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Policing Possession: The War on Crime and the End of Criminal Law

Markus Dirk Dubber

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CRIMINAL LAW

POLICING POSSESSION: THE WAR ON CRIME AND THE END OF CRIMINAL LAW

MARKUS DIRK DUBBER*

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The war on crime has been the dominant ideology of American criminal law for the past three decades. This paper examines the inner workings of this remarkably successful, yet still little understood, strategy of social control. Particular attention will be paid to the role of victimless crimes, and possession in particular, as sweep offenses to incapacitate dangerous undesirables. Easy to detect and to prove, yet far more potent and less vulnerable to constitutional scrutiny, possession emerges as the new and improved vagrancy, a modern policing tool for a modern police regime, the war on victimless crime.

I. INTRODUCTION

For some thirty years, American criminal law has waged a war on crime. From Robert Kennedy's war on organized crime¹ and Lyndon Johnson's war on poverty, crime and disorder,² to Richard Nixon's war of "the peace forces" against "the criminal forces," "the enemy within,"³ the war on crime evolved into an extended comprehensive police action to exterminate crime by incapacitating criminals.⁴ As wars go, the crime war has been unusual, and unusually successful, in that its casualties have also been its success stories; it has managed to incapacitate millions, most through imprisonment, some through death, most tempo-

¹ See RONALD L. GOLDFARB, *PERFECT VILLAINS, IMPERFECT HEROES: ROBERT KENNEDY'S WAR AGAINST ORGANIZED CRIME* (1995).

² See Richard Nixon, *Toward Freedom From Fear* (position paper on crime) (New York, May 8, 1968), reprinted in 114 Cong. Rec. 12936, 12936 (May 13, 1968) ("The war on poverty which I started—is a war against crime and a war against disorder." (quoting Lyndon Johnson, Oct. 16, 1964)); see also President Lyndon B. Johnson, Annual Message to the Congress on the State of the Union (Jan. 17, 1968) (federal government should "help the cities and the States in their war on crime to the full extent of its resources and its constitutional authority").

³ See Nixon, *supra* note 2, at 12936, 12937; see also Todd R. Clear, *Societal Responses to the President's Crime Commission: A Thirty-Year Retrospective*, in RESEARCH FORUM, *THE CHALLENGE OF CRIME IN A FREE SOCIETY: LOOKING BACK, LOOKING FORWARD* 131 (U.S. Dep't of Justice, Office of Justice Programs 1997); James Vorenberg, *The War on Crime: The First Five Years*, ATL. MONTHLY, May 1972, at 63.

⁴ On the distinction between wars—which require an open "declaration" and are bound by the law of war—and police actions—which are often carried out clandestinely and arguably are beyond the constraints of the law of war—see Geoffrey S. Corn, "To Be or Not to Be, That is the Question": *Contemporary Military Operations and the Status of Captured Personnel*, 1999 ARMY LAW. 1; Robert O. Weiner & Fionnuala Ni Aolain, *Beyond the Laws of War: Peacekeeping in Search of a Legal Framework*, 27 COLUM. HUM. RTS L. REV. 293 (1996); Benedetto Conforti, *Non-Coercive Sanctions in the United Nations Charter: Some Lessons from the Gulf War*, 2 EUR. J. INT'L L. 110 (1991).

rarily, some permanently. In 1970, the American prison and jail population stood at around 300,000. Today, it tops two million with another four million or so under various forms of noncarceral control, including parole and probation, adding up to over six million people, or three percent of American adults, under state penal control.⁵

The war on crime has been fought on many fronts, and with many weapons. Most dramatically, it has brought us the resurgence of capital punishment as a measure for the permanent incapacitation of violent predators. Less dramatically, but more pervasively, Draconian laws combating the plague of violent recidivism have pursued a similar strategy of incapacitation.⁶

As a war on violent criminals, the crime war has attracted a great deal of attention. Over decades, the media have eagerly recorded its campaigns and initiatives, kicked off with great fanfare by generations of legislators (and would-be legislators) anxious to incorporate the tough-on-crime plank into their political platform. The crime war's failures have made for particularly and persistently good news, as criminal violence continued even in the face of an all-out campaign to eradicate it. These failures led not to calls for the abandonment of the campaign, but for its expansion and more rigorous prosecution.

To understand the war on crime, however, one must go beneath the sensational and well-covered surface of crimes of violence suffered by innocent citizens at the hands of murderers, rapists, robbers, kidnappers, and other assorted miscreants. There, in the murky depths of criminal law in action, one finds the everyday business of the war on crime: the quiet and efficient disposal of millions of dangerous undesirables for offenses with no human victim whatsoever. To analyze this disposal regime is one of the main goals of this article.

⁵ U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Bureau of Justice Statistics 2000: At a Glance 19 (Aug. 2000, NCJ 183014), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/bjsag00.pdf>; Fox Butterfield, *Number in Prison Grows Despite Crime Reduction*, N.Y. TIMES, Aug. 10, 2000, at A10; The Sentencing Project, *Facts About Prisons and Prisoners*, available at <http://www.sentencingproject.org/brief/facts-pp.pdf>; Justice Policy Institute, *The Punishing Decade: Prison and Jail Estimates at the Millennium*, available at <http://www.cjcj.org/punishingdecade/>.

⁶ See Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689 (1995).

The war on crime, though ostensibly waged on behalf of crime victims, has been first and foremost a war on victimless crime. The paradigmatic crime of the war on crime is not murder, but possession; its sanction not punishment, but forfeiture; its process not the jury trial, but plea bargaining; its mode of disposition not conviction, but commitment; and its typical sentencing factor not victim impact, but dangerousness as "evinced" by a criminal record. Our prisons and jails (which we persist in calling "correctional" institutions) are filled not with two million murderers, nor are the additional four million probationers and parolees superpredators. No, our comprehensive effort to control the dangerous by any means necessary reaches "possessors" along with "distributors," "manufacturers," "importers," and other transgressors caught in an ever wider and ever finer web of state norms designed for one purpose: to police human threats.

Policing human threats is different from punishing persons. A police regime doesn't punish. It seeks to eliminate threats if possible, and to minimize them if necessary. Instead of punishing, a police regime disposes. It resembles environmental regulations of hazardous waste more than it does the criminal law of punishment.⁷

⁷ On this point, see *infra* notes 118-65 and accompanying text. Here, I'm invoking police in the broad sense, as in "police power," rather than in the limited institutional sense, as in "police department." The police power of the state is the power to order its constituents so as to maximize the "public welfare" according to rules of expediency. ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 4 (1904); see ADAM SMITH, *Juris Prudence or Notes from the Lectures on Justice, Police, Revenue, and Arms*, in *LECTURES ON JURISPRUDENCE* 396, 398 (R.L. Meed, D.D. Raphael, & P.G. Stein eds., 1978). In Blackstone's oft-quoted definition, police is "the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations." 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 162 (1769). Law, by contrast, is concerned with the "maintenance of right and the redress of wrong" according to principles of justice. FREUND, *supra*; see SMITH, *supra*. For more recent accounts of the distinction between police and law, see CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993); WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA* (1996). See also Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87 (Graham Burchell, Colin Gordon, & Peter Miller eds., 1991); MARK NEOCLEOUS, *THE FABRICATION OF SOCIAL ORDER: A CRITICAL THEORY OF POLICE POWER* (2000).

In a sense, the current regime of penal police marks the end of criminal law as we know it. It's no more about *crimes* than it is about *law*, as these concepts have come to be understood. Crimes, as serious violations of another's rights, are of incidental significance to a system of threat control. By the time a crime has been committed, the system of threat identification and elimination has failed. Law, as a state run system of interpersonal conflict resolution, is likewise irrelevant. Persons matter neither as the source, nor as the target, of threats. Penal police is a matter between the state and threats.⁸

A penal police regime may *look* like traditional criminal law. But these looks are deceiving. A crime consists no longer in the infliction of harm, but in the threat of harm. Harm itself turns out to be the threat of harm. So to punish crime means to eliminate—or at least minimize—the threat of the threat of harm.

The effort to disguise itself as bread-and-butter criminal law is an important component of a modern police regime.⁹ The camouflage is crucial to its success because non-negligible public resistance would interfere with the state's effort to eliminate as many threats as efficiently and permanently as possible. It's therefore in the interest of a police regime both to retain traces of traditional criminal law and to infiltrate traditional criminal law by manipulating its established doctrines, rather than to do away with it altogether.

This article does two things. First, it sketches the outlines of the police regime that has hollowed out American criminal law in the name of the war on crime. Second, it illustrates how the police regime has manipulated familiar doctrines—like *actus reus* and *mens rea*—to reduce traditional criminal law to ceremonial significance.

To illustrate the inner workings of the war on crime, I will carefully analyze the theory and practice of possession offenses, the new paradigm of criminal law as threat police. Possession offenses have not attracted much attention.¹⁰ Yet they are eve-

⁸ See *infra* notes 54-66 and accompanying text.

⁹ Cf. Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1432 (2001) (exploring "the wish to keep the old criminal 'punishment' façade" in a prevention system).

¹⁰ For suggestive remarks on the problem of punishing possession, see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 197-205 (1978). See also MICHAEL S. MOORE, *ACT*

rywhere in modern American criminal law, on the books and in action. They fill our statute books, our arrest statistics, and, eventually, our prisons. By last count, New York law recognized no fewer than 153 possession offenses; one in every five prison or jail sentences handed out by New York courts in 1998 was imposed for a possession offense.¹¹ That same year, possession offenses accounted for over 100,000 arrests in New York State, while *drug* possession offenses alone resulted in over 1.2 million arrests nationwide.¹²

The dominant role of possession offenses in the war on crime is also reflected in the criminal jurisprudence of the U.S. Supreme Court. They are the common thread that connects the Court's sprawling and discombobulated criminal procedure jurisprudence of the past thirty years. As we will see, virtually every major search and seizure case before the Court, from 1968's *Terry v. Ohio*¹³ (which relaxed Fourth Amendment requirements for so-called *Terry* stops and frisks) to last term's *Illinois v. Wardlow*¹⁴ (which relaxed *Terry*'s relaxed requirements in "high crime areas"), involved a possession offense of one kind or another, in one way or another.

Possession offenses also figure prominently in scores of Supreme Court opinions on *substantive* criminal law. What do the defendants in the following Supreme Court cases have in common: *Pinkerton v. United States* (which gave the infamous *Pinkerton* conspiracy rule its name),¹⁵ *United States v. Bass* (the Court's leading lenity case),¹⁶ *Stone v. Powell* (one of the Court's key ha-

AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 20-22 (1993); Charles H. Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751 (1972); Cornelius Nestler, *Rechtsgüterschutz und Strafbarkeit des Besitzes von Schußwaffen und Betäubungsmitteln*, in VOM UNMÖGLICHEN ZUSTAND DES STRAFRECHTS 65 (Institut für Kriminalwissenschaften ed., 1995); Eberhard Struensee, *Besitzdelikte*, in Festschrift für Gerald Grünwald 713 (Erich Samson et al. eds., 1999).

¹¹ State of New York, Division of Criminal Justice Services, *Possession Related Offenses New York State* (Feb. 4, 2000) (on file with author).

¹² U.S. Dep't of Justice, Bureau of Justice Statistics, *Estimated Number of Arrests, by Type of Drug Law Violation, 1982-1999*, available at <http://www.ojp.usdoj.gov/bjs/dcf/tables/salespos.htm>.

¹³ 392 U.S. 1 (1968).

¹⁴ 528 U.S. 119 (2000).

¹⁵ *Pinkerton v. United States*, 328 U.S. 640 (1946) (possession of liquor).

¹⁶ *United States v. Bass*, 404 U.S. 336 (1971) (gun possession).

beas corpus cases),¹⁷ *McMillan v. Pennsylvania* (the case that laid the foundation for one of the key doctrinal strategies of the war on crime, the shifting of proof elements from the guilt phase to the sentencing hearing, and therefore from the jury to the judge),¹⁸ *Harmelin v. Michigan* (one of the Court's leading cases on the principle of proportionate punishment),¹⁹ and *Lopez v. United States* (the Court's unanticipated 1995 attack on federal commerce clause jurisdiction)²⁰? They were all convicted of possession offenses. And, last but not least, there's *Apprendi v. New Jersey*, last year's big hate crimes case. Charles Apprendi had fired several rifle shots into the home of a black family who lived in his otherwise all-white neighborhood. What was Apprendi sentenced for? Three counts of possession.²¹

So broad is the reach of possession offenses, and so easy are they to detect and then to prove, that possession has replaced vagrancy as the sweep offense of choice. Unlike vagrancy, however, possession offenses promise more than a slap on the wrist.²² Backed by a wide range of penalties, they can remove undesirables for extended periods of time, even for life. Also unlike vagrancy, possession offenses so far have been insulated against constitutional attack, even though they too break virtually every law in the book of cherished criminal law principles.

To better understand the workings of policing through possession and of the crime war in general, this article develops a kind of phenomenology of possession. We will come to appreciate the many and complex uses of possession as a policing tool, some direct, others indirect, some foundational, others supplemental. And we will see how possession has managed to escape the serious scrutiny of courts and commentators.

Like its prototypical policing tool, the war on crime has attracted little scholarly attention, at least as the comprehensive penal regime that it is.²³ Much has been written about the war

¹⁷ *Stone v. Powell*, 428 U.S. 465 (1976) (gun possession).

¹⁸ *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (gun possession).

¹⁹ *Harmelin v. Michigan*, 501 U.S. 957 (1991) (drug possession).

²⁰ *United States v. Lopez*, 514 U.S. 549 (1995) (gun possession).

²¹ *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (gun & bomb possession).

²² This also distinguishes possession from minor offenses whose more vigorous, though still far from universal, enforcement is often referred to as "zero tolerance."

²³ *But see* THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION (1996). *See also* BATMAN: THE WAR ON CRIME (1999); ROBERT M. CIPES, THE CRIME WAR (1968). Though not explicitly about the war on crime as such, there

on drugs. The drug war certainly has been an important part of the war on crime, but it's a mistake to conflate the two. The war on crime is a general strategy of state governance that uses various tools to achieve its goal of eliminating threats, above all threats to the state itself. The war on drugs is but one prong in the war on crime's widespread assault on anyone and anything the state perceives as a threat. To treat the war on crime as synonymous with the war on drugs is to underestimate the significance of the war on crime as a phenomenon of governance.

Only by widening one's focus of inquiry from the war on drugs to the war on crime does a comprehensive strategy of governance like possession emerge. While drug possession is a popular and extremely powerful policing tool, other possession offenses also make significant contributions to the crime war effort. *Terry* and *Wardlow*, for example, were gun possession cases; so was *Apprendi*. The most recent national effort to incapacitate human hazards, "Project Exile," likewise employs tough federal statutes criminalizing the possession of guns by felons and during a violent or drug-related crime.²⁴ And as we will see, other possession offenses, such as possession of stolen property, come in handy as well when it comes to neutralizing dangerous individuals.

We desperately need a detailed account of the war on crime. Without understanding how it came about, how it works, and what it has accomplished, we cannot hope to move beyond it. But move beyond it we must, as the crisis of crime that triggered the war on crime already has begun to subside.²⁵ The crime war will go the way of crime hysteria.

This article doesn't pretend to fill this gap. It does hope to lay the foundation for future work on the war on crime by identifying it as a phenomenon, and an object of study, in the first place. Given the enormous, and largely hidden, changes the war on crime has made in American criminal law, it makes no

is an excellent, and growing, criminological literature on modern criminal law as social control. See, e.g., David Garland, *The Culture of Control: Crime and Social Order*, in CONTEMPORARY SOCIETY (2001); CRIMINOLOGY AND SOCIAL THEORY (David Garland & Richard Sparks eds., 2000); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992).

²⁴ For more on Project Exile, see *infra* notes 66, 260-61 and accompanying texts.

²⁵ For years, crime rates have been on the decline. See Fox Butterfield, *Number in Prison Grows Despite Crime Reduction*, N.Y. TIMES, Aug. 10, 2000, at A10.

sense to go on with business as usual. Before we can go back to discussing "American criminal law" and its principles, we need to figure out what's left of it after decades of the war on crime.

Rebuilding American criminal law, however, isn't simply a matter of undoing the damage caused by the war on crime. The war on crime could not have succeeded as easily as it did, if it hadn't found fertile soil in the reigning orthodoxy of American criminal law: treatmentism. All the war on crime had to do was flip over the treatmentist coin from its benign rehabilitative side to its unsavory incapacitative side.²⁶ It stands as a powerful reminder of the uncomfortable fact that treatmentism, once celebrated as the progressive reform of the atavistic practice of punishment, always allowed for incapacitative "treatment" for incorrigible criminal types.

The war on crime once and for all dashed the naïve hope that the incapacitative arm of treatmentism would simply wither away as criminal policy became increasingly enlightened. When push came to shove, it was the rehabilitative wing of treatmentism that buckled and eventually broke under the pressure of a crisis of crime, where it mattered not whether the crisis was real, imagined, or even artificially generated for political gain. For the victims of the war on crime, it was real enough.

What's needed therefore is a fundamental reassessment, and recreation, of the basic principles of American criminal law. Ultimately, it's to this larger enterprise that this article hopes to make a contribution.

In Part II, I begin by laying out three of the basic characteristics of the war on crime as a system of controlling threats, rather than of punishing persons. The war on crime is *preventive* in that it focuses on the threat, rather than the occurrence, or harm. It's *communitarian* in that it seeks to eliminate threats not to persons, but to communities of one sort or another. And it's *authoritarian* insofar as the community it protects against outside threats ultimately turns out to be the state.

Part III then presents the phenomenology of possession as the crime war's penal policing tool of choice. Through the analysis of statutes, doctrine, Supreme Court jurisprudence, and statistics, we see just how and why possession has proved uniquely useful in the identification and incapacitation of

²⁶ On the connection between rehabilitation and incapacitation, see HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 55 (1968).

criminal threats, and has emerged as the new and improved vagrancy.

In Part IV, this in-depth analysis of possession is placed within the broader context of the war on crime as state nuisance control. Here we see how the state depersonalizes criminal law by turning to crimes (both victim- and offender-less) to maintain its authority in the name of conveniently vague concepts such as "public welfare" or "social interests." The war on crime, in the end, reveals itself not as an aberration from the principled path of Anglo-American criminal law, but as the culmination of the progressive project to reform the barbaric practice of punishment in light of ill-considered social science. This project can be traced back to the early decades of this century and found its most influential manifestation in the Model Penal Code.

The article concludes with a call for subjecting the doctrines of American criminal law to systematic scrutiny in light of fundamental principles of legitimacy. To reconstruct American criminal law after its decimation in the war on crime, we must base its doctrines on firmer ground than the traditions of the English common law or the disappointing discoveries of penological science. A principled system of criminal law can survive in the face of a social phenomenon as powerful and destructive as a "war on crime" only if it is in fact principled, i.e., if it derives from—and can be shown to derive from—a set of basic and universally recognized principles of legitimacy.

II. THE POLICE REGIME OF THE WAR ON CRIME

Penal police is about the elimination, or at least the minimization, of threats. But threats to what, or whom? This question is rarely posed, not to mention answered. In an important sense, posing it already is to misunderstand the point of penal police. If you need to ask, you don't need to know; if you don't feel threatened by something or someone, you may well be a threat yourself. The need to police threats requires no justification. And threats are, by their very nature, vague. A threat is the unfulfilled risk that something bad may happen. What that something might be, or how likely it is that it will come about, or that you may suffer from it, remains unclear. And that's a good thing, for the vagueness of threats equips their eliminators and minimizers—the state through its representatives in the

field—with the necessary flexibility to make those split-second decisions about what or who is or isn't a threat, that executive *discretion* so crucial to effective law enforcement, or rather threat police.

Still, to get at the structure of this deliberately unstructured phenomenon of penal police, we need to ask this question, however inappropriate it might seem: what or who is being threatened, exactly, by the threats that penal police seeks to eliminate? If nothing else, pondering this question is convenient for our expository purposes. It turns out that the police regime established during the war on crime has three general functions, which roughly correspond to three objects of the threat it seeks to eliminate—or, in other words, to three possible answers to our question.

On the political surface, the war on crime aims to prevent violent interpersonal crime. The relevant threat here is to potential victims of interpersonal crime, i.e., every person. This is the *preventive* function.

If we dig a little deeper—and turn to sociology for help—we find another function, related to prevention, but distinct from it. This one might be called the *communitarian* function.²⁷ What's threatened here is not injury to particular victims. Instead, the victim is the community itself. The identification and incapacitation of dangerous deviants thus serves to maintain the community's existence, not by preventing future offenses, but by redefining the community in stark contradistinction to the deviant.

At the very bottom, however, we find not the community, but the state, as the ultimate object of the criminal threat. The *authoritarian* function of the police regime is the enforcement of obedience to state commands and the assertion of the state's authority as the sole and proper guardian of the common good. Unlike the previous two functions, authoritarianism has no interest in interpersonal crime, at least not for its own sake. Authoritarian policing pursues violations of state issued commands as such. It prosecutes victimless crimes not for any indirect effect on the suppression of the crimes that matter, i.e., *victimful* crimes, and crimes of interpersonal violence in particular. In fact, under authoritarian policing, what was victimful

²⁷ This is not to say, of course, that Communitarians with a capital C have endorsed, or even would endorse, this function of criminal law.

is now victimless, and what was victimless is now victimful. Authoritarian policing takes so-called victimless crimes personally, very personally.

A. PREVENTION

The crime war wears crime prevention on its sleeve.²⁸ By "subject[ing] to public control persons whose conduct indicates that they are disposed to commit crimes,"²⁹ we also incapacitate those predisposed to commit *violent* crimes. Here the war on crime is fueled by images of the relatives of horrific crimes calling for swift and harsh punishment of "their" offender. Apart from living out vengeance fantasies borne of the powerlessness inherent in victimhood, these measures are said to prevent future violent crime by taking criminal predators off the street.³⁰

The preventive aspect of the war on crime is the one most closely related to the rights of personal victims. In this preventive light, the war on crime subjects the dangerous classes to police supervision in order to prevent murders. Gun possession is criminalized to avoid "their potential harmful use" in crimes of interpersonal violence.³¹ Similarly, gun possession is declared an inherently violent felony because of the "use or risk of violence" resulting from its "categorical nature."³² And mandatory life imprisonment for simple drug possession is upheld because "(1) [a] drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) [a] drug user may commit crime in order to obtain money to buy drugs; and (3) [a] violent crime may occur as part of the drug business or culture."³³

The success of an incapacitationist regime in the name of prevention will depend on how quickly it can intervene once dangerous deviance is diagnosed. Eager to eradicate threats, this regime will always feel the pressure to intervene at the earli-

²⁸ See Carol S. Steiker, Foreword, *The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998); Robinson, *supra* note 9.

²⁹ MODEL PENAL CODE § 1.02(1)(b) (1985).

³⁰ The crime war prevents by incapacitation, not deterrence. There can be no deterrence, general or special, of undeterrable predators.

³¹ *United v. Lopez*, 514 U.S. 549, 602, 603 (1995) (Stevens, J., dissenting).

³² *United States v. Dillard*, 214 F.3d 88 (2d Cir. 2000). *But see United States v. Singleton*, 182 F.3d 7 (D.C. Cir. 1999).

³³ *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring).

est possible moment, without awaiting the manifestation of the threat in the form of a criminal act. And the pressure will increase with every failure to incapacitate, with every "false negative," in the words of incapacitacionist criminology, which came to prominence in the 1970s and 80s.³⁴ The goal of nipping every potential threat in the bud, combined with the impossibility of its achievement, sets in motion a continuing expansion of preventive measures, an infinite regress along the causal chain toward the origin of threats, the heart of darkness.

This expansion of the preventive police net proceeds along two lines, one focused on the offense, the other on the offender. On the abstract level of offense definitions and theories of criminal liability, incapacitation in the name of prevention will tend to expand the number and reach of offenses the commission of which triggers a diagnosis of dangerousness, and therefore police control. To return to the example of possession offenses, such a regime will find it expedient to criminalize the mere possession of burglary tools or, more broadly, of "instruments of crime,"³⁵ absent any evidence of use that would amount to even a *preparation*, which traditionally has remained beyond the reach of criminal law, never mind the more extensive use, coupled with criminal purpose, ordinarily required for conviction of *attempt*.³⁶

Alternatively, instead of criminalizing possession outright, such a regime might establish a host of presumptions emanating backwards and forwards in time from a finding of possession, including a presumption of illegal manufacture or importation (on the retrospective end of the spectrum), and of illegal use or distribution (on the prospective end).³⁷ In either case, possessors would have displayed sufficient criminal deviance—that all-important *disposition* to commit crimes—to warrant a conviction (which remains the formal prerequisite for penal, if not civil,

³⁴ See, e.g., PETER W. GREENWOOD & ALLAN ABRAHAMSE, SELECTIVE INCAPACITATION (1982); JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES (1981); JOAN PETERSILIA, PETER W. GREENWOOD & MARVIN LAVIN, CRIMINAL CAREERS OF HABITUAL FELONS (1978); see also FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME (1995); Markus Dirk Dubber, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193 (1990).

³⁵ See, e.g., MODEL PENAL CODE § 5.06 (Instruments of Crime; Weapons) (1985).

³⁶ See MODEL PENAL CODE § 5.01 (1985).

³⁷ See *infra* notes 113-15, 262-69 and accompanying texts.

incapacitation), provided they should prove unable to rebut the presumption of criminality by giving a "satisfactory account" of themselves.³⁸

Similarly, in such a system of preventive incapacitation explicit endangerment offenses of all shapes and sizes would soon proliferate. Here one may find specific and abstract endangerment offenses, criminalizing either threats to a particular person or persons (specific) or criminalizing something that generally poses such a threat, though needn't have posed it in the particular case (abstract). Reckless endangerment is an example of the former, speeding of the latter. Once again, the point of these offenses is the identification and neutralization of sources of danger, i.e., threats of threats.

The secret of preventive policing is not only the seamless-ness, but also the flexibility and interconnectedness of its web. So, the definition of offenses is intimately related to the diagnosis and treatment of offenders. Offenses simply lay the foundation for an assessment of dangerousness. In their very malleability lies their value. It's this malleability that makes room for the discretionary dangerousness assessments at the heart of the system.

A "speeder" may be neutralized as a source of danger by a simple fine, or even a stern warning. Then again, he might take a more intrusive incapacitative sanction, like confiscation of his driver's license, and in some cases even imprisonment.³⁹ A similar range of measures is available to treat an "assailant" (or, in New York, a "menacer"⁴⁰) who threatened, as opposed to harmed, his victim. In both cases, and this is crucial, the state official in question (the police officer, the prosecutor, the judge, the warden) also always has the option of radically revising his dangerousness diagnosis upward. Once a potential source of danger has been caught in the web of preventive police, for one reason or another, he has subjected himself to a dangerousness analysis whose scope and intensity will depend

³⁸ Cf. ARTHUR P. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 54 (1930) (discussing old law of vagrancy authorizing arrest of "such Persons as they have probable Cause to suspect, as Idlers and Vagrants or suspicious Characters, and who can give no satisfactory account of themselves").

³⁹ See, e.g., N.Y. VEH. & TRAF. LAW § 1800(b) (McKinney 2001) (penalty for first traffic infraction "fine of not more than one hundred dollars or by imprisonment for not more than fifteen days or . . . both").

⁴⁰ N.Y. PENAL LAW §§ 120.13-15 (McKinney 2000 & Supp. 2001).

entirely on the discretion of the state ("law enforcement") official he happens to run across. As hundreds of thousands, perhaps millions, of prisoners have learned over the past thirty years, a simple traffic stop can soon balloon into a full cavity search of person and car, and a simple speeding ticket can mushroom into a lengthy term of imprisonment.⁴¹ The car is pulled over for a defective tail light, the passenger looks "suspicious" (not necessarily in that order), the driver has no driver's license, a consensual search of the car reveals drugs in the glove compartment, a search incident to arrest turns up an unregistered gun in the passenger's pants pocket, and within ten minutes another source of danger has been temporarily, or perhaps even permanently, extinguished.⁴²

As we have seen, the definition of offenses under a preventive regime of incapacitation is simply a means of giving state officials the opportunity for a dangerousness assessment. At the level of offenders, rather than of offenses, a preventive police regime dedicated to the elimination of crime will be forced to act on ever less concrete evidence of dangerousness, resulting in the control of ever more sources of threats and *potential* threats. As the pressure to identify human hazards mounts with every undiagnosed danger who slipped through the police net, the system will come to rely increasingly on the discretionary diagnoses of ever more and ever less well trained state officials. Given the current mass of regulations of every aspect of modern life, only a minuscule portion of which can be enforced, the most important diagnostician of criminal predisposition is not the expert forensic psychiatrist but the police officer on the beat, aided by a network of informers, anonymous or not, who supply him with indicia of dangerousness.⁴³

With such a vast area of discretion enjoyed by such a vast number of often poorly trained state officials often working under conditions of extreme stress and fear, the factors influencing police discretion are as crucial as they are unknown and

⁴¹ See *infra* notes 171-212 and accompanying text.

⁴² For similar, real-life, scenarios, as reported in U.S. Supreme Court opinions, see *infra* notes 171-212 and accompanying text.

⁴³ Cf. *Florida v. J. L.*, 529 U.S. 266 (2000) (anonymous informer's tip regarding illegal gun possession); *Alabama v. White*, 496 U.S. 325 (1990) (anonymous informer's tip regarding drug possession; drugs found during consensual car search); *Adams v. Williams*, 407 U.S. 143 (1972) (known informer's tip regarding illegal gun and drug possession; drugs found during search incident to gun possession arrest).

unreviewed. They lie even further beyond the reach of analysis and supervision than the notoriously unspecifiable "hunch" leading a police officer to suspect that a given person has committed a specific offense. Consciously and unconsciously shaping a police officer's discretion, these factors never enter the record for one reason or another, though they occasionally emerge—like a sudden break in the clouds—from enforcement statistics or transcripts of intrapolice communications.⁴⁴

These occasional insights into an otherwise hazy world, often intentionally obscured, suggest that police officers' discretion operates in much the same, unreflected way as that of the public at large. Police officers' discretion simply brings into sharp relief the unreflected judgments all of us make. Police officers, after all, have the power—and the obligation—to act upon their discretion, whereas the rest of us can sit idly by as we (pre)judge this person or that. And whatever conscious or unconscious communal identifications guide our judgment, they are magnified a thousand fold in the case of police officers who actually fight the war on crime that we simply observe with varying degrees of attention. To a police officer, the "enemies of society"⁴⁵ that we, fully aware of our powerlessness, vilify in mind and word, are not mere chimeras: they are his personal enemies in the war on crime.

B. COMMUNITARIANISM

The communal aspect of the war on crime is undeniable.⁴⁶ To focus on the preventive aspect of the war on crime at the expense of its communal significance fails to capture its essence. In fact, as we shall see, these two components mutually reinforce each other. In the end, those who are incapacitated for the purpose of preventing violent interpersonal crime are often those who attract communal hatred as deviant outsiders, and vice versa.

⁴⁴ See, e.g., David Barstow & David Kocieniewski, *Records Show New Jersey Police Knew of Racial Profiling in '96*, N.Y. TIMES, Oct. 12, 2000, at A1; John Kifner, *Van Shooting Revives Charges of Racial 'Profiling' by New Jersey State Police*, N.Y. TIMES, May 10, 1998, at 33; see also KATHERYN K. RUSSELL, *THE COLOR OF CRIME* (1998) ("driving while black").

⁴⁵ Max Radin, *Enemies of Society*, 27 J. CRIM. L. & CRIMINOLOGY 308 (1936).

⁴⁶ Cf. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (George Simpson trans., 1933); George Herbert Mead, *The Psychology of Punitive Justice*, 23 AM. J. SOCIOLOGY 577 (1918); SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (Joan Riviere & James Strachey trans., 1963).

There they stand, side-by-side united in common hatred, the murder victim's father and the prosecutor. And their communal experience is replicated vicariously by many others, even millions, thanks to the miracle of modern media. In a society uncertain about its commonalities, divided on many constitutive issues, the common and deeply felt differentiation from sources of danger or evil is a welcome opportunity to feel as one, to be part of something bigger.⁴⁷ And after the collapse of continuously publicized external threats, all of which were traceable to the ultimate source of danger and uncertainty, the Evil Empire itself, the criminal predator suggests itself as a convenient focus for the maintenance of an otherwise disparate community.

The fact of this prolonged orgy of communal feeling is as troubling as it is plain. It is troubling because it subjugates the designated scapegoat to serve the "community's" need for self-preservation. To serve his proper community-enhancing function, the object of communal hatred must first be excluded from the community. In theory, this exclusion occurs at the moment of conviction. In fact, it happens much earlier. Already the "suspect" and certainly the "defendant" finds himself differentiated from the community, and therefore the target of exclusionary, and consolidating, communal sentiment.

And the moment of exclusion can be moved back even further. The offender excluded himself from the community through his deviant act. That self-exclusion only finds formal or informal recognition later on, through suspicion, arrest, indictment, and conviction, or in the more forthright days of Anglo-Saxon law, the act of outlawry.⁴⁸

But that is not all. So far, we have assumed that the exclusion from the political community occurred through an act of some kind. In fact, so far we have assumed that the offender's deviant status derived from an "exclusion," which presupposed that he had been a member of the community at some point in the past. Deviant status, however, need not result from a deviant act. Deviance instead may be just that, deviance.

In this case, the act triggering exclusion is merely symptomatic of a preexisting condition of deviance. There's no need

⁴⁷ See Mead, *supra* note 46.

⁴⁸ HEINRICH BRUNNER, *Abspaltungen der Friedlosigkeit, in* FORSCHUNGEN ZUR GESCHICHTE DES DEUTSCHEN UND FRANZÖSISCHEN RECHTES 444, 458 (Stuttgart, J.G. Cotta 1894).

to exclude the offender, i.e., the deviant, from the community because he didn't belong in the first place. Depending on the nature and origin of his deviance, the offender may never have belonged to the community at all, he may have been an outsider by birth. Then again, perhaps deviants have acquired their condition only later on, perhaps as a result of losing or failing to develop their empathic capacity "through," in the words of John Rawls, "no fault of their own: through illness or accident, or from experiencing such a deprivation of affection in their childhood that their capacity for the natural attitudes has not developed properly."⁴⁹

Most troubling of course is the case where a person is subjected to exclusionary sentiments merely on account of her status, especially if that criminogenic status is for one reason or another permanent. According to the essentialist tendencies underlying the current incapacitative police regime, offenders must be incapacitated because they are presumptively incorrigible. They are presumptively incorrigible because they are essentially dangerous. They are essentially dangerous because they are genetically predisposed to commit crimes, because they are by nature evil, because they are black, because they are hispanic, because they are poor, because they have a low IQ, or all of these at once. The particular nature of their essential dangerousness is of no interest. Unlike the rehabilitationist penologists before them, who prided themselves in their complex nosology of criminal pathology and insisted on careful and prolonged scientific study of the particular symptoms of a specific individual deviant, the modern incapacitationists have no patience for subtleties of this sort. What matters is that there is danger and evil out there that needs to be eliminated, or at least minimized.

In the communitarian approach to the question of police control, the battle lines are clearly drawn. On the one hand is the community of potential victims, the insiders. On the other hand is the community of potential offenders, the outsiders. The boundaries of these communities are not fluid. One either belongs to one community or the other. And it is the duty of the community of potential victims to identify those aliens who have infiltrated its borders, so that they may be expelled and controlled, and their essential threat thereby neutralized.

⁴⁹ John Rawls, *The Sense of Justice*, 72 *PHIL. REV.* 281, 302 (1963).

This clear demarcation is very convenient. It eliminates the need to disassociate oneself from the object of hatred. Whatever inclination one might have had to identify oneself with the offender is overcome by the realization that, from the beginning, the offender had merely passed as "one of us." There is also no need to question oneself, in particular whether I myself might be "disposed to commit crimes."⁵⁰ As a member of a community defined by its absence of criminal tendencies, doubts of this nature are entirely misplaced. There is no need to blame oneself, either. Responsibility for the offender's act is out of the question since, as a deviant, criminal behavior lay incorrigibly in his nature. And finally, distancing oneself from the offender enormously simplifies the process of disposal. Since moral judgments are inappropriate in the case of a predatory animal, an efficiency analysis will do. There is no need to understand why and how this could have happened. The only question is why it hadn't happened sooner.

The current police regime put in place during the war on crime combines preventive and communitarian elements. On the surface it seeks to protect potential victims of violent crime by incapacitating dangerous criminals. A closer look, however, reveals that the potential victims who enjoy the protection are predominantly middle-class whites with political power and that the potential offenders who suffer the incapacitation are predominantly poor blacks with no political power whatever.⁵¹ This is so despite the facts that most victims of violent crime are poor blacks and that middle-class whites face not crime, but the threat of crime, and that they, perhaps driven by a bourgeois obsession with the wondrous and hyperanalyzed complexities of their inner lives, seek not freedom from crime, but freedom from the *fear* of crime, or as Richard Nixon put it in 1968, "freedom from fear," period.⁵²

⁵⁰ MODEL PENAL CODE § 1.02(1)(b) (1985).

⁵¹ See, e.g., Randall Kennedy, *The State, Criminal Law, and Racial Discrimination*, 107 HARV. L. REV. 1255, 1255 (1994).

⁵² Nixon, *supra* note 2, at 12936; see also U.S. Dep't of Justice, Bureau of Justice Statistics, Crime and Neighborhoods (June 1994, NCJ 147005), available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/can.txt>; U.S. Dep't of Justice, Bureau of Justice Statistics, Young Black Male Victims: National Crime Victimization Survey (June 1994, NCJ 147004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ygbkml.pdf>. Nixon, of course, didn't invent freedom from fear as a political concept; Roosevelt did, in 1941. See DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN

And this last point is crucial: the war on crime, to the extent it is fought on behalf of white middle-class victims of violent crime, is purely a symbolic matter, for two reasons. First, there are relatively few middle-class victims of violent crime, and, second, the *fear* of violent crime is best met with symbolic action: adopt a victims' rights amendment here, pass a law solemnly granting victims the right to make victim impact statements at sentencing there, and most importantly, express great concern about the high levels of crime, while at the same time expressing satisfaction at the success of the war on crime in the face of steadily falling crime rates.⁵³

C. AUTHORITARIANISM

The war on crime, though ostensibly fought on behalf of victims, has very little to do with victims, and everything to do with the state. What's more, it has very little to do with persons of any kind. It treats offenders as mere sources of danger, to be policed along with other threats, animate and inanimate alike, from rabid dogs to noxious fumes. And it treats victims as mere nuisances themselves, annoying sources of inefficiency in a system built to incapacitate the greatest number of source individuals for the longest possible time with the least effort. In the end, crime victims got their wish. All they wanted was "to be treated like criminals."⁵⁴ And that they were. In the war on crime, offenders and victims alike are irrelevant nuisances, grains of sand in the great machine of state risk management.

The true victim in the war on crime is not a person, not even "the community," but simply the state itself. Surrounded by pesky nuisances in the form of hordes of persons, be they offenders or victims, it maintains its authority and enforces that obedience which is due its commands. Victimless crimes thus are not victimless after all. They're only victimless in the sense that they're missing a *personal* victim. Any violation of the state's missives, any disruption of its administrative scheme, perhaps even of its very foundation—the unquestioning obedience of its

DEPRESSION AND WAR, 1929-1945 (1999). Nixon, however, turned the ideal inward, by locating the threat within. And so freedom from fear was transformed from a goal of foreign policy, and war, into one of domestic policy, and police.

⁵³ See Dubber, *supra* note 6 (three-strikes laws as symbolic policy).

⁵⁴ Thad H. Westbrook, Note, *At Least Treat Us Like Criminals!: South Carolina Responds to Victims' Pleas for Equal Rights*, 49 S.C. L. REV. 575 (1998).

carefully calibrated rules and regulations formulated by expert bureaucrats guided exclusively by the concern for the common good—victimizes the state. Contumacious conduct of this sort challenges not only the state's authority, but also inflicts palpable emotional harm on its officials who feel unappreciated and inconvenienced by the persistent and perplexing unwillingness of the commoners to comply with the very rules promulgated for their common well-being, their commonwealth.

The war on crime as a police action by the state against its objects easily makes room for the preventive and the communitarian police regimes outlined above. As the preventive model turns out to be driven by the same differentiating impulse that motivates the communitarian model, so the authoritarian, state-based, model in turn accommodates the goals of prevention and of communitarianism. On the connection between preventive incapacitation and the enforcement of obedience to state commands, Roscoe Pound remarked as early as 1927 that modern "penal treatment" is best understood as "interference to prevent disobedience," rather than as punishment.⁵⁵ Other than to prevent disobedience against the state, criminal law had for its province, not the protection of individual rights against interference, but on the contrary "the securing of social interests regarded directly as such, that is, disassociated from any immediate individual interests with which they may be identified."⁵⁶ And the objects of this preventive interference in the form of penal treatment were "well recognized types of anti-social individuals and of anti-social conduct."⁵⁷

In one sense, the preventive-communitarian-authoritarian police regime of the war on crime is simply the full scale adoption of Pound's approach, an approach that removes the person from the criminal law in every respect, as offender and as victim. The offender becomes the manifestation of a "type" of "anti-social individual." This disappearance of the person from punishment in the name of scientific penology has often been re-

⁵⁵ Roscoe Pound, *Introduction*, in FRANCIS BOWES SAYRE, *A SELECTION OF CASES ON CRIMINAL LAW* xxix, xxxv (1927). For an excellent extended discussion of Pound's views on criminal administration, see Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915 (1995).

