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Robert Leider

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THE MODERN COMMON LAW OF CRIME

ROBERT LEIDER*

Two visions of American criminal law have emerged. The first vision is that criminal law is statutory and posits that legislatures, not courts, draft substantive criminal law. The second vision, like the first, begins with legislative supremacy, but it ends with democratic dysfunction. On this view, while contemporary American criminal law is statutory in theory, in practice, American legislatures badly draft and maintain criminal codes. This effectively delegates the "real" drafting of criminal law to prosecutors, who form the law through their charging decisions.

This Article offers a third vision: that modern American criminal law is primarily conventional. That is, much of our criminal law is defined by unwritten common-law-like norms that are widely acknowledged and generally respected, and yet are not recognized as formal law enforceable in courts. This Article makes three contributions. First, it argues that criminal law conventions exist. Second, it explains how nonlegal checks on prosecutorial power bring about criminal law conventions. Third, it provides an account for how legislatures and courts should respond to a criminal law heavily comprised of norms that rely primarily on nonlegal sanctions for their enforcement.

* Assistant Professor, George Mason University, Antonin Scalia Law School. My thanks to: R. Seth Banks, Will Baude, Caroline Cecot, D. Bruce Johnsen, E. Lea Johnston, Jeremy Rabkin, Michael Reksulak, Daniel C. Richman, Paolo Saguato, Megan Stevenson; participants in CrimFest!; participants in the Levy Workshop; participants in the New Scholars Workshop at the Southeastern Association of Law Schools 2019 Annual Conference, including Bruce Green; participants in the Manne Faculty Forum, including Carissa Byrne Hessick and Craig Lerner; my research assistants, Gelane Diamond, Oren Litwin, and Tyler Shannon; and the editors of this journal, especially Katherine Hanley, Leah Karchmer, and Ryan Neu.

INTRODUCTION

Two visions of contemporary American criminal law have emerged. The first vision, often recited by judges, is that criminal law has become statutory.[1] Proponents of this opinion observe that federal courts do not have jurisdiction over common law criminal prosecutions,[2] and that a supermajority of states have abolished common law crimes.[3] Instead, legislatures now decide which conduct is permissible and which is prohibited. In theory, this is a good thing. Only by making criminal law statutory can the criminal law comport with basic principles of legality.[4] The people's representatives decide what should be criminalized, and individuals have notice that the government has prohibited certain conduct.

The second vision, more common in academic circles, contends that modern criminal law has devolved into the "law" of prosecutorial discretion. Adherents to this vision argue that contemporary legislatures badly draft and maintain criminal codes. Legislatures enact too many laws.[5] Congress, in particular, has created a federal criminal law that duplicates state criminal codes.[6] State and federal laws are often too broad, criminalizing actions that should be lawful.[7] Worse still, the statutes are often vague, making it difficult

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[1] Jones v. Thomas, 491 U.S. 376, 381 (1989); 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.1(a) (3d ed. 2017); Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 971–72, 972 nn.17 & 19 (2019) [hereinafter Hessick, *Myth*] (collecting authority for the claim and ultimately arguing against it); Kevin C. McMunigal, *A Statutory Approach to Criminal Law*, 48 ST. LOUIS U. L.J. 1285, 1287 (2004) ("The dominant attitude expressed in American jurisdictions is one of legislative supremacy and exclusivity."); John W. Poulos, *The Judicial Process and Substantive Criminal Law: The Legacy of Roger Traynor*, 29 LOY. L.A. L. REV. 429, 432 (1996) ("Statutes have always played a significant role in American criminal law. Hence, we gradually developed a preference for statutory criminal law.").

[2] United States v. Hudson, 11 U.S. 32, 33 (1812). Perhaps erroneously, this case now stands for the proposition that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." Liparota v. United States, 471 U.S. 419, 424 (1985). But *Hudson* did not rule out Congress passing a statute conferring jurisdiction on federal courts over common law crimes.

[3] Hessick, *Myth*, *supra* note 1, at 980–83 (surveying states).

[4] *Id.* at 971–98 (describing the conventional view).

[5] *See, e.g.*, Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 263 (2001); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 744–45 (1996).

[6] *See* Stephen F. Smith, *Federalization's Folly*, 56 SAN DIEGO L. REV. 31, 35 (2019) [hereinafter Smith, *Folly*].

[7] Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 360 (2019); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506–07 (2001) [hereinafter Stuntz, *Pathological Politics*].

to tell what conduct is criminal.[8] If breadth and vagueness were not bad enough, legislatures hesitate to repeal or amend crimes that have become desuetudinal or are rarely enforced.[9] Combined, proponents argue that these problems leave us with a criminal justice system that suffers from vast over-criminalization. In modern America, everyone commits "three felonies a day."[10]

According to the adherents of this view, these legislative defects provide prosecutors with plenary power over the administration of criminal justice.[11] Because modern criminal law is so broad, prosecutors are delegated the power to decide who to charge and with which crimes.[12] Even where a person has clearly violated the law, prosecutors have absolute discretion to select which crimes to charge, and that selection has an enormous impact on the defendant's ultimate sentence.[13] Conversely, defendants have little power. Most constitutional rights designed to protect defendants against the government are trial rights, and few people today go to trial.[14] Prosecutors have too many crimes to prosecute, while most defendants are guilty of some wrongdoing.[15] So, prosecutors offer defendants lower sentences in exchange for guilty pleas. Defendants who refuse and go to trial face a massive trial penalty if they are convicted.[16] Faced with offers they cannot refuse,[17]

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[8] Hessick & Kennedy, *supra* note 7, at 360.

[9] Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533 (1970); Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1333–34 (2008).

[10] HARVEY SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2011).

[11] Stuntz, *Pathological Politics*, *supra* note 7, at 579–80 ("Enforcement discretion permits overcriminalization, which in turns encourages more discretion. The result is an unwritten criminal 'law' that consists only of enforcers' discretionary decisions.").

[12] *Id.* at 506, 509.

[13] Griffin, *supra* note 5, at 273.

[14] *See* Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1073–74 (2017); Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. U. L. REV. 1071, 1074–75, 1080–81 (2019).

[15] *See* Brady v. United States, 397 U.S. 742, 751–52 (1970); NEIL M. GORSUCH, JANE NITZE & DAVID FEDER, A REPUBLIC IF YOU CAN KEEP IT 242–43 (2019); Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1332 (2002).

[16] NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 6 (2018); Josh Bowers, *Upside-Down Juries*, 111 NW. U. L. REV. 1655, 1664 (2017) [hereinafter Bowers, *Juries*].

[17] *See* Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 FED. SENT'G REP. 284, 286–90 (2019).

defendants almost always plead guilty.[18] Trials are for the reckless, the mentally ill, and the innocent—and sometimes even the innocent plead guilty because the risks are so high or because they wish to escape pretrial detention.[19] Courts have held that the exercise of prosecutorial discretion is a core executive power, almost entirely unreviewable by judges.[20] In essence, criminal law today is contract law between prosecutors and defendants, who have vastly unequal bargaining power.[21] One author laments that "our current system of judicial passivity, legislative delegation, and prosecutorial supremacy" is worse than the common law system it replaced.[22]

American criminal law scholars do not universally subscribe to either of these visions. Some have pushed back on the claims that criminal law is purely statutory.[23] These scholars argue that the common law remains an important part of our substantive criminal law and that vague statutes function as delegations to judges to define the scope of criminal law.[24] Some scholars have also pushed back on claims that prosecutors possess unfettered discretion, arguing that various institutional constraints curb prosecutors' de facto power.[25] But these recent articles have not provided a comprehensive account of how checks and balances turn statutory criminal law into a de facto common law system.

This Article articulates that vision of substantive criminal law. I argue that the structure of criminal law comprises not just statutory and formal common law, but also "conventions." Conventions are unwritten norms and

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[18] John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://pewrsr.ch/2F1Qxn7 [https://perma.cc/6TE3-4H9H].

[19] *See, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 59 (2011); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 173 (2014); Jeffery Q. Smith & Grant R. Macqueen, *Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 27, 34 (2017).

[20] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Griffin, *supra* note 5, at 275; Rebecca Krauss, *Prosecutorial Discretion*, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 4–7 (2009); Misner, *supra* note 5, at 736. For those few areas in which courts will review acts of prosecutorial discretion, see Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1370–72 (1987).

[21] Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1968 (1992).

[22] Hessick, *Myth*, *supra* note 1, at 971; *see also* Hessick & Kennedy, *supra* note 7, at 359.

[23] Hessick, *Myth*, *supra* note 1, at 968; Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 471 (1996).

[24] *See, e.g.*, Hessick, *Myth*, *supra* note 1, at 978–79; Kahan, *supra* note 23, at 473–74.

[25] Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019) [hereinafter Bellin, *Power of Prosecutors*]; *infra* note 27.

customs that are not "law" in the strict sense but nevertheless act as obligatory rules.[26] Unlike formal common law, which is enforceable in courts, conventions are binding only through indirect means, such as political pressure. But even though conventions may not bind legal actors in a court of law, conventions cannot be reduced to exercises of mere prosecutorial discretion.

How did we end up with a conventional criminal law? This Article argues that our current system is a product of checks and balances. Darryl Brown and Daniel Richman have explained how some democratic separation of powers checks work to constrain prosecutors' discretion.[27] Even if statutory criminal law is overbroad, legislatures curtail the scope of criminal law through legislative reform, budgetary decisions, and oversight.[28] Courts occasionally curtail the scope of broadly drafted statutes by employing the rule of lenity or void for vagueness doctrines. And executive officials are accountable to the electorate and incentivized not to enforce criminal statutes when such enforcement would be unpopular with voters.[29] The checks they identify constrain prosecutors' discretion to prosecute conduct that society views as blameless, and they form part of my account, too. In addition, I argue that legislatures and judges have various soft-power tools to constrain prosecutors and that juries—or at least the threat of jury trials—heavily cabin which charges prosecutors bring. Prosecutors who violate these norms by prosecuting blameless conduct will struggle to secure a conviction, regardless of the defendant's technical legal guilt. Further, checks and balances constrain prosecutorial discretion by reducing prosecutors' ability to show excessive leniency. For example, prosecutors are accountable to voters, and federal overcriminalization allows federal prosecutors to compete with local prosecutors. These checks, along with others, reinforce the pressure to maintain the proper scope of criminal law against prosecutors inclined to decriminalize too much.

Finally, this Article explains how legislatures and courts should accommodate the existence of criminal law conventions. The existence of conventions poses a difficult challenge for legal actors because, although

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[26] *See infra* notes 144–147 and accompanying text.

[27] Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 256 (2007) [hereinafter Brown, *Democracy*]; Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, *in* 2 CRIMINAL JUSTICE 2000 81, 91–96 (2000) [hereinafter Richman, *Changing Boundaries*].

[28] Brown, *Democracy*, *supra* note 27, at 256; Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 789–93 (1999) [hereinafter Richman, *Federal Criminal Law*].

[29] Brown, *Democracy*, *supra* note 27, at 256–65; Richman, *Federal Criminal Law*, *supra* note 28, at 789–93.

conventions are mandatory in some political sense, they are not formal law recognized by the legal system. Yet, this does not mean that courts, legislatures, and executive branch officials should ignore their existence. The forces that produce criminal law conventions provide a necessary check on prosecutorial discretion; their existence prevents criminal law from devolving into the prosecutor's private preferences about what should be unlawful. Given this, all three branches of government have a responsibility to facilitate the political, public, and private sanctions that are essential to maintaining a conventional system. In fact, the need for formal legal actors to support conventions is especially acute in criminal law, where occasional deviations from public conventions are often not publicized widely and prejudice unsympathetic or marginalized defendants.

This Article has four parts. In Part I, I argue against the two contemporary visions of criminal law. The first is that criminal law is statutory, while the second contends that, due to rampant overcriminalization, it has devolved into prosecutorial discretion. I argue that neither account is an accurate description of our current criminal law system. The statutory model has well-known shortcomings: Legislatures pass broad, vague, and overlapping laws, effectively delegating much of the criminal law to prosecutors. In addition, much criminal law remains common law, including the definitions of inchoate crimes, causation, and defenses. Even when legislatures purport to define these aspects of the law, they leave significant details to judges. But the prosecutorial discretion model does not offer a much better explanation. We have strong reason to believe that prosecutors are constrained actors. When we look at what prosecutors actually do, they primarily prosecute core crimes, such as murder, rape, robbery, theft, drug crimes, weapon violations, and driving under the influence of alcohol. Substantial portions of criminal law have fallen into total or partial disuse, including, for example, consensual sex offenses, minor speeding, and draft registration evasion. It seems unlikely that prosecutors, exercising their own independent judgment, have such widely convergent preferences on which criminal laws to enforce. Instead, this narrowing of substantive law reflects that prosecutors have many constraints on their power, even if those constraints do not come from formal law.

Part II argues that contemporary criminal law is primarily conventional. Section A defines what "conventions" are and gives an account of how those conventions support the legitimacy of a statutory criminal justice system. Section B then illustrates, through examples, that criminal law conventions exist and that they form an important part of our criminal law system.

Part III explains how these unwritten conventions emerge. I look at the role of legislatures, elections, jurors, judges, and largely redundant state and

federal criminal justice systems. Checks and balances from these sources diminish the scope of prosecutorial discretion by placing constant pressure on prosecutors to shape their charging decisions around generally accepted societal norms. Prosecutors have outer limits on their ability either to criminalize conduct that society does not believe is wrong or decriminalize conduct that society wants punished.

Part IV examines the doctrinal implications of having a criminal law built on unwritten conventions. Our current system of unwritten criminal law conventions does not solve all overcriminalization problems caused by broad, vague, and redundant statutes. I examine three areas where our conventions have fallen short: the ability of prosecutors to abuse a conventional system through arbitrary charges, the lack of true conventions in plea-bargained sentences, and the effect of statutory overcriminalization on criminal procedure. I then look at how a conventional system should address these shortcomings. Building on Adrian Vermeule's work with constitutional law conventions, I argue that judges should enforce criminal law conventions only indirectly, meaning that judges should neither ignore conventions nor enforce them as independent sources of legal obligations. This has two implications. First, because a conventional system relies on indirect enforcement of norms, judges should promote checks and balances in the criminal justice system. Without enforcing any particular conventions, judges can still help maintain a system that allows for conventions to develop. Second, judges have limited power, which they should exercise to enforce particular conventions through indirect means, such as applying the rule of lenity when prosecutors improperly enforce statutes. This final section applies this framework to some problematic areas identified in the first section.

Finally, I end on a cautionary note about criminal law conventions. A major problem with statutory overcriminalization is the weakening of criminal procedure guarantees against unreasonable searches and seizures and proof beyond a reasonable doubt on all essential elements of an offense. I am more skeptical that doctrinal changes will allow unwritten conventions to develop to solve these procedural problems, but I offer some modest suggestions.

I. BEYOND STATUTES AND PROSECUTORIAL DISCRETION

This Part argues against the two primary conceptions of contemporary criminal law. The first is that criminal law is essentially statutory. Legislatures define crimes and punishments, and judges simply carry out the will of the legislature. The second is that, although criminal law ought to be statutory, criminal law has devolved into a system in which prosecutors

essentially write the criminal code through their exercises of prosecutorial discretion. Neither account accurately describes our system. The legislative supremacy model undervalues the role of formal common law and cannot account for how prosecutors effectively narrow the scope of statutory criminal law. The prosecutorial discretion model does a poor job explaining substantial areas in which prosecutors' discretion seems to converge across jurisdictions. The de facto criminal law—the criminal law courts actually enforce—appears to be something different from either statutory criminal law or the private whims of thousands of prosecutors.

A. STATUTORY CRIMINAL LAW

On the surface, contemporary criminal law appears to be almost exclusively statutory. Most criminal law is state law,[30] and most states have abolished common law crimes.[31] An action is criminal only if the state legislature has drafted a statute making the conduct unlawful. Even where common law crimes exist, their scope is often limited to misdemeanors involving public morals.[32] Meanwhile, federal law does not recognize common law crimes.[33] Except for treason, which is defined by the Constitution,[34] "[t]he definition of the elements is entrusted to the legislature."[35]

State and federal courts have bought into the legislative supremacy model. They routinely assert that defining crimes is a legislative function,[36] sometimes with strong language that the power "resides wholly" with the

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[30] Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 453 (2009) [hereinafter Brown, *Prosecutors and Overcriminalization*].

[31] Hessick, *Myth*, *supra* note 1, at 980–83.

[32] Brenner M. Fissell, *When Agencies Make Criminal Law*, 11 U.C. IRVINE L. REV. 855, 884 (2020).

[33] United States v. Hudson, 11 U.S. 32 (1812).

[34] U.S. CONST. art. III, § 3.

[35] Liparota v. United States, 471 U.S. 419, 424 (1985).

[36] *See, e.g.*, *Liparota*, 471 U.S. at 424; State v. Wagstaff, 794 P.2d 118, 123 (Ariz. 1990); Curry v. State, 649 S.W.2d 833, 835 (Ark. 1983); State v. Darden, 372 A.2d 99, 101 (Conn. 1976); Tiplick v. State, 43 N.E.3d 1259, 1266 (Ind. 2015); State v. Rodriguez, 379 So. 2d 1084, 1085 (La. 1980); State v. Divis, 589 N.W.2d 537, 541 (Neb. 1999); Lapinski v. State, 446 P.2d 645, 646 (Nev. 1968); State v. Allen, 423 P.2d 867, 868 (N.M. 1967); People v. Blanchard, 42 N.E.2d 7, 8–9 (N.Y. 1942); State v. Wadsworth, 991 P.2d 80, 86–87 (Wash. 2000).

legislature[37] or that crimes "are solely creatures of statute."[38] The vision of essentially statutory criminal law has led courts to construe criminal laws more broadly than they once did. Courts now view their role as simply to carry out the legislative intent manifested by the (often broad) text of the statute rather than to use the canons of construction to construe criminal statutes narrowly.[39] If a statute is genuinely ambiguous, courts will apply the rule of lenity to narrow it[40] but only after exhausting all tools of statutory interpretation to discern legislative intent.[41] Rightly or wrongly, "[t]he dominant attitude expressed in American jurisdictions is one of legislative supremacy and exclusivity."[42]

As Hessick, Kahan, and others have explained, this legislative supremacy model is closer to fiction than reality.[43] At least a dozen states retain common law crimes in some form.[44] In others, statutes directly incorporate common law elements or simply codify common law

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[37] Whalen v. United States, 445 U.S. 684, 689 (1980).

[38] *Liparota*, 471 U.S. at 424; *see also* Keeler v. Superior Court, 470 P.2d 617, 624 (Cal. 1970) ("[A] fundamental principle of our tripartite form of government . . . [is that] the power to define crimes and fix penalties is vested exclusively in the legislative branch.").

[39] *E.g.*, Callanan v. United States, 364 U.S. 587, 596 (1961) ("The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary."); State v. Goodwin, 82 N.E. 459, 460 (Ind. 1907) ("While the rule of strict construction applies generally to the interpretation of criminal statutes, the excessively strict construction that formerly prevailed has in recent years been so modified as to look within the bounds of reason and common sense to the legislative intent when plainly manifested, or expressed, in the enactment."); People v. Burchell, 100 N.E.3d 660, 665 (Ill. App. 2018) (explaining that "the rule of lenity has limits and does not allow a court to construe a penal statute so rigidly as to defeat the intent of the legislature") (internal quotation marks and ellipses omitted); *see* Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 920–21 (2020) (arguing that the modern rule of lenity has been narrowed since the 1970s); David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 543 (2018) (discussing the narrowing of lenity in federal cases); Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 202 (1994) (describing tension between legislatures and courts over strict construction of criminal statutes). Courts, however, will apply lenity against overbroad statutes that punish innocent conduct. Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2431 (2006).

[40] Crandon v. United States, 494 U.S. 152, 158 (1990).

[41] *E.g.*, United States v. Shabani, 513 U.S. 10, 17 (1994).

[42] McMunigal, *supra* note 1, at 1287; *see also* Kahan, *supra* note 23, at 470 ("The conventional account treats substantive [federal] criminal law as exclusively legislative in origin . . . .").

[43] *See, e.g.*, Hessick, *Myth*, *supra* note 1; Kahan, *supra* note 23; *infra* notes 55 & 61 and accompanying text.

[44] Hessick, *Myth*, *supra* note 1, at 980–83.

terminology and concepts.[45] For example, North Carolina punishes "[r]obbery as defined at common law,"[46] and Virginia, though it statutorily splits murder into degrees, leaves the actual definition of murder to the common law.[47]

In many cases where the legislature drafts statutory crimes, the results are "exceedingly open-textured statutes" that leave the true definitions to the courts.[48] The federal government has numerous statutes prohibiting fraud,[49] among the most important of which are prohibitions against mail and wire fraud.[50] But what is "any scheme or artifice to defraud?"[51] The statute does not define this key term. So, the real work in defining this crime is done by courts rather than by the statute's text.[52] The same holds true for many other crimes. Insider trading is a judicial specification of the Securities Exchange Act's prohibition against trading securities using "any manipulative or deceptive device."[53] And inchoate crimes, including attempts and conspiracy, are more the product of judicial interpretation than their legislative definitions.[54]

Legislatures also may leave the general part of the law either undefined or underdefined. For example, legislatures frequently do not comprehensively define causation[55] or when individuals have affirmative duties to act.[56] So even if a legislature defines murder as "intentionally or knowingly killing another person," that still does not tell us when a person has "caused" the death or when a person may be held liable for a failure to act. These details can make a great difference in criminal cases. Just look at

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[45] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 3.02[b], at 27–29 (8th ed. 2018); Hessick, *Myth*, *supra* note 1, at 987–88.

[46] N.C. GEN. STAT. ANN. § 14-87.1 (2020).

[47] *See* VA. CODE ANN. §§ 18.2-31–32 (West 2020) (defining different degrees of murder but not defining what constitutes murder as opposed to other forms of criminal homicide).

[48] Kahan, *supra* note 23, at 471.

[49] *See, e.g.*, 18 U.S.C. §§ 1001–1040, 1341–1351 (2018).

[50] 18 U.S.C. §§ 1341, 1343 (2018).

[51] 18 U.S.C. § 1341.

[52] Kahan, *supra* note 23, at 475; Hessick, *Myth*, *supra* note 1, at 988–89.

[53] 15 U.S.C. § 78j(b); *see* Hessick, *Myth*, *supra* note 1, at 983–84 (providing and explaining the prohibition as an example).

[54] Hessick, *Myth*, supra note 1, at 985–86; Kahan, *supra* note 23, at 472, 475–76, 479.

[55] Eric A. Johnson, *Dynamic Incorporation of the General Part: Criminal Law's Missing (Hyper)Link*, 48 U.C.D. L. REV. 1831, 1839 (2015); *see, e.g.*, Burrage v. United States, 571 U.S. 204, 210–11 (2014) (adopting a "but for" causation requirement to a Controlled Substances Act provision that applied when death "results from" a distribution violation); United States v. Miller, 767 F.3d 585, 591 (6th Cir. 2014) (noting a similarity for a hate crime statute applying to conduct that occurred "because of" the victim's religious beliefs).

[56] Johnson, *supra* note 55, at 1839–41.

Scot Peterson, the Broward County sheriff's deputy who failed to intervene in the Parkland High School shooting and now faces multiple counts of child neglect causing great bodily harm.[57]

In some jurisdictions, the common law still furnishes defenses.[58] Federal criminal law, for example, recognizes self-defense, defense of others, duress, and necessity, even though no federal statute provides for them.[59] Because the substantive scope of criminal law prohibitions is a function of both the elements of a crime and the defenses that one may have, the scope of criminal prohibitions is left partially to the common law.[60]

Thus, criminal law heavily remains nonstatutory. The common law often supplies definitions for crimes, even those that are statutory. The common law also defines the general parts of criminal law (e.g., causation). And many criminal law defenses are common law, not statutory. As Kevin McMunigal concludes, "[T]he distribution of power in regard to criminal lawmaking is considerably more complex and nuanced than the notion of legislative supremacy indicates and . . . all three branches of government exercise power in shaping criminal law."[61]

B. SUBSTANTIVE CRIMINAL LAW AS THE "LAW" OF PROSECUTORIAL DISCRETION

Many academics offer a different vision from the legislative supremacy model. These commentators argue that the true power to define criminal law rests in prosecutors' hands.[62] Legislatures pass broad, vague, and redundant

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[57] Audra D.S. Burch & Alan Blinder, *Parkland Officer Who Stayed Outside During Shooting Faces Criminal Charges*, N.Y. TIMES (June 4, 2019), https://www.nytimes.com/2019/06/04/us/parkland-scot-peterson.html [https://perma.cc/R2VT-Z4YL].

[58] Johnson, *supra* note 55, at 1842; Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 40 (2000) (listing several states that rely on the common law for essential defenses).

[59] *See* Dixon v. United States, 548 U.S. 1, 19 (2006) (Alito, J., concurring) ("When Congress began to enact federal criminal statutes, it presumptively intended for those offenses to be subject to [common law] defense[s]."); Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1434 (2017) (acknowledging that federal courts "have long exercised powers to create defenses (for instance, self-defense)" not included in statutes); Stephen S. Schwartz, Comment, *Is There a Common Law Necessity Defense in Federal Criminal Law*, 75 U. CHI. L. REV. 1259, 1263 (2008) (acknowledging judicial recognition of the defense of necessity and duress without any statutory recognition).

[60] For example, by not codifying self-defense, individuals cannot learn what constitutes an "unlawful" killing for the purposes of the federal murder statute. 18 U.S.C. § 1111.

[61] McMunigal, *supra* note 1, at 1293–94.

[62] *See, e.g.*, Stuntz, *Pathological Politics*, *supra* note 7, at 509; Bellin, *Power of Prosecutors*, supra note 25, at 173–74 (collecting statements on prosecutorial power).

laws that effectively delegate defining crimes and the magnitude of sanctions to prosecutors and courts—but mostly to prosecutors, who can select who to prosecute and which charges to bring. But a prosecutorial supremacy model also does not fit well with how criminal law operates. Prosecutors enforce many areas of criminal law consistently, including prioritizing the prosecution of core crimes and refusing to enforce crimes for conduct that the community no longer condemns. These areas of convergence, across thousands of prosecutors with different views, belie the claim that prosecutors' private preferences control.

1. Prosecutorial Supremacy and Criminal Law

The prosecutorial supremacy model begins by observing overcriminalization in America. Overcriminalization, in part, is a complaint about the sheer breadth of criminal codes.[63] If one peruses the statute books, one can find many desuetudinal crimes and trivial offenses. States frequently criminalize adultery and fornication.[64] A whole chapter of the federal criminal code is dedicated to "Emblems, Insignia, and Names."[65] One section of the same code makes it a federal crime to use the Red Cross insignia without authorization, while another infamous provision protects "Smokey Bear."[66] Scholars routinely complain about these and other seemingly trivial offenses.[67] And this kind of overbreadth is bad, we are told, because those who engage in "conduct that society no longer condemns" still run the risk of punishment.[68]

A second permutation of the overbreadth problem is that many individual statutes cover too much conduct, including conduct that many do not consider to be socially harmful.[69] Examples can range from petty offenses to serious ones. When there is no traffic, few people drive 55 miles per hour

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[63] Stuntz, *Pathological Politics*, *supra* note 7, at 512–19; Myers, *supra* note 9, at 1340.

[64] Brown, *Democracy*, *supra* note 27, at 229.

[65] 18 U.S.C. ch. 33.

[66] 18 U.S.C. §§ 706, 711, 711a.

[67] *See, e.g.*, Brown, *Democracy*, *supra* note 27, at 229 & n.16 (recounting overbreadth objection and giving these examples); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 704–708 (2005); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 760. *But see* Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997) (explaining that many such laws have legitimate moral reasons supporting the criminalization of conduct they prohibit).

[68] Myers, *supra* note 9, at 1340–41.

[69] Brown, *Democracy*, *supra* note 27, at 229 (describing objection).

on a major highway, even though they face a possible citation for speeding.[70] March Madness pools fall within anti-gambling statutes.[71] And off-duty police officers face up to five years in federal prison if they carry their service weapons within 1,000 feet of a school—a radius that is hard to avoid in most urban and suburban areas.[72]

A third permutation of overbreadth is that legislatures enact criminal statutes with inadequate mens rea requirements.[73] Unlike socially beneficial conduct, here a person has committed a social wrong but arguably not in a blameworthy way. Take, for example, the prosecution under the National Firearms Act in *Staples v. United States*.[74] In *Staples*, the defendant possessed a rifle that had been converted to fully automatic by substituting its internal parts.[75] Although the defendant knowingly possessed the rifle, he contended that he did not know that the firearm had been converted into a statutory "machinegun."[76] The National Firearms Act makes it a crime to possess an unregistered machinegun but contains no mens rea requirement.[77] Without judicial narrowing of the statute (which ultimately occurred), the statute would place those who thought they were engaged in lawful conduct—possession of a semiautomatic firearm—at risk of criminal conviction.

