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REPLY: CRIMINAL LAW'S PATHOLOGY

William J. Stuntz*

I thank Kyron Huigens for devoting his time and his considerable talent to responding¹ to my article, *The Pathological Politics of Criminal Law*.² I also thank editors of the *Michigan Law Review* for giving me the opportunity to reply.

It is best to begin by defining the contested territory. Huigens and I agree (I think) on three propositions. First, American criminal law, both federal and state, is very broad; it covers a great deal more conduct than most people would expect. Second, American criminal law is very deep: that which it criminalizes, it criminalizes repeatedly, so that a single incident can yield a dozen or more separate charges.³ Third, because criminal law has these features, a great many defendants plead guilty who might win at trial given more reasonable criminal liability rules, and a smaller but still significant number of defendants lose the opportunity to raise substantive legal claims they could have raised if those more reasonable rules applied. These effects give prosecutors an enormous amount of power. All this is common ground.⁴

We disagree about two important things. Huigens believes that the nature of criminal law and criminal lawmaking may not be a large problem — overcriminalization may be no more than a “benign” response to the public’s desire to use criminal law to make symbolic statements.⁵ And he believes that if there *is* a problem, it lies in the triumph of consequentialism as the reigning theory of criminal punishment.⁶ Both points are, like all Huigens’ work, very interesting; I

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1. Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811 (2002).

2. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

3. The presence of overlapping crimes also allows prosecutors to offer or threaten a range of sentences — a useful posture for plea bargaining. For a wonderful example under the Federal Sentencing Guidelines, see Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1506-10 (1993).

4. Huigens concedes these points in the first page of his essay. Huigens, *supra* note 1, at 811.

5. See *id.* at 812, 814-15.

6. *Id.* at 812, 819-21.

enjoyed and profited from his essay. And the argument about consequentialism has substantial force. But I think neither point is correct.

Criminal law's breadth and depth are not benign. Among other bad effects, these features of criminal law utterly undo the accuracy-enhancing features of the law of criminal procedure. The result is that we are probably sending a large number⁷ of people to prison based on conduct that is technically criminal (though the ability to stack charges puts even that conclusion in doubt) but functionally innocent. That problem alone should suffice to show that criminal law is diseased, and seriously so.

And consequentialism is not the germ that produced this disease. It is not clear that any idea or theory has done so; I suspect the key culprit is a uniquely bad set of institutional arrangements. But if an idea *is* the culprit, the idea is not consequentialist. Rather, the intellectual villain is the cluster of principles that criminal lawyers call "the rule of law." The irony is thick: we have a deeply lawless criminal justice system in part because that system is deeply committed to legality. That truth does not depend on whether the system is consequentialist, retributive, or rehabilitative. Theories of punishment matter, but their largest effect is on sentencing practices, not on criminal liability rules.

I. THE PATHOLOGY

Huigens argues that I have miscategorized the problem with criminal law:

Imbalances of power in a constitutional system may be dangerous, unwise, or unjust, but at the same time benign — in that they are internal, inevitable, cyclical shifts of power. . . . [I]t is possible to place a benign construction on prosecutorial dominance in contemporary criminal law. Overcriminalization may be the distorted, misguided, but fundamentally legitimate expression of an expectation that the aims of the criminal law will parallel the aims of ordinary morality. If so, then overcriminalization is not pathological.⁸

I can embrace most of the adjectives Huigens uses in this passage — dangerous, unwise, unjust, distorted, misguided, even legitimate (I do not think criminal law's problems are the product of a coup). I object only to three: cyclical, inevitable, and benign.

7. Given the size of our prison and jail population — in excess of two million — the number of innocents may be large even if the percentage is quite small. But the percentage may be larger than one would think. If the threat of trial is not inducing careful screening by police and prosecutors, then those officials' sense of obligation is the only force left to do that job. It seems unduly optimistic to assume police officers and prosecutors do their jobs not just well but extremely well, even though errors are almost certain to go undiscovered. The more plausible assumption is that there will be a large number of errors.

8. Huigens, *supra* note 1, at 812.

Cycles turn. One side of the wheel is up today, a different side tomorrow. Power does shift cyclically in some areas: Congress is more powerful and Presidents are weaker at some times than at others. But there is nothing cyclical about prosecutorial power. At all times, it grows. Look at any state's criminal code at any two dates; the later version will cover a good deal more ground than the earlier one.⁹ That is especially true of the federal criminal code, which seems to expand exponentially.¹⁰ More criminalization means more policymaking space for prosecutors; like most regulatory statutes, criminal prohibitions are delegations of power to the officials who enforce them.¹¹ The number and scope of the delegations are constantly increasing. Prosecutorial power does not ebb and flow. It always flows.