⁵⁶ Pound, *supra* note 55, at xxxii.

⁵⁷ *Id.* at xxxiv.

marked upon, so often in fact that it contributed significantly to the demise of rehabilitation as a purpose of punishment.⁵⁸

What does need emphasis, however, is that the person of the victim, and not merely that of the offender, disappears entirely and emphatically. It is replaced with a new, amorphous, victim, "society," whose "social interests" are protected against that "anti-social conduct" one expects from "anti-social individuals." The victim's "individual interests" are of no interest to the criminal law. In fact, the criminal law is defined in terms of its exclusive focus not on individuals, but on social interests.

A few years later, in an article that continues to be cited as the authoritative study of the rise and scope of so-called "public welfare offenses," Francis Sayre followed and developed Pound's lead when he commented on "the trend . . . away from nineteenth century individualism toward a new sense of the importance of collective interests," and again on "the shift of emphasis from the protection of individual interests which marked nineteenth century criminal administration to the protection of public and social interests"⁵⁹

The victim as a person is so irrelevant to this new system of "criminal administration" designed to protect social interests "from those with dangerous and peculiar idiosyncracies"⁶⁰ that the "individual interests" said to have found such extensive protection in nineteenth century criminal law are the interests of the *offender* (or rather the defendant), not the *victim*. The following passage is worth quoting at greater length for its remarkable, even astonishing, clarity and foresight:

During the nineteenth century it was the individual interest which held the stage; *the criminal law machinery was overburdened with innumerable checks to prevent possible injustice to individual defendants*. The scales were weighted in his favor, and, as we have found to our sorrow, the public welfare often suffered. In the twentieth century came reaction. We are thinking today more of the protection of social and public interests; and coincident with the swinging of the pendulum in the field of legal administration in this direction modern criminologists are teaching that the objective underlying correctional treatment should *change from the*

⁵⁸ FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981); Herbert Morris, *Persons and Punishment*, 53 *THE MONIST*, No. 4, at 475 (1968); Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 *L. & HIST. REV.* 113 (1998).

⁵⁹ Francis Bowes Sayre, *Public Welfare Offenses*, 33 *COLUM. L. REV.* 55, 67 (1933).

⁶⁰ Francis Bowes Sayre, *Mens Rea*, 45 *HARV. L. REV.* 974, 1018 (1932).

*barren aim of punishing human beings to the fruitful one of protecting social interests.*⁶¹

In other words, criminal law does not concern itself with interpersonal crimes, and so it neither punishes nor protects human beings, but instead protects social interests against whatever threat they may face. The paradigmatic offense of this modern criminal law is Sayre's "public welfare offense." In this regulatory scheme of danger police, the offender is stripped of his personhood and reduced to a threat, a source of danger. As an apersonal threat whose personhood is immaterial, his "guilt" is immaterial as well: "the modern conception of criminality . . . seems to be shifting from a basis of individual guilt to one of social danger."⁶² How can a threat be guilty, and even if it could, what difference would that make? The distinguishing feature of Sayre's public welfare offenses is, after all, that they do away with the requirement of mens rea of any kind. All that matters is that, one way or another, through an act or a failure to act, intentionally or not, some social interest or other (the "public welfare") has been threatened. So important are social interests that they require the utmost protection, regardless of against whom or what. Under these circumstances, the police regime of course cannot await the actual interference with these paramount interests! No, early interference is called for—the mere risk of interference, the mere threat, is more than enough. Naturally, the efficient policing of dangers of this sort requires the abandonment of all "defenses based upon lack of a blameworthy mind, such as insanity, infancy, compulsion and the like."⁶³ Since guilt is irrelevant, guiltlessness is irrelevant as well.

At the same time, the *victim* as a person also has no place in this regulatory scheme. It's the *public* welfare that needs protection against all threats, not the individual's. And it's the vague concept of public *welfare*, or rather the social *interests* that the state in its wisdom might fit under that concept, that must be safeguarded at all costs, not the person's concrete rights to life, liberty, and property.

Sayre's article, in the end, is a veritable blueprint for the twentieth century depersonalization of American criminal law

⁶¹ Sayre, *supra* note 59, at 68 (emphasis added).

⁶² *Id.* at 55.

⁶³ *Id.* at 78.

and its transformation into a state regulatory scheme, which culminated and found its most perverse manifestation in the war on crime of the last quarter of that century. Here we find all the ingredients for a streamlined "criminal administration" in substance and procedure. The central concept is flexibility. It is this flexibility that gives state officials—experts all—the necessary discretion to determine not only which social interests require protection, but also how they are best protected, in general as well as in particular instances.

Once these interests are identified, the state determines the most efficient means of protecting them. Here, convenience is key. Substance is driven by enforcement. So, offenses are defined to minimize inconvenient proof requirements, most important *mens rea*, thus relieving prosecutors of the inconvenient burden of establishing each and every offender's mental state. Similarly, the requirement of blameworthiness, or guilt, is jettisoned, thus eliminating the time wasted on defenses such as mistake, ignorance, insanity, infancy, duress, and entrapment. Then, the process itself is streamlined. The jury is abandoned and the decision is turned over to a professional judge, either after a bench trial or, preferably and far more frequently, after a plea agreement. Whenever possible, the matter is to be turned over to "some form of administrative control which will prove quick, objective and comprehensive."⁶⁴

The precise definition of offenses is of secondary importance. All offenses spring from a single source, the state's duty to guard the public welfare against social dangers. All specific public welfare offenses, therefore, are nothing more than specifications of a single, all encompassing offense, or rather command, which instructs everyone (and everything) not to interfere with the public welfare. The details and particular applications of this general injunction are to be worked out by expert state officials at all levels of government. So, Sayre's list of categories of public welfare offenses (not a list of the offenses themselves, mind you) is not meant to be exhaustive, but subject to continuous revision (meaning expansion), the only limits to which are set by the regulatory zeal of state officials. Still, Sayre's list is worth reproducing since it, though framed as a mere snapshot in the history of American criminal administration, so nicely—some anachronisms notwithstanding—charts

⁶⁴ *Id.* at 69.

the course of what was to come in the decades ahead, while at the same placing recent developments—including the war on crime—in a broader historical context:

- (1) Illegal sales of intoxicating liquor;
- (2) Sales of impure or adulterated food or drugs;
- (3) Sales of misbranded articles;
- (4) Violations of anti-narcotic acts;
- (5) Criminal nuisances;
- (6) Violations of traffic regulations;
- (7) Violations of motor-vehicle laws; and
- (8) Violations of general police regulations, passed for the safety, health or well-being of the community.⁶⁵

Offenses falling under these categories today account for the vast majority of matters of “criminal administration.” Offenses in categories (4), (6), and (7) alone easily account for most offenses committed, prosecuted, and sanctioned.

Certainly, things have changed since Sayre’s 1933 article. The state has shown considerable imagination in making use of the flexibility it needed to discharge its duty to safeguard the “public welfare.” The scope of public welfare offenses has been expanded, the sanctions for their commission enhanced, and their enforcement simplified and accelerated. This general development culminated in and was dramatically accelerated by the war on crime. Regulatory offenses provided the ideal means for incapacitating large numbers of undesirables quickly and, eventually, for long periods of time. Among the offenses on Sayre’s list, violations of anti-narcotics law (no. 4) proved to be a particularly popular weapon in the police campaign against crime. The penalties for drug violations today include every punishment short of death, including life imprisonment without parole. In 1993, the number of drug offenders in American prisons reached 350,000, almost twice the *total* number of prison inmates in the early 1960s. The tripling of the *federal* prison population since the 1970s is largely attributable to the expansion and harshening of federal drug criminal law, with the number of federal drug offenders increasing eighteen-fold from three thousand to over fifty thousand, or sixty percent of federal prisoners.

⁶⁵ *Id.* at 78.

But other offense categories have proved useful as well. Weapons offenses, which qualify as violations of "general police regulations, passed for the safety, health or well-being of the community" (no. 8), also allow police officers to take dangerous elements off the streets in large numbers, and with little effort. And thanks to unprecedented cooperation between state and federal law enforcement agencies, weapons offenders can now be incapacitated for extended periods of time. "Project Exile" makes use of the harsh federal weapons laws, literally, to "exile" offenders from their local communities by committing them to far away federal prisons. In a typical case, a Philadelphia police officer, while "frisking [a] suspect near a drug area," happened to find a loaded gun in the suspect's waistband. Instead of the probationary sentence the man might have gotten in city court, he was sentenced to five and a half years in a federal prison, without the possibility of early release. As the officer explained in an interview, "[a]nd that's not just local jail where the family can come visit him, or come see him and visit him. They're sent anywhere in the country, so they're separated from their families and there's no probation or parole under the federal guidelines, so they're doing their complete sentence."⁶⁶

III. POLICING POSSESSION

In general, the offense of possession—whether of drugs, of guns, or anything else—has emerged as the policing device of choice in the war on crime. Most straightforwardly, and now also most commonly, possession operates directly as possession *qua* possession, an offense in and of itself. Or it functions indirectly, through some other offense, either as a springboard to another offense, through retrospective and prospective presumptions, or as an upgrade for another offense, through sentence enhancements. Since possession has achieved the status of the crime war's paradigmatic police offense, it deserves a closer look. By focusing on possession, we will also get a sense of the marvelously integrated operation of the regulatory machine that is the war on crime. Possession, after all, achieved its

⁶⁶ Eric Westervelt, *Philadelphia's Crackdown on Criminals Who Possess Illegal Guns*, Morning Edition, NAT'L PUB. RADIO, Mar. 23, 2000; see also William Clauss & Jay S. Ovsiovitch, "Project Exile" Effort on Gun Crimes Increases Need for Attorneys to Give Clear Advice on Possible Sentences, N.Y.B.J., June 2000, at 35.

avored status partly because it is flexible yet durable enough to fit so nicely into the policing process as a whole.

A. SIMPLY POSSESSION

Operating below the radars of policy pundits and academic commentators, as well as under the Constitution, possession offenses do the crime war's dirty work. Possession has replaced vagrancy as the most convenient gateway into the criminal justice system. Possession shares the central advantages of vagrancy as a policing tool: flexibility and convenience. Yet, as we shall see, it is in the end a far more formidable weapon in the war on crime: it expands the scope of policing into the home, it results in far harsher penalties and therefore has a far greater incapacitative potential, and it is far less vulnerable to legal challenges.

Millions of people commit one of its variants every day, from possessing firearms and all sorts of other weapons, dangerous weapons, instruments, appliances, or substances,⁶⁷ including toy guns,⁶⁸ air pistols and rifles,⁶⁹ tear gas,⁷⁰ ammunition,⁷¹ body vests,⁷² and anti-security items,⁷³ to burglary tools⁷⁴ or stolen property,⁷⁵ and of course drugs,⁷⁶ and everything associated with them, including drug paraphernalia,⁷⁷ drug precursors,⁷⁸ not to mention instruments of crime,⁷⁹ graffiti instruments,⁸⁰ computer related material,⁸¹ counterfeit

⁶⁷ N.Y. PENAL LAW §§ 265.01-05 (McKinney 2000 & Supp. 2001); MODEL PENAL CODE §§ 5.06 (Instruments of Crime; Weapons), 5.07 (offensive weapons) (1985).

⁶⁸ NEW YORK, N.Y., ADMIN. CODE § 10-131(g) (2001).

⁶⁹ *Id.* § 10-131(e).

⁷⁰ *Id.* § 10-131(h).

⁷¹ *Id.* § 10-131(i).

⁷² N.Y. PENAL LAW §§ 270.20, 400.05 (McKinney 2000 & Supp. 2001).

⁷³ *Id.* § 170.47.

⁷⁴ *Id.* § 140.35.

⁷⁵ *Id.* §§ 165.40-65; *see also* 625 ILL. COMP. STAT. § 5/4-103(a)(1) (1976) (possession of stolen vehicle).

⁷⁶ N.Y. PENAL LAW arts. 220, 221 (McKinney 2000 & Supp. 2001).

⁷⁷ *Id.* § 220.50.

⁷⁸ *Id.* § 220.60.

⁷⁹ MODEL PENAL CODE § 5.06 ("Instruments of Crime; Weapons"); *Com. v. Danton*, 654 A.2d 580 (Pa. Super. Ct. 1995).

⁸⁰ N.Y. PENAL LAW § 145.65 (McKinney 2000 & Supp. 2001).

⁸¹ *Id.* § 156.35.

trademarks,⁸² unauthorized recordings of a performance,⁸³ public benefit cards,⁸⁴ forged instruments,⁸⁵ forgery devices,⁸⁶ embossing machines (to forge credit cards),⁸⁷ slugs,⁸⁸ vehicle identification numbers,⁸⁹ vehicle titles without complete assignment,⁹⁰ gambling devices,⁹¹ gambling records,⁹² usurious loan records,⁹³ prison contraband,⁹⁴ obscene material,⁹⁵ obscene sexual performances by a child,⁹⁶ "premises which [one] knows are being used for prostitution purposes,"⁹⁷ eavesdropping devices,⁹⁸ fireworks,⁹⁹ noxious materials,¹⁰⁰ and taximeter accelerating devices (in New York),¹⁰¹ spearfishing equipment (in Florida),¹⁰² or undersized catfish (in Louisiana),¹⁰³ and the list could go on and on.

And that's the first prerequisite for a sweeping offense. Lots of people must be guilty of it. Thanks to the erosion of constitutional constraints on police behavior in the state declared emergency of the war on crime, possession is easy to detect. Every physical or merely visual search, every frisk, every patdown, is also always a search for possession. Like vagrancy

⁸² *Id.* §§ 165.71-73.

⁸³ *Id.* §§ 275.15-45.

⁸⁴ *Id.* § 158.40.

⁸⁵ *Id.* §§ 170.20-30.

⁸⁶ *Id.* §§ 170.40-50.

⁸⁷ *State v. Saiez*, 489 So. 2d 1125 (Fla. 1986).

⁸⁸ N.Y. PENAL LAW §§ 170.55-60 (McKinney 2000).

⁸⁹ *Id.* § 170.70.

⁹⁰ 625 ILL. COMP. STAT. § 5/4-104(a)(2) (1976).

⁹¹ N.Y. PENAL LAW §§ 225.30-35 (McKinney 2000 & Supp. 2001).

⁹² *Id.* §§ 225.00-35, 415.00.

⁹³ *Id.* § 190.45

⁹⁴ *Id.* § 205.25.

⁹⁵ *Stanley v. Georgia*, 394 U.S. 557 (1969); N.Y. PENAL LAW §§ 235.05-07 (McKinney 2000).

⁹⁶ N.Y. PENAL LAW § 263.11 (McKinney 2000 & Supp. 2001).

⁹⁷ *Id.* § 230.40.

⁹⁸ *Id.* § 250.10.

⁹⁹ *Id.* § 270.00.

¹⁰⁰ *Id.* § 270.05.

¹⁰¹ *Id.* § 145.70.

¹⁰² *Delmonico v. State*, 155 So. 2d 368 (Fla. 1963).

¹⁰³ LA. REV. STAT. ANN. § 56:326(A)(7)(b) (West 1987 & Supp. 2001) (*State v. Wingate*, 668 So. 2d 1324 (La. Ct. App. 1996)).

(and pornography), then, police officers know possession when they see it. Unlike vagrancy, they also know it when they feel it.

Police officers have become experts at detecting “bulges” in various articles of clothing, each of which signal an item that may be illegally possessed. Similarly, police officers and the judges who occasionally review their actions have long been particularly imaginative in their interpretation of the particular nature of these bulges, when the time has come to confirm one’s visual suspicion with a physical frisk. Here the search for one illegally possessed item—say a concealed weapon—may actually bear fruit in the form of the discovery of another illegally possessed item—say a bag of cocaine. Possession offenses in this way manage to bootstrap themselves, each giving the other a helping hand.

Moreover, the case for a possession offense begins and ends with a search, no matter whether it was a search for a possession offense or for some other crime. If it’s a search in connection with some other crime, the police officer may well stumble upon evidence of illegal possession. This may come in handy if no evidence of the other crime is found or if that evidence doesn’t stick for one reason or another, say because it’s not sufficiently corroborated by other evidence or because some defense or other applies (like self-defense, perhaps). If it is a search for a possession offense, however, the scope of the search is virtually unlimited, given that items possessed come in all shapes and sizes (especially drugs) and can be hidden in the smallest cavity, bodily or not.

Thanks to an expansive reading of possession statutes—which includes the inapplicability of many defenses—possession is easy to prove. In fact, there won’t be any need to prove anything, to anyone, judge or jury. Virtually all defendants in a possession case see the writing on the wall and plead guilty. And, thanks to penalty enhancements for prior convictions and—most recently—the innovative collaboration of federal and state law enforcement, possession once proved can send a possessor to prison for a long time, even for life without the possibility of parole.

So, in a recent New York case, a defendant was relieved to find himself acquitted of several serious burglary charges on what we now like to call a “technicality.” Unfortunately for him, he was convicted of possessing stolen property—the loot of the very burglary of which he had been acquitted. What’s more, the

judge sentenced him to twenty-five years to life on the possession count alone. As a professional burglar he was a "scourge to the community."¹⁰⁴

In 1998, possession offenses accounted for 106,565, or 17.9%, of all arrests made in New York State.¹⁰⁵ Of these cases, 295 (or 0.27%) resulted in a verdict (by a judge or a jury), a whopping 129 (0.12%) in an acquittal. Of those originally arrested for possession, 33,219 (31.2%) went to prison or jail. New York boasts no fewer than 115 felony possession offenses, all of which require a minimum of one year in prison; eleven of them provide for a maximum sentence of life imprisonment.

Possession has become the paradigmatic offense in the current campaign to stamp out crime by incapacitating as many criminals as we can get our hands on. Every minute of every day, police pull over cars and sweep neighborhoods looking for, or just happening upon, "possessors" of one thing or another. Prosecutors throw in a possession count for good measure or, if nothing else sticks, make do with possession itself. Why, as one Michigan prosecutor remarked before the U.S. Supreme Court, why bother charging more involved offenses if you can get life imprisonment without parole for a possession conviction?¹⁰⁶

In many cases, possession statutes also save prosecutors the trouble of proving that other major ingredient of criminal liability in American criminal law, *mens rea*, or a guilty mind. This means that many possession statutes, particularly in the drug area—where some of the harshest campaigns in the war on crime have been prosecuted—are so-called strict liability crimes. In other words, you can be convicted of them if you don't know that you are "possessing" a drug of any kind, what drug you are "possessing," how much of it you've got, or—in some states—even that you are possessing anything at all, drug or no drug.¹⁰⁷

This much we might have expected from Sayre's theory of "public welfare offenses." Possession, however, also does away with the traditional requirement that criminal liability must be

¹⁰⁴ *People v. Young*, 94 N.E.2d 171 (N.Y. 1999).

¹⁰⁵ State of New York, Division of Criminal Justice Services, *supra* note 11; State of New York, Division of Criminal Justice Services, Criminal Justice Indicators New York State: 1994-1998 (Dec. 13, 1999) (on file with author).

¹⁰⁶ *Harmelin v. Michigan*, 501 U.S. 957, 1022, 1024 (1991) (White, J., dissenting) (quoting Tr. of Oral Arg. 30-31).

¹⁰⁷ *State v. Cleppe*, 635 P.2d 435 (Wash. 1981).

predicated on an *actus reus*, an affirmative act or at least a failure to act (rather than a status, like being in possession of something). So even if some sort of intent (or at least negligence) is required for conviction, there is no need to worry about the *actus reus*.

Plus, it turns out that other defenses also don't apply to possession offenses. We've already seen that, in Sayre's scheme, culpability and responsibility defenses have no place in a possession case. But what about other defenses, such as self-defense or necessity?

Say you're riding in the back seat of your friend's car as a couple of men try to jack the car, guns drawn. You notice a gun under the driver seat, bend down and grab it, and then shoot one of the men in the leg. You're cleared of the assault on grounds of self-defense. Still, since you weren't licensed to carry the gun, you're liable for possessing it illegally. This is so because the defense of self-defense applies only to the use, but not to the possession of the gun.¹⁰⁸

As a final example, consider the so-called "agency" defense. It turns out that this defense applies to the sale, but not to the simple possession, of narcotics.¹⁰⁹ To understand why, we need to take a closer look at the menu of possession offenses available to the modern legislator. We can distinguish between two types of possession offenses, *simple* possession and possession with intent, or *compound* possession. Simple possession itself can, but need not, require proof of actual or constructive awareness—that you knew or should have known that you possessed the object in question. If it doesn't, it's called a strict liability offense (see above). Possession with intent is by definition not a strict liability offense, since it requires proof of intent.

It may be helpful to view the varieties of possession along a continuum from dangerousness at one end to its manifestation at the other. At the end of pure dangerousness is simple possession. Here we are farthest removed from the harm that the use of the object may cause. And in the strict liability variety of simple possession, the inference from the dangerousness of the item possessed to its possessor is most tenuous—since he by definition is not even aware of his possession. Next is com-

¹⁰⁸ *People v. Almodovar*, 62 N.E.2d 126 (N.Y. 1984). For more on the "act" of possession, see *infra* notes 287-92 and accompanying text.

¹⁰⁹ *People v. Sierra*, 45 N.E.2d 56 (N.Y. 1978).

pound possession, which still inflicts no harm since the possession itself is harmless, but at least we have the intent to use the item possessed in a way that may or may not be harmful. Moving further along the continuum we encounter the *preparation* to use the item possessed in some particular way. This preparation, as distinct from an attempt, is not criminalized.

Next comes the *attempt* to use the object possessed, which is a preparation that has almost, but not quite, borne fruit. And eventually, there is the use of the possessed item. In the case of drugs, that use may come in the form of a sale, as in the popular and often severely punished offense of “possession with intent” (to distribute). Of course, the distribution itself is also entirely harmless. It’s another kind of use, which may or may not follow the distribution, that renders drugs harmful, namely their consumption. But the harmfulness of the use is not an element of a compound possession offense criminalizing possession with intent to distribute. There is no offense of possession with intent to consume. In fact, some jurisdictions recognize possession with intent to consume as a *mitigating* rather than an aggravating factor, especially when the drug possessed is marijuana (possession of quantities for personal use).¹¹⁰

Now courts have held that the agency defense does not reach the simple possession of drugs because someone who merely possesses drugs, without the intent to sell, does not—and in fact cannot—act as the “agent” of the ultimate buyer, and his possession therefore cannot be merely incidental to the purchase.¹¹¹ For one thing, he doesn’t *act* at all, he merely possesses. The mere *fact* of possession is enough for conviction, no matter what the reason or who the eventual beneficiary. This arrangement, once again, has the convenient effect—for the prosecutor—of ensuring him a conviction of simple possession, in cases where the agency defense would block convictions of possession with intent to sell, or even the sale itself.

By now, you may not be surprised to learn that you didn’t even have to pick up the gun to be guilty of possessing it illegally. Again in New York—but in many other jurisdictions as well—you may well have “constructively” possessed the weapon simply by having been in the car at the same time. So to possess

¹¹⁰ See, e.g., N.Y. PENAL LAW § 221.05 (McKinney 2000 & Supp. 2001) (unlawful, as opposed to criminal, possession of marijuana).

¹¹¹ See *People v. Sierra*, 45 N.E.2d 56 (N.Y. 1978).

something in the eye of the criminal law doesn't mean you owned it, nor does it mean you physically possessed it. It's generally enough that you *could have* brought it within your physical possession or at least kept others from bringing it within theirs. (Technically, you constructively possessed the gun if you "exercise[d] dominion or control over" it.¹¹²)

And, as though proving possession isn't easy enough, the law of possession also teems with evidentiary presumptions. Not only can you constructively possess something you don't have in your hands or on your person, you can also be *presumed* to constructively possess it. In our example, this means that it will be up to you to prove to the jury—should you be among the minuscule percentage of possession defendants who make it to a jury trial—that you did not in fact possess the gun, constructively, which is a tough row to hoe, given what we just learned about how little it takes to establish possession.

The most popular choice among legislatures anxious to further reduce prosecutorial inconvenience associated with the enforcement of possession offenses is to establish the rule that mere presence constitutes presumptive possession. The more eager the state is to get certain possessors off the street, and the more dangerous these possessors have revealed themselves to be through their possession, the more dangerous the item possessed, the greater the temptation will be to do away with evidentiary requirements, and thereby to accelerate the incapacitation process. Small wonder that these presumptions from presence to possession pop up in gun and drug possession cases.¹¹³

In the New York Penal Law, for example, merely being around drugs not only amounts to presumptively possessing them. It further simplifies the prosecutor's incapacitative task by also establishing a presumption of "knowing" possession.¹¹⁴ So, from evidence of being in the same car or room with a controlled substance, the prosecutor gets, without additional evidence, to jump to the conclusion that you possessed the drugs, and knew that you did. And, as we just saw, this conclusion will stand, unless you convince the fact finder otherwise. And that fact finder is, in virtually every possession case, none other than

¹¹² N.Y. PENAL LAW § 10.00(8) (McKinney 2000 & Supp. 2001).

¹¹³ *Id.* §§ 220.25 (drugs; "knowing"), 265.15 (guns; "unlawful").

¹¹⁴ *Id.* § 220.25.

the prosecutor himself, who offers you a reduced sentence in exchange for a guilty plea.

The use of mere presence as a foundation of criminal liability has an additional benefit. Presence not only simplifies the prosecutorial task of connecting a given object with a particular possessor. Presence can with one fell swoop ensnare not just one, but several, persons in the web of possession liability emanating from a piece of contraband at its center. Presence-to-possession has this useful feature thanks to a generous interpretation of possession that makes room for non-exclusive possession of chattels, notwithstanding that “real” is supposed to differ from “movable” property precisely in that non-exclusive possession was possible in the former, but impossible in the latter: “if we concede possession to the one, we must almost of necessity deny it to the other.”¹¹⁵

Presence-based liability of this sort points up another feature of possession offenses: the irrelevance of traditional distinctions among principals and accomplices. Non-exclusive possession combined with a presumption of possession based on mere presence brings anyone somehow “involved” with a dangerous object within the scope of police control. Careful doctrinal, i.e. abstract, distinctions among different levels of “involvement” in the crime of possession would inconvenience state officials—mostly police officers—to whose discretion the diagnosis of dangerousness in particular cases is entrusted. And it makes sense that complicity analysis would be entirely inappropriate; since possession is not an act, the central question of complicity—can A’s act be imputed to B—simply does not arise. What’s at stake is not liability for an act, carefully calibrated by individual culpability, but the ascription of the label “possessor” (or, functionally, “dangerous individual”) for the purpose of permitting police interference with possible punitive consequences.

Still, the complicity model turns out to be surprisingly useful in an analysis of possession offenses, as long as one frees oneself of the notion that complicity—or any other form of group criminality—requires at least two persons. Possession offenses, in a sense, treat anyone “involved” with the dangerous object as an accomplice. The interesting thing about possession

¹¹⁵ 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 152 (2d ed. 1898, reissued 1968).

offenses is that the principal is not a person, but an inanimate object. In theory, if not in function, the source of criminal liability is the object, not the possessor. Hence, criminal liability results from contact, however slight, with the object. The involvement with the object need only be substantial enough to allow its taint, its dangerousness, to come into contact with its possessor. By failing to disassociate himself from the dangerous object, the possessor has placed himself in a position where the object's dangerousness can be ascribed to him. He has revealed himself as sharing the object's dangerousness. He will be deemed its "possessor," as "exercising dominion or control over it," if he "was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it."¹¹⁶

This imputation of an object's characteristics onto its possessor is familiar from medieval law. There, each head of household was presumptively liable for damage caused by his possessions, animate and inanimate alike, unless he surrendered them to the victim's household immediately upon becoming aware of the damage they had done. If he didn't disassociate himself from the tainted piece of property in this way, and instead continued to feed the offending slave or dog, or handled the blood-stained axe, he had to pay *wergeld* to the victim's household.¹¹⁷ The only prerequisite for liability was causation of harm and possession. On the householder's part, no act was required.

While medieval law thus knew of transferring an object's taint onto its possessor and holding the possessor liable simply as possessor, it differed from contemporary possession liability in one important respect: it required harm. Modern possession liability transfers the danger from an object to its possessor and holds him liable as a source of danger, without the object's danger ever having manifested itself.

The fundamental difference between the two instances of ascribing characteristics from an object to its possessor is that the medieval example is centered on the possessor, whereas the contemporary one focuses on the object possessed. The medieval householder is liable for the harm caused by his possessions

¹¹⁶ N.Y. PENAL LAW §§ 10.00(8), 15.00(2) (McKinney 2000 & Supp. 2001).

¹¹⁷ HEINRICH BRUNNER, *Ueber absichtslose Missethat im altdeutschen Strafrechte, in FORSCHUNGEN ZUR GESCHICHTE DES DEUTSCHEN UND FRANZÖSISCHEN RECHTES* 487, 507, 522 (Stuttgart, J.G. Cotta 1894).

because they are *his* possessions. Today's non-exclusive constructive gun possessor is incapacitated because of his spatial association with the dangerous object. The medieval model extracts damages for the victim from the most obvious source, either in the form of the offending possession that the victim could use—or not use—at his discretion or of the householder's *wergeld*, traveling up the ladder of property relations from possessed to possessor. The modern model turns possession itself into the offense, without harm, to subject a presumptively dangerous individual to police investigation and control. In the medieval model, responsibility travels from the possessor to the possessed. In the modern model, with no harm and therefore no responsibility to be ascribed, dangerousness travels from the possessed to the possessor for its own sake, to label the possessor as dangerous.

The idea of complicity among objects and their human possessors, and of a transfer of characteristics from one to the other and back again, may appear odd. But it makes perfect sense in a police regime of threat elimination and minimization. In such a regime, characteristics apparently limited to persons—such as *mens rea*, or culpability—turn out to be nothing more than general, though cryptic, references to dangerousness. So a person acting with *mens rea*, or “malice,” reveals himself to be abnormally dangerous. The “higher” the *mens rea*, the higher the level of dangerousness. So the *purposeful* actor is most dangerous (because of his evil disposition and his likelihood of success), followed by the actor acting with *knowledge* that he will cause harm, rather than the intent to do so, followed by the merely *reckless* actor, who knows that his conduct may cause harm but goes ahead with it anyway, followed by the *negligent* actor, who is simply dangerously clueless.

The connection between dangerousness and *mens rea* is so natural that courts slide back and forth between the two even in the analysis of the dangerousness of objects. So an object's “inherent dangerousness” can quickly become its “inherent *vice*,” as happened in a fairly recent opinion which had the New York Court of Appeals struggling with the question whether rubber boots qualified as a “dangerous instrument” (they do: though themselves free of “inherent *vice*,” they were used in a danger-

ous way, by stomping someone on the pavement).¹¹⁸ In the end, not only can persons be noxious, but objects can be evil as well.

From the perspective of threat management, no qualitative difference separates possessor from possessed. They simply are more or less serious threats, source individuals and danger carriers, allowing evil taints to pass back and forth between them. It only makes sense, then, that possessors and possessed, in fact dangers of all shapes and sizes, be processed by a general hazard control system that begins with the identification of possible threats, proceeds to their diagnosis, and ends with their disposal.

The general contours of such an apersonal hazard control regime emerge if we superimpose various of its manifestations upon each other. The identification and disposal of dangerous objects occurs in many contexts. In general, every object or animal, the possession of which is criminal, is subject to a parallel system of hazard control. This makes sense: even after the possessor is punished for possessing, and deprived of his possession, the item possessed still needs to be disposed of.

The mere possession of certain highly hazardous (or "toxic") waste is prohibited.¹¹⁹ And so environmental law deals with, among others things, the "management," i.e., the identification and disposal, of "hazardous waste," or more broadly, "substances hazardous or acutely hazardous to public health, safety or the environment."¹²⁰

Possessing dangerous dogs, at least without a license, also is a crime.¹²¹ Supplementing this prohibition, animal laws (often awkwardly classified under laws dealing with agriculture¹²²) handle the "control," i.e., the identification and disposal,

¹¹⁸ *People v. Carter*, 53 N.E.2d 113 (N.Y. 1981) (emphasis added). For an interesting discussion of the differentiated analysis of dangerousness in tort law, see EDWARD J. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 9-27 (1949) (distinguishing between "inherently dangerous," "imminently dangerous," "eminently dangerous," and "latently dangerous").

¹¹⁹ See, e.g., Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (1994 & Supp. 1999).

¹²⁰ N.Y. ENVTL. CONSERV. LAW art. 37 (McKinney 1997 & Supp. 2001).

¹²¹ See, e.g., WASH. REV. CODE ANN. § 16.08.080 (West 1992 & Supp. 2001).

¹²² See, e.g., N.Y. AGRIC. & MKTS. LAW art. 7 (McKinney 1991 & Supp. 2001).

through "seizure," "confiscation,"¹²³ and "destruction," of "dangerous dogs" or "mischievous animals."¹²⁴

Then, of course, there are the laws tracking the criminal proscription of gun and drug possession. These "administrative provisions"¹²⁵ deal with the "[d]isposition of weapons and dangerous instruments, appliances and substances,"¹²⁶ and the "seizure," "forfeiture," and "disposition" of "controlled substances [and] imitation controlled substances."¹²⁷ And of course, the entire law of *in rem* forfeiture which has made such enormous strides in the war on crime is based on the identification and disposal of objects (*res*) that are dangerous in and of themselves.¹²⁸

The general law of nuisances can be seen as the archetypal hazard control regime. (Many, but not all, of the more specific schemes make their connection to nuisance disposal explicit.¹²⁹) Modern nuisance statutes are all about the identification and disposal of hazardous or otherwise "offending" objects, "declaring," "enjoining," "condemning," and "abating" nuisances.¹³⁰ There we also find the distinction between nuisances *per se*—inherently dangerous objects—and other nuisances—objects that are merely put to "noxious" use. Abatement of the former requires destruction (without compensation).¹³¹ Abatement of the latter doesn't; putting the object to non-noxious use is enough.

Hazard control schemes generally begin with a "declaration." Before an item can be subjected to the proper kind of control, it must first be determined *whether* it is a hazard at all,

¹²³ See, e.g., WASH. REV. CODE ANN. § 16.08.070-.100 (West 1992 & Supp. 2001).

¹²⁴ N.Y. PENAL CODE OF 1829, ti. 2, art. 1, § 14 (third degree manslaughter); N.Y. PENAL CODE OF 1881, § 196 (second degree manslaughter).

¹²⁵ See, e.g., N.Y. PENAL LAW ch. 40, pt. 4 ("administrative provisions") (McKinney 2000 & Supp. 2001).

¹²⁶ N.Y. PENAL LAW § 400.05 (McKinney 2000 & Supp. 2001).

¹²⁷ N.Y. PUB. HEALTH LAW § 3387 (McKinney 1993 & Supp. 2001).

¹²⁸ See 21 U.S.C. § 881 (1994 & Supp. 2001); *Bennis v. Michigan*, 516 U.S. 442 (1996).

¹²⁹ See, e.g., N.Y. PENAL LAW § 400.05 (McKinney 2000 & Supp. 2001) (declaring illegally possessed guns public nuisances); N.Y. PUB. HEALTH LAW § 3387 (McKinney 1993 & Supp. 2001) (declaring illegally possessed drugs public nuisances).

¹³⁰ See, e.g., MICH. COMP. LAWS ANN. § 600.3801 (West 2000), the statute at issue in *Bennis*.

¹³¹ See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928).

and, if so, *what kind* of hazard it is. Only items “declared” to be a “nuisance” (or “dangerous”) fall within the jurisdiction of a system of hazard administration or management.¹³²

Among nuisances, a system of hazard management will then roughly distinguish between two types of threats, one incidental and curable, the other inherent and incurable. Depending on the type of hazard, its source is either forfeited and turned to good use, or destroyed as a nuisance *per se*. Objects not inherently dangerous, i.e., objects for which there is hope, are first subjected to a diagnosis that determines whether they in fact have been tainted through association with a dangerous person. These objects may include, for example, “vehicles, vessels and aircraft used to transport or conceal gambling records,”¹³³ family cars used to solicit prostitutes,¹³⁴ and anything somehow associated with a drug offense, from cars, to houses, to yachts, and even exercise equipment.¹³⁵

If the objects have been tainted, and it is upon the possessor to rebut the presumption that they have, then they are forfeited. This means that they are temporarily or permanently brought under state control—and thereby also taken out of the control of their tainted possessor, thus removing the taint. State officials decide in their discretion the duration of the period of control. In cases of temporary control, an object is eventually released to the general public by public sale.¹³⁶ Alternatively, state officials may decide to subject the objects to permanent control. They may “retain such seized property for the official use of their office or department.”¹³⁷ (This provision has

¹³² See, e.g., N.Y. PUB. HEALTH LAW § 3387 (McKinney 1993 & Supp. 2001) (drugs; public nuisances); N.Y. PENAL LAW § 400.05 (McKinney 2000 & Supp. 2001) (guns; public nuisances); N.Y. AGRIC. & MKTS. LAW § 121 (McKinney 1991 & Supp. 2001) (dogs; dangerous); WASH. REV. CODE § 16.08.090 (West 1992 & Supp. 2001) (dogs; dangerous).

¹³³ N.Y. PENAL LAW § 415.00 (McKinney 2000).

¹³⁴ MICH. COMP. LAWS ANN. § 600.3801 (West 2000) (“[a]ny building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons”).

¹³⁵ 21 U.S.C. § 881(4) (1994 & Supp. 1999) (“[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances]”).

¹³⁶ N.Y. PENAL LAW § 415.00(7) (McKinney 2000); 21 U.S.C. § 881(e) (1994 & Supp. 1999).

¹³⁷ N.Y. PENAL LAW § 415.00(7) (McKinney 2000).

brought substantial income to police departments throughout the country, and has provided an important incentive to pursue the war on crime with great vigor.)

Inherently dangerous objects, the incurably vicious, such as guns and drugs, are permanently incapacitated. Weapons, for instance, are “destroyed” or otherwise “rendered ineffective and useless for [their] intended purpose and harmless to human life.”¹³⁸ Dangerous dogs similarly are “euthanized immediately” or “confine[d] securely [and] permanently.”¹³⁹

Interestingly, the New York weapons disposal statute provides for two exceptions to this general rule of permanent incapacitation. One is within the discretion of a judge or a prosecutor: “a judge or justice of a court of record, or a district attorney, shall file with the official a certificate that the non-destruction thereof is necessary or proper to *serve the ends of justice*.” The other is up to the designated disposal official himself: “the official directs that the same be retained in any laboratory conducted by any police or sheriff’s department *for the purpose of research, comparison, identification or other endeavor toward the prevention and detection of crime.*”¹⁴⁰

The parallels between this fairly complex scheme for the identification and disposal of non-human threats, animate or inanimate, and modern criminal administration are apparent. As we saw earlier, these hazard control schemes apply to objects the possession of which is criminal, i.e., they apply to contraband. But not only is the possession of noxious objects criminal, the possessors themselves are noxious objects. In a comprehensive hazard control regime the distinction between possessor and possessed, and between person and property, is as insignificant as the distinction among hazards generally speaking. A person is “declared an enemy of the state,”¹⁴¹ while property is “declared a public nuisance.”¹⁴²

Possessor and possessed are lumped together into a hazard cluster that must be neutralized. That one is a person, and the other isn’t, makes no difference. In the face of such danger,

¹³⁸ *Id.* § 400.05(2); see also 21 U.S.C. § 881(f) (1994 & Supp. 1999) (destruction of drugs); N.Y. PUB. HEALTH LAW § 3387 (McKinney 1993 & Supp. 2001) (same).

¹³⁹ N.Y. AGRIC. & MKTS. LAW § 121(4) (McKinney 1991 & Supp. 2001).

¹⁴⁰ N.Y. PENAL LAW § 400.05(3) (emphasis added) (McKinney 2000 & Supp. 2001).

¹⁴¹ 1934 N.J. Laws ch. 155, N.J. REV. STAT. § 2:136(1) (1937).

¹⁴² N.Y. PENAL LAW § 400.05(1) (guns) (McKinney 2000 & Supp. 2001).

very personal considerations of mens rea are out of place. The possessor's mens rea matters as much as the possessed's: the fact of dangerousness *is* the mens rea, the viciousness, that requires state interference. To say that the possession of hazardous objects is a typical strict liability offense therefore is only half right.¹⁴³ It's the connection to a hazard that substitutes for mens rea. The liability isn't strict; it's grounded in dangerousness.

In the end, possessors are punished not only for possessing nuisances, but for *being* nuisances themselves. A "dangerous dog" is "any dog which (a) without justification attacks a person and causes physical injury or death, or (b) poses a serious and unjustified imminent threat of harm to one or more persons."¹⁴⁴ Similarly, offenders are persons who (a) engage in "conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests"¹⁴⁵ or (b) "whose conduct indicates that they are disposed to commit crimes."¹⁴⁶ Dangerous dogs are identified and controlled.¹⁴⁷ Dangerous humans are identified and then subjected to "public control."¹⁴⁸

The control of human hazards can be temporary or permanent, depending on their classification as incidental or inherent dangers. Corrigible human threats are subjected to rehabilitative treatment, a cleansing process in social control institutions (i.e. prisons). Incurable ones suffer incapacitative treatment, either through permanent warehousing under a life sentence, with an additional element of enlisting inmates in the service of the state. Consider here the use of inmates in prison industries. Note also that the Thirteenth Amendment, prohibiting slavery, explicitly excludes prisoners¹⁴⁹ and that even enlightened reformers like Cesare Beccaria viewed (and advocated) imprisonment as a form of state slavery.¹⁵⁰

¹⁴³ See *State v. Bash*, 925 P.2d 978, 984 (Wash. 1996) (possession of dangerous dog; citing *Staples v. United States*, 511 U.S. 600, 617 (1994)).

