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Benjamin Levin

*University of Colorado Law School*

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## DE-NATURALIZING CRIMINAL LAW: OF PUBLIC PERCEPTIONS AND PROCEDURAL PROTECTIONS

*Benjamin Levin\**

*Innocence, it turns out, is a complex concept. Yet the Innocence Movement has drawn power from the simplicity of the wrong-person story of innocence, as told most effectively by the DNA cases. The purity of that story continues to have power, but that story alone cannot sustain the Innocence Movement. It is too narrow. It fails to accommodate the vast majority of innocent people in our justice system. It fails to embrace innocence in its full complexity. . . . [I]n the end, for virtually all purposes, innocence must be understood under the objective rules that have long governed the criminal justice system. . . . Without proof of guilt determined by a court, the presumption of innocence defines innocence.<sup>1</sup>*

### I. INTRODUCTION

“The American people are tired of watching hoodlums walk,” declared President George H.W. Bush, in a radio address before the 1992 presidential election.<sup>2</sup> The people are disgusted, he claimed, with “seeing criminals mock our justice system with endless technicalities.”<sup>3</sup> The message of a nation enraged by excessive leniency and sharply aware of the threat posed by criminal elements was compelling for many listeners and voters. Not only had this theme been forged over the course of a decades-long war on crime that had progressively ratcheted up the rhetorical ferocity of

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<sup>1</sup> Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1207–08 (2011).

<sup>2</sup> George H. W. Bush, Radio Address to the Nation on the Administration’s Domestic Agenda (June 22, 1991), in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE H. W. BUSH, at 710 (1991).

<sup>3</sup> *Id.*

attacks on criminality as a major foe of modern society,<sup>4</sup> but it had also been a primary component of President Bush's successful campaign three years earlier.<sup>5</sup>

In the months leading up to the 1988 presidential election, then Vice President Bush, his strategists, and supporters focused on the crime issue, eventually using it to overpower the Democratic challenger, Governor Michael Dukakis.<sup>6</sup> While he was governor of Massachusetts, Dukakis had defended the practice of furloughing inmates—even those convicted of violent felonies.<sup>7</sup> During one of these furloughs, Willie Horton, a convicted murderer broke into the suburban home of a young couple, attacked the man, and raped the woman.<sup>8</sup> Republican strategists, the Bush campaign team, and Dukakis's opponents hammered the candidate on the Horton story, branding him as “soft on crime” and presenting the election's choice as being between law and order on the one hand and outrageous lenience on the other.<sup>9</sup> Perhaps most notably, this distinction was highlighted in a television advertisement that presented the two candidates' contrasting views on crime, emphasizing Bush's support for the death penalty as a counterpoint to Dukakis's support of “weekend passes” for criminals like Horton, and featured an image

<sup>4</sup> See generally SUSAN ESTRICH, *GETTING AWAY WITH MURDER: HOW POLITICS IS DESTROYING THE CRIMINAL JUSTICE SYSTEM* 65 (1998) (“Today, Democrats outdo themselves to prove they are just as tough [on crime] as Republicans. . . . No one tells the truth, and the political dishonesty is distorting and destroying the system.”); MICHAEL W. FLAMM, *LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S* 51–52 (2005) (“In political terms, [the war on crime] was a liberal attempt to neutralize or capture the conservative issue of law and order.”); BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 134, 203–08 (2011) (“There is a lengthy track record . . . of presidential and gubernatorial campaigns that explicitly exploit the neoliberal combination of free-market ideology and tough-on-crime politics . . . .”); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 279 (2007) (examining the consequences of the war on crime).

<sup>5</sup> DAVID C. ANDERSON, *CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE* 3 (1995); ESTRICH, *supra* note 4, at 65–66; FLAMM, *supra* note 4, at 182–83.

<sup>6</sup> See ESTRICH, *supra* note 4, at 65–66; FLAMM, *supra* note 4, at 182–83; Editorial, *George Bush and Willie Horton*, N.Y. TIMES, Nov. 4, 1988, at A34 [hereinafter *George Bush and Willie Horton*].

<sup>7</sup> ESTRICH, *supra* note 4, at 65–66; FLAMM, *supra* note 4, at 182.

<sup>8</sup> ESTRICH, *supra* note 4, at 65; FLAMM, *supra* note 4, at 182.

<sup>9</sup> See, e.g., ESTRICH, *supra* note 4, at 65–66, 71; FLAMM, *supra* note 4, at 182–83; Gerald G. Ashdown, *Distorting Democracy: Campaign Lies in the 21st Century*, 20 WM. & MARY BILL RTS. J. 1085, 1093 n.52 (2001) (citing *The '30 Second Candidate, Historical Timeline*, PBS (2001), <http://www.pbs.org/30secondcandidate/timeline/years/1988.html>); *George Bush and Willie Horton*, *supra* note 6; David Lauter, *Crime Issue Becoming Election Battleground*, L.A. TIMES, June 13, 1988, at 1.

of Horton, glaring, bearded, and disheveled.<sup>10</sup>

Bush won the election convincingly,<sup>11</sup> and the public humiliation of Dukakis helped to solidify—at least according to conventional wisdom—the unviability of running a national campaign that was not “tough on crime.” The years that followed saw a shift, with Democratic presidential candidates moving away from skeptical attitudes towards police and policing; for example, Bill Clinton and Barack Obama emphasized their support for the death penalty while shying away from the sort of rehabilitationist model that had defined post-1960s liberalism.<sup>12</sup> Indeed, by the time the 2012 election rolled around, crime had ceased to be a major issue—not necessarily because the streets of U.S. cities were safer, but because both major political parties had at least ostensibly achieved a consensus on the importance of criminal law enforcement and harsh criminal punishment.<sup>13</sup>

This is not an essay about Willie Horton or the 1988 presidential election. The story of the rise of “law and order” politics in the latter half of the twentieth century is one that has been told compellingly by historians, criminologists, political scientists, and legal scholars.<sup>14</sup> The transition from the socio-political climate in which Barry Goldwater’s call to arms against urban criminality and “soft-on-crime” policies<sup>15</sup> to the contemporary one, in which few

<sup>10</sup> *Willie Horton 1988 Attack Ad*, YOUTUBE (Nov. 3, 2008), <http://www.youtube.com/watch?v=Io9KMSSEZOY>.

<sup>11</sup> See FLAMM, *supra* note 4, at 183; see also E.J. Dionne Jr., *Bush is Elected by a 6-5 Margin with Solid G.O.P. Base in South; Democrats Hold Both Houses*, N.Y. TIMES, Nov. 9, 1988, at A1 (reporting George Bush’s solid win over democratic opponent Michael Dukakis in the 1988 presidential election).

<sup>12</sup> See, e.g., Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 17 (2011); Linda Greenhouse, *Justices Bar Death Penalty For the Rape of a Child: Execution Ruled Out, 5-4, if Life Isn’t Taken*, N.Y. TIMES, June 26, 2008, at A1 (quoting President Obama voicing his objection to a Supreme Court ruling that found the execution of child rapists unconstitutional); Michael Kramer, *The Political Interest: Frying Them Isn’t the Answer*, TIME, Mar. 14, 1994, at 32 (quoting President Clinton saying “I can be nicked on a lot . . . but no one can say I’m soft on crime.” (internal quotation marks omitted)).

<sup>13</sup> See Charles Lane, Op-Ed., *The Victims of Safer Streets*, WASH. POST, Nov. 27, 2012, at A15 (arguing that Democrats had embraced Republican criminal justice policies and that this had led to a safer United States—essentially that Republicans had won the war on crime to a certain extent but in so doing had eliminated the importance of crime as an election issue).

<sup>14</sup> See, e.g., FLAMM, *supra* note 4, at 1, 179; DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY*, at vii, xi, 1 (2001); DOUGLAS N. HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3, 5 (2008); SIMON, *supra* note 4, at 3–4; BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 30–32 (2006); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 3–4 (2003).

<sup>15</sup> See generally FLAMM, *supra* note 4, at 31–50 (describing Goldwater’s position that “law and order [was to become] an important part of national political discourse”).

major-party politicians speak out against mass incarceration or injustices in the criminal justice system,<sup>16</sup> however, serves as a fitting point of departure.

In the decades following the highly-publicized crime waves of the late 1960s, the politics of law and order have taken on a critical role in American social, cultural, and legal discourse.<sup>17</sup> Particularly in the wake of the 1988 presidential election, U.S. criminal policies have grown progressively stricter, embracing a culture of mass incarceration and increasing police powers.<sup>18</sup> Key to these developments, I argue, is the same concern that animates this issue—the fear that the guilty will go free, that the procedural protections implemented by the Warren Court, or the socio-legal preoccupation with rehabilitation or root causes of crime will hamstring prosecutions, preventing justice from being meted out and ultimately jeopardizing public safety.

In this essay, I examine this fundamental concern and challenge the rhetorical trope of the guilty going free by emphasizing the institutional and political intricacies that comprise the criminal justice system and necessarily undergird a determination of “guilt.” My goal, at its essence, is to de-naturalize the criminal law and discussions of the criminal justice system in the context of this book. I aim to emphasize that a guilty verdict is the result of a series of (politically-inflected) decisions about how to draft criminal statutes, how to structure a trial, and how to select a jury. De-naturalizing criminal law is, of course, a massive project and is in many ways at the core of much work being done by criminologists and others approaching criminal law from interdisciplinary perspectives,<sup>19</sup> not

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<sup>16</sup> See generally *id.* at 179, 182–83 (describing the “decline of law and order in presidential races after 1968”); cf. also Sen. Barry M. Goldwater, Editorial, *Liberals and Their Issues*, L.A. TIMES, Sept. 27, 1970, at § G-7 (criticizing democrats for their inaction regarding the increasing crime rate in the United States).