That state of affairs is not inevitable, at least not in the strong sense of that word. Consider the contrast between criminal justice and most other forms of government regulation. Save for the divide between parliamentary and presidential systems,¹² governments of first-world countries look alike. Powerful national legislatures, still more powerful executives (sometimes responsible to the legislature, sometimes not), large centralized bureaucracies — these things are present in all wealthy liberal democracies. One might fairly infer that these things are inevitable, at least in countries with democratic traditions and high per capita GDP. Criminal prosecution is different. In most of the world, it is the province of bureaucrats, not elected officials. Those bureaucrats generally work for national governments, not for local ones. Meanwhile, the overwhelming majority of American prosecutors work for local governments, and their offices are headed by elected district attorneys.¹³ Most importantly, other countries' prosecutors do not appear to exercise the kind of broad policymaking power their

9. See Stuntz, *supra* note 2, at 513-14 (discussing changes in the Illinois, Massachusetts, and Virginia codes over time). The only exception is in states that revised their codes to approximate the Model Penal Code. In those states, there was sometimes a temporary (but only temporary) decline in the number and scope of criminal offenses. See *id.* at 514.

10. See *id.* at 514-15. For more detailed discussions that focus on recent developments, see NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960-1993 (1994); TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW (1998).

11. Outside the criminal justice system, these delegations are heavily constrained by oversight both from the executive and from the legislature. Similar constraints are absent in the realm of criminal prosecution: even in the federal system, prosecutors face almost no oversight from either quarter. For the best discussion, see Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999).

12. For a wonderful discussion of that divide, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

13. More than ninety-five percent of local prosecutors' offices are headed by an elected district attorney. See JOHN M. DAWSON ET AL., U.S. DEPT' OF JUSTICE, PROSECUTORS IN STATE COURTS, 1992, at 2 (1993).

American counterparts wield. I suspect a German or French or Japanese prosecutor would be astonished at the thought that she, or her office, should decide to enforce some drug laws but not others. American prosecutors (and American police forces) do that as a matter of course.

Notice the difference. The growth of a large administrative arm of the national government seems to be a natural part of liberal democracies' development. The rise of prosecutors with unreviewable authority to define what criminal law means in their jurisdiction is not like that: it happened here, but it is not clear that it has happened anywhere else. That does not make the case for inevitability.

Consider another feature of American criminal justice: the dominance of plea bargaining — not under the table with winks and nods, but out in the open, with prosecutors and defense attorneys settling criminal cases the way civil litigators do. George Fisher's brilliant work on that subject shows how a series of path-dependent changes in nineteenth-century criminal litigation produced the kind of plea bargaining we see today.¹⁴ Yet plea bargaining can be changed — indeed, it can be abolished, as Stephen Schulhofer's thorough study of criminal litigation in Philadelphia in the 1980s showed.¹⁵ I think something similar is true of American-style prosecutorial discretion. It arose, as plea bargaining arose, out of a series of seemingly unrelated nineteenth-century developments that combined in ways no one expected. The passage of criminal codes, the rise of professional prosecutors, the late-nineteenth-century move to criminalize vice — taken together, these things put prosecutors in the position of choosing not simply between strong cases and weak ones, but between crimes worth enforcing and crimes to be used only as bargaining chips.¹⁶ Once prosecutors could so choose, legislators had the freedom to criminalize strategically, to ban more conduct than anyone actually wanted to ban in order to reduce the cost of prosecution. It all happened naturally. But it is not inevitable that the problem should go uncorrected, that prosecutorial power should have continued to grow unchecked for the past century.

Unlike plea bargaining, prosecutorial discretion cannot simply be abolished, and even were it possible, abolition would probably do more harm than good. But prosecutorial power *can* be reined in, by reining in substantive criminal law. I suggested some ways of doing that in my article;¹⁷ no doubt there are others. Whether or not

14. George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000).

15. Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV L. REV. 1037 (1984).

16. See Stuntz, *supra* note 2, at 577-78.

17. *Id.* at 587-96.

we embrace one of those options is our choice. This is not an unchangeable feature of the system that we must live with.