Legislatures exacerbate the overbreadth problems with vague statutes.[78] Among oft-cited examples are statutes against loitering, federal fraud statutes, laws against racketeering, and statutes containing qualitative standards such as prohibiting taking "unreasonable risks."[79] Commentators have particularly condemned the application of federal fraud statutes.[80] Those critics observe that federal prosecutors use fraud statutes to prosecute

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[70] *See, e.g.*, State v. Heath, 929 A.2d 390, 398 (Del. Super. Ct. 2006) ("In fact, studies conducted on a stretch of I–95 between Baltimore and Delaware demonstrate that 93% of all drivers were observed committing some type of traffic violation.").

[71] Marc Edelman, *Are NCAA Tournament Bracket Pools Legal?*, FORBES (Mar. 21, 2013, 12:50 AM), https://www.forbes.com/sites/marcedelman/2013/03/21/are-online-ncaa-tournament-pools-illegal/#7fdd30e71d62 [https://perma.cc/89YC-HM4F].

[72] 18 U.S.C. §§ 921(a)(25), 922(q).

[73] Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 568–74 (2012) [hereinafter Smith, *Overcriminalization*]; Luna, *supra* note 67, at 723.

[74] 511 U.S. 600 (1994).

[75] *Id.* at 603.

[76] *Id.* at 603–04.

[77] 26 U.S.C. §§ 5861(d), 5871.

[78] *See, e.g.*, Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. STATE L.J. 1137 (2017) [hereinafter Hessick, *Vagueness*].

[79] *Id.* at 1140–41, 1146 n. 46.

[80] *E.g.*, Luna, *supra* note 67, at 709; Hessick, *Myth*, supra note 1, at 989–90.

breaches of fiduciary duties that seem more appropriately handled in civil courts.[81]

Compounding the overbreadth and vagueness problems, legislatures also draft redundant criminal codes.[82] Redundancy can be "interjurisdictional" or "intrajurisdictional."[83] Intrajurisdictional redundancy occurs when a criminal code has multiple, overlapping crimes.[84] A person who commits armed robbery of a motor vehicle may have violated laws against carjacking, armed robbery, grand theft, and illegal carrying or use of a firearm. Interjurisdictional redundancy occurs when multiple levels of government criminalize the same conduct.[85] The federal criminal code has expanded to include many core state crimes, such as robbery, weapons offenses, drug possession, and sex offenses.[86] In fact, other than immigration violations, most federal prosecutions today involve gun and drug violations that are almost always punishable under state law.[87]

Finally, scholars object to the harshness of American criminal law.[88] Since the 1980s, Congress and many states have implemented harsh mandatory minimum sentence schemes.[89] Low-level drug dealers frequently face "years or decades in federal prison."[90] And prosecutors, thanks to certain statutory enhancements, have applied harsh mandatory minimums against

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[81] Luna, *supra* note 67, at 709; *see, e.g.*, Kate Taylor, *Amid Modest Sentences, Prosecutors Bring New Charges in Admissions Scandal*, N.Y. TIMES (May 21, 2020), https://www.nytimes.com/2019/10/22/us/lori-loughlin-bribery-charge.html [https://perma.cc/BB5E-EA4L].

[82] Stuntz, *Pathological Politics*, *supra* note 7, at 518; Myers, *supra* note 9, at 1343–44; Brown, *Democracy*, *supra* note 27, at 228.

[83] Brown, *Democracy*, *supra* note 27, at 228.

[84] *Id.*

[85] *Id.*

[86] 18 U.S.C. §§ 2111–2119 (robbery and burglary); 18 U.S.C. §§ 921–930 (firearms); 21 U.S.C. § 844 (simple drug possession); 18 U.S.C. §§ 2241–2260a (sex offenses).

[87] Stephen Smith, *Overfederalization* 5–6 (Notre Dame Law School Legal Studies Research Paper No. 1761, 2017) [hereinafter Smith, *Overfederalization*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3019480 [https://perma.cc/3KUH-BGZ4].

[88] *See, e.g.*, JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (explaining that American criminal justice is much harsher than its European equivalents).

[89] Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 674 (1997); CHARLES DOYLE, CONG. RSCH. SERV., RL32040, FEDERAL MANDATORY MINIMUM SENTENCING STATUTES, 7–8 (2013); Steven Nauman, Note, Brown v. Plata*: Renewing the Call to End Mandatory Minimum Sentencing*, 65 FLA. L. REV. 855, 863–64 (2013). In 2018, nearly a quarter of federal cases involved a mandatory minimum. *See* U.S. SENTENCING COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY18.pdf [https://perma.cc/E68P-VCXZ].

[90] Luna, *supra* note 67, at 710.

recidivists who have stolen a slice of pizza, pilfered three golf clubs, or possessed a single bullet after a felony conviction.[91]

Scholars argue that these defects in statutory criminal law transfer enormous power to prosecutors, who are "the criminal justice system's real lawmakers."[92] Because police and prosecutors lack the resources to enforce every overbroad criminal statute, executive officers must use their discretion to determine which crimes to prosecute and against whom.[93] For example, many state prosecutors enforce laws against marijuana possession,[94] while others do not.[95] Federal prosecutors choose to enforce laws against gun possession and sexual exploitation of minors but not laws against carjacking or violence against women.[96] Police officers set the de facto speed limits on our roads.[97] Statutory vagueness contributes to the delegation problem.[98] Because many statutes are "open-ended, vague, and unclear,"[99] the legislature has effectively failed to define what conduct is criminal and what is not. Prosecutors make these determinations in the first instance, and they frequently use vague statutes to prosecute an ever-expanding list of bad conduct that is not otherwise prohibited by law.[100]

For those who believe in prosecutorial supremacy, checks and balances are a mirage. "[T]he story of American criminal law," Stuntz writes, "is a

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[91] *Id.* at 710 n.44, 711 n.46.

[92] Stuntz, *Pathological Politics*, *supra* note 7, at 506; *see also* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1892 (2000); Julie Rose O'Sullivan, *Federal Criminal "Code": Return of Overfederalization*, 37 HARV. J.L. & PUB. POL'Y 57, 63 (2014).

[93] Stuntz, *Pathological Politics*, *supra* note 7, at 506; Hessick, *Myth*, *supra* note 1, at 995–96, 998.

[94] John Gramlich, *Four-in-Ten U.S. Drug Arrests in 2018 Were for Marijuana Offenses—Mostly Possession*, PEW RSCH. CTR. (Jan. 22, 2020), https://www.pewresearch.org/fact-tank/2020/01/22/four-in-ten-u-s-drug-arrests-in-2018-were-for-marijuana-offenses-mostly-possession/ [https://perma.cc/X9SK-H2YU]; *see also* Stuntz, *Pathological Politics*, *supra* note 7, at 593.

[95] *See, e.g.*, MARILYN J. MOSBY, OFFICE OF THE STATE'S ATTORNEY FOR BALTIMORE CITY, REFORMING A BROKEN SYSTEM: RETHINKING THE ROLE OF MARIJUANA PROSECUTIONS IN BALTIMORE CITY 13 (Jan. 2019), https://www.stattorney.org/images/MARIJUANA_WHITE_PAPER_FINAL.pdf [https://perma.cc/XE33-YMBR] (outlining the State's Attorney for Baltimore City's decision to no longer prosecute marijuana possession offenses); Justin Jouvenal & Rachel Weiner, *New Pot Policy in 2 N. Va. Counties*, WASH. POST, Jan. 3, 2020, at B1.

[96] Smith, *Folly*, *supra* note 6, at 51.

[97] Hessick, *Vagueness*, *supra* note 78, at 1157 n.106; STUNTZ, *supra* note 19, at 5.

[98] Kahan, *supra* note 23, at 474; Hessick, *Myth*, *supra* note 1, at 988–89; Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. Rev. 695, 701 (2017).

[99] Gregory M. Gilchrist, *Individual Accountability for Corporate Crime*, 34 GA. STATE U. L. REV. 335, 379 (2018).

[100] *See supra* notes 78–79.

story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes . . . ."[101] Legislators are responsive to the electorate, and crime is a significant issue for voters.[102] As a result, legislatures help prosecutors get guilty pleas by increasing the maximum possible sentence and by making new, broad crimes, which are easier for prosecutors to prove.[103] Broadly-defined crimes and long sentences leave defendants with few possible defenses; their only leverage is to forgo trial in exchange for reduced sentences or charges. Legislatures also enact symbolic legislation to show constituents that they are doing something about crime, even if legislators do not expect prosecutors to enforce the law.[104] Thus, criminal law "always expands,"[105] and we are told that "[t]here is near-universal consensus in the legal community that our criminal laws are a mess."[106]

2. Objections to Prosecutorial Supremacy Accounts

For the reasons Darryl Brown has explained, this description of the criminal law, though widely accepted, is both misleading and wrong.[107] It is misleading because the expansion of criminal law is not inherently a sign of overcriminalization.[108] Many times, bad people do bad acts but find some loophole in the criminal law.[109] Also, new criminal law problems emerge as society evolves (e.g., drunk driving and computer crimes).[110] Although this results in the expansion of criminal law, this expansion is not normatively problematic. Brown also argues that Stuntz's description of criminal law is wrong because legislatures decriminalize large areas of conduct. Legislatures have substantially curbed moral and religious crimes, including laws against adultery, fornication, and breaking the sabbath, to name a few.[111] When criminal codes need significant updating, legislatures have also decriminalized many crimes at once as part of major law reform

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[101] Stuntz, *Pathological Politics*, *supra* note 7, at 510.

[102] *Id.* at 529–30.

[103] *Id.*at 531.

[104] *Id.* at 531–32.

[105] *Id.* at 528.

[106] Hessick & Kennedy, *supra* note 7, at 352.

[107] *See* Brown, *Democracy*, *supra* note 27, at 233.

[108] *Id.* at 233–34.

[109] Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1546–47 (2008); *see also* Misner, *supra* note 5, at 746.

[110] Brown, *Democracy*, *supra* note 27, at 233–34.

[111] *Id.* at 234–39.

recommended by independent commissions who study the code.[112] The criminal law, in other words, does not "always expand."

Moving from criminal codes to prosecutors, Jeffrey Bellin has argued why prosecutors lack much of the absolute power often attributed to them to "make" the criminal law. At the outset, Bellin explains, the claim that prosecutors make criminal law is ambiguous about which official is responsible.[113] Is it the head district or U.S. attorney, who may set office policies but personally prosecute few cases? Or is it their assistants, who may be responsible for the vast majority of charging decisions? Or is it police or law enforcement, who generally initiate criminal process through their investigations and arrests? There are 2,344 prosecutor offices that employ "about 78,000 attorneys, investigators, victim advocates, and support staff,"[114] and they run the political gamut from liberal cities to conservative rural regions. One cannot assume that these actors share prosecutorial preferences.

Even if we could pin down which prosecutor is the decisionmaker, there is significant reason to doubt that that person actually has the unilateral power to set criminal justice policy. As Bellin continues, a person may exercise discretion in different kinds of ways; a person can use his discretion when executing a plan that "achiev[es] a shared goal," or a person can exercise discretion to "mak[e] a group of people do what you want."[115] Prosecutors may have significant prosecutorial power in the "shared goal" sense—that is, when they exercise their prosecutorial discretion in accordance with the norms of the community and of other actors in the criminal justice system, such as legislators and judges.[116] But prosecutors have difficulty exercising their prosecutorial discretion to *override* the judgment of everyone else in the community.[117]

In fact, the conventional prosecutorial discretion account acknowledges that prosecutors have significant limits on their discretion. Proponents of this model recognize that the prosecution of violent felonies by local prosecutors

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[112] *Id.* at 250–51.

[113] Bellin, *Power of Prosecutors*, *supra* note 25, at 190.

[114] STEVEN W. PERRY, BUREAU JUST. STATS., U.S. DEP'T JUST., NCJ 213799, NATIONAL SURVEY OF PROSECUTORS: PROSECUTORS IN STATE COURTS 2005, at 1 (Jul. 2006), https://www.bjs.gov/content/pub/pdf/psc05.pdf [https://perma.cc/XPX9-6E63].

[115] Bellin, *Power of Prosecutors*, *supra* note 25, at 176.

[116] *Id.* at 175–76.

[117] *Id.* at 175.

is "as a practical matter, mandatory in every case"[118] because the public demands that prosecutors vigorously pursue such charges.[119] So, claims that "[t]he law-on-the-street—the law that determines who goes to prison and for how long—is chiefly written by prosecutors, not by legislators or judges" do not apply to significant portions of criminal law. [120]

If prosecutors truly had plenary power to set the criminal law, their power would likely result in extraordinarily heterogeneous criminal justice policy. Yet, the data we have on convictions and imprisonment demonstrate that law enforcement efforts are mostly targeted at a narrow range of core criminal behavior widely condemned by society. Start with state felony convictions. About 85% of state felony convictions are for violent crimes, burglary, larceny, fraud, drug crimes, and weapon offenses.[121] The remaining 15% is a nonviolent category and includes receiving stolen property and vandalism.[122] Looking at the federal system, nearly three-quarters of felony convictions involve drug offenses, immigration crimes, and weapons violations.[123] These crimes also constitute about two-thirds of all federal convictions (federal misdemeanor prosecutions comprise less than 10% of the federal criminal docket).[124] Add fraud to that list, and the percentage increases to about 85% of all federal felony convictions and more than three-quarters of all federal crimes.[125]

As with convictions, imprisonment data also reflects consistency in punishing core criminal wrongdoing. There are about 2.3 million incarcerated people in the United States: 1.3 million in state prisons, about 630,000 in local jails, and 226,000 federal prisoners.[126] More than half the people in state prisons are there for violent offenses, mostly murder,

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[118] William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2566 (2004) [hereinafter Stuntz, *Plea Bargaining*]; *see also* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 583–584 (2005).

[119] Stuntz, *Plea Bargaining*, *supra* note 118, at 2563.

[120] *Id.* at 2549.

[121] BUREAU OF JUST. STATS., FELONY SENTENCES IN STATE COURTS, 2006 — STATISTICAL TABLES 3, tbl.1.1 (Dec. 2009), https://www.bjs.gov/content/pub/pdf/fssc06st.pdf [https://perma.cc/WNX4-DFHZ]; Brown, *Democracy*, *supra* note 27, at 266 (recounting statistics from 2002).

[122] *Id.*

[123] BUREAU OF JUST. STATS., FEDERAL JUSTICE STATISTICS 2015–2016 10, tbl.7 (Jan. 2019), https://www.bjs.gov/content/pub/pdf/fjs1516.pdf [https://perma.cc/9R5Y-WTS6].

[124] *Id.*

[125] *Id.*

[126] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE, (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/ZD6Q-ZYHY].

manslaughter, sexual assault (including rape), robbery, and assault.[127] The other half is split among property crimes, drug crimes, and public order offenses (e.g., driving under the influence and weapons violations).[128]

Federal prisoners, like their state counterparts, are overwhelmingly imprisoned for a narrow range of crimes. Nearly two-thirds of federal prisoners are imprisoned for drug offenses and weapons violations, and that percentage increases to nearly three-quarters when sex offenses are included.[129] The remaining 25% is overwhelming composed of prisoners convicted of extortion, fraud, bribery, immigration offenses, property crimes (e.g., burglary and larceny), robbery, and other core violent crimes (homicide, aggravated assault, and kidnapping) with a federal nexus.[130] Federal criminal law, thus, seems to have a well-defined core around immigration, drugs, guns, and fraud, belying that individual federal prosecutors are setting federal criminal law.

If there is one area that lacks good data, it is state misdemeanor practice. This is unfortunate. Unlike the federal criminal law docket, state-law misdemeanor cases make up approximately three-quarters of all criminal cases.[131] And in general, different jurisdictions treat misdemeanors more disparately than they do felony cases.[132] In a survey of eight jurisdictions, Megan Stevenson and Sandra Mayson have found that the "core" of misdemeanor practice generally comprised "possession of marijuana, simple assault (often domestic violence), petty larceny (often shoplifting)[,] . . . DUI . . . disorderly conduct, resisting arrest, prostitution, vandalism, trespass, public intoxication, underage drinking, and unlawful possession of weapons, drug paraphernalia, or crime tools."[133] Although norms may be shifting on some conduct (e.g., whether possession of marijuana should remain a crime), most of this list (for example, driving under the influence, assault, vandalism, and larceny) involves wrongdoing that the community consistently condemns.

In providing these statistics, I do not deny either that overcriminalization is a problem or that prosecutors have tremendous

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[127] *Id.*

[128] *Id.*

[129] FED. BUREAU OF PRISONS, U.S. DEP'T JUST., INMATE OFFENSES: STATISTICS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp [https://perma.cc/R5SX-AUDL] (last updated Mar. 27, 2021).

[130] *Id.*

[131] Megan T. Stevenson & Sandra G. Mayson, *Contributions: The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 746–47 (2018).

[132] Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 1014–15.

[133] *Id.* at 1018.

discretion. We can debate, for example, the legitimacy of broad drug laws and vague fraud statutes. Many criminal codes are also too harsh, carry too long of prison sentences, and bear all of the collateral consequences that come along with having too many technical felonies. Even if the community thinks that drug dealing ought to be unlawful, that does not imply that it is appropriate to imprison low-level street dealers for decades or life. And prosecutors exercise enormous discretion in important pockets of the criminal justice system. Through their charging and plea decisions, they can exercise considerable power over punishing those who commit crimes.[134] Prosecutors, for example, are not required to pursue sentencing enhancements. And, more broadly, police and prosecutors may investigate crimes with different thoroughness. For example, having "stop and frisk" in one neighborhood, but not another, will almost certainly turn up more illegal weapons in the place where the stop and frisk policy is carried out—which, in turn, will affect who gets incarcerated. But these elements of prosecutorial discretion are a different kind of discretion from prosecutors having the quasi-legislative power to set the criminal code. Prosecutors only have that power at the margins.[135]

Finally, the political economy explanation undergirding the plenary prosecutor model has not aged well. Whatever may have been true during the 1980s and 1990s, current voters' political preferences do not appear to be as uniformly "tough on crime" as the plenary prosecutor approach suggests. The plenary prosecutor model describes a dysfunctional cycle in which legislators, with voter approval, expand crimes and make sentences harsher to give prosecutors more power.[136] But overcriminalization has emerged as a politically salient issue today, with political constituencies pushing back on both the pervasiveness of criminal law and its harshness. The killing of George Floyd has prompted calls to "defund the police," leading many cities to reevaluate the kinds of cases police departments handle.[137] About half the states have decriminalized some forms of minor drug possession and use.[138]

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[134] Brown, *Prosecutors and Overcriminalization*, *supra* note 30, at 461–63.

[135] For crimes where people have conflicted norms or where norms are evolving (e.g., marijuana possession) prosecutors have much more discretion.

[136] Stuntz, *Pathological Politics*, *supra* note 7, at 510.

[137] *See* Rashawn Ray, *What Does 'Defund the Police' Mean and Does It Have Merit?*, BROOKINGS (June 19, 2020), https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/ [https://perma.cc/E6MT-DQ53]; Scottie Andrew, *There's a Growing Call to Defund the Police. Here's What It Means*, CNN (June 17, 2020, 10:32 AM), https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html [https://perma.cc/SG5T-KD84].

[138] Drug Policy Alliance, *Drug Decriminalization*, DRUGPOLICY.ORG, https://drugpolicy.org/issues/drug-decriminalization [https://perma.cc/LA3N-P4DJ] (last visited Feb. 14, 2021).

Many urban areas have elected so-called progressive prosecutors who have run against incumbents for arresting too many people for too many petty crimes.[139] For prosecutors and politicians in many jurisdictions, being too tough on crime has become politically toxic.[140] To reduce the harshness of criminal law, Congress and several states have recently passed sentencing reform, including curbing mandatory minimums.[141] And a number of jurisdictions have abolished the death penalty either de jure or de facto.[142] Overall executions are low compared with the 1990s and concentrated in just a few states.[143] The present trend favors less harsh criminal law, not more.

Thus, neither prevailing model of criminal law is a good fit for how our system actually operates. Our criminal law is not exclusively statutory. Unwritten law exists everywhere. Because of vague and overbroad laws, there is also a schism between statutory criminal law and how that criminal law is enforced. Yet, from this, we should not conclude that criminal law has devolved into only a "law" of prosecutorial discretion. Prosecutors are only one part of the criminal justice system. Many other individuals—legislators, judges, voters, jurors, among others—also exercise significant power over the system, and they may have competing or different priorities from prosecutors. The net result is that while prosecutors exercise significant influence over criminal justice policy, they do not control it.

II. CRIMINAL LAW AS A CONVENTIONAL SYSTEM

In the next two Parts, I offer a different vision of American criminal law, one that recognizes that American criminal law remains primarily

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[139] Note, *The Paradox of "Progressive Prosecutors*,*"* 132 HARV. L. REV. 748, 750–51 (2018).

[140] *Id.* at 751; *cf.* Eugene Scott, *Joe Biden's Tough-on-Crime Past Could Haunt Him in 2020*, WASH. POST (Jan. 23, 2019, 2:57 PM), https://www.washingtonpost.com/politics/2019/01/23/joe-bidens-tough-on-crime-past-could-haunt-him/ [https://perma.cc/W5YB-ZGMW] (explaining that Joe Biden's prior support for severe criminal penalties would be a political liability for him in the Democratic presidential primary).

[141] First Step Act of 2018, § 401 Pub. L. 115-391, 132 Stat. 5194, 5220 (reducing mandatory minimum sentences and preventing the stacking of offenses that triggers mandatory minimum penalties); Nauman, *supra* note 89, at 870–72; *see also* Brown, *Democracy*, *supra* note 27, at 267 n.214.

[142] Twenty-one states, as well as the District of Colombia, have officially abolished the death penalty. Four other states are currently operating under a gubernatorial moratoria. *States with & Without the Death Penalty - 2020*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state [https://perma.cc/9XWF-8WMK] (last visited Feb. 21, 2021).

[143] AMBER WIDGERY, NAT'L CONF. OF STATE LEGISLATURES, THE STATE OF CAPITAL PUNISHMENT 3 (July 30, 2019), https://www.ncsl.org/research/civil-and-criminal-justice/the-state-of-capital-punishment.aspx [https://perma.cc/963H-PJE4].

unwritten. This Part argues that contemporary criminal law is defined by unwritten conventions that are widely acknowledged and respected but lack the status of formal law. Section A defines what "conventions" are and the justification for having them, and Section B offers evidence that they form a substantial part of our criminal law system. Part III of this Article will then explain the legal and nonlegal checks that cause these conventions to arise.

A. WHAT ARE CONVENTIONS? WHY HAVE THEM?

Let me begin with the definition of a legal "convention." Following A.V. Dicey, Joseph Jaconelli, Adrian Vermeule, and others, I posit that a "convention" is a kind of rule that is (1) not statutory or written law; (2) not unwritten law enforceable in court (i.e., not common law); but (3) is generally accepted as binding on legal actors; and (4) is enforceable against legal actors through indirect methods such as political pressure.[144]

Conventions are something more than mere exercises of discretion, even if that discretion is exercised in a regular way.[145] To constitute a legal convention, an action not only has to be "regular," it must also "rest[] on a sense of normative obligation."[146] Thus, criminal law conventions are not merely the fortuitous results of various institutional arrangements. What makes something a convention is that individuals accept the normative force of the conventions' directives. As Barber has stated, "[c]onventions are rules and, like laws, they purport to provide reasons for action that pre-empt, to use Raz's term, consideration of the reasons on which they depend."[147]

Conventions have a complex relationship with formal law. Many conventions operate interstitially. The U.S. Constitution does not direct how electors would select the President, nor (before the Twenty-Second

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[144] Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 288 (2015) [hereinafter Vermeule, *Conventions in Court*] (defining "conventions" as "(1) unwritten rules of political behaviour that are (2) widely acknowledged and regularly followed from (3) a sense of obligation—either (3A) a thin sense of obligation resting on a credible threat of sanctions or (3B) a thick sense of obligation resting on internalised precepts of political morality"); *see also* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1182 (2013) [hereinafter Vermeule, *Conventions of Agency Independence*] (giving attributes of conventions); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 280–81 (8th ed. 1915); Joseph Jaconelli, *The Nature of Constitutional Convention*, 19 LEGAL STUDS. 24, 35–39 (1999); Mark Tushnet, *The Pirate's Code: Constitutional Conventions in U.S. Constitutional Law*, 45 PEPP. L. REV. 481, 483 (2018); Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1852 (2013).

[145] Vermeule, *Conventions in Court*, *supra* note 144, at 287–88.

[146] *Id.*

[147] N.W. BARBER, THE CONSTITUTIONAL STATE 83 (Martin Loughlin, John P. McCormick & Neil Walker eds., 2010).

Amendment) did it provide how often a President could be reelected. Yet, conventions require that presidential electors vote for the candidate for whom they have pledged and, before the adoption of the Twenty-Second Amendment, limited the President to two terms.[148] Conventions may also supersede formal law. For example, in Britain, "the Prime Minister has the power to declare war, even though, legally, this power is held by the Monarch."[149]

One of the critical distinctions between conventions and formal law, however, is that conventions are not enforceable through ordinary legal channels. In Britain, for a bill to become law, the bill ordinarily must pass both Houses of Parliament and receive the royal assent.[150] And British constitutional conventions require that the monarch consent to a bill that has passed Parliament.[151] The Queen's decision to veto a bill *sua sponte* might provoke a constitutional crisis.[152] But in a British court, that bill would not be law. Because conventions are not directly binding and enforceable within the legal system, commentators debate the degree to which they constitute "law."[153] I will bracket that debate in this Article.[154] But a convention's lack of status as formal law means that someone can say, without contradiction, that a convention "places constitutional (but not legal) limits on the capacity of" a legislature.[155]

Given that conventions are not enforceable in court, one might be tempted to ignore them when describing the legal system. Blackstone took

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[148] Vermeule, *Conventions in Court*, *supra* note 144, at 286 (providing these and other examples). The Supreme Court has recently upheld state laws that incorporate electoral college conventions requiring electors to vote for their pledged candidates. Chiafalo v. Washington, 140 S. Ct. 2316, 2329 (2020).

[149] BARBER, *supra* note 147, at 93.

[150] Jeremy Waldron, *Are Constitutional Norms Legal Norms?*, 75 FORDHAM L. REV. 1697, 1702 (2006).

[151] *Id.*

[152] *Id.* at 1704 ("The Queen knows that she must not withhold her consent, and she knows that if she did, her action would not be regarded just as surprising or unprecedented, but condemned as wrong and unconstitutional. She treats it as a rule that she must follow.").

[153] *Id.* at 1697; Vermeule, *Conventions of Agency Independence*, *supra* note 144, at 1182–84.

[154] Depending on whether conventions truly are "law," the title of this article is either literal or metaphorical.

[155] BARBER, *supra* note 147, at 79 n.22 ("The Sewel convention places constitutional (but not legal) limits on the capacity of the Westminster Parliament to legislate in areas devolved to the Scottish Parliament . . . ."); *see also* Vermeule, *Conventions in Court*, *supra* note 144, at 290 (explaining that "legal but unconstitutional" is "a seeming oxymoron to the American-trained lawyer" but not to a Commonwealth lawyer) (internal quotation marks omitted).

that approach when describing the British constitution,[156] dedicating several chapters to royal executive power but not discussing the prime minister or the cabinet.[157] But as Dicey pointed out, Blackstone's explanation of the British government "ha[d] but one fault; the statements it contains are the direct opposite of the truth."[158] In reality, the British constitution by convention vests de facto executive power in the cabinet and, especially, the prime minister.[159] Thus, as Barber has concluded, "an understanding of these non-legal rules is essential to a plausible account of the constitution."[160]

Criminal law, I will argue, has similar conventions. On paper, Wisconsin makes adulterers felons,[161] federal law prohibits the possession of marijuana, including for medicinal purposes,[162] and the speed limits on many highways are fifty-five miles per hour. But this is not the de facto criminal law system. The laws on adultery are in desuetude, federal law enforcement targets drug trafficking but not mere possession of marijuana for personal use,[163] and the speed limits enforced on our roads are about ten to fifteen miles per hour more than the posted sign.[164] Real criminal law and statutory criminal law have diverged, just like the real British constitution does not resemble Blackstone's purely legalistic framework.