¹⁴⁴ N.Y. AGRIC. & MKTS. LAW § 108(24) (McKinney 1991 & Supp. 2001).

¹⁴⁵ MODEL PENAL CODE § 1.02(1)(a) (1985).

¹⁴⁶ *Id.* § 1.02(1)(b).

¹⁴⁷ N.Y. AGRIC. & MKTS. LAW § 106 (McKinney 1991 & Supp. 2001).

¹⁴⁸ MODEL PENAL CODE § 1.02(1)(b) (1985).

¹⁴⁹ U.S. CONST. amend. xiii, sec. 1.

¹⁵⁰ CESARE BECCARIA, OF CRIMES AND PUNISHMENTS §§ 16, 30 (1764).

Alternatively, incorrigible human threats are destroyed through execution. It's no accident that the modern method for eliminating human hazards closely resembles that for the elimination of dangerous dogs. Conversely, the New York dangerous dog law provides that "[e]uthanize' means to bring about death by a humane[!] method."¹⁵¹

Even the exceptional retention of inherently dangerous objects marked for neutralization finds a parallel in the realm of human hazards. Consider, for instance, the frequent retention of otherwise dispensable offenders as witnesses in the disposal processes of other human hazards, and, more generally, the practice of granting leniency in exchange for testimony. In either case, "non-destruction" of the human hazard can be deemed "necessary or proper to serve the ends of justice." Today, prisoners are no longer forced to subject themselves to scientific experiments, though they may submit to them voluntarily, or as voluntarily as one can submit to them under the conditions in many prisons.¹⁵²

What's more, some non-human hazard control regimes provide not only a definition of offenses familiar from criminal codes. They even lay out defenses to an allegation of dangerousness analogous to the defenses recognized in criminal law. For instance, New York's statute governing the "Licensing, Identification and Control of Dogs"¹⁵³ is dedicated to "the protection of persons, property, domestic animals and deer from dog attack and damage."¹⁵⁴ A dog reveals itself as dangerous if it "attack[s] any person who is peaceably conducting himself in any place where he may lawfully be"¹⁵⁵ or if it "attack[s], chase[s] or worry[ies] any domestic animal . . . while such animal is in any place where it may lawfully be."¹⁵⁶ So the actual infliction of harm isn't a prerequisite. When the victim is a domestic animal, "chasing" will do.

So much for the special part of this dangerous dog code. But what about defenses? Several are available:

¹⁵¹ N.Y. AGRIC. & MKTS. LAW § 108(8) (McKinney 1991 & Supp. 2001).

¹⁵² See, e.g., *Bailey v. Lally*, 481 F. Supp. 203, 220-21 (D. Md. 1979)

¹⁵³ N.Y. AGRIC. & MKTS. LAW art. 7 (McKinney 1991 & Supp. 2001).

¹⁵⁴ *Id.* § 106.

¹⁵⁵ *Id.* § 121(1).

¹⁵⁶ *Id.* § 121(2); cf. WASH. REV. CODE ANN. § 16.08.070(1), (2) (West 1992 & Supp. 2001) (defining "potentially dangerous dog" and "dangerous dog").

A dog shall not be declared dangerous if the court determines the conduct of the dog (a) was justified because the threat, injury or damage was sustained by a person who at the time was committing a crime or offense upon the owner or custodian or upon the property of the owner or custodian of the dog, or (b) was justified because the injured person was tormenting, abusing or assaulting the dog or has in the past tormented, abused or assaulted the dog; or (c) was responding to pain or injury, or was protecting itself, its kennels or its offspring.¹⁵⁷

The facially dangerous dog thus has at least four defenses at its disposal. All of these defenses qualify as “justifications.” Recall that already in the definition of “dangerous dog,” we find a limitation to attacks “without justification” and “unjustified” threats. First, and more general, the dog can raise a general justification defense by claiming that its victim, in the case of a person, was not “peaceably conducting himself” or was not “in [a] place where he may lawfully be,”¹⁵⁸ or, in the case of a domestic animal, was not “in [a] place where *it* may lawfully be.”¹⁵⁹ This first line of defense finds a rough analogue in the Model Penal Code’s general justification defense (choice of evils), which provides that “[c]onduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that . . . the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged”¹⁶⁰ Here it would seem that the New York legislature has determined that the balance of evils weighs against the victim of a dog attack if he (or it) wasn’t engaging in lawful conduct at the time of the attack, either by not peaceably conducting himself or by not being where he (or it) may lawfully be.

Alternatively, this implicit, general, justification defense is simply fleshed out by the three defenses laid out in the passage quoted above. Again, these defenses are familiar from the Model Penal Code—and traditional criminal law. Defense (a) is analogous to the Code provisions on “use of force for the protection of other persons” (defense of others)¹⁶¹ and “use of force for the protection of property” (defense of property).¹⁶²

¹⁵⁷ N.Y. AGRIC. & MKTS. LAW § 121(5) (McKinney 1991 & Supp. 2001).

¹⁵⁸ *Id.* § 121(1).

¹⁵⁹ *Id.* § 121(2) (emphasis added).

¹⁶⁰ MODEL PENAL CODE § 3.02(1)(a) (1985).

¹⁶¹ *Id.* § 3.05.

¹⁶² *Id.* § 3.06.

Defenses (b) and (c) parallel the Code defenses "use of force in self-protection" (self-defense),¹⁶³ "extreme mental or emotional disturbance" (provocation), and once again defense of others.¹⁶⁴ If anything, the canine statute is more generous than the human statute.¹⁶⁵ The Code—and traditional criminal law—limits the defense of provocation to homicide cases.

By encompassing and connecting human and non-human threats as possessors and possessed, the concept of possession helps to make this apersonal system of hazard control, where hazards are identified and eliminated regardless of who or what they might be, possible. By providing state officials with a flexible doctrinal framework for their discretionary analyses of dangerousness, possession offenses quietly supplement a growing system for the explicit assessment of human dangerousness, which includes pre-trial detention hearings, sentencing hearings, and, most recently, sexual predator ratings, as well as parole hearings.¹⁶⁶ They introduce dangerousness considerations into an area of criminal law that, on its face, follows the traditional approach of matching behavior to definitions of proscribed conduct in criminal statutes. Dressed up like an ordinary criminal statute replete with conduct element ("possesses"), attendant circumstances ("three kilos of powder cocaine"), perhaps even mens rea ("with intent to distribute"), a possession offense in reality is a carte blanche for police control of undesirables, through initial investigation and eventual incapacitation.

Given the flexibility of its conception and the convenience of its enforcement, possession offenses alone can quickly and easily incapacitate large numbers of undesirables for long periods of time. Possession, however, unfolds its full potential as a threat elimination device when used in conjunction with other broad-sweeping police offenses.

¹⁶³ *Id.* § 3.04.

¹⁶⁴ *Id.* § 210.3(1)(b).

¹⁶⁵ See also WASH. REV. CODE ANN. § 16.08.070(2) (West 1992 & Supp. 2001) (defining "dangerous dog" as "any dog that . . . has inflicted severe injury on a human being without provocation").

¹⁶⁶ See also Julia A. Houston, Note, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 GA. L. REV. 729 (1994); Christopher Slobogin, *Dangerousness as a Criterion in the Criminal Process*, in LAW, MENTAL HEALTH, AND MENTAL DISORDER 360, 372 (Bruce D. Sales & Daniel W. Shuman eds., 1996).

The most potent combination of modern policing is the traffic offense and possession. Every day, millions of cars are stopped for one of the myriad of regulations governing our use of public streets. As soon as you get into your car, even before you turn the ignition key, you have subjected yourself to intense police scrutiny. So dense is the modern web of motor vehicle regulations that every motorist is likely to get caught in it every time he drives to the grocery store. The good news is that the gap between regulation and enforcement of the traffic laws is enormous. Unfortunately, that's also the bad news. It is by the good graces, or the inattention, of a police officer that you escape a traffic stop and a ticket, or worse.

Penalties for traffic violations are often astonishingly high, including short term incarceration even for a first offense, but they are irrelevant in the large, incapacitative, scheme of things.¹⁶⁷ The war on crime uses traffic stops not to hand out tickets, or even ten day jail sentences. In the war on crime, traffic stops are a convenient opportunity to identify and eliminate threats. The identification begins with general observation, continues with a glance inside the car, and ends with a full fledged search of the car and its occupants. The elimination takes the form of the one-two punch of traffic violation and possession offense. Untold times each and every day, traffic stops reveal evidence of possession at some stage of the identification process, be it the gun protruding from under the passenger seat, the rounds of ammunition rolling around on the floor, the marijuana paraphernalia sticking out from under a blanket on the back seat, or the vial of crack cocaine found during the search incident to arrest for driving without a registration. One moment the driver of the "late model sedan" was cruising down I-95. The next moment he finds himself charged with a possession felony of one kind or another, or both, as in the "variety of narcotics and weapons offenses" familiar from Supreme Court opinions.¹⁶⁸

In the end, it really makes little difference exactly why a particular person attracted the attention of a police officer. What matters is that, once he has been identified as a potential threat,

¹⁶⁷ See, e.g., N.Y. VEH. & TRAF. LAW § 1800(b) (McKinney 2001) (penalty for first traffic infraction "fine of not more than one hundred dollars or by imprisonment for not more than fifteen days or . . . both").

¹⁶⁸ See, e.g., *United States v. Martinez-Salazar*, 528 U.S. 304 (2000).

possession offenses are a convenient way to get him off the streets, either in conjunction with another offense, or increasingly all by themselves. The connection between evidence of possession and possession is instantaneous, and evidence of possession is easily found.

To see just how easy, let's take a closer look at some of the ways in which police can happen upon "contraband," in the specific sense of "the very things the possession of which was the crime charged."¹⁶⁹ We needn't look far for illustrations of the convenience of possession policing. The Supreme Court's criminal procedure opinions are filled with them. Given that only successful possession searches make it before any court, that only a small portion of these cases then make it before an appellate court, only a minuscule fraction of which in turn make it to the Supreme Court, we can only guess how often the policing practices considered by the Court are used "in the field."

B. POSSESSION IN THE SUPREME COURT

A glance at the Supreme Court's possession related opinions reveals the significance of possession police in all its marvelous variety. We will also see how willing the Court has been to accommodate the needs of law enforcement in its effort to incapacitate undesirables by connecting them to one, or more, of the offenses in their possession grab bag. In fact, it will turn out that much of the Supreme Court's recent criminal procedure jurisprudence has been made with possession cases. From *Carroll* to *Terry* to *Wardlow*, possession offenses have inspired the Court to loosen constitutional protections in the service of more effective policing, and most recently of the war on crime.

Police officers are liable to stumble upon possession evidence anytime they make an arrest. This makes sense. Early on, police were entitled to search any area in an arrestee's possession. So evidence of possession was found within the arrestee's possession. For instance, in *United States v. Rabinowitz*,¹⁷⁰ the search incident to Rabinowitz's arrest revealed a plate "from which a similitude of a United States obligation had been printed," and possession of which was illegal.

¹⁶⁹ *United States v. Rabinowitz*, 339 U.S. 56 (1950).

¹⁷⁰ *Id.*

This connection between possession and possession was muddled when the Court overruled *Rabinowitz* some twenty years later, in *Chimel v. California*.¹⁷¹ Since *Chimel*, the scope of the search incident to an arrest is defined by the arrestee's "armspan."¹⁷² That way, police are not supposed to be able to search areas that are within the arrestee's possession, but not within his reach. This doesn't mean of course, that police no longer find evidence of (illegal) possession during a search incident. On the contrary. For one thing, the armspan area is merely a subset of the area within the arrestee's possession. For another, since the 1990 decision in *Maryland v. Buie*,¹⁷³ police can do a much broader "protective sweep"—as opposed to a search—of surrounding areas far beyond the arrestee's armspan, as well as beyond the area within his actual possession. As Justice Brennan explained in his *Buie* dissent, "a protective sweep would bring within police purview virtually all personal possessions within the house not hidden from view in a small enclosed space."¹⁷⁴ He's right, of course, and from the perspective of possession police, that's a good thing. "Personal possessions" obviously—and conveniently—include not only evidence of the crime underlying the arrest, but evidence of the standard possession offenses as well.

As one might expect, the combination of search incident to arrest and traffic stops has been a fruitful one for the detection of items illegally possessed, and the incapacitation of those who possess them. The Supreme Court expanded a passenger's "armspan" to the interior of a car in *New York v. Belton*.¹⁷⁵ Belton had been a passenger in a car whose driver had been pulled over for speeding. He ended up convicted of cocaine possession. The trooper had smelled and then found marijuana in the car, which led him to put everyone in the car, including Belton, under arrest for marijuana possession. Incident to that arrest for possession offense number 1, the trooper then searched the entire car. It was then and there that he found cocaine in a zipped pocket of Belton's jacket on the backseat. Hence Bel-

¹⁷¹ 395 U.S. 752 (1969).

¹⁷² *Chimel v. California*, 395 U.S. 752 (1969).

¹⁷³ 494 U.S. 325 (1990).

¹⁷⁴ *Id.* at 342 (Brennan, J., dissenting).

¹⁷⁵ 453 U.S. 454 (1981).

ton's connection to the second, and far more serious, possession offense.

It doesn't take a full blown arrest, however, to generate possession evidence—and therefore possession convictions. Mini-arrests called *Terry* “stops” will do. In 1968, the Supreme Court permitted police officers to detain suspects, however briefly, without probable cause—never mind a warrant.¹⁷⁶ That case was *Terry v. Ohio*. *Terry* was a possession case, though a quaint one compared with today's possession proliferation. *Terry* and two others had been “stopped and frisked”—to use the Court's technical description of their mini-arrest and search—by a police officer on the beat who suspected they were casing a store for a burglary. The “frisk” turned up guns on *Terry* and another of the men. They were convicted, not of attempted burglary, but of carrying a concealed weapon, “and sentenced to the statutorily prescribed term of one to three years in the penitentiary.” Such a convenient method of incapacitation was sure to catch on in the war on crime.

And it did. Soon officers en masse were discovering suspicious bulges in the “outergarments” of *Terry* friskees. In *Terry*, police detective Martin McFadden at least had found what he was looking for, a gun. But once a frisking officer is patting down a suspect, there's no telling what contraband he might come across. So the exploration of bulges in search of “weapon-like objects” soon began turning up not only weapons but a panoply of other illegally possessed items, including drugs (of course)¹⁷⁷ and lottery slips, in New Jersey.¹⁷⁸

And just like full fledged arrests, *Terry* mini-arrests work well with traffic stops that don't blossom into a “custodial arrest,” as they did in *Belton*. The seminal case of *Pennsylvania v. Mimms* nicely illustrates the familiar chain of events leading from traffic

¹⁷⁶ 392 U.S. 1 (1968).

¹⁷⁷ *People v. Atmore*, 13 Cal. App. 3d 244 (Ct. App. 1970) (marijuana cigarette); *People v. Watson*, 12 Cal. App. 3d 130 (Ct. App. 1970) (bag of marijuana cigarettes); *Taylor v. Superior Court*, 27 Cal. App. 2d 146 (Ct. App. 1969) (cigarette lighter containing hashish).

¹⁷⁸ *State v. Campbell*, 250 A.2d 1 (N.J. 1969) (lottery slips); see also *United States v. Peep*, 490 F.2d 903 (8th Cir. 1974); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 269-70 (4th ed. 2000).

stop to bulge to frisk to gun possession to a prison sentence.¹⁷⁹ The Supreme Court's rendition is too full of the standard technical lingo to pass up:

While on routine patrol, two Philadelphia police officers observed respondent Harry Mimms driving an automobile with an expired license plate. The officers stopped the vehicle for the purpose of issuing a traffic summons. One of the officers approached and asked respondent to step out of the car and produce his owner's card and operator's license. Respondent alighted, whereupon the officer noticed a large bulge under respondent's sports jacket. Fearing that the bulge might be a weapon, the officer frisked respondent and discovered in his waistband a .38-caliber revolver loaded with five rounds of ammunition. The other occupant of the car was carrying a .32-caliber revolver. Respondent was immediately arrested and subsequently indicted for *carrying a concealed deadly weapon* and for unlawfully *carrying a firearm without a license*.¹⁸⁰

"Armspans" play a role in frisks incident to stops as they do in searches incident to arrests. And once again, the Court has found a way to extend that span to include the interior of cars in traffic stops. In *Michigan v. Long*,¹⁸¹ decided six years after *Mimms*, the Court applied *Terry* to the following connection between possession—in this case of drugs—and a routine traffic violation—in this case speeding. Once again in the vernacular of law enforcement, here is the Court's account of the chain of events, culminating in Long's conviction of marijuana possession:

Deputies Howell and Lewis were on patrol in a rural area one evening when, shortly after midnight, they observed a car traveling erratically and at excessive speed. The officers observed the car turning down a side road, where it swerved off into a shallow ditch. The officers stopped to investigate.

....

. . . After another repeated request [to produce his registration], Long, who Howell thought "appeared to be under the influence of something," turned from the officers and began walking toward the open door of the vehicle. The officers followed Long and both observed a large hunting knife on the floorboard of the driver's side of the car. The officers then stopped Long's progress and subjected him to a *Terry* protective patdown, which revealed no weapons.

¹⁷⁹ 434 U.S. 106 (1977); *Commonwealth v. Mimms*, 232 A.2d 486 (Pa. Super. Ct. 1975).

¹⁸⁰ 434 U.S. at 107 (emphasis added).

¹⁸¹ 463 U.S. 1032 (1983).

Long and Deputy Lewis then stood by the rear of the vehicle while Deputy Howell shined his flashlight into the interior of the vehicle, but did not actually enter it. The purpose of Howell's action was "to search for other weapons." The officer noticed that something was protruding from under the armrest on the front seat. He knelt in the vehicle and lifted the armrest. He saw an open pouch on the front seat, and upon flashing his light on the pouch, determined that it contained what appeared to be marihuana. After Deputy Howell showed the pouch and its contents to Deputy Lewis, Long was arrested for *possession of marihuana*. A further search of the interior of the vehicle, including the glovebox, revealed neither more contraband nor the vehicle registration. The officers decided to impound the vehicle. Deputy Howell opened the trunk, which did not have a lock, and discovered inside it approximately 75 pounds of marihuana.¹⁸²

Long got away with a sentence of two years probation, a fine of \$750, and court costs of \$300.¹⁸³ That was in 1978, in a Michigan state court. In today's coordinated federal-state police regime, possession offenses carry a much heavier incapacitative stick. In federal court, possession of seventy-five pounds of marijuana would get him between thirty-one and forty-one months of real prison time, without parole, assuming he had a clean record.¹⁸⁴ But federal intervention wouldn't have been necessary. In Michigan state court today, he would face "imprisonment for not more than 7 years or a fine of not more than \$500,000.00, or both."¹⁸⁵ Michigan, after all, is the land of *Harmelin*, the case in which the Supreme Court upheld a mandatory sentence of life imprisonment without the possibility of parole for simple drug possession.¹⁸⁶

Police understand the connection between traffic violations, *Terry*, and possession offenses very well. Long before *Terry*, the Supreme Court aided another war on possession—of liquor—by carving out the automobile exception to the Fourth Amendment's warrant requirement. In the 1925 case of *Carroll v. United States*,¹⁸⁷ the Court was so impressed with the mobility of the "automobile" that it did away with the requirement that a

¹⁸² *Id.* at 1035-36 (emphasis added).

¹⁸³ *People v. Long*, 288 N.W.2d 629 (Mich. Ct. App. 1979).

¹⁸⁴ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2000) (offense level 20 (18 for 75 pounds, plus 2 for possession of a dangerous weapon, the knife)).

¹⁸⁵ MICH. STAT. ANN. § 333.7401(d)(ii) (West 2001) (possessing with intent to deliver controlled substance).

¹⁸⁶ *Harmelin v. Michigan*, 501 U.S. 957 (1991).

¹⁸⁷ 267 U.S. 132 (1925).

police officer get a warrant to search a car he thought might contain contraband, to wit liquor; by the time he showed up with the warrant, the car—unlike the more familiar, and stationary, houses—might be long gone. Carroll was suspected, and convicted, of “transportation or possession of liquor.”

Seventy-five years later, police are not limited to pulling over and searching cars they suspect contain evidence of illegal possession. Instead, they are just as likely to pull over cars for something entirely different and then bootstrap themselves into a search of the car for that all-important possession evidence. The officer in *Carroll*, after all, still needed probable cause to search the car for liquor. The automobile exception is an exception to the warrant requirement, not to the Fourth Amendment altogether.

As a result, the car search-possession jurisprudence of the war on crime often has been about everything but possession. It has been about broken tail lights, expired registration stickers, touched divider lines, rolled-through-stop signs, improperly signaled turns, and, of course, speeding. There are many possession offenses. And there are many who commit possession offenses every day. But there are even more traffic offenses, and millions of them are committed every minute.

Nothing’s easier than cruising down the street, or staking out a highway, and developing probable cause that someone has committed a traffic infraction. And armed with that probable cause, a police officer can stop a car, and eventually search its occupants, and the car itself, happening upon possession of offense evidence along the way.

But that’s not all. Since 1968, the police don’t need probable cause that an offense—including a traffic infraction—has been committed. Since *Terry*, “reasonable suspicion” will do. And once stopped, cars and their occupants have a tendency of being searched, and yielding possession evidence.

More recently, the Supreme Court has made the leap from car stop to possession evidence even easier. In 1976, the Court began authorizing police officers to stop cars without any suspicion of any kind, not reasonable suspicion, not probable cause, as long as the stop qualified as a “roadblock” for routine checks

of this and that—illegal aliens,¹⁸⁸ driver's license,¹⁸⁹ registration,¹⁹⁰ and DWI.¹⁹¹

No matter how the initial stop (or arrest) occurs, the so-called plain view exception to the Fourth Amendment comes in handy in order to transform this encounter between police and citizen into an instance of possession police. If a police officer has a right to be where he is, he has a right to see what he sees—and feel what he feels—¹⁹² hear what he hears,¹⁹³ or smell what he smells.¹⁹⁴ In the case of a traffic stop, what he sees often enough is evidence of illegal possession. The “plain view” exception was first recognized in 1971, in a murder case.¹⁹⁵ But it was significantly expanded for use in the crime war in 1983, in yet another possession case. In *Texas v. Brown*,¹⁹⁶ the Court did away with the requirement that the criminal nature of the item seized in plain view be immediately apparent. Since *Brown*, the police merely need probable cause to believe that the item is contraband. Brown had been stopped at “a routine driver's license checkpoint” in Fort Worth, “[s]hortly before midnight.”¹⁹⁷ When the officer shone the ever present flashlight¹⁹⁸ into Brown's car, he noticed “between the two middle fingers of the hand . . . an opaque, green party balloon, knotted about one-half inch from the tip,” which turned out to contain heroin. Brown pled nolo contendere to heroin possession and received four years in prison “pursuant to a negotiated plea bargain.”¹⁹⁹

It makes no difference whether the police officer used the traffic violation as a mere pretext to finding evidence of some other offense, possession offenses in particular. The police offi-

¹⁸⁸ *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

¹⁸⁹ *Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995); *Texas v. Brown*, 460 U.S. 730 (1983). *But see* *Delaware v. Prouse*, 440 U.S. 648 (1979).

¹⁹⁰ *United States v. Lopez*, 777 F.2d 543 (10th Cir. 1985).

¹⁹¹ *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

¹⁹² *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

¹⁹³ *Cf. United States v. Kahn*, 41 U.S. 143 (1974).

¹⁹⁴ *Cf. United States v. Place*, 462 U.S. 696 (1983) (dog sniff); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

¹⁹⁵ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

¹⁹⁶ 460 U.S. 730 (1983) (drug possession).

¹⁹⁷ *Id.* at 733.

¹⁹⁸ *Id.*; *see also* *United States v. Lee*, 274 U.S. 559, 563 (1927) (“[The] use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution.”).

¹⁹⁹ *Brown v. State*, 617 S.W.2d 196, 197 (Tex. Crim. App. 1981).

cer's subjective intent is irrelevant. In 1996, the Supreme Court removed any doubt on this issue in another possession case, *Whren v. United States*.²⁰⁰ There plain-clothes members of a drug task force developed a serious interest in traffic enforcement when they noticed that a car whose occupants they suspected of possessing drugs was driving off at an "unreasonable speed." Their hunch turned out to be correct—it always does in court opinions—and the driver and passenger were convicted of drug possession.

Terry has proved enormously useful to the war on crime as a war on possession. It authorizes police officers to put their hands on suspects without probable cause. And this laying on of hands is enough to provide conclusive evidence of possession, even if nothing else sticks. Without *Terry*, possession wouldn't be the universal velcro charge it is today, which sticks when nothing else will.

As a final example, take the recent case of *Illinois v. Wardlow*.²⁰¹ There, the Supreme Court decided that behavior in a "high crime area" may give rise to the reasonable suspicion required for a *Terry* stop even if the same behavior wouldn't have been suspicious elsewhere. This decision was warmly welcomed by police organizations and heavily criticized by civil rights groups. In the melee, the fact that Wardlow was convicted of a possession offense received scant attention. It didn't help that the Supreme Court reported that Wardlow had been convicted of *using* a weapon. The Illinois statute in question, though entitled "unlawful use or possession weapons by felons . . .," actually criminalizes the mere possession of a weapon, without more.²⁰²

Wardlow nicely illustrates the potential of possession as a sweep offense, as the favored incapacitation broom of the war on crime. Police officers descend on "high crime areas," either in coordinated raids or in casual cruise-throughs, in the hope of finding evidence of possession offenses. In the case of a raid, that evidence emerges in the course of the execution of a search warrant or an arrest warrant, with the inevitable search incident. In the case of a regular patrol, it reveals itself through personal observation ("bulges"), informer tips, or through frisks incident to *Terry* stops. The items illegally possessed tend to be drugs or

²⁰⁰ 517 U.S. 806 (1996).

²⁰¹ 528 U.S. 119 (2000).

²⁰² 720 ILL. COMP. STAT. § 5/24-1.1 (West 1976).

guns (as in *Wardlow*), or both; drug and gun possession offenses pack the greatest incapacitative punch. And in a “high crime area,” they aren’t hard to come by. In New York City alone, the number of illegal guns is estimated to be between one and two million.²⁰³

Still, for searches incident to arrests and frisks incident to stops, police officers need to be able to articulate some (legitimate) reason for focusing their investigative attention on a particular person: probable cause and reasonable suspicion, respectively—except, of course, if their initial stop is part of a “roadblock.” There’s no need for this type of rationalization in another common source of possession evidence: consensual searches. The Supreme Court approved suspicionless consent searches in 1973, in *Schneekloth v. Bustamonte*, and held that officers asking for consent didn’t have to tell suspects that they had the right to say no.²⁰⁴ *Schneekloth* was another possession case, and the possession evidence was found after another “routine” traffic stop, this time for a burned out headlight and license plate light. Only the type of possession offense differed from the run-of-the-mill drug-cum-gun possession case. What the police found “[w]added up under the left rear seat” were three checks. And what Bustamonte was convicted of was “possessing a check with intent to defraud.”

Needless to say, in the decades since *Schneekloth*, police officers have been finding more than stolen checks during their consent searches. In Supreme Court cases, as well as presumably in real life, they tended to find drugs and guns, and especially drugs.²⁰⁵ That’s not to say, however, that *only* illegally possessed drugs and guns turned up. The variety of possession offenses available to the modern police officer insured that, even among the small sample of Supreme Court cases, there was also a case of illegal possession of *stolen mail*.²⁰⁶

That possession case from 1976, *United States v. Watson*, made its own significant contribution to the war on crime.

²⁰³ DONALD B. KATES, WHY HANDGUN BANS CAN’T WORK 43 (1982).

²⁰⁴ 412 U.S. 218 (1973).

²⁰⁵ *Ohio v. Robinette*, 519 U.S. 33 (1996) (possession of a controlled substance); *Florida v. Jimeno*, 500 U.S. 248 (1991) (possession with intent to distribute cocaine); *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (possession of a controlled substance with intent to deliver); *United States v. Mendenhall*, 446 U.S. 544 (1980) (possession with intent to distribute heroin).

²⁰⁶ *United States v. Watson*, 423 U.S. 411 (1976).

There, the Supreme Court for the first time declared that the Fourth Amendment didn't stand in the way of public arrests without a warrant. In and of itself, that authority is a convenient weapon in the hands of police officers ferreting out crime. As we've seen, however, it also has the indirect advantage of justifying searches incident to warrantless street arrests: every arrest is also an armspan search—plus a “protective sweep.” And “searches incident” have a tendency to reveal evidence of possession offenses, especially since the Court has taken an expansive view of what an arrestee's arm might reach.

After *Watson*, police officers once again were more likely to stumble upon drugs than stolen mail in their searches incident to warrantless public arrests. In *United States v. Santana*,²⁰⁷ for example, the police arrested a suspect on the “curtilage” of her home without a warrant. The search incident produced, among other things, “two bundles of glazed paper packets with a white powder.” Santana was convicted of possession of heroin with intent to distribute.

But possession evidence doesn't just happen to crop up incident to arrests or stops for other offenses, traffic or not. Although it's very effective as a piggyback offense, possession is much more than that. It can itself be the offense that justifies the initial police intervention. The myriad of possession offenses therefore also means that police officers have a myriad of justifications for approaching, stopping, or arresting a suspect.

That's what happened in *Watson*, for example. An informer had told a postal inspector that Watson, a mailman, was in the midst of committing a possession offense, specifically that he “was in possession of a stolen credit card.” That's also what happened in the recent case of *Florida v. J. L.*, where an anonymous informer called the Miami police department to report that “a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.” J. L. was Terry stopped-and-frisked, and charged with “carrying a concealed firearm without a license and possessing a firearm while under the age of 18.”²⁰⁸

No Supreme Court case, however, better illustrates the initial justificatory, and the indirect piggyback, function of possession offenses in the war on crime, as well as the interplay

²⁰⁷ 427 U.S. 38 (1976).

²⁰⁸ 529 U.S. 266, 268 (2000).

between different possession offenses, than 1972's *Adams v. Williams*. An informer—there tend to be lots of informers in victimless possession cases—had told a police officer on patrol that “an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist,” i.e., that he was engaging in two possession offenses at the same time, drug possession and gun possession. Here's what happened next:

After calling for assistance on his car radio, Sgt. Connolly approached the vehicle to investigate the informant's report. Connolly tapped on the car window and asked the occupant, Robert Williams, to open the door. When Williams rolled down the window instead, the sergeant reached into the car and removed a fully loaded revolver from Williams' waistband. The gun had not been visible to Connolly from outside the car, but it was in precisely the place indicated by the informant. Williams was then arrested by Connolly for unlawful possession of the pistol. A search incident to that arrest was conducted after other officers arrived. They found substantial quantities of heroin on Williams' person and in the car, and they found a machete and a second revolver hidden in the automobile.²⁰⁹

After a bench trial (possession offenses are very rarely tried before a jury), Williams was convicted of one drug and two gun possession offenses: “having narcotic drugs in his control,” “carrying a pistol on his person without a permit,” and “knowingly having a weapon in a vehicle owned, operated or occupied by him.”²¹⁰ The evidence for the gun possession counts stemmed from the initial *Terry* stop-and-frisk. And the evidence for the drug possession count turned up during the search incident to arrest based on the results of that frisk.

Searches resulting from investigations into ongoing possession offenses of course can produce evidence not only of other possession offenses, but of any other offense. Finding evidence of possession offenses is simply more convenient. It's self-evident, whereas other evidence is merely circumstantial. And the chances of finding other possession evidence are so much greater than the chance of finding evidence of other crimes. As the courts, including the Supreme Court, are fond of pointing out, drug and gun possession tend to go hand in hand. Whoever has drugs is likely to have a gun, and—at least in so-called

²⁰⁹ 407 U.S. 143, 145 (1972).

²¹⁰ *State v. Williams*, 249 A.2d 245, 246 (Conn. 1968).

high crime areas—vice versa. As the Court explained in *Wardlow*, “it [is] common for there to be weapons in the near vicinity of narcotics transactions.” That’s why the officers in *Wardlow* found a gun, even though they were ostensibly looking for drugs, or rather “converging on an area known for heavy narcotics trafficking in order to investigate drug transactions.”²¹¹

Either way, as the boot or the strap, possession offenses are particularly convenient policing instruments because they are continuous, across space and time. As we’ll see in greater detail below, possession offenses are continuous across space in that they can be committed in public or in private. As a result, they have always justified state intrusion into the private sanctuary of the home-castle. But they’re also continuous across time. The whole point of carrying a gun, for instance, or keeping it at home or in the car is to have it around when the need might arise. Gun possession therefore can continue for hours, days, even weeks, months, years, or decades, depending on how insecure the possessor is without his possession. And at any time during this period, the illegal possessor exposes himself to police intervention of various levels of intrusiveness, culminating in an arrest, with its inevitably incident search. He is a constant policing target, subject to incapacitation at any moment, day or night.

As we can see from our brief survey of possession police in the Supreme Court, the Court’s criminal procedure jurisprudence since *Terry* represents an increasingly explicit effort to tap the full potential of possession as a general policing tool. With remarkable frequency, the Court has found ways to legitimize possession searches and seizures in an ever increasing variety of circumstances.

But not only the recurrence of possession offenses among decisions loosening constitutional safeguards in the interest of crime control is remarkable, so is the sheer number of possession cases that have found their way before the Court, hinting at the frequency of possession cases in criminal courts throughout the land. In the thirty-odd years since *Terry*, the Supreme Court has written opinions in give or take 150 cases that involved one possession offense or another, in one way or another. Among these opinions are not only most of the Court’s important Fourth Amendment opinions, but also several significant opin-

²¹¹ 528 U.S. 119 (2000).

ions in other doctrinal areas, not only in criminal procedure but elsewhere as well.

As the investigatory tool par excellence, possession has left its greatest mark on the constitutional law of police investigation. The list of Fourth Amendment/possession cases since *Terry* reads like a who's-who of search and seizure law:

CASE LIST NO. 1

Terry v. Ohio, 392 U.S. 1 (1968)
Sibron v. New York, 392 U.S. 40 (1968)
Vale v. Louisiana, 399 U.S. 30 (1970)
Hill v. California, 401 U.S. 797 (1971)
United States v. Harris, 403 U.S. 573 (1971)
Adams v. Williams, 407 U.S. 143 (1972)
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)
United States v. Robinson, 414 U.S. 218 (1973)
Gustafson v. Florida, 414 U.S. 260 (1973)
United States v. Watson, 423 U.S. 411 (1976)
United States v. Miller, 425 U.S. 435 (1976)
United States v. Santana, 427 U.S. 38 (1976)
Stone v. Powell, 428 U.S. 465 (1976)
South Dakota v. Opperman, 428 U.S. 364 (1978)
Connally v. Georgia, 429 U.S. 245 (1977)
United States v. Ramsey, 431 U.S. 606 (1977)
United States v. Chadwick, 433 US 1 (1977)
Pennsylvania v. Mimms, 434 U.S. 106 (1977)
Rakas v. Illinois, 439 U.S. 128 (1978)
Delaware v. Prouse, 440 U.S. 648 (1979)
Dalia v. United States, 441 U.S. 238 (1979)
Arkansas v. Sanders, 442 U.S. 753 (1979)
Michigan v. DeFillippo, 443 U.S. 31 (1979)
Ybarra v. Illinois, 444 U.S. 85 (1979)
United States v. Mendenhall, 446 U.S. 544 (1980)
United States v. Havens, 446 U.S. 620 (1980)
United States v. Salvucci, 448 U.S. 83 (1980)
Rawlings v. Kentucky, 448 U.S. 98 (1980)
Reid v. Georgia, 448 U.S. 438 (1980)
Steagald v. United States, 451 U.S. 204 (1981)
Michigan v. Summers, 452 U.S. 692 (1981)
New York v. Belton, 453 U.S. 454 (1981)
Washington v. Chrisman, 455 U.S. 1 (1982)

United States v. Ross, 456 U.S. 798 (1982)
Michigan v. Thomas, 458 U.S. 259 (1982)
Florida v. Royer, 460 U.S. 491 (1983)
Texas v. Brown, 460 U.S. 730 (1983)
Illinois v. Gates, 462 U.S. 213 (1983)
United States v. Villamonte-Marquez, 462 U.S. 579 (1983)
Illinois v. Lafayette, 462 U.S. 640 (1983)
United States v. Place, 462 U.S. 696 (1983)
Illinois v. Andreas, 463 U.S. 765 (1983)
Michigan v. Long, 463 U.S. 1032 (1983)
United States v. Jacobsen, 466 U.S. 109 (1984)
New York v. Quarles, 467 U.S. 649 (1984)
United States v. Karo, 468 U.S. 705 (1984)
Segura v. United States, 468 U.S. 796 (1984)
United States v. Leon, 468 U.S. 897 (1984)
Florida v. Rodriguez, 469 U.S. 1 (1984)
United States v. Hensley, 469 U.S. 221 (1985)
New Jersey v. T. L. O., 469 U.S. 325 (1985)
United States v. Johns, 469 U.S. 478 (1985)
United States v. Sharpe, 470 U.S. 675 (1985)
United States v. Montoya de Hernandez, 473 U.S. 531 (1985)
United States v. Sharpe, 470 U.S. 675 (1985)
California v. Carney, 471 U.S. 386 (1985)
New York v. Class, 475 U.S. 106 (1986)
Colorado v. Bertine, 479 U.S. 367 (1987)
United States v. Dunn, 480 U.S. 294 (1987)
New York v. Burger, 482 U.S. 691 (1987)
Griffin v. Wisconsin, 483 U.S. 868 (1987)
California v. Greenwood, 486 U.S. 35 (1988)
Michigan v. Chesternut, 486 U.S. 567 (1988)
Murray v. United States, 487 U.S. 533 (1988)
Florida v. Riley, 488 U.S. 445 (1988)
United States v. Sokolow, 490 U.S. 1 (1989)
Florida v. Wells, 495 U.S. 1 (1990)
Alabama v. White, 496 U.S. 325 (1990)
Illinois v. Rodriguez, 497 U.S. 177 (1990)
California v. Hodari D., 499 U.S. 621 (1991)
Florida v. Jimeno, 500 U.S. 248 (1991)
California v. Acevedo, 500 U.S. 565 (1991)
United States v. Padilla, 508 U.S. 77 (1993)
Minnesota v. Dickerson, 508 U.S. 366 (1993)
Arizona v. Evans, 514 U.S. 1 (1995)

Wilson v. Arkansas, 514 U.S. 927 (1995)
 Ornelas v. United States, 517 U.S. 690 (1996)
 Whren v. United States, 517 U.S. 806 (1996)
 Ohio v. Robinette, 519 U.S. 33 (1997)
 Maryland v. Wilson, 519 U.S. 408 (1997)
 Richards v. Wisconsin, 520 U.S. 385 (1997)
 United States v. Ramirez, 523 U.S. 65 (1998)
 Bousley v. United States, 523 U.S. 614 (1998)
 Muscarello v. United States, 524 U.S. 125 (1998)
 Caron v. United States, 524 U.S. 308 (1998)
 Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357 (1998)
 Minnesota v. Carter, 525 U.S. 83 (1998)
 Knowles v. Iowa, 525 U.S. 113 (1998)
 Illinois v. Wardlow, 528 U.S. 119 (2000)
 Florida v. J.L., 120 S. Ct. 1375 (2000)
 Bond v. United States, 529 U.S. 334 (2000)

The list of possession related Fourth Amendment classics is complete once we look past *Terry* and back to *Carroll*, the 1925 opinion that established the automobile exception in a liquor possession case. Although the fifty-plus years between *Carroll* and *Terry* produced “only” fifty-plus Supreme Court opinions in possession related cases, foundational opinions like *Mapp* (applying the exclusionary rule to the states) and *Aguilar* (the first half of the *Aguilar-Spinelli* test, to be undone some twenty years later in *Gates*, another possession case), remind us that the war on crime didn’t invent possession offenses; it just used them to greater effect. Here are some of the Fourth Amendment chestnuts of the pre-*Terry* era:²¹²

CASE LIST NO. 2

Carroll v. United States, 267 U.S. 132 (1925)
 Steele v. United States, 267 U.S. 498 (1925)
 Dumbra v. United States, 268 U.S. 435 (1925)
 Agnello v. United States, 269 U.S. 20 (1925)
 Byars v. United States, 273 U.S. 28 (1927)
 McGuire v. United States, 273 U.S. 95 (1927)

²¹² See *Harris v. United States*, 331 U.S. 145, 175 (1947) (Frankfurter, J., dissenting) (Appendix: Analysis of Decisions Involving Searches and Seizures, from *Weeks v. United States*, 232 U.S. 383 (1914), up to *Davis v. United States*, 328 U.S. 582 (1946)).

