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## Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz

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Overcriminalization for Lack of Better Options – A Celebration of Bill Stuntz  
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By Daniel Richman\*

The unity of Bill Stuntz’s character -- his profound integrity -- makes it easy to move from a celebration of his friendship (which I’ve treasured since we first met back in 1985) to one of his scholarship, for creativity, wisdom, and humility are strengths not just of Bill himself but of his work. [*This opening depends upon the sequence of essays in the volume.*] Even as his broad brush strokes have fundamentally advanced our understanding of the interplay between substantive criminal law, criminal procedure, and criminal justice institutions over time, Bill’s work – like Bill himself – welcomes and endures sustained engagement.<sup>1</sup> Humility is appropriate for me too as I offer some ruminations sparked by his scholarship. The academic’s plight is to simultaneously worry about being uninteresting and about being wrong. My hope is to err on the side of error. And my methodology here will be much the same as it has been in a lot of my other work: I seek to entertain Bill, and perhaps to bait him into telling me why I’m wrong.

As Bill has noted, “criminal law’s breadth” – the sheer amount of conduct it subjects to penal sanctions – “has long been the starting point for virtually all the scholarship” in the field.<sup>2</sup> Back in 2001, he powerfully laid out the agency problems at the heart of the “pathologies” that inappropriately expand the range and depth of American criminal law: “Legislators gain when they write criminal statutes in ways that benefit prosecutors. Prosecutors gain from statutes that enable them more easily to induce guilty pleas. Appellate courts lack the doctrinal tools to combat those tendencies.”<sup>3</sup> Thereafter, Bill elaborated his model, distinguishing between

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\* Paul J. Kellner Professor of Law, Columbia Law School. Thanks to Alexandra Bowie, Adam Carlis, David Garland, Niki Lacey, Maximo Langer, Jerry Lynch, Maren Messing, Bill Simon, Peter Strauss, Bill [Stuntz](#), Carol [Steiker](#), Jim Whitman, and participants at two very helpful lunches with my colleagues and students at Columbia for extremely helpful comments; to Carol, Mike Klarman and David Skeel for putting on this celebration, and to Bill Stuntz for more than twenty-five years of friendship, inspiration, and humor.

<sup>1</sup> See William J. Stuntz, Book Review: Christian Legal Theory, 116 Harv. L. Rev. 1707, 1744 (2003) (“Imagine how differently most law review articles would read if their authors admitted the possibility that they might be mistaken.”); cf. Letter from Oliver Cromwell to the General Assembly of the Kirk of Scotland (Aug. 3, 1650), in *The Writings and Speeches of Oliver Cromwell* 3022-03 (Wilbur Cortez Abbott ed., 1939) (“I beseech you, in the bowels of Christ, think it possible that you may be mistaken.”). When speaking of Bill, I’ve not altered the present tense in which this essay was written. Bill will always live in his written work, in the minds (including mine) that he challenged to think harder, and in the people (including me) who loved him.

<sup>2</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 507 (2001) [hereinafter Stuntz, *Pathological Politics*]; see also Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford 2008); Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703 (2005); John Coffee, *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193 (1991); Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 Am. Crim. L. Q. 17 (1968).

<sup>3</sup> Stuntz, *Pathological Politics*, supra note 2, at 528.

federal and local political dynamics,<sup>4</sup> and explaining how the loss of local democratic control over the criminal justice system has led to racial inequality in criminal justice outcomes.<sup>5</sup>

Bill has never suggested that these actors make their moves within a closed universe. Indeed, voters' willingness to reward just about any legislation that increases the scope or depth of criminal law lies at the heart of his "pathology,"<sup>6</sup> and he notes how "interest group pressure only aggravates the tendency toward ever broader liability rules."<sup>7</sup> At the core of his diagnostic story, however, is a narrative of how the institutional purposes of these actors are served by more criminal law (and perhaps more criminal enforcement) than is appropriate for a well-functioning society. I suspect Bill's focus is quite right: More punitive and broader penal sanctions certainly tend to increase the discretion of police officers and prosecutors and, under a constitutional regime of largely unfettered bargaining, can be cashed out for search and seizure authority, cheaper adjudications, agency prestige, political capital and the like. That these transactions occur in a regime in which monitoring is particularly difficult makes them even more attractive to enforcement actors, for whom increased criminalization can thus become an unalloyed good.

Yet one might profitably supplement Bill's insights into why institutional actors oversupply criminal law by exploring another, more perverse, reason why Americans are all too quick to resort to criminal statutes and actual prosecutions: Because criminal law offers a unique and unnecessarily bundled set of institutional and procedural characteristics for which there are no non-criminal substitutes, it frequently becomes a recourse – not a preferred choice -- when more effective and durable alternatives just aren't available. It's troubling enough when a society over-criminalizes (by some unspecified metric) and over-punishes (by some unspecified metric). It is even more troubling when we use criminal law not necessarily because we affirmatively want to but because it's easier and cheaper than less punitive options.

To be sure, criminal law comes with some expensive appurtenances – also known as "fundamental constitutional rights" – that tend to limit recourse to it. As Carol Steiker has so insightfully explained, by raising "the cost to government of using the criminal process," the "revolution in criminal procedure" spearheaded by the Warren Court gave state and federal legislators good reason to devise civil avenues for attacking "what might be more plausibly classified as criminal conduct."<sup>8</sup> The chance to avoid adjudicative costs attributed to such criminal procedure rights as that to trial by jury and proof beyond a reasonable doubt will give a legislator or state official good reason to characterize a sanction or restraint as merely

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<sup>4</sup> See Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 *Colum. L. Rev.* 583 (2005).

<sup>5</sup> William J. Stuntz, *Unequal Justice*, 121 *Harv. L. Rev.* 1969 (2008); see also William J. Stuntz, *The Collapse of American Criminal Justice* (2011) (draft).

<sup>6</sup> Stuntz, *Pathological Politics*, *supra* note 2, at 529-33.

<sup>7</sup> *Id.* at 553.

<sup>8</sup> Carol Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 *Geo. L.J.* 775, 780 (1997); see also Carol Steiker, *The Limits of the Preventive State*, 88 *J. Crim. L. & Crim.* 771 (1998); Daniel Richman, *United States v. Salerno: The Constitutionality of Regulatory Detention*, in *Criminal Procedure Stories* (Carol Steiker, ed. 2006); Erin Murphy, *Paradigms of Restraint*, 57 *Duke L.J.* 1321 (2008).

“regulatory” where all things are equal. Yet all things are rarely equal, particularly when institutional context is considered. My goal here is to explore the powerful countervailing forces that often make the criminal route more alluring – the forces that push legislators and enforcers to use criminal law in lieu of other possible interventions, not those that lead them to circumvent criminal protections by proceeding civilly. (In a semi-perfect world, these countervailing forces would balance each other out. We don’t live in that world.)

