctions. Both are discussed below at \_\_\_\_.

<sup>62</sup> See, e.g., Va. Code §§ 18.2-341, -342, -343 (criminal components of “blue laws” repealed in 2004); N.J. Stat. Ann. § 2A:171-1.1 9 (criminalizing certain Sunday sales).

<sup>63</sup> See Distilled Spirits Council of the U.S., Sunday Sales, at [http://www.discus.org/govt\\_affairs/sunday/](http://www.discus.org/govt_affairs/sunday/) (listing states in recent years that have relaxed restrictions on Sunday alcohol sales); Clifford J. Levy, Drink, Don’t Drink. Drink, Don’t Drink, N.Y. Times, Oct. 9, 2005 (describing recent alcohol law reforms in several states including Kansas); Associated Press, Kansas Liquor Laws May Soon Mirror Most of Nation, May 5, 2005 (noting that since 2002, 11 states have repealed Sunday bans on liquor sales), available at <http://www.firstamendmentcenter.org/news.aspx?id=15249>; see also David N. Laband & Deborah H. Leinbuch, Blue Laws: The History, Economics and Politics of Sunday-Closing Laws, (1987) (recounting history and status of blue laws in all states as of 1987).

<sup>64</sup> See National Highway Traffic Safety Administration, Summary of State Speed Laws (5<sup>th</sup> ed. 2001) (collecting state laws, penalties and procedures on speeding and related traffic offenses such as reckless driving and racing). See, e.g., Cal. Veh. Code §§ 22351, 40000.1, 42001(a) (traffic offenses denoted noncriminal infractions); Fla. Code §§ 316.187(3), 316.189(4), 316.1895(9), 316.655, 318.13(3), 318.14(1) (speed law violations denoted noncriminal infractions); §625 ILCS 5/16-104 (Illinois speeding violations denoted noncriminal petty offenses); Va. Code Ann. §§ 46.2-113, 46.2-878.1, 46.2-878.2 (speeding law

Code's recommendation.<sup>65</sup> This is surely an example of decriminalization with broad popular support because it involves offenses that most people commit.<sup>66</sup>

More serious core crimes are also subject to reform or abolition. Significantly, there is a very strong trend of decriminalizing certain weapons offenses. Over the last two decades, most states have abolished crimes of carrying concealed weapons, which often carried felony penalties for repeat offenses. Currently, only four states still criminalize carrying concealed firearms and other weapons.<sup>67</sup> The reason for this trend is not hard to discern: the National Rifle Association has led a concerted effort to convince every state legislature to change the carrying of concealed weapons from a crime to a statutory right. Other groups have opposed these reforms, and public opinion has been roughly split in many jurisdictions, yet the NRA's campaign has met with consistent success.<sup>68</sup> Similar interest-group dynamics explain the decriminalization that occurred when Congress failed to reauthorize the federal assault weapons ban in 2004.<sup>69</sup>

The same interest groups also drive legislatures to (modestly) decriminalize other conduct through expansion of defenses. In 2005, Florida enacted a statute—popularly labeled the “Stand Your Ground” law—that eliminated any duty for one employing force in self-defense to retreat even from public places instead of using force when it is safe to do so.<sup>70</sup> That change makes legal what was once a criminal use of force. This reform is less meaningful for present purposes but worth noting. It shows again how powerful interest groups sometimes lobby for decriminalization; the NRA pushed the Florida law

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violations denoted noncriminal infractions). For a bibliography on decriminalization of traffic offenses, see National Center for State Courts, *CourTopics: Traffic Offenses*, available at <http://www.ncsconline.org>.

<sup>65</sup> National Committee on Uniform Traffic Laws and Ordinances, *Uniform Vehicle Code* (revised 2000), available at <http://www.nhtsa.dot.gov/people/injury/enforce/speedlaws501/uvcspeep.pdf>.

<sup>66</sup> See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 *Harv. L. Rev.* 780 (2006) (arguing legislatures respond to popular preferences on crimes that affect large segments of the populace).

<sup>67</sup> See Neb. Stat. § 28-1202 (2005); Kan. Stat. § 21-4201 (2005); 720 Ill. Comp. Stat. 5/24-1 (2005); Wisc. Stat. § 941.23 (2005). Those making the case for overcriminalization can cite Illinois's statute, which makes it a misdemeanor to carry a “slung-shot.”

<sup>68</sup> For a detailed of this reform process and interest groups' roles in Missouri, as well as a history of this reform trend more broadly, see William T. Horner, *Showdown in the Show-Me State: The Fight over Conceal-and-Carry Gun Laws in Missouri* (2005); see *id.* at 2 & 7 (noting that a small majority of Missouri voters rejected ballot referendum to legalize concealed weapons, and noting public opinion surveys show slight majorities in many states oppose decriminalization of concealed weapons). See also <http://www.nraila.org> (National Rifle Association website).

<sup>69</sup> See 18 U.S.C. § 922 (codifying Title XI of the Federal Violent Crime Control and Law Enforcement Act of 1994, which expired in Sept. 2004).

<sup>70</sup> Fla. Stat. § 776.013 (2005). For an earlier, similar statute, see Colo. Rev. Stat. § 18-1-704.5(2).

and plans the same campaign in other states.<sup>71</sup> It also demonstrates how criminal liability can contract even for violent crimes when the debate is framed in a politically appealing way.

On this latter point, consider how legislatures have explicitly decriminalized other core violent conduct. Intra-family assault and battery was the subject of decriminalization for a period in the mid-twentieth century. In 1962, New York modeled a trend of that period among many states when its legislature passed a statute allowing domestic violence victims to bring civil actions in family court rather than filing criminal complaints (the act *required* criminal courts to transfer proceedings to the family court), so that judicial responses to domestic violence would focus on reconciliation and treatment rather than criminal punishment.<sup>72</sup> Through the 1960s and 1970s, courts used the statute to transfer the full range of violent conduct to a civil forum—burglary, weapons, harassment and assault-with-intent-to-commit-incest charges were handled civilly.<sup>73</sup> The pendulum has swung the other way more recently; we mostly treat domestic violence again as a criminal matter. But the history nonetheless reveals a pendulum rather than a one-way ratchet: criminal law ebbs and flows in response to public opinion and social movement pressure.

On top of such broad trends, low-level, modest changes contracting the scope of criminal codes appear not to be uncommon. In 2004, Virginia abolished clearly wrongful but rarely prosecuted theft and fraud offenses such as conversion of military property, sale of goods of another with failure to pay over proceeds, and overvaluation of property for purposes of influencing lending institution<sup>74</sup> (as well as sillier ones such as the crime of jumping from railroad cars).<sup>75</sup> In 2003, Alabama redefined some felony thefts as

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<sup>71</sup> See NRA Fact Sheet: Fortifying the Right to Self-Defense, at <http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=188>; see also Anthony Sebok, Florida's New Stand Your Ground Law: Why It's More Extreme, at <http://writ.news.findlaw.com/sebok/20050502.html>.

<sup>72</sup> See Family Court Act, 1962 N.Y. Laws 686; Nelson, *supra* note 28, at 288-90 (discussing New York's Family Court Act as decriminalization of domestic violence).

<sup>73</sup> *People v. Williams*, 300 N.Y.S.2d 89 (Ct. App. 1969) (burglary and weapons); *People v. McCarthy*, 398 N.Y.S.2d 585 (App. Div. 2d Dept. 1977) (harassment); *People v. Nuernbereger*, 303 N.Y.S.2d 74 (Ct. App. 1969) (assault with intent to commit incest); Nelson, *supra* note 28, at 289-91.

<sup>74</sup> Virginia State Crime Commission, *The Reorganization and Restructuring of Title 18.2* (House Doc. 15, 2004), at <http://leg2.state.va.us/dls/h&sdocs.nsf/0/efb53246fcf5501a85256ea20046e98f?OpenDocument>.

<sup>75</sup> Va. Code § 19.2-161 (repealed 2004).

misdemeanors by raising the amount required to make a theft punishable as a felony;<sup>76</sup> Colorado raised amounts for a range of theft and fraud offenses a few years earlier (changes that make a rough effort at adjusting crime definitions for inflation).<sup>77</sup> Colorado also abolished most loitering offenses (preserving only a ban on loitering on school grounds), repealed crimes of circulating political material without identifying the sponsor, downgraded the status of a harassment-by-stalking offense and reduced penalties for some drug offenders.<sup>78</sup> A few years earlier, many states lowered the age of consent for sex, thereby abolishing the crime of statutory rape when it involved older teenagers.<sup>79</sup>

Even drug crimes, a dominant category on criminal dockets and the subject of expansive criminal legislation and sentencing increases in recent times, have been the subject of some reform. In the last decade, voters in ten states endorsed ballot initiatives or referenda decriminalizing the use of marijuana for medicinal purposes.<sup>80</sup> The effect of those changes is constrained because federal law continues to criminalize all marijuana use, and federal officials continue to enforce these federal crimes despite state law changes and local public sentiment (a telling example of how varying structures of democratic institutions can yield different outcomes from the same popular preferences). In the wake of the Supreme Court's decision in *Raich v. Gonzales*,<sup>81</sup> state decriminalization is largely symbolic; we may see fewer such reforms for that reason. But the reforms to date nonetheless demonstrate notable democratic reform for criminal law, and other examples will have real effects. Voters approved 17 of 19 ballot initiatives between 1996 and 2002 that either decriminalized some marijuana use, reduced drug-possession punishments or mandated related reforms such as limiting asset

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<sup>76</sup> See Ala. Code § 13A-8-2 through -5 (2005); Ala. Act 2003-355, §1.

<sup>77</sup> See Colo. Rev. Stat. §§ 18-4-401, -402, -410, -501; 18-5-205, -206, -702; Colo. H.B. 98-1160 (effective July 1998) (raising amounts for fraud crimes).

<sup>78</sup> See Colo. H.B. 97-1077 (effective July 1997) (repealing, inter alia, Colo. Rev. Stat. §§ 18-9-112(a)-(c) & (e) (loitering crimes), and 1-3-108 (campaign literature), 18-1-106(3)(B)(IV) (harassment); Colo. Rev. Stat. § 18-18-405 was revised to reduce drug penalties).

<sup>79</sup> See Friedman, *supra* note 37, at 332-34 (recounting increases and decreases in age of consent for statutory rape in various states).

<sup>80</sup> See Bill Piper, et al., *State of the States: Drug Policy Reforms 1996-2002*, at 42 (Drug Policy Alliance pub. 2003) (listing state law changes on medical marijuana and other drug policies).

<sup>81</sup> See *Raich v. Gonzales*, 545 U.S. \_\_\_ (2005).

forfeiture or directing its proceeds to drug treatment.<sup>82</sup> That public sentiment also supports moderate legislative reform of drug crimes, such as Colorado's.

The same political dynamics that purportedly drive overcriminalization also should explain laws that increase punishment severity. Yet while legislatures have dramatically increased prison sentences in recent decades, there is a modest countertrend: they have also proven capable of reducing mandatory sentences and otherwise reforming punishment policy in the direction of leniency.<sup>83</sup> More than half the states have reformed sentences in the direction of leniency in the last several years. They did so by various means—often by eliminating mandatory minimums, increasing judicial discretion in sentencing, or replacing incarceration with treatment for some drug offenders.<sup>84</sup> In 2004 and 2005, the New York legislature passed successive statutes that reduced severe mandatory sentencing requirements required by the state's 1973 "Rockefeller" drug laws. The first statute reduced mandatory punishment levels, and the reach of those punishments, for more serious drug offenders; it also increased early-release possibilities for some classes of previously sentenced offenders as well as future offenders and expanded drug treatment options that are prerequisites for sentence reductions.<sup>85</sup> The second statute extended those reforms for less serious felony drug offenders.<sup>86</sup> Those

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<sup>82</sup> Piper et al., *supra* note 80, at 5, 9-10, 37-41 (noting 12 states reduced drug punishments in 2001-02 and 10 states reformed asset forfeiture laws between 1996 and 2002).

<sup>83</sup> Rachel Barkow persuasively describes these trends as a function of budget constraints on state legislatures, for whom prison costs are a significant expense. See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 *Colum. L. Rev.* 1276, 1285-86 (2005) (discussing this trend of state sentencing reductions and citing sources); *id.* at 1286-1314 (arguing state budget constraints explain state sentencing reform and such cost considerations serve a deliberation-forcing function absent in federal debates).

<sup>84</sup> See Piper et al., *supra* note 80, at 4-5 & 39-40 (listing ten states that reduced sentences, mostly for drug crimes, in 2001 and 2002); Donna Lyons, *State Crime Legislation in 2004* (National Conf. of State Legislatures 2005) (listing 16 states that have reduced drug sentences by increasing treatment options and eliminating mandatory minimums and increasing parole opportunities); Donna Lyons, *State Crime Legislation in 2003* (National Conf. of State Legislatures 2004) (listing similar sentence-reduction legislation several states including other states); Donna Lyons, *State Crime Legislation in 2002* (National Conf. of State Legislatures 2003) (recounting similar reforms). For links to state legislation enacting reforms, see the National Conference of State Legislatures website at [www.ncsl.org/public/leglinks/cfm](http://www.ncsl.org/public/leglinks/cfm).

<sup>85</sup> See Ch. 738, N.Y. Laws (2004); see also Al O'Connor, *A Summary of the Rockefeller Drug Law Reform Legislation*, 21 *Public Defense Backup Center Report* 15-18 (Sept.-Dec. 2004), available at [http://www.nysda.org/hot\\_topics/rockefeller\\_drug\\_laws/rockefeller\\_drug\\_laws.html](http://www.nysda.org/hot_topics/rockefeller_drug_laws/rockefeller_drug_laws.html).