Segurola v. United States, 275 U.S. 106 (1927)
Marron v. United States, 275 U.S. 192 (1927)
Olmstead v. United States, 277 U.S. 438 (1928)
Go-Bart Co. v. United States, 282 U.S. 344 (1931)
Husty v. United States, 282 U.S. 694 (1931)
United States v. Lefkowitz, 285 U.S. 452 (1932)
Taylor v. United States, 286 U.S. 1 (1932)
Grau v. United States, 287 U.S. 124 (1932)
Sgro v. United States, 287 U.S. 206 (1932)
Nathanson v. United States, 290 U.S. 41 (1933)
Scher v. United States, 305 U.S. 251 (1938)
Davis v. United States, 328 U.S. 582 (1946)
Harris v. United States, 331 U.S. 145 (1947)
United States v. Di Re, 332 U.S. 581 (1948)
Johnson v. United States, 333 U.S. 10 (1948)
Trupiano v. United States, 334 U.S. 699 (1948)
United States v. Rabinowitz, 339 U.S. 56 (1950)
United States v. Jeffers, 342 U.S. 48 (1951)
Rochin v. California, 342 U.S. 165 (1952)
Walder v. United States, 347 U.S. 62 (1954)
Rea v. United States, 350 U.S. 214 (1956)
Benanti v. United States, 355 U.S. 96 (1957)
Jones v. United States, 357 U.S. 493 (1958)
Giordenello v. United States, 357 U.S. 480 (1958)
Draper v. United States, 358 U.S. 307 (1959)
Henry v. United States, 361 U.S. 98 (1959)
Jones v. United States, 362 U.S. 27 (1960)
Elkins v. United States, 364 U.S. 206 (1960)
Rios v. United States, 364 U.S. 253 (1960)
Mapp v. Ohio, 367 U.S. 643 (1961)
Wong Sun v. United States, 371 U.S. 471 (1963)
Ker v. California, 374 U.S. 23 (1963)
Aguilar v. Texas, 378 U.S. 108 (1964)
Beck v. Ohio, 379 U.S. 89 (1964)
Stanford v. Texas, 379 U.S. 476 (1965)
United States v. Ventresca, 380 U.S. 102 (1965)
Angelet v. Fay, 381 U.S. 654 (1965)
One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965)
McCray v. Illinois, 386 U.S. 300 (1967)

Although possession offenses were most likely to crop up in Fourth Amendment cases, their ubiquity ensured that they also

appeared in other constitutional—and non-constitutional—contexts. Non-Fourth Amendment cases involving possession included:

CASE LIST NO. 3

- Yee Hem v. United States*, 268 U.S. 178 (1925) (presumptions; drug possession)
- Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (vagueness; gun possession)
- Pinkerton v. United States*, 328 U.S. 640 (1946) (conspiracy; possession of liquor)
- Roviaro v. United States*, 353 U.S. 53 (1957) (presumptions; drug possession)
- Harris v. United States*, 359 U.S. 19 (1959) (double jeopardy; drug possession)
- Smith v. California*, 361 U.S. 147 (1959) (1st am. (mens rea); possession of obscene matter)
- Massiah v. United States*, 377 U.S. 201 (1964) (5th & 6th am.; drug possession)
- Leary v. United States*, 395 U.S. 6 (1969) (presumptions; drug possession)
- Turner v. United States*, 396 U.S. 398 (1970) (presumptions; drug possession).
- United States v. Bass*, 404 U.S. 336 (1971) (lenity; gun possession)
- Davis v. Alaska*, 415 U.S. 308 (1974) (evidence (confrontation); gun possession)
- Stone v. Powell*, 428 U.S. 465 (1976) (habeas corpus; gun possession)
- County Court of Ulster Cty. v. Allen*, 442 U.S. 140 (1979) (presumption (due process); gun possession)
- McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (sentence enhancement; gun possession)
- Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (habeas corpus; gun possession)
- Arizona v. Fulminante*, 499 U.S. 279 (1991) (confession; gun possession)
- Harmelin v. Michigan*, 501 U.S. 957 (1991) (8th am.; drug possession)
- Williams v. United States*, 503 U.S. 193 (1992) (sentencing; gun possession)
- Wright v. West*, 505 U.S. 277 (1992) (habeas corpus; possession of stolen property as presumptive evidence of larceny)

- Withrow v. Williams, 507 U.S. 680 (1993) (habeas corpus; gun possession)
- Stinson v. United States, 508 U.S. 36 (1993) (sentencing guidelines; gun possession)
- Deal v. United States, 508 U.S. 129 (1993) (statutory construction; gun possession)
- United States v. Alvarez-Sanchez, 511 U.S. 350 (1994) (confession; possession of counterfeit currency)
- Custis v. United States, 511 U.S. 485 (1994) (sentencing; gun possession)
- Staples v. United States, 511 U.S. 600 (1994) (mens rea; gun possession)
- Shannon v. United States, 512 U.S. 573 (1994) (insanity; gun possession)
- United States v. Lopez, 514 U.S. 549 (1995) (commerce clause; gun possession)
- Bailey v. United States, 516 U.S. 137 (1995) (statutory interpretation (“uses”); gun possession)
- Neal v. United States, 516 U.S. 284 (1996) (sentencing guidelines; drug possession)
- United States v. Watts, 519 U.S. 148 (1997) (sentencing guidelines; drug & gun possession)
- United States v. Gonzales, 520 U.S. 1 (1997) (concurrent state-federal sentence; drug & gun possession)
- United States v. Labonte, 520 U.S. 751 (1997) (sentencing guidelines; drug possession)
- Gilbert v. Homar, 520 U.S. 924 (1997) (suspension; drug possession)
- Rogers v. United States, 522 U.S. 252 (1998) (mens rea; gun possession)
- Spencer v. Kemna, 523 U.S. 1 (1998) (parole conditions; drug & gun possession)
- Muscarello v. United States, 524 U.S. 125 (1998) (statutory interpretation (“carries”); gun possession)
- Caron v. United States, 524 U.S. 308 (1998) (statutory interpretation (felon-in-possession); gun possession)
- Monge v. California, 524 U.S. 721 (1998) (double jeopardy; drug possession)
- Jones v. United States, 526 U.S. 227 (1999) (sentencing enhancement vs. offense element; gun possession)
- United States v. Martinez-Salazar, 528 U.S. 304 (2000) (jury selection; drug possession)
- United States v. Johnson, 529 U.S. 53 (2000) (ex post facto; drug & gun possession)

Portuondo v. Agard, 529 U.S. 61 (2000) (prosecutorial argument; gun possession)

Apprendi v. New Jersey, 530 U.S. 466 (2000) (sentencing enhancement vs. offense element; gun & bomb possession)

In roughly chronological order, possession offenses thus appeared in opinions dealing with, in addition to the never ending issues raised by the Fourth Amendment, evidentiary presumptions (due process), vagueness (due process), conspiracy (substantive criminal law), First Amendment (constitutional law), burden of proof (due process), right to a jury trial (Sixth Amendment), statutory interpretation (substantive criminal law), habeas corpus (federal courts), Fifth Amendment (due process & self-incrimination), Sixth Amendment (right to counsel), Eighth Amendment (cruel and unusual punishment), mens rea (substantive criminal law), insanity (substantive criminal law), Commerce Clause (constitutional law), sentencing guidelines (substantive criminal law), lenity (constitutional law), parole conditions (law of punishment), double jeopardy (constitutional law), ex post facto (constitutional law), and prosecutorial argument (law of evidence).

That a possession offense appears in an opinion, no matter what its official subject matter, is significant for two reasons. De facto, it illustrates the ubiquity of possession offenses and their frequent and varied use. *De jure*, it may tell us something about *why* this is so, why there are so many possession offenses, and why they are so popular as policing tools.

Not only the number, but also the variety, of possession related cases is impressive. As one might expect, most cases involved the possession of drugs and related "paraphernalia" (or of liquor, during Prohibition), followed by gun possession. But other cases provided glimpses at other offenses in the possession grab bag available to American police at a particular time in American history, including, in chronological order, possession of:

gasoline ration coupons;²¹³
 draft cards;²¹⁴
 counterfeiting stamps;²¹⁵

²¹³ Davis v. United States, 328 U.S. 582 (1946).

²¹⁴ *E.g.*, Harris v. United States, 331 U.S. 145 (1947).

stolen property;²¹⁶
 obscene matter;²¹⁷
 lottery slips;²¹⁸
 "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas";²¹⁹
 foodstamps;²²⁰ and
 counterfeit currency.²²¹

When we look more closely at the Court's possession opinions, we can detect the function and impact of possession offenses for various policing efforts throughout the twentieth century, culminating in their extensive use during the war on crime. The 1939 *Lanzetta* case, for instance, reveals the usefulness of possession offenses as a device for identifying and incapacitating undesirables.²²² The statute at issue in this classic vagueness case was very explicit about its incapacitative aim:²²³

1. A gangster is hereby declared to be an enemy of the State.

2. Any person in whose *possession* is found a machine gun or a sub-machine gun is declared to be a gangster: *provided, however*, that nothing in this section contained shall be construed to apply to any member of the military or naval forces of this State, or to any police officer of the State or of any country or municipality thereof, while engaged in his official duties.

3. Any person, having no lawful occupation, who is apprehended while *carrying* a deadly weapon, without a permit so to do, and who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster.

4. Any person, not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster; *provided, however*, that nothing in this section contained

²¹⁵ *E.g.*, *United States v. Rabinowitz*, 339 U.S. 56 (1950).

²¹⁶ *E.g.*, *Henry v. United States*, 361 U.S. 98 (1959).

²¹⁷ *E.g.*, *Smith v. California*, 361 U.S. 147 (1959).

²¹⁸ *E.g.*, *Beck v. Ohio*, 379 U.S. 89 (1964).

²¹⁹ *E.g.*, *Stanford v. Texas*, 379 U.S. 476 (1965).

²²⁰ *E.g.*, *Liparota v. United States*, 471 U.S. 419 (1985).

²²¹ *E.g.*, *United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994).

²²² *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

²²³ 1934 N.J. Laws ch. 155, N.J. REV. STAT. § 2:136 (1937) (emphasis added).

shall in any wise be construed to include any participant or sympathizer in any labor dispute.

5. Any person convicted of being a gangster under the provisions of this act shall be guilty of a high misdemeanor, and shall be punished by a fine not exceeding ten thousand dollars (\$10,000.00), or by imprisonment not exceeding twenty years, or both.

The *Lanzetta* statute was a classic instrument for the mass neutralization of perceived threats, “enemies of the state.” And possession offenses, coupled with classic vagrancy (of the “disorderly persons” variety),²²⁴ fit the bill. Quickly detected, easily proved, and harshly punished, gun possession was the ideal weapon against those “declared to be a gangster.”

Pinkerton illustrates the sort of disrespect for the constraints of legality that was to characterize the crime extermination campaign of the war on crime.²²⁵ In this infamous conspiracy case from 1946, the Court turned a blind eye to the sweeping use of conspiracy law for the purpose of destroying criminal enterprises. By holding every “member” of a conspiracy liable for the substantive crimes of any other member, the Court equipped law enforcement officials combating underground criminal conspiracies with a powerful weapon to strike at the very heart of their enemy. Minor players could now be held vicariously liable for the acts of major ones. Facing serious punishment for acts they hadn’t committed, the former could be turned against the latter, thus cracking the group.

Possession offenses spring from the same attitude of crime suppression by any means necessary, borne of a perception of criminal law as the struggle against an alien threat. Possession provides state officials with a flexible policing tool, and flaunts almost every principle of criminal law along the way, including the act requirement, the prohibition of status offenses, the general resistance to omission liability, the mens rea requirement, and the principle of personal—as opposed to group—liability.²²⁶

Combining conspiracy and possession, as in *Pinkerton*, produces a formidable policing tool. Conspiracy is an inchoate crime, i.e., a crime that inflicts no harm. So is possession. A

²²⁴ See, e.g., JACKSONVILLE, FLA., ORDINANCE CODE § 26-57, quoted in Papachristou v. City of Jacksonville, 405 U.S. 156, 158 (1972) (“... disorderly persons . . . shall be deemed vagrants”).

²²⁵ *Pinkerton v. United States*, 328 U.S. 640 (1946).

²²⁶ See *infra* notes 287-328 and accompanying text.

conspiracy to possess, thus, is an inchoate inchoate crime. Specifically, it is a plan to engage in a nonharmful nonact, or to share in a state, that of possessing something that may be used in a harmful way.

Like conspiracy, possession offenses also have been used to impose liability on entire groups of people. Whereas the law of complicity has long been careful to remind itself that mere presence does not an accomplice make, the law of possession has had no difficulty imposing liability on that very basis. We've already noted that being in the presence of contraband is enough to establish a presumption of possession.²²⁷ Possession, therefore, often becomes a group affair, with everyone in a room, or everyone in a car, being found in possession of a gun, or a baggie of marijuana.

Lanzetta and *Pinkerton* illustrate the use of possession offenses to police groups perceived as threatening to the state, gangsters, and "conspiracies," respectively. The 1965 case of *Stanford v. Texas* shows how possession offenses can be employed against a particular type of group, a political party. By criminalizing the possession of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas,"²²⁸ Texas authorized state officials to rummage through the homes of suspected sympathizers, so as to nip the Communist threat in the bud. The mere possession of this explosive literature represented the first step along a continuum that was sure to lead from distribution to agitation and, eventually, to revolution.

It's no surprise, then, that so-called profiles should play such an important role in policing possession. Possession offenses are committed by certain people who fit a certain image. An item that is perfectly harmless in the hands of a decent member of society becomes a threat to the survival of that society in the hands of an outsider. In this respect, it's the possessor who makes the possession criminal. And possession merely provides the formal justification, the pretext, for the harassment of persons who are suspicious because of their membership in some group that remains ill-defined precisely because its distinguishing characteristic is its difference from the ingroup, the

²²⁷ See *supra* notes 113-15 and accompanying text.

²²⁸ 379 U.S. 476 (1965).

society whose safety the state is charged with protecting against outside threats. Profiles are post hoc attempts to justify an ad hoc suspicion whose true basis remains hidden, often even to the person harboring it. Nonetheless, the Supreme Court has not stood in the way of the widespread use of profiles in the crime war effort.²²⁹

The war on crime would have been impossible without a dramatic expansion of federal criminal law. Conceived as a presidential police action, the war on crime became a national crime suppression campaign through a remarkable expansion of federal criminal law and the close coordination of federal and state criminal law. The possession cases before the Supreme Court bear witness to both phenomena. On the subject of expanding federal criminal law, the Court has proved remarkably reticent. For instance, much of its (non-constitutional) jurisprudence on mens rea (and ignorance of law) can be found in opinions narrowly construing federal possession statutes, and gun possession statutes in particular.²³⁰ Again and again, the Court was surprisingly receptive to the argument that a statute criminalizing "knowing" possession of a weapon required the prosecution to prove not only that the possessor knew he was possessing a certain gun (a mens rea issue), but also that he knew that knowingly possessing that particular gun was illegal (an ignorance of law issue). In the face of the age old common law maxim that ignorance of the law is no excuse, this receptivity may well reflect a general uneasiness with the federal government's assumption of criminal lawmaking powers traditionally reserved for the states. In its uneasiness, the Court even found itself invoking the principle of lenity, which provides that ambiguous criminal statutes are to be interpreted in favor of the defendant, a principle it had no difficulty ignoring on other occasions.²³¹ Quiet discomfort recently turned into open obstruction, when the Court dusted off the commerce clause to *strike down* a federal statute criminalizing gun possession, in this case gun possession near a school.²³²

²²⁹ United States v. Sokolow, 490 U.S. 1 (1989); Florida v. Royer, 460 U.S. 491 (1983); Reid v. Georgia, 448 U.S. 438 (1980).

²³⁰ Rogers v. United States, 522 U.S. 252 (1998) (guns); Staples v. United States, 511 U.S. 600 (1994) (guns); Liparota v. United States, 471 U.S. 419 (1985) (food stamps); United States v. Freed, 401 U.S. 601 (1971) (guns).

²³¹ United States v. Bass, 404 U.S. 336 (1971).

²³² United States v. Lopez, 514 U.S. 549 (1995).

Still, the Court's occasional resistance to the expansion of *federal* criminal law, and of federal criminal possession law in particular, should not be mistaken for unwillingness to further the crime war effort in general. The war on crime, after all, is not being fought with federal law alone, and even the federal arsenal of possession offenses is hardly depleted by the loss of an offense as inconsequential as the prohibition of gun possession near a school. Who needs a federal offense like that if a state offense of simple drug possession, anywhere and anytime, calls for a mandatory life sentence without the possibility of parole?²³³

And if the state sentence is not enough, the coordination of state and federal crime suppression, combined with the inapplicability of double jeopardy to punishment by separate sovereigns, allows for the extension of incapacitation, if necessary. The Court has done its share to facilitate this coordination, as illustrated by the recent case of *United States v. Gonzales*.²³⁴ A popular federal statute, 18 U.S.C. § 924(c), provides that "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . be sentenced to a term of imprisonment of not less than 5 years . . ." ²³⁵ The statute further specifies that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person."

Gonzales and two others had been sentenced in state court to prison terms from thirteen to seventeen years for drug offenses and having pulled guns on undercover officers during a "drug sting operation." While in state prison, they were indicted in federal court for the same conduct and convicted, once more, of drug offenses—including possession—and of "using firearms during and in relation" to those crimes in violation of section 924(c). There, they "received sentences ranging from 120 to 147 months in prison, of which 60 months reflected the mandatory sentence required for their firearms convictions." The Tenth Circuit held that the sixty months for the firearms offenses could run concurrently, rather

²³³ Harmelin v. Michigan, 501 U.S. 957 (1991).

²³⁴ United States v. Gonzales, 520 U.S. 1 (1997) (emphasis added).

²³⁵ 18 U.S.C. § 924(c) (1994 & Supp. 1999).

than consecutively, to the defendants' state and federal sentences for the drug offenses.²³⁶

The Supreme Court reversed, however, deciding that Congress meant what it said when it provided that a 924(c) sentence *shall not* run concurrently with *any other term of imprisonment*, whether imposed by a state or a federal court. As a result, the federal-state collaboration in this case resulted in an additional five-year period of incapacitation for three "drug offenders" who had threatened federal officers.

Gonzales and his partners in crime, however, got off easy. In its current form, section 924(c) mandates not only a five-year minimum sentence for gun possession during a drug or violent crime, but also a *twenty-five year* minimum sentence for "a second or subsequent conviction under this subsection."²³⁷ That second conviction, however, can result from the same plea agreement (or trial, should there be one). Enterprising Assistant U.S. Attorneys fighting the war on crime therefore can dramatically expand 924(c)'s incapacitative potential—six-fold, from five to thirty years—by tying the possession of a single weapon to different counts arising out of a single drug transaction, such as distribution and possession. The first five years would be for possessing a gun in connection with the drug offense of *distribution*, and the second twenty-five for possessing the same gun in connection with the drug offense of *possession*. And that mandatory thirty-year sentence would be tacked onto whatever other sentence the court imposed for the two drug offenses (distribution and possession), on top of any state sentence imposed for the same offenses, as Gonzales found out. In a recent case out of Rochester, New York, this multiple possession bootstrapping strategy (from drug possession to gun possession to second gun possession (of the same gun)) netted the prosecutor a sentence of 477 months, or roughly forty years.²³⁸

When the Supreme Court does resolve an issue in a way that might be perceived as interfering with the executive flexibility required for an effective anti-crime campaign, Congress steps in to iron out the wrinkles. In *Gonzales*, the drug offenders were charged with "using" a gun. In an earlier case, *Bailey v. United States*, the Supreme Court had decided, quite sensibly but

²³⁶ *United States v. Gonzales*, 65 F.3d 814 (10th Cir. 1995), *rev'd*, 520 U.S. 1 (1997).

²³⁷ 18 U.S.C. § 924(c)(1)(C) (1994 & Supp. 1999).

²³⁸ See Clauss & Ovsiovitch, *supra* note 66, at 38.

against several circuits, that “mere” possession didn’t amount to “use” for purposes of section 924(c).²³⁹ Congress quickly corrected this misunderstanding by amending section 924(c) explicitly to include “any person who, during and in relation to any crime of violence or drug trafficking crime . . . , in furtherance of any such crime, *possesses a firearm*,” thus at the same time re-elevating possession to its proper status in the war on crime and rendering the old “uses or carries” clause superfluous.²⁴⁰

The declaration that “possession” wasn’t “use” under section 924(c) didn’t mean that possession alone wouldn’t result in a higher sentence. This two-track approach to the significance of gun possession in drug offenses, denying it on the one hand while affirming it on the other, was made possible by another important prong of the war on crime, the federal sentencing guidelines, which helped coordinate the crime war, both within the federal system and without, and gave its incapacitative measures the necessary bite. For already at the time of *Bailey*, the relevant sentencing guideline provided for a two-level enhancement for drug offenses, including possession with intent and simple possession, “[i]f a dangerous weapon (including a firearm) was possessed.”²⁴¹

The mandatory federal sentencing guidelines made a comprehensive federal war on crime possible by keeping federal judges in line, some of whom might have been tempted to blunt the incapacitative blow of particular provisions. And the Supreme Court significantly enhanced the guidelines’ coordinating potential, by first upholding the guidelines against a host of constitutional attacks and then declaring their every word, from guidelines to policy statements to commentary, to constitute binding authority on the federal courts.²⁴²

The federal guidelines, however, also contributed to the war effort beyond the borders of federal criminal law. They helped initiate, and backed by federal grants significantly shaped, a national move toward determinate sentencing. Even if the federal

²³⁹ *Bailey v. United States*, 516 U.S. 137 (1995).

²⁴⁰ Mandatory Minimum Prison Sentences for Firearms Violations, 105-386, 112 Stat. 3469 (1998) (emphasis added).

²⁴¹ U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(b)(1), 2D2.1(b)(1) (2000).

²⁴² See *Stinson v. United States*, 508 U.S. 36 (1993) (commentary); *Williams v. United States*, 503 U.S. 193 (1992) (policy statement); *Mistretta v. United States*, 488 U.S. 361 (1989).

guidelines themselves could not be exported to the states for the simple reason that federal law differed from state law, their concept of controlling judicial sentencing authority could be, and was. As a result, not only the federal government, but also state governments, could implement their crime war initiatives without undue interference from the judiciary, no matter how timid and sporadic.

The federal guidelines, however, were not only mandatory. They also were Draconian. The elimination of parole alone—under the heading of “honesty in sentencing”—dramatically expanded the incapacitative potential of existing criminal law. The guidelines created a criminal law behind, or rather beneath, the criminal law, a system of punishment that operated beyond constitutional constraints. They reflected a general shift from the law of crimes to the law of punishments, from conviction to sentencing. In this system, the precise nature of the offense of conviction mattered less and less, and sentence enhancements mattered more and more. What a defendant was convicted of became less important than the fact *that* he was convicted of something, which then marked him for incapacitation to the greatest extent possible. That extent in turn was determined by sentence enhancements, chief among them enhancements for gun possession.

C. POSSESSION PLUS

Section 924(c), the federal sentence premium for gun possession in furtherance of a “drug trafficking crime” (including possession) as well as of “any crime of violence,” merely illustrates a more general incapacitative strategy of using possession *indirectly* to increase the incapacitative potential of a given conviction. In this indirect use, gun possession in particular ensures that dangerous offenders stay off the street longer than they otherwise would have.

As we have seen, the versatility of possession as an instrument of threat suppression is remarkable. So far we have focused on one application of possession offenses, their *direct* use as the offense of arrest and conviction, even if it is only as the fall back velcro charge that always sticks, for the simple reason that possession is as easy to detect as it is to prove. Possession, however, has many other indirect uses as well.

1. Aggravation

The most obvious *indirect* use of possession is as an aggravating or predicate element in another offense or as a sentence premium, which amounts to the same thing: the fact of possession increases the incapacitative potential of the underlying offense. This technique is particularly popular in the case of gun possession. Our modern statute books overflow with offenses whose severity is enhanced by the addition of proof—either at trial or at sentencing—of gun possession. For instance, the original federal carjacking statute was defined in terms of gun possession: “Whoever, possessing a firearm . . . , takes a motor vehicle”²⁴³ In New York, one variety of first degree trespass requires that the offender “[p]ossesses, or knows that another participant in the crime possesses, an explosive or a deadly weapon.”²⁴⁴ “Felon in Possession of a Firearm,” a federal felony, is among the predicate offenses that can add up to a RICO violation.²⁴⁵ And the federal sentencing guidelines provide for harsher sentences in cases of minor assault (“if a dangerous weapon (including a firearm) was possessed and its use was threatened”²⁴⁶) and stalking (“possession, or threatened use, of a dangerous weapon”²⁴⁷).

In general, legislatures prefer to use gun possession as a sentence enhancement, rather than as an offense element. That way, the prosecutor can make full use of the incapacitative potential of possession without having to establish it under the burden of proof at trial (beyond a reasonable doubt), should there be a trial. Instead, the judge can enhance the sentence after conviction, or more likely a guilty plea, upon a showing of possession by a mere preponderance of the evidence. In 1986, the Supreme Court explicitly endorsed this circumvention of constitutional constraints on criminal lawmaking, in *McMillan v. Pennsylvania*,²⁴⁸ showing remarkable deference to the legisla-

²⁴³ *Jones v. United States*, 526 U.S. 227, 229 (1999) (quoting old 18 U.S.C. § 2119 (1988 & Supp. V)).

²⁴⁴ N.Y. PENAL LAW § 140.17(1) (McKinney 2000 & Supp. 2001).

²⁴⁵ *People v. Cantarella*, 606 N.Y.S.2d 942 (Sup. Ct. 1993).

²⁴⁶ U.S. SENTENCING GUIDELINES MANUAL § 2A2.3(a)(1) (2000).

²⁴⁷ *Id.* § 2A6.2(b)(1)(C).

²⁴⁸ *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (sentence enhancement for “visible possession of a firearm”).

ture's classification of gun possession as a sentencing factor, rather than as an offense element, in the process.

Possession offenses serve to extend—or replenish—the incapacitative potential of convictions (which of course may be for possession offenses themselves, as in the case of drug possession under section 924(c)) not only at sentencing, but also at later points in the life of a person who has been marked as a threat to society. Most immediately, possession offenses are used to police—and if possible, to further incapacitate—persons under supervised release (parole and probation), four million by last count. Federal law, for instance, mandates the revocation of supervised release if a “defendant . . . possesses a controlled substance . . . [or] possesses a firearm . . . in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm”²⁴⁹

Next and most intrusively, possession offenses play an important role in the policing of the—roughly two million—people under supervised *non*release, prison inmates. In prison, the prohibition of possession—as a matter of prison discipline—helps complete the incapacitation of human threats during their period of incarceration and, if necessary, allows the extension of that period—as a matter of criminal law. Prisoners are considered so dangerous that they are presumptively prohibited from possessing anything. In the hands of a prison inmate, anything is a dangerous weapon. A prison inmate cannot be trusted to possess the most innocuous items, including toothbrushes, coat hangers, and radio antennas. (Possessing telescoping radio antennas, for example, is forbidden “because they might be turned into ‘zip guns.’ By inserting a bullet into the base of an extended antenna and then quickly compressing it, an inmate could fire the inaccurate but still potentially deadly gun.”)²⁵⁰ Anything in the possession of a prison inmate, through mere association with this human threat, becomes tainted. That taint can only be removed by an affirmative license granted by the administrator of the prison, the prison police.

Prison management is threat management. And the first line of defense against prisoner-threats is the prohibition of pos-

²⁴⁹ 18 U.S.C. § 3583(g) (1994 & Supp. 1999); *see also* *Spencer v. Kemna*, 523 U.S. 1 (1998).

²⁵⁰ TED CONOVER, *NEWJACK: GUARDING SING SING* 97 (2000).

session, except as permitted by the prison police. As Ted Conover reports, prisoners at Sing Sing:

[T]hey couldn't possess clothing in any of the colors reserved for officers: gray, black, blue, and orange. They couldn't possess cash, cassette players with a record function, toiletries containing alcohol, sneakers worth more than fifty dollars, or more than fourteen newspapers. The list was very long—so long, in fact, that the authors of *Standards of Inmate Behavior* found it easier to define what *was* permitted than what wasn't. Contraband was simply "*any article that is not authorized by the Superintendent or [his] designee.*"²⁵¹

As with their analogues in the outside world, however, these prison possession prohibitions are violated every minute of every day. In fact, the more categorical a possession prohibition gets—and it can't get any more categorical than that applied to prisoners—the less categorical its enforcement tends to become. In Sing Sing, for example, where Conover worked as a prison guard, guards were as likely to violate the possession prohibitions applying to them as prisoners were to violate their own. In prison, guards were barred from possessing "glass containers, chewing gum, pocket knives with blades longer than two inches, newspapers, magazines, beepers, cell phones, or . . . our own pistols or other weapons."²⁵² The reason for this prohibition was, once again, the constant threat personified by the *prisoners*, rather than by the guards themselves: "A glass container, such as a bottle of juice, might be salvaged from the trash by an inmate and turned into shards for weapons."²⁵³ Plus, smoking was prohibited indoors, whether by inmates or guards. But, according to Conover, officers didn't pay much attention to these rules: "[P]lenty of officers smoked indoors. Many chewed gum. The trash cans of wall towers were stuffed with newspapers and magazines."²⁵⁴

Needless to say, prisoners found it even more difficult, if not downright impossible, to comply with the far stricter possession rules that applied to them. Again, Conover learned that contraband, in "its most obvious forms—weapons, drugs, and alcohol—could all be found fairly readily inside prison."²⁵⁵ As a

²⁵¹ *Id.* at 104-05 (emphasis added).

²⁵² *Id.* at 104.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

result, enforcing the possession prohibition against inmates became a matter of discretion. Guards knew that they could write up any prisoner for illegal possession of one item or another any time they decided to “look[] for contraband during pat-frisks of inmates and during random cell searches.”²⁵⁶ Possession violations thus became a convenient and flexible way of enforcing discipline, a trump card that could be drawn when needed to recommend to the “adjustment committee”²⁵⁷ that an obstreperous inmate receive more intensive incapacitative treatment, perhaps by transferring him to the “special housing unit.”

If necessary or convenient, possession violations could blossom into possession offenses. Possession of certain items by a prisoner is, after all, not merely a matter of prison discipline, but a matter of criminal law, an issue not only for the adjustment committee, but for a criminal court. Possession of a dangerous weapon by a prisoner is a serious offense; so is drug possession—as one might expect, prisoners are not among the privileged or licensed few who are exempted from the general prohibition of possessing such dangerous items. Some prison guards are.²⁵⁸ Possession of weapons or drugs, therefore, can land a prisoner not only in solitary. It can also extend his stay in prison.²⁵⁹

The possession police, however, doesn't end with the period of penal supervision, carceral or not. Certain possession offenders, in particular those labeled “felons,” will find themselves back in prison even after their supervised release or nonrelease has ended. These felon-in-possession offenses have proved particularly powerful and popular police possession devices. They extend the period of possession police far beyond the period of punishment. Once a person has been marked a danger, a felon, he will be subject to police through possession no matter where he might be, and no matter how unsupervised he might be in theory.

We saw earlier how the federal-state war on crime, under the codename “Project Exile,” uses the Draconian federal felon-

²⁵⁶ *Id.* at 105.

²⁵⁷ *Id.* at 106.

²⁵⁸ N.Y. PENAL LAW § 265.20(2) (McKinney 2000 & Supp. 2001).

²⁵⁹ See U.S. SENTENCING GUIDELINES MANUAL § 2P1.2 (2000) (Providing or Possessing Contraband in Prison); 18 U.S.C. § 1791 (1994 & Supp. 1999).

in-possession statute to take released felons back off the streets.²⁶⁰ With the right felony priors, mere possession of a firearm will land a “felon” (as opposed to an “ex-felon”) in prison for at least fifteen years.²⁶¹ And, thanks to “honesty in sentencing,” a fifteen-year sentence in federal prison means what it says. Finding felons in possession, however, can be as easy as pulling someone over for rolling through a stop sign. The felon-in-possession statute gives the police terrific incapacitative bang for their investigative buck.

2. *Presumption*

But possession, indirectly employed, does more than aggravate the incapacitative treatment of those marked as “convicts”; it also facilitates the marking itself. We’ve already seen how possession can be established with the help of evidentiary presumptions, which shift the burden of proof onto the alleged possessor. So presence quickly transforms itself into possession, unless the person present comes forward with a satisfactory explanation of his presence that blocks the transformation.²⁶²

But possession itself may function as presumptive evidence of another offense: it can be the source, as well as the target, of a presumptive inference. This presumption can either be explicit or implicit, and either backward- or forward-looking.

Among the explicit variety are—retrospective—presumptions of illegal acquisition, including importation, manufacture, transfer, even larceny.²⁶³ Moving ahead in time, possession may be taken—concurrently—as presumptive evidence of knowing possession (knowing that and knowing what),²⁶⁴ and then—prospectively—as presumptive evidence of possession with intent to

²⁶⁰ See *supra* note 66 and accompanying text.

²⁶¹ 18 U.S.C. § 922(g) (1994 & Supp. 1999); *id.* § 924(e)(1) (15 year minimum); U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 (2000).

²⁶² See, e.g., *County Court of Ulster Co. v. Allen*, 442 U.S. 140 (1979).

²⁶³ See, e.g., *Wright v. West*, 505 U.S. 277 (1992) (possession of stolen property as presumptive evidence of larceny); see also *Whitebread & Stevens, supra* note 10, at 754 (possession of stolen property as presumptive evidence of larceny); Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry Into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1086 (1970).

²⁶⁴ N.Y. PENAL LAW §§ 165.55, 170.71, 225.35 (McKinney 2000 & Supp. 2001); *Barnes v. United States*, 412 U.S. 837 (1973) (possession of stolen property as presumptive evidence of knowledge that property was stolen); see also N.Y. PENAL LAW § 265.15(5) (McKinney 2000 & Supp. 2001) (defacement).

use, where the nature of the use may or may not be further specified,²⁶⁵ and in some cases both at the same time.²⁶⁶ Presumptions of this sort are underhanded attempts to reduce simple possession offenses to strict liability offenses and compound possession offenses to simple possession offenses, or both.

Possession presumptions have become less significant since legislatures figured out that they can get away with criminalizing possession outright, and attach severe penalties to its "commission." In that case, there is no reason to have the prosecutor waste time establishing both possession and some ultimate fact which may be presumed from the possession, especially when the Supreme Court has scrutinized possession-based presumptions, but not the outright proscription of possession.²⁶⁷

The more interesting case of possession as presumption, as opposed to possession as presumed, is that of an *implicit* presumption. This phenomenon goes to the heart of the possession offense for two reasons. First, it brings out the inchoate nature of possession. One way of thinking of possession offenses is to view them as criminalized presumptions of some other offense. In criminalizing possession, the legislature *really* criminalizes import, manufacture, purchase. Or forward-looking, the legislature *really* criminalizes use, sale, or export. In the latter variety, the prospective presumption resembles an implicit inchoate offense. So possession *really* is an attempt to use, sell, or export, or more precisely, possession is an attempt to attempt to use, sell, or export, that is, an inchoate inchoate offense. Some courts have even recognized the offenses of attempted possession²⁶⁸ and conspiracy to possess,²⁶⁹ which adds an explicit inchoate layer to the two implicit ones inherent in

²⁶⁵ See, e.g., N.Y. PENAL LAW §§ 158.00 (McKinney 2000 & Supp. 2001) (possession of five or more public benefit cards presumptive evidence of intent to use them for fraudulent purposes); *id.* § 265.15(4) (unlawful use of explosive substance); *id.* § 270.00(2)(c) (sale of fireworks); *id.* § 270.05(3) (use of noxious material); MODEL PENAL CODE § 5.06 (1985) ("purpose to employ [weapon] criminally").

²⁶⁶ See, e.g., N.Y. PENAL LAW §§ 170.27, 235.10 (McKinney 2000).

²⁶⁷ *Leary v. United States*, 395 U.S. 6, 36 n.63 (1969).

²⁶⁸ *People v. Saunders*, 648 N.E.2d 1331 (N.Y. 1995) (attempted weapon possession).

²⁶⁹ *United States v. Peoni*, 100 F.2d 401 (1938) (Hand, J.) (conspiracy to possess counterfeit money); see also *Pinkerton v. United States*, 328 U.S. 640 (1946) (conspiracy to possess liquor).

the concept of possession, resulting in an inchoate inchoate inchoate offense, a triple inchoacy.

Second, the implicit presumption inherent in the concept of a possession offense reveals the *modus operandi* of possession, the secret of its success as a policing tool beyond legal scrutiny. Possession succeeds because it removes all potentially troublesome features to the level of legislative or executive discretion, an area that is notoriously difficult to scrutinize. In its design and its application, possession is, in doctrinal terms, a doubly inchoate offense, one step farther from the actual infliction of personal harm than ordinary inchoate offenses like attempt. In practical terms, it is an offense designed and applied to remove dangerous individuals even before they have had an opportunity to manifest their dangerousness in an ordinary inchoate offense. On its face, however, it does not look like an inchoate offense, nor does it look like a threat reduction measure targeting particular types of individuals.

D. THE NEW VAGRANCY

It is this *sub rosa* quality of possession that helps set it apart from its predecessor, vagrancy. Prior to the advent of possession police, vagrancy laws fulfilled a similar sweeping function. Yet, in comparison to possession, vagrancy laws are the blunt tools of oppression wielded by a state unsophisticated in the science of police control as public hygiene. Blessed with all the definitional flexibility and executory convenience of vagrancy, possession is superior to vagrancy in at least three respects.

1. *Reach: Privacy! What Privacy?*

Possession's first advantage is that it is not a public offense; unlike vagrancy, it can be committed in private as well as in public. This means that the state, through a suspicion of possession, gains entry into the home of suspected danger sources or, while there, can detect evidence of possession. As we have seen, police officers are very good at finding illegally possessed items "in plain view" whenever they enter a residence or get a look inside a car for one reason or another.

This is the beauty of possession as a police instrument: anyone *can* possess anything anywhere anytime and *does* possess something anywhere anytime. Especially if one expansively defines possession to include constructive possession, the crimi-

nalization of possession presumptively criminalizes everyone everywhere. The ideal police environment therefore is the prison, where the possession of anything is presumptively forbidden and, not by accident, the private sphere no longer exists.²⁷⁰

So far, the first amendment appears to be the only constitutional barrier to a comprehensive possession police crossing the traditional—and traditionally impenetrable—border between public and private, the wall surrounding the proverbial home that is also my castle. In 1969, the Supreme Court declared categorically that the “private possession of obscene material may not be punished.”²⁷¹ But, as the Court made very clear, that doesn’t mean that there is anything wrong with “mak[ing] the [private or public] possession of other items, such as narcotics, firearms, or stolen goods, a crime,” because “[n]o First Amendment rights are involved in most statutes making mere possession criminal.” So, when in 1986 the Supreme Court upheld Georgia’s criminal sodomy statute, it made no difference that the statute proscribed private as well as public conduct: “Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home.”²⁷²

The use of possession offenses to extend police regimes into the private sphere has a long tradition. Already the first English Metropolitan Police Courts Act of 1839 included not only several possession offenses, such as the possession of “instruments for unlawfully procuring and carrying away wine,”²⁷³ and of loaded guns on ships,²⁷⁴ but also authorized police officers to enter and search private homes “in case of information given that there is reasonable cause for suspecting that any stolen goods are concealed in a dwelling house.”²⁷⁵ At about the same time in the American South, white slave patrols were authorized to rummage through the houses of blacks in search of illegally possessed weapons.²⁷⁶ A few years later, American prohibition-

²⁷⁰ See *supra* notes 249-58 and accompanying text.

²⁷¹ *Stanley v. Georgia*, 394 U.S. 557, 568 n.11 (1969).

²⁷² 478 U.S. 186, 195 (1986) (citing *Stanley*, 394 U.S. 557).

²⁷³ An Act for regulating the Police Courts in the Metropolis, 1839, 2 & 3 Vict., c. 71, § 30 (Eng.).

²⁷⁴ *Id.* § 36.

²⁷⁵ *Id.* §§ 24, 25.

²⁷⁶ See *infra* notes 334-39 and accompanying text.

ary legislation backed up its criminalization of the possession of liquor by equipping local law enforcement officers with extensive powers to search private homes and confiscate illegally possessed liquor.²⁷⁷

In the contemporary United States, the irrelevance of privacy in the policing of possession as an incapacitation strategy generally remains a hidden, and therefore all the more convenient, feature of the war on crime. Occasionally, however, a legislature makes it explicit. So, in the year 2000, a Connecticut law authorized police to enter private homes to seize *legally* possessed guns based on a finding that the possessor might be “dangerous” to himself or others. Searches and confiscations under the law are not based on the commission of an offense of any kind, but on other evidence of dangerousness. So, in one recent case, a Connecticut man found his mother’s home searched and his legally possessed guns seized on the basis of allegations made by two of his neighbors “that they’d had disputes with him and had observed him with a gun at his side.”²⁷⁸

2. Convenience and Permanence: The Velcro Offense

Possession offenses also are far more efficient than the clunky toothless vagrancy statutes of old; they give law enforcement officials much more bang for their buck. Penalties for vagrancy paled in comparison to those for possession. Although vagrants might be imprisoned for short terms, vagrancy laws were most important in low level and continuous police harassment of undesirables. Already in colonial Virginia, we learn that:

[V]ery few cases appear in the County Court records of Virginia of persons brought in solely for vagrancy. . . . But when a person was brought before the County Court for some other offense—a petty theft, for example—the fact that he was a vagabond might make the punishment a little more severe; or it might serve as an excuse for administering a whipping in case the other charge could not be completely proved.²⁷⁹

²⁷⁷ See WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA 178-81* (1996) (discussing Maine’s 1851 Act for the Suppression of Drinking Houses and Tippling Shops and its progeny).