In addition to honoring Bill by adding a few brush strokes to his wonderful picture, I want to suggest that the solution to overcriminalization lies outside criminal law processes as well as within them. The focus here will be to sketch out what moves in that direction would look like.<sup>9</sup> Insightful and provocative work by David Garland, John Simon, Jim Whitman and others<sup>10</sup> has quite properly focused on the cultural roots of our recourse to criminalization – and highly punitive criminalization at that. Like Bill, however, I think institutional dynamics (spurred by cultural preferences that are not necessarily related to punishment itself) have far more explanatory power than is often appreciated.

### The Institutional “Definition” of What Is “Really” Criminal

Had we an accepted metric for figuring out when conduct can properly be subjected to criminal sanctions and to what degree, guarding against overcriminalization would be a lot easier. Having one would perhaps not produce more reasoned decision making in our punishment of core crimes – murders, rapes, robberies and the like – but it would at least anchor our decisions about when criminal sanctions should be used as a tool of government power at border between “mere” regulation and prosecution. Yet we lack any such metric. Markus Dubber has plausibly suggested that the fault lies (at least in part) in the Anglo-American conflation of law and police power.<sup>11</sup> Picking up on this point, Niki Lacey has noted the contrast with our more discerning cousins on the Continent, who worked hard to keep criminal law preoccupied with wrong-doing and culpability and relied on regulation to advance other state goals like risk-creation or public health.<sup>12</sup> We made no effort in that regard and quietly allowed the police power to be “absorbed” within “law.”<sup>13</sup> The result is intellectual chaos. As Douglas Husak recently noted,

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<sup>9</sup> While the focus here is on the United States, the argument that overcriminalization here is partially a function of peculiar doctrinal and institutional arrangements not found in, say, Europe, the approach may, in passing, offer some comfort to Europeans scared that they are on verge of taking “the punitive turn” down the American or English path. See Nicola Lacey, *The Prisoners’ Dilemma: Political Economy and Punishment in Contemporary Democracies* (2008). But see David Downes, *Contrasts in Toleration – 20 Years On* (Dec. 2008 paper), available at <http://vsr.ruhosting.nl/page24/files/Downes-ContrastsinTolerance.doc> (suggesting that countries like the Netherlands, with “strongly social democratic political economies,” have not as yet taken the punitive turn).

<sup>10</sup> For an excellent review essay, see James Q. Whitman, *The Comparative Study of Criminal Punishment*, 17 *Ann. Rev. Law Soc. Sci.* 17 (2005).

<sup>11</sup> See Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005).

<sup>12</sup> Lacey, *supra* note 9, at 104 (on the Continent “this location of regulatory offenses within the framework of criminal law ‘proper’ would be regarded as most unsatisfactory. Rather than drawing the old police power within the modern framework of criminal justice, the modern governmental settlements of European codification of the early nineteenth century were inclined to separate out this form of social regulation within a discrete framework, leaving regulatory offenses as a more visible and autonomous manifestation of state power.”).

<sup>13</sup> Lacey *supra* note 9, at 102.

“The absence of a viable account of criminalization constitutes the single most glaring failure of penal theory as it has developed on both sides of the Atlantic.”<sup>14</sup>

The scant attention Anglo-American legal development gave to drawing clear distinctions between the province of criminal law and that of civil regulation was partly a function of our general preference for procedural justice over a priori principles of substantive law. As Bill has often noted, our Constitution has a lot to say about how criminal law should be enforced but little about what criminal law should be. Our substantive criminal law therefore developed first through the case-by-case pronouncements of common law judges and then by the varied articulations of incensed legislators. The Model Penal Code eventually offered theoretical rigor to receptive jurisdictions (a category that certainly does include the federal system).<sup>15</sup> But even in those states, the Model Penal Code has had only limited effect on the “special part” of the penal code.<sup>16</sup> To be sure, Continental systems – like those in Germany, France, and Italy -- will occasionally criminalize what we leave to regulation or tort, as the French have done with employment discrimination.<sup>17</sup> And the coherence I see may just come from my distance and ignorance. Yet one discerns an integrity in the substantive penal law of those countries that is sorely absent here. Perhaps the same institutional self-confidence behind the commitment of inquisitorial systems to seek the “real truth” in their courts also supports an effort to systematically discern what really should be criminal.<sup>18</sup> Here, we make it up as we go along.

Our tolerance for theoretically unrestricted criminal law and our readiness to rely on criminal enforcement to advance a wide range of public policies is also a function of our historically weak “state”<sup>19</sup> and the paucity of our institutional structures, i.e. the lack of regulatory actors other than cops, prosecutors and judges. From the Founding – and long before in Britain<sup>20</sup> – criminal justice institutions (however part-time) offered the promise of local control (through juries, venue rules, and decentralized enforcers) and the capacity for accepting

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<sup>14</sup>Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* 58 (Oxford 2008).

<sup>15</sup> See *Dixon v. United States*, 548 U.S. 1, 15 (2006) (when setting contours of the duress defense under federal criminal law, Court gives “no weight” to the Model Penal Code formulation).

<sup>16</sup> Gerard E. Lynch, *Towards A Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 *Buffalo Crim. L. Rev.* 297, 299 (1998) (noting that the “Model Penal Code is a significantly less potent guide to the ‘special part’ of the criminal law today,” in part because “state legislatures have poured out new criminal statutes undreamed of by [that Code’s] drafters.”)

<sup>17</sup> See Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 *Wash. U. L. Rev.* 1315 (2008); Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 *Colum. J. Eur. L.* 241 (2003).

<sup>18</sup> See Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 *Boston College Int’l and Comp. L. Rev.* 317, 353, 357 (1995) (noting the “[n]arrower scope of the criminal law,” in Germany as well as commitment of tribunal to “finding the truth”); see also Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How the French Do It, How Can We Find Out, and Why Should We Care?*, 78 *Cal. L. Rev.* 539, 568 (1990) (similarly noting narrower scope of French criminal law).

<sup>19</sup> For insightful counsel on how the term “state” should be used when referring to the United States in comparative terms, see Desmond King & Robert C. Lieberman, *Ironies of States Building: Comparative Perspective on the American State*, 61 *World Politics* 547 (2009).