Which brings me to the last of those three adjectives: "benign." Here, one must distinguish between two phenomena. The first is overbroad criminal law that is enforced largely as written. The second is broad criminal law-as-written together with much narrower criminal law-as-enforced. The first phenomenon may be unfortunate, but it is benign in the sense that Huigens uses the word. The second is not. But the second accurately describes the way American criminal law works.

The key is the size of the gap between the norms defined in criminal codes and the norms that prosecutors ordinarily seek to enforce. A large gap all but eliminates the accuracy-enhancing portion of the law of criminal procedure. If the nominal crime is x and the real crime is $x + y$, y need not be proved beyond a reasonable doubt in order for the defendant to be found guilty.¹⁸ Either it is important to convict only those who have violated the relevant social norms, or it isn't. If it is, then allowing the government to criminalize more than the norms it seeks to enforce is a very serious problem.

The problem remains serious even if legislators are not behaving strategically. Huigens says that the law is not strategic but symbolic — an effort by legislators to use criminal law to condemn wrongdoing, not just punish it.¹⁹ Criminal codes are, on this account, immorality codes. As morality is comprehensive, so criminal codes must be comprehensive.

There is something to this point, but it does not show what Huigens thinks it shows. Voters undoubtedly demand, and so legislators supply, symbolic criminal legislation. Even if that were the sole source of the problem, it would not follow that criminal law's relentless expansion is benign. To see why, take a contemporary example where criminal law is fairly close to the comprehensive moral code Huigens imagines: deception. There are no doubt some morally justified lies,²⁰ but the great majority — along with the great majority of misleading but technically true statements — are immoral. If criminal law is to serve as something akin to a comprehensive moral code, it must criminalize all those false and misleading statements. Federal criminal law comes surprisingly close to doing just that, with its broad

18. It is not just the reasonable doubt standard that goes by the boards. Whenever a scenario like the one described in the text produces a guilty plea, *all* the doctrines of criminal procedure go by the boards. One implication is that the constitutionalization of criminal procedure has contributed to the disease that afflicts criminal law. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

19. Huigens, *supra* note 1, at 812.

20. For a good discussion, see SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978).

intangible rights²¹ and false statements²² statutes, and its several hundred more specific bans on fraud and misrepresentation.²³

The effect is predictable. Prosecutors cannot possibly enforce such a code; there is far too much dishonesty. They might try enforcing these broad norms randomly — like police cars giving a ticket to every tenth driver exceeding the speed limit even by one mile per hour. But that would mean thousands of prosecutions of defendants like Bill Clinton or Henry Cisneros, people who lied to conceal something embarrassing, not to steal someone else's money or to defraud the judicial system.²⁴ Such prosecutions would be unpopular, just as Ken Starr's investigation of Clinton was unpopular. There is only one other alternative: prosecutors enforce a different set of criminal norms than the ones in the statute books — say, by prosecuting mostly cases of core fraud and perjury.

So the public gets its symbolic condemnation, and the justice system enforces a defensible set of standards for criminal dishonesty. What could be wrong with that? The answer lies in three features of the case selection process. First, prosecutors are the ones defining what counts as core fraud or perjury. Those definitions are unwritten and unreviewable, and they vary from place to place and from time to time, because they are wholly discretionary. That is a scandal: it means criminal law is not, in any meaningful sense, law at all. Second, prosecutors can abandon the norms selectively. As long as those prosecutions are not too common and as long as they target unpopular defendants, prosecutors will pay no political price for them. (Imagine if Ken Starr were running a prosecutor's office today, and his legal guns were trained on Martha Stewart or Kenneth Lay. One suspects his poll numbers would look a lot better, even if the prosecutions were equally wrong.) A legal system in which men and women are imprisoned because they are famously unpopular, or (worse) because some government official wants to take them down, is not a healthy system. Third, even when prosecutors do what they are supposed to do, even when they go after only those defendants who have lied in order to steal something or to defraud a court, the key element of the crime — the theft or the fraud on the court — need not be proved. People go to

21. 18 U.S.C. §§ 1341, 1346 (2000).

22. 18 U.S.C. § 1001 (2000).