<sup>17</sup> See FLAMM, *supra* note 4, at 182 (noting that law and order was “frequently and successfully” implemented with candidates at the local and state levels during the decades subsequent to the 1960s); see also SIMON, *supra* note 4, at 7–10 (explaining the effects of governing through crime and the impact it has had on governmental aspects, lawmaking, the courts system, families, schools, and workplaces).

<sup>18</sup> See FLAMM, *supra* note 4, at 183 (recapping the return of law and order during and subsequent to the 1988 election campaign); see also HUSAK, *supra* note 14, at 3 (asserting that there has been a “dramatic expansion in the substantive criminal law and [an] extraordinary rise in the use of punishment” in recent years); WESTERN, *supra* note 14, at 30 (describing the “growth in imprisonment [that] has been sustained over the [past] three decades”); WHITMAN, *supra* note 14, at 3–4 (describing increases in U.S. incarceration).

<sup>19</sup> See, e.g., STEVEN BOX, POWER, CRIME, AND MYSTIFICATION 1–15 (1983); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 80–81 (Alan Sheridan trans., 1977); HARCOURT, *supra* note 4, at 202–08; JOHN LEA & JOCK YOUNG, WHAT IS TO BE DONE ABOUT LAW AND ORDER?: CRISIS IN THE NINETIES 265–73 (Pluto Press 1993) (1984); Donald

to mention those generally concerned with the lessons of American legal realism and later post-realist critical methodologies.<sup>20</sup>

Ultimately, I argue that our expanding police state and culture of criminalization are rooted in a misguided view of the criminal law—a view that ignores the political economy and institutional dynamics of the criminal justice system and instead imagines a space of moral clarity and emotional vindication where guilt and innocence exist independently of legislative compromise and where criminality exists independent of state, politics, or law.

This essay will proceed in three Parts. The first Part will outline what I mean by “naturalizing” criminal law and how it may serve as a useful frame through which to consider this book’s underlying theme. Situating this project within a broader criminological discourse as well as a broader critical treatment of the “natural,” this Part will examine how the image of a naturalized criminal justice system pervades mass culture, how it underpins legal rules and law-making, and how it has come to shape our basic legal institutions.

The second Part will address the potential costs of the naturalizing move. Exploring this phenomenon is not purely a rhetorical exercise; the stakes of an inquiry into the social preoccupation with the “natural” are all too real. This Part will examine how this method of framing questions of criminal policy and institutional design have helped to create not only an unsustainable, carceral state, but also an increasingly schizophrenic relationship to law and legality, to the police, and to the state.

Finally, this article will conclude by suggesting the potential benefits that might be achieved by rejecting the reductive and dangerous yet (often) intuitive or appealing view of the “naturalized” criminal law. In closing in this way, I hope to offer at least a glimpse of the potential normative or prescriptive payoffs of a de-naturalizing project. I also offer a warning that is the

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Braman et al., *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531, 1551–55 (2010); Louk H.C. Hulsman, *Critical Criminology and the Concept of Crime*, 10 CONTEMP. CRISES 63, 63 (1986).

<sup>20</sup> See, e.g., JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”* 128–29 (1993); MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* 59–60 (Richard Howard trans., 1965); Christine Desan, *The Market as a Matter of Money: Denaturalizing Economic Currency in American Constitutional History*, 30 LAW & SOC. INQUIRY 1, 10–11, 42–43 (2005); Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 46–49 (2010) (noting that “legal realism makes a distinction between law on the books and law in action”); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1721–22, 1731–33 (1976).

necessary refrain of this descriptive work in the context of this book: in addressing real and pressing concerns about public safety, we must not lose sight of the unintended consequences of would-be reforms and of the consequences of uncritically embracing criminal law as a tool of social structuring. We must be willing to address honestly the assumptions that underlie societal decisions about what to criminalize and whom to incarcerate.

## II. NATURAL JUSTICE, NATURAL ASSUMPTIONS

If the project at hand is to *de-naturalize* criminal law in order to challenge the premise of a reform movement to stop the guilty from going free, the first question we must ask is: how is criminal law currently *naturalized*?

### A. *Imagining the Criminal Justice System*

In popular discourse, as well as in the realm of legal argument, criminal law is commonly tied to the language of morality.<sup>21</sup> That is, the imagined space of criminal law is one of sharply-delineated moral binaries. Where other doctrinal areas may be more easily suited to economic analysis or to other normative metrics, the discursive realm of criminal law is one that draws stark contrasts between good guys and bad guys, cops and robbers, the forces of civilized society and those threatening to undermine its very existence.<sup>22</sup>

Indeed, in the United States, the “State,” the “People,” or even the “United States” stand opposite a criminal defendant. Former federal prosecutor turned law professor and critic of the criminal justice system, Paul Butler, describes his own experience at the defendant’s table:

it’s how all federal criminal cases are styled: the U.S. against the defendant. It’s just that I never before had a reason to ponder how bizarre it sounds—you know, the most powerful nation in the history of the world against you. I think I could handle Rhode Island or North Dakota, maybe even the District of Columbia versus Paul, but the frigging United

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<sup>21</sup> See Benjamin Levin, *American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law as Market Control*, 48 HARV. C.R.-C.L. L. REV. 105, 155 (2013) (collecting sources).

<sup>22</sup> See, e.g., JEANINE PIRRO & CATHERINE WHITNEY, *TO PUNISH AND PROTECT: AGAINST A SYSTEM THAT CODDLES CRIMINALS 1* (2003) (“The office of district attorney is a battleground where the fight between good and evil unfolds each day.”).

States of America! I felt a little overpowered.<sup>23</sup>

The criminal prosecution represents—or at least purports to represent—the fulfillment of collective self-defense.<sup>24</sup> Through its framing, the criminal prosecution embodies public hostility, condemnation, and fear by performing the confrontation of polity versus the deviant, the society versus the menace.<sup>25</sup>

Turn on the television on any given evening, and alongside “true crime” accounts of rampant, horrendous, and under-punished criminality, you are likely to find fictional portrayals of sociopaths who must be brought to justice by dedicated public servants and victims who must be avenged through the proper systemic mechanisms.<sup>26</sup> The threat of crime and the need to respond to it swiftly and effectively is a constant refrain.<sup>27</sup> It is not just that we are surrounded by a political culture that has absorbed the criminal philosophy of Goldwater,<sup>28</sup> a philosophy focused on a concern that an omnipresent and unambiguously evil criminal class threatens law-abiding Americans and the values that they hold dear,<sup>29</sup> it is also that we are surrounded by a mass culture that has absorbed the overwrought absolutism of embattled prosecutor-turned cable

<sup>23</sup> PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 11–12 (2009).

<sup>24</sup> See *id.* at 4, 11–15.

<sup>25</sup> Butler accurately describes the state-sanctioned form of retribution embodied by criminal law as “legal hate.” *Id.* at 4.

<sup>26</sup> See generally Ahmed A. White, *Victims’ Rights, Rule of Law, and the Threat to Liberal Jurisprudence*, 87 KY. L.J. 357, 358–63 (1999).

<sup>27</sup> See SIMON, *supra* note 4, at 75–78 (discussing the prevalence of crime control throughout contemporary civil society).

<sup>28</sup> See generally FLAMM, *supra* note 4, at 31–37 (explaining that Goldwater advocated for the federal government to be more involved in the fight against disorder and violence—promoting a society of law and order); Michael A. Simons, *Sense and Sentencing: Our Imprisonment Epidemic*, 25 J. C.R. & ECON. DEV. 153, 158 (2010) (citing TED GEST, CRIME & POLITICS: BIG GOVERNMENT’S ERRATIC CAMPAIGN FOR LAW AND ORDER 1 (2001)) (“In 1964, in the face of rising crime rates, presidential candidate Barry Goldwater made being ‘tough on crime’ a national issue. Although Goldwater did not win the election, his campaign tactic changed the politics of crime on the national stage.”); Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230, 243 (2007) (quoting Barry Goldwater, *Peace Through Strength* (Sept. 3, 1964), in 30 VITAL SPEECHES OF THE DAY 746 (1964)) (“Crime grows faster than population, while those who break the law are accorded more consideration than those who try to enforce the law . . . . Our wives, all women, feel unsafe on our streets.”).

<sup>29</sup> I use the phrase “criminal class” here advisedly and mean to imply a broader group of individuals who do not share accepted social norms or who do not behave within the boundaries of dominant social mores, rather than a group defined by their socioeconomic status (although there certainly may be troubling overlaps between the two concepts). See generally LOIĆ WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 3–6 (2009) (explaining societal views of a broader class of delinquents—the “castaway categories”—including such individuals as the homeless, beggars, drug addicts, immigrants, and the unemployed).

television personality Nancy Grace.<sup>30</sup>

Indeed, in the past several decades, some of the nation's most memorable and most publicized trials have been criminal trials after which a large portion of the public believes that a guilty defendant went free. The murder trial of O.J. Simpson, for example, attracted almost unprecedented media coverage and massive, emotionally-charged public responses.<sup>31</sup> Many were adamant that Simpson was guilty and that he had "gotten off" because of "technicalities" or because of mistaken racial sympathies.<sup>32</sup> Similarly, the trial of Casey Anthony elicited tremendous public response,<sup>33</sup> much reflecting the opinion that Anthony had "gotten away with murder" and that the workings of the legal system had interfered with justice being done.<sup>34</sup>

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<sup>30</sup> See generally NANCY GRACE & DIANE CLEHANE, OBJECTION!: HOW HIGH-PRICED DEFENSE ATTORNEYS, CELEBRITY DEFENDANTS, AND A 24/7 MEDIA HAVE HIJACKED OUR CRIMINAL JUSTICE SYSTEM 302–11 (2005).