<sup>20</sup> See J.M. Beattie, *Policing and Punishment in London 1660-1750* (2002); J.M. Beattie, *Crime and the Courts in England, 1660-1800* (1986); P. King, *Crime, Justice and Discretion in England 1740-1820* (2000)

new responsibilities on a discretionary basis.<sup>21</sup> These characteristics made them the perfect recourse for those who believed in minimal government, disdaining the interventionist Weberian bureaucracies of some other Western polities,<sup>22</sup> but who periodically desired a law for “just this one bad thing” with an off-the-rack enforcement regime. Darryl Brown recounts: “The early decades of the American republic continued earlier English and colonial practices of employing criminal law routinely as a means of local regulation.”<sup>23</sup> Thereafter, efforts to identify and target vice in its many forms have played a remarkably large role in the growth of the criminal docket. As Bill notes in his masterful upcoming book: “Between the late 1870s and 1933, American’s criminal justice system fought a series of cultural battles in which criminal law – especially federal criminal law – was a key weapon: against polygamy, against state lotteries., against prostitution, against opium-based drugs and, last, but definitely not least, against alcoholic drink.”<sup>24</sup> Yet vice is not the whole story. One also sees an easy creep from more mundane regulation to criminalization in *United States v. Grimaud*,<sup>25</sup> the watershed case upholding the constitutionality of administrative crimes.<sup>26</sup> It arose out of the 1908 federal criminal prosecution of a California shepherd for violating the Interior Department’s national forest grazing regulations. The 1897 legislation authorizing the Interior Department to promulgate regulations to protect the lands under its stewardship had left it free to use either civil or criminal sanctions.<sup>27</sup> Thereafter, when the newly created Forest Service – led by the able Gifford Pinchot, who carefully nurtured his ties to the Attorney General<sup>28</sup> – assumed Interior’s responsibilities and found civil injunctions inadequate, it simply prevailed on the Justice Department to replead the regulatory violations in grand jury indictments.<sup>29</sup> While the New Deal and the growth of the administrative state brought a conspicuous proliferation of public welfare offenses within the federal system, that proliferation thus had begun decades before. As early as 1933 a canny observer like Francis Sayres could already worry about the upcoming flood that threatened to erase what was left of the civil-criminal divide.<sup>30</sup>

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<sup>21</sup> Eric Monkkonen notes how the Boston sewer department was essentially spun out of the city marshal’s service in 1837. Eric H. Monkkonen, *Police in Urban America, 1860-1920*, at 47 (2004 ed.) (noting how when Boston incorporated in 1822, the city marshal was given general responsibility for matters affecting the “health, security, and comfort of the city,” and that “[t]he only change in the power of the Boston marshal came in 1837, when the city created a separate department of sewers, run by a former deputy marshal.”).

<sup>22</sup> See Desmond King & Robert C. Lieberman, *supra* note 19, at 573-74 (“A well-rehearsed motif in American political culture is that of being a strong nation with a weak state whose citizens prize decentralization and localism, that is, a political system less centralized, less interventionist, and less Weberian than that found in comparable advanced democracies, including some with strong federal systems such as Australia or Germany.”).

<sup>23</sup> Darryl K. Brown, Yick Wo and the Constitutional Regulation of Criminal Law, 2008 U. Ill. L. Rev. 1405, 1407.

<sup>24</sup> William J. Stuntz, *The Collapse of American Criminal Justice*, 161? (2011) (draft).

<sup>25</sup> 220 U.S. 506 (1911).

<sup>26</sup> See Thomas W. Merrill & Kathryn T. Watts, Agency Rules with Force of Law, 116 Harv. L. Rev. 467, 501-02 (2002) (“*Grimaud* thus established what Congress could do: it could delegate power to an agency to adopt regulations subject to criminal penalties, provided that Congress itself legislated the penalties.”).

<sup>27</sup> See Logan Sawyer, *Grazing, Grimaud, and Gifford Pinchot: How the Forest Service Overcame the Classical Nondelegation Doctrine to Establish Administrative Crimes*, 24 J. L. & Pol. 171, 184 (2008).

<sup>28</sup> *Id.* at 193.

<sup>29</sup> *Id.* at 184-202.

<sup>30</sup> See Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 84 (1933) (“With respect to public welfare offenses involving light penalties the abandonment of the classic requirement of mens rea is probably a

Lacking any commonly accepted intellectual basis for distinguishing the appropriate realm of criminal prosecutions from that of other government interventions, we ended up, by default, with an institutional definition. Over time, criminal law in the United States became what criminal justice actors did, nothing more.

### Why Criminalization Will be Sought by Those Who Might Prefer Something Else

Conceptually, we thus have an inexhaustible supply of criminal law in the United States. As a constitutional matter too, thanks to the Framers' preoccupation with criminal procedure. Although Bill has given us a provocative glimpse of "a kind of criminal substantive due process" that would ensure that "the conduct criminalized was serious enough to justify *some* criminal punishment,"<sup>31</sup> this is not a doctrinal dog likely to bark in the foreseeable future (although every so often, it gets up and walks around).<sup>32</sup> As a result, the federal government and the States are thus substantially free to impose the same stigma and sanctions on the violator of any social policy that they impose on the robber, rapist, or murderer (with the exception of capital punishment). And they can use the same cops, prosecutors, and courts to do so.

The supply of actual criminal enforcement is of course not inexhaustible. Cops and prosecutors are expensive, as are prisons. (Particularly prisons, when you think about it.) Yet these very limits, when combined with the strong norms of police and prosecutorial discretion that characterize American criminal enforcement and the opacity that insulates prosecutorial decision making from scrutiny,<sup>33</sup> have ended up promoting the extension of criminal law's domain. Like those magic bags that seem to hold everything the magician puts in them without getting bigger, criminal justice institutions seem able to assume any number of new assignments without necessarily acting on them. Such is the value of decentralized and highly discretionary authority. And because of our reliance on general jurisdiction criminal enforcement institutions, the mere bringing of a criminal case entails a powerful statement of the condemned conduct's worthiness for criminal treatment.

That a single institution at each level of government should – with notable exceptions -- have responsibility for all criminal prosecutions is something we take for granted, but shouldn't. Our readiness to extend criminal law beyond "core" harm-based concerns<sup>34</sup> did not necessarily (at least as an a priori matter) have to be accompanied by the assignment of these extended criminal functions to the same general jurisdiction enforcement agencies that handle regular crimes (murders, rapes, robberies, and the like). One could imagine a system of subject-specific investigators bringing cases to "special" prosecutors housed in stand-alone agencies with limited

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sound development. But courts should scrupulously avoid extending the doctrines applicable to public welfare offenses to true crimes. To do so would sap the vitality of the criminal law.").

<sup>31</sup> William J. Stuntz, Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 66 (1997).

<sup>32</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003); *California v. Lambert*, 355 U.S. 225 (1957).

<sup>33</sup> See James Q. Whitman, Equality in Criminal Law: The Two Divergent Western Roads, 1 J. Legal Analysis 119 (2009).