<sup>86</sup> Ch. 643, N.Y. Laws (2005); see also Al O'Connor, *A Summary of the 2005 Rockefeller Drug Law Reform Legislation*, 22 *Public Defense Backup Center Report* 13-15 (Aug.-Sept. 2005), available at [http://www.nysda.org/hot\\_topics/rockefeller\\_drug\\_laws/rockefeller\\_drug\\_laws.html](http://www.nysda.org/hot_topics/rockefeller_drug_laws/rockefeller_drug_laws.html)

reforms are not unique. In 1998 Michigan reformed its mandatory life-without-parole statute for large-quantity drug dealers.<sup>87</sup>

Legislatures have also limited the scope of the death penalty. Between 1981 and 2004, thirteen states enacted statutes that eliminated juvenile offenders from capital punishment eligibility (and Washington state did so by judicial decision).<sup>88</sup> Between 1986 and 2001, eighteen states enacted statutes removing mentally retarded offenders from death penalty eligibility; bills to do the same passed in one or both houses of other state legislatures but failed to become law.<sup>89</sup> The Supreme Court cited these consistent legislative trends as evidence of a national consensus on capital punishment limitations that the Court used to support constitutional rules that barred juveniles and the mentally retarded from death eligibility.<sup>90</sup> Despite increasing use of capital punishment in the last twenty years,<sup>91</sup> these restrictions continued a tradition of restricting the scope of capital punishment eligibility.<sup>92</sup> In the wake of *Furman v. Georgia* in the early 1970s, only three states that reinstated the death penalty applied it beyond murder to rape. Before *Furman*, that number had gradually declined, through legislative reform, to sixteen.<sup>93</sup> All those changes are, in a real sense, modest shifts around the edges of death penalty

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<sup>87</sup> Id. at 38 (Michigan House Bill 4065). For description of such trends in Minnesota, see Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, 32 Crime & Justice: A Review of Research \_\_ (2004) (noting “punitive trend” in Minnesota policy has slowed since 1993).

<sup>88</sup> See Victor Streib, Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, Jan. 11973 to Feb. 28, 2005, at 7 (listing states that have raised minimum age for death penalty since 1981); *Roper v. Simmons*, 543 U.S. 551 (2005) (Appendix A lists state statutes that raise minimum age for death penalty to 18). These reductions in death eligibility occurred at a time when states frequently expanded punishment for juvenile criminals in other respects. See H. Snyder & M. Sickmund, National Center for Juvenile Justice, Juvenile Offenders and Victims: 1999 National Report 89, 133 (Sept. 1999).

<sup>89</sup> See *Atkins v. Virginia*, 536 U.S. 304, 313-16 & nn.9-18 (2002) (listing states that removed mentally retarded offenders from capital punishment eligibility).

<sup>90</sup> *Roper v. Simmons*, 543 U.S. 551 (2005) (barring execution of the mentally retarded); *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring execution of offenders under age 18).

<sup>91</sup> A few jurisdictions such as New York and the federal system reinstated capital punishment in the last two decades for some murder offenses, and the rate of executions rose between 1981 and 1999 after a long, steady decline. See Bureau of Justice Statistics, Capital Punishment 2003 (Nov. 2004) NCJ 206627.

<sup>92</sup> The Anglo-American history of capital punishment is one of steady contraction of the crimes punishable by death. England long had mandatory death penalty for all felonies (though with moderating mechanisms such as benefit of clergy). See McLynn, *supra* note 36. The United States initially had the death penalty for all forms of murder (and other serious felonies), until Pennsylvania in 1794 provided a model, copied widely, for separately defining only the worst murders as death eligible. In 1838, Tennessee was the first to adopt a discretionary death penalty statute; 23 states followed by 1900 and all states by 1962. See Louis J. Palmer Jr., *Encyclopedia of Capital Punishment in the United States* 425-26 (2001). By 1970s, capital punishment was barred for all crimes but a subset of murder.

<sup>93</sup> See *Coker v. Georgia*, 433 U.S. 584 (1977) (holding capital punishment unconstitutional for rape offenses and citing the decline of states use of the death penalty for rape as one rationale).

administration. But they are also examples of legislatures overcoming inertia to vote affirmatively to limit capital punishment in states where voters support the penalty.

All of this suggests that, despite scholars' worries, accretion of criminal statutes in recent decades does not mean we are moving closer to a the day that our state criminal codes makes everyone a felon; legislatures can make major as well as minor reforms that contract criminal law without public opposition. The worry about the scope of criminal law touching widely in ordinary people's lives was as legitimate—probably much more so—75 or 100 years ago, when vice, speech/expression, explicit media and lifestyle crimes (including bans on contraception and use of profanity) were at their peak.<sup>94</sup> Prohibition made criminals of many Americans, and recall that Prohibition continued locally in many areas long past 1933. Hold aside colonial-era comparisons that come from a pre-constitutional culture, and hold aside as well Jim Crow laws that made criminals of African Americans in many parts of the country for innocuous conduct—and would have done so more often had those laws<sup>95</sup> and the social practices supporting them been less effective in achieving high compliance.<sup>96</sup> Criminal law has substantially contracted in all these realms of private, social and morals-related conduct, even as it expanded in other dimensions, such as regulatory crimes. Criminal law today often punishes too harshly, but criminal law's *practical* scope for most people—its regulation of most citizens' lives (as opposed to its reach in white-collar and corporate contexts) is narrower than a century ago. The problem of punishing conduct that is widely viewed as wholly innocent is fairly minimal in practice. Because of criminal law's multiple levels of democratic responsiveness, those instances are isolated rather than systemic, and they are not plausibly worse than a century ago.

### C. *International Comparisons*

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<sup>94</sup> See Boyer, *supra* note 48 (history of vice-societies that successfully pushed for legislation and enforcement banning obscene books and movies); Nelson, *supra* note 28, at 273 & nn.34, 37 (noting criminal prosecution of book sellers and of theaters for showing obscene movies); *id.* at 291-99 (describing movie/book censorship that gradually loosened by the 1960s); Friedman, *supra* note 37, at 350-54.

<sup>95</sup> See, e.g., Friedman, *supra* note 37, at 85-97 (describing how “criminal provisions were a vital part” of the southern, post-Civil War “Black Codes” and included crimes for failing to work, for “enticing” a worker away from his job, and for quitting a job while under contract to work).

<sup>96</sup> For a short overview of vigilante activity used especially to enforce racial social codes, see Friedman, *supra* note 37, at 179-92.

As a final reference point, note there is little evidence American criminal law is substantively broader than codes in other comparable democracies, though American incarceration rates are higher. Comparative criminal scholarship focuses mostly on procedure and sentencing; what comparative scholarship exists on substantive law concentrates on “general part” issues rather than specific crime definitions. Where scholars have addressed this question, however—especially regulation of expressive and offensive conduct—we see other Western democracies criminalize conduct that American jurisdictions do not. Germany criminalizes not only offensive or provocative language but the expression of certain ideas, such as insults to religious denominations or minority groups, arguments against democratic government, and denial of the Holocaust.<sup>97</sup> The last is also a crime in many democracies including Israel, Austria, Belgium, Switzerland, and the Netherlands; France criminalizes public denial of crimes against humanity, including minimizing the number of concentration camp victims.<sup>98</sup> Most of those laws were enacted in the 1980s and 1990s to supplement existing criminal laws against racial discrimination.<sup>99</sup> Canada also criminalizes (far more broadly than American hate-crimes offenses) core political speech when it contains expressions of racial hatred or bias that threaten equality, dignity and multiculturalism norms, and it is also more restrictive on pornography distribution.<sup>100</sup>

Germany, like other European nations, also has expansive criminal law against “insult”—offenses that protect personal dignity and respect and that punish expressions such as “jerk,” use of the informal pronoun for “you,” and gesturing insultingly by giving “the finger” (regularly enforced with fines over \$1,100).<sup>101</sup> European nations also legally

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<sup>97</sup> Ronald J. Krotoszynski Jr. *The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech* 93-130 (2006) (describing German law restricting speech); Tatjana Hornle, *Offensive Behavior and German Criminal Law*, 5 *Buff. Crim. L. Rev.* 255 (2002) (describing German crimes of offensive conduct including expression of forbidden ideas or opinions).

<sup>98</sup> See Bert Swart, *Denying Shoah, in Personal Autonomy, the Private Sphere and the Criminal Law: A Comparative Study* 161, 166-67 & n.19 (Peter Alldridge & Chrisje Brants eds. 2001); James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *Yale L.J.* 1279, 1359 (2000).

<sup>99</sup> Swart, *supra* note 98, at 162-67.

<sup>100</sup> See Krotoszynski, *supra* note 97, at 52-92. Among other cases, Krotoszynski discusses *Zundel v. R.*, 3 S.C.R. 731, 743 (1992), in which the majority noted that although Parliament is free “to criminalize the dissemination of racial slurs and hate propaganda,” those criminal statutes must be drafted so that they do not “stifle a broad range of legitimate and valuable speech.”

<sup>101</sup> Whitman, *supra* note 98, at 1296-1304. Interestingly, German scholars, like their American counterparts, urge the contraction criminal codes so as not to criminalize such conduct, but without success. *Id.* at 1301-02.

protect privacy in ways American law does not; in France it is a crime to post nude pictures of another on the internet, and press publication of facts about another's private life can be a *contravention*—a petty criminal offense.<sup>102</sup>

Comparative literature is thinner on other substantive crime topics, but there are not indicia of notably narrower codes on other issues. The general scope of drug prohibition doesn't seem to be notably narrower in other western democracies; even the Netherlands, at the libertarian extreme with a code that long eschewed moralism as a basis for offense definitions, criminalizes drugs in its code but functionally decriminalizes through non-enforcement.<sup>103</sup> (The same approach characterizes Dutch law on euthanasia.)<sup>104</sup> Local enforcement patterns might show much divergence across jurisdictions, but coordinated international efforts on drug enforcement are one indicator of a widespread commitment to fight large-scale narcotics distribution with criminal law.<sup>105</sup> The English criminalize theft of trade secrets, postal or telephone harassment, electronic surveillance, and disclosure of confidential information.<sup>106</sup> Many European countries have expanded crimes and penalties for private pornography possession, especially for images of children.<sup>107</sup> More comparative work might find other democracies have fewer trivial or redundant offenses or narrower offense definitions for fraud. But from these glimpses, at least, there is little basis for a claim that American criminal law is overbroad compared to other western nations.

#### *D. Legislative inaction.*

Finally, consider the record of legislative inaction. Failure is the norm for legislative proposals, because the legislative process is rife with vetogates<sup>108</sup>—procedural

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<sup>102</sup> James Q. Whitman, Two Western Cultures of Privacy: Dignity v. Liberty, 113 Yale L.J. 1151, 1178, 1199 (2004).

<sup>103</sup> See Alldridge & Brandts, supra note 98, at 17.

<sup>104</sup> Constantijn Kelk, Consent in Dutch Criminal Law, in Alldridge & Brandts, supra note 98, at 206, 214-19 (describing euthanasia policy and the Dutch tradition of a non-moralizing criminal code).

<sup>105</sup> See Drug Policy Alliance, Drug Policy Around the World, at <http://www.drugpolicy.org/global/drugtraffick/>.

<sup>106</sup> Peter Alldridge, The Public, the Private, and the Significance of Payments, in Alldridge & Brants, supra note 98, at 83 (citing statutes).

<sup>107</sup> See Kelk, supra note 104, at 211 (describing Dutch law).

<sup>108</sup> William Eskridge, Philip Frickey & Elizabeth Garrett, Legislation and Statutory Interpretation 68 (2000); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation, 80 Geo. L.J. 705 (1992) (discussing concept of vetogates); see also Stuntz, supra note 1, at 549 & 554 (explaining why “many proposed criminal statutes do not pass”).

points at which bills can be blocked. Many vetogates provide occasions to kill a proposal without legislators formally voting on the bill. If criminal law has unusual advantages in overcoming these hurdles, it must somehow finesse the multiple opportunities legislators have to halt a bill's progress through logrolling, creation of new coalitions and other strategic behavior that imperils typical legislation.<sup>109</sup> This is the argument, often made implicitly, by overcriminalization scholars: coalitions for crime creation are easy to form and unusually stable, in part because the imbalance of interest group power, lopsided public sentiment, and political salience of crime bills help broaden and stabilize these coalitions.<sup>110</sup> The commonly employed image is that the criminal law legislative process is a "one way ratchet" for increasing substantive law's scope and sentencing severity.<sup>111</sup>

There is some evidence for this, particularly in Congress.<sup>112</sup> Nonetheless, examples abound of criminal law and sentencing bills failing even when they fit the paradigm of easy-to-pass proposals.<sup>113</sup> Consider two examples from the first session of the 109<sup>th</sup> Congress. The Methamphetamine Epidemic Elimination Act, H.B. 3889, originally contained provisions to increase mandatory minimum sentences for methamphetamine possession offenses. In November 2005, the House Judiciary Committee unanimously approved an amendment, sponsored by the committee's Republican chairman, to eliminate those sentencing provisions from the bill.<sup>114</sup> The

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<sup>109</sup> See Eskridge, Frickey & Garrett, *supra* note 108, at 68.

<sup>110</sup> See Luna, *supra* note 10; at 719; see also Barkow, *supra* note 33, at 727-35 (describing politics of sentencing policy); Stuntz, *supra* note 1.

<sup>111</sup> See Luna, *supra* note 10, at 719 (arguing "the escalation of 'law and order' politics has created a one-way ratchet in U.S. governance, churning out an ever-increasing number of crimes and severity of punishment"); Stuntz, *supra* note 1, at 509 (asking "How did criminal law come to be a one-way ratchet that makes an ever larger slice of the population felons ...?"); *id.* at 547; Beale, *supra* note 10, at 773 (explaining factors that lead to a "one way ratchet toward the enactment of additional crimes and harsher penalties"); Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 *Stan. L. Rev.* 293, 301 (2005) ("legislative adjustments to federal sentencing policy have been a one-way ratchet for twenty years").

<sup>112</sup> See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *Yale L.J.* 331 (1991) (finding that congressional overrides of Supreme Court statutory interpretations that go against the government in criminal cases are more successful than attempts to overturn other statutory interpretations).

<sup>113</sup> Scholars occasionally cite *failure* of bills as examples of legislators' tendency to overcriminalize. See, e.g., Luna, *supra* note 10, at 705-06 & n.16 (citing H.R.834, 108<sup>th</sup> Cong. § 305 (2003) and H.R.2962, 108<sup>th</sup> Cong. § 2 (2003)) (both provisions proposed criminal liability for promoters of social events at which promoters should have known drugs would be used).