<sup>31</sup> <sup>31</sup> See generally ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 19–27 (1996) (discussing how the Los Angeles County District Attorney's Office and the Los Angeles Police Department fed the media information that tended to link O.J. Simpson to the murder); MICHAEL KNOX & MIKE WALKER, THE PRIVATE DIARY OF AN O.J. JUROR: BEHIND THE SCENES OF THE TRIAL OF THE CENTURY 252–68 (1995); Toni Morrison, *The Official Story: Dead Man Golfing*, in BIRTH OF A NATION'HOOD: GAZE, SCRIPT, AND SPECTACLE IN THE O.J. SIMPSON CASE, at xiii–xxii (Toni Morrison & Claudia Brodsky Lacour eds., 1997) (arguing that the media depicted O.J. Simpson as guilty from the start with absolutely no chance of innocence); Nicholas A. Battaglia, Comment, *The Casey Anthony Trial and Wrongful Exonerations: How "Trial By Media" Cases Diminish Public Confidence in the Criminal Justice System*, 75 ALB. L. REV. 1579, 1585 (2012) ("[T]he Supreme Court has acknowledged the interplay of the media in litigation and essentially the notion of a 'trial by media' . . .").

<sup>32</sup> See, e.g., *United States v. Lentz*, 58 F. App'x 961, 966 (4th Cir. 2003) (internal citation omitted) ("[T]he O.J. Simpson case has become a short hand way to describe tragic domestic violence and the inflammatory inference of getting away with murder."); Richard L. Lippke, *Modifying Double Jeopardy*, 15 NEW CRIM. L. REV. 511, 534 (2012) (arguing that the criminal justice system is called into doubt by the public when it appears as though the guilty have been set free).

<sup>33</sup> See generally Battaglia, *supra* note 31, at 1586 (quoting John Cloud, *How the Casey Anthony Murder Case Became the Social-Media Trial of the Century*, TIME, June 16, 2011, <http://www.time.com/time/nation/article/0,8599,2077969-1,00.html>) (describing the Casey Anthony case "as the 'social media trial of the century'"); Amy Pavuk & Bianca Prieto, *Casey Anthony Not Guilty of Murder*, ORLANDO SENTINEL, July 5, 2011, [http://articles.orlandosentinel.com/2011-07-05/news/os-casey-anthony-verdict-20110704\\_1\\_george-and-cindy-anthony-jose-baez-hopespring-drive](http://articles.orlandosentinel.com/2011-07-05/news/os-casey-anthony-verdict-20110704_1_george-and-cindy-anthony-jose-baez-hopespring-drive) (illustrating the crowds that swarmed the courthouse as the verdict was read).

<sup>34</sup> See, e.g., Mikaela Conley, *Public Irate Over Casey Anthony Verdict; Social Media Sites Explode With Opinions*, ABC NEWS (July 5, 2011), <http://abcnews.go.com/Health/casey-anthony-verdict-outrage-spills-online/story?id=14002257#.TrNa0HKLWk8> ("In New York's Times Square, a woman reacted tearfully to the trial's verdict: 'She killed a little girl. So she gets off and, you know, and she goes home and maybe has another baby that she can abuse and hurt.'"). *But cf.* Alan M. Dershowitz, Editorial, *Casey Anthony: The System Worked*, WALL ST. J., July 7, 2011, at A15 ("[T]he evidence in this case left a reasonable doubt in the mind of all of the jurors. The system worked."); Thomas L. Knapp, *Casey Anthony and*

In the narrative that flows through the semi-permeable membrane between true-crime programming and fictional police dramas, the moral binary between law enforcement and criminal offender is clear, and the need to impose “swift justice” and protect vulnerable members of society is unmistakable and non-negotiable.<sup>35</sup> Prosecutors are often portrayed negatively for being overly concerned with legal niceties like burdens of proof and sufficiency of evidence.<sup>36</sup> The heroic detective, officer, or attorney *knows* guilt when she sees it. Indeed, to a certain extent, this naturalization of guilt and emphasis on unambiguous moral binaries may be most notable in an extreme and almost unrecognizable form in the rise of the fictional profiler or the protagonist with an ability to think like or understand the way the perpetrator operates—the criminal is often rendered as other, not just in her moral transgressions but in her thought processes and neuroses, and the law enforcement community can employ a quasi-mystical, quasi-scientific model to pick out the criminal.<sup>37</sup>

Interestingly, this naturalization and unambiguous portrayal of the law’s enforcers is often not terribly noticeable in large part because of the extreme images of criminality that serve as their counterpoints. From *Criminal Minds*, where members of the FBI’s “Behavioral Analysis Unit” use some blend of science and pseudoscience to construct profiles of sociopathic serial killers,<sup>38</sup> to *Law and Order: Special Victims Unit*, where hard-boiled detectives face-off against depraved rapists and sexual predators, the lines are

*American Justice*, COUNTERPUNCH (July 7, 2011), <http://www.counterpunch.org/2011/07/07/casey-anthony-and-american-justice> (“The Casey Anthony verdict is a faint candle flame in a growing darkness—the darkness of political government, an institution fit only for the eradication of freedom’s light.”); Jeffrey Scott Shapiro, Op-Ed., *Casey Anthony Verdict a Victory for the Constitution*, FOX NEWS (July 5, 2011), <http://www.foxnews.com/opinion/2011/07/05/casey-anthony-verdict-victory-for-constitution> (“What many people often think is the product of a flawed justice system that allows the guilty to walk free is actually the finest example of our judicial process and the constitutional framework that designed it.”).

<sup>35</sup> See generally GRACE & CLEHANE, *supra* note 30, at 1–5 (arguing that the Constitution protects the accused, yet victims have no recourse unless individuals like Grace fight for them); PIRRO & WHITNEY, *supra* note 22, at 1–4 (“My ideas and action involve giving a public voice to victims who cannot for themselves . . . . Punish[ment] and [p]rotect[ion] is about them, not about me.”).

<sup>36</sup> See Battaglia, *supra* note 31, at 1597–98 (discussing public perceptions of prosecutors in situations like the Casey Anthony trial where the accused potentially go free because of “procedural loopholes” as well as “extraordinarily high prosecutorial burdens of proof”).

<sup>37</sup> See, e.g., *Criminal Minds* (CBS television broadcast 2005–present) (depicting an “elite team of FBI profilers who analyze the country’s most twisted criminal minds, *anticipating their next moves* before they strike again”) (emphasis added).

<sup>38</sup> See *id.*

generally clear, because the criminals are the worst of the worst.<sup>39</sup> That is, the criminal in these spaces is deranged, sadistic, and menacing. She—or, usually, he—stands as a clear risk to public safety, societal well-being, and decency. Even in renderings where the identity of the guilty party is uncertain, or where authorities originally err in identifying the perpetrator, the act that the criminal committed—senseless killing, child molestation, torture—is clearly abhorrent and unforgivable.

Such emphasis on the clearly criminal, the viciously sociopathic, focuses our attention on the extreme—the unnaturally cunning serial killer, the bloodthirsty sadist, or the child predator— and by doing so deflects attention from the fact that the criminal justice system is not designed (or at least *should not be designed*) with these extreme examples as the paradigm of criminality. Put another way, people break the law with great frequency, and these transgressions vary tremendously in severity. We could certainly imagine a society in which all crimes were viewed as equally inexcusable and greeted with the same punishment. But this is not how the U.S. criminal justice system—a system that gradates crimes based on culpable states of mind, on ages of victims, or on past criminal activities—is structured.<sup>40</sup> The central question, then, that I ask is how this fascination with cases of absolute and certain moral guilt, of clear blacks and whites, affect the institutional design and legal framework of a system that addresses many shades of gray?<sup>41</sup>

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<sup>39</sup> See generally *Law & Order: Special Victims Unit* (NBC television broadcast 1999–present), available at <http://www.nbc.com/law-and-order-special-victims-unit/about> (“This hard-hitting and emotional series . . . [depicts] the New York City Police Department, an elite squad of detectives . . . investigat[ing] sexually based crimes.”).

<sup>40</sup> Doris Layton MacKenzie, *Criminal Justice and Crime Prevention*, NAT'L CRIM. JUST. REFERENCE SERVICE (2013), <https://www.ncjrs.gov/works/chapter9.htm> (explaining that age, gender, and criminal conduct are factors considered in determining criminal activity).

<sup>41</sup> An easy response to my focus on the extremity of these criminal narratives is to say that the serial killer, the sexual deviant, or the unambiguous outlaw is much more interesting than the petty thief, the regulatory offender, or the minor offender. There is certainly some truth in this critique: ultimately, mass culture is an industry, and it is not difficult to believe that these titillating and shocking stories are more marketable and readily consumable than stories of low-level offenders. Even if this critique were entirely accurate, however, it would not detract from my argument, given that my point is not *why* we tell these stories or find them so captivating, but rather that these are the stories that we as a society are told (and tell ourselves). That is, even if the reason that a minute, extreme class of crimes receive the bulk of media attention is obvious and is entirely dependent upon ratings and market share analysis, the fact that we—as a culture of viewers and consumers—are bombarded by these narratives and are able to identify easily these stories as the tales of *true crime* in our society, is ultimately significant, I argue, to the way that we as a society structure our decisions about criminal law and the criminal justice system. See discussion *infra* Part II.B.

In this discursive space, moral disapprobation is not reserved solely for the criminal defendants. We also see criminal defense attorneys treated as somehow complicit in criminality and standing between their clients and justice.<sup>42</sup> Defendants are often presumed guilty (because—as in the case of Anthony and Simpson—we *know* that they did *it*<sup>43</sup>), and the attorneys often appear unconcerned with protecting the boundless universe of viewers from the malevolence of their clients. Victim's rights advocate Wendy Murphy, a vocal proponent of this naturalized view of the criminal law, describes perversion of criminal justice by immoral attorneys and a system that coddles criminals:

we can see the unbelievable shenanigans as criminals get away with murder, while the rest of us—if I can speak for the rest of us—get indigestion watching one smug thug after another walk away from his crimes scot-free. I bet you can conjure up such an image: a man who should be in prison boasting about his victory on the courthouse steps, crowing into the microphones and TV cameras with a smirking lawyer by his side.<sup>44</sup>

There are criminals; then there are “the rest of us,” a law-abiding community which is properly outraged by criminals and the legal “shenanigans” that allow them to roam the streets.<sup>45</sup>

The current depiction of the legal system, therefore, can be seen to reflect a peculiar attitude about the distinction between an adversarial and an inquisitorial system. That is, while past fictional and journalistic accounts of trials often celebrated the clash of attorneys,<sup>46</sup> contemporary criminal narratives appear to harbor a deep resentment towards the presence of the defense attorney and the systemic counterweight that she represents.<sup>47</sup> The ideal of a criminal proceeding that emerges from the various *Law and Order*

<sup>42</sup> As noted, *supra* note 36 and accompanying text, prosecutors who demonstrate restraint or unwillingness to pursue charges on hunches instead of concrete evidence often face a similarly negative treatment, but generally appear to be identified more with obstructionism or perhaps punctiliousness rather than the criminality or amorality/immorality ascribed to defense attorneys.