<sup>34</sup> See generally Douglas Husak, Crimes Outside the Core, 39 Tulsa L. Rev. 755 (2004) (discussing ways to distinguish the "core" of criminal law from its "periphery"); see also Douglas Husak, 29 Oxford J. Legal Stud. 169, 171 (2009) (referring to "offences such as murder, rape, theft and the like" as the "core of the criminal law").

missions. In such a world, specialized enforcement agencies could be equipped with specialized investigative and enforcement tools keyed to their particular subject matter; prosecutors could even bring cases in special courts. We have largely rejected or ignored that model, however.<sup>35</sup> Within the federal system, most prosecutions are brought by generalist U.S. Attorneys. Even the Justice Department's specialized litigating divisions (like those for Antitrust, Civil Rights and Tax) are housed within an agency that has general federal criminal jurisdiction. Similarly, in the States, the vast majority of prosecutors are in general jurisdiction district attorneys offices and bring cases before general jurisdiction criminal judges.<sup>36</sup> Sure, prosecutors within the larger offices sometimes specialize, sometimes in units that proclaim their dedication to particular kinds of cases. And at the local level, some jurisdictions have experimented with specialty drug, gun and domestic violence courts.<sup>37</sup> Yet it is a fundamentally generalist system. Moreover, everywhere, trials (to the extent they occur) will be before the ultimate general jurisdiction players: lay jurors whose response to the evidence (and readiness to convict) will be substantially driven by their views of the “seriousness” of the offense (or offender).<sup>38</sup>

Consider how this institutional design affects the prosecution of offenses outside core criminality: A fraud or “public welfare” offense will usually be pursued with resources (and by prosecutors) that could just as easily be used against rapes, robberies, and murders, and by prosecutors and enforcement personnel who may have just gone after such obviously “real” crimes.<sup>39</sup> And the reputational capital that an agency develops going after “real” crimes gets deployed – consciously or not – across all the criminal cases it brings.<sup>40</sup> No prosecutor would be so stupid as to explicitly analogize a securities fraud or environmental crime to murder, rape, or terrorism at a press conference, arraignment, or trial. Nor will anyone confuse Martha Stewart with Matty “the Horse” Ianniello of the Genovese Family. But the announcement that

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<sup>35</sup> But see Luis A. Aguilar, Speech at North American Securities Administrators Ass’n’s Winder Enforcement Conference, Empowering the Markets Watchdog to Effect Real Results, Jan. 10, 2009 (SEC commissioner argues “that Congress could greatly enhance enforcement of the securities laws by authorizing the Commission to prosecute criminal violations of the federal securities laws where the Department of Justice declines to bring an action.”), available at <http://www.sec.gov/news/speech/2009/spch011009laa.htm>

<sup>36</sup> For a survey of the degree to which state attorneys general get involved in what otherwise would be local prosecutions, see Rachel E. Barkow, Federalism and Criminal Law: What the Feds Can Learn from the States, 109 Mich. L. Rev. 519 (2010).

<sup>37</sup> See generally Michael C. Dorf & Jeffrey A. Fagan, Problem-Solving Courts: From Innovation to Institutionalization, 40 Am. Crim. L. Rev. 1501 (2003); Phyllis Skloot Bamberger, Specialized Courts: Not a Cure-All, 30 Fordham Urb. L.J. 1091 (2003).

<sup>38</sup> See Daniel C. Richman, *Old Chief v. United States*: Stipulating Away Prosecutorial Accountability?, 83 Va. L. Rev. 939, 971-73 (1997) (citing studies).

<sup>39</sup> See Alice Ristroph, Criminal Law in the Shadow of Violence, from *The Law of Violence* (forthcoming Oxford University Press) “In the criminal law, violent crime seems to verify the need for, and justice of, the state’s own violence in policing and punishment.”, available at [www.law.berkeley.edu/img/Ristroph\(1\).pdf](http://www.law.berkeley.edu/img/Ristroph(1).pdf); see also James Q. Whitman, The Comparative Study of Criminal Punishment, 1 Ann. Rev. Law Soc. Sci. 17, 29-30 (2005) (discussing relationship between criminal punishment and social traditions of violence).

<sup>40</sup> The same sort of cross-subsidy has historically supported extensions of federal criminal jurisdiction. See Kathleen J. Frydl, Kidnapping and State Development in the United States, 20 Stud. in Am. Pol. Dev. 18, 20 (2006) (“The quintessential crime against the person, kidnapping, furnished opportunity to those eager to project the formal power of the state.”).

an indictment has been issued in a securities fraud case is made from the same podium as an announcement that a mob boss has been convicted. The police or federal agents will wear the same bedizened raid jackets as they cart boxes out of a hedge fund or counterfeit handbag plant as they do at a hostage “situation” or murder scene. And all handcuffs look alike.<sup>41</sup>

In this world, the decisions prosecutors and other enforcers make and the actions they take speak far more loudly than legislative criminalization. This difference in expressive capacities arises for a number of reasons. For one thing, because criminal laws aren’t self-executing, and we lack the German “principle of legality” that compels prosecution, a penal provision may never have a life beyond the penal code. Yes, a legislator’s campaign literature will tout her sponsorship of the “Get Tough on [Fill in the Blank] Act,” but that marginal contribution to the thickness of the statute book likely has little more salience than a bridge funded or defense contract obtained. It is often only after a prosecutor takes action that a statute – particularly one drafted some years earlier – enters the public consciousness. Moreover, when a prosecutor invokes a provision, she will always do so in the context of facts that she can select for their moral appeal.<sup>42</sup> This both enables the prosecutor to shape the contours of the doctrine and ensures maximum pressure behind the expansion of the criminal law. In the end, though, much of the power of the speech comes from the identity of the speaker: Although generalist prosecutors may lack the specialized knowledge of their regulatory brethren across the civil-criminal divide, they are far better placed to make trans-substantive claims of moral blameworthiness.<sup>43</sup> And since prosecutors have more “skin” in the game, because of the opportunity costs of their cases, their claims of “criminality” have far more power to transform social norms than the assertions of a legislature that has an infinite supply of such epithets.<sup>44</sup>

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<sup>41</sup> See *Caaldarola v. County of Westchester*, 343 F.3d 570 (2d Cir. 2003) (dismissing civil claim of corrections officers complaining about videotaped “perp walk” following their arrest for disability benefit fraud). The court noted:

The “perp walk,” that is, when an accused wrongdoer is led away in handcuffs by the police to the courthouse, police station, or jail, has been featured in newspapers and newscasts for decades. The normally camera-shy arrestees often pull coats over their heads, place their hands in front of their faces, or otherwise attempt to obscure their identities. A recent surge in “executive perp walks” has featured accused white collar criminals in designer suits and handcuffs. Whether the accused wrongdoer is wearing a sweatshirt over his head or an Armani suit on his back, we suspect that perp walks are broadcast by networks and reprinted in newspapers at least in part for their entertainment value. Yet, perp walks also serve the more serious purpose of educating the public about law enforcement efforts. The image of the accused being led away to contend with the justice system powerfully communicates government efforts to thwart the criminal element, and it may deter others from attempting similar crimes.

Id. at 572-73.

<sup>42</sup> See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469, 480 (“By paying close attention to the facts of the cases they select as vehicles for novel statutory readings, federal prosecutors can highlight the benefits and suppress the costs of the interpretations that they favor.”).

<sup>43</sup> See Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 L. & Contemp. Probs. 23, 54 (1997) (“The EPA or SEC lawyer may be better able to compare each case with other violations of securities or environmental laws, in terms of its importance to operating honest capital markets or protecting environmental quality, but the prosecutor is better equipped to compare the violation with other types of crime in terms of the moral blameworthiness of conduct, the degree of departure from general standards of citizenship, and the equity of imposing stigmatizing punishment.”).