<sup>114</sup> See Famm.org.

Senate counterpart to this bill contains no provisions to increase mandatory sentences.<sup>115</sup> On the other hand, the House fairly quickly passed H.B. 1279, the Gang Prevention and Effective Deterrence Act, which created mandatory minimum sentences for juvenile offenders in gang-related crimes. The Senate committee, however, failed to act on its counterpart bill, S. 155, in the first session. That may be in part due to lobbying efforts by groups that opposed the sentencing provisions. Those groups included not only the ABA, the Judicial Conference (familiar, if often weak, opponents of mandatory-sentencing laws) and Families Against Mandatory Minimums, but also the U.S. Chamber of Commerce, National Association of Manufacturers and the American Federation of Independent Businesses.<sup>116</sup>

As a random state example, Virginia’s legislature in 2005 let die in committee bills that would criminalize the creation of a secret compartment in a car to transport drugs, interference with a phone call with the intent to prevent a victim from summoning emergency assistance, assault of a state judge and use of fake discount coupons, as well as penalty increases for injuring animals or committing murder pursuant to gang orders.<sup>117</sup> Since most bills fail, these examples prove little, except that bills for politically appealing offenses do not necessarily “sail through the legislature”<sup>118</sup> much more readily than bills on other many other topics, and legislators can stop such proposals often without recorded votes against them.

More systematic data is hard to generate. No comprehensive empirical analysis exists on the success rate of criminal law bills in state legislatures or Congress (nor apparently on other policy topics).<sup>119</sup> We nonetheless have some data that work as rough proxies and suggest criminal law proposals do not have distinctive success rates in

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<sup>115</sup> Id.

<sup>116</sup> See [http://famm.org/si\\_federal\\_sentencing\\_gangbill05.htm](http://famm.org/si_federal_sentencing_gangbill05.htm) (copies of letters to Senate Committee opposing S.155 that are signed by these groups).

<sup>117</sup> See HB 170, HB 1502, HB 1618, HB 1748, HB 646, HB 1800 (2005 session) (histories available on the Virginia Legislative Information System, Bill Subject Index, under the Crimes and Offenses heading at <http://leg1.state.va.us/cgi-bin/legp504.exe?000+sbj+SBJ>).

<sup>118</sup> See Robinson & Cahill, Degradation, *supra* note 1, at 634, though this claim is common in criminal law literature.

<sup>119</sup> The task would be formidable. While all legislatures have legislation databases, most do not organize them by subject matter. Most can be searched, but search terms (such as “crime,” “sentence,” “felony,” “misdemeanor,” etc.) don’t yield comprehensive lists of statutes creating, modifying or abolishing offenses. Further, one needs to sort bills that add crimes and penalties from those that reform offense definitions, decriminalize or cut punishments, and also sort bills that address substantially the same topic.

American legislatures. We have solid data on the percentage of bills (on all topics) that become law in every legislature. Passage rates vary greatly. In Congress, only about five percent of bills become law. The percentage climbs substantially for state legislatures, though with much variation: from 5.4 percent in Minnesota in a typical year and 15.2 in Illinois to nearly 40 percent in California and over 60 percent in Arkansas, North Dakota and Utah.<sup>120</sup>

Further, a few states have databases that categorize both bills and enactments by subject matter. Data from those sources are suggestive. In Texas, for the 1997 general session, the overall percentage of bills that were enacted was 26.7 percent.<sup>121</sup> Searching by four substantive criminal law categories,<sup>122</sup> it turns out that only 19.75 percent of bills in those categories passed both houses.<sup>123</sup> Figures in Utah are similar. In the 1997 legislative session, the overall success rate of bills was 58.9 percent. For bills in the “criminal code” category,<sup>124</sup> however, the passage rate was only 47.5 percent.<sup>125</sup> And in Pennsylvania’s 1995-96 session only 7.38 percent of bills categorized under “crimes and offenses” were enacted; the overall passage rate of all bills in that body that year was 7.9 percent.<sup>126</sup>

To be sure, these data are only suggestive. Criminal bills are not sorted by the substantive content and thus the data may include bills that both create or abolish crimes, that increase or decrease penalties, or that address the same issue; some bills may pass in a future session; a multi-topic bill may pass while single-topic bills fail.<sup>127</sup> Legislators may gain credit for merely introducing bills that don’t pass, which still reflects an incentive toward criminalization. But these measures are as suggestive as raw word- or

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<sup>120</sup> See Peverill Squire & Keith E. Hamm, 101 *Chambers: Congress, State Legislatures and the Future of Legislative Studies* 117 tbl. 4-3 (2005).

<sup>121</sup> *Id.* at 117; 33 *Book of the States* at 109.

<sup>122</sup> I used four search categories in the Texas legislature’s database: crimes—drugs; crimes—against morals; crimes—against persons; crimes—against property. See [www.capitol.state.tx.us/tlo/billsrch/criteria.htm](http://www.capitol.state.tx.us/tlo/billsrch/criteria.htm).

<sup>123</sup> *Id.*; data for 1997 general session. Data on gubernatorial vetoes is not readily available in the database.

<sup>124</sup> Criminal law bills were identified solely by the database’s category “criminal code.”

<sup>125</sup> Data for 1997 general session, searching under “criminal code—all legislation” and “criminal code—passed bills” headings on the “bill search” database at <http://www.le.state.ut.us/Documents/bills.htm>.

<sup>126</sup> See 33 *Book of the States* 109 (using 1995-96 data for all bills and enactments); data on crime bills generated by searching under “crimes and offenses (18PaCS)” heading for 1995-96 session in the Bill Topic Index at [http://www.legis.state.pa.us/cfdocs/legis/home/bills/topindex.cfm?CiScope=/2005\\_0](http://www.legis.state.pa.us/cfdocs/legis/home/bills/topindex.cfm?CiScope=/2005_0).

<sup>127</sup> Note that it is possible but unlikely that a large number of bills abolishing crimes or decreasing penalties were introduced and then rejected, thereby driving up the overall failure rate of bills in the category.

offense-counts to measure codes' growth, which don't discount redundant criminalization (though it does not increase criminal law's scope) nor acknowledge legitimate new crime definitions (for, say, computer crimes, environmental crimes or terrorism). And these data nonetheless raise a question about the assumption that bills adding offenses and penalties have a distinctly higher success rate in legislatures because members fear voting against such proposals. This should not surprise: research on legislative process offers explanations both for the common failure of bills and for legislators' ability to support bills that abolish offenses and reduce penalties.

### III. Theories of Legislative Process

The record of legislative reform of criminal law raises suspicions about the dominant story of criminal law's peculiarly easy path to enactment. Something must explain legislators' abilities to vote for an array of decriminalization and punishment-reduction measures that should be effective fodder for campaign ads, and to vote against—or avoid voting on—bills that increase criminalization and punishments. Part of the explanation, especially for many speech-related, alcohol, and consensual sex crimes, and perhaps some weapons offenses, lies in ordinary theories of legislatures' responsiveness to social movements and broad shifts in majority preferences. But much of this change is low-visibility legislative action (or inaction) not subject to powerful lobbies or much public attention or other monitoring. Much of the explanation for these actions lies in legislation scholarship, a body of work undervalued by criminal law scholars and that, in turn, pays little direct attention to criminal justice issues.

#### *A. Organizational variations among state legislatures and Congress.*

Legislation research makes the overcriminalization story puzzling. Most legislation fails because vetogates give interest groups, committees, legislative leaders, or larger coalitions means to block legislation, often without recorded votes by most (or any) legislators. Peverill Squire and Keith Hamm's recent survey of research on state legislatures documents that those bodies vary substantially in their organization compared to Congress and to each other, making generalizations from congressional research difficult. The focus on congressional research is natural in the broad range of policy areas that federal policy dominates. But *states* dominate crime and punishment policy,

and state legislatures vary greatly with regard to the very procedural rules and frameworks that legislation scholars (focusing on Congress) have found to affect legislative outcomes. Those rule variations, which alter the number and nature of vetogates, are reflected the widely different passage rates for bills introduced in state assemblies.

Congressional scholars have noted shifts in the power of parties, committees or their chairs, and chamber leadership over time as congressional rules and norms have changed.<sup>128</sup> State legislatures show those same variations, but they hardly shift in unison or in accord with Congress. As one example, scholars have measured the power of house speakers in Congress and state legislatures over time. Congressional house speakers' power has diminished over time: Speaker Cannon's power far exceeded Speaker Hastert's. But speakers in the lower chamber of eleven states have powers that exceed even Cannon's, and the vast majority have power that exceed Hastert's.<sup>129</sup> Powerful speakers can diminish or increase the effectiveness of many vetogates.

Further, committee power in state legislatures has not been nearly as thoroughly studied as congressional committees, and those bodies show great variation along every parameter: the number of committees per chamber; the rate at which they favorably report bills referred to them (a measure of their effectiveness as vetogates) and the degree to which they otherwise play an important role in the legislative process; the specification of their jurisdiction; who appoints committee members; whether committee membership accords with proportional representation rules or otherwise reflects median or majority sentiments; and whether conference committees are used to resolve House and Senate differences and by what decision rules.<sup>130</sup> Committee procedures and germaneness rules

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<sup>128</sup> See, e.g., Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 Colum. L. Rev. 702, 708-10 (2000) (describing shifts in congressional power among committee chairs and from committee chairs to parties and arguing that budget procedures strengthen parties over committee chairs and explaining why individual members give up in that framework); Burdett A. Loomis, *The Contemporary Congress* 87-88 (2d ed. 1998) (describing 1970s congressional reforms that decentralized power); Norman J. Ornstein et al., *The Changing Senate: From the 1950s to the 1970s*, in *Congress Reconsidered 3* (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1977) (describing decentralization of power in the Senate).

<sup>129</sup> See Squire & Hamm, *supra* note 120, at 102-03 & tbl. 4-1, relying on data from Richard A. Clucus, *Principle-Agent Theory and the Power of State House Speakers*, 26 Leg. Studies Q. 319 (2001).

<sup>130</sup> See Peverill & Squire, *supra* note 120, at 105-20. State chambers vary as well in other procedural choices: who controls referral of bills to committee; on what issues they employ supermajority rules;

may explain how reforms come more easily in some contexts than others. Colorado's repeal of its loitering offenses, harassment statute and anonymous-political-ads crimes were bundled in a single bill that also increased punishment options for some juvenile felony offenders, expanded liability for contributing to delinquency of minors and raised some drug offense penalties while lowering others.<sup>131</sup>

Scholars also measure state legislatures' "professionalization" through indicia such as members' pay, days in session, and amount of staff and other administrative resources.<sup>132</sup> Chambers vary greatly on those parameters as well, which creates an uncertain variable. There is some evidence that "legislators enjoy increasing electoral isolation from political tides as professionalization levels rise," in part because "the relationship of interest groups and legislators is mediated by professionalization."<sup>133</sup> On the other hand, some scholarship suggests that states with more professionalized legislatures have greater congruence between public opinion and policy outcomes.<sup>134</sup> (Note that Congress is the most professionalized legislature, and scholars widely assume that it is excessively well attuned to political tides on crime issues.)

All of these variations in legislative structure make untenable assumptions that theories explaining congressional behavior will map easily onto state legislatures or, more specifically, that theories of criminalization's easy success in a particular legislative regime will have strong explanatory force across the range of American legislative bodies.<sup>135</sup> Instead, this variation suggests some legislative models will be more effective than others at moderating or otherwise shaping legislation on criminal law as well as other topics. Democratic outcomes are "a product of specific institutional structures and

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whether and how filibusters are used; and how readily discharge petitions can be employed to move bills from committees to the floor. *Id.* at 116-26.

<sup>131</sup> See Colo. H.B. 97-1077 (effective July 1997).

<sup>132</sup> *Id.* at 79-97.

<sup>133</sup> Squire and Hamm, *supra* note 120, at 95, citing Michael D. Berkman, Legislative Professionalism and the Demand for Groups: The Institutional Context of Interest Group Density, 26 *Leg. Studies Q.* 661 (2001); William D. Berry, Michael B. Berkman & Stuart Schneiderman, Legislative Professionalism and Incumbent Reelection: The Development of Institutional Boundaries, 94 *Am. Pol. Sci. Rev.* 859 (2000).

<sup>134</sup> See Cherie Maestas, Professional Legislatures and Ambitious Politicians: Policy Responsiveness of State Institutions, 25 *Leg. Studies Q.* 663 (2000).

<sup>135</sup> While the federal government eliminated parole and adopted rigid sentencing guidelines, only a minority of states followed the federal model on those two policy changes. See Menlove, *supra* note 24 (listing the majority of states that still have parole); Barkow, *supra* note 33 (discussing state sentencing laws and comparing the federal sentencing commission with state counterparts).

legal rules” rather than unmediated manifestations of popular will.<sup>136</sup> “The bills that are regularly enacted owe their existence to institutional structures and agenda control by party leaders as much as to majority rule.”<sup>137</sup> The procedural and structural variations among state legislatures, then, should yield different outcomes even if popular sentiment on criminal law issues is consistent across jurisdictions. At least some existing legislative structures should pose substantial roadblocks to any popular pressure for overcriminalization.

*B. Harnessing expertise and procedural frameworks for criminal law.*

While legislatures vary in their standard rules and organizational features, they sometimes adopt special rules on specific legislative topics. Elizabeth Garrett has recently described models of “framework legislation” in Congress that structure decision-making in particular policy areas to solve collective action problems, increase or decrease powers of committees or other players, or make certain substantive outcomes more likely by, for example, insulating staff or bill drafters from partisan pressure.<sup>138</sup> Congress’s creation of the federal Sentencing Commission to overhaul sentencing policy is one version of this practice and was adopted with just these sorts of goals in mind.<sup>139</sup> Other federal examples include the budget process,<sup>140</sup> the Base Realignment and Closure Act (which assigns initial decision-making to an independent commission and limits Congress’s authority to change or reject the commission decisions), fast-track trade legislation (which structures Congress’s involvement on trade agreements negotiated by presidents), and a 1998 tax act that requires a “tax complexity analysis” on many tax bills.<sup>141</sup>

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<sup>136</sup> Samuel Issacharoff and Richard Pildes, *Partisan Lockups of the Democratic Process*, 50 *Stan. L. Rev.* 643, 644 (1998).