23. A few years back, Jeffrey Standen counted 325. Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 289 (1998).

24. Clinton lied in a deposition in a civil case in order to conceal an affair. Cisneros lied to FBI agents performing a background check for the same reason. For the best discussion to date of the facts of the Clinton case and their legal implications, see RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* 16-58 (1999). On Cisneros, see, for example, Bill Miller, *Cisneros Pleads Guilty to Lying to FBI Agents: \$9 Million Probe Yields Fine, No Jail*, WASH. POST, Sept. 8, 1999, at A1.

prison when prosecutors believe they are guilty, not when some neutral fact finder has so decided or when the defendant has confessed. (Notice that a guilty plea need entail only a confession to the nominal crime, not to the real one.) It is hard to see how any of this could possibly be “benign.”

Criminal codes cannot do double duty, defining both morally proper conduct and the standards that justify incarceration. If the law plays the first role, it relinquishes the second. The result is not bad law; it is no law at all.

Anyone who drives a car understands the relevant phenomenon. A highway near my home²⁵ has speed limit signs that ban driving over fifty-five miles per hour. Traffic on that highway appears to move at an average speed of about sixty-five miles per hour. Tickets are never handed out to anyone who drives sixty or below; above that level, the speed that will lead to a ticket is unclear — probably somewhere in the seventy-mile-per-hour range, but it varies from day to day, presumably depending on who is patrolling the highway.²⁶ Surprisingly often, criminal codes work the same way, with one key difference: those who guess wrong about where the real boundary lies do not pay a fine — they go to prison. There is no reason why criminal law must work that way. That it *does* work that way shows how diseased criminal law is.

II. THE SOURCE OF THE PATHOLOGY

Huigens attributes whatever problems criminal law has to the triumph of consequentialism as the reigning theory of criminal punishment.²⁷ His claim is that legislators and prosecutors see punishment as a means of quarantining dangerous people, not punishing wrongdoers, and that this is the logical product of American legal theory’s relentless utilitarianism. That, Huigens believes, is what has produced broad and deep criminal liability rules.

As an explanation for contemporary American sentencing practices, Huigens’ argument seems plausible. As an explanation for the century-and-a-half-long trend toward ever broader and deeper criminal liability rules, it is a good deal weaker. The central problem goes to timing. Criminal codes have been expanding, and prosecutors’ powers have been expanding along with them, for a very long time. For a theory to cause that trend, the theory must be similarly longstanding.

25. The highway is a stretch of Route 2 just outside Boston, running from Belmont to Concord.

26. I have no source apart from personal observation. One of the evils of this system — in traffic enforcement and in criminal law more generally — is the absence of any reliable source of information about real, as opposed to nominal, legal boundaries.

27. Huigens, *supra* note 1, at 819-25.

Yet theories of criminal punishment are anything but constant. On the contrary, they come and go. One generation is dominated by retributivists, another by believers in rehabilitation, a third by proponents of deterrence, then the cycle begins again. Short-lived theories are not good explanations for long-lived practices.

Huigens' response is presumably that consequentialism is *not* short-lived, that it has dominated American law and legal theory since Bentham's time. Perhaps so. But any label that fits legal thought of both the 1890s and the 1990s, that captures the essence of both Herbert Wechsler's Model Penal Code and Stephen Breyer's sentencing guidelines, is too capacious to do much work. Huigens plainly believes there has been a large shift in the reigning theory over the past thirty years or so.²⁸ But there has been no significant change in criminal law's expansive trend during that time. Criminal liability rules expanded in Langdell's day, in Wechsler's day, and in the present day. It seems odd that a theory that changes shape so radically would produce such a constant phenomenon.

There is another problem. Huigens seems to believe that developments in sentencing practice flow out of the same intellectual trend that drives changes in criminal law.²⁹ But sentencing levels in the United States have *not* been constant; they have fluctuated considerably over time. In 1904, the United States incarcerated 69 people per 100,000 population.³⁰ In 1923 — the middle of Prohibition — that number had grown only modestly, to 73. By 1940, it had mushroomed to 125; the Great Depression saw a lot more incarceration than did the Roaring Twenties. That figure held constant for the next twenty years. Then, from 1960 to 1970, it fell from 125 to 97 (even while crime was rising sharply). Beginning in the mid-1970s, the prison population began to explode, as the index rose to 141 in 1980, to 298 in 1990, and to 411 in 1995.

I do not believe that intellectual developments — the decline of one theory of punishment, the rise of another — are the key that unlocks these figures, though I might be wrong about that. One thing, however, should be clear: the same intellectual trends cannot explain

28. See Huigens, *supra* note 1, at 820 (discussing the "shift from the rehabilitative, indeterminate sentencing philosophy exemplified in the Model Penal Code to the incapacitative, determinate sentencing philosophy exemplified in the Federal Sentencing Guidelines").