<sup>44</sup> See Mariano-Florentino Cuéllar, *The Institutional Logic of Preventive Crime* 34 (2008) (“Unlike other agencies, the bureaucracies charged with crime prevention are likely to enjoy a greater degree of political insulation and

The unique expressive capabilities of those who actually bring cases can be misused. As Bill has pointed out, prosecutors may have reasons for deploying the “criminal” label that have little to do with culpability or social harm and much to do with building institutional or political capital. There may be short-term political gains – to the prosecutor personally or to her office – from putting all sorts of temporary “public enemies” on the same moral plane as “other” criminals. Moreover, the implicit or explicit claim that “crimes are crimes” can end up being a bridge too far. Early in the New Deal – a time when criminal law was increasingly used as the leading edge for federal regulatory regimes -- the A.L.A. Schechter Poultry Corporation in Brooklyn emerged as a serious threat to the National Recovery Administration’s program for the notoriously corrupt kosher poultry business. Government inspectors found serial violations of the Live Poultry Code’s wage and hour provisions, sales of unfit and uninspected poultry, and they were themselves threatened with violence as they pursued these problems.<sup>45</sup> The Justice Department obtained an indictment against the four Schechter brothers and their firm on sixty criminal counts, gained a conviction on nineteen counts, and an affirmance on appeal.<sup>46</sup> When the case reached the Supreme Court, Justice McReynolds got defense counsel to explain the poultry’s code’s “straight killing” requirement – the seller was supposed to put his hand in the coop and take the first chicken he touched – then commented “‘And it was for that your client was convicted?’” Counsel replied: “‘Yes, and fined and given a jail sentence.’”<sup>47</sup> The rest is history.<sup>48</sup>

Still, the idea that a prosecutor’s office – not the courtroom or the criminal code<sup>49</sup> – is the place where discussions about what is “really” criminal runs deep. Particularly in the rarified world of white collar enforcement that Kenneth Mann and Jerry Lynch have captured so insightfully,<sup>50</sup> the standard defense pitch starts by explaining how the alleged conduct, though “technically” covered by a criminal provision does not rise to the level of a “real” crime. Indeed, this tack is pursued to a fault.<sup>51</sup>

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influence owing to the perceived sensitivity of their law enforcement missions and their ability to strategically leverage responsibilities widely perceived as involving high social value.”).

<sup>45</sup> See Peter H. Irons, *The New Deal Lawyers* 87 (1982)

<sup>46</sup> *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617 (2d Cir. 1935), rev’d, 295 U.S. 495 (1935). The Second Circuit opinion in *Schechter* was written by Judge Martin Manton, who had just missed being appointed to the Supreme Court, and who later became the first federal judge convicted of receiving bribes. *United States v. Manton*, 107 F.2d 834 (2d Cir. 1939) (affirming conviction); see also David R. Stras, *Pierce Butler: A Supreme Technician*, 62 *Vand. L. Rev.* 695, 710 n.112 (2009). Bill loved these sorts of details. Bill recently reminded me that another of his favorite New Deal cases, the “Hot Oil” case, *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), arose out of a National Industrial Recovery Act regime that threatened code violators with criminal prosecution. For a lovely tour of the criminal law in the midst of changes brought by its deployment for regulatory purposes, see Livingston Hall, *The Substantive Law of Crimes: 1887-1936*, 50 *Harv. L. Rev.* 616, 618 (1937).

<sup>47</sup> Irons, *supra* note 45, at 99.

<sup>48</sup> See *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935) (finding poultry industry regulations to be outside Congress’s Commerce Clause authority and to be unconstitutional delegations of congressional power).

<sup>49</sup> The federal system doesn’t even have a formal criminal code, since codifiers have never been able to wrangle all the U.S. Code’s penal provisions into a single title.

<sup>50</sup> See Kenneth Mann, *Defending White-Collar Crime* (1985); see also Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Ford. L. Rev.* 2117 (1998).

<sup>51</sup> Two former executives at the Southern District of New York U.S. Attorney’s office recently noted: “In our

The thickness of the prosecutorial portfolio, the privileged status of certain of its component parts (violent crime, treason, et al.), and the opacity of the criminal enforcement regime can have material, as well as expressive, consequences. Consider the effects on investigative or prosecutorial tactics. A standard story starts when some technique or tactic is rolled out and authorized for an especially egregious offense – terrorism or child pornography, for instance. Over time, the argument “isn’t [some other] offense just as bad” gains power, particularly when accompanied by the assumption that enforcers will pick out only the really “bad” instances of the new offense. Prosecutors or agents/police who move from one unit to another will tout the virtues of the new tool, but word will get out even without personnel shifts because of the common hierarchy and culture. Before long, the extraordinary tactic becomes just another criminal enforcement tool. Outside the federal system, the vehicular stops that the police make for felonies soon get made for misdemeanors.<sup>52</sup> Within the federal system, USA PATRIOT ACT subpoenas get used in cases having nothing to do with terrorism,<sup>53</sup> and insider trading cases get investigated with the sort of electronic surveillance previously reserved for mobsters and drug traffickers.<sup>54</sup> While none of these tactics is necessarily inappropriate on the facts, the pooling of criminal cases without the slightest concern for proportionality can be disconcerting. This is doubly true when the criminal law has expanded beyond into realms traditionally enforced by civil law.

Showing a causal link is difficult, especially when one tries to connect constitutional development to political change and bureaucratic choice. Yet I wonder whether the creep of enforcement tactics from one offense to another not just mirrors, but is actually promoted by, the “transsubstantive” state of criminal procedure doctrine that Bill has rightfully highlighted.<sup>55</sup> That courts draw no “distinctions among crimes . . . when it comes to regulating criminal investigations,”<sup>56</sup> surely affects the calculus of enforcers deciding whether to import a tactic from one area to another.

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experience, it is not uncommon for defense counsel to seek non-criminal or deferred resolutions when, in view of the charging precedent of the office, prosecutorial practice and the facts and circumstances of the case, such request is not realistic.” See Lev L. Dassin and Guy Petrillo, Pre-Charge Presentations to a U.S. Attorney’s Office and the Department of Justice (2010) (draft).

<sup>52</sup>See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 Ind. L.J. 419, 458 (2002) (“[B]y disavowing any need to correlate reasonableness with offense gravity, the *Atwater* majority missed an opportunity to provide legislatures with an incentive to undertake critical reexaminations of their criminal codes, a task that is long overdue”); see also Sameer Bajaj, Note: *Policing the Fourth Amendment: The Constitutionality of Warrantless Investigatory Stops for Past Misdemeanors*, 109 Colum. L. Rev. 309 (2009).

<sup>53</sup> See, e.g., Eric Lichtblau, U.S. Uses Terror Law to Pursue Crimes from Drugs to Swindling, N.Y. Times, Sept. 28, 2003 (detailing federal government expansive application of investigatory powers granted to it under the USA PATRIOT Act); see also Risa Berkower, *Sliding Down a Slippery Slope? The Future Use of Administrative Subpoenas in Criminal Investigations*, 73 Fordham L. Rev. 2251 (2005) (explaining the increasing availability of administrative subpoenas to criminal investigators).