<sup>43</sup> David Epps, *Casey Anthony and O.J. Simpson*, CITIZEN (July 8, 2011, 12:28 PM), <http://www.thecitizen.com/blogs/david-epps/07-08-2011/casey-anthony-and-oj-simpson>.

<sup>44</sup> WENDY MURPHY, AND JUSTICE FOR SOME: AN EXPOSÉ OF THE LAWYERS AND JUDGES WHO LET DANGEROUS CRIMINALS GO FREE 3 (2007).

<sup>45</sup> *See id.*

<sup>46</sup> *See* ESTRICH, *supra* note 4, at 107 (describing a shift in the way attorneys practice law). *But see* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 73 (2011).

<sup>47</sup> *See, e.g.*, ESTRICH, *supra* note 4, at 94–95, 110–11; GRACE & CLEHANE, *supra* note 30, at 5.

franchises and their ilk is the grand jury—the space in which the government gets to make its case, without any critical or confrontational voice in opposition.

Murphy, like other commentators who contend that great injustices are done by corrupt defense attorneys who prevent society from punishing offenders, is careful to emphasize that she does not believe that all defense attorneys are immoral or that there is something inherently wrong with defending those accused of crimes.<sup>48</sup> “[A]ttorneys who represent disgusting human beings [but] play by the rules,” Murphy contends, “deserve our utmost respect.”<sup>49</sup> The problem is not that we are being confronted with a popular reaction against “cheating” defense attorneys; the problem is that there is no meaningful distinction being made between cheating and defending. Certainly, questions of legal ethics, of the social desirability of suppressing confessions or evidence, and of the way to balance the duties to client, the court, and the public are legitimate and difficult ones. But if we call the legitimate exercise of procedural protections and behavior within proscribed professional norms “cheating” that may result in the guilty going free, then whose job is it to protect the rights of the criminal defendant? Are we veering too close to eliding the identity of the *criminal defendant* with that of the *criminal*? And, finally, what of the criminal defendant who is not guilty or who is not a “disgusting person”?

This is not to say that there is a monolithic treatment of criminal law and criminality in mass culture. Indeed, other powerful counter-narratives or alternative narratives embrace a more ambiguous view of the line between law and lawlessness, glamorize the outlaw, or expose the social, economic, and political causes of criminal behavior.<sup>50</sup> But it is important to acknowledge the prevalence of the rhetorical space in which criminality is treated in the absolute because, I argue, it is this trope that helps shape the cultural fear that the guilty may go free and that the hyper-technical space of the “legal” and of procedural protection may fail to maintain public safety and perform the acts of public retribution

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<sup>48</sup> See ESTRICH, *supra* note 4, at 94–95, 110–11; see also MURPHY, *supra* note 44, at 3–4.

<sup>49</sup> MURPHY, *supra* note 44, at 3–4. This is a repeated refrain in Murphy’s writing: “Let’s get one thing on the table right away. There’s nothing wrong with zealous advocacy for accused criminals. Public relations people are paid to spin, and lawyers are paid to advocate.” *Id.* at 27.

<sup>50</sup> See, e.g., BUTLER, *supra* note 20, at 138–40; Donald F. Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment Through the “War on” Paradigm*, 15 J. GENDER RACE & JUST. 47, 73–79 (2012).

that society appears to be demanding.

### B. *Fitting Law to Rhetoric*

There is much more to be said about the cultural framing of criminal law and criminal procedure, but in order to situate my ultimate argument about the significance of de-naturalizing, I move now to the concrete ways in which naturalization plays out in courts across the United States and in the doctrinal evolution of criminal law. Without tracing a direct causal link, this article proceeds on the assumption that there is indeed an important relationship between formal legal discourse and lawmaking on the one hand, and unofficial, cultural discourse on the other.<sup>51</sup> While this relationship is one that has certainly been explored elsewhere,<sup>52</sup> it appears particularly resonant in the criminal realm for several reasons.

First, as discussed at the outset of this essay, criminal law has frequently been an important election issue,<sup>53</sup> meaning that public discourse has a clear point of interaction with official policymaking.<sup>54</sup> Indeed, unlike many legal areas that appear

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<sup>51</sup> See David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 786, 796 (1993); see also Angelique M. Paul, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?*, 58 OHIO ST. L.J. 655, 655–56 (1997).

<sup>52</sup> See, e.g., JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 67–69 (1983); GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND 213–14 (1999); RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO 3–5 (1994); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 60–61, 107–11 (1984); Bernard E. Harcourt, *On the American Paradox of Laissez Faire and Mass Incarceration*, 125 HARV. L. REV. F. 54, 54 (2012) (“[B]rilliant and well-regarded thinkers have proposed a range of theories and methods to emancipate us from these figments of our imagination. They have offered genealogies and archaeologies, psychoanalysis, *Ideologiekritik*, poststructuralism, and deconstruction—to name but a few. Their writings are often obscure and laden with a jargon that has gotten in the way of their keen insights, but their central point continues to resonate loudly today: our collective imagination has real effects on our social condition and on our politics.”); Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim*, 75 ALB. L. REV. 559, 567–72 (2012).

<sup>53</sup> JED HANDELSMAN SHUGERMAN, THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 177–80, 235, 252 (2012).

<sup>54</sup> Certainly, this observation is not unique to criminal law, and the public conversations that shape electoral politics frequently deal with issues that relate to the courts and the drafting of statutes. Not to exceptionalize, but in the criminal context, these political debates seem more compelling than in other contexts. That is, where most policy debates have clear legal implications and necessarily involve some discussion of “law reform,” the debates about criminal justice are more often explicitly grounded in conversations about specific statutory alterations and court decisions. See, e.g., Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 791–93 (2007) (describing the discourse and legal aims of feminist law reformers who had joined forces with the victim’s rights movement).

daunting to those without legal training or a substantial, specialized vocabulary, criminal law appears more easily accessible and more relatable.<sup>55</sup>

Second, the jury, an essential component of the criminal justice system, is a representation of public values and community norms.<sup>56</sup> The “reasonable man”—that amorphous and clearly fictional benchmark of morality and community values—is a linchpin for criminal law in the United States,<sup>57</sup> and jurors, as those “reasonable men,” occupy a critical and highly privileged position in a criminal trial. Reading criminal law doctrine and evolutions in criminal law policy against the backdrop of cultural narratives and popular representations of the criminal justice system, therefore, becomes an important component of a project that encourages the re-examination of how we conceptualize the criminal justice system.

In the legislative arena, the pre-occupation with increasingly harsh criminal statutes has yielded, *inter alia*, “three strikes” sentencing mechanisms that target some broader criminal class,<sup>58</sup> mandatory minimum sentences that eliminate the possibility of judicial mercy,<sup>59</sup> and the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) that significantly hampers the ability of prisoners to obtain federal review of their state court convictions.<sup>60</sup>

<sup>55</sup> Even without delving into the cultural narrative examined in the previous Part, it hardly seems a reach to suggest that the quintessential image of the trial in popular culture is derived much more from *Perry Mason* or *Twelve Angry Men* than from the imagined space of securities litigation.

<sup>56</sup> See Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 31–32 (1994).

<sup>57</sup> See generally ESTRICH, *supra* note 4, at 13 (explaining how the law is often defined by what a reasonable person would do); CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 3–4 (2003) (describing the purpose of the reasonable man standard).

<sup>58</sup> See, e.g., *Ewing v. California*, 538 U.S. 11, 17–18, 30–31 (2003) (upholding a three-strikes sentence of life incarceration for the theft of three golf clubs); see WESTERN, *supra* note 14, at 50; Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 103 (1998); Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 705 (2006).

<sup>59</sup> See, e.g., Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, in FORGIVENESS, MERCY, AND CLEMENCY 19 (Austin Sarat & Nasser Hussain eds., 2007); Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 72 (2012).

<sup>60</sup> See, e.g., *Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011) (citing *Bobby v. Dixon*, 132 S. Ct. 26, 27 (2011) (per curiam); *Bobby v. Mitts*, 131 S. Ct. 1762, 1765 (2011) (per curiam); *Cullen v. Pinholster*, 131 S. Ct. 1388, 1410 (2011); *Felkner v. Jackson*, 131 S. Ct. 1305, 1307 (2011) (per curiam); *Premo v. Moore*, 131 S. Ct. 733, 745 (2011); *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011); *Renico v. Lett*, 130 S. Ct. 1855, 1860 (2010); *Berghuis v. Smith*, 130 S. Ct. 1382, 1395, 1397 (2010); *Thayler v. Haynes*, 130 S. Ct. 1171, 1172 (2010) (per curiam); *Smith v. Spisak*, 130 S. Ct. 676, 680 (2010)) (“In 2010–11 alone, the Supreme

This statutory framework, in many ways, operates as a check on the perceived “judicial activism” of the Warren Court that might insert judges as a mitigating voice in the public’s war on crime.<sup>61</sup> That is, under many of these statutes, legislators—often in blatant efforts to appeal to popular narratives about the need to check otherwise unrestrained criminality—eliminate discretion or clemency from the workings of the criminal justice system.<sup>62</sup>

Meanwhile, on the judicial front, the expansive procedural protections of the Warren Court have seen substantial narrowing in recent decades.<sup>63</sup> *Miranda* has been carved away as courts defer to the “expertise” of police officers.<sup>64</sup> Similarly, in the realm of civil checks on the criminal justice system, courts have displayed marked hostility to civil rights suits that seek to compensate individuals who have been wronged by official actors. *Bivens* actions<sup>65</sup> are all but moribund,<sup>66</sup> while claims under 42 U.S.C. § 1983 face increasing

Court has reversed circuit appellate courts in ten decisions for not adhering to AEDPA’s requirements.”); David Rubenstein, Comment, *AEDPA’s Ratchet: Invoking the Miranda Right to Counsel After the Antiterrorism and Effective Death Penalty Act*, 86 WASH. L. REV. 905, 925–26 (2011); Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 327.