With respect to the scope of criminal law conventions, I do not suggest that those conventions exist exclusively at either the national or local level. Unwritten English law recognized both "general customs"—that is, "the common law, properly so called"[165]—and "[p]articular customs" which were unwritten laws that "affect[ed] only the inhabitants of particular districts."[166] In our federal system, criminal law conventions probably have a similar structure. Many conventions are national in scope. One easy example is the decriminalization of consensual sex offenses.[167] Even prosecutors in remote and religiously conservative areas do not prosecute adultery and

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156 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *190–337.

157 BARBER, *supra* note 147, at 81–82 (providing this example).

158 DICEY, *supra* note 144, at cxxx.

159 Rodney Brazier, *A British Republic*, 61 CAMBRIDGE L.J. 351, 357 (2002).

160 BARBER, *supra* note 147, at 81–82.

161 WIS. STAT. § 944.16 (2020).

162 21 U.S.C. § 812 (2018); 21 U.S.C. § 844 (2010).

163 Sadie Gurman, *Sessions: U.S. Prosecutors Won't Take on Small-Time Pot Cases*, ASSOCIATED PRESS (Mar. 10, 2018), https://apnews.com/5b27da207202466f90a08ae87614eaea/Sessions:-US-prosecutors-won't-take-on-small-time-pot-cases [https://perma.cc/3TXU-3K6E].

164 *See infra notes* 214–234 and accompanying text.

165 BLACKSTONE, *supra* note 156, at *63.

166 *Id.* at *67.

167 Brown, *Democracy*, *supra* note 27, at 235.

fornication.[168] And the contrary examples sometimes cited are bizarre and fleeting incidents.[169] Local customs exist, too. For example, rural areas may ignore violations of a state's concealed weapons law, while urban areas may prosecute those crimes more vigorously.[170] The recent debate over "Second Amendment sanctuary cities" may be seen as an effort to create local customary law that effectively nullifies state statutory law within the jurisdiction.[171] And even though our national drug norms may be in flux, many cities have developed local customs that tolerate some personal use of recreational drugs—San Francisco may be the most extreme example.[172]

Of the many justifications for having conventions, a principal purpose is that conventions correct for defects in the formal legal system. In the British constitutional system, one obvious defect is legitimacy. What gives a hereditary monarch the right to wield executive power? The conventional cabinet system largely abates this democratic deficit by vesting de facto executive power in a government accountable to the voters.[173] Conventional criminal law serves a similar legitimacy function to constitutional conventions. Although I will not lay out a full theory of criminal law, for present purposes, I will assume that what makes an act punishable is, in part,

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[168] *See* DEBORAH L. RHODE, ADULTERY: INFIDELITY AND THE LAW 61–67 (2016) (explaining that adultery statutes "are generally unenforced" even when prosecutors have evidence of a violation).

[169] *Id.*; Brown, *Democracy*, *supra* note 27, at 258–59.

[170] *See* LAWRENCE A. GREENFIELD & MARIANNE W. ZAWITZ, BUREAU OF JUST. STATS., FIREARMS, CRIME, AND CRIMINAL JUSTICE: WEAPONS OFFENSES AND OFFENDERS 2 (Nov. 1995) [hereinafter WEAPONS OFFENSES AND OFFENDERS], https://bjs.gov/content/pub/pdf/woofccj.pdf [https://perma.cc/9J8X-7KWL].

[171] *See, e.g.*, Letter from Mark R. Herring, Virginia Attorney General, to Hon. Jerrauld C. Jones, Member, Virginia House of Delegates (Dec. 20, 2019), https://oag.state.va.us/files/Opinions/2019/19-059-Jones-issued.pdf [https://perma.cc/KYN3-MQ8X] (opining on the legality of Virginia's sanctuary cities). For a limited defense of sanctuary cities, see Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437 (2020). My argument in this Article would provide a qualified defense of sanctuary cities when prosecutors refuse to enforce statutory laws that do not accord with legal conventions. *But see infra* note 174 (explaining when legal conventions may be unworthy of respect).

[172] *See* Lee Ohanian, *Why Drug Addicts Outnumber High School Students in San Francisco*, HOOVER INST. (Oct. 1, 2019), https://www.hoover.org/research/why-drug-addicts-outnumber-high-school-students-san-francisco [https://perma.cc/AR4M-DN2X].

[173] *See* Brazier, *supra* note 159, at 357 (noting that power has shifted from the Crown to democratic institutions). *But see id.* at 383 (explaining that substantial portions of the royal prerogative exercised by ministers lack effective democratic oversight).

that the action breaches societal norms.[174] Criminal law conventions help shape statutory criminal law around evolving norms.

If the goal is to have a criminal law with democratic legitimacy, one might think that only a democratically elected legislature should determine the proper scope of criminalization. Many commentators hold such views. Some argue that legislative approval is more democratic than having common law crimes.[175] Others go so far as to argue that legislative approval is a necessary element of the principle of legality[176] or required by political theories of punishment.[177] For example, relying on an expressivist theory of punishment, Brenner Fissell asserts that "the symbolic communication of condemnation must come from the community and that therefore the duties imposed by criminal law must be determined by a democratic institution."[178]

But democratic legitimacy does not inherently follow from legislative action. The existence of majoritarian approval is neither necessary nor sufficient to make statutory law. Legislators are imperfect agents of their constituents' views. Legislators get captured by special interests, or they vote based on the views of an impassioned minority over more apathetic majority.[179] In either case, one cannot necessarily infer democratic legitimacy from legislative approval.

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[174] Joel Feinberg, for example, argues that what separates criminal punishment from other types of penalties is the expression of society condemning the act subject to punishment. Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965). Joshua Kleinfield uses the metaphor that "crime is a tearing of social fabric, and punishment is a restitching of that torn social fabric." Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1500 (2016); *cf.* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. Rev. 1655, 1678 (2010) ("A criminal is normatively innocent where his conduct is undeserving of communal condemnation, even if it is contrary to law.") [hereinafter Bowers, *Equitable Decision*]. Again, this comes with the qualification that I am not attempting to articulate a theory of just criminal law. I do not contend that societal condemnation is sufficient to warrant the imposition of criminal punishment, nor that societal acceptance is sufficient to justify the lawfulness of conduct. Correlatively, I accept that some criminal law conventions exist because society recognizes them, and yet believe that they are unworthy of respect because they are incompatible with general principles of justice.

[175] Hessick, *Myth*, *supra* note 1, at 976 & n.40.

[176] *Id.* at 976 (collecting examples of such theories).

[177] Fissell, *supra* note 32, at 900–06.

[178] *Id.* at 891; *see also* Myers, *supra* note 9, at 1341 (raising concerns that desuetudinal and unconstitutional statutes will muddle criminal law's expressive message).

[179] MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 132–68 (1965) (discussing special interests); Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 69 (2006).

Majoritarian support, moreover, is insufficient to pass legislation. Legislation faces many nonmajoritarian vetogates.[180] Presidents and governors can veto bills that enjoy majority support. The federal Senate is malapportioned. Heads of legislative committees enjoy disproportionate influence over legislative business. Legislative time is limited; many state legislatures are part-time, with heavily compressed schedules. As a result, many laws with majoritarian support do not get passed, and contemporary statutes lacking such support do not get repealed.[181]

In some cases, the inability for simple majorities to get preferred criminal law legislation through the legislature may be a positive thing. One can distinguish, as James Madison did in the *Federalist Papers*, between a majoritarian faction and "the permanent and aggregate interests of the community."[182] If, as Fissell argues, "the symbolic communication of condemnation must come from the *community*,"[183] perhaps we want the condemnation to come from the community broadly rather than from a mere majority. This has the advantage of defaulting to favor liberty over the coercive effects of criminal law. And I will argue below that, because of the ability of impassioned minorities to disrupt criminal law norms, conventional criminal law is more consensus-driven than majoritarian.

For statutory criminal law, however, the inability of the majority to repeal or amend criminal law legislation leads to an objection analogous to the dead hand objection in constitutional law: from a democratic perspective, why should we care if a legislature passed a crime unless a recent legislature did so?[184] Legislatures passed many crimes decades or centuries ago.[185] Some of these old laws are in desuetude. But many are not, and some jurisdictions enforce them vigorously. Congress passed the Controlled Substances Act in 1971,[186] the Gun Control Act in 1968,[187] the law against presidential assassinations in 1965,[188] and the Espionage Act in 1917.[189] How does legislative approval decades or a century ago confer legitimacy today?

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[180] For a discussion of vetogates, see WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 70–80 (2d ed. 2006).

[181] *See, e.g.*, Brown, *Democracy*, *supra* note 27, at 249, 261; Myers, *supra* note 9, at 1345–46.

[182] THE FEDERALIST NO. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961).

[183] Fissell, *supra* note 32, at 891 (emphasis added).

[184] Hayden v. Pataki, 449 F.3d 305, 367 (2d Cir. 2006) (Calabresi, J., dissenting); Myers, *supra* note 9, at 1332–34.

[185] *See, e.g.*, 18 U.S.C. § 953 (1799).

[186] Controlled Substances Act of 1971, Pub. L. No. 91-513, 84 Stat. 1236.

[187] Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.

[188] Act of Aug. 28, 1965, Pub. L. No. 89-141, 79 Stat. 580.

[189] Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217.

The existence of criminal law conventions provides an answer to this problem. We have developed an unwritten common law of crime by using various political and legal checks to constrain prosecutorial decision-making around contemporary community norms. Thus, we recognize certain criminal statutes as legitimately constituting our modern criminal law because the community presently recognizes the actions these statutes prohibit as wrong.[190] In part, the true justification for a criminal law is not the existence of a statute, but the community's present belief that those who commit the acts described in the statute deserve public censure and punishment.[191]

This justification provides a better answer than other alternatives. Perhaps one could argue that Congress has implicitly blessed old statutes by not repealing them or by recently amending the statutes, thereby accepting their legitimacy sub silentio. But this, again, ignores how difficult it is to legislate in our system; nonmajoritarian vetogates prevent new laws from passing, and they prevent us from repealing old laws. As a result, many statutes exist that the majority does not support, but which lack sufficient legislative support to repeal. Contemporary conventions provide a better justification than legislative inaction.

The existence of conventions also explains why broad and vague laws are less of a problem in practice than in theory. At first glance, our broad and vague criminal statutes may seem like a delegation to prosecutors to develop criminal law through their charging decisions. But that power has been checked in a variety of ways by legislatures, the public, judges, jurors, and other prosecutors. Because of these checks, prosecutors must continually mold their enforcement of criminal law around contemporary public norms, resulting in a more responsive de facto criminal law than could be achieved through a legislative code, through judicial specification alone, or through agency rulemaking.[192] And the existence of diverse checks by different constituencies makes it more difficult for minority special interests to exert their will than if criminal justice policy were set just by the legislature or by a single prosecutor. If a legislature (captured by a special interest) enacts criminal laws distasteful to the community, prosecutors will have a difficult time enforcing them.

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[190] *See* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (discussing why the dead-hand argument is not a valid objection to textualism).

[191] I say "in part" here because I do not want to be construed as condoning a morally relative criminal law. *See supra* note 174. Although beyond this Article, I believe that a morally justified criminal law must also be justified by a theory of justice that is external to the community's preferences.

[192] Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 3 (1971) ("[P]ublic attitudes change over time, and it is not always possible immediately to adapt the statutory law to these changes.").

Some may object that the lack of official promulgation means that ordinary citizens cannot know or understand our criminal law. Myers, for example, hypothesizes a person trying to determine whether fornication is unlawful. He reads the statute books and finds a law, though someone assures him that such laws are not enforced.[193] From this, Myers concludes that it is "fundamentally unfair" to make someone "choose for herself, at her peril, which of the laws on the books to obey . . . ."[194]

Although I do not have the space here for a full-fledged defense of unwritten law, I think this objection is mistaken. As Stephen Sachs explains in *Finding Law*, people can have knowledge of unwritten and nonpromulgated community customs.[195] People learn the de facto criminal law through observation as part of the shared culture—the same way that they learn about most societal customs. A newly-arrived Martian coming to live in the United States may be genuinely confused about whether fornication is a "real" crime, but no one who has lived in the United States would harbor any doubt about the answer to that question.

That people generally learn criminal law conventions through socialization is also evident when officials arrest individuals for violating local norms. Although no American jurisdiction enforces laws against fornication, jurisdictions vary widely in how they restrict gun possession. Restrictive jurisdictions arrest many individuals who carry weapons that are lawful in their states of residence but unlicensed in the jurisdiction.[196] These individuals have no idea about the local laws and customs.[197] And prosecutors in these jurisdictions often consider the lack of knowledge to be a significant mitigating factor, allowing individuals to plead guilty to lesser-included offenses.[198]

Of course, the evolution of criminal law conventions is not a complete answer to criminal law's legitimacy. As Vermeule notes, "[c]onventions are equilibria," and sometimes society settles on equilibria that are "normatively abhorrent."[199] Paradigmatic examples include the customs of not prosecuting

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[193] Myers, *supra* note 9, at 1341–42.

[194] *Id.* at 1342.

[195] Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 538–39 (2019).

[196] *See, e.g.*, Michael Wilson, *Legal Guns en Route to New York Are Cause for Arrest Before Flight Home*, N.Y. TIMES (June 9, 2013), https://www.nytimes.com/2013/06/10/nyregion/lawful-handguns-departing-for-new-york-but-unlawful-upon-arrival.html [https://perma.cc/5KGR-D6T4].

[197] *Id.*

[198] *Id.*

[199] Vermeule, *Conventions in Court*, *supra* note 144, at 304–05.

whites who killed African Americans in the South[200] and white juries treating African Americans more harshly than white citizens for comparable crimes.[201] Another was the underenforcement of domestic violence crimes.[202] The existence of criminal law conventions does not insulate criminal law from societal defects generally. Quite to the contrary, societal defects may entail defects in criminal law conventions by hampering the indirect enforcement of criminal law norms. A disenfranchised population cannot vote out prosecutors, seek legislative changes, pressure city councils to change how the police enforce the law, or serve on juries to prevent either unjust acquittals or unjust convictions. I do not mean to suggest that our conventional system is perfect. But it is better and more legitimate than a purely statutory system, particularly because modern statutory systems take place under nonideal conditions of limited legislative time and incentives to placate special interests.

B. SOME EVIDENCE THAT CRIMINAL LAW CONVENTIONS EXIST

My argument in this Section is that criminal law conventions exist. These conventions form a crucial and largely overlooked part of substantive criminal law, even if they do not constitute "law" in the most technical sense of that term. The conventions have a common-law-like nature: they are public norms that are widely acknowledged and respected by the public and those charged with enforcing and administering criminal law. As with the common law, conventional criminal law evolves as new norms emerge, gain acceptance, and are recognized.[203] Unlike the common law, however, these customs are not directly enforceable in court or through other legal channels but rely instead on political, public, and private sanctions for their effect.[204] These conventions shape much of de facto substantive criminal law and, thus, narrow the effective range of prosecutorial discretion.

Let me start with perhaps the easiest example of criminal law conventions: desuetudinal laws. Although definitions of legal desuetude vary, a crime in "desuetude" generally refers to a statutory crime that "has

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[200] *See, e.g.*, Feinberg, *supra* note 174, at 407; Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 82–84 (2009).

[201] W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. (forthcoming 2021) (manuscript at 12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542575 [https://perma.cc/P432-SNDA].

[202] Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 854–57 (1994).

[203] Sachs, *supra* note 195, at 548–52.

[204] Vermeule, *Conventions in Court*, *supra* note 144, at 286–88.

not been enforced for a long period of time, no longer reflects the goals and values of the community, and is thus widely ignored."[205] Today, these crimes often include morality offenses such as adultery, fornication, and unlawful cohabitation.[206]

Desuetudinal crimes have posed a significant challenge to our concepts of legality. On the one hand, there is widespread recognition that such laws are not a de facto part of our criminal justice system.[207] Evidence that a law has fallen into desuetude involves "a combination of open violations of the law and conscious decisions not to prosecute."[208] Yet, except in West Virginia, courts have refused to invalidate such laws, so they remain part of the statutory criminal law corpus.[209]

Desuetudinal crimes fit the general criteria of criminal law conventions. In most jurisdictions, no rule internal to the legal system—whether statutory or common law—renders such laws unenforceable.[210] Yet, the community generally recognizes that the laws are not part of the de facto criminal law. Prosecutors almost never bring such charges, let alone successfully convict offenders. And this is not a matter of mere prosecutorial discretion. The norms against prosecuting such cases are so well-engrained that prosecutors bringing such charges would likely face insurmountable resistance both politically and from other actors in the criminal justice system.[211] Thus, when the New York governor publicly admitted committing adultery, he could

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[205] Mark Peter Henriques, Note, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 VA. L. REV. 1057, 1069 (1990).

[206] *See* Fort v. Fort, 425 N.E.2d 754, 758–59 (Mass. App. Ct. 1981).

[207] Arthur E. Bonfield, *Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 390–91 (1964); John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 569–71 (2014) (giving traditional criteria for when a law had fallen into desuetude).

[208] Hillary Greene, Note, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL'Y REV. 169, 172 (1997).

[209] Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209, 2211 (2006).

[210] Robert Misner, *Minimalism, Desuetude, and Fornication*, 35 WILLAMETTE L. REV. 1, 4 (1999) ("[T]he criminal law tradition in most American jurisdictions does not recognize a doctrine of desuetude.").

[211] I, thus, disagree with statements suggesting that desuetudinal laws are merely a form of prosecutorial discretion. *See, e.g.*, Myers, *supra* note 9, at 1334. Such statements ignore the binding nature of the norms, instead suggesting that prosecutors could choose to enforce such laws.

declare publicly (and without irony) that he "didn't break the law,"[212] even though adultery remains a misdemeanor in New York.[213]

For a second example, take an area of great state overcriminalization: traffic offenses.[214] It is virtually impossible to drive a motor vehicle without committing a traffic offense.[215] Speeding is one of the most common offenses. The general guidance on setting speed limits is that the limit "should be the 85th percentile speed of free-flowing traffic, rounded up to the nearest 10 km/h (5 mph) increment."[216] But, as nearly everyone knows, that does not happen. Speed limits are routinely set too low,[217] usually by about ten to fifteen miles per hour.[218] Executive nonenforcement ultimately compensates. In a study of 1.3 million speed tickets issued by Massachusetts police from 2010 through part of 2016, fewer than 0.1% were for driving less than five miles above the speed limit and 1.1% were for driving less than ten miles per hour over.[219] A study of Ohio traffic tickets found that Ohio police rarely ticketed drivers going less than ten miles per hour above the speed limit.[220] And in Virginia courts, in 2018, the percentage of tickets for drivers going less than five miles per hour above the speed limit was 0.007% and

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[212] Sewell Chan, *Is Adultery a Crime in New York?*, N.Y. TIMES: CITY ROOM (Mar. 21, 2008, 1:51 PM), https://cityroom.blogs.nytimes.com/2008/03/21/is-adultery-a-crime-in-new-york/ [https://perma.cc/K8UX-5ZER].

[213] N.Y. PENAL LAW § 255.17 (McKinney).

[214] *See* STUNTZ, *supra* note 19, at 3 (noting that speed limits often define the de facto "*minimum* speed"). Brown notes that some states have decriminalized traffic offenses, but even those states have statutes that, in theory, impose quasi-criminal civil penalties on blameless conduct. Brown, *Democracy*, *supra* note 27, at 239–240, 269.

[215] David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545 (1997); *see also id.* at 558 ("Police officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation.").

[216] KAY FITZPATRICK, PAUL CARLSON, MARCUS A. BREWER, MARK D. WOOLDRIDGE & SHAW-PIN MIAOU, NAT'L COOPERATIVE HIGHWAY RESEARCH PROGRAM REPORT 504: DESIGN SPEED, OPERATING SPEED, AND POSTED SPEED PRACTICES 51 (2003), http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_504.pdf [https://perma.cc/3KXF-PN7F].

[217] *Id.* at 48, fig.6 (noting the difference between eighty-fifth percentile speed and posted speed limits); STUNTZ, *supra* note 19, at 3.

[218] Fitzpatrick, Carlson, Brewer, Wooldridge & Miaou, *supra* note 216, at 52, fig.7.

[219] Matt Rocheleau, *Stay Less than 10 m.p.h. Above Speed Limit and You're Unlikely to Be Ticketed*, BOS. GLOBE (July 28, 2017, 9:45 PM), https://www.bostonglobe.com/metro/2017/07/28/old-axiom-proves-true-stay-less-than-above-speed-limit-and-you-unlikely-ticketed/HTU3lmnzuQ2hlaG1rvILFN/story.html [https://perma.cc/7KWW-F2QU].

[220] Rodney Dunigan, *How Fast Is Too Fast? The Most Common Speeding Ticket Triggers in Ohio*, ABC 6 NEWS (Nov. 21, 2017), https://abc6onyourside.com/investigators/how-fast-is-too-fast-the-most-common-speeding-ticket-triggers-in-ohio [https://perma.cc/U7J7-FCML] (about 1,200 tickets out of 300,000 were written for doing less than eight miles per hour over the limit).

under ten miles per hour was 2.3%, whereas nearly 30% of cases involved going 10 to 14 miles per hour.[221] Put somewhat differently, the true speed limits on our roads are conventional rather than statutory. Motorists believe—and enforcement statistics back up the belief—that the de facto speed limit is about 10 to 15 miles per hour over the de jure limit.

The traffic offense example demonstrates how conventional law modifies statutory law. The real norms for traffic speed are not found in statutory law or regulations. They are not common law that one can enforce in courts.[222] No individual or government body having authority has promulgated them, and no court has recognized them.[223] Despite this, these traffic customs are public, well-known, and respected as norms by both law enforcers and citizens.[224] And these norms are enforced by indirect sanctions. For example, when North Carolina police implemented its "obey the sign or pay the fine" campaign, the mere rumor that police would strictly enforce speed limits unsettled community expectations and became a newsworthy event.[225] After police stated that they have the power to ticket motorists exceeding the speed limit by any amount,[226] community concern prompted officials to reassure the public that police still had discretion to ignore de minimis speeding.[227] Political pressure prevented excessively strict enforcement.

Although speeding is only a petty offense, the example highlights how criminal law conventions correct for deficiencies in our statutory law. Ideally, speed limits would reflect the true speed limit above which

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[221] Erica Mohun & Catalina Currier, *The Need for Speed Proves Costly for Some VA Drivers*, INSIDE NOVA (Dec. 20, 2019), https://www.insidenova.com/news/transportation/the-need-for-speed-proves-costly-for-some-va-drivers/article_2b49fd62-2290-11ea-b5b1-8b787dc056ab.html [https://perma.cc/AN5L-XKS8].

[222] There might be more of a common-law claim in states with presumptive speed limits. *See, e.g.*, Cal. Veh. Code § 22352 (West 2019); *see also* Tex. Transp. Code Ann. § 534.352 (West 2019).

[223] Sachs, *supra* note 195, at 534 (discussing how norms can arise in a decentralized manner).

[224] *See, e.g.*, Rocheleau, *supra* note 219; *see also* Martin Austermuhle, *Even D.C.'s Traffic Cameras Tolerate a Little Speeding*, DCIST (Aug. 29, 2012, 3:30 PM), https://dcist.com/story/12/08/29/even-dcs-traffic-cameras-tolerate-a/ [https://perma.cc/A275-TVNC]; *Speeders Beware, Law Enforcement Is Cracking Down*, ABC 11 NEWS (Mar. 22, 2016), https://abc11.com/travel/speeders-beware-law-enforcement-is-cracking-down/1257209/ [https://perma.cc/VFN6-Q3D8].

[225] *Speeders Beware, Law Enforcement Is Cracking Down*, *supra* note 224.

[226] *Id.*

[227] Tonya Maxwell, *Ticket for 56 mph in a 55? Not Likely in NC*, CITIZEN TIMES (Mar. 24, 2016, 4:49 PM), https://www.citizen-times.com/story/news/local/2016/03/24/ticket-56-mph-55-not-likely-nc/82204916/ [https://perma.cc/C2ZP-6372].

enforcement would begin. Then everyone would have notice of the actual limit and the consequences for violating. As it stands now, the "true" speed limit is an unknown limit, approximately ten to twenty miles per hour over the de jure limit. But as imperfect as it may be, unwritten conventional norms provide some corrective measure. Statutory speed limits are regarded as too low. But individuals know with substantial certainty that they will not face enforcement if they drive within about ten miles per hour of the speed limit and with almost complete certainty if they stay within five.[228] A driver's knowledge about the rules of the road come from custom, not from a statute or a posted speed limit.

One may object that police enforcement patterns simply reflect how law enforcement behaves in the face of resource constraints. With limited budgets, [229] police and prosecutors prioritize some crimes over others. And when everyone violates the speed limit, police lack the resources to enforce speed limits against all motorists.

But this is an unpersuasive rationalization. Even where technology has reduced resource constraints,[230] such as when cities use speed cameras, they do not prosecute people for de minimis speeding.[231] In the District of Columbia, tickets are generally issued only when the driver exceeds the speed limit by ten miles per hour.[232] In Maryland, the legislature (undoubtedly recognizing the conventional nature of speeding) imposed the

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[228] *See* Jonathan Witmer-Rich, *Arbitrary Law Enforcement Is Unreasonable:* Whren*'s Failure to Hold Police Accountable for Traffic Enforcement Policies*, 66 CASE W. RES. L. REV. 1059, 1071 (2016) (concluding that police officers do not generally issue tickets for minor speeding); *see also supra* notes 219–221 (showing that a small fraction of tickets are issued at that speed).

[229] Budgeting is a way that legislatures control enforcement. Brown, *Democracy*, *supra* note 27, at 256; Richman & Stuntz, *supra* note 118, at 607.

[230] Speed cameras do not eliminate all resource constraints since drivers could challenge the ticket. But few do, given the cost and time involved. *See, e.g.*, Kathy A. Bolten, *Traffic-Camera Appeals Often Successful, but Few Try*, DES MOINES REG. (June 20, 2015, 9:13 PM), https://www.desmoinesregister.com/story/news/crime-and-courts/2015/06/20/automated-traffic-enforcement-cameras-appeals/29055365/ [https://perma.cc/SJW8-F5XV] (compiling statistics in Iowa).

[231] *See, e.g.*, Scott Calvert, Paul Overberg & Max Rust, *Speed Cameras: The Cities with the Worst Offenders*, WALL ST. J. (Dec. 22, 2019, 5:30 AM), https://www.wsj.com/articles/speed-cameras-the-cities-with-the-worst-offenders-11577010601 [https://perma.cc/28NE-893N].

[232] Austermuhle, *supra* note 224; *Speeders Beware, Law Enforcement Is Cracking Down*, *supra* note 224; Luz Lazo, *Drivers Continue to Ignore Speed Cameras in the District, Earning City More than $100 Million*, WASH. POST (Sept. 26, 2018, 6:30 AM), https://www.washingtonpost.com/transportation/2018/09/26/drivers-continue-ignore-speed-cameras-district-earning-city-more-than-million/ [https://perma.cc/LT6R-EYZY] (noting about one-third of ticketed drivers are doing eleven miles per hour over the limit).

enforcement limit for speed cameras; Maryland's law prohibits speed-camera tickets for less than twelve miles per hour above the limit.[233] In New York, the City will issue tickets only for at least ten miles per hour over the limit.[234] So, the customs survive, even when few resource constraints exist; and where legislatures are afraid that police will not respect the customs, they incorporate them into statutory law.

For a third example, take the difference between federal and state criminal law. Unwritten conventions of criminal law mediate the boundary between these criminal law systems. On paper, federal criminal law essentially duplicates state law, a fact that scholars widely criticize.[235] Yet, as Klein and Grobey have explained, the "explosion in federal criminal law . . . is largely irrelevant to charging decisions made by federal prosecutors. Many of these new federal crimes are virtually ignored or overlooked by prosecutors."[236]

Where is the boundary? The federal government often focuses on cases that involve substantial interstate activity, are unusually complex, or involve matters of national concern.[237] For example, the federal government generally prosecutes international drug trafficking, while leaving drug possession to the states.[238] The federal government prosecutes international

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[233] MD. CODE ANN., TRANSP. § 21-809(a)(8) (West 2020) (defining allowable "[s]peed monitoring system[s]"); MD. CODE ANN., TRANSP. § 21-810(b)(3) (West 2009) (restricting a work zone speed control system to recording images of drivers going at least twelve miles per hour over the limit).

[234] *FAQ's—Speed Cameras*, VISION ZERO, https://www1.nyc.gov/html/dot/downloads/pdf/2014-10-speed-camera-faq.pdf [https://perma.cc/CW3X-VSRW].

[235] *See, e.g.*, Smith, *Overfederalization*, *supra* note 87 (arguing that federal criminal law's duplication of state law is problematic, in part because of the severity of federal sentences).

[236] Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 7 (2012).

[237] *Id.* at 19.