<sup>54</sup> See Peter J. Henning, *White Collar Watch: Using Drug War Methods to Look for Insider Trading*, N.Y. Times, Sept. 30, 2010, at F7.

<sup>55</sup> William J. Stuntz, O. J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment, 114 Harv. L. Rev. 842 (2001).

<sup>56</sup> *Id.* at 843.

The ability of agencies that pursue “real” crime to attract and maintain funding and resource commitments also has repercussions outside the core. Public safety is not exactly a non-negotiable part of governmental budgets. Indeed, it has been interesting to watch state and local governments cut back on their criminal justice expenditures in the wake of the recent economic downturn.<sup>57</sup> But support for general criminal enforcement agencies – local police and prosecutors; the FBI and federal prosecutors – certainly has a durable strength that agencies lacking their core crime portfolio can only envy. And the relative opacity of those agencies, the high fixed cost of the informational networks (i.e. the local police patrol beat; the federal relationships with local enforcers), and the apparently low marginal cost of extending beyond the core crime mission means that even when funding for some government mission lags (perhaps because of shifting political preferences), criminal prosecutors will remain potential actors.

Notice the two steps of the problem: Lacking any clear understanding of what ought to be criminalized, we have opted for an institutional definition. This is not in of itself indefensible. However intellectually unsatisfying this approach may be to moral retributivists or adherents to Becker and Posner,<sup>58</sup> there is something to be said for expanding the sanction curve and leaving prosecutors to make the granular determinations not amenable to easy legislative specification: while crack houses are usually targeted civilly, the owner of this particular one should face criminal charges; while the SEC generally brings civil enforcement actions against insider traders, this particular group should be prosecuted for criminal securities fraud. Yet in combination with a second aspect of our system -- our reliance on relatively high-status general criminal jurisdiction institutions – we end up with a dangerous political dynamic that makes criminal enforcement the envy of anyone with a policy agenda -- even a policy agenda that, all things being equal, they would have preferred to pursue with some other form of governmental action. The intervention of agencies that, via legislative and theoretical abdication, we have placed in charge of sorting for “real” criminality will thus often be sought less for features intrinsic to criminalization than for those that have been bundled into criminal enforcement only contingently.

The problem occurs at all levels of government and is not new. Decades ago, Sanford Kadish bemoaned how the criminal process had become “overburdened” by the imposition on prosecutors and police of the duty to provide various “social services to needy segments of the community.”<sup>59</sup> Although the obligation to pursue non-support complaints, he noted, “is performed by police and prosecutors with some success, it is done reluctantly and usually less effectively than by a civil agency especially designed to handle the service. In addition, it is performed at a sacrifice to those primary functions of protecting the public against dangerous and

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<sup>57</sup> See Judith Greene & Marc Mauer, *Downscaling Prisons: Lessons from Four States* (Sentencing Project 2010); Pew Center on the States, *Prison Count 2010: State Population Declines for the First Time in 38 Years* (March 2010).

<sup>58</sup> Compare John C. Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 *Am. Crim. L. Rev.* 417 (1980), with Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 *Am. Crim. L. Rev.* 409 (1980), and Gary Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169 (1968).

<sup>59</sup> Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 *Am. Crim. L. Q.* 17, 27-28 (1968).

threatening conduct which only the criminal law can perform.”<sup>60</sup> As Kadish surely recognized, however, any such civil agency would face vagaries of public funding and political support that criminal justice agencies would never face. Perhaps the relative sanctity of criminal justice expenditures (at least until the current recession) is endemic to California. Exploring how California prosecutors have been using statutory rape charges as leverage for child support payments, Kay Levine recently noted: “In an age where funding for social services is constantly on the decline and law and order programs seem to be the only measures garnering bipartisan support, criminal justice agencies may be the only institutions with the financial resources to take on seemingly intractable social problems.”<sup>61</sup> Yet Jonathan Simon (writing from California) has plausibly suggested the phenomenon is national, reporting that “prosecutors operating mainly at the local level have found themselves pulled to act in a wider sphere of governance that was largely abandoned by the retreat of welfarism.”<sup>62</sup>

Not only will funding be stickier when a policy is pitched as a criminal enforcement project but it will come with institutional and fiscal multipliers because of the priority that other organizations, public and private, give to cooperation with crime-fighting institutions. Consider Nancy Wolf’s account of mental health courts: “By invoking the court’s power and legitimacy [and presumably that of the prosecutors bringing the cases], mental health courts may more effectively jump queues or circumvent access barriers and, as such, be more successful in getting mentally ill offenders into treatment.”<sup>63</sup> Or consider the allure of “community prosecutors,” whose status often allows them to leap bureaucratic boundaries and deploy (without themselves providing) social services in the name of public safety.<sup>64</sup>

We see the same phenomenon on the federal side, particularly in the white collar area. Even as the Bush Administration’s ambivalence about financial regulation led to diminished numbers and zeal among front-line investigators at the Securities and Exchange Commission,<sup>65</sup> federal prosecutors were racking up convictions in financial fraud prosecutions and the Justice

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<sup>60</sup> Id. at 30.

<sup>61</sup> See Kay Levine, *The New Prosecution*, 40 *Wake Forest L. Rev.* 1125, 1211 (2005).

<sup>62</sup> Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* 72 (2007).

<sup>63</sup> Nancy Wolff, *Courts as Therapeutic Agents: Thinking Past the Novelty of Mental Health Courts*, 30 *J. Am. Acad. Psychiatry L.* 431, 433 (2002).

<sup>64</sup> See Cecelia Klingele, Michael S. Scott, Walter J. Dickey, *Reimagining Criminal Justice*, 2010 *Wisc. L. Rev.* 953, 981 (2010) (noting that “prosecutors possess a level of credibility and moral authority within many communities that could enable them to engage members of the community in active partnerships and to garner support for new initiatives”); Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 24 *Fordham Urb. L.J.* 573, 605 (1999) (“It is not that the prosecutors will run the after-school programs, but rather they have the wherewithal to bring to the table the front-line service providers who know how to make the world of legitimate work more attractive to [] children than the world of their drug-dealing friends.”);

<sup>65</sup> See General Accountability Office, *Securities and Exchange Commission: Greater Attention Needed to Enhance Communication and Utilization of Resources in the Division of Enforcement*, 17-24 (March 2009), available at [www.gao.gov/new.items/d09358.pdf](http://www.gao.gov/new.items/d09358.pdf); Securities and Exchange Commission, Office of Inspector General, *Program Improvements Needed Within the SEC’s Division of Enforcement* (Sept. 29, 2009), available at <http://www.sec-oig.gov/AuditsInspections/Reports.html>. See also Donald C. Langevoort, *The SEC and the Madoff Scandal: Three Narratives in Search of a Story*, 2009 *Mich. St. L. Rev.* 899.