²⁷⁸ Nancy Cohen, *New Law in Connecticut Allows Police to Seize Guns from People They Believe to Be Dangerous, Even When No Crime Has Been Committed*, All Things Considered, NAT’L PUB. RADIO, Jan. 18, 2000.

²⁷⁹ SCOTT, *supra* note 38, at 273-74.

And Christopher Tiedeman colorfully described how vagrancy laws were used in late nineteenth century America to harass, and “warn out,” the dangerous classes:

A very large part of the duties of the police in all civilized countries is the supervision and control of the criminal classes, even when there are no specific charges of crime lodged against them. A suspicious character appears in some city, and is discovered by the police detectives. He bears upon his countenance the indelible stamp of criminal propensity, and he is arrested. There is no charge of crime against him. He may never have committed a crime, but he is arrested on the charge of vagrancy, and since by the ordinary vagrant acts the burden is thrown upon the defendant to disprove the accusation, it is not difficult in most cases to fasten on him the offense of vagrancy, particularly as such characters will usually prefer to plead guilty, in order to avoid, if possible, a too critical examination into their mode of life. But to punish him for vagrancy is not the object of his arrest. The police authorities had, with an accuracy of judgment only to be acquired by a long experience with the criminal classes, determined that he was a dangerous character; and the magistrate, in order to rid the town of his presence, threatens to send him to jail for vagrancy if he does not leave the place within twenty-four hours. In most cases, the person thus summarily dealt with has been already convicted of some crime, is known as a confirmed criminal, and his photograph has a place in the “rogues’ gallery.”²⁸⁰

Equipped with an arsenal of possession offenses, today’s law enforcement official has no reason to confine himself to expelling dangerous elements, knowing full well that they may soon find their way back into town. Now he can incapacitate them through substantial prison terms, after a summary process that will take little more of his time. Today’s possessor faces not the choice between a short stay in jail and hitting the road. Instead he finds himself choosing between pleading to a five year prison term and taking the chance of spending the rest of his life behind bars after a jury trial, where the deck is stacked in the state’s favor.²⁸¹

3. *Impunity: The Teflon Offense*

Most important, possession is far less susceptible to legal challenges than vagrancy. Vagrancy had been the police sweep offense of choice for centuries until vagrancy statutes began to

²⁸⁰ CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT § 49, at 124 (1886).

²⁸¹ See *supra* notes 67-116 and accompanying text.

run into constitutional trouble in the 1960s. Vagrancy statutes were too explicit in their criminalization of status without any particular criminal act and in their delegation of interpretive discretion to frontline police officers. So courts began to strike down vagrancy statutes targeting "disorderly persons," or even "suspicious persons," which gave free reign to police officers and their fellow "criminal administrators," sympathetic local magistrates and justices of the peace, to cleanse their community of undesirables, among whom one could find a disproportionate percentage of racial minorities, poor people, and other outsiders.

Historically, twentieth century American vagrancy laws had replaced even more obvious and oppressive attempts to dispose of undesirables. While, according to a study by Eric Foner, "most provisions" of the Black Codes passed by Southern legislatures immediately following emancipation "were quickly voided by the army or Freeman's Bureau, or invalidated by the Civil Rights Act of 1866," the vagrancy statutes remained in force, presumably because they were racially neutral, at least on their face. Thus immunized from legal challenges, they could fulfill their function of policing newly freed blacks in the field. As Foner points out, "[w]hat is critical is the manner of their enforcement, and in the South of 1865 and 1866, with judicial and police authority in the hands of the planter class and its friends, impartial administration was an impossibility. Many southern vagrancy laws, in fact, contained no reference to race. But as John W. DuBose, the Alabama planter and Democratic politico later remarked, "the vagrant contemplated was the plantation negro."²⁸²

The vagrancy laws' immunity survived for another hundred years, when they themselves fell prey to judges who were willing to look behind the abstract letter of the law to its meaning on the streets. Possession offenses represent the next generation of general police measures. They make no reference to race or any other suspect classification. In fact, they make no explicit reference to any sort of status. By contrast, vagrancy statutes brimmed with descriptions of types, rather than of acts, which—given the act requirement in criminal law—invited scrutiny. Their objective was to define not vagrant acts, but vagrants.

²⁸² ERIC FONER, *NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY* 51-52 (1983).

Those who fit the definition were not convicted of vagrancy, but “deemed vagrants.” Take, for example, the Florida vagrancy statute eventually invalidated by the Supreme Court in the 1972 case of *Papachristou v. City of Jacksonville*.

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

²⁸⁵

A statute as broad and rambling as this, straining to capture the image of disagreeable people, even looks like the sweep it is obviously designed to facilitate. It bespeaks the very irrationality and arbitrariness it attempts to justify.

It didn't help matters that the pedigree of these statutes was fraught with arbitrary and thinly veiled oppression. This history extended past the post-Civil War Black Codes through colonial America and the complex English system of poor police of the sixteenth, seventeenth, and eighteenth century and eventually to the first English poor laws of the fourteenth century. The new colonies took up the task of policing vagrants almost immediately. The establishment and refinement of the vagrancy regime in colonial Virginia may serve as an illustration:

In 1672 the Assembly found it necessary to order that the English laws against vagrants should be strictly enforced. The chief of these laws was the 39 Eliz., chapter 4 (1597), which permitted the erection of houses of correction in any county, and directed that rogues and vagabonds were to be whipped by order of a justice, constable, or tithingman, and sent to their own parishes, there to be put in the house of correction until employment was found for them, or until they were banished. The law of 1 James I, chapter 7 (1604), provided that incorrigible and dangerous rogues might by order of the justices be branded in the shoulder with the letter R . . . The English statute 17 Geo. II, chapter 5, repealed the earlier laws on vagrancy, and went on to provide for the punishment of idle and disorderly persons, vagabonds, and incorrigible rogues. It was

²⁸³ JACKSONVILLE, FLA., ORDINANCE CODE § 26-57, quoted in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 158 n.1 (1972).

from this statute that the Assembly copied extensively in 1748. . . . The law defined vagabonds, and provided that they were to be taken by warrant before a justice, who might order them whipped from constable to constable like runaways, until they reached the parish in which their families last resided. At that point the local justices were to take a bond that the delinquents would find work. Failing this, the next County Court might bind such persons to work for a year.²⁸⁴

Efforts to control this dangerous class continued uninterrupted and virtually unchanged through the nineteenth century, and were by no means confined to the South, as an opinion of the Ohio Supreme Court upholding a vagrancy statute in the year 1900 makes very clear:

The act in question undertakes to define a tramp, or vagrant, by stating what acts shall constitute such character. It is, in the main, the old method of describing a vagrant, and vagrancy, time out of mind, has been deemed a condition calling for special statutory provisions, *i.e.*, such as may tend to suppress the mischief and protect society. These provisions rest upon the economic truth that industry is necessary for the preservation of society, and that he who, being able to work, and not able otherwise to support himself, deliberately plans to exist by the labor of others, is an *enemy to society* and to the commonwealth.²⁸⁵

Possession offenses not only avoid explicitly criminalizing types, they also steer clear of criminalizing facially innocent conduct, such as the "wandering or strolling around from place to place without any lawful purpose or object," which drew such derision from the Supreme Court in *Papachristou*.²⁸⁶

Compared to the bumbling vagrancy laws which, on their face, looked as suspicious as the types they described, possession offenses look very much like modern criminal statutes. On their face, one finds no description of types and no reference to status, no awkward definition of facially innocent conduct, and, in fact, no definition of conduct of any kind.

So possession is, on the face of it, neither a status offense nor a conduct offense. As a result, it is immune against all challenges. It is the phantom offense of modern American criminal law, everywhere yet nowhere, an offense so flexible that it no longer is an offense, but a scheme, a means of surreptitiously expanding the reach of existing criminal prohibitions, of transforming them into instruments of incapacitation. Neither fish

²⁸⁴ SCOTT, *supra* note 38, at 273-74.

²⁸⁵ State v. Hogan, 58 N.E. 572, 573 (Ohio 1900) (emphasis added).

²⁸⁶ *Papachristou*, 405 U.S. at 164.

nor foul, possession is *sui generis*, the general part of criminal law as police control of undesirables, the paradigmatic modern police offense.

To appreciate its function, and the complexity of its operation, one must scratch the surface of this apparently bland, yet ubiquitous and potent offense. So far we have taken the first step toward understanding possession by identifying it as a phenomenon. Normally, the offense goes about its work unnoticed as it disappears in its myriad particular manifestations. So, discussions of the "legalization" of drugs as a rule ignore the technique by which drugs are "criminalized." But the criminalization of drugs means the criminalization of their possession. Similarly, any debate about gun "control" always also is a debate about possession offenses.

Once the teflon layer has been stripped away, possession emerges as an offense that closely resembles its predecessor, vagrancy, in substance, if not in form. Possession does what vagrancy did, only better and behind a legitimate façade.

4. Behind the Façade

Let us begin with the obvious. Possession is not a conduct offense. As commentators have pointed out for centuries, possession is not an act, it is a state of being, a status.²⁸⁷ To possess something is to *be* in possession of it.

To dismiss possession simply on the ground that it violates the so-called act requirement of Anglo-American criminal law, however, would be premature. The act requirement, from the outset, applied to common law offenses only, i.e., to offenses that traced their origins back through a grand chain of common law precedents, rather than to a specific statute that created a new offense. Certainly the concept of common law offenses was malleable, so that judges had some discretion in treating a particular offense as a common law or as a statutory offense. That's not the point here, however. The point is that English judges from very early on threw out possession indictments as violative of the act requirement only if they alleged a *common law* offense of possession, rather than invoked a *statutory* possession provision. Once it was settled that the possession indictment was brought under one of the increasing number of possession stat-

²⁸⁷ E.g., *Regina v. Dugdale*, 1 El. & Bl. 435, 439 (1853) (Coleridge, J.).

utes, the common law's act requirement was no longer an issue.²⁸⁸ The act requirement was as irrelevant to statutory possession as the mens rea requirement was to "statutory" rape.²⁸⁹

The common law's act requirement, therefore, does not stand in the way of modern possession statutes. And the thin slice of the act requirement constitutionalized by the U.S. Supreme Court in the (decidedly pre-crime war) 1962 case of *Robinson v. California*²⁹⁰ also can do little, by itself, to challenge possession offenses. The constitutional act requirement merely prohibits the criminalization of addiction in particular, and of sickness in general (or at least "having a common cold").²⁹¹ Possession doesn't criminalize an illness, at least not directly. The Supreme Court in *Robinson* went out of its way to reassure legislatures that they remained free to "impose criminal sanctions . . . against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics."²⁹²

Then there is the general uneasiness regarding omission of offenses characteristic of American criminal law. Absent a clear duty to act, the failure to act is not criminal. If possession isn't an act, perhaps one should think of it as an omission, the omission to get rid of the item one possesses.²⁹³ But what is the duty that compels me to drop the shiny new pistol that my friend has just bought himself at the local gun store, or to toss out the baggie of cocaine I noticed in the glove compartment of my rental car? If one looked hard enough, perhaps one could find such a duty nestled in the criminalization of a possession that is defined as the failure to end it. But the point of requiring a specific duty for omission liability, the significance of the general unwillingness to criminalize omission, is precisely to reject omission liability absent specific and unambiguous provisions to the contrary. Still, by itself, the disfavored status of omissions does not imply rejecting possession liability.

²⁸⁸ See, e.g., *Rex v. Lennard*, 1 Leach 90 (1772) (applying An Act for the better preventing the counterfeiting the current coin of this kingdom, 1697, 8 & 9 Will. 3, c. 26 (Eng.)).

²⁸⁹ See *Regina v. Prince*, 2 L.R. Cr. Cas. Res. 154 (1875).

²⁹⁰ *Robinson v. California*, 370 U.S. 660 (1962).

²⁹¹ *Id.* at 667.

²⁹² *Id.* at 664 (emphasis added).

²⁹³ See, e.g., MODEL PENAL CODE § 2.01(4) (1985); N.Y. PENAL LAW § 15.00(2) (McKinney 2000 & Supp. 2001).

And the same could be said about the abandonment of another ironclad principle of Anglo-American criminal law, *mens rea*. Some possession offenses, after all, do away not only with the—even ironcladder—requirement of an *actus reus*, but also the requirement of criminal intent.²⁹⁴ If this absence of *mens rea* alone would condemn possession offenses to illegitimacy, the bulk of modern American criminal law would suffer the same fate.

Finally, as discussed earlier on, one might try to domesticate possession offenses by categorizing them as kinds of inchoate offenses. To pick a familiar example, the simple possession of certain large quantities of drugs can be seen as an attempt to sell them. Possession in this case would be a kind of inchoate inchoate offense, an attempted attempt, perhaps. Inchoate liability, however, much like omission liability, is disfavored in traditional Anglo-American law and therefore limited to cases where the offender acted with the specific intent to bring about the proscribed harm. But, by definition, that intent is missing in a simple possession offense, as opposed to a compound possession offense, which requires proof of an intent to use the object possessed in one way or another. Punishing simple possession as a quasi inchoate offense, therefore, would violate the general rule that inchoate liability requires specific intent. As nineteenth century cases emphasized again and again, in terms reminiscent of the theory of attempt liability, it was the *intent* to use the objects in a proscribed way that justified criminalizing compound possession, *not* the possession itself: “The offense consists not in the possession of [adulterated] milk . . . but in the *intent* to sell or exchange” it.²⁹⁵ Lacking this all-important intent element, the prohibition of simple possession obviously could not avail itself of this justification.

Now the point of this litany of difficulties is not to suggest that any or each of them taken individually exposes the illegitimacy of possession offenses. Instead, we learn two things from this quick diagnosis. First, we come to recognize that possession is *sui generis* and therefore subject neither to traditional categories of criminal liability nor to traditional avenues of critique. Second, and more important, we come to appreciate just how anxious the modern state is to pursue its incapacitative mission,

²⁹⁴ See, e.g., *State v. Cleppe*, 635 P.2d 435 (Wash. 1981).

²⁹⁵ *State v. Smyth*, 14 R.I. 100, 101 (1883).

so eager in fact that it is willing to enlist the services of an offense that runs afoul of most, if not all, of the fundamental tenets of traditional American criminal law.

What's more, it is the very fact that possession ignores so many of the basic rules, even bedrock principles, of traditional American criminal law, which turns it into such an attractive weapon in the war on crime. This is so because every substantive principle has its procedural analogue. Without *actus reus*, no act needs to be proved. Without *mens rea*, no evidence of intent is required. Without omission, there's no need to establish a duty. Without inchoacy, the prosecutor can do without proving specific intent. Possession is unclassifiable, it is everything and nothing, an unspecifiable offense for a task best left unspecified: the control of undesirables.

It is this control function of possession that is most troubling, not its tensions with established principles of criminal law doctrine. Possession offenses are wolves in sheep's skin, highly efficient instruments of oppression and discrimination that have been camouflaged as run-of-the-mill criminal offenses, and thereby protected against legal challenges and shielded from public scrutiny.

It is true that, on the surface, possession offenses don't stand out among the offense definitions in the special part of our modern criminal codes. They are professionally short and to the point, in welcome contrast to vagrancy's amateurishly rambling laundry lists of suspicious types. But, as soon as one looks beyond the definition of a core possession offense like "criminal possession of a weapon,"²⁹⁶ what does one see but long lists, lists of types! These lists take one of two forms: they are either lists of the policed²⁹⁷ or lists of the police.²⁹⁸ The former are modern versions of the lists of those "deemed to be vagrants," the latter are lists of those who do the deeming. "Whoever" fits a type on the first list may not possess a gun. "Whoever" fits a type on the second list is not only entitled to possess a gun, but is exempt from the law criminalizing its possession. The former cannot legally possess a gun, the latter cannot illegally possess one.

²⁹⁶ N.Y. PENAL LAW §§ 265.01, 265.20 (McKinney 2000 & Supp. 2001); 18 U.S.C. § 922(g)(1)-(11) (1994 & Supp. 1999).

²⁹⁷ 18 U.S.C. § 922(g)(1)-(11) (1994 & Supp. 1999).

²⁹⁸ N.Y. PENAL LAW § 265.20 (McKinney 2000 & Supp. 2001).

It turns out that instead of replacing vagrancy's list of types, a gun possession statute like the one in the New York Penal Law simply removes the list from the definition of the offense to another, subsidiary, part of the statute. This strategy of burying the troubling aspect of a criminal statute in the fine print has proved popular in the war on crime. So, legislatures have been fond of classifying aggravating factors—including, as we saw earlier, gun possession—as sentencing considerations, thereby insulating these provisions from constitutional attack and, thanks to the lower burden of proof at sentencing, simplifying their application, all at once.

Two types appear again and again on the list of dangerous characters prohibited categorically from possessing a gun: convicted felons²⁹⁹ and aliens.³⁰⁰ The justification for inclusion of the former is explicitly based on dangerousness considerations: Convicted felons are “persons who, by their actions, have demonstrated that they are dangerous, or that they may become dangerous. Stated simply, they may not be trusted to possess a firearm without becoming a threat to society.”³⁰¹ Presumably, aliens too are potential threats to society simply on account of their outsider status.

“Convicted felons” and “aliens” thus resemble the targets of vagrancy laws, who also were considered far too dangerous to possess a gun.³⁰² “The vagrant,” as one commentator remarked in 1886, “has been very appropriately described as the chrysalis of every species of criminal.”³⁰³ Vagrants were members of a permanent underclass who, by moving about the land without attachment to a recognized unit of social control, such as a household, an employer, a school, or a prison, were by their very nature disobedient, disorderly, and therefore dangerous. Congregating under bridges and in other hidden places, they constituted a constant conspiracy against innocent and hard-working citizens who knew their place in orderly society. They were a breeding ground of criminality, a menace to society.

²⁹⁹ *Id.* § 265.01(4) (convicted of a felony or serious offense).

³⁰⁰ *Id.* § 265.01(5).

³⁰¹ 114 Cong. Rec. 14,773 (May 23, 1968) (statement of Sen. Long).

³⁰² *State v. Hogan*, 58 N.E. 572 (Ohio 1900) (applying Ohio law prohibiting any “tramp” from “carrying a firearm, or other dangerous weapon”).

³⁰³ TIEDEMAN, *supra* note 280, at 124.

Now the point is not simply that vagrants, like convicted felons and aliens today, were not allowed to possess guns. The larger point is that members of these groups are considered by their nature to be dangerous simply on account of that membership, without any need to assess their dangerousness individually. The prohibition of gun possession is merely symptomatic of this general classification by type. Those deemed to be "felons," "aliens," or "vagrants" are inherently dangerous, and therefore cannot be trusted to possess a gun without putting it to harmful use. Once a felon, always a felon.

To prohibit not merely possession, but possession by a certain type of person, is to create a double status offense. To *be* in possession is a status. And to *be* a felon, or alien, or youth, or insane person, in possession is another status. So, a felon in possession is punished for the status of being a "felon" and of being "in possession." This makes "Felon in Possession of a Firearm . . . the prototypical status offense," as a federal court recently put it.³⁰⁴

Lumping together felons and aliens in this way may seem odd, but it is not unusual. Aliens and felons also share other disqualifications, including the prohibition against voting,³⁰⁵ holding elected office,³⁰⁶ and serving on juries,³⁰⁷ as judges, as prosecutors, police officers, prison guards, or wardens.³⁰⁸ In other words, since felons and aliens have no say in the making, application, or enforcement of police regulations or the criminal law, they consistently find themselves among the policed, rather than the police, among the objects, rather than the subjects of police. They are, by their nature, excluded from the political community, outsiders by definition.

One way of thinking about the list of classes whose members are bound to wreak havoc with a gun is to recognize it as estab-

³⁰⁴ United States v. Leviner, 31 F. Supp. 2d 23, 26 (D. Mass. 1998).

³⁰⁵ N.Y. ELEC. LAW §§ 5-102, 5-106(2)-(5) (McKinney 1998). See PATRICIA ALLARD & MARC MAUER, REGAINING THE VOTE, AN ASSESSMENT OF ACTIVITY RELATING TO FELON DISENFRANCHISEMENT LAWS (2000); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality and 'The Purity of the Ballot Box,'* 102 HARV. L. REV. 1300 (1989).

³⁰⁶ See *Ambach v. Norwick*, 441 U.S. 68 (1979); *Sugarman v. Dougall*, 413 U.S. 634 (1973).

³⁰⁷ N.Y. JUD. LAW § 510 (McKinney 1992 & Supp. 2001); cf. *Ambach v. Norwick*, 441 U.S. 68 (1979).

³⁰⁸ N.Y. EXEC. LAW § 513(3) (McKinney 1996 & Supp. 2001) (citizen & good moral character); see *Foley v. Connelie*, 435 U.S. 291 (1978).

lishing an irrebuttable presumption that anyone matching the type is not of "good character" and cannot give a "good account of himself." From this perspective, two key characteristics of possession offenses clearly emerge, each of which highlights the similarities between possession- and vagrancy-based police regimes: their incorporation into a comprehensive policing scheme driven by the discretion of state officials and their heavy reliance on presumptions of dangerousness, general and specific.

By the eighteenth century, English vagrancy laws belonged to a complex scheme for the control of deviants, which began with sureties and ended with whipping and imprisonment. According to Blackstone, sureties for keeping the peace or for good behavior were "intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion, that some crime is intended or likely to happen"³⁰⁹ Any justice of the peace could demand such a guarantee on his own discretion or at the request of any person upon "due cause."³¹⁰ If the bound person violated the conditions of his bond (to keep the peace or to show good behavior), he forfeited to the king the amount posted. For our purposes, what is most interesting is the recognizance for good behavior "towards the king and his people" that applied to "all them that be not of good fame." Just who fell into this category was up to the individual justice of the peace. Here is Blackstone's attempt to illustrate the scope of the limitless concept:

Under the general words of this expression, that be not of good fame, it is holden that a man may be bound to his good behaviour for causes of scandal, contra bonos mores, as well as contra pacem; as, for haunting bawdy houses with women of bad fame; or of keeping such women in his own house; or for words tending to scandalize the government; or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eavesdroppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wake on the night; common drunkards; whoremasters; the putative father of bastards; cheats; idle vagabonds; and other persons, whose misbehaviour³¹¹ may reasonably bring them within the general words of the statute

³⁰⁹ BLACKSTONE, *supra* note 8, at 249.

³¹⁰ *Id.* at 250.

³¹¹ *Id.* at 253.

There was, in other words, substantial overlap between those subject to regulation by sureties and those in danger of being classified as vagrants; "idle vagabonds" were explicitly listed as in need of control through sureties of the peace. In fact, the vagrancy laws can be seen as a fall-back option, should the sureties prove unsuccessful. By the eighteenth century, vagrancy laws grouped vagrants into three categories:³¹² "idle and disorderly persons" (punished by one month's imprisonment), "rogues and vagabonds" (whipping & imprisonment up to six months); and "incorrigible rogues" (whipping & imprisonment up to two years). The severity of the sanction increased as the amenability to treatment decreased. While the least serious type of vagrant retained the title of a "person" with the incidental qualities of being "idle and disorderly," the more serious types were defined exclusively by their deviant status: they were "rogues and vagabonds," rather than persons. Any hope for a reclassification as a person was lost in the case of the most aggravated type of vagrant, the "incorrigible rogue."

All of these vagrants pose a threat simply through their existence. They are, in Blackstone's words, "offenders against the good order, and blemishes in the government, of any kingdom."³¹³ As blemishes, they must be removed. Removed they can be through re-education, or, if they are inherently and unalterably deviant, through incapacitation.

The dangerous classes, then, were subject to a three-step police regime. First came the surety bond, designed to avert the manifestation of the threat by tying it to conditional financial loss. Next, for threats so substantial as not to be amenable to such inducements for self-correction, came the forced correction through fines, whipping, infamous punishments, or imprisonment. And finally, for the incorrigible rogues beyond all hope of reintegration, there was the prospect of incapacitation through prolonged and repeated imprisonment. At each level, a presumption of dangerousness attached upon an initial suspicion of "being not of good fame" or of "being idle or disorderly," and could be rebutted by proof to a justice of the peace who enjoys wide discretion, assuming of course that one's initial attempt to remove the suspicion of the constable (or concerned

³¹² *Id.* at 169-70; Vagrancy Act, 1744, 17 Geo. 2, c. 5 (Eng.).

³¹³ BLACKSTONE, *supra* note 8, at 170.

citizen), who enjoyed even wider discretion, proved unsuccessful.

In the case of gun possession offenses, a modern possession police regime, like New York's, operates much like a full-fledged vagrancy regime. The criminalization of possession essentially sets up two presumptions of dangerousness, one rebuttable, the other not. Gun possession is presumptively illegal.³¹⁴ It is up to the state, in its discretion, to grant licenses to those whom it deems insufficiently dangerous in general, and insufficiently likely to use a gun to harm others. The state is not required to issue a gun license to anyone. Gun possession is not a matter of right, but of grace.³¹⁵ For this reason, an applicant for a gun license also is not entitled to an administrative hearing, though the state may grant him one, again in its discretion.³¹⁶ The presumption of dangerousness becomes irrebuttable when the individual has revealed himself to be inherently dangerous, as in the case of "felons."

But how can an applicant for a gun license remove the presumption of dangerousness? By convincing a "licensing officer," in large cities a member of the police department's license division, that he is "of good moral character!"³¹⁷ And as the English justice of the peace, the state licensing officer enjoys virtually unlimited discretion in deciding whether the applicant is or is not "of good fame."³¹⁸ Felons are by definition not "of good character;" that's what it means to *be* a felon. And so are aliens who, also by definition, have not been found to be "person[s] of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."³¹⁹

The use of presumptions, however, is not limited to gun possession offenses. We already have discussed at some length the specific evidentiary presumptions emanating from and

³¹⁴ N.Y. PENAL LAW § 265.01 (McKinney 2000 & Supp. 2001) ("a person is guilty of criminal possession of a weapon in the fourth degree when . . . [h]e possesses any firearm").

³¹⁵ *Shapiro v. New York City Police Dep't (License Division)*, 595 N.Y.S.2d 864 (Sup. Ct. 1993).

³¹⁶ *Id.*

³¹⁷ N.Y. PENAL LAW § 400.00(1)(a) (McKinney 2000 & Supp. 2001).

³¹⁸ *Shapiro*, 595 N.Y.S.2d at 864.

³¹⁹ 8 U.S.C. § 1427(a)(3) (1994 & Supp. 1999).

pointing toward possession.³²⁰ The very concept of possession liability is based on the presumption that the possession of certain items, by certain people, is inherently dangerous and therefore worthy of police investigation, if not of outright interference by seizing the possessors and the item possessed for incapacitative purposes. Ill-defined presumptions granting ill-defined discretion to police officials have accompanied possession offenses at least since the late eighteenth century, when the state began to tap the police potential of possession offenses. For example, the English Frauds by Workmen Act of 1777 defined the following new possession offense: "having in his or her possession any materials suspected to be purloined or embezzled, and not producing the party or parties being duly intitled [sic] to dispose of the same, of whom he or she bought or received the same, nor *giving a satisfactory account* how he or she came by the same."³²¹ Similarly, the 1851 "Act for the better Prevention of Offences" imposed a prison sentence of up to three years on anyone "found by Night having in his Possession *without lawful Excuse* (the Proof of which Excuse shall lie on such Person) any Picklock Key, Crow, Jack, Bit, or other Implement of Housebreaking."³²²

Not even the licensing scheme is unique to gun possession offenses. Drug possession offenses operate in much the same way.³²³ Once again, the possession of certain "controlled" substances is presumptively illegal. A controlled substance is a substance subject to a license requirement. Possession is legal only to the extent authorized by the state. That authorization, that license, is granted to particular groups of persons.

Licensing is less important in the case of drug possession offenses simply because so few licenses are granted. As a result, drug possession is criminal for almost everyone. This means that for all intents and purposes, the presumption of dangerousness is irrebuttable in drug possession cases. Everyone is presumed to be incapable of putting the inherently dan-

³²⁰ See *supra* notes 113-15, 262-69 and accompanying texts.

³²¹ The Frauds by Workmen Act, 1777, 17 Geo. 3, c. 56, § 14 (Eng.) (emphasis added).

³²² An Act for the better Prevention of Offences, 1851, 14 & 15 Vict., c. 19, § 1 (Eng.) (emphasis added).

³²³ See also N.Y. AGRIC. & MKTS. LAW art. 7 (McKinney 1991 & Supp. 2001) (dog licensing).

gerous drug to harmless use. Given the addictive potential of drugs, their very dangerousness consists of their tendency to overcome their possessor's ability to prevent them from unfolding their dangerous potential. So strong is the power of drugs, and so weak the power of resistance of almost everyone, that already their mere possession is so likely to result in not only use, but harmful use, that we are presumptively ill-equipped to even possess these noxious substances.

Possession offenses, particularly gun possession, therefore are merely the punitive culmination of a policing process that begins with a licensing requirement. And what a sophisticated process it is! By requiring a license, the state kills several birds with one stone. First of all, it deters anyone from applying for a license who is not blessed with a "good moral character." Moreover, the requirement of a license itself very probably has a disproportionate effect on outsiders, who are far less likely to apply for a gun license in the first place, precisely because they do not identify with the state and its institutions. In fact, they are unlikely to be inclined to comply with state licensing requirements of any kind, be it for dogs, cars, or guns, perhaps because they resent such obvious efforts to police them, perhaps because they don't expect much of a chance of actually being awarded a license, perhaps because their neighborhood is so inundated with unlicensed guns that the license requirement strikes them as entirely toothless—until of course they are stopped by a police officer who subjects them to a *Terry* frisk.

Anyone who does submit an application for a gun license thereby subjects himself and his character to the inquisitive eye and virtually limitless discretion of a licensing officer. Here, those not "of good moral character" who have the audacity to apply can be weeded out. And, at yet another level of inquiry, the ones that slip through the cracks can later be subjected to license revocation proceedings, which in turn are backed up with criminal penalties. Plus, an additional inquiry into fitness and harmlessness will take place when the license comes up for renewal, perhaps as often as every other year.³²⁴

Of course, if a bad character doesn't apply for a license, and most don't, then the possession offenses come into play. Obviously they apply to anyone who, such as "felons" and "aliens," has revealed himself to be not "of good moral character" with-

³²⁴ NEW YORK, N.Y., ADMIN. CODE § 10-131(a)(1) (2001).

out further inquiry by the licensing officer. Not so obviously, possession offenses also capture those perfectly good characters who possess a gun without a license. Possession without a license is possession without a license, no matter who does the possessing.

This formal irrelevance of good moral character, of harmlessness, deserves emphasis. It suggests that the core of the possession offense is not the prevention of harm, but the chastisement of disobedience. In this light, the immediate and very real victim of a possession offense is the state, as the origin of the command not to possess guns without its specific authorization. Licensing is a regulatory technique of the modern state and assumes a state powerful and sophisticated enough to set the background condition against which a licensing regime can operate. That background condition is a universal presumption of dangerousness, which the state in its discretion permits its regulatory objects to rebut. Everyone is presumed dangerous, unless the state declares it to be otherwise under conditions defined and applied by the state.

Another way of looking at the possession licensing scheme is to regard the state as the original owner of all objects it deems dangerous. Having declared itself the owner of all contraband (all "controlled substances"), it is within the state's discretion to assign possession of this contraband to certain individuals. As the rightful owner, the state can also retake these objects into its possession anytime it pleases, and certainly anytime the conditions of its grant have been violated or someone has boldly taken possession of contraband without receiving permission from the state. As Justice Murphy explained in his dissent in *Harris v. United States*,³²⁵ "certain objects, the possession of which is in some way illegal, may be seized on appropriate occasions without a search warrant. Such objects include stolen goods, property forfeited to the Government, property concealed to avoid payment of duties, counterfeit coins, burglar tools, gambling paraphernalia, illicit liquor and the like."

Under either view, and even without an explicit licensing mechanism, possession offenses are the sign of a powerful state. Possession is illegal, literally, because the state says so. Illegal (or "unlawful" or "criminal," in some possession offenses) means unauthorized, period. In the words of the New York

³²⁵ 331 U.S. 145, 191 (1947).

Court of Appeals, “a person either possesses a weapon lawfully or he does not,”³²⁶ and the conditions of lawful possession are exhaustively established by the state in the possession offense itself. Hence, there’s no need to worry about such messy concepts as self-defense or, even worse, justification, which claims that a violation of a statute may be justified on the general ground that, though facially criminal, it was not unlawful in the grand scheme of things.³²⁷ Possession offenses begin and end with the state. This is what makes them so simple and so useful to the state.

But this is also what makes them so troubling. To commit a possession offense is to interfere with the state’s effort to regulate, to control, the possession of certain dangerous items, including not only certain guns and drugs, but also, say, firecrackers.³²⁸ In its heart of hearts, the illegal—i.e., unauthorized—possession of guns or of drugs does not differ from the illegal—i.e., unauthorized—possession of firecrackers. The essence of a possession offense is disobedience of state authority.

5. *Authoritarian States and Fatherly Monarchs*

Despite the central role of the modern state in possession-based policing, there are important structural similarities between the possession model and the original English vagrancy model. It is no accident that the theory of original state ownership of contraband generally resembles the theory of original royal ownership of land, and in fact the entire system of delegation which traced the origin of all legal authority and entitlements to the king. Both models presume a strong central authority of governance charged with maintaining the well-being of the political community.

And both models spring from the police power of their respective sovereigns. In a passage much quoted by nineteenth century American writers on police power and regulation, Blackstone explained in 1769 that the king, as the “father” of his people,³²⁹ and “*pater-familias* of the nation,”³³⁰ was charged with:

³²⁶ *People v. Almodovar*, 464 N.E.2d 463, 465 (N.Y. 1984).

³²⁷ See *supra* note 108 and accompanying text.

³²⁸ N.Y. PENAL LAW art. 405 (McKinney 2000).

³²⁹ BLACKSTONE, *supra* note 8, at 176.

³³⁰ *Id.* at 127.

the public police and oeconomy[, i.e.,] the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations.³³¹

In the United States, the paternal (or parental, as John Locke insisted³³²) “police power” of the king eventually was taken over by the state as *parens patriae*, which—but ultimately of course also who—regulated the commonwealth, and later on defined and protected the interests of the community as such.

It was this same quasi-paternal police power, proceeding from a quasi-familial hierarchy of policer and policed, of subject and object, that gave rise to the string of American vagrancy laws that began in the early days of colonial America—when the *parens patriae* was still the English king—and continued for over three centuries, through the second half of the twentieth century. The American revolution and the Civil War might have wrought fundamental changes in American law. They had no effect on vagrancy police, which was considered a necessary weapon in the arsenal of any government that took its task of preserving public order and welfare seriously. Only the civil rights era brought the downfall of this convenient police mechanism, as judges began to identify with the objects of this police regime, rather than only with its subjects.³³³

Still, something does distinguish the possession scheme from the tried, but true, and ultimately dismantled vagrancy police regime. Here, I don’t mean the many ways in which possession offenses are preferable to vagrancy statutes as instruments of social control, in particular their insulation against legal attack, at least on their face and in the abstract. I mean, instead, precisely the flipside of that process of abstraction which rendered possession police facially unassailable.

The fundamental difference between a vagrancy statute and a possession statute is that one is open about its discriminatory purpose, and the other isn’t. In other words, vagrancy statutes apply only to vagrants, possession statutes apply to everyone.

³³¹ *Id.* at 162.

³³² JOHN LOCKE, SECOND TREATISE OF GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT § 52 (1690)

³³³ See *supra* note 283 and accompanying text.

Vagrancy laws were clearly a way, and clearly understood as a way, of policing the boundaries of a political community, which was neatly defined along socio-economic and, not only in the South and not only immediately after the Civil War, especially along racial lines.³³⁴ The same cannot be said for possession offenses; and that's why they make the NRA so nervous.

When we marvel at the antiseptic, and apparently unassailable, neutrality of sleek modern possession offenses, it's good to remember that they weren't always so. They wore their now hidden connection to vagrancy laws right on their sleeves. Through the nineteenth century, the suppression of gun possession among blacks, and other undesirable sources of threats to the governing group, was a common, and very explicit, strategy of governance.³³⁵ Before the Civil War, Slave Codes regularly prohibited free blacks and slaves from possessing guns.³³⁶ Legislatures also already made full use of the intrusive potential of possession offenses. In 1825, Florida authorized slave patrols to "enter into all negro houses and suspected places, and search for arms and other offensive or improper weapons, and . . . lawfully seize and take away all such arms, weapons, and ammunition" ³³⁷ Eight years later, Florida reaffirmed the patrols'

³³⁴ For an interpretation of American slave law as "boundary law" and police measure, see Jonathan A. Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 YALE J.L. & HUMAN. 417 (1993).

³³⁵ See Robert Cottrol & Raymond Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 331 (1991); Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341 (1995).

³³⁶ See, e.g., An act for preventing Negroes [sic] Insurrections, 1680, 2 Va. Stat. 481 (William Waller Hening ed., 1810) ("it shall not be lawfull for any negroe or other slave to carry or arme himselfe with any club, staffe, gunn, sword or any other weapon of defence or offence"); An Act for the better ordering and governing of Negroes and Slaves, 1712, 7 S.C. Stat. 352, 353 (David J. McCord ed., 1840) ("negro houses to be searched diligently and effectually, once every fourteen days, for fugitive and runaway slaves, guns, swords, clubs, and any other mischievous weapons"); Black Code, ch. 33, § 19, 1806 La. Acts 150, 160 (1807) ("no slave shall by day or by night, carry any visible or hidden arms, not even with a permission for so doing"); An Act to provide for the more effectual performance of Patrol Duty, 1819 S.C. Acts 29, 31 ("it shall not be lawful for any slave, except in the company and presence of some white person, to carry or make use of any fire arms, or other offensive weapon, unless such slave shall have a ticket or license in writing from his owner or overseer, or be employed to hunt . . . , or shall be a watchman"); N.C. REV. CODE OF 1854, ch. 107, § 26 ("[n]o slave shall go armed with gun, sword, or other weapon, or shall keep any such weapon, or shall hunt or range with a gun in the woods").

³³⁷ An Act to Govern Patrols, § 8, 1825 Fla. Acts 52, 55.

broad search authority and went on to provide that blacks unable to "give a plain and satisfactory account of the manner . . . they came possessed of" weapons found in their possession were to be "severally," and summarily, punished—"by moderate whipping on the bare back, not exceeding thirty-nine lashes."³³⁸

After the Civil War, Black Codes continued the general prohibition of gun possession by blacks, until the passage of the Civil Rights Act of 1866.³³⁹ Thereafter, openly discriminatory gun possession statutes disappeared from the statute books.

That didn't mean that gun possession statutes in general were a thing of the past. On the contrary. As in the case of vagrancy statutes, the goal of racial oppression simply migrated underground, from the face of the statute into its increasingly unspoken intent. As in the case of now race neutral vagrancy statutes, the race neutral gun possession statutes applied only to blacks, and everybody knew it. Here is what a judge on the Florida Supreme Court, in 1941, had to say about the racist point of that state's race neutral gun possession law:

I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers The statute was never intended to be applied to the white population and in practice has never been so applied.³⁴⁰

Possession offenses and vagrancy statutes thus followed a similar trajectory from explicit to implicit oppression. What distinguishes possession from vagrancy is the subtlety with which possession discharged its oppressive function. Vagrancy stat-

³³⁸ An Act concerning Patrols, ch. 671, §§ 15, 17, 1833 Fla. Acts 26, 29-30.

³³⁹ See, e.g., An Act to punish certain offences [sic] therein named, and for other purposes, § 1, 1865 Miss. Laws 165 (approved Nov. 29, 1865) ("no freedman, free negro or mulatto, not in the military service of the United States Government, and not licensed so to do by the board of police of his or her county, shall keep or carry firearms of any kind, or any ammunition, dirk or bowie knife"). In legislative debate, proponents of the Civil Rights Act, 14 Stat. 27 (1866), cited racist gun possession statutes as evidence that federal intervention was necessary. See, e.g., Cong. Globe, 39th Cong., 1st Sess., pt. 1, 474 (Jan. 29, 1866) (statement of Sen. Trumbull); see also Freedmen's Bureau Act, 14 Stat. 173 (1866) (guaranteeing "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, . . . including the constitutional right to bear arms"); see generally Halbrook, *supra* note 335 (discussing legislative history).

³⁴⁰ *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring).

utes, even after their forced neutralization in the wake of the Civil War, never managed to shed their oppressive origins. Possession offenses did. Modern possession offenses on their face apply to anyone and everyone who possesses some object without the authorization required by the state. They apply, as modern criminal statutes do generally, to "whoever." By contrast, vagrancy statutes by their very nature singled out rogues, vagabonds, dissolute persons, common gamblers, jugglers, gamblers, common drunkards, common night walkers, thieves, pilferers, pickpockets, lewd, wanton and lascivious persons, common railers and brawlers, habitual loafers, disorderly persons, and even "persons wandering or strolling around from place to place without any lawful purpose or object."³⁴¹ Singling out undesirable types, i.e., vagrants, remained the explicit point of vagrancy statutes, while possession offenses managed to transform themselves into quasi-conduct offenses that could be committed by all types.

There is a list of types even in possession offenses, as we have seen, but that list is much shorter: felons and aliens. Other distinctions are irrelevant, except for one, and this is the crucial distinction for possession as a pure state obedience offense: the fundamental distinction between the state and everyone else. The state commands, everyone else obeys.

