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THE THIN BLUE LINE FROM CRIME TO PUNISHMENT

ALICE RISTROPH*

Criminal law scholarship is marked by a sharp fault line separating substantive criminal law from criminal procedure. Philosophical work focuses almost exclusively on the substantive side of that line, addressing adjudicative procedure (the trial process) rarely and investigative procedure (especially police conduct) almost never. Instead, criminal law theorists devote substantial attention to just two questions: what conduct should be criminal, and why is punishment justified? This essay argues that criminal law theory cannot adequately address these favored subjects—the definition of crime and the justification of punishment—without also addressing the enforcement mechanisms that link crimes to punishments. Specifically, philosophers of criminal law cannot continue to ignore the police.

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INTRODUCTION

A line can separate, or it can connect. The contemporary police force is sometimes characterized as “the thin blue line” separating civil order from violent anarchy.¹ In various ways, though, the police also connect civility to

* Professor, Brooklyn Law School. Many of the ideas in this Article served as the basis of a Clough Distinguished Lecture in Jurisprudence at Boston College Law School in March 2015. I am grateful to Paolo Barrozo and Vlad Perju for inviting me to deliver that lecture, and for their feedback on the project in its early stages. Additional thanks to Chad Flanders, Cynthia Godsoe, Zach Hoskins, and Eric Miller for helpful discussions and comments.

¹ After a Dallas prosecutor used the phrase “the thin blue line” in closing arguments at a 1977 trial for the murder of a police officer, filmmaker Errol Morris used the same phrase as

violence. Force is always at the background of police action, so much so that classic sociological descriptions of the police focus on their authority and readiness to use physical force.² If actual incidents of police force seem the exception rather than the rule, that perception is due in part to efforts to narrow the definition of force in the context of policing, excluding ordinary tactics like the use of handcuffs.³ Whatever acts the law labels as force or violence, there should be little doubt that police secure order through threats of superior physical force, and at least sometimes, actual exercises of it.⁴

The thin blue line is a link rather than a divider in another important sense, too. Police connect crimes to punishments: they detect and investigate and sometimes even facilitate offenses; they identify and arrest suspects. Through these activities, police supply prosecutors, courts, and eventually prisons with persons to punish.⁵ Policing is central to the operation of the modern criminal law, and yet, it has long been almost entirely ignored by criminal law theorists.⁶

the title of a documentary about the case. Morris's title seems tongue-in-cheek; the documentary explores claims that police and prosecutorial misconduct caused an innocent man to be sentenced to death for the officer's murder. *THE THIN BLUE LINE* (American Playhouse 1988). The documentary prompted a Texas court to reexamine the case and eventually set aside the conviction. See J. Michael Kennedy & Daniel Cerone, *Conviction Set Aside for Thin Blue Line Character*, L.A. TIMES, March 2, 1989, at A1.

² Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in *THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE* 17, 35 (Herbert Jacob ed., 1974) (“[P]olice work consists of coping with problems in which force may have to be used . . .”) (emphasis omitted).

³ The United States Supreme Court has characterized police use of handcuffs as a use of force, and handcuffs are typically viewed as force if used by a private individual on another person in the course of criminal conduct. See, e.g., *Muehler v. Mena*, 544 U.S. 93, 99 (2005) (referring to the use of handcuffs as a “use of force”); cf. *Pennington v. Rains*, 105 F. App'x 207, 210–211 (9th Cir. 2004) (citing evidence that victim was handcuffed to support a robbery, or theft by force, conviction). But discussions of “police force” usually focus on the use of weapons or the infliction of significant pain. See Alice Ristorph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1213–14 (2017).

⁴ For that reason, analogies between the police and the military are commonplace. “The thin blue line” is a spinoff of “the thin red line,” a phrase once used to describe the British army at the Battle of Balaclava in the Crimean War, and now used more broadly to describe a vulnerable but resolute military unit. See R.B. MOWAT, *NEW HISTORY OF GREAT BRITAIN* 774–75 (1921–1922) (“[T]he 93rd stood firm, a ‘thin red line’ two deep, prepared to die where they stood The Russian cavalry threw itself against the thin red line in vain.”).

⁵ Cf. Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1449–52 (2009) (describing the “obstinacy offense,” or pretextual criminal charges brought to punish disrespect toward the state); *id.* at 1502–07 (discussing ways that police can manufacture such offenses).