Department was touting their successes.<sup>66</sup> To be sure, prosecutors faced competing criminal enforcement priorities<sup>67</sup> and had to do some back-peddling in response to congressional concerns about over-aggressive enforcement.<sup>68</sup> But they were far more insulated from deregulatory pressures than their SEC cousins. And anyone wanting more zealous public enforcement in the capital markets during the Bush years (the lack of which we are now coming to regret) would have reached for criminal sanctions far more than any rational sanction model would dictate.<sup>69</sup>

Then there are the cheer-leaders for criminal enforcement that come from the ranks of those who want less government intervention, not more. Take public corruption. The mantra of opponents to campaign finance or lobbying reform – whether in Washington, D.C. or a state capital – is that the bad behavior that reform proposals would target through prophylactic regimes can simply be prosecuted, should actual instances occur.<sup>70</sup> They drive the point home by regularly passing overlapping criminal statutes that explicitly target the bad behavior. So too with gun regulation, where the need for state and federal prosecutions of gun-toting felons has been a key plank of anti-firearms regulation forces.<sup>71</sup> Note how the best-case scenarios for a regulatory regime can thus be picked off and assigned to the criminal process.

Criminalization – not just symbolic legislation but actual prosecutions – has thus become a sweet spot for both those favoring maximal government action and those favoring minimal. Rather than offering an extreme option in a graduated spectrum of sanctions and regulatory

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<sup>66</sup> See Daniel Richman, Political Control of Federal Prosecutions, 58 Duke L.J. 2087 (2009).

<sup>67</sup> See Daniel Richman, Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem, 57 DePaul L. Rev. 295, 314 n.90 (2008) (highlighting sketchy and somewhat contradictory evidence as to the extent of criminal resources committed to white collar prosecutions during the Bush Administration).

<sup>68</sup> *Id.* at 297-302 (recounting Bush Administration's response to congressional concerns about Justice Department's corporate attorney-client privilege waiver policies).

<sup>69</sup> See John C. Coffee, Jr., Law and the Market: The Impact of Enforcement, 156 U. Pa. L. Rev. 229 (2007) (highlighting value of public enforcement).

<sup>70</sup> See, e.g., Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604, 642 (1996) (Thomas, J. concurring) (quoting with approval the argument by appellants in *Buckley v. Valeo*: "If a small minority of political contributions are given to secure appointments for the donors or some other *quid pro quo*, that cannot serve to justify prohibiting all large contributions, the vast majority of which are given not for any such purpose but to further the expression of political views which the candidate and donor share. Where First Amendment rights are involved, a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent." (quoting Brief for Appellants in *Buckley v. Valeo*, O. T. 1975, Nos. 75-436 and 75-437, pp. 117-118); Testimony of Roger Pilon, Cato Institute, before the House Committee on House Administration: Constitutional Issues Related to Campaign Finance Reform (July 22, 1999) (1999) ("If there is quid-pro-quo corruption, then let the Justice Department investigate it. All the evidence suggests, however, that money buys access, it does not buy votes."), available at <http://www.cato.org/testimony/ct-rp072299.html>; see also *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 908 (2010) (in course of striking down campaign finance restrictions, Court notes that bribery laws cover *quid pro quo* arrangements).

<sup>71</sup> See Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369 (2001); see also Jackie Calmes, Administration Invites N.R.A. to Meet on Gun Policies, But It Declines, *N.Y. Times*, Mar. 15, 2011, at A24 (noting, in connection with efforts by the White House to reach out to the NRA, that President Obama's recent column had "emphasized, 'First we should begin by enforcing laws that are already on the books'" – a line long used by the gun lobby.").

choices, criminal prosecution ends up as the natural point of first resort for all too many players of this perverse political game. And the odds become slim that actual enforcement patterns – the institutional choices that we rely on in lieu of serious thinking about the criminal/civil divide – will reflect a serious engagement with overcriminalization concerns.

One can argue that criminal prosecutions are simply the gold standard for state action in the United States, and that the centrality (and severity) of penal sanctions are just features of the larger “culture of control” that David Garland has so insightfully explored.<sup>72</sup> Yet, as Garland himself has noted, we should attend to the structural and political sources that contribute to our distinct culture.<sup>73</sup> The (tentative) suggestion here is that the historically contingent institutional arrangements highlighted above are more a cause than an effect of that culture (though they are probably both). At the very least, we should recognize how our distinct institutional mechanisms reinforce the social dynamics that social theorists have sketched out. And we certainly ought to do so before making broad claims that American penal policy is “but the pretext and springboard for a broader remaking of the perimeter and functions of the state.”<sup>74</sup>

### Relieving the Demand

Just as consideration of how criminal law and its enforcement become a resort for those for whom the stigma and punishment are but side-effects of an institutional preference makes the pathologies of criminal law seem even worse than Bill has portrayed, so too might it offer new avenues for relief. Bill has suggested that the overcriminalization problem could be solved either by deregulating criminal procedure or by constitutionalizing the borders of criminal law.<sup>75</sup> Perhaps there is another avenue, more true to our process-orientation: \_reducing the allure of criminal law by providing institutional alternatives to prosecution, and giving those institutions sufficient insulation from the ebb and flow of political preferences that they remain effective alternatives even in the lean years.

Criminal enforcers (tautologically) have a monopoly over the state’s harshest coercive sanctions. Against whom should this sanction be deployed? That question – extended to include all instrumental uses of criminal sanctions, including information gathering – ought to be at the heart of any discussion about what conduct should be criminalized and to what extent. If we are not going to be systematic in having such a discussion, we might still – at least in theory -- obtain a regime reflecting revealed societal preferences by relying on the choices made by accountable enforcement agencies. When criminal sanctions are simply the second-best preference of those who would prefer a regulatory, social services, or some other non-criminal

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<sup>72</sup> David Garland, *Culture of Control* (2001).

<sup>73</sup> See David Garland, *Concepts of Culture in the Sociology of Punishment*, 10 *Theoretical Criminology* 419, 437 (2006).

<sup>74</sup> Loïc Wacquant, “The Place of the Prison in the New Government of Poverty,” 23, 24, in *After the War on Crime: Race, Democracy, and a New Reconstruction* (Marie-Louie Frampton, Ián Haney López and Jonathan Simon, eds.) (2008); see also Loïc Wacquant, *Ordering Insecurity: Social Polarization and the Punitive Upsurge*, 11 *Radical Philosophy Review* 9 (2008). I’m grateful to Jim Whitman and David Garland for pointing me toward Wacquant’s work.

<sup>75</sup> William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 *J. Contemp. Legal Issues* 1, 29 (1996).

regime, but can't obtain it, that regime is unattainable, and overcriminalization — however normatively measured — is bound to occur. That our harshest sanctions are used only because less harsh alternatives are unavailable – that certain securities fraud cases are prosecuted because public and private civil enforcement are underfunded or procedurally obstructed;<sup>76</sup> that drug treatment is more easily provided to addicts who are prosecuted than to those who simply seek help — makes no sense at all. We therefore ought to try to reduce this overuse by addressing the ways in which criminalization can crowd out and displace non-criminal processes and institutions.