In this particular case, the state commands that anyone who wants to possess must apply for a license. This is so because everyone, not just those "deemed vagrants," is presumed to be dangerous and therefore incapable of possessing a gun without putting it to harmful use. The presumption of dangerousness has been expanded from vagrants to everyone. To rebut it, everyone must convince a state license officer of his "good character."

Anyone who fails to comply with these commands, and thereby to acknowledge the state's authority, is guilty of a weapons offense, no matter how good his character. And this is the problem, and the distinctive feature of possession offenses: the lines separating the policer and the policed are no longer clearly drawn. Those middle class whites who could be certain to escape classification as vagrants cannot rest assured that they

³⁴¹ JACKSONVILLE, FLA., ORDINANCE CODE § 26-57, *quoted in* Papachristou v. City of Jacksonville, 405 U.S. 156, 158 n.1 (1972).

may not find themselves on the wrong side of the law of possession.

The anxiety about gun control, i.e., the regulation of gun possession, arises from this tension, this uncertainty among those who once clearly identified themselves with the policers in their effort to control undesirables. Privileged members of the political community are appalled to find themselves treated by the law, if not necessarily by its enforcers, as presumptively dangerous, and therefore as vagrants, felons, aliens, and "negroes." Pointing to the Second Amendment, they challenge the state's claim to original ownership of guns as dangerous instruments, with possession to be delegated to those deemed worthy. Men of "good moral character" balk at the requirement that they demonstrate their moral fitness to a state official.

They are, in short, experiencing the very sense of powerlessness so familiar to the traditional objects of police control. Now, they too are the outsiders who find themselves confronted with the arbitrary discretion of a superior power, the state. And this sense of alienation only grows when these state-defined sources of danger realize that state officials are exempt from the general prohibition of possession.

This then is the second list of types one finds in modern possession offenses, to go along with the list of inherently dangerous characters like felons and aliens: the list of types who are inherently harmless and therefore subject to an irrebuttable presumption of fitness to possess a weapon, without further inquiry into their moral character. What follows is a short excerpt from the New York exemption provision:

Section 265.20 Exemptions

a. Sections 265.01, 265.02, 265.03, 265.04, 265.05, 265.10, 265.11, 265.12, 265.13, 265.15 and 270.05 [weapons offenses] shall not apply to:

1. Possession of any of the weapons, instruments, appliances or substances . . . by the following:

(a) Persons in the military service of the state of New York

(b) Police officers

(c) Peace officers

(d) Persons in the military or other service of the United States

(e) Persons employed in fulfilling defense contracts with the government of the United States

. . . .

2. Possession of a machine-gun, firearm, switchblade knife, gravity knife, pilum ballistic knife, billy or blackjack by a warden, superinten-

dent, headkeeper or deputy of a state prison, penitentiary, workhouse, county jail or other institution for the detention of persons

....

11. Possession of a pistol or revolver by a police officer or sworn peace officer of another state while conducting official business within the state of New York.

....

15. . . .

b. Section 265.01 shall not apply to possession of that type of billy commonly known as a "police baton" which is twenty-four to twenty-six inches in length and no more than one and one-quarter inches in thickness by members of an auxiliary police force³⁴²

But how is this reverse presumption possible? Because the only relevant victim in modern criminal law (or rather administration) is the state, and state officials by definition cannot pose a threat to the state, no matter how dangerous the instruments they possess, and no matter how prone to violence they are or how bad their character is.³⁴³ Only harm against the state counts; harm against anyone or anything else does not.

State officials are qualitatively different from the rest of us. They can do no relevant harm. They cannot illegally possess guns. And the communal boundary they police is that between the state and everyone else. They, and only they, do the policing. They, and only they, are the subjects of police. Everyone else is reduced to its object.

Or so it is in principle, if not in fact. In fact, the white middle class still has little to fear, the NRA's constant warnings notwithstanding. In fact, possession police draws the same socio-economic lines familiar from the days of vagrancy, only more deeply, thanks to its vastly greater punitive potential. The devastating impact that the war on drug possession has had on poor blacks is well known. Poor blacks also are disproportionately represented among unlicensed gun possessors³⁴⁴ and, more im-

³⁴² N.Y. PENAL LAW § 265.20 (McKinney 2000 & Supp. 2001).

³⁴³ Cf. WASH. REV. CODE ANN. § 16.08.080 (West 1992 & Supp. 2001) (police dogs exempted from prohibition of possession of unregistered dangerous dog).

³⁴⁴ See Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67 (1991).

portant, among "felons in possession." Weapons arrest rates are five times higher for blacks than for whites.³⁴⁵

And yet possession police is so much more than a hyper-charged vagrancy police. For in principle, if not in fact, the in-group that protects itself against outside threats is the state itself, rather than this or that social, ethnic, or economic group or class. The ultimate victim in a regime of possession police is the state, and the ultimate offender is the community at large, rather than a mere subset of it.

So far possession police merely functions as a more sophisticated cover for the hidden oppression of those social groups that have always been oppressed in the open. The ever increasing facial neutrality of police measures has done little more than to insulate long-standing practices from legal attack. But the removal of distinguishing features from the definitions of state norms, for the purpose of eliminating open discrimination, not only has driven the same discrimination underground. It also has dramatically expanded the group of potential police objects from the well recognized outsiders persecuted by old-style police measures like vagrancy statutes to everyone (and everything) whom (or that) the state, or rather a particular state official, perceives as a threat to his authority and therefore to the authority of the grand institution he represents, serves, and protects.

IV. STATE NUISANCE CONTROL: DEPERSONALIZING CRIMINAL LAW

By reducing everyone to a potential threat to the state, possession offenses are symptomatic of an apersonal regime of criminal administration in which persons have a role only as sources of inconvenience, as nuisances to be abated, as objects of regulation. This police regime is apersonal in three senses: First, it does without personal offenders. Second, it does without personal victims. And, third, its only victim is apersonal, namely the state itself considered as an abstraction, rather than as a group of persons.

In the end, everything and everyone is reduced to a nuisance, an inconvenience to state officials who know best. Contraband is a nuisance; dogs are a nuisance; offenders are a

³⁴⁵ U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Weapons Offenses and Offenders 2 (Nov. 1995, NCJ 155284), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/woofccj.pdf>.

nuisance; victims are a nuisance; and so is the cumbersome apparatus of traditional criminal law. So, offenders are abated, victims rendered irrelevant or used as cover, and the principles of criminal law ignored or openly abandoned as anachronistic remnants of a time when the regulatory nature of criminal law had not revealed itself, and when the criminal law was about personal rights, rather than social interests.

A. OFFENDERLESS CRIMES

The irrelevance of the offender's personhood is obvious. We already have noted, prior to our exploration of the place of possession offenses in an apersonal police regime, that the "public welfare" takes "offense" as soon as it is threatened by, literally disturbed by, anyone and anything. Hence, the preventive measures of social control put in place for its protection will attach themselves to any threat, whether it emanates from a person or not. Hence, there is no need to worry about that peculiarly human question of "guilt." Likewise, the reluctance to criminalize the failure to act (something of which plants are capable) evaporates, status (namely that of being dangerous, again a familiar attribute of dogs, objects, and natural phenomena) is freely punished in open defiance of the venerable *actus reus* principle, mere presence (also something well within the capacity of inanimate objects) is enough for penal intervention, infancy and insanity defenses are irrelevant, and so on and so on.

We have seen how possession has been adapted to assist the state in its identification and then eradication of human sources of danger. Possession has proved very useful because it bears the form of a traditional offense while it is in substance merely an instrument of nuisance control. Its form therefore is the only concession to the personhood of its objects. The state generally does not find it necessary to pour measures for the control of threats emanating from animals, inanimate objects, or natural phenomena into the mold of a criminal statute, which at least on its face is addressed not only to state officials but also to those who might fall within the scope of its prohibition.

B. VICTIMLESS CRIMES

Perhaps less obvious, this system of nuisance control also has no room for persons as *victims*. Once again, possession recommends itself as a useful tool, this time not because it's offenderless, but because it's victimless. Take gun possession, for instance. *Possessing* a gun harms no one. Using it may, but we're not talking here about the many statutes that criminalize improper gun *use*, say, to kill someone. We're talking about simply possessing, not using, not abusing,³⁴⁶ not even owning, a gun. Conviction of a possession offense does not require the prosecution to show that the gun was used to harm anyone, or anything for that matter. Again, this doesn't mean that the gun might not in fact also have been used to cause some harm. This simply means that, even if it was, that result is not required for a conviction of possessing the gun. That's why possession works both individually and in conjunction with other charges. Depending on the case, a prosecutor can either go after the possession alone or can use the possession charge as a fall back in case the more serious offense—which involved the use, but not the possession of the gun—does not stick for one reason or another. Possession is the universal velcro offense.

The absence of a victim is convenient in two ways. First, it lightens the prosecution's burden of proof. It's always easier to prove possession than it is to prove its use against a particular victim in a particular way at a particular time. Why? Because use includes possession so that every use is also a possession, but not every possession a use. Plus, we already saw how easy it is to prove possession.

Second, and most important, victims are a nuisance. They slow down the process. They forget things, lose evidence, misremember facts, change their stories. They miss appointments. They try to drop charges. They want harsher penalties, they want lower penalties. They just want their money back, or their hospital bills paid for. They require attention, even hand-holding. They may be annoying, greedy, poor. In fact, victims

³⁴⁶ On the distinction between use and abuse in the context of possession, see *Beebe v. State*, 6 Ind. 401, 419-20 (1855).

tend to resemble offenders in every socio-economic category, including race, income, residence, gender, and even age.³⁴⁷

Victims are in the way. They are a hindrance to the efficient disposal of dangers, which is what the war on crime, ostensibly fought on their behalf, is all about. And the recent creation of victims' rights to give victims more say in more aspects of the criminal process only makes things harder on the prosecutor who is just trying to do her part in the state's grand scheme of incapacitation.³⁴⁸

How much cleaner, faster, and more convenient is a victimless crime like possession, with no victim to deal with? No victim to notify about court hearings, trial dates, or negotiations with defense counsel. No victim to be consulted about charges, about plea arrangements, about trial strategy, about sentencing, about everything.

As a victimless regulatory offense, possession is a perfect creation of the state. Who is offended, whose interests violated, by possessing a gun? No one in particular, except the state. The only clear violation of a personal interest, and a heavily guarded personal interest at that, occurs not in the commission of a possession offense, but in its punishment.

1. Property! What Property?

To put it more succinctly, the only personal victim of a possession offense is the person doing the possessing, or *being* the possessor. The punishment of possession directly interferes with the possessory interest of the person in possession of the thing in question. And traditionally, that possessory interest has enjoyed extensive protection in American law. Interference with someone's possession gives rise to criminal liability (in the form of the crime of larceny) and civil liability (in the form of the tort of trespass).

In fact, courts have from early on enforced the possessory interest even of wrongful possessors. Since the crime of larceny protects possession *per se*, the thief can be the victim of another thief. This age old doctrine has been interpreted as an attempt

³⁴⁷ Elizabeth Anne Stanko, *The Impact of Victim Assessment on Prosecutors' Screening Decisions: The Case of the New York County's District Attorney's Office*, 16 L. & SOC'Y REV. 225 (1981); see also TOWARDS A CRITICAL VICTIMOLOGY (Ezzat A. Fattah ed., 1992).

³⁴⁸ See Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3 (1999).

to deter the use of self-help, which in medieval English law was treated as contempt of the king, who claimed the monopoly of violence.³⁴⁹ To engage in self-help, for example by using violence to retake stolen goods or land illegally possessed, drew into question the king's ability to maintain the peace of his realm by punishing the illegal possessor. At the same time, the universal prohibition of interference with possession also reflected the central significance assigned to the possessory interest itself. The violent retaking of stolen goods was prohibited for the same reason that the initial larceny was prohibited—it interfered with the current possessor's interest in the objects, even though the original possessor's *ownership* remained undisturbed.³⁵⁰ It was larceny, since larceny was the interference with possession, period.

So close is the connection between larceny and possession that the history of the law of larceny is largely the history of the concept of possession. In this context, the concept of possession already displayed the considerable malleability that would allow it to play such an important role in the use of possession offenses as flexible policing tools. Interestingly, the judicial use of possession to expand the borders of larceny already had obvious policing overtones. This manipulation of larceny with the help of the invention of the concept of "constructive possession" occurred against the background of master-servant law, with the effect of dramatically expanding the servant's liability vis-à-vis the property of his lord. Originally, servants could not steal objects entrusted to them by their lord for the simple reason that they had legally acquired possession of them. What they already possessed they couldn't steal, since larceny was the interference with someone else's possession. This loophole was eventually closed to better protect the lord's property against disloyal—but not yet thieving—servants. So the courts invented the concept of constructive possession. The servant, it was decided in the eighteenth century, had only "custody" of the objects handed to him by his lord, while possession, *constructive* possession, remained with the master. Hence, when the servant ran away, or

³⁴⁹ POLLOCK & MAITLAND, *supra* note 115, at 54.

³⁵⁰ *Id.* at 42.

otherwise misappropriated the objects constructively possessed by his lord, he committed larceny.³⁵¹

That the possession of the object has been prohibited by the state makes no difference—it can still be stolen. Even the possessory interest in contraband is protected against interference by another. Again and again, the courts have upheld convictions for larceny of contraband, including intoxicating liquor³⁵² and gambling devices.³⁵³

Yet, it is an entirely different story when the *state* rather than another person interferes with the otherwise so strictly guarded possessory interest. A full discussion of this topic would take us too far afield since it would require an investigation of the relationship between the power of eminent domain and the regulation of real property under the police power. A brief look at the state's authority to interfere with *personal* property, or chattel, will suffice for our purposes, especially since the privileged position of the state will come through loud and clear even in this limited context. This limitation also makes sense because larceny originally was limited to personal, as opposed to real, property and the possession offenses that concern us here all prohibit the possession of personal, not real, property.

State officials enjoy very wide authority to commit acts that would constitute larceny if committed by a private person. Any seizure of property by a police officer, as opposed to a brief inspection, is, technically speaking, a theft—it permanently interferes with the possessory interest of a person. Notice that this theft occurs long before the state action that tends to receive the lion share of attention, forfeiture. The disposal of forfeited property presumes a prior theft and constitutes an additional offense: destruction of property or criminal mischief.³⁵⁴ Similarly, an arrest is on the face of it an assault³⁵⁵ and false or un-

³⁵¹ See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 704 (2d ed. 1986).

³⁵² *Commonwealth v. Crow*, 154 A. 283 (Pa. 1931); *People v. Otis*, 139 N.E. 562 (N.Y. 1923); *Ellis v. Commonwealth*, 217 S.W. 368 (Ky. 1920); *State v. May*, 20 Iowa 305 (1866).

³⁵³ *Smith v. State*, 118 N.E. 954 (Ind. 1918).

³⁵⁴ Damaging property of another person. See, e.g., N.Y. PENAL LAW § 145.00 (McKinney 2000 & Supp. 2001); MODEL PENAL CODE § 220.3 (1985).

³⁵⁵ Inflicting minor or serious physical harm on another person. See, e.g., N.Y. PENAL LAW §§ 120.00, 120.05 (McKinney 2000 & Supp. 2001); MODEL PENAL CODE § 211.1(1), (2) (1985).

lawful imprisonment;³⁵⁶ the mere entrance into a house to execute a search warrant a trespass;³⁵⁷ imprisonment is, once again, false or unlawful imprisonment; and execution is *prima facie* murder.³⁵⁸ In each case, what distinguishes one from the other is that one is justified and the other isn't.

But what provides this justification? The answer is, in a state-centered system of criminal law, the status of the actor as a state official. In fact, and increasingly also in law, the inquiry begins and ends with the question whether the putative thief was a police officer or not. So entrenched is the notion that status alone justifies the actions in these situations that the very need to inquire into a justification is dismissed as preposterous. This was not always the case. In nineteenth century America, trespass actions against police officers who entered private residences were not uncommon and not always unsuccessful.³⁵⁹

The point is not that no justifications would be available. In fact, larceny and each of the offenses listed above—with the exception of assault and murder—often have justifications built into their very definition (“having no right to do so nor any reasonable ground to believe that he has such right,”³⁶⁰ “not licensed or privileged,”³⁶¹ “unlawful,”³⁶² “false”³⁶³). The point is instead that these justifications are irrelevant, that no state official needs to avail himself of them. State officials are by their nature implicitly exempt; it is as though every criminal offense, no matter how serious, contained the following silent clause: “except if it is committed by a state official.” A criminal code littered with this clause would drive home the point that the official (non-civilian) makers, appliers, and enforcers of penal norms lie beyond their reach.

This tacit exemption for state officials is rarely made explicit. This is why the lengthy and detailed list of “exemptions”

³⁵⁶ Restraining another person so as to interfere substantially with his liberty. *See, e.g.*, N.Y. PENAL LAW § 135.05 (McKinney 2000); MODEL PENAL CODE § 212.3 (1985).

³⁵⁷ Entering any building without permission. *See, e.g.*, N.Y. PENAL LAW § 140.05 (McKinney 2000 & Supp. 2001); MODEL PENAL CODE § 221.2 (1985).

³⁵⁸ Intentionally causing the death of another person. *See, e.g.*, N.Y. PENAL LAW § 125.25 (McKinney 2000 & Supp. 2001); MODEL PENAL CODE § 210.2 (1985).

³⁵⁹ *See, e.g.*, *Oystead v. Shed*, 13 Mass. 520 (1816).

³⁶⁰ N.Y. PENAL LAW § 145.00 (criminal mischief) (McKinney 2000 & Supp. 2001).

³⁶¹ MODEL PENAL CODE § 221.2 (criminal trespass) (1985).

³⁶² N.Y. PENAL LAW § 135.05 (unlawful imprisonment) (McKinney 2000).

³⁶³ MODEL PENAL CODE § 212.3 (false imprisonment) (1985).

from gun possession laws, which we encountered earlier on, is so remarkable. Imagine if every provision in every criminal code, in fact every criminal provision anywhere, were followed by an exemption provision like this:

The prohibition of [insert name of crime here] shall not apply to:

- (a) Persons in the military service of the state,
- (b) Police officers,
- (c) Peace officers,
- (d) Persons in the military or other service of the United States,
- (e) Wardens,
- (f) Prison guards,
- (g) Members of any auxiliary police force.

An exemption differs from a defense. While a defense exculpates someone who has engaged in facially criminal conduct, an exemption removes the conduct from the realm of crime. To defend oneself against an allegation of criminal behavior is to provide reasons for that behavior or to plead for mercy. To claim an exemption, by contrast, is to do just that. It is to deny the need for a defense, an explanation, a plea for mercy. It is instead to claim that the general criminal laws do not apply to oneself for one reason or another.³⁶⁴

Status-based exemptions thus shield state officials from criminal liability under the laws they generate, apply, or enforce. They turn on a fundamental distinction between the subject and the object of governance. Laws are made for others, applied against others, and enforced on others. The legislator, the judge, the police officer never imagines herself as the object, but rather always only as the subject of governance, i.e., the one doing the governing, rather than the one being governed.

Exemptions join the under-the-table immunity of state officials from criminal liability as testimony to the power of the state to protect its own.³⁶⁵ As every state official knows, he is virtually

³⁶⁴ Analogously, in tax law, to claim an exemption is different from claiming a deduction. A deduction reduces tax liability, an exemption denies it altogether. To claim an exemption is not to explain one's failure to pay taxes, but to assert that one had no obligation to pay any in the first place.

³⁶⁵ It goes without saying that state officials today also enjoy all manner of broad and explicit immunity, qualified and absolute from all manner of civil liability, even for constitutional violations. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (prosecutors entitled to absolute immunity); *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967) (judges entitled to absolute immunity).

immune against the sort of police measures the state uses to keep the rest of us under control. Few, if any, police officers, prosecutors, judges, and legislators will receive a speeding ticket. Police officers especially, who are so identified with the task of policing as to bear its name, are effectively exempted from the rules they apply.

Viewed in this light, the radical distinction between private and state interference with a person's possessory interest in personal property merely exemplifies a fundamental distinction between private and state action typical of contemporary criminal law. The contrast is nonetheless startling in its starkness, given that Anglo-American law so long has been so unyielding in its protection of possessory interests against private interference. At a time when the distinction between state and private larceny was not yet obvious to all, courts occasionally found themselves in the uncomfortable position of having to immunize the state while at the same punishing the person for the same act.

Take, for example, the 1923 case of *People v. Otis* from New York. Here, Mr. Otis argued against his larceny conviction for stealing whiskey on the perfectly reasonable—though by now hopeless—ground that he couldn't be convicted of taking possession of something from someone who had no right to possess it. Unfortunately for the New York Court of Appeals, it couldn't dismiss this argument, as many other courts had done before it and have done since, simply by referring to the old common law that saw stealing from someone who had no right to possess the item stolen, and perhaps had stolen it himself, as still stealing. (Any other conclusion, so the argument went, would mean "to discourage unlawful acquisition but encourage larceny," to quote a much trotted out phrase.³⁶⁶) Otis's case was different because the New York legislature had, in its prohibitory zeal, declared that "no property rights shall exist' in liquor illegally possessed."³⁶⁷

But, the court went on, since "[t]here can be no larceny of property not subject to ownership . . . [h]ow then, it is asked,

³⁶⁶ See, e.g., *Smith v. State*, 118 N.E. 954, 955 (Ind. 1918) (quoting *Commonwealth v. Rourke*, 10 Mass. (1 Cush.) 397, 399 (1852)).

³⁶⁷ *People v. Otis*, 139 N.E. 562, 562 (N.Y. 1923). For an analogous provision in current law, see 21 U.S.C. § 881(a) (1994 & Supp. 1999) (drug-related forfeiture; "[t]he following shall be subject to forfeiture to the United States and no property right shall exist in them").

may there be larceny of such liquor?"³⁶⁸ The answer was, simply, that the state was different. The purpose of the New York legislature's broad declaration was not to immunize private persons from larceny liability for dispossessing private persons of illegally possessed whiskey. No, the purpose was to immunize *the state* from criminal and, more important, tort liability for doing the exact same thing. There was some cause for concern since every wave of prohibitory legislation in the nineteenth and twentieth century had brought with it a slew of tort suits and constitutional challenges by liquor owners who saw their inventory turn into contraband, and their often substantial investment into a (criminal) liability, from one day to the next. And unlike the courts in most other states, with the notable exception of Indiana, the New York courts had once proven receptive to these complaints.³⁶⁹ The state, in short, meant to immunize itself, not anyone else. And since Otis was anyone else, he was out of luck.

It was in the nineteenth century challenges to liquor prohibition, i.e., the prohibition of the simple possession of liquor, that American courts took their hardest—and so far only—look at the oppressive potential of possession offenses. The prohibition of liquor possession was a harbinger of things to come, also because it fit into a comprehensive police regime that began with a general licensing requirement. At the outset, nineteenth century liquor regulation looked much like it does today—and, as we'll see, generally resembled the regulation of guns. To sell liquor, one needed a license. Selling liquor without a license was a crime. According to William Novak, these penal provisions were "a constant feature of local law enforcement," at least in Plymouth County, Massachusetts.³⁷⁰ A 1787 Massachusetts law provided that liquor licenses were to be granted by town selectmen only to applicants whom they found to be "person[s] of sober life and conversation."³⁷¹

This license system was simple, but it was not strict enough for temperance enthusiasts. By the 1830s, outright prohibitions

³⁶⁸ *Otis*, 139 N.E. at 562-63.

³⁶⁹ *Wynehamer v. People*, 13 N.Y. 378 (1856) (applying Act for the prevention of intemperance, pauperism and crime, of Apr. 9, 1855); *see also* *Beebe v. State*, 6 Ind. 401, 419-20 (1855).

³⁷⁰ NOVAK, *supra* note 277, at 173.

³⁷¹ *Id.*

of liquor began to appear, culminating in a much copied Maine liquor law of 1851. Under this new regime, licenses were still granted, but they were restricted to "special municipal agents for medicinal and mechanical purposes."³⁷² Now, for the first time, the possession of liquor was criminalized. Liquor possessed in violation of these laws was subject to confiscation and summary abatement as a public nuisance, without compensation.

Much of the litigation and commentary triggered by these new laws focused on their procedural aspect. So, for example, Massachusetts Chief Justice Lemuel Shaw was inspired to write an eloquent opinion on the demands of "due process," even in the case of the forfeiture and destruction of contraband liquor.³⁷³ There was also much handwringing about the retroactive effect of the sudden condemnation of once valuable property held by businessmen, who at one time or another were at least reputable enough to have passed the character test of a liquor licensing officer, perhaps more than once.

These musings, though often extensive, are of little interest to us, except perhaps to point out, once again, the tendency of American jurists to evade difficult substantive questions by delving into detailed, but secondary, procedural ones. Far more interesting are two—now celebrated—cases in which courts addressed the substantive question of whether the state may interfere with the property rights of liquor owners through statutes that prohibited, among other things, the possession of liquor.

In *Beebe v. State*,³⁷⁴ the Indiana Supreme Court struck down, as an unjustified interference with the right to property, an 1855 Indiana law providing that "no person shall manufacture, keep for sale, or sell" liquor. Violations of the law were punished with confiscation and destruction of the liquor and fine. Beebe had refused to pay the fine and landed in prison. Technically, the case arose out of his habeas corpus petition to win release from confinement. In essence, the court concluded that the statute's radical interference with a person's right to property could not be justified because the property in question was not inherently dangerous, or, in the court's words, because "the manufacture

³⁷² *Id.* at 179.

³⁷³ *Fisher v. McGirr*, 67 Mass. (1 Gray) (1854).

³⁷⁴ *Beebe v. State*, 6 Ind. 401 (1855).

and sale and use of liquors are not necessarily hurtful."³⁷⁵ The criminalization of public drunkenness was another question, for "[i]t is the abuse, and not the use, of all these beverages that is hurtful."³⁷⁶

One year later, the New York Court of Appeals followed suit, but on broader grounds. In *Wynehamer v. People*, the court invalidated the "Act for the Prevention of Intemperance, Pauperism and Crime," also passed in 1855, which prohibited the sale of liquor, as well as its possession with intent to sell, along with its simple possession.³⁷⁷ In the court's view, the statute confronted liquor possessors with an intolerable dilemma:

Property is lost before the police are in motion, and, I may add, crime is committed without an act or even an intention. On the day the law took effect, it was criminal to be in possession of intoxicating liquors, however innocently acquired the day before. It was criminal to sell them, and under the law, therefore, no alternative was left to the owner but their immediate destruction.³⁷⁸

The New York court based its decision on the simple, and sweeping, proposition that the legislature was not justified in summarily destroying liquor because liquor was private property, period. What was at stake was nothing less than "a vindication of the sanctity of private property."³⁷⁹ Unlike their Indiana colleagues, the New York judges saw no need to investigate the dangers of alcohol. Since "all property is alike in the characteristic of inviolability," the only thing that mattered was that liquor was indeed property.³⁸⁰ "If the legislature has no power to confiscate and destroy property in general," which it clearly had not, "it has no such power over any particular species."³⁸¹ In the face of such categorical principles, a detailed analysis of the dangers of a particular type of property was not only unnecessary, but positively dangerous:

It may be said, it is true, that intoxicating drinks are a species of property which performs no beneficent part in the political, moral or social economy of the world. It may even be urged, and, I will admit,

³⁷⁵ *Id.* at 416.

³⁷⁶ *Id.* at 415.

³⁷⁷ *Wynehamer v. People*, 13 N.Y. 378 (1856).

³⁷⁸ *Id.* at 388-89.

³⁷⁹ *Id.* at 387.

³⁸⁰ *Id.* at 385.

³⁸¹ *Id.*

demonstrated with reasonable certainty, that the abuses to which it is liable are so great, that the people of this state can dispense with its very existence, not only without injury to their aggregate interests, but with absolute benefit. The same can be said, although, perhaps, upon less palpable grounds, of other descriptions of property. Intoxicating beverages are by no means the only article of admitted property and of lawful commerce in this state against which arguments of this sort may be directed. But if such arguments can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of the legislature, and the guarantees of the constitution are a mere waste of words.³⁸²

Although the Indiana statute prohibited possession with intent to sell and the New York statute prohibited possession with intent to sell as well as mere possession, neither court focused on that aspect of their respective statutes. Beebe was convicted of manufacturing and selling liquor, Wynehamer of selling, and Toynbee, the other defendant in the New York case, of possession with intent to sell. The possession question didn't come up simply because the courts found that the prohibition of manufacture and sale alone constituted an unjustified interference with the right of property. Their discussion applies with even greater force to the prohibition of possession which of course is even more intrusive than prohibiting the creation and alienation of the item possessed.

If the prohibition of possession was insignificant, so was the distinction between different kinds of possession, namely simple possession and possession with intent to sell. That distinction, however, played a crucial role in several later decisions reviewing liquor statutes containing possession clauses and other possession offenses. The prohibition of simple possession was struck down, and the prohibition with intent to sell was upheld, on the general ground that mere possession "neither produces nor threatens any harm to the public."³⁸³ For example, an 1889 Michigan case invalidated the 1887 amendment to the state liquor law which made it a crime to "keep [liquor] in his possession for another" on the ground that:

[T]he keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public; and, therefore, the statute prohibiting

³⁸² *Id.* at 384-85.

³⁸³ TIEDEMAN, *supra* note 280, at 499-500.

such keeping in possession is not a legitimate exertion of the police power.³⁸⁴

We have already encountered the Rhode Island case, which, in upholding an 1882 statute making it a crime to “have in his possession adulterated milk, to wit, milk which contained more than eighty eight per cent. of watery fluids, and less than twelve per cent. of milk solids, . . . with intent then and there to sell the same,” stressed that “[t]he offence consists not in the possession of [adulterated] milk . . . but in the *intent* to sell or exchange such milk,”³⁸⁵ implying that there would have been trouble had it prohibited mere possession.

Now, as we saw, the distinction between simple and compound possession has lost much of its significance because of implicit and explicit presumptions that, emanating backward and forward in time, could quickly generate upon prosecutorial demand not only the intent to sell, but all manner of illegal acquisitions and alienations of the object simply possessed. The significance of these nineteenth century cases, however, does not lie in their recognition of the distinction between different types of possession, but in their deep respect for the property rights of the possessor. Fine doctrinal distinctions, such as that between simple and compound possession, were carefully drawn precisely because the courts knew that they were entering a sensitive area when they were reviewing statutes massively interfering with property rights, even to the point of prohibiting not merely the acquisition and sale, but even the mere possession of certain items of property, or as the *Wynehamer* court put it, the existence of the thing itself.³⁸⁶

Today, this concern about the policing of contraband property has completely disappeared. Today’s legislatures and courts don’t think twice about the legitimacy of criminalizing not only the manufacture and sale (along with virtually every imaginable means of acquisition and alienation), but also the possession of certain items. In fact, contemporary criminal law not only punishes the possession with intent to sell, but simple possession. And it not only punishes simple possession, but simple possession with no mens rea requirement of any kind. Today the legitimacy of possession offenses is so far beyond the

³⁸⁴ *State v. Gilman*, 10 S.E. 283, 284 (W. Va. 1889).

³⁸⁵ *State v. Smyth*, 14 R.I. 100, 100-01 (1883).

³⁸⁶ *Wynehamer*, 13 N.Y. at 415.

shadow of a doubt that we punish simple possession with life imprisonment without parole, which is a far cry from the modest fines imposed by the statutes that so incensed the *Beebe* and *Wynehamer* courts. So oblivious are we to the otherwise so heavily guarded property rights at stake in possession offenses that we completely ignore that aspect of the property police that drew the harshest criticism from nineteenth century courts: the automatic confiscation and destruction of contraband, supplemented by the widespread "forfeiture" (i.e., confiscation and disposal) of any property, real and personal, somehow connected to some criminal activity or other, which more often than not consisted precisely in the possession of contraband, specifically drugs.

2. *Opium, Chinese Immigrants, and the War on Crime*

How did we get from there to here? The answer is dangerous drugs, dangerous outsiders, and a depersonalized criminal law as danger disposal, or, more simply, opium, Chinese immigrants, and the war on crime.

Possession offenses are a fairly recent invention in Anglo-American criminal law. We know already that the common law did not recognize any possession offenses, simple or compound, because "the bare possession is not an act."³⁸⁷ To punish possessing "indecent, lewd, filthy, bawdy and obscene prints" with intent to publish, stamps which could impress the scepter on coin with intent to utter sixpences for half guineas, or counterfeit coin with intent to utter would amount to punishing a mens rea without an actus reus, "an intent without an act."³⁸⁸ No one would have dreamed of punishing simple possession, without any intent, since then both mens rea and actus reus would be missing.

English *statutory* law had no similar compunction about criminalizing possession, and for that matter simple possession, directly. The crown was not shy about enlisting the extraordinary preventive potential of suppressing the possession even before the use. A good, and early, example is the treason statute 8 & 9 Will. 3 c. 26, which provided:

³⁸⁷ 1 JOEL PRENTISS BISHOP, *NEW COMMENTARIES ON THE CRIMINAL LAW UPON A NEW SYSTEM OF LEGAL EXPOSITION* 111 (1892).

³⁸⁸ *Regina v. Dugdale*, 1 El. & Bl. 435, 439 (1853) (Coleridge, J.).

That whoever (other than the persons employed in the Mint) shall make or mend, or assist in the making or mending, &c. any puncheon, counter-puncheon, matrix, stamp, die, pattern or mould, of any materials whatsoever, in or upon which there shall be, or be made or impressed, or which will make or impress the figure, stamp, resemblance, or similitude, of both or either of the sides or flats of any gold or silver coin current within this kingdom . . . or shall have in their houses, custody, or possession, any such puncheon, counter-puncheon, matrix, stamp, die, or other tool or instrument before-mentioned, shall be adjudged guilty of High Treason.³⁸⁹

After early attempts to use gun possession to police blacks, the punishment of simple possession in American criminal law began in earnest when the western states, and Oregon in particular, decided it was high time to police two new serious threats to the well-being of the community, one an inherently dangerous object, opium, and the other an inherently dangerous race, the Chinese. The 1887 Oregon "Act to regulate the sale and gift of opium, morphine, eng-she or cooked opium, hydrate of chloral, or cocaine" provided that "[n]o person shall have in his or her possession or offer for sale" any of the drugs enumerated in the title "who has not previously obtained a license from the county clerk of the county in which he or she resides or does business."³⁹⁰

In *Ex parte Mon Luck*, a Chinese man, who had been imprisoned under this new law, filed a habeas corpus petition to regain his freedom, pointing out that courts had struck down statutes prohibiting the simple possession of liquor as unjustified uses of the police power. In response, the court explained that opium, unlike alcohol, was dangerous *per se* and its use, therefore, necessarily constituted abuse. It was "admitted by all to be an insidious and demoralizing vice, injurious alike to the health, morals, and welfare of the public."³⁹¹

But not only was opium qualitatively different—and more dangerous—than alcohol, that traditional American beverage of choice. At least as important, the people who possessed it were likewise qualitatively different—and more dangerous—than Americans. As the court explained, opium, again unlike alcohol, "has no place in the common experience or habits of the

³⁸⁹ An Act for the better preventing the counterfeiting the current coin of this kingdom, 1697, 8 & 9 Will. 3, c. 26 (Eng.), quoted in *Rex v. Lennard*, 1 Leach 90 (1772).

³⁹⁰ *Ex parte Mon Luck*, 29 Ore. 421 (1896).

³⁹¹ *Id.* at 428.

people of this country.”³⁹² The “public’s” well-being was threatened by aliens, the Chinese, through their very presence, but in particular through their possession of an alien substance which, due to its inherent and mysterious dangerousness, was certain to drive “the weak and unwary . . . to their own physical and mental ruin.”³⁹³

In other words, the dangerous Chinese must be prevented at all costs from using the dangerous opium to ruin the American—alcohol drinking—community. Given the vital importance of this campaign of preventive communal self-protection for the very existence of the community, the legislature could not afford to detain itself with legal niceties. Quick and decisive action was called for. There simply was no time for luxuries such as qualms about the unconstitutionality of destroying property rights in an object by prohibiting its sale, and if not its sale, then certainly its possession with intent to sell, and if not its possession with intent to sell, then certainly its simple possession.

Such worries were entirely misplaced not only because the situation was so desperate and the threat to the American community so serious. They were also simply inappropriate given the object of the necessary police action: threats. It made no difference whether these threats emanated from the possessor or the item possessed, or, for that matter, the interplay of the two. Possessor and possessed were relevant only as threats, and threats don’t have constitutional rights.

In the end, the possessor and the possessed, and the respective threats they embodied, were indistinguishable. The perceived dangerousness of opium derived in large part from the perceived dangerousness of those who possessed it, particularly in the absence of scientific research into the constitution and effect of opium. In the end, however, it mattered little whose dangerousness infected the other. This identification of possessor and possessed emerges clearly from a remarkably—and unusually—honest federal court opinion upholding the constitutionality of a predecessor to the statute at issue in *Mon Luch*.³⁹⁴ The 1885 statute at issue in *Ex parte Yung Jon*, “An act to regulate the sale of opium, and to suppress opium dens,” prohibited the

³⁹² *Id.*

³⁹³ *Id.* at 427.

³⁹⁴ *Ex parte Yung Jon*, 28 F. 308 (D. Ore. 1886).

sale, and not yet the possession, of opium. In rejecting Yung Jon's habeas corpus petition, the court conceded that opium use was "now chiefly confined to the Chinese," and even that, in direct contradiction to the reasoning of the Oregon court in *Mon Luck* ten years later, "[s]moking opium is not a vice."³⁹⁵ But more important, even stunning, was its conclusion: "therefore it may be that this legislation proceeds more from a desire to vex and annoy the 'Heathen Chinees' in this respect, than to protect the people [!] from the evil habit."³⁹⁶ Perhaps even more remarkable, however, was that the court, having just let the cat out of the bag, squeezed it right back in, on the ground of no less sweeping a principle of constitutional adjudication than that "the motives of legislators cannot be the subject of judicial investigation for the purpose of affecting the validity of their acts."³⁹⁷

Whether "to vex and annoy the 'Heathen Chinees'" or "to protect the people from the evil habit" of opium smoking, or both at the same time, Oregon's opium statute amounted to an all out war on the Chinese and opium, with the goal of extinguishing them as potential sources of threats to "the people," before they had a chance to manifest their inherent noxious potential. The opium possession statute thus must be seen as part of a comprehensive, two-pronged, effort to eliminate the Chinese threat: by keeping them out, by expelling them from the body politic, and, if this proved impossible for some reason, by subjecting them to intensive police control through simple possession offenses. The possession offenses proved useful police tools for the now familiar reasons, including easy detection and proof, followed by incapacitation. In addition, conviction could result in the preferred means of policing: expulsion through deportation.

Although this police campaign emanated from the western states, it soon engulfed the entire nation. Federal interference was necessary, prohibiting Chinese immigration. And a new administrative agency, the Immigration and Nationalization Service, was needed to police the influx of Chinese. This is not

³⁹⁵ *Id.* at 312.

³⁹⁶ *Id.*

³⁹⁷ *Ex parte Yung Jon*, 28 F. 308, 312 (D. Ore. 1886). For an extended exploration of this question, a century later, see John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205 (1970).

the place for a detailed recounting of the history of the growth of American immigration law as an anti-Chinese police measure, especially since this story has been told recently and with great success.³⁹⁸ This discriminatory purpose also requires no great interpretative unearthing because it appears brazenly on the surface, for the entire world to see. The Chinese were so far beyond the pale, and everyone knew that they were, that a camouflage for racism was unnecessary. As the first Justice Harlan put it matter of factly in 1896, the same year the Oregon Supreme Court decided *Mon Luck*, in his dissent in *Plessy v. Ferguson*, now celebrated as a plea for the constitutional enforcement of racial equality: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."³⁹⁹ Harlan's point? The criminal prohibition against blacks riding in white-only railroad cars was patently irrational since the same prohibition did not apply to the Chinese who, as was common knowledge, were inferior to and even more despised than blacks.

A federal case from the same period—1892 to be exact, and thus falling between *Mon Luck* and *Yun Jong*—made the connection between containing the dangerous Chinese and their dangerous opium as police measures explicit. The question in this case out of Louisiana was whether the court had criminal jurisdiction over an illegal Chinese immigrant, Hing Quong Chow, who had been "found" in the United States in violation of a federal statute providing that "any Chinese person or person of Chinese descent . . . shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."⁴⁰⁰

The court dismissed the indictment on the ground that the case involved a matter of preventive police, not of retrospective punishment. As such, it was something for an immigration

³⁹⁸ LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF THE MODERN IMMIGRATION LAWS* (1995).

³⁹⁹ 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

⁴⁰⁰ *United States v. Hing Quong Chow*, 53 F. 233, 234 (C.C.E.D. La. 1892) (citations omitted).

commissioner, not a judge. Along the way, the judge gave a telling reading of the statute which, he explained:

. . . [d]eals with the coming in of Chinese as a police matter, and is the re-enacting and continuing what might be termed a 'quarantine against Chinese.' They are treated as would be infected merchandise, and the imprisonment is not a punishment for a crime, but a means of keeping a damaging individual safely till he can be sent away. In a summary manner, and as a political matter, this coming in is to be prevented.⁴⁰¹

This being a police matter, then, rather than a punishment matter, the principles of substantive and procedural criminal law were suspended. As an object of police, rather than of punishment, as a danger to be eliminated, rather than as a person guilty of a criminal act, Hing Quong Chow was a threat carrier, a nuisance, and thus depersonalized enjoyed the same individual rights as "infected merchandise." There was no mens rea requirement, no actus reus, no inquiry into guilt, no conviction, no trial, no judge, no jury, no presumption of innocence, no burden of proof on the state, and, of course, no punishment:

The matter is dealt with as political, and not criminal. The words used are those which are ordinarily found in criminal statutes; but the intent of congress is . . . unmistakable. What is termed "being convicted and adjudged" means "found," "decided" by the commissioner, representing not the criminal law, but the political department of the government.