29. Thus, he couples his criticism of the Model Penal Code's focus on cognition with his criticism of the Federal Sentencing Guidelines' use of revealed preferences. *Id.* at 820-22. The idea is that both phenomena spring from the same root.

30. To calculate the figures in this paragraph, I used the following sources. For prison populations up to 1970, see MARGARET WERNER CAHALAN, *HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984*, at 29 tbl.3-2 (1986). For the prison populations from 1980 forward, see Bureau of Justice Statistics, *Corrections Populations in the United States*, available at <http://www.ojp.usdoj.gov/bjs/abstract/cpius.htm>. For the total population throughout the relevant period, I used census data, available online at <http://eire.census.gov/popest/archives/pre1980/popclockest.txt>.

both the fluctuations in the prison population *and* the steady rise in criminalization.

What, then, is the source of criminal law's steady growth, and of the criminal justice system's equally steady march toward lawlessness? No single answer suffices; law and legal institutions are too complex for that. Still, one part of the answer seems easy enough. Legislators and prosecutors have acted, and no doubt will continue to act, in ways that are natural given the institutional and legal framework that surrounds them. The problem lies in that framework.

Legislators voting on criminal statutes face asymmetric political costs.³¹ If they criminalize too little, there is some possibility, however small, that they will be blamed for not giving police and prosecutors the necessary tools to deal with crime. If they criminalize too much, the only risk is that law enforcers will go after defendants who attract public sympathy — the Ken Starr / Bill Clinton scenario. But as that episode showed, the public blames the overzealous prosecutor in such cases, not the overcriminalizing legislator. Overcriminalization, whether strategic or symbolic, thus looks costless to lawmakers. This asymmetry is aggravated by another: it is much cheaper for interest groups to lobby *for* criminal legislation than *against* it. This inverts the usual dynamic, where legislation is easier to block than to generate. Plus, the most important interest group is law enforcers — police and prosecutors. They benefit from broader criminal prohibitions, which allow police officers to justify stops and arrests more easily (hence the appeal of loitering laws) and prosecutors to induce guilty pleas more readily. More guilty pleas make prosecutors' jobs easier, and have the added benefit of raising their conviction rate.³²

That is the pathology. And this disease is degenerative: if everyone in the criminal justice system continues to do what comes naturally, the problem will continue to get worse.

31. The points in this paragraph are developed at greater length in Stuntz, *supra* note 2, at 547-57.

32. Huigens says that my argument "reduce[s] ultimately to one piece of logic: if conviction is easier, then more people will be convicted and imprisoned." Huigens, *supra* note 1, at 819. He then goes on to pose the question "why this should be anyone's objective." *Id.*

I do not accept this characterization of my argument. The reality is more complicated than a drive to maximize the prison population. When they pass criminal statutes, legislatures delegate power to prosecutors. In any delegation of power, there is some potential for the agent to deviate from the wishes of the principal. As I explained in my article, the largest such agency cost is that prosecutors will prosecute too little. See Stuntz, *supra* note 2, at 549-52. That will generally be true whether crime rates are high or low. The point is not that everyone (or anyone) wants to send as many people as possible to prison. Rather, the point is that prosecutors have an incentive to prosecute fewer people than legislatures would like — however high or low the latter level is. See *id.*; William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 16-19 (1996).

The system's attachment to a particular vision of the rule of law has the effect of locking in this perverse dynamic.³³ The ban on common-law crimes allocates crime definition to legislatures, even though legislatures have proved much more eager than courts to expand criminal liability. The ban on *ex post facto* crimes reinforces that allocation — legislatures, unlike courts, act prospectively as a matter of course. Vagueness doctrine seems to restrict legislatures, by requiring specificity when defining crimes. Actually, it restricts courts, by barring open-ended crimes that require substantial judicial definition. The rule of lenity seems to protect defendants against unfair surprise by resolving interpretive doubts in defendants' favor. But that rule only encourages legislatures to resolve doubts *against* defendants in advance. Taken together, these doctrines encourage legislatures to create more, and more particular, new crimes — many of which will naturally overlap existing crimes, thereby giving prosecutors more opportunities to stack charges. The more new crimes are created, the easier will be the process of extracting guilty pleas, and the fewer opportunities courts will have to define the boundaries of criminal prohibitions. As criminal codes grow, courts' power fades, and criminal law becomes, increasingly, a matter of legislative delegation and prosecutorial choice.