<sup>137</sup> Eric Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 *Yale L.J.* 1665, 1686 (2002); see also Daniel Ortiz & Samuel Issacharoff, *Governing Through Intermediaries*, 85 *Va. L. Rev.* 1627 (1999) (describing the effects of political intermediaries, such as lobby groups and civic groups, on the problems of direct public monitoring of representatives).

<sup>138</sup> Elizabeth Garrett, *Purposes of Framework Legislation*, 14 *J. Contemp. Legal Issues* \_\_ (2005).

<sup>139</sup> See Barkow, *supra* note 33, at 717-18 (describing legislator’s hopes that the commission will reduce the risk of Congress “politicizing the entire sentencing issue”); *id.* at 757 (noting the federal commission is “universally recognized to be an ineffectual agency that has done little to change the tough-on-crime politics of sentencing at the federal level”).

<sup>140</sup> See Garrett, *supra* note 128.

<sup>141</sup> Garrett, *supra* note 138, at 5-8 (describing these framework laws and other examples).

States' uses of framework laws are vastly under-studied. Interestingly, however, some states in recent years have devised special procedures for criminal law issues that fit this framework description. Some states have established law reform or crime commissions to which they delegate tasks of assessing needs for criminal law reform, proposing legislation and analyzing legislators' proposals.<sup>142</sup> This is a model Congress has used on a range of topics—military base closings, social security reform, security reform after 9/11, and federal sentencing policy—but, tellingly, never for substantive criminal law to ameliorate legislative dysfunction. Combined with Congress's greater ability to reap publicity from symbolic legislative action, which makes it more tempting,<sup>143</sup> that helps explain why expansion of the federal code is so much greater than state codes.

Take two examples. The Virginia legislature charged its state crime commission in 2001 with proposing revisions to the criminal code,<sup>144</sup> and in 2004 the legislature accepted the commission's first set of recommendations and repealed a dozen rarely-used criminal statutes. Those offenses were the sort scholars often complain about—silly offenses such as unlawful use of words “Official Tourist Information” or bringing dogs onto the Capitol Square, and antiquated ones such as jumping off railroad cars.<sup>145</sup> They also included the more serious theft, fraud and conversion offenses noted above.<sup>146</sup> This reform legislation also fixed some of the sorts of drafting problems that criminal code

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<sup>142</sup> See, e.g., Virginia Crime Commission, discussed *infra*; New Jersey Law Revision Commission, N.J. Stat. Ann. § 1:12A-1 (1985) (mandate to “revise the statutory law”); North Carolina Sentencing and Policy Advisory Commission, N.C. Gen. Stat. §164-43 (2003) (mandate includes reviewing “all proposed legislation which creates a new criminal offense” or “changes in the classification of an offense”). For a positive account of the North Carolina commission, see Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 1980-2000, 29 *Crime & Just.* 39, 41 (2002); Kevin R. Reitz, The Status of Sentencing Guideline Reforms in the U.S., *Overcrowded Times*, Dec. 1999, at 11, 13.

<sup>143</sup> The latter point is from Stuntz, *supra* note 1, at 546.

<sup>144</sup> See Va. House Joint Resolution 687 (summarized and available on Virginia Legislative Information System at <http://leg2.state.va.us/dls/h&sdocs.nsf/0/efb53246fcf5501a85256ea20046e98f?OpenDocument>).

<sup>145</sup> In repealing this last provision, Va. Code § 19.2-161 (repealed 2004), Virginia partially responded to Stuntz's complaint about an excessive number of outdated railroad crimes. See Stuntz, *supra* note 1, at 556 & nn.185-86 (2001) (noting Virginia's code has “a substantial separate section ... devoted to railroad crime”).

<sup>146</sup> See *supra* text at note \_\_; Virginia State Crime Commission, The Reorganization and Restructuring of Title 18.2 (House Doc. 15, 2004), at <http://leg2.state.va.us/dls/h&sdocs.nsf/0/efb53246fcf5501a85256ea20046e98f?OpenDocument> (abolishing crimes of conversion of military property, sale of goods of another and failure to pay over proceeds, and overvaluation of property for purposes of influencing lending institution).

experts such as Paul Robinson urge.<sup>147</sup> The commission proposed, and the legislature adopted, a consistent definition of “mandatory minimum” sentence, which had formerly varied across provisions. They moved non-crime statutes out of the criminal code, and adopted a comprehensive penalty structure for felony sentencing.<sup>148</sup>

New Jersey’s Law Revision Commission also had some success in cleaning up some redundant or outdated crimes, conflicting sentencing ranges and poor organization in its code. The legislature adopted its recommendations to revise awkward crime definitions; to repeal duplicative crimes on marijuana-growing, on persuading others to take drugs, and on a range of other provisions; and to decriminalize several offenses that are “regulatory in nature and can be adequately address[ed] through civil remedies,” including trivial offenses such as selling ship tickets without indicating the ship’s country of origin.<sup>149</sup>

Note these reforms succeeded even though these state commissions are fairly weak as framework laws. The legislatures were not restricted to up-or-down votes on the commission reports but still adopted them in bulk. To be sure, this is not proof that all legislatures are consistently effective at keeping codes coherent and up-to-date. Robinson has documented they do not,<sup>150</sup> and variations in states’ legislative procedures, as well as the absence or ineffectiveness of such commissions in many states, would predict as much.<sup>151</sup> But these examples demonstrate a mechanism and capacity for repeal and reform of criminal provisions that scholars criticize, despite the fact that those

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<sup>147</sup> See Robinson & Cahill, *supra* note 8, at 170-73 (describing “the code degradation problem”); Robinson et al., *supra* note 18.

<sup>148</sup> Virginia State Crime Commission, *The Reorganization and Restructuring of Title 18.2* (House Doc. 15, 2004), at <http://leg2.state.va.us/dls/h&sdocs.nsf/0/efb53246fcf5501a85256ea20046e98f?OpenDocument>.

Not every crime commission recommendation makes it swiftly through the legislature. The legislature let a commission proposal die in committee the following year. See HB 1053 (reorganizing sentencing provisions) (passed the House but left in Senate committee, see <http://leg1.state.va.us/cgi-bin/legp504.exe?051+sum+HB1053>).

<sup>149</sup> N.J. Law Revision Com’n, *Report and Recommendations Relating to the Compilation of Criminal Law* (1995) (describing recommendations for repeal, amendment and code reorganization); recommendations enacted in L. 1999 c. 90 (see <http://www.lawrev.state.nj.us/index/alpha-page1.htm>).

<sup>150</sup> See Robinson et al., *supra* note 18. Nor have examples of legislatures creating new, frivolous crimes ceased. One example, perhaps among many, is 72 Okla. Stat. § 6-1 (felony of impersonating a veteran by wearing a Congressional Medal of Honor and falsifying supporting documents).

<sup>151</sup> For an example of an ineffective commission, see Okla. Criminal Justice Resource Center, *Summary of Criminal Justice Actions of the 2004 Oklahoma Legislature* (27 bills enacted creating new felonies; all four bills introduced to repeal offenses or reduce punishments failed), on file at <http://www.ocjrc.net/>. See also Barkow, *supra* note 33, at 771-94 (describing variations in state commissions’ effectiveness with legislatures on sentencing issues).

changes are hardly pressing issues on legislative or interest-group agendas nor triggered by high-profile news events. Commissions help legislatures achieve reform that is less likely under regular rules and procedures.<sup>152</sup> The ratchet of criminal legislation can turn both ways.

Variations on this model appear elsewhere. Most states have now established commissions to study and make recommendations on their sentencing policies.<sup>153</sup> Some have already succeeded in prompting sentencing reform such as that described above,<sup>154</sup> and a key tool they employ to prompt reform is financial impact analysis of sentence enhancements that show legislatures the likely cost of incarceration policies.<sup>155</sup> Further, states periodically organize special bodies to review their codes and propose comprehensive reform, a process that sometimes provides the impetus for wide-ranging code reform. Illinois and Kentucky both recently created commissions to study and offer reform strategies for their bloated codes (though neither has yet led to reform).

In addition to framework laws, triggering events can prompt legislatures to act when they otherwise would not. This is a familiar overcriminalization point: a publicized crime like a carjacking prompts (often unnecessary) legislation; many states added terrorism provisions in murder statutes and other parts of their criminal codes after 9/11.<sup>156</sup> But triggering events can also prompt criminal law repeal and reform; the best known example is promulgation of the Model Penal Code. The MPC's 1962 publication provided an occasion for several states to comprehensively revise their criminal codes. That wide-ranging reform, in addition to reducing redundancy and conceptual incoherence in many codes, included some decriminalization that states might not have pursued as readily if proposed as discrete repeal bills. The MPC is credited with

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<sup>152</sup> Cf. Garrett, *supra* note 138, at 32-33 (“Frameworks can be seen as precommitment devices enacted to constrain lawmakers and to make certain legislative outcomes more likely” or to “change the dynamics of bargaining” and “make certain actions more costly in political terms”).

<sup>153</sup> For a complete list of such commissions, see <http://www.criminology.fsu.edu/p/cjl-info.php>. For a discussion of several, see Robin Campbell, Dollars & Sentences: Legislators' Views on Prisons, Punishment, and the Budget Crisis 15 (July 2003).

<sup>154</sup> See *supra* text at notes 83-93; see, e.g., Alabama Sentencing Commission Achieves Success: Sentencing Reform Legislation Enacted, at <http://sentencingcommission.alacourt.gov/Publications/ASC%20Achieves%20Success%20NASC%20Article%207-03.doc>; Alabama Sentencing Commission, 2005 Annual Report.

<sup>155</sup> Barkow, *supra* note 33, at 800-10 (discussing state commission's use of financial impact statements).

<sup>156</sup> See, e.g., Va. Code Ann. §§ 18.2-31(13) & 18.2-46.4 (defining murder during an act of terrorism as a capital offense and defining terrorism).

prompting decriminalization of sodomy and other consensual sexual conduct,<sup>157</sup> for example, as well as petty offenses that the MPC categorizes as non-criminal “violations.”<sup>158</sup> Paul Robinson and Michael Cahill advocate a Model Penal Code Second as the most promising means to prompt states again to comprehensively reform their criminal laws, arguing an MPC helps solve familiar bases for political resistance to reform by prosecutors, defenders, judges and legislators.<sup>159</sup> Note that this pattern is familiar in other policy areas, which means also that legislative reluctance for comprehensive law reform is widespread across subject areas.<sup>160</sup>

#### IV. The Breadth of Democratic Governance of Criminal Law

##### *A. Executive branch actors and democratic responsiveness.*

If a key measure of overcriminalization is whether its scope and effect accords with majoritarian preferences, laws-on-the-books do not tell the full story. Democratic regulation of criminal justice does not end with legislatures. The vast bulk of criminal law—state criminal law—is administered by prosecutors who are elected by local constituencies.<sup>161</sup> (Federal prosecutors are appointed, and their accountability is more attenuated.)<sup>162</sup> As Dan Richman and Bill Stuntz recently described, state prosecutors’ accountability combines with the salience of crime as a local political issue and constraints on enforcement budgets to give state prosecutors relatively little practical

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<sup>157</sup> See *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (crediting the MPC with prompting decriminalization of consensual sexual conduct). See also Robinson & Cahill, *supra* note 8, at 173-77 (stressing MPC’s influence on state code reform in the 1960s and 1970s and arguing a second MPC could solve roadblocks to reform).

<sup>158</sup> See M.P.C. § 1.04 (“A violation does not constitute a crime”); cf. *id.* at § 2.12 (mandating dismissal for “de minimus” infractions of crimes).

<sup>159</sup> See Robinson & Cahill, *supra* note 8, at 169-77.

<sup>160</sup> The MPC’s success at prompting state reform was modest compared to the states’ wider adoption of the Uniform Commercial Code and the Federal Rules of Evidence. Forty-six states have adopted all or key parts of the U.C.C. See <http://www.law.cornell.edu/uniform/ucc.html>. Thirty-eight have substantially adopted the Federal Rules of Evidence or the Uniform Rules of Evidence. See <http://www.law.cornell.edu/uniform/evidence.html>.

<sup>161</sup> See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 *J. Crim. L. & Criminology* 717, 734 (1996) (95% of state prosecutors are locally elected) (citing Bureau of Justice Statistics, U.S. Dep’t of Justice, *Prosecutors in State Courts* 2 (1993)).

<sup>162</sup> On federal prosecutors as political actors, see James Eisenstein, *Counsel for the United States: U.S. Attorneys in the Political and Legal Systems* (1978). See also William J. Stuntz, O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment, 114 *Harv. L. Rev.* 842, 861-63 (2001) (describing differences in political pressures and accountability between state and federal prosecutors).

discretion on a large portion of their dockets.<sup>163</sup> Homicides, robbery, burglary, assault, auto-theft and some drug crimes are politically mandatory crimes for prosecutors and police to pursue—as are some lesser crimes, especially drunk driving and, often, domestic violence<sup>164</sup>—even if the odds of obtaining a conviction in any given case are fairly long. That consumes most of police and prosecutors’ time and budgets. State prosecutors depend on police to provide them with cases; police, busy with violent and other politically mandatory crimes as well as order-maintenance policing, have little time for silly, antiquated crimes.<sup>165</sup>

Historically, patterns in discretionary enforcement vary. Prosecutors mostly ignored crimes against homosexual sex, fornication or prostitution for decades, then dramatically stepped up enforcement in many locales for several years. Sodomy prosecutions jumped in the early twentieth century before declining again.<sup>166</sup> Liquor prosecutions in Virginia jumped in the 1920s to briefly become the most prosecuted felony.<sup>167</sup> The federal Mann Act was aggressively used in the 1910s and 1920s to combat prostitution and even fornication but was nearly a dead letter by the 1960s;<sup>168</sup> prosecutorial campaigns against prostitution and red-light districts rose and declined with public sentiment and social-movement campaigns.<sup>169</sup> Those variations do not refute the Richman-Stuntz thesis; they demonstrate instead that what crimes are politically mandatory (or at least politically appealing) to prosecutors vary as public opinion and interest group pressures shift.