...

A reversal of the presumption of conduct or presence being lawful might be introduced into procedures which were political in character, and assimilated to those relating to quarantine The whole proceeding of keeping out of the country a class of persons deemed by the sovereign to be injurious to the state, to be effective of its object, must be summary in its methods and political in its character.⁴⁰²

The mere fact that the statute provided for one year's imprisonment at hard labor didn't mean that it was a criminal law rather than a police measure any more than did its employment of terms "ordinarily found in criminal statutes." No, the imprisonment also was a matter of quarantine: "[H]e must keep from entering the community of the people of the United States, and therefore is to be imprisoned. To prevent expense to the government, and as a sanitary matter, he is to be made to work."⁴⁰³

⁴⁰¹ *Id.* at 234.

⁴⁰² *Id.*

⁴⁰³ *Id.* at 235.

Of course, the racist immigration policies against the Chinese fit into a comprehensive, local and national effort in the nineteenth century to exclude, and if that proved unsuccessful, to police all immigrants. Like vagrants and tramps, immigrants as a group posed a dual threat to the "public welfare" as potential criminals or potential public charges. The constitutionality of this police regime was never seriously questioned. So in *New York v. Miln*, the Supreme Court in 1837 upheld a New York statute requiring ship captains to post bond for each passenger to cover any expenses the port city might incur in poor relief as "a mere regulation of internal police":

We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease.⁴⁰⁴

Still, in their open racism and harshness, the anti-Chinese policies stood apart from this general discrimination against aliens in the name of social hygiene. Unlike other, particularly European, immigrants, the Chinese were not simply presumptively dangerous, they were dangerous *per se*. And so was opium, making it the paradigmatic Chinese drug. Unlike liquor, the intoxicant of choice among Americans and European immigrants alike, opium was inherently dangerous, so dangerous that only complete prohibition, even of its possession, would stand any chance of containing its noxious nature.

Eventually, the instrument of police through possession spread from opium to other dangerous drugs, and from the Chinese to other dangerous classes, and, ultimately, with the development of a state centered criminal law, to the entire "public" as a giant dangerous class. In the end, the very public whose welfare originally was protected against outside threats thus finds itself transformed into an outside threat, this time to the interests of the state, all of course ostensibly in the interest of its own welfare. Through the use of facially neutral, abstract, police offenses like possession, camouflaged as traditional criminal statutes, the public ends up being policed by the state for its protection from itself.

⁴⁰⁴ *New York v. Miln*, 36 U.S. (11 Pet.) 102, 142-43 (1837).

In the area of drug police, the analogue to the general prohibition of gun possession without a state issued license that on its face applies to the very people of "good morals" whom it is designed to protect, is the prohibition of marijuana possession. Designed in the early decades of the twentieth century along the lines of the earlier Chinese opium model as a campaign to police another class of dangerous aliens, Mexican immigrants, this prohibition fulfilled its regulatory function admirably, at least at first. It was an added benefit when marijuana use, and therefore the scope of its police through possession offenses, spread in the 1920s to another troublesome outgroup, urban blacks and black jazz musicians in particular. It didn't hurt either that "'degenerate' bohemian subcultures" soon took up the drug as well.⁴⁰⁵

The facially unlimited scope of marijuana possession offenses did not become apparent until the 1960s, when the chickens came home to roost. Having entrusted itself with the power to punish marijuana possession, period, the state began to apply that power against members of the very community whose integrity, whose order, these laws were, in practice though not on paper, designed to protect. Suddenly the "sons and daughters of the middle class"⁴⁰⁶ found themselves the objects of police, demoted to the status of a dangerous outgroup. And thus the enormous police potential of possession revealed itself to those who had always thought of themselves as the policers, rather than the policed. As Richard Bonnie and Charles Whitebread pointed out in 1970, "[s]ince marijuana use has become so common, there are certain student and hippie communities in which the police could arrest nearly everyone. Here the problem of selective enforcement necessarily arises—the police arrest those they dislike for other reasons"⁴⁰⁷ Substitute "gun or drug possession" for "marijuana use" and "urban blacks" for "certain student and hippie communities" and the statement captures an important aspect of the war on crime today.

To recapitulate, the right to property of possessors of contraband today is as irrelevant as their other personal rights sim-

⁴⁰⁵ Bonnie & Whitebread, *supra* note 263, at 1035.

⁴⁰⁶ *Id.* at 1096.

⁴⁰⁷ *Id.* at 1100-01; see also *People v. Valot*, 189 N.W.2d 873, 874 (Mich. Ct. App. 1971) ("hippie-type people").

ply because they are considered not as persons, but as threats. Threats cannot have rights. They also can't be victims. The difference between the nineteenth century cases carefully reviewing, and in some cases overturning, statutes interfering with the right to property in liquor and contemporary cases upholding statutes prohibiting simple possession of drugs without any proof of mens rea, including negligence, is the difference between respectable white Americans who enjoy their occasional drink or who run a liquor related business and opium smoking Chinese immigrants or their contemporary analogue, the inner city "drug fiend." Over time, the formally abstract but substantively discriminatory system of possession police showed its potential as a convenient means of state oppression, not only of recognized outgroups, but of those who fancied themselves members of the ingroup.

3. *The State as Victim*

With the irrelevance of the possessor himself, all potential personal victims of possession offenses have been eliminated. Only the state remains. And the state is defined precisely in contradistinction to a community of persons. The state is apersonal because it ostensibly, and simply, manifests the interests of the community it governs. It is a bureaucratic institution with no identity, and no function, except the maintenance of "public welfare" through the protection of "social interests." It is that which stands above the particular groups that constitute the mass of people under its governance, (civil) society or the community at large.

Left without personal victims, the essence of a possession offense is reduced to disobedience of state authority. At bottom, the function of possession offenses is to control dangerous persons and things, i.e., to eliminate or at least to minimize threats. Threats to what? To the "public's" "welfare," the fundamental "social interest." The state defines both "public" and "welfare," "social" and "interest." Most often, the public is simply the dominant group in society, the ingroup. The state, however, may also come to identify itself with the public and confuse the public's welfare with the state's. The first case results in intrasocial conflict, the second in consternation among members of the (normally) dominant social group who saw the state as the extension of their community. Oppression occurs in both cases,

either of outsiders by the dominant social group (via the state) or of the community at large by the state directly.

Both aspects of a state-centered criminal law, or rather police regime, are important. Not only is the state the only victim, but the state, as an abstraction, is an entirely apersonal victim. The first move eliminates all personal victims, the second move insulates the first from critique.

Once again, the notion of the state as the only victim is nothing new to modern American criminal law. Since the middle ages, English criminal law has been conceived of as a system of enforcing the king's peace. And the king's peace in turn was nothing other than the peace attached to every householder, his *grið* or *mund*.⁴⁰⁸ Since the king's household eventually covered the entire realm, rather than his court, any attack within the realm against one of *his* subjects (an odd, but all too common, oxymoron) also disturbed *his* peace. In Pollock and Maitland's words, "[b]reach of the king's peace was an act of personal disobedience," a personal affront, daring him to exercise his power to keep his house in order.⁴⁰⁹

And yet again, the modern American state makes for an entirely different victim than did the English king, much as it makes for a different kind of *pater patriae*. The significant difference here lies in the fact that a breach of the king's peace amounted to a personal challenge to the king, as a person and not merely as an institution. Every man within the king's *mund* was beholden to him personally by an oath of fealty, as every man to his lord, ever since William the Conqueror "decree[d] that every freeman shall affirm by oath and compact that he will be loyal to king William both within and without England, that he will preserve with him his lands and honor with all fidelity and defend him against his enemies."⁴¹⁰

The state, unlike the king, has no personal identity. As a total institution, not merely an abstraction but an abstraction precisely from particular persons and their conflicting interests, the state has only an institutional identity. So, counterfeiting is not an offense against the king, but "a contempt of and misdemeanor against the United States."⁴¹¹

⁴⁰⁸ POLLOCK & MAITLAND, *supra* note 115, at 463.

⁴⁰⁹ *Id.* at 45.

⁴¹⁰ LAWS OF WILLIAM THE CONQUEROR § 3.

⁴¹¹ *United States v. Smith*, 27 F. Cas. 1147 (C.C.D. Mass. 1792).

Or so "it" would have us believe. In practice, though not in theory, the state, of course, is constituted by certain persons called officials, officers, ministers, judges, and senators. Although a violation of state commands constitutes, technically speaking, an act of abstract disobedience against the state, as opposed to one of personal disobedience against the king, it is always also an act of disobedience against the officials constituting the state and one of *personal* disobedience against the particular official issuing the command or enforcing it. The modern American system of governance thus turns out to be just like the historical English one, except it has no head, or rather its head is not a person, but a deliberately apersonal abstraction. In the United States today, an act of disobedience against the state is an act of disobedience against a particular state official. In England, threats to judicial authority were always also threats to royal authority because all judges derived their power from a commission issued on the king's prerogative. As a "judicial officer," a judge represented royal authority to non-officials. As a "ministerial" officer, however, he was a link in the chain of command moving from the king through superior to inferior courts.⁴¹² Unlike in England, the indignity of defiance or contempt in the United States does not travel up the ladder to the king, but remains with the state official experiencing it first hand, since there is nothing at the top except a great abstraction called "the state."

So, we find that the modern American state takes great pains to protect the authority, dignity, safety, and well-being in the broadest sense, of "its" officials. Acts, even hints, of disobedience are punished severely, and acts of obedience rewarded. Any interference with the well-being of a state official, physical or otherwise, is likewise threatened with punishment. In general, the line between the state and everyone else, between the policers and the police, is guarded with great vigilance. So any behavior by the policed that is inconsistent with their inferior status, including the egregious attempt to assume the superior status of the state official on the other side of the line, is taken as a challenge to the line separating the state from the rest and therefore represents a welcome opportunity to reinforce that all-important line by putting the disorderly and contumacious in their proper place.

⁴¹² BLACKSTONE, *supra* note 8, at 284.

The protection of state officials is achieved through a variety of status-based provisions, sprinkled throughout modern American criminal codes. For example, in the New York Penal Law one finds not only a special "assault on a peace officer, police officer, fireman or emergency medical services professional,"⁴¹³ along with a special "aggravated assault on a police officer of peace officer,"⁴¹⁴ but also a special "assault against a peace office, police officer, fireman, paramedic, or emergency medical technician . . . by means including releasing or failing to control an animal."⁴¹⁵ As in all modern American death penalty statutes, first degree murder is elevated to capital murder if the victim is a police officer, peace officer, or employee of a correctional institution.⁴¹⁶ Even "killing or injuring a police *animal*" is covered in a special provision.⁴¹⁷

At the same time, the authority and dignity of state officials is ensured by punishing disobedience and rewarding obedience. Most obvious are offenses that explicitly criminalize acts of disobedience, including—in the New York Penal Law—disorderly "conduct" by "congregat[ing] with other persons in a public place and refus[ing] to comply with a lawful order of the police to disperse"⁴¹⁸ (a watered down version of the infamous English Riot Act, which criminalized disobedience of the order to disperse communicated by reading the Act⁴¹⁹), resisting arrest,⁴²⁰ refusing to aid a peace or police officer,⁴²¹ failing to respond to an appearance ticket,⁴²² and refusing to yield to a party line.⁴²³ Plus, there are extensive and comprehensive prohibitions of all manners of contempt, including criminal contempt in the first and second degree,⁴²⁴ which reaches "[d]isorderly, contemptuous, or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending

⁴¹³ N.Y. PENAL LAW § 120.08 (McKinney 2000).

⁴¹⁴ *Id.* § 120.11.

⁴¹⁵ *Id.* § 120.05(3).

⁴¹⁶ *Id.* § 125.27(1)(a)(i), (ii), (iii).

⁴¹⁷ *Id.* § 195.06 (emphasis added).

⁴¹⁸ *Id.* § 240.20(6).

⁴¹⁹ Riot Act, 1714, 1 Geo., c. 5 (Eng.).

⁴²⁰ N.Y. PENAL LAW § 205.30 (McKinney 2000 & Supp. 2001).

⁴²¹ *Id.* § 195.10.

⁴²² *Id.* § 215.58.

⁴²³ *Id.* § 270.15.

⁴²⁴ *Id.* §§ 215.50-51.

to interrupt its proceedings or to impair the respect due to its authority,"⁴²⁵ "intentional disobedience or resistance to the lawful process or other mandate of a court except in cases involving or growing out of labor disputes,"⁴²⁶ "[c]ontumacious and unlawful refusal to be sworn as a witness in any court proceeding or, after being sworn, to answer any legal and proper interrogatory,"⁴²⁷ "[i]ntentional failure to obey any mandate, process or notice, issued pursuant to . . . the judiciary law, or to rules adopted pursuant to any such statute or to any special statute establishing commissioners of jurors and prescribing their duties or who refuses to be sworn as provided therein,"⁴²⁸ "contumaciously and unlawfully refus[ing] to be sworn as a witness before a grand jury, or, when after having been sworn as a witness before a grand jury, [refusing] to answer any legal and proper interrogatory,"⁴²⁹ and "in violation of a duly served order of protection . . . intentionally or recklessly damag[ing] the property of a person for whose protection such order was issued in an amount exceeding two hundred fifty dollars."⁴³⁰

Then, for good measure, the criminal law throws in provisions punishing disobedience of other state officials, beyond judges, police officers, and peace officers, who might issue particular directions, such as subpoenas. Hence, one finds crimes of criminal contempt of the legislature,⁴³¹ and even criminal contempt of a temporary state commission⁴³² and of the state commission on judicial conduct.⁴³³

For our purposes, most interesting is the offense of criminal possession of a weapon in the fourth degree, which criminalizes "refus[ing] to yield possession of such rifle or shotgun upon the demand of a police officer" by a "person who has been certified not suitable to possess a rifle or shotgun."⁴³⁴ As a possession offense that explicitly punishes disobedience of a state official's demand to surrender the object possessed by persons deemed

⁴²⁵ *Id.* § 215.50(1).

⁴²⁶ *Id.* § 215.50(3).

⁴²⁷ *Id.* § 215.50(4).

⁴²⁸ *Id.* § 215.50(6).

⁴²⁹ *Id.* § 215.51(a).

⁴³⁰ *Id.* § 215.51(d).

⁴³¹ *Id.* § 215.60.

⁴³² *Id.* § 215.65.

⁴³³ *Id.* § 215.66.

⁴³⁴ *Id.* § 265.01(6).

“not suitable to possess” it, this offense is the paradigmatic possession police offense in the guise of an ordinary criminal statute.

The flipside of this disobedience possession offense is an obedience possession defense. So a “person voluntarily surrendering” a weapon illegally possessed to the proper police authority thereby joins the select ranks of state officials exempt from criminal possession statutes.⁴³⁵

Supplementing offenses that explicitly criminalize disobedience against the state, or rather state officials, are impersonation offenses.⁴³⁶ These statutes preserve the state’s monopoly on oppression not by punishing disobedients, but by exposing impostors. The criminal impersonator attempts to obtain for himself the respect that is due only to state officials. He is a disorderly person of the worst kind, an object of police who tries to pass as its subject. He is a personal self-counterfeiter who boldly appropriates the external indicia of insider status, be it in the form of the king’s seal or a police officer’s uniform. The interesting feature of impersonation offenses is that the impersonation by itself does no damage to the authority of the state. To the contrary, it relies on the very fact that the external indicia of statehood suffice to command obedience from outsiders. Instead, impersonation offenses are offenses against the state because they represent an attempt to circumvent the strict requirements for entry into statehood. The impersonator threatens the very distinction between police and policed, between state and other, by challenging that fundamental distinction itself. The impersonator pretends as though anyone could become a state official worthy of respect and unquestioning obedience, simply by donning a uniform or displaying a badge.

Apart from criminalizing disobedience to state officials at all levels of government, the criminal law also punishes disobedience in more subtle ways that extend far beyond specific disobedience offenses. The law of sentencing, for example, provides for various contumacy premiums. Most obvious and most Draconian are the sentencing enhancements for recidivists, which have been a central weapon in the war on crime.⁴³⁷ These laws permit, and in many case require, the judge to in-

⁴³⁵ *Id.* § 265.20(1)(f).

⁴³⁶ *Id.* §§ 190.25-26.

⁴³⁷ See Dubber, *supra* note 6.

crease the sentence based exclusively on prior convictions. They target those offenders who have revealed themselves as particularly dangerous or particularly disobedient, or both. The period of carceral incapacitation for these "recidivists" is extended, in an increasing number of cases until their death. They have proved themselves impervious to previous threats of punishment, and as undeterrable must be incapacitated. In most cases, they also have thumbed their noses not merely at the threat of punishment, but even at the actual imposition and infliction of punishment. Their repeat offense therefore reflects multiple acts of disobedience against the state and a disregard for its superior power. Recidivists personify contempt of state authority and, for that reason alone, must be put in their place. That place is either prison or, in particularly outrageous cases, the grave, for recidivism is also a symptom of deathworthiness in the American law of capital punishment.⁴³⁸

Disobedience is penalized, and obedience rewarded, in other aspects of the sentencing process as well. As anyone who has ever encountered a police officer—or for that matter a DMV official—knows, state officials do not appreciate inconvenience. To state officials, ordinary people represent potential nuisances. Interactions between members of each group therefore are designed, from the perspective of the former, to abate nuisances. Any additional inconvenience is not appreciated, no matter what form it might take. Least appreciated is any behavior that might be interpreted as a manifestation of disobedience. Sanctions for non-cooperation, i.e., additional inconvenience, depend on the nature of the interaction and the power of the state official. If we stick with police officers, that sanction may range from formal measures (including further investigation, ranging from frisks to full-fledged searches of the person, objects, and places, or the initiation of proceedings, which may be accompanied by an arrest) to their informal, and far more expedient, analogues (harassment and "police violence," which conveniently compress the imposition and infliction phases of the criminal processes into one act of discipline, as a sort of summary nuisance abatement, including permanent abatement through destruction by the use of "lethal force").

But police officers are not the only state officials in the criminal justice system who do not appreciate recalcitrance.

⁴³⁸ See, e.g., N.Y. PENAL LAW § 125.27(1)(a)(9) (McKinney 2000 & Supp. 2001).

Once a nuisance has been passed on to the prosecutor—which means that the police officer has chosen a formal sanction for disobedience, perhaps as a supplement to informal sanctions imposed and inflicted at the time of the original encounter between state and nuisance—the “suspect” is well advised to display a properly respectful demeanor to prevent his reclassification as a “defendant.” Should that reclassification nonetheless have occurred, and a formal charge of one kind or another have been filed, the now-defendant should do everything in his power to minimize any further inconvenience to the prosecutor, and of course to the judge, the next state official whose valuable time might be occupied with the abatement of the defendant-nuisance. Luckily, the modern American criminal process has developed the perfect procedure for this purpose: plea bargaining.

A plea bargain is often nothing more than the exchange of a reduction in punishment for a reduction in prosecutorial and judicial inconvenience. It is a form of personal summary self-abatement. Through an act of submission to state authority, the defendant relieves the state officials in question of the time-consuming task of beating him into submission.

That is not to say, of course, that the superior may not decide to go through with this ceremony of humiliation nonetheless. It simply means that the inferior is well advised to assume a submissive position—to humiliate himself—in order to maximize his chances of averting the impending attack. This discretion to insist on official humiliation in the face of self-humiliation helps to account for a startling phenomenon in American criminal law, the imposition of the death penalty on defendants who have entered a guilty plea.⁴³⁹ Entering a guilty plea simply means to throw oneself upon the mercy of the state official in charge, thus acknowledging his superior power.

There is, of course, another model of the plea bargain, which focuses on the fact that it is a *bargain*, rather than a *plea*. And bargaining is said to presume some basic equality among bargainers. As a theoretical matter, this is entirely correct. And as a participatory model of the imposition of punishment, plea

⁴³⁹ See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984); *Agan v. Singletary*, 12 F.2d 1012 (11th Cir. 1994); see also WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 53-72 (1991).

bargaining is attractive.⁴⁴⁰ Nonetheless, the reality of American plea bargaining reflects a fundamental inequality of power between defendant and state officials inconsistent with this model, no matter how attractive. That is not to say that plea bargaining must always be more of a plea than a bargain, but merely that it is.

From the perspective of a state official, any resistance to punishment by “defendants” is considered a cumbersome complication of their nuisance abatement, which only aggravates the original nuisance and therefore calls for more radical and permanent abatement. So, neither prosecutors nor judges appreciate a defendant who prolongs the abatement proceedings by filing motions, by demanding a trial, perhaps even by having a trial before a jury, then raising evidentiary objections at trial, and filing post-trial motions or even an appeal, not to mention collateral motions, such as a habeas corpus petition.

Defendants who do behave themselves so as to accelerate their own abatement can expect certain benefits, again within the discretion of the relevant state official. A defendant with the proper attitude may receive sentence discounts for “acceptance of responsibility.”⁴⁴¹ Or, he may receive more lenient treatment in exchange for “substantial assistance to [the] authorities,”⁴⁴² much like a dangerous weapon, which can escape complete and permanent incapacitation upon a state official’s “certificate that the non-destruction thereof is necessary or proper to serve the ends of justice.”⁴⁴³

The same pattern continues, in ever more drastic form, as the person is transformed from “suspect” to “defendant” to “convict” to “inmate,” and even continues when he becomes “parolee.” In prison, guards constantly struggle to extract from inmates the respect owed a state official.⁴⁴⁴ Prison guards are particularly anxious to separate themselves from the objects of their (and the state’s) power because they occupy a particularly low position in the status hierarchy among state officials. Un-

⁴⁴⁰ KLAUS LÜDERSEN, *Strafrecht als schwarzer Mann*, in *ABSCHAFFEN DES STRAFENS?* 17, 18 (1995); Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 *STAN. L. REV.* 547, 604 (1997).

⁴⁴¹ U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2000).

⁴⁴² *Id.* § 5K1.1.

⁴⁴³ N.Y. PENAL LAW § 400.05(3) (McKinney 2000 & Supp. 2001).

⁴⁴⁴ See CONOVER, *supra* note 250.

like their fellow frontline officials (who are police officers), prison guards also do not enjoy most of the accoutrements of state power that help them gain and, if necessary, enforce respect. Their training is perfunctory, their uniforms unimpressive, they have no patrol cars with special police engines and ever more advanced communications equipment, and most important they do not have at their disposal the ever increasing arsenal of the modern police officer, except for its least intimidating and least effective component, the baton.

The most blatant evidence of the state's claim to victimhood in modern American criminal law comes not in the form of punishments for disobedience or rewards for obedience. One finds it where one would least expect it: in the campaign for victims' rights. So a federal appellate court determined that the federal government, and in particular the Internal Revenue Service, is a victim of the federal Victim and Witness Protection Act, and therefore entitled to compensation as a *crime victim*.⁴⁴⁵ Likewise, the California Penal Code provides, without the aid of judicial interpretation, that "victim' shall include . . . the immediate surviving family of the actual victim" as well as "any . . . government, governmental subdivision, agency, or instrumentality . . . when that entity is a direct victim of a crime."⁴⁴⁶

The irony of this move must be savored. Here is the state fighting a campaign on behalf of persons who have been twice victimized, once by the perpetrator of a crime and then by the state itself, whose officials treat the victim like a nuisance rather than a person. And now that state, which already occupies the positions of both violator and vindicator of victims' rights, classifies itself as the victim for whose benefit it is fighting the war on crime. In the end, then, we have the state violating and vindicating itself.

Small wonder that the war on crime and the campaign for victims' rights has been so tremendously successful. It involves the state and only the state, as offender and as victim.

By including itself among the victims it is protecting from itself, the state does not deny the existence of personal victims al-

⁴⁴⁵ United States v. Helmsley, 941 F.2d 71, 101 (2d Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992). For a more detailed exploration of the place of victims' rights in the war on crime, see MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS* (forthcoming 2002).

⁴⁴⁶ CAL. PENAL CODE § 1202.4(k)(2) (West 2001) (emphasis added).

together. Yet the state is more than just another victim. It is *the* paradigmatic victim of modern criminal law. As apersonal, it is qualitatively different than all other victims, including communal organizations like corporations and other societal entities. The state is not simply a bigger corporation, a wider community, a broader society. It is an abstraction and, as such, without any connection to persons. It is the pursuit of societal interests itself and, as such, without rights and without interests. Any interference with the state is an interference with the interests it protects. It is selfless in both senses of the word.

C. FROM CRIMINAL ADMINISTRATION TO THE WAR ON CRIME

The war on crime represents the most advanced and comprehensive manifestation of this type of apersonal criminal administration, which begins and ends with the state, reducing all persons to objects of hazard police along the way. But modern criminal administration has roots that extend far beyond Richard Nixon's anti-crime campaign. At the very height of the civil rights era and the Warren Court, American criminal law was ripe for the incapacitationist turn of the war on crime.

The beginnings of rehabilitationism during the first quarter of the twentieth century were also the beginnings of the incapacitationism that was to shape American criminal law during the last quarter of the century. By the time the Model Penal Code was completed, in 1962, the person had already been removed from the heart of criminal law to its periphery.

In the end, the enduring legacy of the Warren Court—in procedural criminal law—and the Model Penal Code—in substantive criminal law—turned out to be the endorsement of threat minimization as a, if not the, central function of the criminal law. And the target of the threats to be minimized was the state, directly and indirectly. The preventive-communitarian-authoritarian model of modern criminal administration was in place long before the war on crime perfected and implemented it on a broad scale.

1. *The Pound-Sayre Model*

Already Pound and Sayre explained that modern criminal law was about social interests, not about individuals.⁴⁴⁷ The state

⁴⁴⁷ See *supra* notes 55-65 and accompanying text.

was merely the abstract representation of these interests. The state and the interests of society were identical. So, to protect the state was to protect social interests and to protect social interests was to protect the state.

In modern criminal law, personal victims and the vindication of their rights play at best a supporting role. In fact, one may view the elaborate system of so-called traditional criminal law, with its discoveries of bodies, investigations, arrests, trials, juries, verdicts, victim impact statements, and sentencing hearings, as a convenient cover for the protection of the one apersonal victim that matters in the end: the state. The state thus buys its comprehensive control of society as a whole through the dramatic vindication of the individual rights of some of society's members. In the end, even the protection of individual rights serves the protection of the state's.

In its role as cover, the individual victim appears not as an object of respect, endowed with the dignity of personhood. Whether as the policing of public nuisances (in regulatory offenses) or the unconsidered manifestation of reflexive impulses (in "true crimes"), contemporary punishment respects neither offenders nor victims as persons. The first, administrative, model simply views both victim and offender as expendable. The "victim" is the public (as in "public" nuisances) or perhaps even the state itself (as in pure disobedience offenses). Under the second, traditional, model the victim emerges as consumed by a rage as confused as it is uncontrollable, and the offender as an alien threat to the survival of the herd. Overcome with the grief and sense of powerlessness often associated with victimization, the sobbing victim begs the all-powerful state to apply "a salve to help heal those whose rights and dignity have been violated" ⁴⁴⁸ And the state is all too happy to oblige.

In fairness to Sayre it must be said that he saw not only the promise of a state-based criminal law, he also recognized some of its dangers. He did not fully appreciate the general tendency of modern criminal administration to bend, if not to abandon, principles of criminal law. Instead he focused, somewhat excessively, on the dilution of a single principle, that of mens rea. By making mens rea the defining characteristic of police offenses, he even can be said to have unwittingly facilitated the

⁴⁴⁸ *People v. Robinson*, 699 N.E.2d 1086, 1093 (Ill. App. Ct. 1998), *vacated*, 719 N.E.2d 662 (Ill. 1999).

radical extension of Draconian police offenses that paid homage to mens rea, but abandoned other principles, while circumventing mens rea through presumptions. Still, with respect to this particular means of rendering the state's job of nuisance control less inconvenient, Sayre clearly saw the potential for state oppression:

The modern rapid growth of a large body of offenses punishable without proof of a guilty intent is marked with real danger. Courts are familiarized with the pathway to easy convictions by relaxing the orthodox requirement of a *mens rea*. The danger is that in the case of true crimes where the penalty is severe and the need for ordinary criminal law safeguards is strong, courts following the false analogy of the public welfare offenses may now and again similarly relax the *mens rea* requirement, particularly in the case of unpopular crimes, as the easiest way to secure desired convictions.⁴⁴⁹

Sayre even captured much of the essence of the modern police regime, which renders it such a formidable machine for the discretionary suppression of state defined nuisances: "convenience in the interest of effective administration depending in part upon the vagueness of its limits."⁴⁵⁰

What's more, Sayre noticed a particular manifestation of this potential for oppression in his own days, which was to play a key role in the blossoming of criminal administration into the war on crime some fifty years later: drug criminal law. As Sayre reminds us, the Supreme Court's cavalier treatment of the mens rea requirement began with a case involving an early federal drug statute, the Narcotic Act of 1914. The defendants in that case, *United States v. Balint*,⁴⁵¹ had been convicted of the tax offense of "unlawfully selling to another a certain amount of a derivative of opium and a certain amount of a derivative of coca leaves, not in pursuance of any written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue."⁴⁵² They protested that they weren't charged with knowing that the drugs were "inhibited," so that it wouldn't make a difference if they mistakenly thought otherwise. The trial court agreed and threw out the indictment. In a very short opinion,

⁴⁴⁹ Sayre, *supra* note 59, at 79.

⁴⁵⁰ *Id.* at 79 n.87.

⁴⁵¹ 258 U.S. 250 (1922).

⁴⁵² *Id.* at 251.

the Supreme Court unanimously reinstated the indictment on the basis of the following observation:

[I]n the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide "that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes⁴⁵³

Sayre's analysis of the *Balint* opinion is appropriately blunt and eerily foretelling: "The decision goes far; it can be justified only on the ground of the extreme popular disapproval of the sale of narcotics."⁴⁵⁴ *Balint*, in other words, was not only the beginning of the end of the mens rea requirement, as contemporary accounts of American criminal law would have it—it was a harbinger of the hate driven war on drugs, which by the end of the century would claim many more casualties among the hallowed principles of criminal law. In fact, the Supreme Court had sent the mens rea requirement packing more than a decade before *Balint*, in *Shevlin-Carpenter Co. v. Minnesota*, a little known case involving an offense that would go on to play a distinctly minor role in the development of modern American criminal law: "cutting or assisting to cut timber upon the lands of the state."⁴⁵⁵

In the end, however, Sayre saw only the danger, but not its source. To a progressive reformer like Sayre the solution to the problem of state oppression lay, paradoxically, with the state. The problem was not the state itself, but its administration. If only one could place state discretion into the hands of selfless experts, the discretionary state would fulfill the abstract state's potential for good, not evil, and the essential selflessness of the state would manifest itself. If those wielding discretion were good, so was the state. Or, in the words of Justice Frankfurter in an opinion applying *Balint* some twenty years later: "In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted,"⁴⁵⁶

⁴⁵³ *Id.* at 252 (quoting *Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57, 69, 70 (1910)).

⁴⁵⁴ Sayre, *supra* note 59, at 80.

⁴⁵⁵ 218 U. S. 57 (1910).

⁴⁵⁶ *United States v. Dotterweich*, 320 U.S. 277, 285 (1943).

in exactly that order of significance, we might add, with a sharp decline from the prosecutor to the jury, since so very few cases ever make it past the prosecutor to any sort of fact finder, never mind a jury.

The police regime of the war on crime, by implementing and developing Sayre's model of a modern administrative system that polices dangers to social interests, rather than punish violators of individual rights, points up Sayre's blind spot, one he shared with Pound and every social engineer of his time and since: the failure to distinguish state from community, and the resulting failure to perceive the dangers of an authoritarian state which, acting in the name of the community, in fact advances its very own interests. The concept of society (or "the social") is sufficiently ambiguous to refer either to the community or to the state, or to both at the same time. Yet in the end it is the state, and not the community, that determines *which* "social interests" deserve its penal protection. It is the state, and not the community, that decides *how* to protect the "social interests" it deems worthy of protection. And it is the state, and not the community, that actually inflicts pain on persons to make these "social interests" stick.

This scenario is troubling only to those who have lost their faith—assuming they ever had it—in the ideal of an apersonal state composed entirely of selfless bureaucratic experts using their discretion in the interests, not of any individual (including themselves), but of the community or "the social." Along with so many of their contemporaries, Sayre and Pound were intoxicated by this ideal. So was an entire generation of American writers on law in general, and criminal law in particular. This trust in the benevolence of the bureaucratic state lies at the heart of the Legal Process School, so many adherents of which cut their teeth during the New Deal and the control economy of World War II. And it forms the foundation of the entire artifice of modern American criminal law, which was constructed by one of the key exponents of this sweeping movement, the great Herbert Wechsler.

2. *The Model Penal Code*

The Model Penal Code was a characteristically ambitious attempt to bureaucratize American criminal law in the Legal Process vein. Sponsored by the American Law Institute, a blue ribbon society of concerned jurists, and drafted by Wechsler

with the assistance of a group of penological experts drawn from criminal law and other related disciplines like criminology and psychiatry, the Model Code placed all discretion in the making and application of criminal law in the hands of experts. The very need for the Model Code arose from the inability of amateur legislatures to appreciate the administrative complexities of a truly scientific system of penal treatment. Stuck on atavistic, even barbarian, common sense notions of punishment according to desert, unreflecting legislators were in desperate need of scientific assistance, which Wechsler and his collaborators were anxious to provide.⁴⁵⁷

Once the rules of criminal administration were defined according to the Model Code's expert blueprint, their actual administration had to be controlled.⁴⁵⁸ In particular, judicial discretion had to be eliminated as much as possible by a detailed set of interpretative guidelines. While the judge retained discretion in sentencing, that discretion was curtailed by a set of sentencing guidelines based on a fairly elaborate hierarchy of offense grades. These limitations may appear modest from today's standpoint, after decades upon decades of ever more specific constraints on judicial sentencing discretion, culminating in the federal sentencing guidelines.⁴⁵⁹ At the time, however, the Model Code's sentencing provisions represented a significant departure from the "law" of sentencing, which then was little more than a set of local customs varying from courtroom to courtroom, and from judge to judge. Moreover, the judge's sentencing decision was subject to review by the head penological bureaucrat, the commissioner of correction, within the first year of penal treatment, who could petition the court to resentence the offender, if he was "satisfied that the sentence of the Court may have been based upon a misapprehension as to the history, character or physical or mental condition of the offender."⁴⁶⁰ Finally, the nature and, most important, the duration of penal treatment, lay largely within the discretion of the penological experts in correctional facilities. Under the Model

⁴⁵⁷ See Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53 (2000).

⁴⁵⁸ See, e.g., MODEL PENAL CODE §§ 1.02(3), 1.13(9)-(10), 2.20(3)-(5) (interpretive guidelines) (1985).

⁴⁵⁹ See Gerard E. Lynch, *Toward a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297 (2000).

⁴⁶⁰ MODEL PENAL CODE § 7.08 (1985).

Code scheme, judges merely set the general time frame for "correctional treatment"⁴⁶¹ in the form of indeterminate sentences which might range, in the case of a first-degree felony, from anywhere between one to ten years and one year to life in a "correctional institution."⁴⁶²

The problem of criminal codification to Wechsler and his collaborators was a problem of criminal administration. As such, it was primarily a staffing problem. The criminal administration was as good as its administrators. And the best administrators were those best versed in the science of criminal administration, penology. The system thus had to be designed so as to shift discretion into the hands of the penologists, at least to the extent of their scientific expertise. Traditional actors retained discretion for two reasons: to maximize the Model Code's chances of adoption in American legislatures by minimizing the appearance of reform and to retain functions that for the moment lay beyond the current state of penology. To illustrate the second point, Wechsler eventually realized that the penologists could not generate a truly scientific insanity test.⁴⁶³ So, instead of turning the insanity inquiry entirely over to the psychiatrists, he merely revised the traditional common law insanity test, but gave psychiatric experts a far greater procedural role in its application. So, the Code provided that the court appoint a psychiatrist as a matter of course, who was to make detailed findings regarding the defendant's mental condition, that the defendant could have himself examined by a psychiatrist of his own choice, and that the court hold a pre-trial hearing on the insanity question, where the expert or experts would be subject to direct and cross-examination. The experts would take the stand once again at the subsequent trial, should the judge permit the defendant to raise the insanity defense on the basis of the pre-trial hearing. They may then get to testify a third time at the post-trial civil commitment hearing, should the insanity defense have succeeded at trial, resulting in a verdict of not guilty by reason of insanity. There, they would address the question of whether the ex-defendant, having just escaped the

⁴⁶¹ See, e.g., *id.* § 303.1(1)(a).

⁴⁶² See, e.g., *id.* § 303.6(1).

⁴⁶³ See *id.* §§ 3.01-5.07 cmt., at 186-201 (1985).

custody of the Commissioner of Corrections, would now be entrusted to the care of the Commissioner of Mental Hygiene.⁴⁶⁴

Having recognized the limits of penological science on the insanity question, Wechsler thus had the psychiatrists guide the discretion of the judge and, if necessary, the jury, rather than settle the issue themselves. This arrangement had the additional advantage of outwardly maintaining the status quo, while at the same time strengthening the influence of penological experts in fact.

Now, the significance of shifting discretion on the insanity issue from experts to lay people, in particular jurors, should not be overestimated for the simple reason that the insanity defense is rarely invoked and, if invoked, is even less likely to make it past a pre-trial hearing and before a jury. Still, the role of the jury in the Model Penal Code's bureaucratic scheme deserves some attention. A body of lay judges is an odd fit for a system built on the notion of expert efficiency. Whatever a jury trial may be, it is neither efficient nor particularly scientific. In fact, it would not be an overstatement to say that the jury trial is specifically designed to be cumbersome and unscientific.

What then is the jury doing in the Model Penal Code—other than keeping the Code on the good side of the Sixth Amendment? It is *not* the critical voice of the community checking the otherwise boundless power of the state. The jury instead fulfills two other functions. First, it enables convenient solutions to drafting problems inherent in an attempt to define away discretion in the administration of criminal law. The Model Code drafters repeatedly rely on the law of evidence to solve tricky problems in criminal law, in particular by varying and shifting the burden of proof through affirmative defenses and presumptions.⁴⁶⁵ The details of these drafting techniques aren't important here; what matters is that none of them would have been available without the jury. The American law of evidence represents a single sustained attempt to guide the discretion of jurors, who are considered to be unreliable and impressionable fact finders, in contrast to professional judges, whose expert judgments deserve greater respect—though they too are in considerable need of guidance, in the opinion of the

⁴⁶⁴ MODEL PENAL CODE § 4.08 (1985).

⁴⁶⁵ See Markus Dirk Dubber, *Reforming American Penal Law*, 90 J. CRIM. L. & CRIMINOLOGY 49, 73-74 (1999).

erable need of guidance, in the opinion of the Model Code drafters.

Furthermore, and for our purposes more important, the jury plays a role in the identification of deviants who are in need of penal treatment in institutions for the correction of the criminally abnormal. Repeatedly, the Model Code drafters stress that the jury should determine whether certain behavior crosses the line between normal and abnormal, between the reasonable and the unreasonable. Especially in borderline cases, it's up to the jury to decide whether the defendant should be marked as deviant, and whether he "deserves" the stigma of being labeled a criminal, a felon, a murderer, and so on.⁴⁶⁶

Here, one might find the making of a communal corrective of state oppression. Whether the jury actually performs that function, however, depends crucially on the community it is meant to represent. If the jury represents the community of insiders which more or less openly conspires with the state to police outsiders, the jury becomes a terrible instrument of oppression, which contributes to oppression by wrapping it in the mantle of legitimacy. The jury can only fulfill its critical function, by giving the community a voice in the machinery of state power exercised in its name, if the community it represents is that of the *object* of state power. In the trial against a black slave defendant, a jury of white slave owners oppresses, a jury of black slaves legitimates.⁴⁶⁷

The Model Penal Code doesn't show much interest in this function of the jury, nor in the all-important question of representativeness. Although the Code has a great deal to say about other procedural matters (including, for instance, the elaborate procedures for the participation of experts in insanity cases), that omission by itself is perhaps not significant. Still, by integrating the jury into the comprehensive administrative process of deviance diagnosis, the Model Code in characteristically pragmatic fashion manages to retain a traditional institution of the criminal law while reinterpreting its function. The fact remains that the jury is fundamentally inconsistent with the Model Code's general bureaucratic approach. The penologist at the

⁴⁶⁶ See, e.g., MODEL PENAL CODE §§ 1.01-2.03 cmt., 240-41 (negligence), 262 (causation) (1985).

⁴⁶⁷ See Christopher Waldrep, *Due Process for Slaves in Mississippi* (1995) (unpublished manuscript, on file with author).

heart of the Code's model of criminal administration through the diagnosis and treatment of deviants has about as much need for a lay jury as does a brain surgeon.