<sup>61</sup> See Chris Gaspard, Note, *Kimbrough and Gall: Taking Another “Crack” at Expanding Judicial Discretion Under the Federal Sentencing Guidelines*, 36 PEPP. L. REV. 757, 758–59 (2009).

<sup>62</sup> See, e.g., STUNTZ, *supra* note 46, at 10, 73, 295; Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1027–42 (2005).

<sup>63</sup> See generally *Smith v. Maryland*, 442 U.S. 735, 745–46 (1979) (holding that there is no legitimate expectation of privacy for Fourth Amendment purposes as to phone numbers dialed); *United States v. Miller*, 425 U.S. 435, 440 (1976) (holding that there is no legitimate expectation of privacy in bank records); *Stone v. Powell*, 428 U.S. 465, 494–95 (1976) (holding that Fourth Amendment issues are not cognizable in federal habeas corpus petitions when state has provided full and fair opportunity to litigate claims); see also Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court’s Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1402 (2006); Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1358 (2002) (“Instead of overruling Warren Court precedents it deemed to be erroneous, the Rehnquist Court has distinguished, created exceptions to, and reinterpreted such precedents . . . . Whatever else might be said about the Court’s approach, it was highly effective in producing the ‘law and order’ results Nixon and Reagan promised to deliver.”).

<sup>64</sup> See, e.g., *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2262 (2010); Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 16–25 (2010) (reviewing Supreme Court precedents “gradually overruling” *Miranda*).

<sup>65</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 394–97 (1971).

<sup>66</sup> See, e.g., *Minneci v. Pollard*, 132 S. Ct. 617, 620, 626 (2012); *Hui v. Castaneda*, 130 S. Ct. 1845, 1851, 1855 (2010) (holding that *Bivens* actions are barred in situations where Congress explicitly states that the Federal Tort Claims Act “shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee”); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (“*Bivens* is a relic of the

obstacles.<sup>67</sup> The doctrine of qualified immunity has grown to protect the actions of police officers,<sup>68</sup> while absolute immunity shields the over-zealous or unethical prosecutor.<sup>69</sup>

The rhetoric of opinions both in the criminal realm and in the context of federal civil rights cases arising from plaintiffs' interactions with the criminal justice system have come to emphasize extreme deference for the knowledge and expertise of law enforcement officers.<sup>70</sup> That is, in analyzing questions of probable cause, reasonable suspicion, and use of force, courts tend to rely on deferential standards that take as a starting point, an assumption that law enforcement officers possess expertise and act reasonably.<sup>71</sup>

heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."); T. Ward Frampton, Comment, *Bivens's Revisions: Constitutional Torts After Minneci v. Pollard*, 100 CAL. L. REV. 1711, 1717 (2012).

<sup>67</sup> See, e.g., Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 885 & n.69 (2010).

<sup>68</sup> See, e.g., Messerschmidt v. Millender, 132 S. Ct. 1235, 1241, 1250 (2012); Susan Bendlin, *Qualified Immunity: Protecting "All But the Plainly Incompetent" (And Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1026–27 (2012); A. Allise Burris, Note, *Qualifying Immunity in Section 1983 & Bivens Actions*, 71 TEX. L. REV. 123, 163 (1992) (citing Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 614–15 (1989); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 65, 80 (1989)) ("Harlow's concern for eliminating inquiries into malice may shield even those who knowingly violate the law.")

<sup>69</sup> See, e.g., *Connick v. Thompson*, 131 S. Ct. 1350, 1355–56, 1366 (2011); *Van de Kamp v. Goldstein*, 555 U.S. 335, 338–39, 346 (2009).

<sup>70</sup> See generally Josh Segal, Note, *"All of the Mysticism of Police Expertise": Legalizing Stop-and-Frisk in New York, 1961–1968*, 47 HARV. C.R.-C.L. L. REV. 573, 577–78 (2012) (explaining how the courts will generally heed and give deference to the expertise of law enforcement officers, gained through their training and experience).

<sup>71</sup> See, e.g., *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment."); *United States v. Chavez*, 660 F.3d 1215, 1221–1222 (10th Cir. 2011) (quoting *United States v. McHugh*, 639 F.3d 1250, 1255–56 (2011)) ("Although 'reasonable suspicion requires [an] officer to act on something more than an inchoate and unparticularized suspicion or hunch, the level of suspicion required . . . is considerably less than proof by a preponderance of the evidence or that required for probable cause.' In determining whether reasonable suspicion exists, 'we look to the totality of the circumstances, rather than assessing each factor or piece of evidence in isolation.' In so doing, we 'defer to the ability of . . . trained law enforcement officer[s] to distinguish between innocent and suspicious actions.'"); *United States v. Dunbar*, 553 F.3d 48, 55 (1st Cir. 2009) (quoting *United States v. Ruidiaz*, 529 F.3d 25, 29 (1st Cir. 2008) ("This inquiry into reasonableness 'requires a reviewing court to consider the totality of the surrounding circumstances' and make a 'commonsense determination' that entails some deference to the perceptions of experienced officers."); *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002) (stating that the analysis of use of reasonable force by a police officer "contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances"); *United States v. Zubia-Melendez*, 263 F.3d 1155,

This account is of course cursory, and there may well be practical reasons suggesting that it might not be a normative good for courts to spend more time and effort closely monitoring the behavior of police officers and prosecutors; nevertheless, this doctrinal evolution represents a clear shift in the balance of power. Discretion has not been removed from the criminal justice system; rather it—and the locus of power—has been shifted from the courts to law enforcement officers and prosecutors. Perhaps this has some appeal from a populist perspective—many judges are not elected,<sup>72</sup> though many prosecutors<sup>73</sup> and sheriffs<sup>74</sup> are. But even here, such a reading misses the way that the system increasingly disempowers juries, which are (at least ostensibly) the ultimate populist institution.<sup>75</sup> With prosecutors holding more of the cards, and with more cases shifting from trials to pleas, the polity actually has less and less direct voice in the process.<sup>76</sup>

This shift is also an important marker of the naturalization of criminal law: judges are supposed to be objective, favoring neither side, and instead, representing some nebulous idealized understanding of “The Law.”<sup>77</sup> Prosecutors and law enforcement officers are meant to represent “the public” and are bound by assorted professional, ethical, and legal rules, but they are also players in an adversarial system.<sup>78</sup> By reassigning power from

1162 (10th Cir. 2001).

<sup>72</sup> Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 849 (2011) (noting that federal judges in the United States are not elected).

<sup>73</sup> Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L. J. 1528, 1530 & n.1 (2012) (footnote omitted) (“The United States is the only country in the world where citizens elect prosecutors.”).

<sup>74</sup> See, e.g., N.Y. CONST. art. 13, § 13 (“[T]he sheriff and the clerk of each county shall be chosen by the electors once in every three or four years as the legislature shall direct.”).

<sup>75</sup> See Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 433–34 (1999) (explaining how case law has minimized jury contributions to the justice system).

<sup>76</sup> See, e.g., Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 341 (2012) (noting that the criminal justice system is dominated by plea bargaining, as nearly ninety-five percent of felony defendants enter into guilty pleas).

<sup>77</sup> See Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 742 (1982) (“The judge . . . seeks not just a plausible interpretation, but an objectively true one. Judges may not protect their preferences or their views of what is right or wrong, or adopt those of the parties, or of the body politic, but rather must say what the [law] requires.”).

<sup>78</sup> See David Aaron, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor’s Duty to Disclose Nonevidentiary Information*, 67 FORDHAM L. REV. 3005, 3005 (1999) (“Legal and ethical codes maintain a general standard of professional conduct among attorneys.”); *id.* at 3015 (explaining that “[t]he prosecutor represents society” as a whole and it is her duty to “protect[] the due process rights of [all] individual[s]”); see also Dasha Kabakova, *The Lack of Accountability for the New York Police Department’s Investigative Stops*, 10 CARDOZO PUB. L. POL’Y & ETHICS J. 539, 561 (2012) (noting that the NYPD took initiatives to ensure more professionalism among law enforcement officers).

judges to prosecutors, then, the criminal justice system has shifted the axis. Instead of a counterweight before the judge (and the jury), the defendant and defense counsel become interlopers, outsiders in a realm dominated by the prosecution.<sup>79</sup>

### III. WHY DE-NATURALIZE?

“[F]aith in natural order,” writes Bernard Harcourt, “forecloses a full, normative assessment of market outcomes.”<sup>80</sup> Viewing the market or market structures as natural, he argues:

[This] faith in natural order . . . closes the door on the very condition of possibility. It effectively depoliticizes the market itself and its outcomes. It is only when the illusion of natural order is lifted that a real problem arises: that of the justice of the organizational rules and their distributional consequences.<sup>81</sup>

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<sup>79</sup> See, e.g., Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 314–15, 314 n.23 (2001) (footnote omitted) (noting that the prosecutor dominates the criminal justice system by having a “virtual monopoly [over] the fact-finding process”).

<sup>80</sup> HARCOURT, *supra* note 4, at 32.