Note those constraints are not solely a product of prosecutors’ accountability. They are also a function of *legislatures’* decisions to limit prosecutors’ budgets. What legislatures give with one hand—expansive, redundant codes—they restrict with the

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<sup>163</sup> Richman and Stuntz, *supra* note 10, at 599-606.

<sup>164</sup> Fla. Stat. § 741.2901 (mandatory prosecution policy).

<sup>165</sup> State prosecutors still have some discretion—witness local prosecutors’ recent creativity with drug courts and other dispositional alternatives. John S. Goldkamp et al., Bureau of Justice Assistance, Community Prosecution Strategies: Measuring Impact 2-7 (Nov. 2002) (NCJ 192826) (listing programs employed by half of all prosecutors). See also Bureau of Justice Assistance, Defining Drug Courts: The Key Components (Nov. 2004 NCJ 205621) (describing prosecutors’ nontraditional roles in drug courts).

<sup>166</sup> Friedman, *supra* note 37, at 344.

<sup>167</sup> *Id.* at 340.

<sup>168</sup> *Id.* at 325-28 & 343; see also Anne M. Coughlin, Of White Slaves and Domestic Hostages, 1 Buff. Crim. L. Rev. 109 (1997) (comparing arguments that led to Mann Act and the Violence Against Women Act of 1998).

<sup>169</sup> Friedman, *supra* note 37, at 328-29.

other by limiting prosecutors' resources, so that they cannot enforce every crime on the books. Those limits have several effects; one is that they encourage plea bargaining over trials, which allows processing of more cases within a limited budget. But budget limits also greatly constrain some effects of code growth, and this is likely legislatures' intent. While tight budgets are a function of allocation decisions in light of resource constraints, restricting agency budgets is also a familiar legislative strategy to limit enforcement—an observation familiar to administrative law,<sup>170</sup> where legislative opposition to enforcement policy is more common than in criminal law. But legislators (and the public) express little such opposition to most criminal enforcement both because there is a large realm of universally accepted enforcement (traditional core crimes) and because resource constraints, plus accountability, are so effective at keeping prosecutors from doing much else.

The combination of political accountability and budget constraints give state prosecutors a small practical range for pursuing prosecutions with little public support.<sup>171</sup> That is a key reason why overcriminalization scholarship pays a lot of attention to statutes on the books and much less to prosecutions under antiquated or trivial statutes. There is rarely a *pattern* of prosecutions under such statutes; we have only rare outliers, such as the sodomy prosecution of John Lawrence in Harris County, Texas.<sup>172</sup> Overcriminalization can happen on the books because it is so constrained in practice.

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<sup>170</sup> Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 Sup. Ct. Rev. 153, 191 (“Congress also has any number of formal and informal tools for placing political pressure on agencies to reverse unwanted actions” including “reduc[ing] agency budgets for enforcement.”); Paul B. Smyth, Milo C. Mason, *Tough Choices Easier: Compliance and Enforcement*, 18 SPG Natural Resources & Env't 3 (Spring, 2004) (similar point on EPA enforcement); Joe Sims, Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 Antitrust L.J. 865, 885 n.70 (1997) (noting Congress could “choose less aggressive or expansive enforcement by simply reducing agency budgets”).

<sup>171</sup> Those twin constraints are possible because prosecution is now monopolized by public prosecutors, and the maintenance of those constraints may explain why American jurisdictions are firm in resisting any efforts to return to even a limited role for private prosecutors. See, e.g., *State v. Culbreath*, 30 S.W.2d 309 (Tenn. 2000) (dismissing indictments because public prosecutor allowed a private attorney, paid by a private group, to act as a special prosecutor and initiate charges with little public supervision).

<sup>172</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003). The prosecution in *Griswold v. Connecticut*, 381 U.S. 479 (1965), was equally unusual, even in a state with strict anti-contraception laws. See Comment, *supra* note 50 (describing pre-*Griswold* history of prosecutions under anti-contraception statutes). For another discussion of an adultery prosecution that seems to be an unusual outlier, see Joanna Grossman, *Punishing Adultery in Virginia*, Dec. 16, 2003, at <http://writ.news.findlaw.com/grossman/20031216.html> (discussing a 2003 Virginia adultery prosecution).

Democratic accountability also explains the occasional small, local pattern of enforcing obscure or controversial statutes. In the 1990s an Idaho prosecutor won convictions of several pregnant teenage girls and their boyfriends for fornication; punishments were community service and parenting classes.<sup>173</sup> The prosecutions (which didn't continue long) were a strategy to deter teenage pregnancy and related social problems;<sup>174</sup> most were prosecuted only after applying for public assistance. The prosecutions drew criticism in national media, but it is likely the local electorate was not strongly opposed; the prosecutor won re-election a few months after securing the convictions. The example supports the broader point. Because state criminal law enforcement is accountable to local constituencies, prosecutions under seemingly outdated statutes may accord with *local* majoritarian preferences, and those preferences may be based on a policy rationale beyond simply moral opposition to fornication. Even outlier prosecutions, then, might not be properly characterized as examples of *over*-criminalization. American criminal law is fragmented among 50 states, which fragment enforcement among localities. We should expect the sort of policy variation and experimentation that characterizes (and is a virtue of) federalism.<sup>175</sup>

Federal practice is different and worse. Even there, scholars concede that much-maligned statutes on carjacking or Smokey Bear's image are rarely or never enforced.<sup>176</sup> But federal prosecutors have much more practical discretion arising from bigger budgets,

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<sup>173</sup> See Heidi Meinzer, Idaho's Throwback to Elizabethan England: Criminalizing a Civil Proceeding, 34 Fam. L.Q. 165, 165 (2000) (describing the prosecutions); Scott Morris, Idaho Prosecutor: Old Law, New Plan to Curb Teen Pregnancy, World Mag., Nov. 11, 1996 (noting parenting classes as part of sentence), available at <http://www.ageofconsent.com/idaho.htm>

<sup>174</sup> See Morris, *supra* note 173 (quoting prosecutor's explanation that the prosecutions address the area's high teenage pregnancy rate and the risk that children of single teen mothers are more likely to go to jail later in life). A few months after these prosecutions, prosecutor Douglas Varie was reelected (running unopposed) in Nov. 1996. See Idaho Sec. of State, Election Division, at <http://www.idsos.state.id.us/elect/96cntyrc.htm> (Gem County election results 1996). Apparently he did not run for reelection in 2000. See Idaho Sec. of State, Election Division, at [http://www.idsos.state.id.us/ELECT/2000rslt/general/county\\_2.htm](http://www.idsos.state.id.us/ELECT/2000rslt/general/county_2.htm) (same for 2000).

<sup>175</sup> Cf. Herbert Wechsler, Codification of Criminal Law in the United States: The Model Penal Code, 68 Colum. L. Rev. 1425, 1427 (1968) (explaining the MPC drafters did not seek national uniformity because "substantive difference in social situation or point of view among the states should be reflected in substantial variation in their penal laws").

<sup>176</sup> See Stuntz, *supra* note 1, at 545-466 (discussing Congress's tendency to enact symbolic crimes that "generate very few federal prosecutions").

less democratic monitoring, and the power they gain from a rigid sentencing regime.<sup>177</sup> That discretion is most problematic when it combines with one specific sort of statutory breadth—expansive fraud and regulatory offenses that define undisputed wrongdoing but which also capture some marginal or innocuous conduct.<sup>178</sup> The problem is worst where prosecutorial discretion is greatest—the small, unique but prominent (and now formally defunct) practice of independent counsels, who rigorously pursue marginal wrongdoing under broad false-statements statutes or the like.<sup>179</sup> More common arguable abuses also arise under broad fraud and regulatory statutes,<sup>180</sup> and federal offenses that duplicate state crimes, such as drug or weapons offenses, can result in disparate sentencing for criminal conduct.<sup>181</sup> Those problems are real and worthy of scholarly and political attention, but bear in mind their exceptionalism. Much overfederalization is contained within widely supported offenses (drug trafficking or gun use during crimes)<sup>182</sup> rather than marginal ones, even though the sentencing disparities are troubling. And problematic fraud and regulatory prosecutions make up a small fraction of federal practice,<sup>183</sup> which itself

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<sup>177</sup> See Stuntz, *supra* note 1, at 555-65 (fraud examples); Rosenzweig, *supra* note 3, at 1-2 (criticizing conviction for negligent discharge of pollutant in *United States v. Hanousek*, 176 F.3d 1116 (9<sup>th</sup> Cir. 1999)). For a counter-argument that prosecutions like *Hanousek* are appropriate, see Steve Solow & Ronald Sarachan, *Criminal Negligence Prosecutions Under the Clean Water Act: A Statistical Analysis and an Evaluation of the Impact of Hanousek and Hong*, 32 *Env. L. Rptr.* 11153, 11157-59 (Oct. 2002).

<sup>178</sup> See Coffee, *Tort/Crime*, *supra* note 17; Coffee, *Paradigms Lost*, *supra* note 17; Rosenzweig, *supra* note 3.

<sup>179</sup> See Stuntz, *supra* note 162, 861-65 (2001); Richman & Stuntz, *supra* note 10, at 590-91; Jeffrey Rosen, *Overcharged: An Indefensible Indictment*, *The New Republic* (Nov. 4, 2005) (noting the rarity of prosecutions solely for unsworn false statements and criticizing federal special prosecutors for inappropriately pursuing such charges)

<sup>180</sup> There is not uniform scholarly agreement that much-criticized federal prosecutions are unmerited or common. See Kathleen F. Brickey, *Charging Practices in Hazardous Waste Crime Prosecutions*, 62 *Ohio St. L.J.* 1077 (2001) (defending environmental crime prosecutions); Solow & Sarachan, *supra* note 177.

<sup>181</sup> This is the complaint behind *United States v. Armstrong*, 517 U.S. 456 (1996). It is also the explicit rationale for Operation Exile, which diverted offenders of state weapons crimes to federal court for harsher punishment. See Daniel C. Richman, “Project Exile” and the Allocation of Federal Law Enforcement Authority, 43 *Ariz. L. Rev.* 369 (2001).

<sup>182</sup> Thirty-six percent of federal cases in 2001 included a charge for drug trafficking, and 85% included violent crime charges, and 7.5% included weapons charges. (About 94% of drug cases were for trafficking rather than possession.) See 2003 Sourcebook, *supra* note 4, at tbl. 5.17.

<sup>183</sup> About 11.7% of all federal criminal cases in 2001 were fraud cases (9,028 of 77,145), and presumably most of those were not controversial cases of marginal, ambiguous or innocuous conduct. All “regulatory offenses” accounted for 1.5% of federal criminal cases in 2001 (1,166 of 77,145). See 2003 Sourcebook, *supra* note 4, at tbl. 5.17. And white-collar crime is the one area scholars have suggested may be *under-criminalized*. See Beale, *supra* note 10, at 780 (explaining why overcriminalization is less likely in white-collar contexts and why we may have “too little white collar crime enforcement”); Richard Lazarus, *Reforming Environmental Criminal Law*, 83 *Geo. L.J.* 2407, 2454 n.218, 2511 & n.448 (1995) (calling

constitutes perhaps five percent of American criminal law.<sup>184</sup> Those problems are hardly representative of the general scope or effects of overcriminalization.

Enforcement patterns arising from democratically accountable state prosecutors explain a final point as well. Because most obscure or superfluous statutes in criminal codes are effectively nullified by prosecutors, legislatures' incentives to update codes and repeal antiquated statutes are greatly reduced. If American jurisdictions had mandatory prosecution policies, coupled with investigatory resources to pursue most violations, legislatures would likely repeal crimes much more quickly that no longer accord with majoritarian preferences. (One suspects it wouldn't take many prosecutions of Girl Scout troops for misusing Smokey Bear's image to move Congress to repeal that crime.) But legislators have little incentive to, because police and prosecutors, taking signals from local electorates, largely do it for them, and legislatures make sure they do by constraining enforcement budgets. To be sure, effective repeal by non-enforcement is not the same as actual repeal. Outdated, poorly conceived, and duplicative statutes, as noted, can generate doctrinal confusion on mens rea requirements, allow disparate treatment of similar offenders, and facilitate occasional vindictive prosecutions as well as muddy criminal law's expressive and moral force. But the democratic responsiveness of executive-branch officials nonetheless explains why legislatures are not more vigilant about keeping criminal codes in accord with popular sentiments.<sup>185</sup> They achieve much of that goal indirectly through prosecutors' budgets and accountability, rather than directly by repeal or careful code drafting. Some are explicit about this delegation of code maintenance to the executive branch. A Washington state statute urges prosecutors not to enforce "antiquated statutes" that "serve[] no deterrent or protective purpose in today's society" and have "not been recently reconsidered by the legislature."<sup>186</sup>

*B. Courts and democratic responsiveness.*

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occupational health and safety law under-criminalized and arguing for reform of environmental criminal law rather than "the extreme result of noncriminalization").

<sup>184</sup> See supra note \_\_\_\_.

<sup>185</sup> In the federal context, Dan Richman has described additional tools Congress uses to influence enforcement, including use of oversight committees, constraints on investigative agencies' jurisdictions and budgets, funding prosecutor jobs for specific agendas, and requiring Main Justice approval for some prosecutions. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 U.C.L.A. L. Rev. 757, 791-805 (1999).

<sup>186</sup> Wash. Rev. Code § 9.94A.411(1).