At the very least, the Model Penal Code's treatment of the jury does nothing to prevent the jury's subsequent development into that silent instrument of outsider police which it can become if one disregards its function as communal critique of state oppression. The jury of the war on crime represents the insider community of potential and actual victims, bound together through identification with the particular victim's experience. It does not represent the outsider community of offenders. As a result, it merely reinforces the communal hatred captured by the state's accusation, labeling, and eventual disposal of the outside threat to the community of victims. The jury is eager to do its part by aligning itself with the victim in a united front against external evil.

As slave owner juries once sat in judgment over their fellow slave owner, rather than his accused slave, so contemporary American juries more often than not sit in judgment over their fellow victim, rather than his accused victimizer. Only now the object of their attention and identification stands to lose nothing from the humiliation and disposal of the ostensible focus of the trial. Unlike the slave owner, whose proprietary interests were at stake in the trial of his human capital, the victim today is seen as *benefiting* from the punishment of "his" offender. The transition from identification to condemnation, therefore, is so quick and easy as to become indistinguishable: to identify with the victim is to condemn the offender and vice versa. Anything less than an act of communal hatred against the offender would bespeak a failure to identify with the victim. And not to identify with the victim implies identifying with the offender, and therefore excluding oneself from the in-group, or rather revealing oneself as already having been deviant to begin with.

The jury in this form facilitates, rather than checks, state oppression. It facilitates state oppression of a particular kind, namely the state assisted oppression by a societal in-group with access to state power. So, juries have done little to prevent, and much to aid, race based oppression throughout the United States, and not only because so very few cases are disposed of after a jury trial. They simply provide a veneer of legitimacy to state oppression.

Juries can play the same role in direct state oppression, i.e., oppression of anyone and anything outside the state understood as the ultimate in-group. The infamous German Volksgerichtshof (People's Court), which handed out scores of death sentences under the Nazis, featured several lay judges, who lacked the formal independence of jurors and therefore provided a thinner veneer of legitimacy. These lay judges made no difference whatsoever to the operation of the court, apart from whatever little legitimacy they could contribute.⁴⁶⁸

The People's Court lay judges were hand-picked by the Nazis for their commitment to stamping out enemies of the state, which Hitler long ago had identified—along with the Nazi party and, of course, himself—as the ultimate manifestation of the German community (the Volk) thanks to his claimed ability to identify “its” social interests. These enemies of the state, it bears emphasis, appeared to the naked eye to be members of the German community. The Volksgerichtshof is most famous for its disposal of actual and suspected participants in the failed July 20, 1944 assassination attempt on Hitler. The defendants who were humiliated in various ways before the tribunal (for example, by removing the belts from their loose fitting pants) and then hanged on meat hooks included high ranking officers of the German army and public officials, all of whom had acted in pursuit of the well-being of the German *community* by ridding it of the *state* in its personification as Adolf Hitler.

In the total National Socialist state we therefore find both the identification of community and state, and the use of the jury (or, more precisely, lay judges) as representatives of the community to enforce the interests of the state against those of the community. The People's Court manifested the interests of the ultimate state in-group, Hitler and his associates, against an attack from the community, whose interests the state ostensibly protected. The entire community had become the object of police, rather than its subject.

Given the experience of Nazi terror, the result of which Wechsler saw first-hand at Nuremberg, it is surprising that the Pound-Sayre model of state-centered criminal administration survived World War II intact and managed to exert such influence on the Model Penal Code. The jury question here is only

⁴⁶⁸ See Markus Dirk Dubber, *The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology*, 43 AM. J. COMP. L. 227, 263-67 (1995).

symptomatic of a general phenomenon. Wechsler's faith in the benevolent bureaucratic state and the concomitant failure to recognize the distinction between the community and *its* state—or the public and its public servants—never wavered. In this fundamental respect, nothing distinguishes Wechsler's 1952 plan for the Model Penal Code⁴⁶⁹ from his 1937 blueprint for American criminal law reform (“A Rationale of the Law of Homicide”).⁴⁷⁰ The 1937 piece itself is a prolonged attempt to work out the implications of the Pound-Sayre model for the doctrine of criminal law in general, and the law of homicide in particular.

Wechsler, in this seminal article, both implemented the bureaucratic model of criminal law and, by expanding it to the heartland of criminal law, illustrated its weakness. Like Sayre, Wechsler's Model Code recognizes the need for strict liability offenses, while limiting this device of prosecutorial convenience to minor offenses. Sayre had gone so far as to *define* his public welfare offenses, which could be sanctioned without proof of intent, as minor offenses. For that reason, he had no room for *serious* strict liability offenses, such as bigamy, statutory rape, adultery, and drug offenses.⁴⁷¹ These were, Sayre explained, “wholly unlike public welfare offenses, and although often cited among the cases of the latter, are subject to altogether different considerations,”⁴⁷² whatever these considerations might be. (Sayre didn't say.)

Not only that, but the way the Model Code retained strict liability offenses also deserves attention. The Code simply declared that strict liability offenses were not crimes, but an altogether different kind of animal, a *sui generis* category of civil, not criminal, offenses dubbed “violations.”⁴⁷³ Moreover, the Code drafters punted on the difficult issue of Sayre's public welfare—and strict liability—offenses by restricting the scope of their project to traditional criminal law. In an appendix, the drafters remarked simply that “a State enacting a new Penal

⁴⁶⁹ Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

⁴⁷⁰ Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide I & II*, 37 COLUM. L. REV. 701, 1261 (1937).

⁴⁷¹ Sayre, *supra* note 59, at 75, 79.

⁴⁷² *Id.* at 75.

⁴⁷³ MODEL PENAL CODE §§ 1.04(5), 2.05 (1985).

Code may insert additional Articles dealing with special topics such as narcotics, alcoholic beverages, gambling and offenses against tax and trade laws."⁴⁷⁴

In this way, the Code could have its cake and eat it too. It could declare its categorical rejection of strict criminal liability, yet retain strict liability for any offense deemed civil, rather than criminal. And what was a violation? Whatever the legislature declared it to be. Only in the absence of a legislative classification did the Code place any limits on what might be considered a violation, and therefore punished without criminal intent: a violation could not be punished by imprisonment, though no limits applied to other punishments, including fines and forfeiture, which the legislature remained free to set at whatever level it pleased.⁴⁷⁵ Even these timid limitations were frequently ignored by state legislatures that picked up the Model Code's general endorsement of strict liability offenses without its limitation to "violations" and defined violations more generously to include offenses threatened with short term imprisonment.⁴⁷⁶

As we saw earlier, one of the weaknesses in Sayre's conception of public welfare offenses was his obsession with *mens rea*. He mistook strict liability for the essence of modern criminal administration, rather than as a mere symptom. Modern criminal administration is by nature apersonal and state-centered. The abandonment of *mens rea* is merely a symptom of the general irrelevance of personhood and the primacy of convenience in the state's enforcement of its commands. This also means, conversely, that the absence, or even the emphatic rejection, of strict liability does not imply the absence of modern criminal administration. The distinction between "true crimes" and "public welfare offenses" does not survive simply by retaining *mens rea* for the former.⁴⁷⁷

As Wechsler made clear, modern criminal administration can swallow traditional criminal law while at the same time proclaim its strict adherence to the principle of *mens rea*. Wechsler expanded the administration model from the least serious and most modern to the most serious and least modern of offenses, from Sayre's public welfare offense to first-degree mur-

⁴⁷⁴ MODEL PENAL CODE § 241 (Proposed Official Draft 1962).

⁴⁷⁵ MODEL PENAL CODE §§ 1.04(5), 6.03(6) (1985).

⁴⁷⁶ See, e.g., N.Y. PENAL LAW § 10.00(3) (McKinney 2000 & Supp. 2001).

⁴⁷⁷ Sayre, *supra* note 59, at 79.

der. With the expansion of offenses came an expansion of sanctions. Where Sayre had to contend only with fines, Wechsler's account of criminal administration covered the entire range of penal measures, all the way to capital punishment.

Sayre sketched a model of modern criminal law as bureaucratic risk management. Wechsler expanded that model to cover the entirety of criminal law, including the societal response to those "true crimes" which Sayre was so anxious to leave untouched. In such an apersonal and state-based system of criminal law, the retention of mens rea is of no significance, other than as a camouflage. The system of danger control applies equally to a strict liability offense like the sale of adulterated milk, and to a mens rea offense like premeditated murder. In both cases, the perpetrator appears as a threat to societal interests that requires suppression.

Wechsler's—and therefore the Model Penal Code's—regime of criminal administration is apersonal with respect to both offenders and victims. It treats offenders as nonpersons insofar as it regards them as criminal deviants "disposed to commit crimes" who pose a threat to "individual or public interests." It treats victims as nonpersons insofar as it subordinates the protection of "individual" to that of "public interests," and penalizes interference with the latter without any connection to the former.

a) apersonal offenders

The Model Penal Code did not break new ground in criminal law theory. It merely implemented a long-standing consensus about the objective of penal law—"the prevention of offenses"⁴⁷⁸—where offenses were defined, vaguely, as "conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests."⁴⁷⁹ Offenses were to be prevented by extinguishing threats, either through deterrence or, if that failed, through treatment. Treatment, in turn, came in two basic forms: rehabilitative and incapacitative, including the "extreme affliction sanction" of death.⁴⁸⁰

And whatever treatment turned out to be, everyone agreed what it was not and could never be in a rational regime of

⁴⁷⁸ MODEL PENAL CODE § 1.02 note, at 3 (1985).

⁴⁷⁹ *Id.* § 1.02(1)(a).

⁴⁸⁰ Wechsler, *supra* note 463, at 1123.

criminal administration: punishment. Like every other enlightened writer on criminal law since at least the 1930s, the Model Code drafters studiously avoided the term "punishment."⁴⁸¹ Punishment was passé, treatment very much en vogue.⁴⁸²

So eager was the Code to extinguish threats, rather than to punish crimes, that its goal was not merely to prevent the infliction of harm, but already the mere threat of that infliction.⁴⁸³ Preventing the infliction of harm was too close for comfort. The Code preferred to intervene earlier on, when the threat had not yet appeared, never mind manifested itself, in the form of actual harm suffered. *Potential threats* were to be extinguished, before they could blossom into full-fledged threats. The objective of criminal law was to prevent not threats, but threats of threats.

If the criminal law—through its criminal code—didn't succeed in extinguishing the threat personified by a particular potential offender, then it was time for penological treatment. In the words of the Code, the time had come "to subject to public control persons whose conduct indicates that they are disposed to commit crimes."⁴⁸⁴ That "public control," of course, had nothing to do with the "public," except if the public was synonymous with the state. State control would take whatever form, and last however long, the "correction" of the offender's particular criminal deviance required. Once that treatment was complete, the offender—now cured of his "disposition to commit crimes"—could reenter the community of normals, except of course if he turned out to have been incorrigible, in which case some extreme affliction sanction or another would be indicated. The corrigible deviants were treated through rehabilitation, the incorrigible ones through incapacitation, but treated they all were, one way or the other.

The Model Penal Code was but the first half of the Model "Penal and Correctional Code," as it is properly called.⁴⁸⁵ The general and special parts of the Penal Code, dedicated to the

⁴⁸¹ See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 425 (1958).

⁴⁸² See Dubber, *supra* note 451, at 117-20.

⁴⁸³ See, e.g., MODEL PENAL CODE § 1.02 note, at 3 (1985) ("[t]he major goal is to forbid and prevent conduct that threatens substantial harm to individual or public interests").

⁴⁸⁴ MODEL PENAL CODE § 1.02(1)(a) (1985).

⁴⁸⁵ *Id.* § 1.01(1).

general principles of criminal liability and the definition of specific offenses, respectively, guided the penological diagnosis that determined the appropriate correctional treatment. As the Code drafters saw it, "[i]t ought to be the objective of the criminal law to describe the character deficiencies of those subjected to it in accord with the propensities that they . . . manifest."⁴⁸⁶ And these character deficiencies, and with them the offender's abnormal disposition to commit crimes along with his extraordinary dangerousness, were ironed out according to the scheme laid out in the Code's second half, the Correctional Code, which encompassed parts III & IV of the Penal and Correctional Code, entitled "treatment and correction" and "organization of correction," respectively.

This diagnosis of criminal deviance with the help of the Penal Code's categories of liability (general part) and offenses (special part), however, not only aided the penologists' prescription of the proper, rehabilitative or incapacitative, treatment. Before the deviant could be treated, he first had to be identified.

The Code, therefore, places tremendous emphasis on the detection of abnormally dangerous individuals and of exceptional criminal threats. The criminal law should interfere early and often. There's no reason to wait for the infliction of harm, because the infliction of harm is of no significance, other than as the concrete manifestation of a particular individual's criminal deviance. Other indicia of abnormal dangerousness are far preferable. As a threat radar, the Code consistently errs on the side of early intervention, often long before the threat has transformed itself into harm.

So, the Code explicitly criminalizes the creation of danger. It devotes a substantial portion of its special part to defining "offenses involving danger to the person."⁴⁸⁷ There, we find offenses that do so much more than those that "involve danger to the person," including murder, manslaughter, negligent homicide, and rape. The drafters presumably were less worried about the oddness of characterizing a homicide as a type of *danger* to a person than they were eager to indicate what they con-

⁴⁸⁶ MODEL PENAL CODE AND COMMENTARIES (OFFICIAL DRAFT AND REVISED COMMENTS) §§ 220.1-230.5, at 157 n.99 (1980).

⁴⁸⁷ MODEL PENAL CODE arts. 210-213 (1985).

sidered to be their progressive focus on threats, rather than harm.

This threat-based category made room for a new offense, "recklessly endangering another person,"⁴⁸⁸ which codified the general principle of threat neutralization the Code drafters detected behind "antecedent statutes addressed only to ad hoc situations, such as reckless driving or a motor vehicle or reckless use of firearms."⁴⁸⁹ Once again, it authorized penal intervention already on the basis of potential, and not merely actual, threats. It subjected to state control anyone who "recklessly engages in conduct which places *or may place* another person in danger of death or serious bodily injury."⁴⁹⁰

Another advantage of the new crime of reckless endangerment was that it conveniently supplemented the law of attempt, by authorizing state control of dangerous individuals who lack the proper mens rea—purpose—for an attempt conviction, at least in cases "involving" serious "danger to the person," to wit, death or serious bodily injury. In the Code's view of criminal law as threat elimination, "[t]he primary purpose of punishing attempts is to neutralize dangerous individuals."⁴⁹¹ This had Draconian consequences. First, the Code expanded the concept of attempt to reach any conduct "strongly corroborative of the actor's criminal purpose."⁴⁹² What mattered, in the Code drafters' eyes, was not whether some abstract line separating preparation from attempt had been crossed, but whether the offender had revealed that level of dangerousness, that abnormal criminal disposition, which indicated the need for penal treatment.

Second, the Code rejected the impossibility defense. Once again, the focus was on the offender's abnormal dangerousness, not the likelihood—or even the impossibility—of the actual infliction of criminal harm. In other words, the offender's criminal disposition—the threat he posed as a criminal deviant—required state intervention even if his particular conduct posed no threat to anyone or anything.

⁴⁸⁸ *Id.* § 211.2.

⁴⁸⁹ *Id.* art. 211, at 125 note.

⁴⁹⁰ *Id.* § 211.2 (emphasis added).

⁴⁹¹ MODEL PENAL CODE AND COMMENTARIES (OFFICIAL DRAFT AND REVISED COMMENTS) §§ 3.01-5.07, at 323 (1985); *see also id.* at 325.

⁴⁹² MODEL PENAL CODE § 5.01(2) (1985).

Third, it punished attempt much more harshly than before, namely as harshly as its consummation. This must be so because someone who goes through the trouble of attempting a crime is just as dangerous, and suffers from the same general disposition to commit crimes, as the person who succeeds in attaining his criminal goal. "To the extent that sentencing depends upon the antisocial disposition of the actor and the demonstrated need for corrective sanction, there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan."⁴⁹³

Consistent with its treatment—or rather its neutralization—of attempters as threats, the Model Code did not hesitate to criminalize possession as an inchoate inchoate offense. Possession, like attempt, demanded correctional interference because it indicated that the possessor was "disposed to commit crimes," the assumption being that possessing a particular object wasn't a crime, while using it could be. Still, since the Code sought to prevent crimes, rather than to punish them, merely posing a threat of a crime could be treated as a crime in and of itself. In the Code, possession is simply another endangerment offense.

In addition to several possession offenses among the Code's special part, part II, which contains the definitions of specific offenses, one finds two crucial and broad-sweeping possession offenses in its general part, part I, containing the general principles of criminal liability that apply to all offenses in the special part: possession of instruments of crime, including firearms and other weapons, and possession of offensive weapons.⁴⁹⁴ These two provisions appear, appropriately, in the article on inchoate crimes, following the Code's expansive definitions of attempt, solicitation, and conspiracy, each of which criminalizes the propensity to commit some crime or another. The first, and more general, possession provision makes it a crime for anyone to "possess[] any instrument of crime with purpose to employ it criminally," with instrument of crime defined loosely as "anything specially made or specially adapted for criminal use" or "anything commonly used for criminal purposes and possessed by the actor under circumstances which do not negative unlawful purpose."⁴⁹⁵

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* §§ 5.06-.07.

⁴⁹⁵ *Id.* § 5.06.

This general possession offense is not so much an offense as a theory of criminal liability, or rather a diagnosis of dangerousness, that no longer has anything to do with punishment for harmful conduct. In the process, it stretches the already broad traditional offense of possessing burglar's tools (such as the 19th century English statute prohibiting being "found by Night having in his Possession without lawful Excuse (the Proof of which Excuse shall lie on such Person) any Pick-lock Key, Crow, Jack, Bit, or other Implement of Housebreaking"⁴⁹⁶) beyond recognizability. It punishes the possession pure and simple, rather than the possession with an intent to commit a particular crime. No such intent need be proved; the possession of "anything *commonly used* for criminal purposes" of some form or another, will do.⁴⁹⁷ It's punishment not merely for an intent to commit a particular crime, but for an intent to commit *some* crime. In other words, it's punishment for a criminal disposition.

In its search for indicia of dangerousness, the Model Code pays particular attention to one class of objects, weapons. It goes without saying that weapons are included among the instruments of crime, possession of which is criminalized. Weapons are also conveniently defined to include not only firearms, but "anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for lawful uses which it may have."⁴⁹⁸ Even "firearm" is defined generously to include "a firearm which is not loaded or lacks a clip or other component to render it immediately operable, and components which can readily be assembled into a weapon."⁴⁹⁹ What's more, weapons unlike other instruments of crime are presumptively possessed "with purpose to employ [them] criminally." And that's not all: even the possession itself is presumed, if the weapon is found in a car.⁵⁰⁰ And so, mere presence turns into possession turns into possession with intent to use it "criminally." If we put it all together, the Model Code criminalizes being in the presence of "anything readily capable of lethal

⁴⁹⁶ An Act for the better Prevention of Offences, 1851, 14 & 15 Vict., c. 19, § 1 (Eng.) (emphasis added).

⁴⁹⁷ MODEL PENAL CODE § 5.06 (1985).

⁴⁹⁸ *Id.* § 5.06(2).

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.* § 5.06(3).

use." Why? Because that presence alone is a symptom of a "dispos[ition] to commit crimes."

This theory of criminal liability, of course, flies in the face of the Code's very own act requirement. As the Code announced in its general part: "A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable."⁵⁰¹ Even in its most explicit endorsement of incapacitation, the Code insists that one of its "general purposes" is "to subject to public control persons whose *conduct* indicates that they are disposed to commit crimes."⁵⁰²

The Code resolves this difficulty with characteristic simplicity: through legislative (or codificatory) fiat. Possession is an act because the Code says it is. Right after the announcement of the categorical act requirement, we learn that "[p]ossession is an act . . . if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession."⁵⁰³ Possession is criminalized as a symptom of criminal deviance. Since only acts may be criminalized, possession is declared an act.

The personhood of the possessor is as irrelevant as the personhood of the criminal deviant. Possession is convenient for the diagnosis of abnormal dangerousness, as opposed to the punishment of persons for wrongful acts, precisely because it is a *state*, and as such can be experienced by any living creature, persons and nonpersons alike. Animals, in other words, can possess, but they cannot act. Likewise, animals can possess, but cannot own; and they can behave, but cannot act.

The suspension of the act requirement, whether it is through the criminalization of possession or of omissions (i.e., failures to act), expands the criminal law beyond the realm of persons. Personhood, then, is no longer a prerequisite for punishment, or rather treatment. Any living creature can possess; anyone, even anything, can fail to act.

And any living creature, along with a host of inanimate objects and natural phenomena, can pose a threat. In a view of criminal law as singularly concerned with the extermination of

⁵⁰¹ *Id.* § 2.01(1).

⁵⁰² *Id.* § 1.02(1)(b) (emphasis added).

⁵⁰³ *Id.* § 2.01(4).

potential threats as those underlying the Model Code, the offender is of interest only as a threat personified. As a result, criminal law is radically depersonalized. There is nothing necessarily personal about a threat. Threats can emanate from anything and anybody. And the proper way of dealing with threats is their elimination, without any reference to guilt or other uniquely personal considerations.

This is not to say that remnants of the personal offender can't still be found in the Model Penal Code, at least on the surface. So, the Code insists on proof of some sort of mens rea for all crimes (as we noted above) and provides for various justification and excuse defenses that shield even offenders acting with the required mens rea from criminal liability. But neither the consideration of the offender's mental state nor the availability of defenses implies that the offender is punished as a person. Instead, the Code's mens rea scheme and the grading of offenses on its basis can be seen as classifying offenders by dangerousness. The mental state simply reveals the *level* of criminal disposition, once the general presence of the "dispos[ition] to commit crimes" has been diagnosed. The inquiry into mental states thus allows for a fine tuning of the general diagnosis of criminal deviance, with an eye toward prescribing the appropriate mode and length of the peno-correctional regimen.

Defenses have a similar function. Causing a threat to relevant interests triggers the penal response. The presence of mens rea indicates a deviant disposition to commit crimes. The levels of mens rea indicate the level and nature of that disposition. The initial diagnosis of deviance based on a finding of mens rea, however, can be adjusted in the exceptional cases where mens rea does not imply deviance. These exceptional cases are captured by the defenses of justification and excuse. For example, according to the Model Penal Code commentaries, the defense of claim of right (where the offender acts under the belief, however mistaken, that the property he stole belonged to him) is needed because "[p]ersons who take only property to which they believe themselves entitled *constitute no significant threat to the property system and manifest no character trait worse than ignorance.*"⁵⁰⁴

⁵⁰⁴ MODEL PENAL CODE AND COMMENTARIES (OFFICIAL DRAFT AND REVISED COMMENTS) §§ 220.1-230.5, at 157 (1980) (emphasis added).

The availability of defenses thus doesn't mean that their beneficiaries are persons. They also are not inconsistent with an apersonal regime of hazard control. As we've seen, the New York dog control statute includes a full panoply of justification defenses. What's more, the statute refers to the dog's "conduct," another concept that one might have thought had no application outside the sphere of persons. Here too, there is a remarkable similarity to the Model Code. Like the Code, the dangerous dog law doesn't focus on conduct for its own sake. Conduct is only relevant as an indication of dangerousness. What matters in the end is whether the dog is dangerous, i.e., whether it "poses a serious and unjustified imminent threat of harm to one or more persons."⁵⁰⁵ That's why the dog isn't punished for having done something, namely inflicted harm, but for *being* something, namely dangerous. The only difference between the Code and the dangerous dog law is that the latter doesn't bother with prevention. In the end, both are about the identification and disposal of threats, one personal, the other not.

b) apersonal victims

Having transformed the offender into an apersonal deviant threat, the Model Code also largely depersonalizes the victim. Recall that the Code defines crime as "conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests."⁵⁰⁶ The "individual or public interests" protected by offenses defined in the Code include, in that order, "the existence or stability of the state," "the person," "property," "the family," "public administration," and "public order and decency."⁵⁰⁷ As we saw earlier, the Code also recog-

⁵⁰⁵ N.Y. AGRIC. & MKTS. LAW § 108(24) (McKinney 1991 & Supp. 2001).

⁵⁰⁶ MODEL PENAL CODE § 1.02(1)(a) (1985). Section 1.02(1)(a) originally referred to "individual and public interests." See Model Penal Code § 1.02(1)(a) (Tentative Draft No. 4, 1955) (emphasis added). The crucial change from "and" to "or" was made shortly before the completion of the Model Code to "eliminate an ambiguity" mentioned in the proceedings of a 1960 conference on "law and electronics." See MODEL PENAL CODE AND COMMENTARIES (OFFICIAL DRAFT AND REVISED COMMENTS) § 1.02 n.3 (1985) (citing Layman E. Allen, *Logic and Law, in LAW AND ELECTRONICS: THE CHALLENGE OF A NEW ERA—A PIONEER ANALYSIS OF THE IMPLICATIONS OF THE NEW COMPUTER TECHNOLOGY FOR THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 187-98 (Edgar A. Jones Jr. ed., 1962)).

⁵⁰⁷ MODEL PENAL CODE § 241 (Proposed Official Draft 1962); MODEL PENAL CODE pt. ii (Definition of Specific Crimes) (1985).

nizes the state's authority "to insert additional Articles dealing with special topics such as narcotics, alcoholic beverages, gambling and offenses against tax and trade laws."⁵⁰⁸

In other words, the vast bulk of the Code's criminal law concerns not individual interests, but communal interests, ranging from the protection of the "family" (!) to that of the "corporation" or "unincorporated association," then to the "public," and ultimately the "state." The primacy of public interests, and particularly the interests of the state as such, is easily overlooked, even if the bulk of the Code is dedicated to offenses protecting communal interests of one kind or another. To conclude that the Code restricts the scope of criminal law to the vindication of personal rights against personal interference is to misunderstand the Code's scope, and thereby to mistake the Code for the entirety of criminal law. That misunderstanding, unfortunately, is fostered by the Code drafters themselves. So, the final version of the Code contains no reference to the "victimless" police offenses. The above quoted appendix appeared in the Proposed Official Draft, not in the Final Draft. Similarly, the Final Draft makes no mention of the very first category of offenses, namely those against the existence or stability of the state. Again, only a note in the Proposed Official Draft as much as hints that the Code drafters recognized the existence, never mind the central importance, of this category—and, for that matter, of the state itself:

This category of offenses, including treason, sedition, espionage and like crimes, was excluded from the scope of the Model Penal Code. These offenses are peculiarly the concern of the federal government. . . . Also, the definition of offenses against the stability of the state is inevitably affected by special political considerations. These factors militated against the use of the Institute's limited resources to attempt to draft "model" provisions in this area. However we provide at this point in the Plan of the Model Penal Code for an Article 200, where definitions of offenses against the existence or stability of the state may be incorporated.⁵⁰⁹

Without this note, the final version of the Code creates the mistaken impression that the first interest to be protected by the criminal law is the paradigmatic individual interest in the existence of the person (in article 210 (criminal homicide)). In-

⁵⁰⁸ MODEL PENAL CODE § 241 (Proposed Official Draft 1962).

⁵⁰⁹ *Id.*

stead, the firstness of the first interest to be protected belongs to the paradigmatic public interest in the existence *and stability* of the state.

The Model Penal Code did not altogether eliminate the victim as person. If we include the categories of state and police offenses, the second of the seven offense categories, after all, is explicitly dedicated to the protection of "the person." Characteristically, this category deals with offenses "involving danger" to the person, and thereby combines the vagueness typical of a police regime ("involving") with its focus on threats, rather than harm ("danger").

The Code defines "person" broadly to include not only "any natural person," but also "a corporation or an unincorporated association."⁵¹⁰ The drafters, however, here appear to have thought of offenders, not victims, and we've already seen that the offender as person had no place in the Code's model of criminal administration through danger control. The Code does not define "victim."

The "person" protected in the category of "offenses involving danger to the person" is the individual, or "natural," person who is the victim of a homicide, an assault, a kidnapping, or a rape. The same could be said for offenses in the next category, "offenses against property," though here already the Code turns its attention from the person to an interest, property, which may be either individual or public. It is the interest that the Code seeks to protect, not the person holding it. Only one of the offenses against "the property system,"⁵¹¹ robbery, presumes an individual victim because it presumes an "offense involving danger to the person," assault: robbery is theft (an offense against property) plus assault (an offense involving danger to the person). The ultimate, or true, victim of a robbery, however, is apersonal since the core of robbery is theft, and not assault. It is, after all, theft plus assault, and not the other way around. That is why robbery appears among the property offenses, and not the person offenses.

Still, the victim of a property offense *may*, though it need not, be a person. The next offense category, offenses against the family, is the first one explicitly to protect not an individual,

⁵¹⁰ MODEL PENAL CODE § 1.13(8) (1985).

⁵¹¹ MODEL PENAL CODE AND COMMENTARIES (OFFICIAL DRAFT AND REVISED COMMENTS) §§ 220.1-230.5, at 157 (1980).

but a community. Whereas the third offense category protects an interest (property), which may be held by individual or communities, and is in this sense apersonal, the fourth offense category protects not an interest, but a community, the family. By definition (or rather by categorization) offenses against the family are not offenses against persons, at least not directly. They may be construed as offenses against persons only indirectly, by conceiving of these persons as members of a family. So, bigamy, incest, and child neglect obviously (and abortion not so obviously) affect individuals, but they also victimize the family, at least according to the Model Code.

The remaining three categories bear an even more remote relation to individual persons. Offense categories five and six concern the "public" (as in "public administration" and "public order and decency"), whereas the seventh, and last, category, that of police offenses, once again protects the state, and thereby closes the circle originating with the first category, of "offenses against the existence and stability of the state."

In the end, the victim as person plays a subordinated role in the Model Code. It finds itself sandwiched between apersonal victims, beginning (and ending) with the state, but also including the family and the public, as well as an abstract interest, property. The Code begins with the state and ends with the state. Along the way, it touches upon the person, in the second category ("offenses involving danger to the person") but then immediately proceeds to remove the person, by reducing it, first, to incidental significance (as potential holder of a property interest), next, to indirect significance (as members of the family and the public), and, eventually, to insignificance (as object of state police).

The relative insignificance of personal victims in the Model Code raises the more general question of the significance of so-called traditional, or "true," crimes in modern criminal administration. The Model Code goes a long way toward shifting the core of criminal law from interpersonal crime—of persons against persons—to apersonal offense—of threats against interests, communities, and ultimately the state, a shift first described (and applauded) by Pound and Sayre. This new model of criminal law behind the new model of a criminal code remained unchallenged even during the liberal constitutional challenges against criminal statutes of the 1960s and early 1970s. It found

its fullest and most comprehensive implementation in the war on crime of the decades since then.

3. *The War on Crime*

In the war on crime, the traditional criminal law—with its central ceremony, the jury trial—is not only pushed into the periphery, but also is relegated to a mere means to the end of facilitating the enforcement of the new core of criminal law. As a cover for the efficient and silent administration of the bulk of offenses, the entire elaborate system of traditional criminal law serves a function not unlike the mens rea and actus reus principles in the Model Penal Code: its retention—with the requisite exhortations of its crucial significance—serves to hide its irrelevance. In this way, the remnants of traditional criminal law serve to legitimate modern criminal administration. Needless to say, the legitimacy of traditional criminal law itself is beyond question. Theories of punishment are useless not only because punishment is passé, but also because there's no need to justify anything.

It's not clear to what extent the war on crime merely spelled out the administrative program of the Model Penal Code, or deviated from that program in some significant way. The Model Code, as we saw, obscured its underlying program of criminal administration as state-focused danger control both through the explicit retention of principles of traditional criminal law and through the exclusion of state and police offenses from its scope. Yet, all of the weapons of the crime war can be found in the Code, even if they are not apparent to the naked eye. On the surface, we find the heavy use and expansive definition of inchoate offenses, the full arsenal of possession offenses supplemented by presumptions, and, in general, a system of criminal law geared toward the identification and disposal of criminal deviants. Even without the excluded categories of state and police offenses, the Code assigns the protection of victims as persons a minor, supporting, role.

If one looks closely, one can even make out the ultimate weapon of the crime war: permanent disposal and complete incapacitation through capital punishment. The entire, and extensive, Code section dealing with this "extreme affliction sanction" appears in brackets, expressing the drafters' inability to reach a consensus on its legitimacy. Despite its non-committal brackets, this section provided the blueprint for the

revival of capital punishment in the United States.⁵¹² And last but not least, there is the Code's off-hand suggestion that legislatures might wish to insert into their criminal codes "additional Articles dealing with special topics such as narcotics, alcoholic beverages, gambling and offenses against tax and trade laws,"⁵¹³ a suggestion that legislatures were only too happy to take up in the war on drugs, though surely with an enthusiasm and consequences that the Code drafters didn't anticipate.

In the end, the war on crime took the general system of modern criminal administration as threat elimination, sketched by Pound, Sayre, and their contemporaries and, belatedly, codified by Wechsler, and then put it to radically different use. A shift from a presumption of corrigibility to one of incorrigibility produced a concomitant shift from rehabilitation to incapacitation. Eventually, extreme affliction sanctions became the norm, and correctional measures the exception. Prisons were transformed from correctional institutions run by penologists into warehouses supervised by inventory managers. Treatment still was the name of the game, but the realities of treatment, as well as its function, had changed in ways unimaginable to the naively progressive champions of treatmentism.

In the war on crime, the Model Code's mechanisms for the early detection and diagnosis of correctional needs became a vast net of mass incapacitation. The attempter was still placed under state control as soon as his abnormal dangerousness had revealed itself, with no regard for traditional worries about the line between preparation and attempt or the impossibility defense. And having been identified as exceptionally dangerous, he was still subjected to the same treatment as the offender who had succeeded in putting his criminal plan into action. But now, that treatment was no longer designed to cure, but merely to quarantine, and to quarantine for as long as possible, given that the offender's criminal tendencies were presumed to be inherent and permanent.

So, possession offenses were transformed from opportunities for early correctional intervention into opportunities for lengthy, perhaps permanent, incapacitation. Strict liability

⁵¹² MODEL PENAL CODE § 4.02 (1985); *see, e.g.*, *California v. Ramos*, 463 U.S. 992, 1009 (1983); *Gregg v. Georgia*, 428 U.S. 153, 158, 190-91, 194 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976); *McGautha v. California*, 402 U.S. 183, 202 (1971).

⁵¹³ MODEL PENAL CODE § 241 (Proposed Official Draft 1962).

crimes flourished, no longer constrained by the Model Code's artificial limitation to "violations," and even extending to serious felonies punished with mandatory life imprisonment without the possibility of parole. In fact, parole was entirely abandoned, rendering supervision and continued diagnosis of inmates unnecessary and maximizing the incapacitative potential of every conviction. Most dramatically, the death penalty, that most extreme of extreme affliction sanctions, which had found only an awkward place in the Model Code, re-emerged as the most permanent of permanent incapacitation sanctions.

But the Model Code, and the progressive approach to criminal law it represented, was not alone in unwittingly laying the groundwork for the war on crime. As an emergency measure designed to abate a national crisis, the war on crime was not choosy when it came to selecting the tools that helped it accomplish its crime extermination mission. There simply was no time to revamp American criminal law in its entirety. Nor was there any need to do so. The war on crime instead used the principles and practices at its disposal and molded them into tools, turning progressive reforms into Draconian incapacitation measures.

The Warren Court suffered the same fate in criminal procedure as the Model Code did in substantive criminal law. In the war on crime, not only the Model Penal Code, but also the Warren Court's Fourth Amendment jurisprudence became a blueprint for policing threats through early incapacitative intervention. Much as the Model Penal Code's greatest influence on substantive criminal law was not its elaborate system of correctional treatment (codified in its parts III & IV, long since forgotten) but its model death penalty statute, so the Warren Court today lives on in millions upon millions of *Terry* stop-and-frisks.

Terry today does not survive as an attempt to bring low level police intervention within the realm of, albeit scaled down, constitutional scrutiny. *Terry* instead stands for the explicit endorsement of police intervention as threat management, and more specifically—and troubling—as management of threats against the state by the state, or rather against state officials by those same officials.

Terry turns entirely on the safety of state officials. *Terry* held that a police officer is entitled to "frisk" a suspect he has "stopped" for the purpose of protecting himself. Evidence discovered during such a safety frisk, like *Terry*'s gun, is an unan-

ticipated benefit, not a justification for the frisk. The Supreme Court, after *Terry*, spent a lot of time stressing the exclusively protective justification of the frisk, without recognizing the danger of authorizing state intervention on the basis of threats to an official of the state as perceived by that official. These perceptions were not only unreviewable; in the war on crime, they were also unreviewed. In the crisis of crime that triggered the war on crime, police officers in the trenches had good reason to fear for their safety. What appellate court, comfortably removed from the realities of hand-to-hand combat, would dare challenge the apprehension experienced by an officer in the field who comes face to face with the enemy, a criminal suspect?

The result has been that *Terry* today justifies "protective sweeps" of buildings following arrests, car frisks incident to traffic stops, and ever more elaborate connections between ever more innocuous items seized by ever more frightened police officers during protective sweeps and frisks of persons reasonably suspected of criminal conduct. And with the help of presumption enhanced possession offenses, modeled on the Model Penal Code, these *Terry* searches and seizures play an important role in the war on crime. *Terry* thus establishes a convenient link between a state official's perception of a person as a threat and the threat's elimination through the person's incapacitation. And that, in a nutshell, is what the war on crime is all about.

V. CONCLUSION

Over the past thirty years, the war on crime has transformed American criminal law into a system of threat elimination and minimization that has no room for persons, as offenders or as victims. Today criminal justice policy begins and ends with incapacitation. And that incapacitation is achieved by any means necessary.

Faced with a crisis of crime in the 1960s, as real as it was political, the much celebrated artifice of Anglo-American criminal law simply collapsed. The traditional common law, unthinkingly imported from England centuries ago, put up no resistance to the state's attempt to turn criminal justice into a system for the identification and disposal of dangerous elements. The two fundamental principles of this much celebrated body of law, *actus reus* and *mens rea*, proved so malleable and ungrounded

in anything other than common law tradition that they were easily accommodated to the new demands of emergency management. The mens rea requirement either simply disappeared, or was easily circumvented through evidentiary presumptions. The actus reus requirement likewise went quietly, as the concept of act proved flexible enough to provide at least the sheen of legitimacy to the paradigmatic offense of the war on crime, possession. It made no difference that English courts centuries ago had expelled this status offense from the realm of the common law.

The treatmentist orthodoxy of the time similarly did nothing to halt the triumph of incapacitation as the core function of the criminal law. On the contrary, it facilitated the emergence of the war on crime in various ways. It was treatmentism that rendered mens rea and actus reus expendable. It was treatmentism that had softened up these once iron-clad principles of criminal law, giving them the sort of flexibility that proved so useful to the state's efforts to retain the façade of normalcy for the emergency measures of the war on crime.

Having transformed punishment into treatment, the progressive treatmentists paved the way for the war on crime's shift of emphasis from enlightened rehabilitation to the other, darker and danker, end of the treatment spectrum, incapacitation. Having successfully debunked what they perceived as the anachronistic orthodoxy of retributivist punishment, the rehabilitationists found themselves ill-equipped to restrain the arational urge to exterminate the evil of crime, personified by an identifiable subgroup called "criminals." All treatmentists are out to "subject to public control persons whose conduct indicates that they are disposed to commit crimes."⁵¹⁴ The only difference between rehabilitationists and incapacitationists is what sort of treatment they prescribe to the abnormally dangerous. The rehabilitationist is a treatmentist who thinks all criminals are at bottom good, and therefore curable. The incapacitationist is a treatmentist who thinks they're all bad, and incurably so. An incapacitationist is a rehabilitationist who has been mugged.

There is something rotten in a system of law that abandons all principles at a time of crisis. What good are principles of constitutional law that buckle under the pressure of crisis—and the excitement of wartime xenophobia—to justify the mass in-

⁵¹⁴ MODEL PENAL CODE § 1.02(1)(b) (1985).

ternment of enemy minorities.⁵¹⁵ Similarly, what good are the time honored principles of Anglo-American criminal law if they can so easily be pressed into service in a war on crime, resulting once again in the mass internment of enemy minorities, this time on an even larger scale? And what good are enlightened principles of correctional treatment if they can so easily flip over into a blueprint for eliminatory treatment? They are all good for one thing, and for one thing only: wrapping the unprincipled exercise of state power in the mantle of legitimacy.

The war on crime has done American criminal law a favor. It has exposed the weakness of its foundation. In particular, it has demonstrated the impossibility of building a system of law grounded only in tradition, rather than in firm principles. More specifically, the war on crime has shown once and for all that the only way to guarantee the legitimacy of state governance is to ground it in the concept of the person. The progressive treatmentists had removed the person from criminal law, and replaced it with the concept of threat, transforming person punishment into threat neutralization, and criminal law into criminal administration. It was this apersonal concept of criminal law that paved the way for the war on crime, which replaced rehabilitation with incapacitation as the threat neutralization method of choice.

The problem with the war on crime, then, was not that it employed incapacitative treatment, but that it employed treatment of any kind, as opposed to meting out just punishment. The problem was not that it policed only innocents, but that it policed everyone, regardless of guilt or innocence.

To overcome the war on crime, and to guard against the collapse of legality in the face of future crises, we need to put the person back into American criminal law. We need a personal egalitarian account of criminal law, centered around the victim and offender as equal persons. We need a system of criminal law that finally and completely abandons the apersonal authoritarian orthodoxy that has shaped American criminal law since the beginning of the twentieth century, and culminated in the war on crime.

⁵¹⁵ *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 230 U.S. 81 (1943).