[238] Excluding marijuana possession offenses, the federal government prosecutes about two hundred drug possession cases per year. MELISSA K. REIMER, U.S. SENT'G COMM'N, WEIGHING THE CHARGES: SIMPLE POSSESSION OF DRUGS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 3–4, 5–6 (Sept. 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/201609_Simple-Possession.pdf [https://perma.cc/P4SR-4PXY]. The number rises to about five hundred per year if marijuana offenses outside the District of Arizona are included. *Id.* at 4. In contrast, the government prosecutes about twenty thousand drug trafficking cases per year. GLENN R. SCHMITT & CASSANDRA SYCKES, U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES 5 (June 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/WT75-94PG]. Drug trafficking is more complicated and often the result of cooperative agreements among local and federal prosecutors. *See* Richman, *Changing Boundaries*, *supra* note 27, at 93–95.

terrorism cases, even though these could be prosecuted under state law.[239] And the federal government often prosecutes interstate sex crimes.[240]

In contrast, federal prosecutors rarely seek to prosecute core state crimes, even when they have the legal authority. Statutes against domestic violence, carjacking, gun free school zones, and motor vehicle theft sit largely unused.[241] Undergirding this disuse are norms against federal prosecutors usurping areas of traditional state concern, especially when state law is adequate.

How has this boundary developed? Through usage and tradition. Customary law develops when there is "a widespread practice, and . . . the practice [is] followed from a sense of obligation."[242] By custom, some crimes become part of federal criminal law, while others do not.

For example, federal prosecutors routinely prosecute felons who illegally possess firearms.[243] The Gun Control Act generally prohibits the possession of a firearm by a person convicted of a felony if that firearm has moved one time in interstate or foreign commerce.[244] Between fiscal years 2008 and 2017, federal prosecutors averaged about 9,100 prosecutions of firearm offenses per year.[245] Of those, about 60% were cases in which felon in possession was the lead charge.[246] To put that number in perspective,

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[239] Klein & Grobey, *supra* note 236, at 19 (reporting that the federal government prosecuted all international terrorism cases in 2006).

[240] *Id.* at 29–30.

[241] *See id.* at 5–6; ADMIN. OFF. OF THE U.S. DISTRICT CTS., FEDERAL JUDICIAL CASELOAD STATISTICS tbl.D-2 (Mar. 31, 2018), https://www.uscourts.gov/statistics/table/d-2/federal-judicial-caseload-statistics/2018/03/31 [https://perma.cc/M2GY-4PZH] (reporting about two hundred fifty carjacking prosecutions per year and ten to fifty auto theft prosecutions); TRAC, FEDERAL WEAPONS PROSECUTIONS RISE FOR THIRD CONSECUTIVE YEAR (Nov. 29, 2017) [hereinafter FEDERAL WEAPONS PROSECUTIONS RISE], https://trac.syr.edu/tracreports/crim/492/ [https://perma.cc/UQ53-3RJ8] (reporting forty-seven prosecutions for the federal Gun Free School Zones Act from 2008 through 2017 in which the violation of that Act was the lead charge); TRAC, PROSECUTIONS FOR 2018 (Mar. 14, 2019), https://tracfed.syr.edu/results/9x205c8aa4bef6.html [https://perma.cc/8N5U-SFJX] (noting that the federal government prosecuted about one to eighteen cases per year where interstate domestic violence was the lead charge).

[242] Sachs, *supra* note 195, at 540.

[243] *See* Phillip S. Jackson, *Federal Firearms Prosecutions: A Primer*, 33 U. BALT. L.F. 2, 2–3 (2002).

[244] Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified 18 U.S.C. § 922(g)(1)).

[245] EXEC. OFF. FOR U.S. ATT'YS, U.S. DEP'T OF JUST,. UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2017, at 15 (2018), https://www.justice.gov/usao/page/file/1081801/download/ [https://perma.cc/V9UV-ENB4]. The actual number is 9,129.5.

[246] FEDERAL WEAPONS PROSECUTIONS RISE, *supra* note 241.

federal prosecutors averaged a little more than 60,000 federal prosecutions per year during that same time period.[247] So, almost one in ten federal prosecutions was primarily for a felon illegally possessing a gun.

In contrast, Congress prohibited traveling in interstate commerce for the purpose of committing domestic violence.[248] The law passed in 1994 by solid majorities in Congress—more than 55% in the House and more than 60% in the Senate.[249] Yet, the federal government hardly prosecutes the law. During the past twenty years, the federal government has filed between one and eighteen cases per year where this was the lead charge.[250] More people are prosecuted for going less than five miles per hour above the speed limit.[251] And this is not because domestic violence is rare or because the American people do not support prosecuting people who harm their family members.[252] Likely, individual federal prosecutors do not feel empowered to routinely federalize domestic violence cases even when they can satisfy the federal jurisdictional nexus.

The boundary between federal and state criminal law is also heavily a customary law. For many crimes, federal jurisdiction is easy to acquire—the gun moved once in interstate commerce, a person used a telephone to commit fraud, a robbery affects interstate commerce[253]—so, the crime could be prosecuted in state or federal court. Federal prosecutors cannot prosecute everything within their jurisdiction, so they must narrow their focus. As Richman recognizes, the border between federal and state criminal law is both complex and evolving.[254] Underneath it are three key facts that help

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[247] EXEC. OFF. FOR U.S. ATT'YS, U.S. DEP'T OF JUST., ANNUAL STATISTICAL REPORTS, https://www.justice.gov/usao/resources/annual-statistical-reports [https://perma.cc/F5W3-FTN9] (compiling the United States Attorneys' Annual Statistical Reports for fiscal years 2008–2017).

[248] 18 U.S.C. § 2261.

[249] Violent Crime Control and Law Enforcement Act of 1994, Pub L. No. 103-322, 108 Stat. 1796 (1994).

[250] *See supra* note 241.

[251] *See supra* notes 219–221.

[252] On the prevalence of intimate partner violence, see *The National Intimate Partner Sexual Violence Survey: 2015 Data Brief—Updated Release*, CTR. FOR DISEASE CONTROL & PREVENTION 7–8 (Nov. 2018), https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf [https://perma.cc/4V4N-8TFP] (estimating one in four women and one in ten men experience domestic violence in their lifetimes).

[253] *See, e.g.*, Scarborough v. United States, 431 U.S. 563, 575 (1977) (holding that a gun has to move only once in interstate commerce for federal law to apply to gun possession); 18 U.S.C. § 1343 (wire fraud) (criminalizing wire fraud furthered by interstate telephone calls or electronic communications); 18 U.S.C. § 1951 (criminalizing the obstruction of interstate commerce by committing robbery, extortion, or threats of violence).

[254] *See* Richman, *Changing Boundaries*, *supra* note 27.

demarcate the line, independent of any agreements between federal and local prosecutors.

First, the border is heavily a law of sentencing. Regardless of the theoretical maximum sentences, actual sentences imposed in the federal system are often harsher than in the state system for comparable crimes, partially because of stiff statutory mandatory minimums and the lack of parole.[255] Prosecutors consequently decide whether to pursue federal charges based on whether criminal defendants may deserve more punishment than is available under the state system.[256] Although felon-in-possession cases make up the bulk of federal gun prosecutions, the federal government still leaves substantial numbers of these cases to the states.[257] Usually, the federal government targets gun offenders who have more significant criminal histories or who may be a danger to the community.[258]

Conversely, when federal penalties are too harsh, federal prosecutors leave prosecutions to the states. Take, for example, the prohibition against carrying a concealed weapon aboard a commercial aircraft. Congress originally made it a misdemeanor to carry a concealed weapon, unless the person acted willfully or recklessly in "disregard for the safety of human life," which upgraded the offense to a felony.[259] In 1994, Congress increased the penalty for mere possession to a felony punishable by up to ten years in prison.[260] The new penalty was too harsh for a crime rooted in negligence. The Transportation Security Administration found 4,432 firearms in 2019.[261] Most people who attempt to bring a gun through a security checkpoint lawfully possess the weapon and simply forgot to remove the gun from their bag, briefcase, or purse before going to the airport.[262] In response, the Justice Department has issued guidelines narrowing the offense to "aggravated

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[255] Smith, *Folly*, *supra* note 6, at 40–41; Clymer, *supra* note 89, at 674.

[256] Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 574–75 (2011).

[257] *See* TRAC, FEDERAL WEAPONS ENFORCEMENT (Feb. 13, 2013), https://trac.syr.edu/trac reports/crim/307/ [https://perma.cc/C2DU-KFS3].

[258] *See* Daniel C. Richman, *Project Exile and the Allocation of Federal Law Enforcement Authority,* 43 ARIZ. L. REV. 369, 374–75 (2001) [hereinafter Richman, *Project Exile*].

[259] Act of Sept. 5, 1961, Pub. L. No. 87-197, 75 Stat. 466, 466–67 (1961).

[260] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 705(b), 110 Stat. 1214, 1295 (1996).

[261] Press Release, Transp. Sec. Admin., *Number of Guns Brought to Airport Checkpoints in 2019 Up 5 Percent* (Jan. 15, 2020), https://www.tsa.gov/news/releases/2020/01/15/number-guns-brought-airport-checkpoints-2019-5-percent [https://perma.cc/Q8UU-JA5L] (also providing data from 2009 until 2019).

[262] Kim Bellware, *TSA Caught People Trying to Fly with More Guns than Ever in 2019. Experts Have Questions.*, WASH. POST (Jan. 20, 2020), https://www.washingtonpost.com/ transportation/2020/01/20/tsa-gun-record-2019/ [https://perma.cc/ELQ4-9PSN].

cases," such as those who have a gun to commit a crime or those who intentionally try to bring the gun on the plane.[263] The Justice Department instructs prosecutors to refer other cases to state prosecutors or, if appropriate, to use a federal misdemeanor provision.[264] And, as with many of the previous examples, this is not just attributable to resource constraints: quite the contrary, the federal government pursues civil penalties in nearly all firearm cases involving airports.[265] Instead, federal prosecutors make a conscious decision not to file felony federal prosecutions when the application of federal criminal law would be excessively harsh in the circumstances.

Second, federal criminal law is often used to defend peculiar federal interests, including immigration crimes and fraud against the government.[266] About half of federal prosecutions comprise immigration offenses alone.[267]

Third, cases are often brought under federal law when it would be difficult for an individual state to investigate or prosecute because they lack jurisdiction, resources, or technical knowledge.[268] These include complex fraud prosecutions, computer crimes, international terrorism, and crimes that transcend state jurisdictional boundaries. The federal government has emphasized different kinds of crimes over time, and these changes often relate to changes in community concerns, from alcohol and kidnapping during the 1920s and 1930s to violent crime today.[269] The scope of federal criminal law is heavily determined by public norms, even if prosecutors may memorialize practice dictated by public convention in private agreements or in statements of policy about what they will prosecute.[270]

The malleable nature of conventional law—especially compared with statutory law—aids in allowing substantive criminal law to evolve as underlying assumptions change. Take, for example, the federal Gun Free School Zones Act, which contains a clear prohibition against possessing a

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[263] U.S. Dep't of Just., Manual § 9-63.161 (2020).

[264] *Id.*

[265] *See* Fredrick Kunkle & John D. Harden, *TSA Goes for Guns and Money*, WASH. POST (Oct. 18, 2018, 5:30 AM), https://www.washingtonpost.com/transportation/2018/10/18/tsa-goes-guns-money/ [https://perma.cc/6G7X-WEXH] ("The TSA filed more than 4,000 actions against gun-carrying travelers in 2017 . . . ."). That number matches the approximate number of firearms found in 2017. *See* Transp. Sec. Admin., *supra* note 261 (finding 3,957 firearms at checkpoints). It is unclear why there were slightly more actions filed than firearms reported.

[266] Klein & Grobey, *supra* note 236, at 6, 31.

[267] TRAC, IMMIGRATION NOW 52 PERCENT OF ALL FEDERAL CRIMINAL PROSECUTIONS (Nov. 28, 2016), https://trac.syr.edu/tracreports/crim/446/ [https://perma.cc/WX4D-M8SC].

[268] Klein & Grobey, *supra* note 236, at 9.

[269] *See* Richman, *Changing Boundaries*, *supra* note 27, at 85–86, 90.

[270] *Id.* at 93–95.

firearm within 1,000 feet of a school, subject to narrow defenses that are also clearly spelled out.[271] To carry a firearm in a school zone, law enforcement officers must be on official duty, and private citizens generally need a license to carry from the state in which the school zone is located.[272] The precision of the Act has caused it to become overbroad as subsequent developments in state and federal gun laws have created policy conflicts. Federal law now allows off-duty and retired law enforcement officers to carry their weapons off-duty throughout the country,[273] most states allow adults to carry firearms in some manner without a license,[274] and most states have some recognition of out-of-state weapons permits.[275] If enforced to the maximum, the Act would prohibit the public carrying of firearms in most urban and suburban areas by these individuals. Yet, in the Act's thirty years of existence, state prosecutors have not referred such cases for federal prosecution, and federal prosecutors have not made any effort to target these groups. What few recorded decisions exist show that the Act has been primarily used as an additional charge for those who commit other crimes in school zones.[276] This is a significant narrowing of the statute.

Yet again, this narrowing does not simply reflect the exercise of enforcement discretion. The question for whether something is a "convention," as opposed to an act of discretion, depends on whether the relevant official has an obligation to respect the norm. The pertinent question is whether, for example, a U.S. Attorney (or an Assistant U.S. Attorney) *could* decide to prosecute police officers for carrying their service weapons

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[271] 18 U.S.C § 922(q).

[272] 18 U.S.C § 922(q)(2)(B).

[273] 18 U.S.C. §§ 926B, 926C.

[274] *Open Carry: Summary of State Law*, GIFFORD'S L. CTR. TO PREVENT GUN VIOLENCE, https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/open-carry/ [https://perma.cc/XX9P-C7P6] ("Thirty-one states allow the open carrying of a handgun without any license or permit, although in some cases the gun must be unloaded."); *Concealed Carry: Summary of State Law*, GIFFORD'S L. CTR. TO PREVENT GUN VIOLENCE, https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/ [https://perma.cc/Y68Y-YWRZ] ("[Fifteen States] . . . generally allow individuals to carry concealed weapons in public without a permit."); Wikipedia.com, *Constitutional Carry* (accessed April 9, 2021, 8:50 PM) https://en.wikipedia.org/wiki/Constitutional_carry [https://perma.cc/LP6J-KPNL] (recognizing that approximately 20 states allow the carrying of concealed firearms without a license).

[275] *Concealed Carry Reciprocity Maps for All U.S. States*, GUNS TO CARRY (2019), https://www.gunstocarry.com/ccw-reciprocity-map/ [https://perma.cc/9N5B-966V] (acknowledging that thirty-eight states recognize at least some out-of-state weapons permits, with twenty of those states recognizing all state-issued concealed carry permits).

[276] *See, e.g.*, United States v. Fernandez-Jorge, 894 F.3d 36, 36 (1st Cir. 2018); United States v. Tait, 202 F.3d 1320, 1320 (11th Cir. 2000).

off duty. The answer is no—and obviously so. As Bellin notes,[277] a prosecution requires the concurrence of other people—law enforcement officers to make the arrest, a grand jury to indict, a petit jury to convict, and support (or at least noninterference) from politically-accountable officers. A U.S. Attorney who tried prosecuting such a case would likely come under such intense scrutiny that he would be forced to drop the case. It is true that in some formal sense a prosecutor may have the power to prosecute for a technical violation. But that statement is like saying that the British monarch could veto a bill against the wishes of Parliament and the government. What is true in a formal legal sense may nevertheless be erroneous as a matter of customary norms—norms that are enforced indirectly through the political process rather than directly through the legal system.

As with formal common law, unwritten criminal law conventions evolve over time.[278] To give an illustrative example, let me go back to felon-in-possession offenses. The de facto expansion of federal criminal law into weapons possession, a traditional state area, did not become a core part of federal criminal law until at least the late 1970s and arguably the late 1980s. The federal government statutorily began regulating the trafficking of ordinary firearms in 1938[279] and first prohibited felons from receiving firearms in interstate commerce in 1961.[280] But those statutes did not change the substantive criminal law reality. Federal prosecution of gun crimes remained uncommon until around 1990.[281] Federal weapons prosecutions rose steeply during the Ronald Reagan and George H.W. Bush presidencies, trailed off for a bit during the early Clinton years, and then rose quickly during the end of President Clinton's second term and President George W. Bush's first term.[282]

And similar to the evolution of formal common law, many conventions evolve because someone violated an old convention. This was true with the

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[277] Bellin, *Power of Prosecutors*, *supra* note 25, at 181–82.

[278] *See* Sachs, *supra* note 195, at 548–52.

[279] Federal Firearms Act, ch. 850, 52 Stat. 1250 (1938). Four years earlier, Congress regulated the highly destructive weapons. National Firearms Act (NFA), ch. 757, 48 Stat. 1236 (1934).

[280] An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961). *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009).

[281] Between 1966 and 1968, only two hundred seventy-eight arrests were made for Federal Firearms Act violations. Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 142 (1975); *see also* WEAPONS OFFENSES AND OFFENDERS, *supra* note 170 (providing data from 1980 onward); FEDERAL WEAPONS PROSECUTIONS RISE, *supra* note 241(providing data from 1986 onward).

[282] FEDERAL WEAPONS PROSECUTIONS RISE, *supra* note 241, at tbl.1.

federalization of state gun crimes, which was met with vociferous complaints. In 1997, the federal government implemented "Project Exile" in Richmond, Virginia, which diverted state weapons charges into federal court.[283] At the time, Richmond's murder rate was one of the country's highest.[284] One federal judge wrote a letter to Chief Justice Rehnquist complaining that Project Exile had "transformed [the district court] into a minor-grade police court."[285] And without mentioning specific programs, Chief Justice Rehnquist repeatedly complained about the federalization of crime throughout the 1990s.[286] But repeated violation of one norm can create a new norm, and in the case of guns, substantial federalization stuck. By 1999, stronger prosecution of federal gun laws had bipartisan support, the support of the executive branch, and the support of state officials.[287] George W. Bush made the expansion of federal prosecutions a part of his platform,[288] which he implemented when elected.[289] Today, felon-in-possession cases compose a large fraction of the federal criminal docket. Sustained resistance against an old convention can spark a new convention.

The federal policing of sex offenses also shows how shifts in popular customs can alter the common law of crime—this time, in favor of decriminalization. In 1910, Congress enacted the Mann Act, which prohibited transporting in interstate or foreign commerce "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[290] The Act "was aggressively used in the 1910s and 1920s to combat prostitution and even fornication."[291] But as American sexual mores changed, prosecutions diminished. Beginning in the 1930s, prosecutors faced jurors who harbored more liberal attitudes towards consensual sex; and as convictions for consensual, noncommercial sex became more difficult to obtain, prosecutors filed Mann Act charges based on that conduct less

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283 Richman, *Project Exile*, *supra* note 258, at 370, 379.

284 *Id.* at 379.

285 Susan H. Moran, *Report: Gun Crime Plan Is Unconstitutional*, UNITED PRESS INT'L (June 18, 2002, 5:37 PM), https://www.upi.com/Top_News/2002/06/18/Report-Gun-crime-plan-is-unconstitutional/42101024436279/?ur3=1 [https://perma.cc/FG3E-W5H9].

286 William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, 11 FED. SENT'G REP. 134, 135-36 (1998); William H. Rehnquist, *Remarks at Monday Afternoon Session (May 11, 1998)*, 75 A.L.I. ANNUAL MEETING SPEECHES 13, 17–19 (1998); William H. Rehnquist, *The 1993 Year-End Report on the Judiciary*, 17 AM. J. TRIAL ADVOC. 571, 574–75 (1994).

287 Richman, *Project Exile*, *supra* note 258, at 371–72.

288 *Id.* at 371.

289 *See id.* at 396.

290 Pub. L. 61-277, § 2, 36 Stat. 825, 825 (1910).

291 Brown, *Democracy*, *supra* note 27, at 257.

frequently.[292] The Act "was nearly a dead letter by the 1960s."[293] Since then, federal prosecution of sex crimes has not ended, but shifted. Today, nearly 3% of the federal criminal docket comprises child pornography cases,[294] and the federal government routinely prosecutes sex trafficking cases.[295] This corresponds well to the shift in popular norms, which today recognize the gravity of sexual abuse while accepting the legitimacy of consensual sex. Mann Act prosecutions, thus, ultimately depended upon widely shared cultural norms about the criminalization of sex. When societal norms changed, prosecutors were bound to follow, and they faced indirect sanctions (e.g., jury nullification) if they did not. Broad criminal statutes provided a basis for federal criminal jurisdiction across a range of possible cases, but the effective scope of those statutes depended on customary norms, which changed over time.

Today, we continue to see evolution in criminal law conventions. The possession of marijuana for personal use is becoming decriminalized.[296] The federal government usually does not prosecute such cases, and increasingly, state prosecutors do not either.[297] Serious hate crimes, in contrast, are being shifted to federal prosecutors, who may seek harsher federal sentences including the death penalty.[298] These trends follow broader social trends, which show increasing sensitivity to bias-motivated wrongdoing and more libertarian leanings on personal drug use.[299] How far the federal government

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[292] DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 161–67 (John C. Fout ed., 1994). Overall Mann Act prosecutions and sentences sometimes fluctuated higher, however, as prosecutors targeted organized prostitution. *Id.* at 168–69.

[293] Brown, *Democracy*, *supra* note 27, at 257.

[294] U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2016 2, fig.2 (May 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/FY16_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/8WMR-4LEP].

[295] MARK MOTIVANS & HOWARD N. SNYDER, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 251390, FEDERAL PROSECUTION OF HUMAN-TRAFFICKING CASES, 2015 (June 2018), https://www.bjs.gov/content/pub/pdf/fphtc15.pdf [https://perma.cc/DL7K-HWXV].

[296] *See supra* notes 95 & 163.

[297] *See* U.S. SENT'G COMM'N, *supra* note 294, at 3–5; *supra* note 95.

[298] *See, e.g.*, Devlin Barrett & Valerie Bauerlein, *Alleged Charleston Church Shooter Indicted on Federal Hate Crime Charges*, WALL ST. J. (July 22, 2015, 5:30 PM), https://www.wsj.com/articles/justice-department-plans-hate-crime-charges-in-charleston-church-shooting-1437587642 [https://perma.cc/7AES-GC8K]; Ann O'Neill, *Tsarnaev Guilty of All 30 Counts in Boston Bombing*, CNN (Apr. 8, 2015, 11:35 PM), https://www.cnn.com/2015/04/08/us/boston-marathon-bombing-trial/index.html [https://perma.cc/9RNS-R68C].

[299] Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RSCH. CTR. (Nov. 14, 2019), https://www.pewresearch.org/fact-tank/2019/11/14/americans-

will assume hate-crimes prosecutions or drug crimes will become decriminalized remains to be seen.

Finally, much like formal common law, criminal law conventions are not purely democratic. They need a broader social consensus than a weak democratic majority to be binding and effective. For example, look at the death penalty. Abolitionists are in the minority, even in some liberal states.[300] California voters have repeatedly voted to maintain the death penalty. In 1972, California voters overturned the state supreme court's abolition of the death penalty[301] with 67.5% of the vote.[302] Two recent propositions to overturn the death penalty have failed by simple majorities.[303] Polls show that Californians support the death penalty by a substantial majority.[304] And jurors return death sentences, with more than 700 inmates awaiting execution.[305] Yet, California has had only thirteen executions since capital punishment's reinstatement, and none since 2006.[306] The California governor

support-marijuana-legalization/ [https://perma.cc/94B4-N746] (tracking a consistent rise in support of decriminalizing personal drug use); Sara Steen & Mark A. Cohen, *Assessing the Public's Demand for Hate Crime Penalties*, 21 JUST. Q. 91, 96–97 (2004) (tracking a consistent rise in support of hate crimes prosecutions).

[300] *See, e.g.*, John Wagner & Peyton M. Craghill, *Washington Post Poll Finds Most Marylanders in Favor of Death Penalty*, WASH. POST (Feb. 26, 2013), https://www.washingtonpost.com/local/md-politics/washington-post-poll-finds-most-marylanders-in-favor-of-death-penalty/2013/02/26/c3f37fdc-800a-11e2-b99e-6baf4ebe42df_story.html [https://perma.cc/Z4PW-LYS2] (60% in favor; 36% opposed); *Connecticut Voters Say Abolishing Death Penalty is a Bad Idea*, QUINNIPIAC (April 25, 2012), https://poll.qu.edu/connecticut/release-detail?releaseid=1739 [https://perma.cc/V9PF-DJAM] (62% in favor; 30 % opposed); *infra* note 303.

[301] People v. Anderson, 493 P.2d 880 (Cal. 1972) (holding the death penalty to be cruel or unusual under the state constitution).

[302] Cal. Proposition 17 (1972); Arthur L. Alarcó & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S132 (2011).

[303] Cal. Proposition 62 (2016); Cal. Proposition 34 (2012).

[304] *See, e.g.*, *Poll Finds Most Californians Support Death Penalty*, ABC 7 (Mar. 13, 2019), https://abc7.com/politics/poll-finds-most-californians-support-deathpenalty/5190628/ [https://perma.cc/JX64-K63V] (60% in favor; 26% opposed); Phil Willon, *Poll Finds Californians Support the Death Penalty – and Newsom's Moratorium on Executions*, L.A. TIMES (June 17, 2019, 5:00 AM), https://www.latimes.com/politics/la-pol-ca-california-death-penalty-poll-20190617-story.html [https://perma.cc/H7GJ-8FNZ] (61% in favor; 39% opposed).

[305] Paige St. John & Maloy Moore, *These Are the 737 Inmates on California's Death Row*, L.A. TIMES (Mar. 13, 2019), https://www.latimes.com/projects/la-me-death-row/ [https://perma.cc/K622-GY8E].

[306] CAL. DEP'T. OF CORR. & REHAB., *Number of Executions 1893 to Present*, https://www.cdcr.ca.gov/capital-punishment/number-of-executions-1893-to-present/ [https://perma.cc/NCS3-4VLU].

has recently called a moratorium.[307] Likewise, ten other states have not executed anyone in more than a decade.[308] And this despite majority support for the death penalty.[309] Criminal law is difficult to enforce when society is intensely divided.

In giving these examples, I do not purport to offer a comprehensive account of what conventional criminal law actually is. That would be an exercise in treatise writing. My goal here is only to show that criminal law conventions exist—that is, that much of what comes within so-called "prosecutorial discretion" results from obligatory customs that are indirectly enforced. Modern substantive criminal law is heavily a law of unwritten conventions, and these unwritten conventions function much like common law. They are public norms that are widely understood, that evolve, and that gain their legitimacy from general public consensus. These conventions constrain actors in the criminal justice system, including prosecutors who, on paper, may have near-absolute discretion to bring or decline charges.

Finally, the adaptation of statutory law into a de facto customary law results in a different kind of common law than the modern view of the common law. The post-legal realist vision of the common law, which Hessick and Kahan seem to accept,[310] is that judges promulgate the law through their rulings.[311] But there is an older, more traditional vision of the common law, which recognizes the law as a binding form of custom that society can generally recognize even though no one has promulgated it.[312] Modern substantive criminal law remains a heavily customary enterprise in this older sense. To be sure, contemporary criminal law customs are not formally legally binding in a court of law as the common law is. But they nevertheless share many traits analogous to the pre-realist vision of the common law: the existence of customs widely accepted by the public and by those in authority,

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[307] Sophia Bollag, *'Ineffective, Irreversible and Immoral:' Gavin Newsom Halts Death Penalty for 737 Inmates*, SACRAMENTO BEE (Mar. 12, 2019, 7:24 PM), https://www.sacbee.com/news/politics-government/capitol-alert/article227489844.html [https://perma.cc/CMJ2-4FYA].

[308] John Gramlich, *California Is One of Eleven States that Have the Death Penalty but Haven't Used It in More than a Decade*, PEW RSCH. CTR. (Mar. 14, 2019), http://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/ [https://perma.cc/ZNS4-CRUF].

[309] *Death Penalty*, GALLUP: IN DEPTH TOPICS, https://news.gallup.com/poll/1606/death-penalty.aspx [https://perma.cc/8Z2F-AV6Y] (last visited July 21, 2020).

[310] *See* Hessick, *Myth*, *supra* note 1, at 967 ("[J]udges played a central role in determining the substance of criminal law . . . ."); Kahan, *supra* note 23, at 470 (describing common law doctrines as "the products of judicial invention").

[311] Sachs, *supra* note 195, at 529 (describing this "modern" account).

[312] *See id.* at 548–53.

considered as binding as a matter of public morality, and defined without the need for formal promulgation by a person acting with legislative or judicial authority.