<sup>81</sup> *Id.*; see also Desan, *supra* note 20, at 7 (stating that the history of the American political economy, and “the market,” should be analyzed within a constitutional framework, rather than by looking at it as a “natural development”); Roy Kreitner, *Legal History of Money*, 8 ANN. REV. L. & SOC. SCI. 415, 425 (2012) (noting that economics tends to naturalize money—which has become “an instrument [rather than] something that was made to be used”). While presented by Harcourt through a Foucauldian lens, this argument finds roots in the strands of American legal realism (particularly as interpreted by later scholars) that critiqued the treatment of legal rules and exchanges in a vacuum and emphasized the political and economic implications of treating such rules as natural, unalterable, and inviolable. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 11–13 (1928) (rejecting the idea that legal principles are neutral and noting that economics and politics must be considered in conjunction with the laws); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923) (“Some sort of coercive restriction of individuals, it is believed, is absolutely unavoidable, and cannot be made to conform to any Spencerian formula. Since coercive restrictions are bound to affect the distribution of income and the direction of economic activities, and are bound to affect the economic interests of persons living in foreign parts, statesmen cannot avoid interfering with economic matters, both in domestic and in foreign affairs. There is accordingly a need for the development of economic and legal theory to guide them in the process.”); see Hale, *supra*, at 493 (arguing that “[t]he ‘principles of justice’ supposed to govern courts do not suffice”); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 327 (1991) (suggesting “a method for analyzing the role of the law in the reproduction of social injustice in . . . capitalist societies.”). By beginning to recognize an institution not as naturally-occurring, inevitable, or immutable, we open up discursive spaces, policymaking spaces, and law-making spaces to broader assessments of the desirability of these ostensible givens. See Desan, *supra* note 20, at 7 (advocating that understanding the market and the American political economy as a hybrid of practices could actually result in a “hidden constitutional world”). Background rules may cease to be treated as unchangeable and may become the building blocks for alternate social, economic, or political relationships. See *supra* Part II.

A similar argument undergirds this article: when we treat as natural assumptions about guilt and innocence and when we embrace a sort of “natural order” that categorizes criminals as sociopaths and others as potential victims, that cleaves the polity from the criminals. We similarly “close[] the door on the very condition of possibility” and depoliticize the criminal justice system and its outcomes.<sup>82</sup> When we take as our starting point a society in which criminals are “going free” due to the interference of attorneys and judges in the workings of natural justice, we naturally silence a range of concerns about over-criminalization and expanding criminal punishment. We too easily forget about the trade-offs—the checks and balances that are built into the criminal justice system.<sup>83</sup>

This selective amnesia yields a troubling schizophrenia in the politics and institutional design of the U.S. criminal justice system. “While Americans vote for politicians who pass laws that make most people criminals,” observe Judge Alex Kozinski and Misha Tseytlin in their provocatively-titled essay *You’re (Probably) A Federal Criminal*, Americans “also support harshly punishing and socially ostracizing those convicted of crimes . . . [and] [i]n sum, most people think of criminals as bad people, who deserve punishment, while not realizing that they are criminals themselves.”<sup>84</sup>

On the one hand, being perceived as “soft on crime” has become the kiss of death for elected officials in all branches of government and at local and national levels.<sup>85</sup> On the other hand, however, wide swaths of criminal behavior have become—implicitly, if not altogether explicitly—socially accepted. Certainly, some degree of acceptable law-breaking occurs where the penalties are limited and the moral stigma attached to the offense is neither new or unique, nor terribly noteworthy. “Law-abiding” citizens exceed speed limits,

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<sup>82</sup> HARCOURT, *supra* note 4, at 32. Harcourt’s work on market de-naturalization is also rooted in a nuanced argument about the interdependence of *laissez-faire* economic policies and the expansion of the carceral state—a relationship he terms “neoliberal penalty” and which rests in many ways on the same sort of naturalist rhetoric and ideology examined in this article. See generally *id.* at 37–40.

<sup>83</sup> See Jeanne M. Kempthorne, *Naked and Arbitrary Power: Judicial Judgments of Acquittal*, 48 BOS. B. J. 30, 30 (Sept./Oct. 2004) (highlighting the distribution of power that provides balance to the criminal justice system).

<sup>84</sup> Alex Kozinski & Misha Tseytlin, *You’re (Probably) A Federal Criminal*, in IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE “THE AIMS OF THE CRIMINAL LAW” 44 (Timothy Lynch ed., 2009).

<sup>85</sup> See generally NICOLA LACEY, *THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES*, at xv–xvi (2008) (claiming that leniency is seen as “politically impossible”).

commit traffic violations, and may well commit other ticketable offenses that might not raise an eyebrow from friends, neighbors, or prospective employers. But what about transgressions that carry heavy criminal penalties? Massive numbers of the population, including the last three U.S. Presidents,<sup>86</sup> have used illegal drugs.<sup>87</sup> Generations have come of age burning CDs and DVDs, downloading and trading movies, and viewing copyright protections as an inconvenience as opposed to a clear legal directive.<sup>88</sup> At the same time that mass cultural narratives of naturalized criminal justice proliferate,<sup>89</sup> images of drug use, underage drinking, impaired driving, and potentially criminal youthful sexual activity abound,<sup>90</sup> often unaccompanied by any sort of moral opprobrium.<sup>91</sup>

Am I suggesting that we cannot distinguish between a marijuana user and a murderer? Of course not. It would be disingenuous to conclude that because we do not take every law seriously as a moral directive, we cannot take any law seriously as such. Nevertheless, the view of criminal law as unambiguous and rooted in sharp moral binaries and designed to punish and prosecute inexcusable deviance simply does not jibe with a social context in which criminal behavior—behavior punishable with incarceration—is treated as mundane:

We are used to thinking of “criminals” as a small subset of the population,” argues Ilya Somin.<sup>92</sup> In that happy state of

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<sup>86</sup> See Drew Harwell, *Obama's Drug Use Debated*, CBS NEWS (Feb. 11, 2009, 3:26 PM), [http://www.cbsnews.com/2100-502323\\_162-3823725.html](http://www.cbsnews.com/2100-502323_162-3823725.html) (discussing the drug use of Presidents Obama, Clinton, and Bush).

<sup>87</sup> See, e.g., EXEC. OFFICE OF THE PRESIDENT, OFFICE OF NAT'L DRUG CONTROL POLICY, DRUG POLICY INFORMATION CLEARINGHOUSE FACTSHEET: DRUG USE TRENDS 1-2 (October 2002), available at <http://www.policyarchive.org/handle/10207/bitstreams/20719.pdf> (showing the reported rate of drug use among the general population); Kozinski & Tseytlin, *supra* note 84, at 46-47 (estimating that nearly half of the adult population will try illicit drugs at some point).

<sup>88</sup> See, e.g., Bootie Cosgrove-Mather, *Poll: Young Say File Sharing OK*, CBS NEWS (Feb. 11, 2009, 8:29 PM), <http://www.cbsnews.com/stories/2003/09/18/opinion/polls/main573990.shtml> (stating that up to fifty-eight percent of Americans think that sharing music electronically is acceptable).

<sup>89</sup> See discussion *supra* Part II.A.

<sup>90</sup> See, e.g., HAROLD & KUMAR GO TO WHITE CASTLE (New Line Cinema 2004) (telling the story of two affluent, successful young men who drive around New Jersey and smoke a great deal of marijuana); SUPERBAD (Columbia Pictures 2007) (portraying high school students who drink, use fake driver's licenses, and engage in sexual activity).

<sup>91</sup> See generally JOHANNA BLAKLEY & SHEENA NAHM, NORMAN LEAR CTR., THE PRIMETIME WAR ON DRUGS & TERROR 8 (2011), available at <http://www.learcenter.org/pdf/Drugs&Terror.pdf> (“In TV storylines about the War on Drugs, drug users are not arrested and drug suspects are often portrayed as morally ambiguous or even heroic.”).

<sup>92</sup> Ilya Somin, *If You're Reading This, You're Probably a Federal Criminal*, VOLOKH

affairs, criminal law threatens only a small number of people, most of whom have committed genuinely heinous acts . . . [b]ut when we are all federal criminals, perfectly ordinary citizens can easily get swept up in the net . . . .<sup>93</sup>

This schizophrenia between the one-way ratchet of criminal law and the expanding portion of the population that occupies liminal spaces or is somehow connected to criminality occasionally boils down to the surface of public consciousness. The recent death of Aaron Swartz, the young internet activist whose federal prosecution is believed to have precipitated his suicide, is one such powerful example.<sup>94</sup> Swartz, a well-known figure in the internet and cyberlaw communities, was charged with violating the Computer Fraud and Abuse Act (“CFAA”)<sup>95</sup> for gaining access to the Massachusetts Institute of Technology Network and downloading numerous academic articles.<sup>96</sup> Under CFAA, a statute enacted prior to the internet’s widespread usage, Swartz faced up to thirty-five years in prison because he had “intentionally accesse[d] a computer without authorization or exceed[ed] authorized access,” and, in the process, “obtain[ed] information from [a] protected computer.”<sup>97</sup>

Criticism of the prosecutors involved and CFAA in general rained down furiously.<sup>98</sup> Some critics focused on the fact that Swartz faced

CONSPIRACY (July 27, 2009 12:21 AM), <http://www.volokh.com/2009/07/27/if-youre-reading-this-youre-probably-a-federal-criminal>.

<sup>93</sup> *Id.*

<sup>94</sup> See Stephen L. Carter, *The Overzealous Prosecution of Aaron Swartz*, BLOOMBERG (Jan. 17, 2013), <http://www.bloomberg.com/news/2013-01-17/the-overzealous-prosecution-of-aaron-swartz.html>; Lawrence Lessig, *Aaron’s Law: Violating a Site’s Terms of Service Should Not Land You in Jail*, ATLANTIC (Jan. 16, 2013, 4:38 PM), <http://www.theatlantic.com/technology/archive/2013/01/aarons-law-violating-a-sites-terms-of-service-should-not-land-you-in-jail/267247/>.