⁶ There are a few recent exceptions. See generally Ian Loader, *In Search of Civic Policing: Recasting the ‘Peelian’ Principles*, 10 CRIM. L. & PHIL. 427 (2016); Eric Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, U. CHI. LEGAL. F. 295 (2016). See

That inattention would be regrettable at any moment, but it is especially troubling at this particular historical juncture. American criminal law broadly, and American policing specifically, face a legitimacy crisis.⁷ Mass incarceration, profound racial and socioeconomic disparities, and the burdens of criminal records and collateral consequences, together with high-profile and seemingly unnecessary uses of force by police officers, have prompted deep criticisms from across the political spectrum.⁸ At the same time, reform has been elusive.⁹ Never has it been more urgent to develop normative frameworks to evaluate and inform criminal justice policies. And yet, the philosophy of criminal law has remained narrowly focused on a few questions, and answers, that arose long before the development of the modern police force and long before the current crisis of criminal justice.¹⁰

What are these traditional questions, and familiar answers, that continue to claim scholars' attention? What is the subject of criminal law theory, if not the arc from crime to punishment? It is risky to make generalizations about such an expansive field of study, but I think it is fair to say that criminal law theory tends to focus on *either* crimes *or* punishments in two mostly independent inquiries. About crime, scholars ponder principles of criminalization, general rules of liability, and specific definitions of offenses and defenses.¹¹ About punishment, the usual questions are ones of normative

also Christopher Beauchamp, *Notable Lacunae*, 20 GREEN BAG 2d. 307, 307 (2017) (noting that if a topic "truly is neglected . . . an affirmative citation is metaphysically challenging").

⁷ See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 1 (2011) ("[T]he last half of the twentieth century saw America's criminal justice system unravel."); Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2061 (2017) (referring to "the current policing crisis").

⁸ See, e.g., JOSEPH R. BIDEN JR. ET AL., *SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE* (Inimai Chettiar & Michael Waldman eds., 2015) (featuring essays calling for reform by Joe Biden, Chris Christie, Hillary Clinton, Ted Cruz, Mike Huckabee, Janet Napolitano, and Rand Paul, among others).

⁹ See MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 2 (2015) (examining "the shortcomings of the dominant penal reform strategies" and suggesting that political pathologies are obstacles to meaningful reform); Katherine Beckett et al., *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 238, 253–54 (2016) (studying the growing discourses of criminal justice reform and identifying political, institutional, and cultural barriers to actual change).

¹⁰ See *infra* Part I. As should be clear, I use the phrases "philosophy of criminal law" and "criminal law theory" interchangeably.

¹¹ See generally ANDREW ASHWORTH & JEREMY HORDER, *PRINCIPLES OF CRIMINAL LAW* (7th ed. 2013); JOHN GARDNER, *OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW* (2007); DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

justification: when and how much is punishment justified?¹² Notably, state agents are mostly absent from both kinds of inquiries. Of course, the criminal law theorist hopes that wise legislators will heed his principles of criminalization and that wise sentencers will heed his advice on just punishment. But the agent at the center of most theories of criminalization and most theories of punishment is not a public official, but the wrongdoer: criminal law theory tends to focus on the private actor and ask when his acts should *be criminalized* and how they should *be punished*.¹³ Note the passive voice: it is the voice in which criminal law theory all too often speaks.¹⁴

In order for a crime to be punished, of course, it must be detected, investigated, and prosecuted. Or, to rephrase without the passive voice: in order for the state to punish conduct that it has defined as criminal, public agents must detect, investigate, and prosecute the criminal conduct. Those actions we call the criminal process, usually distinguishing between the investigative process, where police are the most important agents of the state, and the adjudicative process, where prosecutors and judges are the central agents.¹⁵ In legal scholarship (and in the standard law school curriculum), substantive criminal law, investigative procedure, and adjudicative procedure are treated as three separate fields. To the extent that philosophers of criminal law have addressed procedural questions, they have usually focused on adjudicative procedure rather than investigative policing.¹⁶ But by and large,

¹² See e.g., ALAN BRUDNER, PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE (2009); R.A. DUFF, TRIALS AND PUNISHMENTS (1986); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); Joel Feinberg, *The Expressive Function of Punishment*, in DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY (1970); Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968), reprinted in SENTENCING 93 (Hyman Gross & Andrew von Hirsch eds., 1981); see also Mitchell N. Berman, *Punishment and Justification*, 118 ETHICS 258, 258 (2008) (noting that the need to justify punishment is the “first premise” of most theorists writing on the subject).

¹³ See, e.g., Michael S. Moore, *A Tale of Two Theories*, 28 CRIM. JUST. ETHICS 27, 31 (2009) (“[P]rima facie, all moral wrongs culpably done should be criminalized.”) (emphasis in original); Jim Staihar, *Proportionality and Punishment*, 100 IOWA L. REV. 1209, 1211 (2015) (offering a theory of when and why an offender should “be punished”).

¹⁴ See Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1041 (2014).

¹⁵ See, e.g., Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 146–47 (2011) (distinguishing investigatory process and adjudicative process).