Thus, this Part has argued that criminal law consists heavily of unwritten, conventional norms. Among other things, these norms demarcate the line between criminal and noncriminal conduct, narrow the effective scope of broad criminal crimes, and divide federal and state criminal jurisdictions. And the conversion of statutory law into conventional law provides continued legitimacy for criminal law statutes, as the connection between the population and the legislatures who approved such laws weaken over time. The next Part will explain how criminal law conventions develop.

III. REACHING EQUILIBRIUM: HOW DO CRIMINAL LAW CONVENTIONS DEVELOP?

On paper, prosecutors have enormous discretion. Yet, they lack the de facto power to use much of that discretion to impose their personal criminal justice preferences against greater societal norms. Why? Building on work by Brown, Richman, Bellin, and others, I argue that prosecutors face extensive checks and balances on how they exercise their power. Politically, prosecutors are pressured by the legislature and the electorate, both of whom demand that prosecutors punish core crimes but not overbroad crimes. Within the court system, prosecutors face pressure from judges, who have formal and informal tools to discourage prosecutors from being too harsh or too lenient. Prosecutors also face political pressure from different levels of government: overcriminalization and cooperative federalism combine to make it difficult for prosecutors to punish too little or too much. For prosecutors who try to criminalize too much, any individual prosecution is ultimately answerable to a jury, who may be reluctant to convict those who have not breached societal norms. Even though few cases go to trial today, the mere threat of a jury cabins how prosecutors exercise their power. As a result of all these checks, true substantive criminal law is largely determined by societal conventions, not prosecutors' private preferences. This section will now explain how competing pressures from legislatures, elections, jurors, judges, and federalism combine to cabin prosecutorial discretion and create a common law of crime.

A. LEGISLATURES

As explained in Part II, legal conventions differ from formal law in that conventions rely on indirect means for their enforcement. Instead of culling the statute books, legislatures routinely use indirect means to curb broad statutory law and to sanction executive officials who violate customary

enforcement norms. One method is through budgetary decisions. Legislatures can decriminalize conduct by cutting off funds to prosecutors and enforcement agencies for investigation and prosecution.[313] Or legislatures can limit an enforcement agency's budget, leaving it unable to investigate and prosecute trivial offenses.[314]

Legislatures also prevent excessive enforcement by directly or indirectly controlling enforcement agencies. For example, legislatures can restrict how enforcement agencies gather and use information needed for an investigation, such as by prohibiting enforcement agencies from using computer searches or by banning investigators from using wiretaps.[315] And legislators conduct oversight of prosecutorial decisions.[316]

Legislatures also use political sanctions against the executive to prevent excessive enforcement.[317] For example, Congress blocked certain Justice Department nominations to prevent what some Senators viewed as excessive federal drug enforcement.[318] In 2009, President Obama's Justice Department responded to the increased legalization of medical marijuana in the states by instructing the U.S. Attorneys in those jurisdictions not to prosecute "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[319] The

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[313] *See, e.g.*, United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016) (discussing effect of a congressional appropriations rider prohibiting the Department of Justice from interfering with states allowing medical marijuana).

[314] *See* Brown, *Democracy*, *supra* note 27, at 257; *see also* LaFave, *supra* note 9, at 533–35; James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1542–43 (1981) (both similar).

[315] *See* Richman, *Federal Criminal Law*, *supra* note 28, at 800–02 (noting, for instance, that "Congress has prevented ATF from creating a centralized computerized registry for various firearms records"); *see also* Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 636–40 (explaining why Congress restricted federal law enforcement's ability to use informants and wiretaps in public corruption cases).

[316] *See* Griffin, *supra* note 5, at 280.

[317] *See, e.g.*, Richman, *Federal Criminal Law*, *supra* note 28, at 789–90 (explaining how Congress uses hearings and its power to confirm appointments to control executive discretion).

[318] *See* Camila Domonoske, *Colorado Sen. Cory Gardner Continues His Standoff with Jeff Sessions over Marijuana*, NPR (Jan. 10, 2018, 4:00 PM), https://www.npr.org/sections/thetwo-way/2018/01/10/577103864/colorado-sen-cory-gardner-continues-his-standoff-with-jeff-sessions-over-marijua [https://perma.cc/WA59-WF3L]; Max Greenwood, *GOP Senator Says Sessions Broke Pledge to Him on Marijuana Policy*, HILL (Jan. 4, 2018, 10:39 AM), https://thehill.com/homenews/senate/367410-senator-says-sessions-broke-pledge-to-him-on-marijuana-policy [https://perma.cc/Q7W2-LWSS].

[319] Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected United States Attorneys on Investigations & Prosecutions in States Authorizing the Medical Use of

Department of Justice expanded this guidance in 2013 to eschew enforcement of marijuana possession in states that legalized it for recreational use.[320] Five years later, Attorney General Jeff Sessions rescinded the memo.[321] The revocation caused an immediate backlash from members of Congress. Senator Cory Gardner, a Republican from Colorado—a state that had legalized recreational marijuana—responded by blocking the confirmation of about twenty D.O.J. nominees.[322] The standoff ended three months later when the President assured Senator Gardner that the Department of Justice would not interfere with Colorado's legal marijuana industry and that the Administration would support marijuana reform.[323] President Trump's next Attorney General, William Barr, pledged in writing to Senators during his confirmation that he would abide by the terms of the 2013 memo.[324] Thus, legislatures can create de facto decriminalization by raising the political price of enforcement beyond what the executive is willing to pay.[325]

When public prosecutors persist in overzealously enforcing statutes, legislatures can respond by narrowing them. In 1968, Congress passed the Gun Control Act, which, in part, made it a crime to knowingly engage in the

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Marijuana (Oct. 19, 2009), https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states [https://perma.cc/ZS2H-S2FH] (on file with the Department of Justice archives); *see also* Memorandum from James M. Cole, Deputy Att'y Gen., to United States Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011) (updating policy).

[320] *See* Memorandum from James M. Cole, Deputy Att'y Gen., to All United States Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf [https://perma.cc/YAF6-92KV] (on file with the Department of Justice archives).

[321] *See* Memorandum from Jefferson B. Sessions, III, Att'y Gen., to All United States Attorneys, Marijuana Enforcement (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download [https://perma.cc/27FV-CRR8] (on file with the Department of Justice archives).

[322] *See* Domonoske, *supra* note 318; Greenwood, *supra* note 318.

[323] *See* Seung Min Kim, *Trump, Gardner Strike Deal on Legalized Marijuana, Ending Standoff over Justice Nominees*, WASH. POST (Apr. 13, 2018, 12:17 PM), https://www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800_story.html [https://perma.cc/P588-6KQN].

[324] *See* Tom Angell, *Trump Attorney General Pick Puts Marijuana Enforcement Pledge in Writing*, FORBES (Jan. 28, 2019, 1:23 PM), https://www.forbes.com/sites/tomangell/2019/01/28/trump-attorney-general-pick-puts-marijuana-enforcement-pledge-in-writing/#38ab7f225435 [https://perma.cc/5PJ7-7EZE].

[325] *See* Richman, *Federal Criminal Law*, *supra* note 28, at 789–90.

business of dealing firearms without a federal firearms license.[326] During the early 1980s, Congress held extensive hearings on the Act's enforcement.[327] Many members concluded that, instead of targeting violent criminals, the Bureau of Alcohol, Tobacco, and Firearms (ATF) had targeted legitimate gun owners by prosecuting trivial technical violations.[328] Congress responded by raising the mens rea to "willful[ness]" for most Gun Control Act violations and narrowing the definition of those who are "engaged in the business" of firearms.[329] Congress left the mens rea at "knowingly" for the felon-in-possession provision and for making a false statement to gun dealers.[330]

Congress's investigation and disapproval of the ATF's enforcement decisions sent the message that Congress disagreed with the ATF's enforcement priorities. The Bureau received the message. For the past twenty years, the Bureau has primarily prosecuted people for unlawful possession of a firearm.[331] There have been a few prosecutions each year for unlawful dealing, but not many.[332] The ATF has been timid in its enforcement against gun dealers who break the Gun Control Act—hesitant even to revoke their licenses.[333]

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[326] An Act to Amend title 18, United States Code, to Provide for Better Control of the Interstate Traffic in Firearms, Pub L. No. 90-618, 82 Stat. 1213 (1968).

[327] *Legislation to Modify the 1968 Gun Control Act: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. (1987) (conducting hearings on Oct. 28, 1985, Oct. 30, 1985, Nov. 9, 1985, Feb. 19, 1986, & Feb. 27, 1986).

[328] *The Federal Firearms Owner Protection Act: Hearing on S. 914 Before the S. Comm. on the Judiciary*, 98th Cong. 1 (Oct. 4, 1983) (statement of Sen. Thurmond); S. REP. NO. 98-583, at 1 (1984) (Sen. Thurmond) (complaining that federal firearm laws had "given rise to certain questionable enforcement policies").

[329] Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308 § 104(a)(1)(D) 100 Stat. 449 (1986); 18 U.S.C. § 921(a)(21).

[330] Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308 § 104(a)(1)(A), (B) 100 Stat. 449 (1986).

[331] *See* TRAC, WEAPONS PROSECUTIONS CONTINUE TO CLIMB IN 2018 tbl.2 (Aug. 27, 2018), https://trac.syr.edu/tracreports/crim/525/ [https://perma.cc/KQ94-8NMX] (showing in Table 2 that the number one charge for the past twenty years has been for unlawful acts—including unlawful possession—with a firearm); FEDERAL WEAPONS PROSECUTIONS RISE, *supra* note 241 (about 5,000 prosecutions per year for violating the felon in possession law).

[332] *See* FEDERAL WEAPONS PROSECUTIONS RISE, *supra* note 241 (about one hundred fifty prosecutions per year nationwide).

[333] *See* Ali Watkins, *When Guns Are Sold Illegally, A.T.F. Is Lenient on Punishment*, N.Y TIMES (June 3, 2018), https://www.nytimes.com/2018/06/03/us/atf-gun-store-violations.html [https://perma.cc/SS8Y-X74R]; Scott Glover, *Unlicensed Dealers Provide a Flow of Weapons to Those Who Shouldn't Have Them, CNN Investigation Finds*, CNN (Mar. 25, 2019, 8:39 AM), https://www.cnn.com/2019/03/25/us/unlicensed-gun-dealers-law-invs/index.html [https://perma.cc/2HVV-EYZW]; *see also* Richman, *Federal Criminal Law*, *supra* note 28, 796–98 (noting how legislative oversight and the ATF's political weakness checks the Bureau's enforcement).

This is just one of many examples where legislatures use their statutory power to control excessive enforcement. Congress also maintains a willfulness requirement in tax prosecution cases, even though it makes federal prosecutions difficult against tax evaders who "genuinely," but unreasonably, believe that the federal income tax is unconstitutional or that their wages do not constitute income.[334] In civil cases, Congress flipped the burden of proof from the taxpayer to the Internal Revenue Service (IRS) and also made it easier for taxpayers to sue the IRS for damages.[335] State legislatures restrict excessive enforcement, too. Pennsylvania prohibits its local police from using radar guns to enforce speeding violations because the legislature is afraid that municipalities will use excessive enforcement to raise revenue.[336] Spurred by the arrest of a twelve-year-old girl for eating a french fry in a metro station, the D.C. City Council reformed the city's juvenile delinquency law to allow police to cite juveniles instead of arresting them.[337]

Indeed, public prosecutors likely maintain their monopoly over criminal prosecutions because we expect them *not* to prosecute trivial or blameless cases.[338] In early America, private prosecutors brought most criminal complaints.[339] One familiar quasi-criminal mode of prosecution was the *qui tam* suit, in which a private informer split the penalty with the government.

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[334] *See* Klein & Grobey, *supra* note 236, at 70, 101; Cheek v. United States, 498 U.S. 192, 203–05 (1991).

[335] *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, §§ 3001, 3101–3102, 112 Stat. 685, 726, 730 (1998).

[336] *See* 75 Pa. C.S. § 3368(c)(2); Paul Muschick, Opinion, *Harrisburg Hypocrisy: Work Zone Cameras but No Radar for Local Police*, MORNING CALL (Oct. 16, 2018, 6:00 AM), https://www.mcall.com/opinion/mc-opi-pa-work-zone-cameras-radar-muschick-20181008-story.html [https://perma.cc/V7WY-M39R].

[337] *See* Hedgepeth v. Washington Metro. Area Transit Auth., 386 F.3d 1148, 1150–51 (D.C. Cir. 2004); Martine Powers, *Metro Transit Police Arrest Teenager for Carrying Chips and Lollipop into Station*, WASH. POST (Oct. 19, 2016) https://www.washingtonpost.com/local/trafficandcommuting/metro-transit-police-arrest-teenager-for-carrying-chips-and-lollipop-into-station/2016/10/19/1360a014-9627-11e6-bb29-bf2701dbe0a3_story.html [https://perma.cc/4Q24-SD88].

[338] *See* Brown, *Democracy*, *supra* note 27, at 258 n.168; *see also* Bowers, *Equitable Decision*, *supra* note 174, at 1663; Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PA. ST. L. REV. 1155, 1176 (2005) (arguing in favor of publishing criteria for prosecutorial discretion). My thanks to Jeremy Rabkin for suggesting this point.

[339] *See* Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 571 (1984); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1205 & n.220 (1999).

But private prosecutions produced undesirably high levels of enforcement,[340] and they have been largely abandoned.

Thus, it is not true that "when law enforcers are happier, so are lawmakers."[341] Even where legislatures confer broad authority on police and prosecutors, they expect the executive branch to exercise its discretion appropriately. And legislatures take either prophylactic or corrective action when they do not trust the executive to abide by the norms. The threat of these corrective actions helps maintain criminal law conventions.

Stuntz is correct that political factors incentivize legislatures to proscribe too much conduct rather than too little, but this is not inherently a bad thing. With respect to redundancy, overlapping criminal statutes with different penalty provisions, gives prosecutors the ability to tailor punishments to crimes,[342] including by showing mercy where warranted.[343] As for overbreadth, it is much easier for prosecutors to forgo prosecuting some conduct than to try to stretch a statute unnaturally to cover other forms of misconduct that society desires to be punished.[344] The use of broad and vague statutes is not inherently problematic if sufficient checks curtail prosecutors' statutory power to punish nonblameworthy conduct.

Prosecutorial abuse does not occur solely by prosecuting too many cases; prosecutors also can abuse their discretion by failing to adequately enforce the law.[345] Although "[t]he prosecutor's decision not to prosecute a case is virtually unreviewable,"[346] legislatures are sensitive to underenforcement. If prosecutors are too lenient or lack resources, legislatures can respond by decentralizing enforcement. Congress passed the False Claims Act in 1863,[347] which authorized *qui tam* suits for treble damages against those who defraud the government. Those provisions

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[340] *See* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 732 (2004).

[341] Luna, *supra* note 67, at 722.

[342] *See* Misner, *supra* note 5, at 742.

[343] My thanks to Bruce Green for this point.

[344] *See* Buell, *supra* note 109, at 1496.

[345] Underenforcement of core crimes has been among the most pernicious police practices, particularly hurting minorities and the poor. *See* Alexandria Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1723 (2006); *see also* LEON WHIPPLE, OUR ANCIENT LIBERTIES: THE STORY OF THE ORIGIN AND MEANING OF CIVIL AND RELIGIOUS LIBERTY IN THE UNITED STATES 144 (1927) (recognizing that "if we turn to the state's influence on liberty, we find that the most extensive and frequent losses of liberty are not due either to court or executive, but to the failure of the force of the government to protect men from violence and mobs").

[346] Misner, *supra* note 5, at 743.

[347] False Claims Act, 31 U.S.C. §§ 3729-3733 (original version at ch. 67, § 4, 12 Stat. 696, 698 (1863)).

remain popular with key members of Congress, who guard the decentralized authority against government prosecutors.[348] Decentralized enforcement exists in the criminal context as well. State legislatures can authorize police or victims to prosecute cases directly.[349] And legislatures can authorize multiple government officers—say, the Attorney General and the local prosecutor or multiple local prosecutors with overlapping jurisdiction—to bring charges, thereby depriving a single prosecutor of a monopoly on the authority to prosecute.[350] In addition to decentralizing enforcement, legislatures can limit the ability of prosecutors to plea or charge bargain, if they believe that prosecutors are abusing that power.[351]

Recently, the Pennsylvania General Assembly decentralized enforcement for gun crimes in Philadelphia.[352] As described more fully below, Larry Krasner, the Philadelphia district attorney, has been under fire for lenient plea bargains in cases involving violent crimes and gun crimes.[353] In response, the legislature gave the Pennsylvania Attorney General concurrent jurisdiction to prosecute unlawful gun possession and the unlawful transfer of firearms arising in Philadelphia.[354] Prosecutors, thus, are not mini-sovereigns, and even their ability to show leniency has limits.

B. ELECTIONS

Elections also serve to cabin prosecutorial power within a reasonable range.[355] Most district attorneys and state attorneys general are elected.[356]

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[348] For example, during his first stint in the Department of Justice, William Barr argued that the *qui tam* provisions were "an abomination and a violation of the appointments clause"—views that he maintained over a decade later. Interview by Jim Young, Nancy Baker & Russell Riley with William P. Barr, in Charlottesville, Va. (Apr. 5, 2001), https://millercenter.org/the-presidency/presidential-oral-histories/william-p-barr-oral-history-assistant-attorney-general [https://perma.cc/Z62E-KBZT]. But as a nominee for Attorney General, Barr had to promise to "diligently enforce the False Claims Act" to win confirmation. *William Barr's Hearing on Capitol Hill*, CNN TRANSCRIPTS (Jan. 15, 2019), http://www.cnn.com/TRANSCRIPTS/1901/15/cnr.04.html [https://perma.cc/7KK4-6J9F https://perma.cc/7KK4-6J9F].

[349] Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1252 (2020).

[350] *See* Misner, *supra* note 5, at 732–33.

[351] Bellin, *supra* note 349, at 1251–52 (noting restrictions against bargaining away consideration of recidivism).

[352] *See* Act No. 58, H.B. 1614, 2019 Gen. Assemb. (Pa. 2019).

[353] *See* infra notes 365–73 and accompanying text.

[354] *See* Act No. 58, H.B. 1614, 2019 Gen. Assemb. (Pa. 2019).

[355] *See* Brown, *Democracy*, *supra* note 27, at 258; Myers, *supra* note 9, at 1353.

[356] *See* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1268 (2011); Stephanos Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, 157

These officers remain attuned to popular will because they want to continue in their current positions or they have ambitions for higher office.[357] Prosecutors who are not elected—most notably U.S. Attorneys—are generally politically sensitive for two reasons. First, they serve at the discretion of an elected office holder.[358] Second, many U.S. Attorneys have ambitions for higher elected office or want to become judges, which requires the support of elected officials.[359]

For reasons well-explained, voters' preferences make it difficult for prosecutors to be too lenient. Many crimes—especially violent felonies—are "politically mandatory" for prosecutors to pursue.[360] Notwithstanding overcriminalization, 60% of state prisoners are imprisoned for one of the traditional common law felonies, including murder, manslaughter, rape, or robbery.[361] Voters' preferences substantially reduce the amount of de facto discretion prosecutors have when it comes to prosecuting serious *mala in se* crimes.

U. PA. L. REV. 959, 983 (2009) [hereinafter Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*].

[357] *See* Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334, 349 (2002).

[358] Fairfax, *supra* note 356, at 1268; *see* H. RICHARD UVILLER, THE TITLED PLAYING FIELD: IS CRIMINAL JUSTICE UNFAIR? 45 (1999).

[359] *See* Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 277 (2002).

[360] Stuntz, *Plea Bargaining*, *supra* note 118, at 2566–67 (2004); *see also* Bowers, *Equitable Decision*, *supra* note 174, at 1658; Brown, *Democracy*, *supra* note 27, at 256; Vorenberg, *supra* note 314, at 1526. "Politically mandatory" does not mean, however, that prosecutors are obligated to dedicate all possible resources to identify the person who committed the crime. Many crimes that are "politically mandatory" to prosecute may nevertheless have low clearance rates. *See* Shima Baradaran Baughman, *How Effective Are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA. L. REV. 47, 87 (2020).

[361] STUNTZ, *supra* note 19, at 79; *see, e.g.*, Chris Brennan, *Philly DA Larry Krasner Casts Carlos Vega as Part of Team Trump*, PHILA. INQUIRER, (Mar. 26, 2021), https://www.inquirer.com/politics/clout/larry-krasner-carlos-vega-trump-fop-20210326.html [https://perma.cc/69FK-WRHB] (reporting that the Philadelphia police union endorsed the progressive incumbent's opponent); Bob Chiarito, *Chicago Police Call for State's Attorney to Resign in Smollett Controversy*, THOMSON REUTERS (Apr. 1, 2019), https://www.reuters.com/article/us-people-jussie-smollett-protests/chicago-police-call-for-states-attorney-to-resign-in-smollett-controversy-idUSKCN1RD3CL [https://perma.cc/2PPY-6AXD] (reporting that police called for the resignation of the State's Attorney for dropping a prosecution involving a false report to police).

Lenient prosecution policies can also frustrate law enforcement officers, who will take their frustration to the voters.[362] A prosecutor's refusal to prosecute can "expose police to media backlash and public outcry."[363] So, police pressure prosecutors to file charges when they have made arrests.[364] Thus, after a spate of shootings, the Philadelphia Police Commissioner indirectly suggested that Larry Krasner, the Philadelphia District Attorney, had not been seeking adequate penalties when prosecuting gun violations.[365] Krasner disputed the allegation,[366] but the local press has begun tracking his performance in gun cases.[367] Likewise, when Cook County State's Attorney Kimberly Foxx dropped charges against Jussie Smollett for falsely reporting a hate crime, she received blistering criticism from the Mayor and the Police Superintendent.[368] Ultimately, a special prosecutor reindicted Smollett about a month before Foxx faced reelection.[369] A central issue in the election was

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[362] *See* Fairfax, *supra* note 365, at 1275 (explaining that police "are able to exert institutional pressure on prosecutors who might otherwise be inclined to decline prosecution in a given case"); Marco della Cava, *More Progressive Prosecutors Are Angering Police, Who Warn Approach Will Lead to Chaos*, USA TODAY (Feb. 10, 2020, 11:50 AM), https://www.usatoday.com/story/news/nation/2020/02/08/criminal-justice-police-progressive-prosecutors-battle-over-reform/4660796002/ [https://perma.cc/DQL6-NK46] (reporting the developing tension between police and progressive prosecutors).

[363] Bowers, *Equitable Decision*, *supra* note 174, at 1700.

[364] *Id.* at 1700–01; *see also* Daniel C. Richman, *Accounting for Prosecutors*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 40, 46 (Máximo Langer & David Alan Sklansky, eds. 2017) [hereinafter Richman, *Accounting for Prosecutors*] ("The police who apprehend a suspect surely have views on whether and how much he should be punished—views that prosecutors are bound to take into account.").

[365] Chris Palmer, Jeremy Roebuck, Dylan Purcell & Julie Shaw, *Trading Blame for Rise in City's Gun Violence*, PHILA. INQUIRER, June 23, 2019, at A1.

[366] Chris Palmer, *After Weekend Shootings, Philly DA Larry Krasner Defends His Office's Record of Gun Cases*, PHILA. INQUIRER (June 18, 2019), https://www.inquirer.com/news/larry-krasner-district-attorney-philadelphia-gun-prosecutions-richard-ross-20190618.html [https://perma.cc/B7ZS-CX63].

[367] *See* Julie Shaw, *More Gun Cases Go to Court Diversion*, PHILA. INQUIRER, June 23, 2019, at A17.

[368] Hollie McKay, *Chicago Cops Smell Political Rat in Wake of Jussie Smollett Case Dismissal*, FOX NEWS (Mar. 27, 2019), https://www.foxnews.com/us/chicago-cops-smell-political-rat-in-wake-of-jussie-smollett-case-dismissal [https://perma.cc/Q53A-K5C9]; Meg Wagner, Brian Ries & Veronica Rocha, *Jussie Smollett Charges Dropped*, CNN (Mar. 28, 2019, 1:44 PM), https://www.cnn.com/us/live-news/jussie-smollett-charges/h_6f33a329b128da47c2e76aa745244e3a [https://perma.cc/H7PG-TKUG].

[369] Courtney Gousman, *New Smollett Indictment May Shape Cook County State's Attorney's Race*, WGN (Feb. 12, 2020, 6:50 AM), https://wgntv.com/2020/02/12/new-smollett-indictment-may-shape-cook-county-states-attorneys-race/ [https://perma.cc/8S5D-XW42].

whether Foxx properly handled the case in the first place.[370] Foxx won reelection, but the incident caused political damage.[371]

Electoral pressure also helps discipline career prosecutors. Although most prosecutors are career civil servants who are not directly accountable to the voters, their bad decisions can create political headaches for their bosses. For example, in Philadelphia, a prosecutor offered a three-to-ten-year plea for an armed robber who shot a store owner with an AK-47.[372] Even though the public elected Philadelphia District Attorney Larry Krasner on a progressive decriminalization platform, the deal went too far. After severe negative publicity, Krasner unsuccessfully tried to revoke the deal and, going forward, the office reaffirmed internal policies that require supervisor approval of plea deals.[373]

Some have objected that prosecutorial elections do not accurately measure prosecutorial performance. As Stephanos Bibas explains, many prosecutorial elections are low-information, low-turnout events in which anecdotes or misleading statistics may have outsized influence.[374] The public may fail to notice isolated aberrations in prosecutorial decision-making.[375] Moreover, incumbency can prove an insurmountable advantage.[376] Election results do not inherently reward good prosecutors and remove bad ones.

Still, the threat of elections provides some discipline for prosecutors. In a low-information environment, prosecutors seek to avoid negative publicity, which too much leniency easily produces.[377] Victims of serious crimes who

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[370] *Id.*

[371] *See* Richard A. Oppel, Jr., *Despite Backlash over the Jussie Smollett Case, Kim Foxx Wins Primary*, N.Y. TIMES (Mar. 17, 2020), https://www.nytimes.com/2020/03/17/us/kim-foxx-chicago-prosecutor.html [https://perma.cc/9S4W-8D8G].

[372] Bobby Allyn, *After Year One, Philly DA Larry Krasner Earns Praise from Reformers, Scorn from Victim Advocates*, WHYY (Feb. 5, 2019), https://whyy.org/articles/after-his-first-year-philly-d-a-larry-krasner-earns-praise-from-reformers-scorn-from-victim-advocates/ [https://perma.cc/JLT8-YZFB].

[373] *Id.*; Julie Shaw, *Krasner Now Seeks to Vacate Plea Deal for AK-47 Gunman Who Critically Wounded West Philly Beer Deli Owner*, PHILA. INQUIRER (Dec. 7, 2018), https://www.inquirer.com/news/district-attorney-larry-krasner-seeks-reversal-plea-deal-ak-gunman-west-philly-20181208.html [https://perma.cc/GCR6-DYCF].

[374] Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, *supra* note 356, at 983–87.

[375] Bowers, *Equitable Decision*, *supra* note 174, at 1714.

[376] Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, *supra* note 356, at 983–88.

[377] *See id.* at 983–91.

do not get adequate justice will go to the press.[378] And too much tolerance for minor crimes can erode quality of life.[379]

Elections are not only an important check against excessive leniency; they also help prevent overcriminalization. Prosecutors already lack sufficient resources to investigate and prosecute all core crimes; many murders and most rapes, robberies, burglaries, and car thefts go unsolved.[380] Given these limitations, if a prosecutor desired to prosecute adultery or an office March Madness pool, it would likely create a public relations disaster. Public pressure also can provide a modest check against arbitrary enforcement, at least in high-profile cases.[381]

Local elections are also susceptible to special interest capture, which can reward the refusal to enforce laws that are deeply unpopular among a passionate minority. Executive officials in many liberal cities have declared themselves "sanctuary cities" in which they have refused to detain unlawfully present aliens or provide assistance to federal agencies enforcing immigration laws.[382] Not to be outdone, many conservative localities refuse to enforce new gun-control laws.[383] Even if the gun-control laws are supported by an electoral majority within the jurisdiction, sometimes elected officials will gain more votes by going along with intensely held special-

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[378] Allyn, *supra* note 372.