<sup>95</sup> See 18 U.S.C. § 1030 (2006).

<sup>96</sup> Lessig, *supra* note 94.

<sup>97</sup> 18 U.S.C. § 1030(a)(2)(C). Various articles have described in detail the prosecution of Aaron Swartz. See generally James Boyle, *The Prosecution of Aaron Swartz: A Reply to Orin Kerr*, HUFFINGTON POST (Jan. 18, 2013, 10:11 PM), [http://www.huffingtonpost.com/james-boyle/prosecution-aaron-swartz\\_b\\_2508242.html](http://www.huffingtonpost.com/james-boyle/prosecution-aaron-swartz_b_2508242.html); Carter, *supra* note 94; Orin Kerr, *The Criminal Charges Against Aaron Swartz (Part 1: The Law)*, VOLOKH CONSPIRACY (Jan. 14, 2013, 2:50 AM), <http://www.volokh.com/2013/01/14/aaron-swartz-charges>; Orin Kerr, *The Criminal Charges Against Aaron Swartz (Part 2: Prosecutorial Discretion)*, VOLOKH CONSPIRACY (Jan. 16, 2013, 11:34 PM), <http://www.volokh.com/2013/01/16/the-criminal-charges-against-aaron-swartz-part-2-prosecutorial-discretion/>; Lawrence Lessig, *Prosecutor as Bully*, TUMBLR (Jan. 12, 2013), <http://lessig.tumblr.com/post/40347463044/prosecutor-as-bully>; Tim Wu, *How the Legal System Failed Aaron Swartz—And Us*, NEW YORKER (Jan. 14, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/01/everyone-interesting-is-a-felon.html>.

<sup>98</sup> See, e.g., Carter, *supra* note 94 (“The prosecution of Swartz was ridiculous.”); Lessig, *supra* note 94 (contending that the government’s actions in prosecuting Swartz was “absurd—especially in a world where prosecutors can’t be trusted to make *reasoned and proportionate*

the possibility of being branded a felon and incarcerated for decades for breaching a contract and exceeding the terms of a user agreement—the sort of behavior that is a quotidian part of life in the internet age.<sup>99</sup> That is, Swartz faced state violence and societal condemnation for (a more extreme version) of a transgression commonly committed by “law abiding citizens” as a part of day-to-day web browsing. Others, however, emphasized that Swartz’s prosecution was not unusual in a world with expansive prosecutorial discretion and public hunger for high profile prosecutions.<sup>100</sup>

Like the Swartz prosecution, the Innocence Movement, powered by heart-wrenching stories of individuals forced to endure incarceration, public condemnation, and life as convicts for crimes that they did not commit, provides another example of public discomfort with the realities of the criminal justice system.<sup>101</sup> In much the same way as the stories of crime victims and their families who have suffered terrible loss but have not experienced some sort of satisfactory closure by witnessing retribution, the accounts of innocent people snatched from their lives and banished to the darkest recesses of the criminal justice system have captivated the media’s imagination.<sup>102</sup>

What is all too easy to disregard, however, is the necessary

*judgments* about who should be labeled a felon and who should not” (emphasis added)).

<sup>99</sup> See, e.g., Carter, *supra* note 94.

Consider: You’re sitting in your office, when suddenly you remember that you forgot to pay your Visa bill. You take a moment to log on to your bank account, and you pay the bill. Then you go back to work. If your employer has a policy prohibiting personal use of office computers, then you have exceeded your authorized access; since you went to your bank website, you have obtained financial information.

Believe it or not, you’re now a felon. The likelihood of prosecution might be small, but you’ve still committed a crime.

*Id.*

<sup>100</sup> See, e.g., David Boeri, *Retired Federal Judge Joins Criticism Over Handling of Swartz Case*, WBUR (Jan. 16, 2013), <http://www.wbur.org/2013/01/16/gertner-criticizes-ortiz-swartz>; Boyle, *supra* note 97; Carter, *supra* note 94.

<sup>101</sup> See generally BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 5–6 (2011) (discussing that human error *does* occur within the criminal justice system and more than 250 innocent people in the last thirty years have been exonerated by post-conviction DNA testing); JIM DWYER et al., *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* 315–16 (2003).

<sup>102</sup> See, e.g., Jenée Desmond-Harris, *Meet 22 People Exonerated in 2012*, ROOT (Dec. 18, 2012, 1:02 PM), <http://www.theroot.com/buzz/meet-22-people-exonerated-2012> (profiling three men, wrongfully convicted, who were later exonerated); Rich Phillips, *Man Exonerated, Freed From Prison After 35 Years*, CNN (Dec. 17, 2009, 3:36 PM), <http://edition.cnn.com/2009/CRIME/12/17/florida.dna.exoneration/index.html> (describing a man in Florida being exonerated—after having served thirty-five years, wrongly convicted of kidnapping and raping a nine-year-old boy); THE CENTRAL PARK FIVE (Florentine Films 2012); THE THIN BLUE LINE (Miramax Films 1988).

relationship between the naturalized view of criminal law that takes as its concern the specter of the “guilty going free” and other views of criminal law that use a concern for “the innocent being convicted.”<sup>103</sup> In a political climate where prosecutors, legislators, and perhaps even judges feel that they have a public mandate to ensure public safety and catch criminals whatever the cost, it is inevitable that there will be costs.

We see this occasionally in the response to youth sexuality: whether dealing with statutory rape, “sexting,” or other sexualized behavior by minors, lawmakers tend to pass harsh laws designed to deter or punish those who might prey on young people.<sup>104</sup> Yet, like so many other spaces where the blunt instrument of criminal law is used in an effort to shape or reform social policy, unintended consequences abound, and those who are caught in the prosecutor nets are not necessarily the intended targets or do not look like the offenders whom we see on *Law and Order*.<sup>105</sup> Stories of students punished for sending risqué photos to one another,<sup>106</sup> or the high

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<sup>103</sup> It is worth noting that the Innocence Movement or concern for wrongful convictions need not be accompanied by a particular attitude towards a natural or de-naturalized criminal justice system. That is, this focus may actually be accompanied by the same sorts of moral clarity and lack of ambiguity discussed above: there are clearly guilty people and clearly not guilty ones. See Findley, *supra* note 1, at 1158–63. The job of the criminal justice system is to draw clear lines between society and law breakers, but we (as a society concerned with The Rule of Law) should be concerned about making sure that the system operates as it should and the innocent are not subjected to state violence. On the other hand, however, this focus on wrongful convictions may take on the form of a broader systemic critique, focused on deeper flaws with the legal and political institutions responsible for drawing and enforcing lines between the guilty and the innocent. See *id.*

<sup>104</sup> See, e.g., Norman Arey, *Teen’s Sentence a Shock to Jurors*, ATLANTA J. CONST., June 2, 2003, at C1 (discussing Georgia’s mandatory ten-year minimum sentence without parole for an aggravated child molestation conviction).

<sup>105</sup> This critique finds substantial purchase in critical feminist and post-feminist literature on the negative consequences of tough-on-crime feminism. See, e.g., JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 6, 17–22 (2006) (arguing that too narrow a focus on different feminist theories obstructs the rightful focus on real-world problems facing women); JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 6 (2009) (showing that domestic violence enforcement has led to unintended consequences for female victims); Gruber, *supra* note 54, at 791–92 (noting that feminist ideals have gradually become subsumed within the conservative victims’ rights movement); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 649–50 (2009) (arguing that because of mandatory policies, certain women may suffer more harm as a result of prosecuting abusers); Janet Halley et al., *From the International to the Local in Feminist Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006) (discussing the theory of “governance feminism”); Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT’L L. 1 (2008).

<sup>106</sup> See, e.g., *Sexting: Schools, Legislators Debate Punishments for Offenders*, HUFFINGTON POST (Feb. 9, 2011, 9:48 PM), <http://www.huffingtonpost.com/2011/02/09/sexting-schools->

school student incarcerated for child molestation after having sex with a classmate leads to public outcry.<sup>107</sup> “How did we get such unjust results,” critics ask, even as voters continue to elect those who embrace the most extreme attitudes toward criminal punishment.<sup>108</sup>

Consider also the Duke lacrosse rape case. After a black stripper reported that she had been raped at a party hosted by affluent, white students on the Duke University lacrosse team, the Durham, North Carolina community erupted in calls for the aggressive prosecution of the perpetrators.<sup>109</sup> District Attorney Mike Nifong, up for reelection acquiesced, aggressively pursuing indictments and convictions, and eventually bringing charges against three Duke lacrosse players.<sup>110</sup> Eventually, all charges were dropped, Nifong was disbarred for a variety of ethical infractions, and massive civil suits were filed by the three defendants.<sup>111</sup> In the aftermath, media commentators, legal scholars, and others—amidst discussion of the racial and socioeconomic politics that underlay the case<sup>112</sup>—focused on the role of Nifong, concluding that this was a tragic case of a “rush to judgment” and an out-of-control prosecutor.<sup>113</sup>

Nifong is hardly a sympathetic character in this story, but he should be viewed (not entirely unlike the defendants) as collateral damage in our naturalized criminal justice system’s efforts to keep

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legislation\_n\_821047.html.

<sup>107</sup> See, e.g., Rich Cimini, *Dixon Making Most of Second Chance*, ESPN (Nov. 22, 2011), [http://espn.go.com/new-york/nfl/story/\\_id/7269043/new-york-jets-marcus-dixon-found-jail-high-school-now-making-most-nfl-chance](http://espn.go.com/new-york/nfl/story/_id/7269043/new-york-jets-marcus-dixon-found-jail-high-school-now-making-most-nfl-chance) (recounting the story of Marcus Dixon who was convicted under the Georgia Child Protection Act and sentenced to ten years in jail—and noting that “[s]everal members of the jury were reportedly stunned that the sentence was so severe”).