As noted above, many of the Supreme Court decisions that constitutionally barred crimes or punishments occurred in the wake of state legislative trends repealing such laws. State supreme courts similarly overturned criminal prohibitions and often prompted no legislative or popular backlash to reinstate those crimes. Both of those patterns accord with an increasingly prominent thesis about American courts and majoritarian preferences. Rather than being counter-majoritarian institutions, American courts rarely get far ahead of public opinion on controversial issues. Michael Klarman's landmark book *From Jim Crow to Civil Rights* makes this argument in what had previously seemed the unlikely context of the constitutional law of race relations.<sup>187</sup> The same thesis may explain *Lawrence v. Texas*: the Court's ban on sodomy crimes followed rather than led popular opinion.<sup>188</sup> William Nelson offered a similar thesis to explain New York state courts' changing interpretation of several morals-related criminal statutes through middle decades of the twentieth century.<sup>189</sup> Nelson described New York courts as strictly enforcing criminal morals offenses, such as obscenity restrictions on media, in accord with popular support for such enforcement in the early part of that century. As public opinion shifted, Nelson detailed shifts in courts' interpretation of statutes not only of obscenity offenses and other crimes implicating free speech but even domestic violence and non-stranger rape crimes, which he characterized as functionally decriminalized by a range interpretative choices that made those offenses difficult to enforce. Similarly, even the Warren Court's criminal procedure decisions may be understood as more majoritarian than traditionally thought.<sup>190</sup>

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<sup>187</sup> See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (2004); see also Michael J. Klarman, "Rethinking the Civil Rights and Civil Liberties Revolutions," 82 Va. L. Rev. 1 (1996); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7 (1994). For a comparable argument that the Supreme Court's Establishment Clause decisions correspond with popular sentiments and views of dominant political coalitions, see John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279 (2001).

<sup>188</sup> See Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 Mich. L. Rev. 431 (2005) (making this argument and describing changes in social views on homosexuality between *Bowers v. Hardwick* (1986) and *Lawrence* (2003)).

<sup>189</sup> See Nelson, *supra* note 28.

<sup>190</sup> See Corinna Barrett Lain, *Counter-majoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. Pa. L. Rev. 1361, 1365 (2004) (describing landmark criminal procedure cases as revealing "the Supreme Court's lack of inclination for counter-majoritarian decision making").

Viewed this way, we can understand other trends in courts' doctrinal construction of crime and punishment rules as adjustments that track shifts in popular sentiment. Consider two federal examples. Federal judges had notoriously little discretion under sentencing guidelines before *United States v. Booker*.<sup>191</sup> But even here, scholars found patterns of courts using their modest interpretive tools within the guidelines to temper excessive sentences.<sup>192</sup> And in the context of federal regulatory or white-collar crime prosecutions, federal courts have a clear pattern of interpreting hundreds of criminal statutes to contain strict mens rea requirements. Those constructions make prosecutions more difficult by giving defendants an ignorance-of-the-law defense.<sup>193</sup> Many of the statutes courts have restricted in this way are the type of expansive provisions on obscure or marginal fraud conduct that a common focus of overcriminalization complaints:<sup>194</sup> statutes that criminalize un-sworn false statements,<sup>195</sup> health and safety violations,<sup>196</sup> misapplication of student loan funds,<sup>197</sup> unauthorized use of food coupons<sup>198</sup> or recorded

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<sup>191</sup> 543 U.S. \_\_\_ (2005) (holding portions of the federal sentencing guidelines unconstitutional and making those guidelines merely advisory for judges).

<sup>192</sup> See Frank O. Bowman, III & Michael Heise, Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences, 86 Iowa L. Rev. 1043 (2001).

<sup>193</sup> See Sharon L. Davies, The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance, 48 Duke L.J. 341 (1998). Davis catalogs at least 160 statutes in which federal courts have interpreted the mens rea term "willful" to require proof that defendant knew his conduct was unlawful.

<sup>194</sup> See Coffee, Paradigms Lost, supra note 17; Coffee, Tort/Crime, supra note 17; Rosen, supra note 179 (noting the rarity of prosecutions solely for unsworn false statements and criticizing federal special prosecutors for inappropriately pursuing such charges).

<sup>195</sup> See *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994) (requiring knowledge that conduct was unlawful to support a conviction for causing campaign treasurers to submit false reports to the Federal Election Commission, in violation of 18 U.S.C. § 1001 (1994)); *United States v. Gross*, 961 F.2d 1097 (3d Cir. 1992) (holding that the district court properly precluded a good-faith defense in instructing the jury on the willfulness element of a conviction for making false statements to the Securities and Exchange Commission, in violation of 15 U.S.C. § 78m(a) (1994)).

<sup>196</sup> See *United States v. Ladish Malting Co.*, 135 F.3d 484, 487 (7th Cir. 1998) (upholding determination by magistrate judge that criminal violation of workplace safety regulations under Occupational Safety and Health Act § 17(e), 29 U.S.C. §666(e) (1994), requires proof the defendant had "basic legal information"); *McLaughlin v. Union Oil Co.*, 869 F.2d 1039, 1047 (7th Cir. 1989) (holding that a violation of OSHA "is not willful when it is based on a nonfrivolous interpretation of OSHA's regulations").

<sup>197</sup> See *United States v. Bates*, 96 F.3d 964, 970 (7th Cir. 1996) (construing 20 U.S.C. §1097(a) (1994), which makes it a crime to knowingly and willfully misapply federally insured student loan funds, to require proof that an accused exercised unauthorized control over such funds with knowledge that such an exercise was a violation of the law), aff'd, 118 S. Ct. 285, 291 & n.7 (1997) (noting, however, that the question of whether a defendant had to have knowledge of illegality was not before the Court).

<sup>198</sup> See *Liparota v. United States*, 471 U.S. 419, 425 (1985) (holding that a person accused of knowing possession of food stamps in manner unauthorized by 7 U.S.C. § 2024(b)(1) (1982) must be shown to have known the possession was unlawful); *United States v. Marvin*, 687 F.2d 1221, 1227-28 (8th Cir. 1982) (same).

phone conversations,<sup>199</sup> and the like. One way to view these interpretive trends by courts is an effort to reign in excessive federal criminalization, and to decrease the odds that such statutes will be used to convict defendants whose conduct would widely be viewed as innocent or insufficiently wrongful to merit criminal punishment.

On this account, courts serve as a third mechanism to moderate criminal law in accord with changing social views on appropriate criminalization. That is especially important to explain the one area of substantial decriminalization that legislatures did not lead: crimes that implicated First Amendment liberties. Crimes that limit free expression values, from radical political advocacy and civil rights protests to pornography and artistic or personal expression, are notable categories of activity that were substantially decriminalized in the twentieth century more by courts than legislatures. Yet three observations suggest that the Supreme Court was not decriminalizing speech-related conduct in the face of strong public opposition.

First, there are few indicia that the Court is notably more in conflict with majoritarian preferences and dominant political opinion on First Amendment topics than it has been on racial equality issues or elsewhere. The Court has been notably solicitous, for instance, of legislative and executive actions that restrict speech in times of perceived crisis, such as the Red scares of the early 1920s and 1950s.<sup>200</sup> Second, recent scholarship on the intellectual history of free speech has described the influence of social movements (such the Free Speech League founded around 1900) and elite opinion that urged deregulation of both obscenity and political speech and presaged doctrinal changes toward those ends.<sup>201</sup> Court decisions barring crimes of speech-related conduct generated

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<sup>199</sup> See *United States v. Wuliger*, 981 F.2d 1497, 1502-03 (6th Cir. 1992) (holding that knowledge of the illegality of the wire interception is an element of the offense described in 18 U.S.C. § 2511(1)(d) (1988)).

<sup>200</sup> See Martin H. Redish, *The Logic of Persecution* (2005); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 *Colum. L. Rev.* 449 (1985). For examples of Court decisions upholding convictions under state and federal statutes that criminalize political speech, see, e.g., *Dennis v. United States*, 341 U.S. 494, 510 (1951) (upholding convictions under Smith Act for conspiring to overthrow government by organizing Communist Party); *Gitlow v. New York*, 268 U.S. 652 (1925) (affirming New York state's criminal speech statute); *In re Debs*, 249 U.S. 211 (1919) (affirming Eugene Debs' conviction under the federal Espionage Act for a political speech praising socialism and criticizing World War I); *Schenck v. United States*, 249 U.S. 47 (1919) (affirming Espionage Act conviction for speech against the draft); *Frohwerk v. United States*, 249 U.S. 204 (1919) (affirming Espionage Act conviction); *Abrams v. United States*, 250 U.S. 616 (1950) (affirming Sedition Act conviction).

<sup>201</sup> See David Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 *Stan. L. Rev.* 47 (1992); David Rabban, *Free Speech in Progressive Social Thought*,

little of the sustained social-movement opposition sparked by decisions on abortion, school prayer, or even some criminal procedure rulings.<sup>202</sup> Finally, popular culture seems to have largely endorsed many of the speech-related liberties courts evolved in the last several decades. Risky clothing, books, periodicals, music, movies, advertising and other media once banned by obscenity laws meet with considerable success in the marketplace and provide cultural support for the dramatic contraction of obscenity regulation.<sup>203</sup>

Some components of First Amendment liberties likely remain counter-majoritarian—decriminalization of flag burning and perhaps of some radical political speech are examples. Also, given constitutional leeway, we would probably see some local political communities regulating in all these areas despite a national consensus in favor of decriminalization. Nonetheless, in the largest area in which courts are responsible for decriminalization without legislative leadership, it is still plausible to view this form of decriminalization as an example of courts working within the rough parameters of democratic preferences. Like prosecutorial decisions not to enforce statutes, courts that overturn or narrowly interpret criminal laws take pressure off of legislatures for decriminalization by doing some of the work for them. Courts' contributions, like those of state prosecutors, seem to do more to keep criminal law's substantive reach in rough accord with majoritarian preferences than to depart from those preferences.

*C. The democratic baseline for judging overcriminalization.*

The foregoing account responds partially to overcriminalization critiques that imply criminal law's growth—and criminal justice's problems—stem in large part from the one-way ratchet of legislatures expanding but rarely contracting crimes and punishment. It addresses as well the less explicit argument that legislatures distort

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74 Tex. L. Rev. 951 (1997); Mark Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (1991).

<sup>202</sup> On the social history of the abortion debate and reaction to *Roe v. Wade*, see, e.g., *Bearing Right: How the Right Won the Abortion Wars* (2003); *Abortion Wars: A Half Century of Struggle 1950-2000* (Rickie Solinger ed. 1998).

<sup>203</sup> See Friedman, *supra* note 37, at 350-54 (describing twentieth century weakening of obscenity regulation and attributing it to popular culture changes); Felice Flanery Lewis, *Literature, Obscenity and the Law* 225-47 (1976) (describing trend toward greater legal protection and social acceptance of explicit or obscene materials).

majoritarian preferences through construction of criminal law.<sup>204</sup> But this does not answer some overcriminalization criticisms, because many rest on normative claims about the appropriate scope and use of criminal law. Statutes *over*-criminalize only relative some baseline of appropriate criminalization. Many scholars are clear about normative-baseline claims.<sup>205</sup> Erik Luna argues explicitly for a libertarian theory of criminal law, which would constrain many extant components of contemporary criminal codes.<sup>206</sup> A similar perspective underlies recent overcriminalization reports sponsored by the Federalist Society, the Cato Institute and the Heritage Foundation. David A.J. Richards grounds his human rights critique in an extension of deontological moral theory that gives priority to autonomy and equal rights for all persons.<sup>207</sup> More fundamentally, the dominant popular and scholarly account of criminal law's proper scope probably is the harm principle, a thesis that traces its origins from John Stuart Mill's essay "On Liberty"<sup>208</sup> through H.L.A. Hart's defense of the principle (most prominently against the legal moralism thesis of Lord Devlin)<sup>209</sup> to its adoption by Joel Feinberg,<sup>210</sup> Herbert Packer,<sup>211</sup> and others.<sup>212</sup> The Hart-Devlin debate was a debate about the proper basis and

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<sup>204</sup> This argument is implicit in complaints that legislatures enact silly, trivial or overexpansive statute that criminalize conduct few believe is blameworthy, and that they leave on the books offenses that majorities no longer support.

<sup>205</sup> Luna, *supra* note 10 (libertarian baseline); Packer, *supra* note 21 (urging no regulation of petty offenses better handled by civil regulation); Kadish, *supra* note 3; Kadish, *supra* note 21 (opposing morals and economic offenses); Rosensweig, *supra* note 3.

<sup>206</sup> See Luna, *supra* note 10, at 729-46.

<sup>207</sup> See Richards, *supra* note 3, at 1-20. For another example, see Husak, Crimes, *supra* note 1 (sketching preliminary thoughts on a limiting theory for substantive crimes built on George Fletcher's work).

<sup>208</sup> John Stuart Mill, On Liberty (Elizabeth Rapaport ed., 1978) (1859).

<sup>209</sup> H.L.A. Hart, Law, Liberty and Morality (1963); Patrick Devlin, Morals and the Criminal Law, in The Enforcement of Morals 1 (1965). The Hart-Devlin debate was recognized as a reiteration of the debate between Mill and Lord James Fitzjames Stephen a century earlier. See, e.g., Louis B. Schwartz, Morals Offenses and the Model Penal Code, 63 Colum. L. Rev. 669, 670 n.1 (1963) (citing the Mill-Stephen debate and noting "[t]he recent controversy traverses much the same ground as was surveyed in the nineteenth century."). For Lord Stephen's position, see James Fitzjames Stephen, Liberty, Equality, Fraternity (R.J. White ed., Cambridge Univ. Press 1967) (1873).

<sup>210</sup> See Feinberg, Moral Enforcement and the Harm Principle (from Social Philosophy (1973)), reprinted in Ethics and Public Policy 291 (Tom L. Beauchamp ed., 1975).

<sup>211</sup> See Packer, *supra* note 21, at 249-95.

<sup>212</sup> For a great account of the history of the harm principle and its advocates' long battle against legal moralism, see Bernard E. Harcourt, The Collapse of the Harm Principle, 90 J. Crim. L. & Criminology 109 (1999). By "collapse" Harcourt refers to the principle's ubiquitous adoption in criminal law discourse, so that the principle no longer does much work of constraining criminal law when advocates can find every sort of action causes some diffuse, indirect, social harm.

scope of criminal law and therefore, at bottom, about the criteria by which overcriminalization claims should be judged.<sup>213</sup>

Many of these arguments are (to me) persuasive. American jurisdictions overcriminalize or overpunish when judged against a range of normative claims grounded in retributive justice, optimal deterrence or effective crime prevention.<sup>214</sup> But these are arguments about what principles legislatures (and courts) should choose to adopt<sup>215</sup> and, ultimately, what principles democratic majorities should be persuaded by and urge upon their representatives. Many of those arguments, however sound, have not yet prevailed in political debates or the marketplace of ideas beyond academia.