[379] *See* Rafael A. Mangual, *The Bloody Toll from Baltimore and Chicago's Soft-On-Crime Mindset*, MANHATTAN INST. FOR POL'Y RSCH. (Dec. 28, 2019), https://www.manhattan-institute.org/the-bloody-toll-from-baltimore-chicagos-soft-on-crime-mindset [https://perma.cc/FA88-ZUS9] (finding that declining to enforce low-level offenses and drug laws leads to an increase in violent crime and community instability); Jake Novak, Opinion, *Big Cities Are Posing a Major Threat To The Economy by Ignoring Minor Crimes*, CNBC (Oct. 11, 2019, 1:26 PM), https://www.cnbc.com/2019/10/11/big-cities-pose-major-threat-to-the-economy-by-ignoring-minor-crimes.html [https://perma.cc/WA2C-G5RS] (documenting the negative economic effects for communities when quality of life crimes are not enforced).

[380] *See, e.g.*, FED. BUREAU OF INVESTIGATION: UNIFORM CRIME REPORTING, 2017 CRIME IN THE UNITED STATES (2017), https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/clearances [https://perma.cc/7XJM-AUPH] (last visited Jan. 23, 2021) (providing clearance rates ranging from 13.7% for car theft to 61.6% of murders and nonnegligent manslaughter).

[381] Bowers, *Equitable Decision*, *supra* note 174, at 1714.

[382] Jessica M. Vaughan & Bryan Griffith, *Sanctuary Cities, Counites, and States*, CTR. FOR IMMIGR. STUDS., https://cis.org/Map-Sanctuary-Cities-Counties-and-States [https://perma.cc/FE2S-RXHN] (last updated Oct. 26, 2020) (assembling a state-by-state list of sanctuary localities).

[383] Salena Zito, Opinion, *The Second Amendment Sanctuary Movement Isn't Going Away*, WALL ST. J. (Jan. 21, 2020, 7:00 PM), https://www.wsj.com/articles/the-second-amendment-sanctuary-movement-isnt-going-away-11579651251 [https://perma.cc/L5NQ-8JSU]; *see, e.g.*, Terry Tang, *Arizona's Most Populous County Becomes Gun 'Sanctuary,'* ABC NEWS (Feb. 26, 2020, 5:49 PM), https://abcnews.go.com/US/wireStory/arizonas-populous-county-gun-sanctuary-69242884 [https://perma.cc/6VTX-FSPB].

interest views than they will lose by acceding to weakly held majoritarian beliefs. Elections help make criminal law conventions more consensus driven than purely majoritarian.

Finally, the public's preference for law-and-order politics may not be as static as once assumed. In recent elections, progressive candidates have won several local prosecutorial elections on promises to prosecute less.[384] Even national presidential candidates have faced difficult questions about their law-and-order records.[385] When crime rates are low and people feel safe, they may be more sensitive to claims that the justice system is too harsh. Electoral politics are now moderating criminal law. The fact that most local prosecutors are elected arguably backs these decriminalization decisions with democratic legitimacy.[386]

Thus, electoral oversight helps cabin prosecutorial discretion. In a low-turnout, low-information election, the worst thing a prosecutor can do is stir up passionate hatred among a significant constituency. Prosecutors are incentivized to prosecute core crimes, but not waste resources on overbroad application of criminal laws that lack public support.

C. JURORS

Juries act "as a lay buffer . . . 'against the corrupt or overzealous prosecutor.'"[387] Jurors, as community members unlearned in the law, arguably have a comparative advantage in deciding whether someone ought to be punished, notwithstanding the technicalities of the criminal law.[388]

Jurors can check excessive prosecutions in different ways. Their most extreme power is to nullify—that is, to refuse to convict despite a belief in guilt. Jurors do this in at least two circumstances: first, when they believe the underlying conduct is not blameworthy; and, second, when they are aware that the penalties are too high relative to the blameworthiness of the

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[384] These elections have included races in Chicago, Denver, Houston, Philadelphia, Orlando, and St. Louis. Andrew McCarthy, *The Progressive Prosecutor Project*, COMMENT. MAG. (Mar. 2020), https://www.commentarymagazine.com/articles/the-progressive-prosecutor-project/ [https://perma.cc/7TAR-GNTX].

[385] Jeffery Taylor, *Harris Brings Experience, Law-and-Order Baggage to Biden Ticket*, BLOOMBERG L. (Aug. 12, 2020, 3:00 AM), https://news.bloomberglaw.com/us-law-week/harris-brings-experience-law-and-order-baggage-to-biden-ticket [https://perma.cc/AQ47-F4KB].

[386] *See generally* Murray, *supra* note 201.

[387] Bowers, *Juries*, *supra* note 16, at 1656 (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

[388] *Id.* at 1657.

offense.[389] English juries, thus, refused to convict Protestant dissenters, undervalued stolen loot in larceny cases,[390] and refused to condemn those who violated a statute punishing the exportation of wool with death.[391] Even today, prosecutors worry about jurors exercising their power to acquit. Recently, for example, federal prosecutors received mandamus against a district judge, who had ruled that the defendant could tell the jury that he faced a mandatory minimum fifteen-year sentence if convicted of a statutory sex offense.[392] Obviously, the prosecutor would not have been concerned—and certainly not to the level of seeking a trial stay and mandamus—if he thought that the jury would view the crime as sufficiently blameworthy to merit a fifteen-year sentence. More broadly, the decision to seek mandamus shows that prosecutors strongly oppose giving juries sentencing information.

But jurors need not resort to full nullification to affect criminal prosecutions. Sympathetic jurors are also more likely to actually *believe* that reasonable doubt exists.[393] And even jurors who favor harsh criminal penalties in the abstract may hesitate to convict once faced with a particular defendant.[394]

Although jurors in theory form an important buffer between a defendant and the state, in practice, the role of jurors has been greatly diminished because jury trials have almost disappeared.[395] In recent years, only 2–3% of federal defendants had their cases resolved by a jury trial.[396] State jury trials are similarly rare. One study sampling sixteen jurisdictions found that juries

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[389] Lora M. Levett, Erin M. Danielsen, Margaret Bull Kovera & Brian L. Cutler, *The Psychology of Jury and Juror Decision Making*, *in* PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE 365, 388–89 (Neil Brewer & Kipling D. Williams eds., 2005).

[390] 4 BLACKSTONE, COMMENTARIES *239.

[391] ADAM SMITH, LECTURES ON JURISPRUDENCE 105 (R. L. Meek, D. D. Raphael & P. G. Stein, eds., 1978).

[392] United States v. Manzano, 945 F.3d 616 (2d Cir. 2019).

[393] *See* Michael Conklin, *Reasonable Doubt Ratcheting: How Jurors Adjust the Standard of Proof to Reach a Desired Result*, 95 N.D. L. REV. 281, 285 (2020).

[394] Ramsey, *supra* note 15, at 1363–64.

[395] *See, e.g.*, Hessick, *Myth*, supra note 1, at 1016 ("The elimination of trials has also removed juries as a check on substantive criminal law in individual cases.").

[396] BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., TABLE D-4—U.S. DISTRICT COURTS–CRIMINAL FEDERAL JUDICIAL CASELOAD STATISTICS (2018), https://www.uscourts.gov/statistics/table/d-4/federal-judicial-caseload-statistics/2018/03/31 [https://perma.cc/LT9Q-CZ29] (2.17%) (last visited Jan. 23, 2021); BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., TABLE D-4.
U.S. DISTRICT COURTS—CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND OFFENSE, DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2017 (2017), https://www.uscourts.gov/sites/default/files/data_tables/fjcs_d4_0331.2017.pdf [https://perma.cc/3HDZ-GBSY] (2.15%) (last visited Jan. 23, 2021); Offit, *supra* note 14, at 1074.

resolved 1.1% of criminal cases in 2009.[397] A Bureau of Justice Statistics sampling showed that 98% of felony convictions resulted from guilty pleas, with only 2% coming from jury trials.[398] And in 2012, the Supreme Court reported that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[399] Moreover, the function of juries in trials has been reduced to that of a factfinder applying the law given by the judge; under the modern view, they are not supposed to interpret the law on their own or act as judges of normative guilt.[400]

Despite the rarity of jury trials, though, the mere possibility of presenting a case to a jury has a significant constraining influence on prosecutors. In a recent ethnographic study of federal prosecutors, assistant U.S. Attorneys explained that their beliefs about how jurors would view cases affected the investigation methods they employed, their decisions whether to pursue charges or decline prosecution, and what plea offers they decided to make.[401] Prosecutors made their decisions, among other things, on perceptions of how the jury would view the defendant, the victims, the witnesses, and the significance of the charges.[402] Prosecutors, for example, described their dislike of bringing technical regulatory prosecutions for crimes such as structuring, unless they could tie those crimes to broader wrongdoing.[403] Those findings confirm what prosecutors say and do elsewhere. A recent interview with a Bureau of Alcohol, Tobacco, Firearms, and Explosives official explained that the Bureau has difficulty prosecuting unlicensed gun sellers because many have no criminal records, which makes jurors hesitant to convict.[404] Prosecution records confirm this preference. Between Fiscal Years 2008–2017, U.S. Attorneys brought about 1,500 prosecutions where unlicensed gun dealing was the lead charge,[405] while they

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[397] Offit, *supra* note 14, at 1075 (citing VICTOR E. FLANGO & THOMAS M. CLARKE, REIMAGINING COURTS: A DESIGN FOR THE TWENTY-FIRST CENTURY 68–69 (2015)) (providing a chart that captures the declining percentage of case dispositions by bench and jury trial between 1976 and 2009).

[398] *Id.*

[399] Missouri v. Frye, 566 U.S. 134, 143 (2012).

[400] Sparf v. United States, 156 U.S. 51, 102 (1895); Bowers, *Juries*, *supra* note 16, at 1662. Historically, juries had more power to consider the character and blameworthiness of the defendant and to be the ultimate arbiters of the law. *See id.* at 1660–62.

[401] Offit, *supra* note 14, at 1088–1105.

[402] *Id.* at 1088–99.

[403] *Id.* at 1089.

[404] Glover, *supra* note 333.

[405] FEDERAL WEAPONS PROSECUTIONS RISE, *supra* note 241.

brought about 60,000 prosecutions against prohibited persons (e.g., felons) for possessing firearms.[406]

Thus, even in a world where nearly all cases are plea bargained, juries (or the threat of jury trials) play a significant role in determining the scope of modern substantive criminal law. For a plea bargain to happen, there must be a mutual exchange. A defendant gives up his trial rights in exchange for a lower sentence; the prosecutor, in turn, gains an easy conviction without the cost of going to trial or needing to worry whether the evidence will be sufficient to sustain a conviction. A prosecutor who pursues a case in which the jury likely will not convict, regardless of the evidence, has little leverage with which to bargain. Under these circumstances, jury pressures incentivize prosecutors to pursue the kinds of wrongdoing which jurors will convict if there is a trial. Even as prosecutors now operate "in the shadow of the jury,"[407] the threat of jury trials contributes to developing an unwritten conventional law of crime.

D. JUDGES

The judiciary also plays a critical role in developing criminal law conventions. Law enforcement, prosecutors, and judges are all repeat players in the criminal justice system. Actions taken by police and prosecutors that exceed customary norms may invite pushback from the judiciary, even if police and prosecutors' actions are technically within the law.

Judges have a wide variety of tools to limit prosecutorial abuse. Judges wield ultimate power over statutory interpretation, and they use it to cabin the scope of vague and overbroad laws.[408] Judges, first, narrow criminal statutes through their interpretation of mens rea requirements. In statutes that omit a mens rea element, judges often supply it.[409] Judges can increase the prosecution's burden of proof by interpreting statutory mens rea requirements to apply not just to the actus reus but also to the attendant

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406 *Id.*

407 *See generally* Offit, *supra* note 14.

408 Klein & Grobey, *supra* note 236, at 73 ("Where Congress has refused to limit broadly worded federal criminal prohibitions, either by clearer definitions or by enhancing culpability requirements, the Supreme Court has once again stepped in to remedy the problem."); *id.* at 73–77 (collecting decisions throughout federal criminal law).

409 *See, e.g.*, Staples v. United States, 511 U.S. 600 (1994) (requiring the government to prove beyond reasonable doubt that defendant knew the weapon he possessed could fire more than one shot automatically); Morissette v. United States, 342 U.S. 246 (1952) (requiring criminal intent for conversion of government property, even when the statute made no mention of intent).

circumstances.[410] And judges can narrow statutes by strengthening the meaning of mens rea requirements.[411]

Judges also can narrow the actus reus using a variety of statutory interpretive tools. For example, based on federalism concerns and constitutional avoidance principles, the Supreme Court narrowed the scope of the Chemical Weapons Convention Implementation Act of 1998 when prosecutors used the provision to charge a woman for spreading toxic chemicals to injure her husband's paramour.[412] Later, using various interpretive canons (e.g., *noscitur a sociis* and *ejusdem generis*), the Court narrowed the definition of "tangible object" in a Sarbanes-Oxley evidence destruction provision when a U.S. Attorney prosecuted a fisherman for throwing illegal fish overboard.[413] And concerned about the scope of honest services fraud and the Hobbs Act's official bribery provisions, the Supreme Court whittled both crimes down to their most basic forms of wrongdoing.[414]

In a few jurisdictions, legislatures have even delegated to judges some power over prosecutorial discretion. Fifteen states have adopted statutes permitting courts to dismiss prosecutions in the interests of justice.[415] Hawaii, Maine, New Jersey, and Pennsylvania have adopted section 2.12 of the Model Penal Code, which authorizes judges to dismiss prosecutions for "de minimis infractions."[416] De minimis infractions include criminal conduct that is (1) "within a customary license or tolerance," (2) "did not actually cause or threaten the harm or evil sought to be prevented . . . [or caused the harm]

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[410] *See, e.g.*, Flores-Figueroa v. United States, 556 U.S. 646 (2009) (requiring the government to prove that the defendant knew that the means of identification he unlawfully transferred, possessed, or used did, in fact, belong to another person); Rehaif v. United States, 139 S. Ct. 2191 (2019) (requiring the prosecution to prove that a felon in possession of a firearm knew that he had the relevant status when he possessed the firearm).

[411] *See, e.g.*, Cheek v. United States, 498 U.S. 192, 203–05 (1991) (holding the government must prove willfulness and intent to violate the law in tax evasion cases); Ratzlaf v. United States, 510 U.S. 135 (1994) (requiring same elevated mens rea as applied to a prosecution for structuring).

[412] Bond v. United States, 572 U.S. 844 (2014).

[413] Yates v. United States, 574 U.S. 528, 543–45 (2015) (relying on *noscitur a sociis* and *ejusdem generis*, both of which use surrounding terms in a list to limit the scope of a general or broad term in that list).

[414] *See* McDonnell v. United States, 136 S. Ct. 2355 (2016) (reading the definition of "official act" for purposes of the federal bribery statute narrowly); Skilling v. United States, 561 U.S. 358 (2010) (reading the honest services statute to cover only bribery and kickback schemes).

[415] Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 332 (2017).

[416] HAW. REV. STAT. ANN. § 702-236 (2020); ME. REV. STAT. ANN. 17-A, § 12 (2020); N.J. STAT. ANN. § 2C:2-11 (West 2020); 18 PA. CONS. STAT. § 312 (2020); *see generally* Douglas Husak, *The De Minimis "Defense" to Criminal Liability*, *in* THE PHILOSOPHY OF CRIMINAL LAW 362, 367 (Oxford Univ. Press ed., 2010).

only to an extent too trivial to warrant the condemnation of conviction," or (3) "presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense."[417] These are factors that prosecutors should consider when deciding whether to bring charges. So, in these jurisdictions, courts have some residual power to check a prosecutor's decision to bring charges in trivial cases.

Judges have various soft-power tools, as well. Trial judges can express their disapproval of certain prosecutions and encourage prosecutors to drop charges or plead them out as lesser offenses.[418] Like prosecutors, judges face docket pressures and prosecuting trivial cases is a poor use of judicial resources.[419] Although judges may not be able to stop a determined prosecutor from bringing charges, line prosecutors are repeat players who are incentivized not to anger the judges that they will appear before.

Appellate judges have soft-power tools, too. They can express their disapproval of the statute or the prosecution in the hopes that policymakers take note.[420] They can also issue threats to narrow the scope of statutes by how they interpret the mens rea or actus reus requirements.[421] These tools do not correct all bad prosecutions, but they do send a message about the judiciary's tolerance for abusive prosecutions.

Sometimes, soft-power persuasion is not sufficient to restrain prosecutorial excess, but statutory interpretation tools are too strong. Between these two options lies a third way that judges control prosecutorial excess: using minor technical reasons to reverse convictions that, for less sympathetic defendants, would not merit reversal. The Seventh Circuit's decision in *United States v. Abair* is a good example.[422] The case involved a prosecution for structuring. Abair, a Russian immigrant, had purchased a home. Her Russian bank refused to transfer Abair's money to her American bank account because her Russian account was in her maiden name, while her American account was in her married name.[423] So, Abair decided to

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[417] MODEL PENAL CODE § 2.12 (AM. L. INST., 1962).

[418] *See, e.g.*, *Ohio County Judge Criticizes Prosecution Grand Jury Tactics*, CHARLESTON GAZETTE-MAIL (July 6, 2015), https://www.wvgazettemail.com/news/legal_affairs/ohio-county-judge-criticizes-prosecution-grand-jury-tactics/article_b81271ae-c933-5523-8a5b-f2874f59bed0.html [https://perma.cc/WPU8-MM5C].

[419] *See* Brown, *Democracy*, *supra* note 27, at 270 & n.223.

[420] Yates v. United States, 574 U.S. 528, 570 (2015) (Kagan, J., dissenting).

[421] For example, during the oral argument in *Yates*, the Department of Justice stated that its policy was to charge the most serious offense; Justice Scalia then warned the government that he would be "very careful about how severe I make statutes." Transcript of Oral Argument at 29, *Yates*, 574 U.S. 528 (2015) (No. 13-7451).

[422] United States v. Abair, 746 F.3d 260, 261 (7th Cir. 2014).

[423] *Id.*

withdraw the money in small amounts from ATMs, which she deposited into her American account. Because she transferred more than $10,000 in small increments, the government prosecuted her for structuring.[424] The Seventh Circuit reversed her conviction, holding that the government asked an improper impeachment question when cross-examining Abair.[425] The rationale for reversing the conviction was weak,[426] but it had the desired effect: the U.S. Attorney's Office did not retry the case.[427]

Judges have some tools to combat prosecutorial leniency, though not as many. Judges can refuse to accept plea bargains or, where plea bargained sentences are nonbinding, subject defendants to higher sentences.[428] Philadelphia judges, for example, have already started pushing back on the new district attorney's leniency by rejecting pleas of juvenile offenders originally sentenced to life in prison.[429] Most states also require a judge's approval to dismiss a prosecution after a prosecutor decides to file charges.[430] And at the extreme outer perimeter of judicial power, where prosecutors refuse to charge defendants, judges in some jurisdictions can appoint special prosecutors to try the case—although this raises obvious separation of powers concerns.[431]

E. FEDERALISM

In criminal law, federalism is intertwined with overcriminalization.[432] Congress has expanded federal criminal law to cover traditional state

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[424] *Id.* at 262.

[425] *Id.* at 265–66.

[426] *Id.* at 269–70 (Sykes, J., dissenting).

[427] United States v. Abair, No. 3:12-CR-00076 (N.D. Ind. May 9, 2014) (dkt. 112) (dismissing indictment).

[428] Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 81 (2017) [hereinafter Brown, *Judicial Role*]; Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 66–67 (2015). For an example of a judge with a policy against plea bargaining, see United States v. Walker, 922 F.3d 239, 251 (4th Cir. 2019), *vacated on other grounds*.

[429] Samantha Melamed, *Philly Judges Block DA Krasner's Deals for Juvenile Lifers* PHILA. INQUIRER (Apr. 6, 2018), https://www.philly.com/philly/news/crime/krasner-juvenile-lifer-judge-rejecting-deals-20180406.html [https://perma.cc/KM77-MXYV].

[430] Misner, *supra* note 5, at 749.

[431] *See* Brown, *Judicial Role*, *supra* note 428, at 73–76; *see also,* Marlena Baldacci, Elliot C. McLaughlin, & Jen Goelz, *Judge Stands by Decision to Appoint Special Prosecutor in Jussie Smollett Case*, CNN (July 31, 2019, 2:37 PM), https://www.cnn.com/2019/07/31/us/jussie-smollett-judge-prosecutor-motions-denied/index.html [https://perma.cc/8PSQ-KRYU].

[432] *See, e.g.*, Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995) (describing the consequences of having substantive federal criminal law heavily duplicate state law).

crimes.[433] Today, defendants are subject to two nearly coextensive criminal law codes.[434] Federal prosecutors lack the resources to punish all state crime. So, U.S. Attorneys effectively set federal criminal law by selecting which offenses to prosecute.[435] And federal prosecutors can divert defendants into the federal system where they generally face harsher penalties.

Less appreciated, however, is that duplicative criminalization serves as a check against idiosyncratic prosecutorial preferences. Duplicative criminal codes check prosecutorial leniency. Take the case in Philadelphia, for example, where the Philadelphia District Attorney's office offered a three-to-ten-year plea deal for the armed robber who shot a store owner with an AK-47. In response, the U.S. Attorney indicted the defendant for Hobbs Act robbery and for using a firearm during a crime of violence.[436] That defendant now faces a mandatory minimum sentence of ten years.[437] Similarly, before the state trial court appointed a special prosecutor, a federal investigation was underway in Chicago after state prosecutors dropped charges against Jussie Smollett for allegedly faking a hate crime against himself.[438] In economic terms, the failure by one prosecutor to serve the market invites entry by other market participants.

Relatedly, duplicative criminalization checks the ability of prosecutors to show leniency that may accord with local democratic majorities.[439] During the 1960s, when southern officials would not indict for racially-motivated violence, the Department of Justice did, using federal civil rights charges.[440] The Boston Marathon bomber received a federal death sentence, even though Massachusetts abolished the death penalty in 1984 and has repeatedly voted

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[433] *Id.* at 1141–45.

[434] *Id.* at 1162 ("Many federal criminal statutes overlap with or merely duplicate state law prohibitions unrelated to any substantial federal interest.").

[435] *See supra* note 92.

[436] Julie Shaw, *Federal Prosecutors Charge AK-47 Shooter Who Got Plea Deal from DA Krasner's Office*, PHILA. INQUIRER (Feb. 28, 2019), https://www.inquirer.com/news/philadelphia-district-attorney-larry-krasner-us-attorney-william-mcswain-feds-charge-ak-gunman-20190228.html#:~:text=McSwain%20and%20Philadelphia%20District%20Attorney,considered%20a%20lenient%20plea%20deal [https://perma.cc/6NCD-UJKF].

[437] *Id.*; *see also* 18 U.S.C. § 924I(1)(A)(iii).

[438] Terry Shropshire, *Not So Fast: Jussie Smollett Still Under Investigation by the FBI, USPS*, ROLLING OUT (Mar. 27, 2019), https://rollingout.com/2019/03/27/not-so-fast-jussie-smollett-still-under-investigation-by-the-fbi-usps/ [https://perma.cc/TF49-9CUY].

[439] Here, I disagree with Brown, who treats criminal law as essentially a local democratic exercise. *See* Brown, *Democracy*, *supra* note 27, at 259.

[440] Michal R. Belknap, *The Vindication of Burke Marshall: The Southern Legal System and the Anti-Civil-Rights Violence of the 1960's*, 33 EMORY L.J. 93, 104–05 (1984).

against reinstating it.[441] And the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act permits federal prosecutions for hate crimes but only after the Attorney General certifies that a state prosecution would be ineffective to do justice.[442] Duplicative federal–state criminalization means that enforcement of criminal law is not solely "local representation applying local standards to the enforcement of essentially local laws."[443] And, to restate an earlier point, it is one reason why I take no firm position on whether the conventional law of crime is local or national; it is likely some of both.

Excessive harshness or leniency also can provoke state and local governments to engage in "uncooperative federalism."[444] Federal and state prosecutors are interdependent. State governments have far more police, investigators, and prosecutors than the federal government.[445] The federal government often uses these resources.[446] But states also depend on the federal government. The federal government has sophisticated investigative resources that are often unavailable to state or local officials, such as witness protection, forensic laboratories, and nationwide fingerprint analysis.[447] The federal government also controls law enforcement grants.[448] Prosecutors who defy norms can create tension in this necessary relationship. When the Trump

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[441] MASS. GEN. LAWS 265 § 2 (2020); An Act Relative to Juvenile Sentences for First Degree Murder, ch. 189, H.B. 4307, 2014. Legis. Serv. (Mass. 2014); Commonwealth v. Colon-Cruz, 562 N.E.2d 797 (Mass. 1990) (striking down death penalty statute); *Massachusetts Again Votes Overwhelmingly Against Reinstating Death Penalty*, DEATH PENALTY INFORMATION CENTER (Nov. 16, 2007), https://deathpenaltyinfo.org/node/2216 [https://perma.cc/22GN-Y6UQ] (tracking votes against reinstating the death penalty). *See generally* Brickey, *supra* note 432, at 1166–67 ("In enacting death penalty provisions for dozens of crimes, for example, Congress chose to override the decisions of fourteen states and the District of Columbia to ban capital punishment.") (footnotes omitted).

[442] 18 U.S.C. § 249(b)(1) (allowing certification when a state (1) lacks jurisdiction, (2) has requested a federal prosecution, or (3) has prosecuted the case but "the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence," and (4) when "a prosecution by the United States is in the public interest and necessary to secure substantial justice").

[443] JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 38 (1980).

[444] Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

[445] *Id.* at 1280 (noting that "there are roughly ten times as many state and local full-time police officers as federal officers"); Richman, *Changing Boundaries*, *supra* note 27, at 82 (noting the "[f]ederal enforcement bureaucracy is still quite small, at least when compared with State and local authorities").

[446] Bulman-Pozen & Gerken, *supra* note 444, at 1266–68.

[447] Richman, *Changing Boundaries*, *supra* note 27, at 95; Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 1009–10 & n.115 (1995).

[448] *See* Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 882–84 (2015).

Administration announced that it would take a harder line on immigration enforcement, many municipalities declared themselves "sanctuary cities" and refused to assist the federal government in detecting and detaining unlawful aliens.[449] The Trump Administration, in turn, threatened to cut off federal funds to those cities.[450] Ultimately, when breakdowns occur, both sides suffer.

Given cooperative federalism, duplicative federal crimes should not be written off as merely symbolic actions; they also provide concurrent investigative jurisdiction for federal law enforcement agencies. Congress evades constitutional limits on its Commerce Clause power[451] through minimal jurisdictional nexuses, such as a requirement that a gun cross state lines one time.[452] As a result, many contemporary federal crimes (e.g., involving child exploitation, carjacking, or domestic violence) essentially duplicate state crimes. Even if the federal government does not intend to enforce these overlapping federal crimes, those offenses provide federal law enforcement agencies with jurisdiction to investigate, which they may use to aid state prosecutors.[453] And more broadly, Congress's failure to criminalize an offense can leave federal investigative jurisdiction in doubt. For example, when President Kennedy was assassinated in 1963, murdering the president was not a federal offense. No doubt, the murder violated state law, and Lee Harvey Oswald would have been subject to the death penalty in Texas. The federal assassination statute, thus, was largely duplicative of state law.[454] But the Warren Commission nevertheless pushed for a federal murder statute

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[449] Martin Kaste, *Trump Threatens 'Sanctuary' Cities with Loss of Federal Funds*, NPR (Jan. 26, 2017, 11:06 PM), https://www.npr.org/sections/thetwo-way/2017/01/26/511899896/trumps-threatens-sanctuary-cities-with-loss-of-federal-funds [https://perma.cc/C5VH-KVWH].

[450] *Id.*; *see also* State v. Dep't of Just., 951 F.3d 84, 90 (2d Cir. 2020) (holding "the federal government may deny grants of money to State and local governments that would be eligible for such awards but for their refusal to comply with three immigration-related conditions imposed by the Attorney General of the United States").

[451] United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun Free School Zones Act as a police regulation with insufficient connection to interstate commerce); United States v. Morrison, 529 U.S. 598 (2000) (striking down part of the Violence Against Women Act on similar grounds).

[452] Alderman v. United States, 562 U.S. 1163, 1165–66 (2011) (Thomas, J., dissenting from denial of certiorari).

[453] *See, e.g.*, U.S. Dep't of Just., Just. Manual § 9-60.1010 (2020) (noting that federal law enforcement may provide assistance to state and local officials to investigate carjacking); Richman, *Federal Criminal Law*, *supra* note 28, at 783 (explaining that the threat of more severe federal penalties can aid in extracting pleas from those guilty of state crimes).