¹⁶ The most important work in this area is probably Antony Duff et al.’s three-volume *The Trial on Trial*, which explicitly identifies adjudicative procedure as the link between crime and punishment. See 1 ANTHONY DUFF ET AL., THE TRIAL ON TRIAL: TRUTH AND DUE PROCESS (2004); 2 ANTHONY DUFF ET AL., THE TRIAL ON TRIAL: JUDGMENT AND CALLING TO ACCOUNT (2006); 3 ANTHONY DUFF ET AL., THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL (2007). Notwithstanding Duff’s influential study, which is discussed further in Part I below, procedural issues remain at the fringe of the philosophy of criminal law. See generally Paul Roberts, *Groundwork for a Jurisprudence of Criminal Procedure*, in

even the inquiries into adjudicative procedure are marginal discussions, and criminal law theory focuses primarily on the substantive criminal law. Philosophers, in short, have had relatively little to say about what transpires in the days (or months or years) that pass between the commission of an offense and the eventual imposition of punishment.

This Article argues for, and begins to develop, a new and more holistic approach to criminal law theory. My claim is not simply that those interested in the philosophy of criminal law should add a new project—theories of policing—to their endeavors.¹⁷ Instead, I suggest that policing and the law of investigative procedure are central (but too often ignored) components of the things that criminal law theorists already study: crimes and punishments. An adequate philosophical account of principles of criminalization must include enforcement considerations: what powers do we give law enforcement officials by criminalizing a given type of conduct? Regrettably, theorists have treated the question of what should be criminal as a question about what conduct is blameworthy, or what conduct we would like to wish out of existence. But the criminal law is not a “magic wand,” as Doug Husak has put it; it doesn’t make harmful or wrongful conduct disappear.¹⁸ To criminalize is to authorize state agents to use force and coercion against persons suspected or convicted of the prohibited conduct, and a theory of criminalization must evaluate the role of these official enforcers.

Similarly, an adequate philosophical defense of punishment must address the enforcement process that brings a suspect to his punishers. To evaluate the legitimacy of punishment for a given defendant, we must ask not just what the defendant has done, but also whether the state has identified, prosecuted, and convicted the defendant within the bounds of legitimate state power. The constable’s blunder, in other words, may well be grounds for the criminal to go free.¹⁹ But to see that principle (or even to argue against it),

PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 380 (R.A. Duff & Stuart P. Green eds., 2011) (“To the best of my knowledge, there has never been any grand conspiracy to keep Criminal Law Theory pure and uncontaminated by criminal procedure scholarship. Procedural issues have simply been ignored by the vast majority of card-carrying criminal law theorists.”).

¹⁷ Philosopher John Kleinig has written notable studies of policing. See generally JOHN KLEINIG, *THE ETHICS OF POLICING* (1996). Elsewhere in criminal law theory, policing occasionally receives brief scrutiny as part of a larger survey of criminal justice issues. See generally ANDREW ASHWORTH & MIKE REDMAYNE, *THE CRIMINAL PROCESS* (4th ed. 2010); see also JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 106–15 (1990); LUCIA ZEDNER, *CRIMINAL JUSTICE* 126–38 (2004).

¹⁸ Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & PHIL. 437, 469 (2004).

¹⁹ In an oft-quoted critique of the exclusionary rule, Justice Cardozo complained that it allowed “the criminal . . . to go free because the constable has blundered.” *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926). Cardozo, and most of those who have repeated his quip,

criminal law theory must follow the thin blue line.

Part I of this Article explores briefly the intellectual division of labor that has isolated the study of procedure from the philosophy of criminal law. Part of the problem, I suggest, has been inadequate attention to the state and the various state actors that make punishment happen. The Article then elaborates on some specific implications of a more integrated approach that places criminal law in political context, in part by drawing upon political theory and its analysis of state institutions. Part II argues that consideration of police authority is essential to principles of criminalization. For example, a great deal of currently prohibited conduct should probably be decriminalized because the costs of enforcement are too high. Part III examines the relationship between police authority and punishment theory. When punishment theory focuses on the state as the agent of punishment, rather than looking only at the target of punishment—the criminal—it becomes clear that rules of investigative procedure, like the requirements of legality or fair trial or proof beyond a reasonable doubt, serve as conditions for legitimate punishment.²⁰

The philosophy of criminal law could, and should, be far more relevant to twenty-first century discussions of overcriminalization, mass incarceration, police violence, racial bias, and the possibilities for reform. I suspect that the particular implications addressed in this essay are but a sample of the new directions criminal law theorists could take, if they would be honest about the institutions they are supposedly theorizing. Criminal law is not self-executing.²¹ It does not operate independently of its enforcers, and so the theorist of criminal law must address the agents and practices of law enforcement.

I. THE PROCESS-THEORY DIVIDE

Whether criminal law theory neglects policing or other aspects of the criminal process depends, of course, on what counts as criminal law theory.

assumed rather than argued for the proposition that the proper designation of a person as a “criminal,” and the legitimate punishment of that person, are not dependent on a blunder-free investigation.