<sup>108</sup> See, e.g., Karin Brulliard, *Approaches to Fighting Va. Gangs are Varied*, WASH. POST, Oct. 7, 2005, at B1 (discussing the 2005 Virginia gubernatorial candidates’ proposals for stricter penalties for gang members, including one proposal that would expand the number of crimes punishable by death).

<sup>109</sup> See STUART TAYLOR JR. & KC JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE* 34–35, 64–65, 87–88 (2007); DON YAEGER & MIKE PRESSLER, *IT’S NOT ABOUT THE TRUTH: THE UNTOLD STORY OF THE DUKE LACROSSE CASE AND THE LIVES IT SHATTERED* 100–01 (2007); Andrew E. Taslitz, *The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press*, 62 HASTINGS L.J. 1285, 1295 (2011).

<sup>110</sup> Susannah Meadows & Evan Thomas, *What Happened at Duke?*, NEWSWEEK, May 1, 2006, at 46, 48–51.

<sup>111</sup> See Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 298 (2007); Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 305–06 (2008).

<sup>112</sup> See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 6–7, 196 n.7, 197 nn.12 & 16 (2007).

<sup>113</sup> Rachel Smolkin, *Justice Delayed*, AM. J. REV., Aug.–Sept. 2007, at 20.

the guilty from going free. If we were to take the easy way out, we could embrace Murphy's critique of the criminal justice system, proclaim that the problem is the existence of lying lawyers, and call it a day. But this approach misses the point that we live in a society that clamors for the heads of criminal defendants, that—as discussed *supra*—is steeped in a cultural and legal discourse in which the accused are usually guilty and all that stands between us and unspeakable evil are prosecutors and law enforcement officers who must be allowed to act swiftly with limited encumbrances. Nifong, in many ways, did what was asked of him. The community called for blood, and the prosecutor—the legal representative of “the People”—did what he could to provide vengeance. And then we were appalled.

Nifong's fall stands as a compelling example of the schizophrenic view of criminal law that naturalization and the “tough on crime” fixation with the guilty going free brings with it. Criminal law becomes a draconian space, unmitigated by concerns for mercy, causes of criminal behavior, or even the ambiguity of guilt; yet, at the same time, people remain shocked when they see the results of this aggressive approach of criminal law. As retired Judge Nancy Gertner observed in the context of the Swartz prosecution,

If the U.S. attorney is going to take credit for every successful prosecution . . . [he] then winds up as “Bostonian of the Year” for these prosecutions . . . .

. . . .

[However, w]hat happens with the press [is] you don't talk about the cases which really reflect this kind of poor judgment. You talk only about the cases that succeed . . . [and t]his is the example of bad judgment [by prosecutors] I saw too often.<sup>114</sup>

The benefits of a carceral state are appealing, but the costs remain staggering<sup>115</sup> and (somehow) continue to shock many of those who endorse the same policies that invite sloppy, over-inclusive criminal enforcement.

By recognizing the fallacy of the naturalized model and by embracing a more nuanced view of the criminal justice system (a

<sup>114</sup> Boeri, *supra* note 100 (quoting Judge Gertner) (internal quotation marks omitted).

<sup>115</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 16–19 (2010) (arguing that mass incarceration actually creates a new caste system, perpetuating racism and continued struggle for African Americans); HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT*, at xxxi, xlv–xlvi (2011) (describing increasing prosecution of behavior generally viewed as commonplace).

view that has allowed for so much of the scholarship that defines the field of criminology),<sup>116</sup> we might enter a more productive political and legal discourse that is more honest about and open to assessments “of the justice of the organizational rules and their distributional consequences.”<sup>117</sup> Of course there are politics at play in the crafting and application of criminal law, but perhaps we would gain something by treating it honestly,<sup>118</sup> by acknowledging that it can be a space of nuance and differing opinions instead of embracing the false clarity that has led to an almost limitless culture of criminalization and incarceration.<sup>119</sup>

As a practical matter, there is no necessary normative outcome of a denaturalizing move. Just because we honestly address the ambiguities in the criminal law, acknowledge that police do not have oracular power, and discuss the costs and benefits of the carceral turn does not mean that a more lenient result will ensue. Critical Legal Studies and Chicago-School law and economics were both arguably descendants of American Legal Realism and its denaturalizing moves, yet the two legal philosophies embraced entirely different normative projects and used similar realist insights to advance very different ends.<sup>120</sup> In the same way, one

<sup>116</sup> See, e.g., DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 3–10 (1990); STEVE HALL, THEORIZING CRIME & DEVIANCE: A NEW PERSPECTIVE 1 (2012) (examining a shift in the theory of criminology in Western society); DRAGAN MILOVANOVIC, CRITICAL CRIMINOLOGY AT THE EDGE: POSTMODERN PERSPECTIVES, INTEGRATION, AND APPLICATIONS 1 (Steven A. Egger ed., 2002) (describing the “postmodern analysis” of criminology—“a radical departure from the modernist framework and assumptions incorporated from the Enlightenment era”); Angela Y. Davis, *Race and Criminalization: Black Americans and the Punishment Industry*, in THE HOUSE THAT RACE BUILT, at 264–78 (Wahneema Lubiano ed., 1998) (discussing the interplay between race and criminalization/incarceration practices and suggesting the need for reform); Phil Scraton & Kathryn Chadwick, *The Theoretical and Political Priorities of Critical Criminology*, in THE POLITICS OF CRIME CONTROL, at 181 (Kevin Stenson & David Cowell eds., 1991) (“The criminal justice process and the rule of law assist in the management of structural contradictions and the process of criminalization is central to such management.”); Jock Young, *The Failure of Criminology: The Need for a Radical Realism*, in CONFRONTING CRIME, at 4, 25–30 (Roger Matthews & Jock Young eds., 1986) (examining mainstream criminology and noting a need for reform); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY 449, 452 (1992) (explaining an emerging concept of criminology, which seeks to “identify, classify, and manage groupings sorted by dangerousness”).

<sup>117</sup> HARCOURT, *supra* note 4, at 32.

<sup>118</sup> See ESTRICH, *supra* note 4, at 8.

<sup>119</sup> See, e.g., White, *supra* note 58, at 705 (“Habitual offender laws . . . [have] bec[om]e more prominent over the last couple of decades, with almost every state, as well as the federal government . . . adopting . . . or reinforcing [these types of laws.]”).

<sup>120</sup> Cf. BERNARD E. HARCOURT, LANGUAGE OF THE GUN: YOUTH, CRIME, AND PUBLIC POLICY 222–26 (2006) (arguing that “leaps of faith” always occur as scholars and researchers attempt to make their data confirm their theory or ideology).

could certainly be—and, indeed, there already are—de-naturalized proponents of tough-on-crime policies. But even the acknowledgment that this is a *choice*, that it is rooted in a broader ideological project as opposed to being either inevitable or a necessary component of caring about the public welfare, is of critical importance. At least with oppositional projects, the cards are on the table. In our naturalized criminal justice system, the hard choices are obscured, and we are left with inevitability and un-contestable “truths.”

#### IV. CONCLUSION

Ultimately, this is an article about decisions and about competing concerns. Perhaps, as William Blackstone, Voltaire, and others have argued, it is worth risking the guilty going free so that the innocent do not go to prison.<sup>121</sup> Or, perhaps, public safety is such an integral value and ensuring its existence is such an essential function of the state that we should be willing to risk wrongful conviction or violation of our civil liberties so that criminals are not able to act with impunity. What I argue and what is too often absent from the naturalized space of discussions about criminal law and criminal justice policy is that this is, in some sense, the choice that we are presented with. Ideally of course the guilty would always be punished and the innocent would always go free and, indeed, one of the goals of a book like this one may well be to try to advance rules and reforms that get us closer to this paradigm. But it is an unlikely outcome.

The framing of these competing views is one of the great problems and the tremendous fallacies driving the legal and cultural discourse on criminal law. The procedural protections of the Warren Court, with its concerns for the rights of criminal defendants, are treated as representing a trade-off between civil libertarian values and the desire to punish the guilty and protect the polity.<sup>122</sup> Our escalating criminal policies and near-obsession with ensuring that the guilty not go free, however, are all too rarely

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<sup>121</sup> See, e.g., *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“[I]t is far worse to convict an innocent man than to let a guilty man go free.”); 4 WILLIAM BLACKSTONE, COMMENTARIES \*358 (“[B]etter that ten guilty persons escape, than that one innocent suffer.”); VOLTAIRE: CANDIDE & ZADIG 150 (Tobias George Smollett trans., Lester G. Crocker ed., Washington Square Press 1962) (“[I]t is better to run the risk of sparing the guilty than to condemn the innocent.”).

<sup>122</sup> See Smith, *supra* note 63, at 1358 (“[T]he Rehnquist Court has distinguished, created exceptions to, and reinterpreted [Warren Court] precedents.”).

treated as a costly trade-off.<sup>123</sup> Yet they are. The choice is not one between law and order and lawlessness. The choice is between two philosophical or ideological understandings of the roles and obligations of the state. Until we recognize these trade-offs, recognize that a powerful police force and lengthy prison sentences are no more natural than the exclusionary rule,<sup>124</sup> the Confrontation Clause,<sup>125</sup> or *Miranda* warnings,<sup>126</sup> we invite further criminalization,<sup>127</sup> greater mass incarceration,<sup>128</sup> and the proliferation of a criminal justice system that is anything but just.

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<sup>123</sup> See Findley, *supra* note 1, at 1208 (discussing how innocence must be defined in an increasingly fallible legal system).

<sup>124</sup> See U.S. CONST. amend. IV.

<sup>125</sup> See *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

<sup>126</sup> See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

<sup>127</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 569 (2001) ("Legislatures' incentive to expand criminal liability has important procedural effects: it reduces prosecutors' incentive to separate guilty defendants from innocent ones.").

<sup>128</sup> See, e.g., Alexander, *supra* note 12, at 12.