[454] But not perfectly coextensive with every individual state law: federal law authorizes the death penalty, which a minority of states have abolished.

because the FBI and the Secret Service did not have clearly established jurisdiction to investigate President Kennedy's murder.[455]

In theory, over-federalization can result in excessive harshness through duplicative federal–state prosecutions. In practice, this rarely happens. For decades, the Justice Department has maintained the "Petite Policy," which precludes federal prosecutors from bringing a second prosecution for criminal conduct previously prosecuted in state court, subject to narrow exceptions where the state prosecution failed to vindicate "a compelling federal interest."[456] The fact that the policy has existed so long through different administrations with a variety of criminal justice policies provides some evidence that it is not merely an instantiation of the Attorney General's private discretion. And a new Attorney General inclined to reverse the policy would face significant hurdles. Federal prosecutors lack the resources necessary to prosecute most state crimes.[457] Federal judges, upset with burgeoning dockets, could issue sentences concurrent with state judgments, making the subsequent prosecution pointless. And duplicative prosecutions would discourage defendants in state cases from pleading guilty, placing pressure on state criminal justice systems.[458]

Although federal prosecutors may have more discretion than their state counterparts, the scope of this discretion is often exaggerated. Much of a U.S. Attorney's docket is still consumed with cases for which there is heavy political pressure to bring charges, albeit of a different sort than a state prosecutor's mandatory docket.[459] The vast majority of federal prosecutions—about four in five—are for immigration violations, drug trafficking, illegal gun possession, and fraud.[460] About half of federal charges were brought under two federal laws for drug trafficking and illegal reentry.[461]

Given our federal structure, we should be wary of claims that nonenforcement by one government somehow dilutes the moral message of the criminal law. Stuntz worried that Congress reduced the expressive function of punishment by legislating crimes that the executive would not

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[455] Morris D. Forkosch, *Presidential Murder—The Constitutionality of a Statute Making It a Federal Crime*, 19 SW. L.J. 229, 229, 233–35 (1965).

[456] U.S. Dep't of Just., Just. Manual § 9-2.031 (2020); *see also* Petite v. United States, 361 U.S. 529, 530–31 (1960).

[457] Richman, *Federal Criminal Law*, *supra* note 28, at 765–66.

[458] *See* Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 VAND. L. REV. 1181, 1198 (1996).

[459] Klein & Grobey, *supra* note 236, at 7.

[460] *Id.* at 6.

[461] *Id.* at 20.

enforce.[462] But nonenforcement by one level of government does not confer the same societal approval of actions that nonenforcement by all levels of government would have. Take Stuntz's example of the Violence Against Women Act,[463] which was part of the 1994 Crime Bill.[464] Congress not only added a federal domestic violence crime, but also authorized other forms of federal assistance to protect against domestic violence. Congress allocated $1.6 billion in funds, provided for interstate recognition of protection orders, and, in another section of the 1994 Crime Bill, prohibited the possession of firearms by those subject to domestic violence restraining orders.[465] These actions hardly correspond with a failure to take domestic violence seriously. Serious enforcement by one level of government is sufficient to send a moral message that society condemns an action.

Despite vast statutory overcriminalization, various checks and balances control the criminal law through both formal and informal means. These controls, in turn, generate norms that prosecutors follow. Conventional norms narrow the reach of statutes, force other statutes to become desuetudinal, and divide the scope of federal and state criminal law. These norms check prosecutorial power when the majority tries to enact law over a passionate minority or when local majorities try to substantially alter criminal law norms widely held outside that community. Thus, viewing our substantive criminal law as primarily statutory ignores the complicated ways in which checks and balances mediate the substantive law around custom and tradition. Our substantive criminal law is neither primarily statutory nor delegated to prosecutors. In the next Part, I examine how our formal legal doctrine should accommodate a primarily conventional criminal law system.

IV. DOCTRINAL IMPLICATIONS OF A DE FACTO CONVENTIONAL CRIMINAL SYSTEM

That our modern criminal law is primarily a system of unwritten and informal conventions poses significant doctrinal challenges. In a conventional system, obligatory customs are not judicially enforceable. The enforcement of conventions, instead, relies on indirect means, such as political pressure. Yet, prosecutions take place in courts, so when prosecutors undertake actions that do not accord with community values, defendants

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462 Stuntz, *Pathological Politics*, *supra* note 7, at 520–23.

463 *Id.*

464 An Act to Control and Prevent Crime, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796 (1994).

465 *Id.*

naturally seek judicial relief.[466] The result is a formal legal doctrine detached from real-world criminal law practice, and it raises the question whether and how legal doctrine should bridge the gap.

A. PROBLEMS CREATED BY THE GAP BETWEEN DOCTRINAL AND DE FACTO CRIMINAL LAW

The existence of a gap between statutory criminal law and the de facto law is not, by itself, serious cause for concern. An unwritten common law system can still respect traditional rule of law values of notice, clarity, and prospectivity by tracking widely understood societal norms and customs. Similarly, the existence of a de facto common law does not threaten rule-of-law values if law enforcers respect criminal law conventions in their decisions to enforce or not enforce statutory criminal law. In British constitutional law, for example, respect for convention prevents the formal requirement of royal assent for legislation from imperiling democratic norms.

Our system of criminal law conventions, however, falls short of this ideal for at least three reasons. First, prosecutors actually defect from legal conventions in some criminal cases. This makes criminal law conventions significantly different from those in British constitutional law, in which a defection would be highly visible and would trigger a constitutional crisis. Second, in some areas of criminal law—particularly in sentencing—norms have developed that are not public and not subject to the democratic checks that ensure their evenhanded application across defendants. These norms fall short of true legal conventions. Third, because formal law and conventions diverge, prosecutors can leverage broader statutory criminal law to circumvent traditional criminal procedure rights.

1. Substantive Criminal Law

The mismatch between formal legal rules and de facto conventional law creates the potential for arbitrary and excessive criminal liability. In a conventional criminal law system, no formal legal doctrine *requires* a prosecutor to abide by the commonly understood conventions. And sometimes prosecutors defect.

For example, Rudy Giuliani instituted "federal day" for drug crimes when he was U.S. Attorney for the Southern District of New York.[467] Ordinarily, conventional rules determine which crimes are prosecuted in state

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[466] *See* Myers, *supra* note 9, at 1349 ("A significant disconnect between the law and current values leads to pressure on the system that seeks relief in the judiciary.").

[467] Brickey, *supra* note 432, at 1174 n.138.

court and which are handled in federal court.[468] But on federal day, federal prosecutors diverted all local drug cases to federal court, which imposes harsher penalties for drug crimes.[469] To maximize deterrence, the U.S. Attorney's office kept secret which day was federal day.[470]

Defections from commonly understood norms create serious rule-of-law problems. Some are obvious, such as the distributive justice principle that like cases should be treated alike. Giving a drug defendant a harsher sentence because he was caught on Monday rather than Tuesday is the apex of arbitrariness.

But the rule-of-law problems with prosecutorial defections run deeper than just a failure of distributive justice. Defections can call into question the public's shared understanding about what the law really is. People base their understandings of the legal system from their beliefs about shared practice, not from the words in a statute book.[471] Unusual prosecutions unsettle the community's shared understanding of the law, and, correlatively, they interfere with the basic requirements of clarity and prospectivity that underlie the rule of law.[472]

Overbroad criminal laws also allow prosecutors to target individuals selectively. Virtually everyone commits a technical violation of some law.[473] The checks described in Part III mitigate much of that overcriminalization. But checks that work well in the aggregate do not necessarily work well in every individual case. So-called "contempt of cop" cases are one example. When police and prosecutors take offense, they often respond in disproportionate ways.[474] Another example may be the trend among some federal prosecutors to find high-publicity cases to prosecute, which prosecutors may leverage for their future careers.[475] A third example was the independent counsel statute, which incentivized the targeting of high-level

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[468] *See supra* note 238 and accompanying text.

[469] Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1334 n.103 (1997).

[470] *Id.*

[471] *See* John M. Darley, Kevin M. Carlsmith, & Paul H. Robinson, *The Ex Ante Function of the Criminal Law*, 35 L. & SOC'Y. REV. 165, 181 (2001).

[472] On the basic requirements of the rule of law, see LON FULLER, THE MORALITY OF LAW (Yale Univ. Press rev. ed. 1969).

[473] SILVERGLATE, *supra* note 10; *see, e.g.*, Paul Craig Roberts, *How the Law Was Lost*, 20 CARDOZO L. REV. 853, 857 (1999).

[474] *See, e.g.*, Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 179–85 (2017).

[475] Richman, *Federal Criminal Law*, *supra* note 28, at 784.

political officials.[476] Criminal law conventions do not protect against isolated cases of selective targeting. And that is especially true for individuals who may be unsympathetic defendants or who are members of marginalized populations for whom political recourse may not be a viable option to check executive excess.

2. Plea Bargaining and Sentencing

Much of the worst overcriminalization problems involve excessive harshness against guilty defendants.[477] A defendant's sentence heavily depends on the charges selected by the prosecution and on the process of plea bargaining.[478] This introduces a lot of arbitrariness into the process. For example, some jurisdictions may routinely prosecute three-strikes statutes, while others do not.[479] Different jurisdictions—or even different prosecutors within a jurisdiction—can seek widely divergent sentences for the same criminal conduct.[480] And state and federal prosecutors may jointly use the threat of severe (and redundant) federal penalties to compel guilty pleas.[481]

A significant subset of these problems concerns sentences for plea-bargained convictions. Although vast statutory sentencing ranges may leave questionable the precise sanction a defendant will face for violating a law, that uncertainty is reduced by the tendency of prosecutors and judges to have "going rates" for plea bargains within a jurisdiction.[482] But the existence of "going rates" can have significant legitimacy problems. These rates are often not public, which means that lawyers who are repeat players have a significant information advantage.[483] They also lack any real claim to

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[476] Helen Dewar, *Independent Counsel Law Is Set to Lapse*, WASH. POST, June 5, 1999, at A2.

[477] Brown, *Prosecutors and Overcriminalization*, *supra* note 30, at 462–63.

[478] *Id.* at 463–64.

[479] Peter W. Greenwood, Susan S. Everingham, Elsa Chen, Allan F. Abrahamse, Nancy Merritt & James Chiesa, *Three Strikes Revisited: An Early Assessment of Implementation and Effects*, RAND (Aug. 1998), https://www.ncjrs.gov/pdffiles1/nij/grants/194106.pdf [https://perma.cc/BNW5-LWDQ].

[480] Hessick, *Vagueness*, *supra* note 78, at 1148–50.

[481] *See, e.g.*, Kevin A. McDonald, *Felon in Possession Sentencing Under the Federal Guidelines, Considering State Sentences*, 36 SETON HALL LEGIS. J. 106, 124 (2011) ("This threat of federal prosecution allows the U.S. Attorney's Office to secure harsher plea bargains at the state level . . . .").

[482] Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1141 (2011) [hereinafter Bibas, *Regulating the Plea-Bargaining Market*]; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2528, 2533 & n.310 (2004) [hereinafter Bibas, *Outside the Shadow of Trial*].

[483] Bibas, *Outside the Shadow of Trial*, *supra* note 482, at 2539.

legitimacy. As a regular course of practice, these going rates may be "conventions" in the broadest sense of that term. But going rates are not true legal conventions, insofar as they are not generally accepted as binding on legal actors, nor are they enforceable through nonlegal sanctions. Thus, going rates lack political legitimacy insofar as the public is unaware of them and has not acquiesced. And the inability to have binding conventions creates distributive justice problems because, without significant means to enforce the going rates, defendants' sentences vary arbitrarily.

3. Criminal Procedure

The most serious harms of the gap between de facto and doctrinal law occur not in substantive criminal law, but in criminal procedure. As Stuntz observed, the Supreme Court's enthusiasm in policing criminal procedure has had the perverse effect of causing legislatures to water down substantive criminal law requirements.[484] Traffic offenses are a paradigmatic example. Although the Supreme Court has held that police need some justification to detain a driver,[485] the Court has held that police may satisfy that burden if they have probable cause to believe that the driver has committed any traffic offense.[486] This gives police significant discretion to detain drivers for conduct that is customarily tolerated (and for which the police probably will not issue a violation anyway)—authority that police use to fish for more serious wrongdoing.[487] In one case, for example, police pre-planned to detain a suspected drug dealer once he exceeded the speed limit by a single mile per hour.[488]

Overbroad criminal law has two effects on criminal procedure and one effect on civil redress. First, it narrows the effective scope of the exclusionary rule. Police may justify detentions, and even arrests, by showing objective probable cause that the defendant fits within some offense, however broadly defined or however minor.[489] "Subjective intentions," the Court held, "play no role in ordinary, probable-cause Fourth Amendment analysis."[490] Second, broader statutes reduce the prosecution's burden of proof if a case goes to trial. To borrow Richman and Stuntz's example, it is easier to show that Al

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[484] *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7, 58–59 (1997).

[485] Delaware v. Prouse, 440 U.S. 648, 663 (1979).

[486] Whren v. United States, 517 U.S. 806, 809–11 (1996).

[487] *See* Hessick, *Vagueness*, *supra* note 78, at 1157.

[488] United States v. Fuerher, No. 15–CR–1016–LRR, 2015 WL 5316970, at *2 (N.D. Iowa Sept. 10, 2015) (order denying motion to suppress).

[489] Atwater v. City of Lago Vista, 532 U.S. 318, 353–54 (2001).

[490] *Whren*, 517 U.S. at 813.

Capone did not pay his taxes than it is to prove his involvement in organized criminal activity.[491] Third, with respect to civil law, overbroad criminal laws disable civil remedies for police misconduct. If an officer has probable cause that a person has committed an offense, he will have a defense to a tort action arising either under state law for false imprisonment or malicious prosecution, or under 42 U.S.C. § 1983 for a violation of the Fourth Amendment. And in § 1983 actions, courts look again to "objective good faith," not to the officer's subjective motivations.[492]

Overbroad criminal law—especially as it relates to traffic offenses—heavily drives racially-disparate policing. The Bureau of Justice Statistics has reported that "[b]eing a driver in a traffic stop [is] the most common form of police-initiated contact."[493] African-American drivers are more likely to be stopped by police than other racial groups.[494] Even outside of vehicles, police stop African Americans at higher rates.[495] And these stops are significant because they allow police to fish for more serious wrongdoing—indeed, the stops themselves may be just a pretext to fish.[496] Prosecutors exercise significant discretion at the investigative stage, when police choose whom to investigate and how.[497] Prosecutors, however, cannot prosecute offenses that they do not know about.[498] Broad statutes, thus, increase exposure to the criminal justice system, even when police and prosecutors do not intend to enforce them standing alone.

More broadly, there are serious procedural problems with how we handle misdemeanor and petty-offense prosecutions. Our misdemeanor system is (to borrow Brown's phrase) "different and worse"[499] from how we handle serious offenses. Defendants often lack the right to counsel and the

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[491] Richman & Stuntz, *supra* note 118, at 583–84.

[492] *See, e.g.*, Graham v. Connor, 490 U.S. 386, 397 (1989).

[493] ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 251145, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015 at 4 (Oct. 2018), https://www.bjs.gov/content/pub/pdf/cpp15.pdf [https://perma.cc/3BQ8-26ZB].

[494] *Id.*

[495] *Id.*

[496] Whren v. United States, 517 U.S. 806, 809–11 (1996).

[497] *See* Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 729–30 (1999).

[498] *See* Paul Butler, *Starr Is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705, 709 (1999) ("There is an important correlation between looking for things and finding them.").

[499] Brown, *Democracy*, *supra* note 27, at 259.

right to trial by jury.[500] Although defendants have these rights for serious misdemeanors,[501] they may be ineffective. Many defendants cannot afford bail, and for them, pleading guilty may be their only means to escape long pretrial detention.[502] And prosecutors often lobby legislatures against adequately funding public defenders.[503] Without the pressures created by a system of checks, prosecutors often screen charges cursorily, if at all.[504] In jurisdictions that keep track of prosecution decisions, it appears that prosecutors decline felony cases at substantially higher rates than misdemeanor cases.[505]

This leads to problematic results. Although misdemeanor convictions may lack the collateral consequences of felony convictions, they can still have long-lasting effects. Defendants face subsequent burdens caused by paying off fines, violating probation, and having suspended driver's licenses.[506] And more misdemeanor arrests also lead to more felony arrests. As with traffic offenses, police use misdemeanor arrests as a pretext to search for more serious wrongdoing.[507] So, uneven enforcement of misdemeanor crimes facilitates uneven enforcement of felonies.

B. CLOSING THESE GAPS

How can criminal law address the problems identified in the previous Section? In this Section, I argue that criminal law reform efforts should look toward conventional law and provide ways to indirectly enforce community norms. This Section has two subsections.

Subsection One will look theoretically at different approaches that courts can take with respect to incorporating legal conventions. These approaches are to ignore the conventions entirely, to incorporate them as binding law, or to incorporate them indirectly. I argue that courts should adopt the third approach.

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[500] Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that counsel is required only if the sentence imposed is one of imprisonment); Alabama v. Shelton, 535 U.S. 654 (2002) (extending *Argersinger* to suspended sentences); *see also* Duncan v. Louisiana, 391 U.S. 145, 159 (1968) (recognizing an exception to trial by jury in petty offense cases).

[501] *See* DAVIS, WHYDE & LANGTON, *supra* note 493.

[502] Samuel R. Gross, *Errors in Misdemeanor Adjudication*, 98 B.U. L. REV. 999, 1004 (2018).

[503] Richman, *Accounting for Prosecutors*, *supra* note 364, at 58.

[504] Bowers, *Equitable Decision*, *supra* note 174, at 1660–61, 1702; Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1337–40 (2012).

[505] For declination statistics, see Bowers, *Equitable Decision*, *supra* note 174, at 1716–21; Mayson & Stevenson, *supra* note 132, at 984.

[506] Stevenson & Mayson, *supra* note 131, at 735.

[507] Bowers, *Equitable Decision*, *supra* note 174, at 1694.

Subsection Two then applies that approach to several of the remaining problems identified in Section A. Instead of statutory reform, the imposition of democratically-accountable checks on criminal justice actors may ameliorate many of these deficiencies in criminal law. Most of the individual policy proposals are not novel. My hope, instead, is to give them a coherent theoretical grounding and to reframe their justification. These proposals promote criminal law conventions through the creation and indirect enforcement of criminal law norms. Viewed in this way, these proposals—especially reinvigorating the power of juries—should not be viewed as inviting lawless equitable exceptions to criminal law; to the contrary, they promote the rule of law by tailoring broad statutes to the community's shared, present understanding of proper criminalization and punishment.

1. Formal Legal Rules and Conventional Criminal Law

In *Conventions in Court*, Vermeule explains three approaches that courts can take vis-à-vis legal conventions. First, courts can ignore the existence of conventions. Second, they can directly enforce them by treating them as an explicit part of the law. Third, they can recognize the existence of the conventions but enforce them indirectly.[508] Here, I will argue for a version of Vermeule's third option: legal actors—not just courts—should facilitate the indirect enforcement of criminal law conventions. Some separation between de facto and statutory criminal law is inherent in our system because legislatures must draft and amend statutes under nonideal conditions, including limited legislative time, counter-majoritarian vetogates in the legislative process, and lack of political consensus among those responsible for drafting the criminal law. Courts and legislatures should embrace criminal law conventions as a way to provide legitimacy and democratic responsiveness to criminal law under these nonideal conditions.

a. The Classical Approach

The first possibility that Vermeule identifies is what he labels "the classical approach" or "[t]he classical Diceyan view." Under that view, courts enforce only formal sources of law, such as statutes and common law. Conventions are not "law," which means that remedies for the violations of conventions belong solely to the political process.[509]

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[508] For reasons explained below, I will treat indirect enforcement in the third category.

[509] Vermeule, *Conventions in Court*, *supra* note 144, at 288–89; DICEY, *supra* note 144, at cxli.

In criminal law, the Diceyan approach may be best represented by Justice Kagan's dissent in *Yates v. United States*.[510] *Yates* involved a fisherman caught with undersized grouper in federal waters.[511] At that time, federal law required groupers to be more than twenty inches long, but Yates was caught with seventy-two fish between 18.75- and 20-inches long. The officer issued a citation for the fish, placed the undersized fish in separate crates, and ordered Yates to transport them back to shore.[512] By the time Yates returned to shore, he had dumped the undersized fish back into the ocean.[513] The Government charged Yates with violating the Sarbanes-Oxley Act of 2002 by destroying a "tangible object" that impeded a government investigation.[514]

The Government's prosecution under Sarbanes-Oxley was excessive. The fishing violation was a noncriminal violation; Yates faced either a civil fine or an administrative suspension of his fishing license.[515] But Yates faced up to twenty years in prison for the Sarbanes-Oxley charge, an offense created after the Enron scandal to combat those covering up accounting fraud.[516]

Justice Kagan's dissent recognized the real issues in the case: "overcriminalization and excessive punishment in the U.S. Code."[517] This Sarbanes-Oxley provision was "a bad law—too broad and undifferentiated, with too-high maximum penalties, which gives prosecutors too much leverage and sentencers too much discretion." She also recognized that this statute was "not an outlier, but an emblem of a deeper pathology in the federal criminal code."[518]

But for Justice Kagan, none of this context had any legal significance. For her, the fish was a tangible object, so Yates's offense fell within the plain text of the statute.[519] As a judge, that was all she was authorized to decide.[520] Congress, not judges, bore sole responsibility for fixing overcriminalization.[521] Justice Kagan's opinion was a dissent, of course. But

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[510] 574 U.S. 528 (2015).
[511] *Id.* at 533 (plurality opinion).
[512] *Id.*
[513] *Id.* at 533–34.
[514] *Id.*
[515] *Id.* at 532.
[516] *Id.* at 529–31 (citing 18 U.S.C. § 1519).
[517] *Id.* at 569 (Kagan, J., dissenting).
[518] *Id.* at 570.
[519] *Id.* at 553–54.
[520] *Id.* at 570.
[521] *Id.*

there are plenty of majority opinions in which courts have thrown up their hands in the face of overcriminalization, declaring it to be a legislative problem.[522] That the Sarbanes-Oxley provision was overbroad was a political problem, which the judiciary was not competent to resolve as an interpreter of law.

In the realm of criminal law, the Diceyan approach has little to commend. Presumably, its chief benefit is that it promotes democratic legitimacy of criminal law by vesting the power to shape criminal law in a legislature accountable to the voters. But that is not, of course, the reality. As Stuntz recognized, legislatures pass broad and vague criminal laws, which can shift the de facto criminal lawmaking to prosecutors.[523] Preventing criminal law from becoming the law of prosecutors requires adequate checks on prosecutorial power. A court's failure to facilitate checks and balances is itself an important structural decision to facilitate executive primacy.

b. Direct Enforcement

The second approach, direct incorporation, brings conventions within the formal legal system. Under this approach, conventions are "straightforwardly judicially enforceable in whatever ways, and to the extent that, other sources of law are judicially enforceable."[524] Judicial enforcement may occur in two ways. Judges may enforce conventions directly by holding that the conventions "generat[e] a legal obligation without the presence of a separate legal rule which is being interpreted or applied."[525] Or judges may indirectly enforce conventions by using them to construe statutes and other formal sources of law when those formal sources are indeterminate.[526] My argument here will focus on the direct enforcement approach.

As explained above, a few American jurisdictions include some legal conventions as part of their formal criminal law. Four states allow judges to dismiss de minimis offenses when, for example, a person's conduct did not create the harm sought to be prevented by the statute.[527] Ordinarily, this would be solely an exercise of prosecutorial discretion. West Virginia courts also may declare certain statutory crimes desuetudinal.

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[522] *See, e.g.*, United States v. Rodgers, 466 U.S. 475, 484 (1984) ("Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress.").

[523] Stuntz, *Pathological Politics*, *supra* note 7, at 519.

[524] Vermeule, *Conventions in Court*, *supra* note 144, at 291.

[525] BARBER, *supra* note 147, at 93; *see also* Vermeule, *Conventions in Court*, *supra* note 144, at 296.

[526] BARBER, *supra* note 147, at 92; *see also* Vermeule, *Conventions in Court*, *supra* note 144, at 296.

[527] *See supra* note 416.

In *Committee on Legal Ethics of the West Virginia State Bar v. Printz*, the West Virginia Supreme Court of Appeals recognized a desuetude defense to criminal violations.[528] The case involved a noncriminal disciplinary proceeding against an attorney alleging that the attorney unethically demanded that his client's alleged victim return nearly $400,000 in embezzled funds; in exchange, the attorney promised that his client would not file embezzlement charges with police.[529] A predicate issue was whether the attorney had violated an archaic West Virginia statute that prohibited compounding crimes.[530] The statute contained no defense for victims who sought only restitution under a claim of right.[531]

The court held that West Virginia's statute was unconstitutional "to the extent that it prohibits a victim or his agent from seeking restitution in lieu of a criminal prosecution" because the offense was desuetudinal in those circumstances.[532] Analogizing to void for vagueness doctrine, the court explained that "a law prohibiting some act that has not given rise to a real prosecution in 20 years is unfair to the one person selectively prosecuted under it."[533] Although ultimately grounding its holding in constitutional due process, the court's analytical framework for desuetude was based on Roman customary law.[534] The court said that a malum prohibitum crime may become desuetudinal where there are "open, notorious, and pervasive violation[s] of the statute for a long period" and a "conspicuous policy of nonenforcement"[535]—which the court believed had happened to the crime of compounding, at least where the victim seeks only restitution. Thus, unlike the classical approach, the direct incorporation approach makes customs a binding part of the legal system.

The argument for direct enforcement of legal conventions is stronger in criminal law than it is in constitutional law. In the constitutional realm, Vermeule objected that conventions could produce undemocratic and normatively bad equilibria, which democratic majorities would be powerless to overturn.[536] Criminal law conventions arguably avoid these pitfalls. Many of the institutions that drive criminal law conventions—legislative oversight of executive enforcement, electoral accountability of prosecutors, and the

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528 416 S.E.2d 720, 726–27 (W. Va. 1992).
529 *Id.* at 721–22.
530 *See* W. VA. CODE ANN. § 61-5-19 (West 2020).
531 *Printz*, 416 S.E.2d at 724.
532 *Id.* at 726–27.
533 *Id.* at 724.
534 *Id.* at 726.
535 *Id.*
536 Vermeule, *Conventions in Court*, *supra* note 144, at 304–05.

threat of jury trials, among others—provide democratic accountability. So, criminal law norms may be less "democratically suspect" than their constitutional counterparts.[537] And if bad conventions result, citizens can overturn them through ordinary statutory means.[538] For example, if a local district attorney unreasonably refuses to prosecute a certain class of offenses, the state can vest the power in other prosecutors[539] or Congress can intervene.[540] Overturning constitutional conventions, in contrast, may require a constitutional amendment.

Despite these advantages, there are still good reasons for courts to avoid direct enforcement of conventions. First, courts may legitimately worry that direct enforcement threatens separation of powers.[541] Epps argues that formal separation of powers is unnecessary and insufficient to protect individual liberty in the face of the criminal justice system.[542] I agree. But the formal separation of powers is still part of *our* constitutional system. A judiciary that arrogates for itself the power to override criminal law would be acting as a super-legislature, thereby undermining the coherence of our system. The rule of law requires that judges respect a particular legal system's internal legal rules.

Direct enforcement may also create instrumental problems by inhibiting the evolution of criminal law. Conventions often change when someone violates them and that violation gains acceptance.[543] Breaches of convention may be normatively important to fix bad conventions. For example, it may have been the custom to ignore domestic violence as a "family issue."[544] If courts had directly incorporated the convention, that custom would have been a legally recognized exception, thereby requiring the legislature to pass a new statute to punish domestic violence. The same goes for white violence against African Americans in the South. No matter how much a society informally

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[537] *Id.* at 306.

[538] *Cf.* Vermeule, *Conventions in Court*, *supra* note 144, at 305–06 (discussing overriding ordinary common law).

[539] *See* Act No. 58, H.B. 1614, 2019 Gen. Assemb. (Pa. 2019).

[540] *See* Belknap, *supra* note 440.

[541] *See* Myers, *supra* note 9, at 1348 ("Desuetude also raises significant separation of powers issues because the executive, through non-enforcement, and the judiciary, through a due-process-based refusal to enforce desuetudinal statutes, are permitted to override the legislature.").

[542] Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 40 (2021).

[543] Vermeule, *Conventions in Court*, supra note 144, at 18–19; Sachs, *supra* note 195, at 545–47.

[544] Peter Welte, *Domestic Violence: The Evolution from a Family Problem to Legal Discipline*, 88 N.D. L. REV. 863, 864 (2012).

tolerated it at one time, we would not have wanted such conventions to ossify into formal law, changeable only through legislation. In the case of racial violence, duplicative federal criminalization permitted the federal government to destroy pernicious local conventions.[545] Once destroyed, local jurisdictions then had the power, without further legislation, to apply the laws against violence evenly.