One key to such demand reduction lies in recognizing the features we have bundled together with criminal sanctions that need not be exclusive to that regime. Sometimes unbundling will be particularly hard because of the relationship that Bill has highlighted between criminal defense rights and exercises of government power. Because criminal defendants have speedy trial rights that civil parties lack, criminal cases will be on a fast adjudication track that regulatory action can't match. Criminal proceedings will also dominate where potential informational sources can invoke their Fifth Amendment right against self-incrimination, since the threat of prosecution (or the promise of immunity against prosecution) will be a powerful information-forcing tool. Yet we could do a lot more to bridge the huge gap between civil information-gathering mechanisms and the search warrants, grand jury subpoenas, and other such tools currently available only to prosecutors.

I suspect, for example, that a truly independent ethics commission with adequate resources and subpoena power would not be able, by itself, to clear up the self-dealing in Albany, Springfield, or any other state capital in the intense competition for “most corrupt.”<sup>77</sup> Because the most troubling transactions are those about which participants are least likely to tell the truth, even under oath, only the threat or reality of criminal prosecution and imprisonment will likely shake this information loose. (Bill would probably have argued that anti-snitching norms are now stronger in state capitals than in some Mafia families. But he could be harsh.) Yet subpoena power and the manpower to analyze compelled disclosures might well make recourse to the criminal law less necessary, particularly if given to an agency with the esprit and professionalism to make use of them. While those who would starve regulatory agencies will indeed get less regulation, they will likely end up with more criminal prosecutions as well, in cases that might otherwise have been pursued without the threat of prison. The precise distribution of cases in a institutionally richer system is of course uncertain: In the course of its regulatory work, an effective ethics commission might kick up evidence of serious offenses meriting prosecution – as a result of direct referral by the commission or otherwise – frequently enough that we end up with more criminal cases than before. One can equally imagine fewer criminal cases. The goal here should simply be to create a number of institutional half-way houses – instead of a desert with criminal sanctions as the only shelter.<sup>78</sup>

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<sup>76</sup> See Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. Corp. L. 361 (2008).

<sup>77</sup> See Gail Collins op ed., *N.Y. Times*, Feb. 14, 2010.

<sup>78</sup> See also Robert A. Kagan, *American Legalism: The American Way of Law* (2003) (suggesting that even in its civil mode, American-style regulation has too much in common with criminal prosecutions).

Consider the citizen seeking recourse for some “wrong,” perhaps done to him, perhaps to others; perhaps one for which the law creates a private cause of action, perhaps not. Although the line operator -- the jaded desk sergeant or eye-rolling agent – to whom she brings this information may well do exactly nothing with it, a set of positive gatekeeping decisions by criminal enforcers will trigger a cascade of publically funded actions that will likely impose penal sanctions on the wrongdoer and, should he have any money, recompense for anyone actually harmed (via restitution or facilitated civil recovery). How far would the citizen have to look for non-criminal attention, and to what extent will the state subsidize that alternative process? Obviously the answer to that question will vary greatly by context and jurisdiction. And in some contexts, because of, say, the nature of the targeted conduct or the value in developing a public norm, it might make sense to flatten out the landscape short of criminal sanctions, and give the citizen fewer substitutes.<sup>79</sup> In many others, however, it’s worth thinking more about the gap between the satisfaction offered by a prosecution – if enforcers decide to pursue one – and that offered by alternatives (which might be as simple as regulatory outreach). Against the obvious net-widening risks whenever opportunities for recourse are increased (more litigation or regulatory responses to more complaints), we should weigh the distorting effect that the absence of such opportunities has on criminal enforcement.

We have similarly given too little attention to the development of efficient public institutions charged with finding facts and inflicting stigma outside of the criminal justice process. Because of defamation laws and the prohibitive cost of civil litigation, a person’s criminal record is often the only source of public information about his past; it is certainly the most frequently consulted.<sup>80</sup> The private or public official who wants a record of someone’s misdeeds maintained in the public domain will therefore often see criminal prosecution as the only solution. Moreover, civil service or other employment protections can often make it far easier (and cheaper for the employer) to have someone prosecuted than to terminate them with cause.<sup>81</sup> This is not to say that libel and employment law don’t have social benefits. The point is simply that these and other institutional limitations of the civil process funnel close cases to the criminal side.

Even public discourse has become impoverished. Consider how many discussions of the morality of a public figure’s behavior soon degenerate into arguments about whether the behavior constitutes a “crime,” with the implication that what’s not criminal is acceptable. Or how often criminal procedure’s foundational “presumption of innocence” drives debates about a

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<sup>79</sup> This may be one justification for the no-drop policies and other such institutions and procedures that have been explored in domestic violence cases. See Andrew R. Klein, Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges (Nat’l Insti. of Justice Report 2009), available at <http://www.ojp.usdoj.gov/nij/topics/crime/intimate-partner-violence/practical-implications-research/welcome.htm>; see also Michelle Madden Dempsey, Prosecuting Domestic Violence: A Philosophical Analysis (2009) (exploring moral dimensions of prosecutorial policies in this area).

<sup>80</sup> See Shawn D. Bushway, Labor Market Effects of Permitting Employer Access to Criminal History Records, 20 J. Contemp. Crim. J. 276 (2004).

<sup>81</sup> See Nicole B. Porter, The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause, 87 Neb. L. Rev. 62, 78-84 (2008).

candidate or appointee's qualifications.<sup>82</sup> And because recourse to the criminal process leads to the underdevelopment of the very noncriminal norms that would condemn behavior without declaring it worthy of prosecution, the funnel widens over time.

Jonathan Simon suggests that the state has deployed the rubric of crime itself as a tool of governance: “When we govern through crime, we make crime and the forms of knowledge historically associated with it – criminal law, popular crime narrative, and criminology – available outside their limited original subject matter domains as powerful tools with which to interpret and frame all forms of social action as a problem for governance.”<sup>83</sup> Perhaps. Ours is indeed a culture that has become all too quick to criminalize what we don't like. But if we decoupled certain criminal enforcement privileges from the criminal label we might substantially reduce recourse to the criminal process, and to the sanctions and stigma that attend it.

As Bill has long noted, the degree to which we rely on criminal enforcers to sort out conduct that is “really” criminal from that which isn't challenges standard “rule of law” notions. And judges and legislators ought to take on a lot more of this responsibility. But while we are waiting for these reluctant actors, we should give more thought to the socio-legal vacuums that criminal enforcers will rush in or be recruited to fill. Recognizing the degree to which diverse institutional and political factors push toward overuse of the criminal process should push us to design effective alternatives to it.

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<sup>82</sup> Dennis E. Curtis, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings: The Fake Trial*, 65 S. Cal. L. Rev. 1523, 1525 (1992).

<sup>83</sup> Simon, *supra* note 62, at 17.