The most obvious corrective is to give judges more discretion, in order to check prosecutors' discretion. Judicial discretion is of course in tension with rule-of-law norms, both because it weakens legislative supremacy and because it is necessarily open-ended. But it would make criminal litigation *more* lawlike, not less so. Consider a recent example: Bill Clinton's impeachment and his subsequent Senate trial and acquittal.³⁴ The decision to impeach Clinton was made by the House of Representatives, a majority of which concluded that Clinton had committed serious crimes that justified removing him from office. The Senate may have agreed that Clinton violated the governing federal criminal statutes, but concluded that those violations did not merit removal from office. Notice the nature of the Senate's acquittal: Clinton probably did commit federal crimes, but not the sort of crimes that deserve formal punishment, and certainly not the sort of crimes that merit removal of a sitting President. In less technical terms, one might say that Clinton was a liar, but not the sort of liar who should go to prison or, in the case of a high-ranking public official, be forced to quit his job.

The hard issue in Clinton's case was not whether he violated federal statutes, but whether those violations were serious enough to justify kicking him out of the White House. A lot of criminal prosecu-

33. The points in this paragraph are developed at greater length in Stuntz, *supra* note 2, at 559-65, 578-79.

34. For an excellent account, see POSNER, *supra* note 24, at 59-132.

tions are similar: the hard issue is not whether the defendant committed the crime charged (or one of them), but whether criminal punishment is merited. In Clinton's case, that issue was decided both by the "prosecution" (Ken Starr's office and the House of Representatives) and by the "court" (the Senate). In ordinary criminal litigation, only the prosecutor gets to decide; the court is limited to the question whether the criminal statute has been transgressed. Which system is more lawlike? The one in which a court wrestles with the key issue in the case, or the one in which the prosecutor alone decides — without formal argument, a record, or appellate review? The question answers itself. As it is conventionally understood, the rule of law bars courts from making such vague, open-ended, discretionary judgments about desert and punishment. But that bar does not do away with open-ended discretion. Rather, it leaves the discretion in prosecutors' hands, subject to no review by anyone else. The system that looks more lawlike is actually less so.³⁵

We would do well to have courts exercise the kind of power the Senate exercised in Clinton's case. That would go some distance toward reining in abusive prosecutions, as it did in that case. Better still, it would reduce law enforcers' incentive to seek, and legislators' incentive to enact, ever more expansive criminal prohibitions.

III. CONCLUSION

The problem with American criminal law is not that it embraces the wrong theory of punishment. Theories of punishment have more to do with criminal sentencing and *mens rea* — two topics that Huigens focuses on in his essay³⁶ — than with the definition of criminal acts. Yet criminal law has expanded precisely by adding ever more prohibited conduct to the criminal code. Nor is the problem that voters and politicians are too tough on criminal defendants (though they probably are). Even when crime was not the headline issue it has been for the past few decades, criminal law expanded and prosecuto-

35. Huigens and I agree that (in his words) "[t]he existence of discretion, somewhere in the system, to make a context-sensitive evaluation of the offender's conduct and character is intrinsic to criminal law because context-specific, retrospective assessments of the offender and his wrongdoing are intrinsic to just punishment." Huigens, *supra* note 1, at 818. Discretion cannot be eliminated. If it could, and if we eliminated it, we would live in a less just society. I did not intend to suggest anything to the contrary in my article; if I did so, it was a result of poor expression, not conscious choice. The rule-of-law problem with the criminal justice system is not that the system allows prosecutors to exercise discretion; it is that prosecutors' discretion goes unchecked. The best check would be judicial discretion. That is how checks and balances are supposed to work: discretion by one branch checks discretion by another.

36. See Huigens, *supra* note 1, at 820-22 (discussing the Model Penal Code's culpability structure and its emphasis on cognition, and the Federal Sentencing Guidelines' focus on revealed preferences when setting sentencing levels).

rial power grew. Unless something else changes, the same thing will continue to happen when crime is again a small political issue. Rather, the problem is that strong legislative supremacy and strong prosecutorial discretion don't mix — they produce the kind of power imbalance that reinforces rather than corrects itself. The combination must be broken. If it isn't, we will continue to see ever more criminal laws, and ever less criminal *law*.