Allowing conventional change also encourages criminal law conventions to adapt to changing times. Take draft registration. A military draft appears to be a remote possibility, and there has been little support to see U.S. Attorneys prosecute hundreds of thousands of young men who do not register.[546] But if there were a largescale armed conflict necessitating the draft, we may want prosecutors to be able to enforce the draft registration laws.[547] Judicial enforcement of contemporary conventions risks ossifying conventions in suboptimal ways.[548]

c. Judicial Recognition and Indirect Enforcement

The third option is that the judiciary may recognize conventions, even while they do not directly enforce them.[549] The lack of direct enforcement means that "conventions are not to be enforced by courts as *freestanding* obligations."[550] But courts may nevertheless recognize and consider criminal law conventions in their decisions in two ways.

First, judges may indirectly enforce specific conventions. In indirect enforcement, judges enforce a convention "because of its connection with a distinct legal right."[551] Conventions may provide necessary background and context "to clarify the meaning of statutes."[552] Or, outside of statutory

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[545] *See* Belknap, *supra* note 440, at 110–12.

[546] Despite thousands of men failing to register each year, the Department of Justice has not prosecuted anyone for failing to register for the Selective Service System since 1986. Gregory Korte, *For a Million U.S. Men, Failing to Register for the Draft Has Serious, Long-term Consequences*, USA Today (Apr. 3, 2019 11:07 AM), https://www.usatoday.com/story/news/nation/2019/04/02/failing-register-draft-women-court-consequences-men/3205425002/ [https://perma.cc/NT2D-DU3Q].

[547] *Cf.* Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1041 (2008) ("[E]xternal forces push and pull the laws in new directions, reflecting societal debates about whether the alleged social harm is really a problem that the criminal justice system must solve.").

[548] Vermeule, *Conventions in Court*, *supra* note 144, at 27.

[549] *Id.* at 14.

[550] *Id.*

[551] BARBER, *supra* note 147, at 90; *see also* Vermeule, *Conventions in Court*, supra note 144, at 15.

[552] BARBER, *supra* note 147, at 90.

interpretation, judges may enforce criminal law conventions by using procedural rules to deter prosecutions outside of commonly accepted limits.[553]

Second, judges may account for criminal law conventions by treating the system itself as conventional. At this macro level, judges do not enforce conventions related to particular crimes. But they do strive to maintain the conventional system. Judges do this by facilitating checks and balances[554] and, more specifically, the kinds of checks that encourage the criminal law to adapt to democratic preferences.

Take Justice Scalia's dissent in *Morrison v. Olson*, which upheld the independent counsel statute.[555] The first four parts of Justice Scalia's dissent concerned separation of powers. He argued that Congress may not shield independent counsel against Presidential removal because the Constitution vests purely executive power in the President alone.[556] But Part V of the opinion switched from a discussion of separation of powers to one concerning checks on prosecutorial abuse. Quoting Justice Jackson, Justice Scalia explained that "[w]ith the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, . . . it is a question of picking the man and then searching the law books . . . ."[557] Because prosecutors have enormous formal legal power, Justice Scalia continued, "the primary check against prosecutorial abuse is a political one," and thus it is necessary to have prosecutors who can be removed by an elected official accountable to the people.[558]

At the macro level, this is the quintessential way in which judges take account of the conventional nature of criminal law. Unlike the dissent in *Yates* (which Justice Scalia ironically joined), Justice Scalia's answer in *Morrison* was not for the executive branch to seek legislative reform cabining the number of substantive crimes. That was water under the bridge. Instead, Justice Scalia recognized the need for nonlegal checks against prosecutors to cabin the de facto scope of substantive criminal law.[559] And one way in which the judiciary could facilitate nonlegal checks is by prohibiting Congress from

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[553] *See, e.g.*, United States v. Abair, 746 F.3d 260 (7th Cir. 2014).

[554] *See* Epps, *supra* note 542 (giving a theoretical account of checks and balances in criminal law and providing doctrinal implications).

[555] 487 U.S. 654, 697–734 (1988).

[556] *Id.* at 699–727 (Scalia, J., dissenting).

[557] *Id.* at 728 (quoting Robert Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of the United States Attorneys, Apr. 1, 1940).

[558] *Id.*

[559] *See id.* at 727–32.

shielding individual prosecutors from removal by politically accountable officers.

The political accountability of prosecutors is just one example.[560] I will offer some other examples in the next subsection, especially as they relate to trial by jury. Both electoral accountability and trial by jury are important not just because they provide checks in the abstract, but because they provide *democratic* checks on substantive criminal law. The examples in the following subsection also recognize that criminal law conventions are not directly analogous to their constitutional law counterparts. Violations of constitutional conventions are high-information events. People will notice when an elector is faithless or, in Britain, if the Queen vetoes a bill. Criminal law conventions are different. Most people will not notice if police ticket a random person for going one mile per hour above the speed limit, if police arrest someone for a hypertechnical criminal violation, or if a prosecutor significantly overcharges a person for a minor violation. Structurally, we need checks that deter low-information deviations and encourage prosecutors to shape their charging decisions around societal norms.

2. Harnessing Conventions to Correct for Overcriminalization's Problems

In this section, I will offer some policy proposals to correct contemporary overcriminalization problems. These include, among others, to give the jury more power over sentencing defendants, to reinvigorate the executive clemency process, to provide more transparency in criminal law enforcement, and to have courts consider an officer's subjective good faith when making detentions and arrests for offenses that are not customarily enforced. The basic theme of these proposals is that legal actors should seek to develop and preserve unwritten conventions as a necessary supplement to statutory criminal law.

a. Prosecutorial Discretion over Guilty Defendants

Outside of overcriminalization's effect on criminal procedure (discussed below), perhaps the most serious overcriminalization problem is that prosecutors have enormous power over those who are guilty of breaching societal norms.[561] Comparatively few criminal cases today go to trial.

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[560] It is unclear whether Justice Scalia thought the political accountability of prosecutors was sufficient for checking expansive criminal law. Justice Scalia also joined Justice Kagan's dissent in *Yates*, which suggested that overcriminalization was a problem for Congress, not the courts. Or perhaps Justice Scalia saw the conventional nature of criminal law more acutely when prosecutors went after executive branch officials than he did when prosecutors charged private defendants.

[561] Brown, *Prosecutors and Overcriminalization*, *supra* note 30, at 463.

Prosecutors and defendants resolve the overwhelming majority through plea bargains.[562] And when a defendant has committed a blameworthy act (not just a technical statutory violation), redundant and overlapping criminal provisions give prosecutors leverage.[563] Prosecutors can dictate sentencing outcomes by deciding what crimes are charged and which facts go into the plea—for example, whether the drugs were of a certain weight, a firearm was carried, or a recidivist statute applies. Out of respect for separation of powers, courts have refused to review prosecutorial charging decisions, absent the most flagrant forms of abuse.[564] And individual sentencing recommendations tend to be low-information events in which political pressure will not cabin prosecutorial abuse.[565]

One method to combat unreasonable charging decisions by prosecutors would be to further empower juries. Judges, first, can inform jurors about a defendant's possible sentence exposure, including the maximum possible sentence and any mandatory minimums. In *Yates*, for example, the judge could have informed the jury that the defendant faced up to twenty years in prison for throwing the fish overboard.[566] Appellate courts have routinely held that district courts are not *obligated* to inform juries about the relative sentencing ranges.[567] But, except for a recent Second Circuit decision,[568] they have not held that courts inherently abuse their discretion by providing jurors with this information.[569]

Providing the jury with sentencing information is not inherently tantamount to endorsing nullification. At trial, defendants may offer defenses that are implausible but not frivolous. A jury that knows the full consequences of its decision may have different perceptions about what constitutes reasonable doubt or how to apply a vague element of the offense.[570] Jurors would probably insist on more certainty before putting someone to death than they would if the offense were as serious as a traffic

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[562] *See supra* note 14.

[563] Stuntz, *Plea Bargaining*, *supra* note 118, at 2549; Myers, *supra* note 9, at 1344.

[564] Misner, *supra* note 5, at 736–37, 748 (1996).

[565] *See, e.g.*, Brown, *Prosecutors and Overcriminalization*, *supra* note 30, at 463 ("Redundant and overlapping criminalization poses a considerable risk for prosecutorial misuse in a relatively low-visibility manner that is hard to monitor.").

[566] 18 U.S.C. § 1519; Yates v. United States, 135 S. Ct. 1074, 1078–79 (2015) (plurality opinion).

[567] *See, e.g.*, United States v. Polouizzi, 564 F.3d 142, 161–63 (2d Cir. 2009); United States v. Thomas, 895 F.2d 1198, 1200–01 (8th Cir. 1990).

[568] *See* United States v. Manzano, 945 F.3d 616 (2d Cir. 2019).

[569] *See* Brief for Cato Institute et al. as Amici Curiae Supporting Respondents at 9–14, United States v. Manzano, 945 F.3d 616 (2d Cir. 2019) (No. 18-3430).

[570] *See* Levett, Danielsen, Kovera & Cutler, *supra* note 389, at 389.

violation.[571] Because the harshness of the sentence may influence how juries perceives reasonable doubt, prosecutors may be more likely to drop harsh mandatory minimums in cases where they may not be appropriate by either charging a less-serious crime with a correspondingly less-serious sentence or by not bringing charges at all.

Although giving the jury sentencing information is not inherently a license to nullify, a little jury nullification may not be a bad thing. Jurors have traditionally played this role, most famously when undervaluing stolen goods to prevent thieves from receiving the death penalty.[572] Judges can facilitate a similar kind of "pious perjury"[573] with harsh recidivist provisions. Recidivist statutes amplify punishments, often by many multiples for drug and gun offenders.[574] Yet, despite *Apprendi*, which expanded the Sixth Amendment jury trial right to most sentencing enhancements, defendants charged under recidivist statutes have no right to trial by jury on whether they were previously convicted.[575] Just like eighteenth-century jurors would undervalue property, juries might be unwilling to convict under recidivist statutes if they are told they must find that a person was previously convicted. Indeed, it appears that under the formerly-binding Sentencing Guidelines,[576] judges frequently did this on their own.[577]

Detractors will object that empowering jurors in these ways encourages lawless juries. But the lawlessness objection is based on a mistaken perspective that statutory law *is* our criminal law, and that to acquit in the face of technical guilt is to allow an acquittal against the law. In actuality, we know that de facto criminal law is narrower than statutory criminal law,[578] and that sentencing enhancements (as with criminal statutes more broadly) can be inappropriately applied to trivial instantiations of wrongdoing.[579] Allowing the jury to know a defendant's sentencing exposure provides a check whereby the community can judge whether the *prosecutor* has acted lawlessly by overcharging particular cases. That is, juries can refuse to

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[571] *See id.*

[572] BLACKSTONE, *supra* note 390, at *239.

[573] *Id.* (adopting the phrase "pious perjury").

[574] *See, e.g.*, Armed Career Criminal Act, Pub. L. No. 98-473, § 1801-803, 98 Stat. 1837 (1984).

[575] Apprendi v. New Jersey, 530 U.S. 465, 490 (2000); Almendarez-Torres v. United States, 523 U.S. 224, 246 (1998).

[576] *See* United States v. Booker, 543 U.S. 220 (2005) (holding that mandatory sentencing guidelines violated the Sixth Amendment).

[577] Brown, *Democracy*, *supra* note 27, at 262.

[578] Stuntz, *Pathological Politics*, *supra* note 7, 506–07.

[579] United States v. Yirkovsky, 259 F.3d 704, 707 (8th Cir. 2001) (affirming Armed Career Criminal Act sentence for possession of a single round of ammunition).

endorse the actions of prosecutors who act technically within statutes but outside the commonly accepted criminal law conventions.

For cases that do not go to trial, prosecutors should have to disclose to the public their "going rates" for plea bargains. Disclosure will confer several advantages over the present system. First, it will ameliorate some of the information advantage that repeat players have within a courthouse.[580] Second, publication of the information will deter prosecutors from deviating in isolated cases.[581] Third, publication will also subject the going rates to democratic legitimacy. Most prosecutors are elected, and the actual expected sentences for crimes are a core criminal justice issue that should be the subject of popular oversight through elections. Even though prosecutorial elections are low-information events, the availability of this information would alert the public to substantial deviations from popular norms and deter prosecutors from setting popularly unacceptable going rates.[582] Here again, the goal is to develop legal conventions that have popular legitimacy and the real threat of indirect sanctions for violating them.

b. Developing Conventions to Cabin Statutory Mandatory Minimum Sentences and to Reduce the Need for Congress to Pass Such Sentencing Laws

A robust system of checks and balances can also ameliorate the problems created by excessively harsh mandatory minimum sentences. In addition to providing greater jury participation, the criminal law can cabin excessively harsh sentences by reinvigorating the clemency process. Pardons and commutations were among the traditional remedies for excessively harsh statutory sentences.[583] Today, clemency is rare. Except for President Obama's grant of clemency to some drug offenders at the end of his second term, most years see, at most, a few dozen people pardoned and a handful of commutations.[584] The virtual unavailability of clemency can work significant injustice in cases where prosecutors have overcharged crimes and in marginal cases where Congress's statutory penalties are too harsh given the facts.

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[580] Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 482, at 1141.

[581] Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, *supra* note 356, at 1006.

[582] *Id.*

[583] *See* Chris Barker, *The Certainty of Punishment & the Proportionality of Incarceration, in* RETHINKING PUNISHMENT IN AN ERA OF MASS INCARCERATION 69, 77 (Chris W. Surprenant ed., 2018).

[584] *See* OFFICE OF THE PARDON ATT'Y, U.S. DEP'T OF JUSTICE, CLEMENCY STATISTICS, https://www.justice.gov/pardon/clemency-statistics [https://perma.cc/P445-8RHZ] (last updated Jan. 22, 2021).

The causes of dysfunction in the clemency process are primarily political: for most politicians, the risk is asymmetric. As the infamous Willie Horton ad showed, politicians can face significant public backlash for providing leniency, if someone later reoffends.[585] In contrast, the refusal to give clemency has little political cost, and those most affected often cannot vote.[586]

In part, reform should look to provide executives with political cover. Courts can play a more active role in suggesting clemency. In cases where statutory sentences are too harsh, nothing prevents courts from sending recommendations to the Pardon Attorney that the President should immediately commute the sentence to something more reasonable. Such procedures were routinely used by English judges.[587] A judge's recommendation to commute an unreasonable sentence may also give the President or a Governor some political cover in case the defendant reoffends in the future. Some have proposed creating a clemency commission.[588] The existence of such a commission could also help the executive diffuse responsibility when someone reoffends. In the federal system, Congress should also create some separation between the clemency process and the Department of Justice. The current organizational structure—in which responsibility for mitigating harsh results is vested in the same department that prosecuted the case—is inherently a conflict of interest. As such, the Pardon Attorney's office should be removed from the Department of Justice.

Legislatures and judges might also reduce the need for mandatory minimums by dividing sentencing responsibility. Legislatures often pass mandatory minimums to prevent idiosyncratic judges from issuing inappropriately low sentences.[589] The problem is more acute where judges lack accountability to the electorate.[590] Dividing sentencing responsibility

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[585] *See* Morgan Whitaker, *The Legacy of the Willie Horton Ad Lives on, 25 Years Later*, MSNBC (Oct. 21, 2013, 9:30 PM), http://www.msnbc.com/msnbc/the-legacy-the-willie-horton-ad-lives [https://perma.cc/WS5U-JHWM].

[586] *See* Epps, *supra* note 542, at 63–64.

[587] Joanna M. Huang, Note, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 DUKE L.J. 131, 141–42 (2010).

[588] *See, e.g.*, Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 5 (2015).

[589] *See* Misner, *supra* note 5, at 756; James Vorenberg, *An Argument Against Mandatory Minimum Prison Sentences*, BOS. GLOBE, Dec. 27, 1975, at 7 ("The premise is that judges are soft on criminals, that they are putting dangerous criminals back in circulation because they do not understand or do not share the public's concern about crime."); Scott & Stuntz, *supra* note 21, at 1965 (explaining that "mandatory sentencing is a valuable corrective" when "politically unresponsive judge are too lenient").

[590] Scott & Stuntz, *supra* note 21, at 1965.

may help prevent inappropriately low sentences issued by single trial judges, thereby reducing the incentive to have mandatory minimum sentences. One method may be to solicit the jury, as representatives of the community, to see what they believe to be the appropriate sentence.[591] And juror participation may prevent excessive harshness, too. In at least one judge's experience, "Every time I ever went back in the jury room and asked the jurors to write down what they thought would be an appropriate sentence . . . every time—even here, in one of the most conservative parts of Iowa, where we haven't had a 'not guilty' verdict in seven or eight years—they would recommend a sentence way below the guidelines sentence."[592] The use of a multimember jury—as opposed to a single judge—can cabin the effects of idiosyncratic preferences and mistaken perceptions.

c. Misdemeanor Practice

I do not purport to offer a full slate of reforms for misdemeanor justice. Code reform may help a little; some misdemeanors (e.g., marijuana possession) no longer involve conduct that society generally condemns. And code reform can help correct other overcriminalization problems, such as the power to use technical offenses to expand law enforcement's search and seizure authority.[593] Even when officers do not care about the underlying misdemeanor, the existence of such offenses can serve as a gateway to fish for more serious crimes.[594]

But code reform alone cannot fix the misdemeanor system because the core of prosecuted misdemeanors and petty offenses also involve conduct that society does condemn—driving under the influence, theft, vandalism, trespass, disorderly conduct, weapons violations, and the like.[595] Going beyond code reform, the goal of misdemeanor reform should be to develop a conventional law of misdemeanor crime that complements our statutory system. This can be done by facilitating checks on police and prosecutors. In part, this will involve removing barriers to presently existing checks. Setting high cash bail and inadequately funding public defenders, for example, gives

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[591] *See, e.g.*, United States v. Collins, 828 F.3d 386, 389 (6th Cir. 2016) (affirming the district court's discretion to poll the jury for their views on an appropriate sentence).

[592] Eli Hager, *When Juries Help Judge*, MARSHALL PROJECT (Mar. 13, 2015, 12:18 PM), https://www.themarshallproject.org/2015/02/13/when-juries-help-judge [https://perma.cc/7HQD-KRR6].

[593] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 353–54 (2001); *see also supra* text accompanying note 489.

[594] *See* Bowers, *Equitable Decision*, *supra* note 174, at 1694; *see also supra* text accompanying note 507.

[595] *See* Mayson & Stevenson, *supra* note 132, at 1018.

prosecutors inordinate leverage over indigent defendants.[596] Even in our system of plea bargaining, prosecutors shape their charging decisions around expected trial outcomes.[597] But the threat of going to trial will not discipline prosecutors when they know that defendants will have to pay a heavy price to exercise their rights.

d. Discouraging Arbitrary Enforcement

Criminal law conventions are different from constitutional conventions because law enforcement officials may make occasional deviations from criminal law conventions without incurring significant nonlegal obstacles. For example, even if nearly all drivers can drive within five or ten miles per hour of the speed limit with impunity, police ticket a few such drivers each year.[598] In these cases, the law seems to be defined by statute, not by convention. This reflects the fact that most criminal prosecutions are low-information events,[599] *a fortiori*, when the offense is a misdemeanor or an infraction. Arbitrary enforcement of statutes creates significant rule-of-law problems, particularly when that enforcement may be in violation of customary norms.

Here, the legislature and the executive branch may take steps to promote the rule of law. Because conventions depend on nonlegal means for their enforcement, increasing transparency in law enforcement aids in applying political sanctions when actors breach criminal law conventions. To continue with the speeding ticket example, it would be helpful to know who and why officers ticketed for minor speeding. One can think of many legitimate and customary reasons for these tickets. Perhaps these individuals were, in fact, going significantly faster, but the officer wrote the ticket as if the driver were just above the limit to reduce the fine. Or perhaps they were driving at an unsafe speed through a school zone. Alternatively, one can think of more problematic reasons, such as pretextual stops (e.g., because the person was suspected of a drug violation) or just being arbitrarily selected by police. The fact that forty drivers in Virginia received a speeding ticket in 2018 for driving less than five miles per hour above the speed limit may not be a significant political event to change police practices. But if the data reveal troubling trends about who are selected and why, that could provide the

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[596] Juleyka Lantigua-Williams, *Why Poor, Low-Level Offenders Often Plead to Worse Crimes*, ATLANTIC (July 24, 2016), https://www.theatlantic.com/politics/archive/2016/07/why-pretrial-jail-can-mean-pleading-to-worse-crimes/491975/ [https://perma.cc/WW27-T6V7].

[597] *See supra* notes 401–403 and accompanying text.

[598] *See supra* notes 219–221 and accompanying text.

[599] Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, *supra* note 356, at 992.

necessary political impetus for correction.[600] Legislatures can also require police and prosecutors to disclose their office policies for enforcing the law. If a prosecutor's office has a policy to decline marijuana possession cases, that decision has a de facto legal effect in that jurisdiction. The publication of such policies may make it more difficult to maintain isolated and arbitrary prosecutions. In a conventional system, the principal cabining of power comes through effective nonlegal checks on the arbitrary enforcement of statutes.[601]

e. Criminal Procedure and Pretext

Some of the worst effects of statutory overcriminalization concern its effects on criminal procedure.[602] Acknowledging that unwritten conventions form part of criminal law may help alleviate some of these problems. For example, courts might require subjective good faith to justify a search or seizure when the police only have probable cause that a person has committed an offense that is ordinarily within the customary tolerance of society, such as driving one mile per hour above the speed limit.[603] A similar rule might also apply in civil cases, which would give civil juries more power to remedy pretextual stops.

The Court's recent decision in *Nieves v. Bartlett* heads in this direction.[604] The case involved a § 1983 claim alleging that officers arrested the plaintiff for disorderly conduct as retaliation for the plaintiff's exercise of his First Amendment rights.[605] The Court held that, in general, a plaintiff in a retaliatory prosecution case must "plead and prove the absence of probable cause for the underlying criminal charge."[606] But concerned that police could justify an arrest by providing probable cause of any statutory violation, including those such as jaywalking that rarely result in arrest, the Court also held that "the no-probable-cause requirement should not apply

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[600] *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 56–67 (1998) (advocating "racial impact studies" to encourage legal and non-legal sanctions against discriminatory law enforcement practices).

[601] *See, e.g.*, Myers, *supra* note 9, at 1354 (describing legitimacy concerns with lack of transparency).

[602] *See* Stuntz, *Pathological Politics*, *supra* note 7, at 519.

[603] *Cf.* Witmer-Rich, *supra* note 228, at 1062 ("When the police consistently choose to enforce the law—here, the traffic code—by using standards different from those written into the code, then the appropriate baseline for assessing the reasonableness of police conduct is by evaluating that conduct against the police department's own chosen enforcement practices and policies.").

[604] 139 S. Ct. 1715 (2019).

[605] *Id.* at 1721.

[606] *Id.* at 1723.

when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[607] This exception recognizes that we have a common law of crime, which is narrower than the statutes on the books.

An effort to inject more subjective good faith into the Fourth Amendment and civil actions come at significant cost for police. In *Whren*, the Supreme Court said, "[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement."[608] But judges, no less than other members of the community, have general knowledge about the norms of how laws are enforced. And this approach facilitates symmetry between police and the community. The community knows that statutory criminal law is overbroad; to navigate this, individuals have to have some sense about what are the "real crimes" and what technical crimes fall within customary tolerance. The police should be held to the same standard in their enforcement decisions. Thus, courts should examine charges with more scrutiny when law enforcement officers stop or arrest someone for offenses that widely come within customary social tolerances, such as trivial speeding.

These proposed solutions do not solve all externalities caused by overcriminalization. Stuntz is correct that broader crimes dilute the burden of proof at trial,[609] and I am not sure there is a great answer to that problem. For certain statutory omissions (e.g., absence of a mens rea requirement), courts can continue to apply the normal rules of statutory construction and infer stricter statutory requirements. And as many commentators have called for, courts also can use the ordinary tools of statutory construction—especially clear statement rules and the rule of lenity—to curb the scope of statutes.[610] More rigorous statutory review will deter prosecutors from bringing cases that the statute was not designed to reach. And when judges narrow the scope of ambiguous statutes, they shift the burden back to the legislature to decide whether certain marginal cases should, in fact, be criminalized.

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[607] *Id.* at 1727.

[608] Whren v. United States, 517 U.S. 806, 818 (1996).

[609] Stuntz, *Pathological Politics*, *supra* note 7, at 519; *see also, e.g.*, Jeff Mordock, *Thought Police: Small Criminal Charges Used to Stop Large-Scale Terrorism Caught in Legal Gray Area*, WASH. TIMES (Mar. 10, 2019), https://www.washingtontimes.com/news/2019/mar/10/christopher-hasson-case-shows-terror-prevention-ta/ [https://perma.cc/3R7P-93ZV] (explaining that prosecutors use easy to prove charges to circumvent more stringent proof requirements in terrorism cases).

[610] *See, e.g.*, Smith, *Overcriminalization*, *supra* note 73, at 567; Hopwood, *supra* note 98, at 702; Hessick & Kennedy, *supra* note 7, at 375–76.

But more aggressive approaches to interpreting statutes will lead the judiciary to exercise too much power to redraft statutes. That cure may be worse than the disease. It may be that we have to rely on the other actors in the criminal justice system to ensure that prosecutors do not abuse relaxed burdens of proof. The development and recognition of criminal law conventions will not fix every serious problem of statutory overcriminalization.

CONCLUSION

Most accounts of contemporary American criminal law paint a distressing picture. Criminal codes are broad, vague, and harsh. Political dysfunction causes legislatures continually to add new crimes. Everyone violates some law—whether petty or serious—virtually every day. Ultimately, prosecutors are left to decide who to charge and for what, making them "the criminal justice system's real lawmakers."[611] And federal law often duplicates state law but with much harsher penalties.[612] The result, we are told, is a system of criminal justice that fails to adhere to many basic principles of legality. Broad and vague criminal laws fail to put people on notice of what conduct is criminal. These laws lack democratic legitimacy because broad and vague laws essentially delegate criminal lawmaking to prosecutors. And having duplicative federal and state criminal codes facilitates the disparate treatment of offenders who commit identical crimes.

This vision of criminal law is unduly bleak. A lawless world in which prosecutors truly act as both lawmakers and law enforcers would look very different from ours. In reality, our system is fairly predictable. That is because a rich set of unwritten norms supplement our statutory system. Criminal law remains a form of conventional law. It is not the legal realist common law of judge-made rules, but rather an older vision of common law, where the law is defined by present but evolving customs. Those customs shape statutory law into a workable system of criminal law. They narrow overbroad statutes. They divide federal and state criminal law, despite their statutory overlap. And, perhaps most importantly, these customs shift as society shifts, providing legitimacy to our criminal law as it presently exists.

These customs are the result of extensive checks and balances, which do exist in our criminal law. Legislatures, voters, jurors, judges, and redundant executive officials keep the criminal law in check. They place pressure to enforce the law against those who engage in blameworthy

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[611] Stuntz, *Pathological Politics*, *supra* note 7, at 506.

[612] Smith, *Folly*, *supra* note 6, at 40.

conduct. And they apply pressure against enforcing statutory laws that have no relationship to blameworthy conduct.

The development of common-law-like norms through checks on power may also provide a method of improving those areas where our modern criminal law has fallen short. Harsh sentencing in individual cases, arbitrary enforcement of misdemeanors, and arbitrary use of substantive criminal law to circumvent search and seizure rights have occurred in pockets where there are few effective checks on executive power. And the rise of mandatory minimum sentences occurred as a response to perceived abuses by individual judges, who wield enormous discretion in sentencing. Empowering juries, reinvigorating the clemency process, removing barriers that prevent misdemeanor defendants from exercising trial rights, and requiring subjective good faith on the part of law enforcement when they enforce laws more severely than the community expects may all contribute to the development of unwritten conventions that check the excesses technically allowed by statutory law.

More basically, we should stop fretting over the state of statutory law. The criminal codification project promised more than it could deliver: clear laws, specifying specific conduct *ex ante*, written for all to read and learn, and maintained by a democratically-accountable legislature that would be responsive to popular shifts. But statutory laws are never perfectly drafted. Small errors can create large overcriminalization problems, while precise specification encourages bad actors to find legal loopholes. Making matters worse, legislatures lack the time and resources to maintain criminal codes. These legislative defects are not readily fixable. Fortunately, our criminal law is not primarily statutory. Statutes may provide the broad framework for our criminal law, but unwritten conventions—a kind of common law—place the meat on the statutory bones.[613] In this system, we primarily improve our criminal law not by fixing statutes, but by developing and improving our customs and traditions.

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[613] *Cf.* Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5, 6–7 (1997) (describing the relationship between formal common law and federal criminal law).