Judged instead by how well it tracks majoritarian preferences, criminal law looks much less like *over*-criminalization, and legislative processes look less anomalous in their construction of criminal law. High American incarceration rates reflect a broad cultural and political consensus for harsh criminal law that legislatures reflect fairly accurately, a claim at the core of James Whitman's and David Garland's recent, excellent (and divergent) books comparing American and European punishment policies.<sup>216</sup> It is probably an insurmountable task to aggregate public preferences accurately on a broad topic like criminal justice and then assess how well political outcomes reflect those preferences.<sup>217</sup> But there is little evidence that American legislatures, prosecutors and courts depart substantially and consistently—as opposed to occasionally in specific cases—from those preferences, nor that they do more so with regard to criminal law than other broad social policy topics.

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<sup>213</sup> European scholars have the same complaints of their own codes. See Whitman, *supra* note 98, at 1301-1303.

<sup>214</sup> I have joined some of these arguments. See Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 *Calif. L. Rev.* 323 (2004); Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 *U. Pa. L. Rev.* 1295 (2001).

<sup>215</sup> Some are quite explicit on this point. Packer directs his argument at what point to what the “rational legislator” should and should not vote for. See Packer, *supra* note 21, at 272. See also Luna, *supra* note 10, at 742 (“The idea would be for government officials to begin their consideration of a particular action—such as a proposed law or an occasion for enforcement—from the perspective of libertarianism.”).

<sup>216</sup> For distinct arguments explaining contemporary American commitment to harsh punishment, see J. Whitman, *supra* note 6; D. Garland, *supra* note 6. For data suggesting that prison incarceration rose only as mental hospital confinement declined, see Harcourt, *supra* note 20, at 2-4, 15-28.

<sup>217</sup> It may be a conceptually impossible one if no clear preferences are discernable outside the processes used to determine them. See Posner & Vermeule, *supra* note 137, at 1686 (discussing Condorcet paradox, which “casts doubt on the premise that a simple majority can in normal circumstances even be identified”).

That, in turn, helps explain consistent public support for criminal law. Majorities are not always reliable protectors of minorities' interests, and thus we have no political solution in sight, for instance, on excessive incarceration of African American men (though note modest progress on racial profiling).<sup>218</sup> But if criminal law frequently reached conduct that majorities care about, public support for criminal law would shift quickly. Imagine a world with regular prosecutions for sex or cohabitation between unmarried people, for Sunday retail sales, for wearing bikinis in public or possessing racy novels, for criticizing public officials on cable news channels, for defaulting on debt or refusing employment—all things we once criminalized, or nearly so, and that are still sometimes punished in other (mostly non-democratic) nations. Even present-day cases of marginal federal fraud and false statement offenses would generate opposition if widespread enough to draw public attention (as independent counsel Ken Starr learned). Deviations from broad public preferences are agency costs; principals can't monitor and control every detail of agents' actions. But the broad sweep of criminal law aligns, and adjusts over time, roughly with public preferences. It just happens that, to the dismay of many (including me), those preferences support exceedingly harsh sanctions for many crimes and use of criminal law for social problems on which other policy tools could be effective.

*D. The coherence of democratic preferences on criminal law.*

Even if American law is not overcriminalized by a plausible measure of democratic preferences, scholars criticize codes not only for failing to embody a particular normative vision, but for manifesting incoherence or irrationality by, for instance, criminalizing innocuous conduct, excessively punishing conduct that creates attenuated risks of harm, or punishing similar conduct (e.g., possession of crack and powder cocaine), or even the same conduct, differently under various statutes.

Many of these criticisms track those made against regulation more generally. Agencies value human lives very differently in different contexts, and precautions against risk reduction don't consistently match objective estimates of the likelihood of risks.<sup>219</sup>

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<sup>218</sup> See Racial Profiling Data Collection Resource Center at <http://www.racialprofilinganalysis.neu.edu/> (noting more than twenty states have passed legislation prohibiting racial profiling or requiring data collection on racial profiling).

<sup>219</sup> See, e.g., Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of*

These regulatory defects reflect much-discussed defects in human cognition: people exaggerate vivid, easily understood or recently publicized risks, for instance. But those regulatory criticisms are themselves highly contested, and recent work reassessing regulatory critiques suggests a means also to challenge at least portions of the depictions of criminal codes as incoherent and irrational.

Consider how emerging research on “cultural cognition” and its role in democratic decision-making might generate a more defensible description of recent trends in criminal code coverage. Dan Kahan, Paul Slovic and their colleagues have developed accounts of “cultural worldviews” that categorize people’s perspective along axes of individualism-solidarism and hierarchy-egalitarianism. Briefly, “hierarchists morally disapprove of behavior that defies conventional norms and thus naturally believe that deviant behavior is dangerous; egalitarians morally disapprove of norms that rigidly stratify people, and individualists disapprove of norms that constrain individual choice generally, so these types naturally believe that deviant behavior is benign” but favor markets and private orderings.<sup>220</sup> These worldview descriptors help explain conflicting perspectives on risks and social policies addressing risks. Worldviews affect how people assess risks, and even what evidence of risks they are willing to credit. Perceptions of activities’ costs and benefits are filtered through cultural perceptions of the activities’ social meaning and moral import.<sup>221</sup> Risk perceptions express, because they are dependent upon, cultural worldviews.

With these tools, we can see a path toward an account of some of criminal law’s contentious components as well as recent trends of its expansion and contraction. For consensual sex crimes, individualist and egalitarian norms are now trumping formerly dominant hierarchical ones; the latter see greater risks in promiscuous sex.<sup>222</sup> That is an emerging (much more modest) trend on nonviolent drug possession crimes as well, but hierarchists, who worry more about the harms of individual drug use, are still a dominant

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Environmental Protection, 150 U. Pa. L. Rev. 1553 (2002); Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 Yale L.J. 1981 (1998).

<sup>220</sup> Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 116 Harv. L. Rev. \_\_\_ (forthcoming 2006) (at ms. p22; see also 17); see also Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. Penn. L. Rev. 1291, 1297-98 (2003) (similar descriptive overview).

<sup>221</sup> Kahan et al., *supra* note 220, at 22-23.

<sup>222</sup> *Id.* at 22.

force in drug policy.<sup>223</sup> Kahan and his colleagues have studied gun policy and find egalitarian and solidaristic people disfavor widespread private gun ownership on the view that it harms public safety; hierarchists and individualists fear gun *restrictions* because limiting private tools of defense diminishes public safety. In these ways, cultural views affect how likely we perceive risks from such policy choices to be, and they these policy views in turn express specific, cultural visions of the good society and the virtuous life.<sup>224</sup>

This cultural-evaluator approach provides a means for Kahan and his colleagues to respond to critiques that describe public preferences on regulatory issues as irrational by explaining the coherence of policy choices that depart from those implied by actuarial or other expert analysis of risk. These tools likewise suggest ways to respond to some criticisms of criminal codes as irrational.

I will not attempt here a full-scale theory of criminal codes' coherence in light of recent patterns of offense expansion and repeal, but note some possibilities for that project. The expansive federal law on fraud and false statements may be appealing to hierarchists, who may view even modest examples of such conduct as deviant challenges to legitimate institutional arrangements, while individualists may not view such conduct as benign acts entitled to freedom from sanction. Change in alcohol policies might be coherent in these terms as well. As we liberalize alcohol access and as driving increases, we aim to reduce increasing risks from deviant misuses of these activities by harshly punishing drunk driving and restricting teen drinking.<sup>225</sup> Widespread trends of decriminalizing consensual sex and gun possession likewise suggest a rise of individualist values. But jurisdictions have also widely adopted increased penalties for illicit weapons use: penalties increase for gun usage in crimes, felons are widely barred

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<sup>223</sup> This cultural worldview typology may explain why the Black Congressional Caucus split nearly evenly in supporting severe penalties for crack cocaine that had racially disproportionate incarceration effects; worldview types are likely not fully co-extensive with race. See David A. Skansky, Cocaine, Race, and Equal Protection, 47 *Stan. L. Rev.* 1283 (1995) (describing legislative history of the cocaine sentencing laws). For an argument justifying punishing crack more harshly than power cocaine, see Steven D. Levitt & Stephen J. Dubner, *Freakonomics* (2005).

<sup>224</sup> Kahan et al., *supra* note 220, at 23; Kahan & Braman, *supra* note 220, at 1306-08.

<sup>225</sup> For example, raising the minimum drinking from 18 to 21, despite widespread violation, reduces drinking, and alcohol-related problems, in that age group. See A.C. Wagenaar & T.L. Toomey, Effects of Minimum Drinking Age Laws: Review and Analyses of the Literature from 1960 to 2000, *J. Studies on Alcohol*, *supp.* no. 14, 206-225 (2002).

from owning guns, and violent crime sentences remain high.<sup>226</sup> Those combinations of policies likely map out coherently in cultural cognition terms; they may imply a individualist-dominated approach to private liberties backed by a hierarchists' concern about deviant, order-threatening abuse of those liberties in the form of vivid risks such as armed criminals (or drunk drivers or sexual predators). Gambling fits the same story: more freedom from criminal and civil regulation for consensual transactions, but officials regulate abuses through criminal fraud<sup>227</sup> and money laundering<sup>228</sup> laws and prosecution of organized crime as well as with related regulatory schemes. The decriminalization of much public profanity, of revealing or unconventional dress, and bans on unmarried cohabitation likely marks a coalition of individualistic and egalitarian worldviews.<sup>229</sup>

These speculations are preliminary to be sure. And we should not expect to be able explain a broad collection of laws perfectly as according perfectly public preferences even if these cultural types are accurate accounts of those preferences. There may be no clear majority preference on a given issue but rather cycling pluralities on multiple options.<sup>230</sup> And public preferences do not translate directly into legislation; they are mediated by legislative and other democratic processes, which open avenues for minority preferences to prevail, or for policy options to be presented and debated in ways that shift preferences. Nonetheless, contemporary criminal law may well fit a coherent account built with the conceptual tools of insights such as cultural cognition, even as it fails by scholars' normative standards of the harm principle, libertarianism, or a vision of rational sanction according to objective measures of risks and harms. And by such an account, many features of criminal law may look less like *over*criminalization.

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<sup>226</sup> Bureau of Justice Statistics, Prison Statistics (Dec. 2004) (portion of offenders in prison for violent crimes grew from 47% in 1995 to 51% in 2004, while portion incarcerated for drug crimes declined from 22% to 21% and for property crimes from 23% to 20%).

<sup>227</sup> See, e.g., Va. Code § 18.2-327 (defining criminal offense of winning at gambling through fraud).

<sup>228</sup> See, e.g., *Ratzlaf v. United States*, 510 U.S. 135 (1994) (overturning conviction, due to improper jury instruction on mens rea issue, of a gambler who structured his debt payments to a Nevada casino to avoid federal reporting requirements under 31 U.S.C. §§ 5322(a) & 5324(3)).

<sup>229</sup> Likewise, scholars make compelling arguments that drug policies are deeply flawed, but cultural accounts may explain why democratic majorities often favor policies that seem suboptimal to experts. See, e.g., Steven B. Duke & Albert C. Gross, *America's Longest War: Rethinking Our Tragic Crusade Against Drugs* (1993) (criticizing drug policy).

<sup>230</sup> See Posner & Vermeule, *supra* note 137, at 1686 (discussing Condorcet paradox, which "casts doubt on the premise that a simple majority can in normal circumstances even be identified").

## V. Overcriminalization and Criminal Justice's Biggest Problems

Despite the constraint of democratic preferences, the facts remain that over the last several decades criminal codes' overall growth outstripped their contraction.<sup>231</sup> At the same time, incarceration rates have risen dramatically, and a range of much-discussed problems worsened, including excessive plea bargaining and incarceration, racial disparities, and small but significant problem of wrongful convictions. If overcriminalization criticisms are really complaints about how we make and maintain criminal law—or put differently, about democratic governance of criminal law—then how much blame does the growth of criminal law share for this state of affairs?

Relatively little. Consider three prominent sets of problems.

### A. Incarceration rates

There is a wide scholarly consensus that American incarceration rates are excessive and racially skewed and that sentencing policies are overly rigid.<sup>232</sup> Expansion of substantive criminal law deserves little blame for this. The dramatic growth in incarceration rates is mostly of a function of new *sentencing* laws rather than new crimes, coupled with greater enforcement of mostly long-standing, familiar crimes, not outdated ones with little popular support.

Data on state felony convictions suggest that convictions focus overwhelmingly on traditional crimes about which there is little criminalization debate. In 2002, there were just over one million conviction felony convictions in state courts. Eight-five percent of those were for traditional crimes of violence (murder, sexual assault, robbery and aggravated assault), property (burglary, car theft and other larceny or fraud offenses) or drugs. The remaining fifteen percent mostly included uncontroversial nonviolent crimes such as receiving stolen property or vandalism.<sup>233</sup>

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<sup>231</sup> See Robinson, *supra* note 18.

<sup>232</sup> On incarceration rates, see Roy Walmsley, *World Prison Population List* (3d ed. 2002), available at <http://www.homeoffice.gov.uk/rds/pdfs/r166.pdf>. On racial disparities, see, e.g., Marc Mauer, *Race to Incarcerate* 182-87 (1999); Sentencing Reform in Overcrowded Times: A Comparative Perspective 219-48 (Michael Tonry & Kathleen Hatlestad eds. 1997). On rigidity of sentencing guidelines and other statutes, see, e.g., Kath Stith and Jose Cabranes, *Fear of Judging* (criticizing rigidity of pre-*Booker* federal sentencing guidelines); Paul Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of the Federal Mandatory Minimums)*, 56 *Stan. L. Rev.* 1017 (2004).

<sup>233</sup> BJS, *State Court Sentencing of Convicted Felons, 2002*, at tbls. 4.1, 4.3.

To be sure, these broad categories obscure some risks of overcriminalization. They lump together multiple definitions of theft, arson and other crimes that might cause the sorts of effects that scholars worry about, such as disparate sanctions for comparable offenders or excessively light proof burdens for prosecutors.<sup>234</sup> Nonetheless, the data strongly suggest that pursuit of obscure, marginal or controversial crimes is a statistically negligible problem, at least at the felony level. Occasional, outlier crimes—felony punishment for breaches of private fiduciary duties or of false statements under oath—are still legitimate causes for scholarly concern, but they are not substantial systemic problems, and they are concentrated in the federal system.<sup>235</sup>

Thus, note this misleading correlation: we have an increase in the number of crimes and a corresponding increase in incarceration. But virtually none of the incarceration increase of the last 25 years comes from the new substantive crimes added during that period; it comes from new punishment policies.<sup>236</sup> The incarceration increase comes almost entirely because we've decided to punish longstanding crimes more harshly; punishment for newly created crimes seems to add a statistically insignificant increment to incarceration rates. And Bernard Harcourt's current work suggests that even recent incarceration rate increases are not *over*-incarceration, relative to rates in the first half of the twentieth century, if we aggregate prison and mental hospital confinement. That combined measure of confinement was highest in the mid-twentieth century; current prison incarceration increases only substitute criminal confinement for the dramatic drop in institutionalization of the mentally ill, so that recent combined confinement measures merely match those of a half-century ago.<sup>237</sup> Harcourt's data

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<sup>234</sup> Multiple statutes that criminalize prohibited conduct such as drug sales and arson under several definitions are also not distinctive to the United States. For a description of various German drug and arson crimes, see Floyd Feeney, *German and American Prosecutions: An Approach to Statistical Comparison* 60-64 (BJS publication, NCJ 166610 Feb. 1998).

<sup>235</sup> Federal prosecutions are more diverse, and overcriminalization is worse there in many respects. Still, 85 percent of federal cases included a violent-crime charge, and 36 percent included a drug trafficking charge; 11.7% included fraud charges and 1.5% alleged regulatory offenses. The smaller, latter two categories are the focus of complaints of over-expansive crimes that cover marginal wrongdoing, and presumably only a subset of each category is controversial. See 2003 Sourcebook, *supra* note 4, at tbl. 5.17 (2001 data).

<sup>236</sup> The arguable exception might be drug crimes, especially if we count federal criminalization of state drug crimes as substantive expansion. The same basic drugs were criminalized before incarceration rate increases, but some important alternations to those drug crime statutes, such as the federal crime of crack cocaine possession and distribution, see Sklansky, *supra* note 236, surely account for some portion of incarceration increases. Still, these are not wholly new crimes nor outdated ones.

<sup>237</sup> See Harcourt, *supra* note 20, at 2-4, 15-28.

implies that recent punishment increases, in context, do not demonstrate an unprecedented “over” incarceration shift.

*B. Selective prosecution and racial disparities.*

Selective prosecution and racial disparities are also prominent, persistent problems, but here as well the increasing breadth of substantive law is a minimal factor. The causes of racial disparities are many. One of the most significant is likely differences in ease and cost of investigation between, for example, street-based drug markets and trade that occurs more privately in homes and offices.<sup>238</sup> Others may be racial profiling, bias in prosecutorial discretion, and (for the small percentage of cases that go to juries and for which the evidence is close) jury bias.<sup>239</sup> Duplicate crime definitions have little or no effect on racial profiling, but profiling is facilitated by expansive codes—especially traffic codes, which give police grounds to stop most people (and thus anyone they choose) for minor infractions who are then investigated for major ones.

But most of these disparities arise under offenses that are not plausible candidates for abolition and thus do not arise from overcriminalization. Save for some petty traffic offenses—which, despite some movement toward decriminalization, remain the segment of state codes best described as overcriminalized—the list of crimes that facilitate this discretion and that we would be willing to decriminalize is probably minimal. Discretion, and bias in its use, is an inevitable risk under any statute. Selective enforcement and disparities in outcomes occur even under crimes for which there is universal support—although one wonders if *sentencing* for those crimes would find more public disapproval if enforcement were more evenly distributed across race and class. No one urges decriminalization of murder (though some oppose the death penalty for it), yet some of the strongest evidence of racial bias is arises from capital murder prosecutions.<sup>240</sup>

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<sup>238</sup> Stuntz, *Race, Crime and Drugs*, 98 *Colum. L. Rev.* 1795 (1998).

<sup>239</sup> David Baldus, *Racial Discrimination and the Death Penalty in the post-Furman Era: An Empirical and Legal Overview*, with Recent Findings from Philadelphia, 83 *Cornell L. Rev.* 1638 (1998); *McClesky v. Kemp*, 481 U.S. 279 (1987).

<sup>240</sup> See *McClesky*, 481 U.S. 279 (1987); Baldus, *supra* note 239; David Baldus et al., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (1990); *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (calling death penalty “wantonly and so freakishly imposed”). Selectivity and bias have much to do with design and administration of capital punishment but nothing to do with overcriminalization.

Few oppose criminalizing cocaine distribution (though, again, many urge punishment reform), yet some of the most compelling data on racial disparities arise from enforcement of this prohibition. Here again, a prominent part of this disparity problem is federal law. Broad statutes (such as fraud offenses) and wide prosecutorial discretion raise the odds of selective enforcement.<sup>241</sup> And federalization of conduct already covered by state offenses increases the odds of disparate sentencing outcomes, because federal penalties far exceed most state ones.<sup>242</sup> On this point the critical scholarly consensus seems sound. But in the overall problem of racially disparate prosecution and sentencing patterns, overcriminalization in state codes seems to play a small part.

*C. Wrongful convictions and plea bargaining.*

A final pair of prominent issues is wrongful convictions and increasingly high rates of plea bargaining along with correspondingly shrinking numbers of trials. Overcriminalization seems to have no relation to the first, save to the extent it does to the second. That is, the only factor scholars and advocates point to as a cause of wrongful convictions that might implicate overcriminalization is prosecutorial power to coerce risk-averse, innocent defendants into guilty pleas.<sup>243</sup>

Expansive codes contain more offenses with varying penalties that prosecutors can leverage in bargaining. Plea to crime *X* with a five-year sentence, or face trial on crimes *X*, *Y*, and *Z* with a much higher minimum sentence if you lose.<sup>244</sup> This argument has some merit, but probably less than first appears. A range of other factors drive plea bargaining and would likely push it to its current levels even if codes contained less substantive redundancy and criminalization of marginal conduct. Drastic plea discounts—the difference between sentences after pleas and those after trial—do more to increase prosecutorial bargaining power than a wide array of substantive statutes,

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<sup>241</sup> See Richman & Stuntz, *supra* note 10 (discussing federal prosecutors' lesser political accountability, greater budgets and consequent wider discretion).

<sup>242</sup> See *United States v. Armstrong*, 517 U.S. 456 (1996).

<sup>243</sup> See Innocence Project, <http://www.innocenceproject.org/causes/index.php> (noting serology, hair analysis and other forms of forensic analysis with high error rates were bases of significant numbers of wrongful convictions later uncovered with DNA evidence); Report of the Governor's Commission on Capital Punishment (April 2002) (report to Illinois Governor available at <http://www.idoc.state.il.us/ccp/>). On the risks of bargains inducing pleas from innocents, see Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 *Cardozo L. Rev.* \_\_\_ (2006). For an innovative, insightful analysis in federal courts, see Wright, *supra* note 29 (linking inaccurate case outcomes to prosecutorial power in plea bargaining).

<sup>244</sup> See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* (Harvard Law School Research Paper No. 120).

especially those that plausibly could be abolished.<sup>245</sup> The force of prosecutorial plea offers depends on the ability to obtain harsher sentences after trial.<sup>246</sup> Caseload increases on prosecutors, defenders and judges without corresponding increases in resources encourage all those players to favor bargains over trial.<sup>247</sup> (Ron Wright, however, in an insightful analysis of federal cases, finds pleas increase as prosecutorial resources increase.)<sup>248</sup> Expansive criminal codes may play a role; they increase prosecutors' ability to stack multiple charges on the same course of conduct and thereby have more to bargain with. But in the routine run of cases, many of those charges do not arise from offense definitions that even most scholars (let alone legislators or voters) would find easy candidates for repeal; recall that most felons, especially in state systems, serve sentences for familiar violent, drug and property crimes.<sup>249</sup>

Moreover, our best historical account of plea bargain practice makes little mention of expanding substantive codes as an explanation for bargaining's rise. George Fisher's definitive study found plea bargaining grew from an almost non-existent practice to a dominant one over the nineteenth century largely due to rigid *sentencing* laws, not broad codes. Mandatory sentences eliminate judicial discretion and allow prosecutors to control the discount for pleas over trials and thus bargaining first emerged in liquor cases, where sentences were determinate.<sup>250</sup> Other changes supported bargaining's growth—caseload pressures on judges and prosecutors, and changing evidence rules that made trial (and trial testimony) more risky for defendants.<sup>251</sup> But plea bargaining arose before codes started their expansive growth. While more crimes add to prosecutors' charge-stacking options, it is the sentencing implications of those charges—whether they carry

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<sup>245</sup> See Wright, *supra* note 29, at 130; George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (2003); Gazal-Ayal, *supra* note 243.

<sup>246</sup> See Stuntz, *supra* note 244; Wright, *supra* note 29, at 129-37.

<sup>247</sup> See William J. Stuntz, *Criminal Law's Disappearing Shadow*, 117 *Harv. L. Rev.* 2548, 2553-55 (2004) (describing docket pressures and resource constraints on prosecutors and noting the prosecutors' budgets and staff have not kept pace with caseload increases); G. Fisher, *supra* note 245, at 111-36 & 175-80 (noting judges went along with plea bargaining to make room for increasing civil dockets); Milton Heumann, *Plea Bargaining* 144-48 (1978) (noting judges' and defense attorneys' active participation in plea bargaining). For a measure of docket pressure on federal trial judges, see *Sourcebook 2003*, *supra* note 4, at tbl. 5.8 (noting criminal cases-per-judge rose from 63 in 1982 to 104 in 2003).

<sup>248</sup> Wright, *supra* note 29, at 85 & 129-37.

<sup>249</sup> See *supra* note notes \_\_\_ - \_\_\_.

<sup>250</sup> See Fisher, *supra* note 245.

<sup>251</sup> *Id.*

mandatory penalties, and whether sentences on separate charges will merge run concurrently—that make charge-stacking and bargaining a powerful force.

Again, the federal system is more suspect than the states. Even post *Booker*,<sup>252</sup> federal sentences remain more rigid than states' (mandatory-minimum statutes are unaffected by *Booker*), and the case for abolishing overbroad and redundant *serious* offenses is stronger there. Even so, Wright's detailed empirical analysis attributes to the expansive federal code no such effect.<sup>253</sup> Moreover, the point remains for the vast bulk of criminal law, which occurs in state systems. Leaner, more coherent substantive codes would likely have only modest effects prosecutorial bargaining power and practice; other factors would still drive much plea bargaining.

## VI. Conclusion

There is no doubt that many state codes are overstuffed with redundant, outdated and trivial offenses, and the federal code surpasses the worse state offender. But that does not mean the story of democratic construction of substantive criminal law is as bleak as many scholars suggest, nor are bloated codes' effects as significant. Little conduct is criminalized, and even less is enforced, that majorities think is wholly innocent. And when majority preferences change about conduct that is criminalized, legislatures often find their way to repealing such provisions. When a minority of them does not, courts sometimes do it for them, and prosecutors mostly make sure law-in-action matches those preferences even if law-on-the-books does not. States vary in their capacity to reform their codes, but the glass is plausibly viewed as at least half full. There are plenty of examples of states improving that capacity, especially through the design of legislative processes—framework laws and use of expert commissions—that point the way for more states to more effectively manage and monitor criminal law.

Legislatures' work on criminal law seems little worse than other perennial topics in which legislative products are open to criticism as wasteful, serving minority interests at the expense of common ones, or violating a normative ideal. Think of parochial pork-

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<sup>252</sup> *United States v. Booker*, 543 U.S. \_\_\_ (2005) (holding mandatory application of federal sentencing guidelines unconstitutional).

<sup>253</sup> Wright, *supra* note 29, at 116-54; *id.* at 120 (“The federal criminal code ... has expanded to cover more and more conduct .... But the real footprint ... is measured not by the reach of the code, but the number and type of cases actually filed.”).

barrel items in federal appropriations bills or specialized tax provisions that gradually clutter the tax code in the wake of its periodic reform. Democratic lawmaking is messy and rarely accords with a single, coherent theory of how any policy—the tax code or criminal code, say—should be organized. But Congress occasionally finds ways to improve these imperfect processes—framework laws are good examples—and a significant number of states are finding comparable ways to do so with regard to criminal lawmaking. And if those sorts of procedural reforms improve legislative management of criminal law, then remaining problems are not so much criminal law politics and democracy generally but in significant part choices among particular, sub-constitutional mechanisms of political process, which are clearly amenable to reform.

The full details of criminal law defy description within a coherent normative theory, but holding aside pockets of federal practice and some unenforced, mostly minor state laws, its broad sweep roughly accords with majoritarian preferences. If this is true, criminal law's substantive reach is not likely to undermine its public legitimacy; majorities seem to have little problem with many provisions scholars complain about. Other effects of criminal law's haphazard growth—inconsistent terminology, publication of offenses outside the criminal code, varying punishments for similar crimes—are continuing issues. But they are largely separate from the core concern of overcriminalization, namely that criminal law punishes conduct most people think is innocent, and that law's substantive scope excessively enhances prosecutorial power.

Criminal law, in short, is not as substantively broad—especially in its practical reach—as overcriminalization literature typically implies. Nor are democratic processes as deeply and distinctively flawed on the construction of criminal law. Legislatures have an undervalued history for reforming crime definitions, prosecutors constrain those offenses even more in practice, and procedural innovations show the possibility, and perhaps the promise, for improving legislative governance of criminal law.