²⁰ See Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1605–10 (2015); Alice Ristroph, *Conditions of Legitimate Punishment*, in *THE NEW PHILOSOPHY OF CRIMINAL LAW* 79–95 (Flanders & Hoskins eds., 2016).

²¹ Criminal law is not self-executing, nor is it self-evident. In other works, I have emphasized the folly of naturalism in criminal law theory—naturalism understood as the claim that the substantive prohibitions of criminal law are determined by natural law principles, universally shared moral intuitions, or some other extra-legal standard. See, e.g., Alice Ristroph, *The Definitive Article*, U. TORONTO L.J. 140, 149–54 (2018).

The participants in the field have tended to frame their inquiries broadly.²² Much of the work in this field is philosophical, in that it employs the conceptual and analytical approaches of philosophy, but a doctorate in philosophy is hardly a requirement. In a typically inclusive characterization, Nicola Lacey defined criminal law theory as “any relatively systematic attempt to explicate the social institution of criminal law.”²³ The relationship between criminal law doctrine and criminal law theory is complex: theorists often seek to explain or evaluate existing doctrinal rules, but they usually address general principles and broad concepts rather than the minutiae of positive law in a given jurisdiction. The field of criminal law theory includes, in Lacey’s elaboration,

not only work focused on the structure of the criminal law doctrine but also work addressed to the broader questions of criminalisation and penalty; the actual or proper subject matter of criminal law and its classification; the role of the state in drawing on its power to criminalise; the justification for state punishment in general or in its particular forms.²⁴

Notably absent from Lacey’s list (which is unusually and perhaps unduly generous in its identification of inquiries into the state as standard fare in criminal law theory)²⁵ is the law of criminal enforcement—the procedural steps that take an offender from crime to punishment. According to one recent historical study, William Blackstone deliberately and influentially separated “procedural technicalities” from the definitions of crimes, labeling only the latter as “the criminal law.”²⁶ Theorists have mostly accepted this distinction. The few criminal law theorists to address criminal procedure usually begin as I do here: by bemoaning their isolation and regretting theorists’ general indifference and inattention to criminal procedure.²⁷

²² See, e.g., Antony Duff, *Introduction*, in *PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE* 1 (1998) (describing an inclusive approach to his edited collection that did not “worry[] too much about whether the writers or their essays would count as ‘philosophical’ in a narrow professional sense”).

²³ Nicola Lacey, *Contingency, Coherence, and Conceptualism: Reflections on the Encounter between ‘Critique’ and ‘the Philosophy of Criminal Law*, in *PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE*, *supra* note 22, at 19.

²⁴ *Id.* at 12.

²⁵ Lacey is, of course, herself a distinguished and influential criminal law theorist, and her work has been unusually attentive to the role of the state and the questions of political theory. For example, she has argued that punishment must be theorized “within the context of an integrated political philosophy” and “cannot be treated as a discrete, isolated political and moral problem.” NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* xi (1988).

²⁶ LINDSAY FARMER, *MAKING THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL ORDER* 66 (2016).

²⁷ See Roberts, *supra* note 16, at 380.

Still, more specification is needed to defend a claim that criminal law theory neglects criminal procedure. We have from Lacey a rough and broad account of criminal law theory; we should specify also what counts as criminal procedure. Commentators typically use this term to capture two different but related stages of the path from crime to punishment. First, criminal procedure includes investigative procedure—the processes by which the police detect crimes, gather evidence, and take suspects into custody.²⁸ Second, criminal procedure includes adjudicative procedure—the legal process through which prosecutors bring and pursue charges and courts adjudicate them.²⁹ Both kinds of procedure get less attention from criminal law theorists than “substantive” questions of crime definition and punishment, but the neglect of investigative procedure is far more pronounced. The trial is, after all, a far older and more established institution than the modern police force. At least since Jeremy Bentham and through the contemporary work of Antony Duff, adjudicative procedure (especially trial procedure) has occasionally gained the philosopher’s attention.³⁰

Across a number of works, Antony Duff has argued that the criminal trial serves important moral and political functions.³¹ A trial is not exclusively or even primarily a quest for truth, at least as truth-seeking is ordinarily understood by criminal law scholars. The trial is instead a forum to assess responsibility, and that assessment is a moral inquiry and not strictly a question about what facts transpired. Through adjudicative procedures, the community calls a defendant to answer allegations of wrongdoing. In the trial, the defendant should not be a mere bystander, a voiceless object of assessment. Instead, the trial is a forum in which the community can address the defendant as a rational and responsible agent and expect him to respond as such. In Duff’s work, the theory of the trial is integrated with the theory of punishment: after a trial calls a defendant to answer for wrongdoing and the defendant fails to provide a satisfactory defense, punishment calls the defendant to account for his actions.³²

One of the distinctive, and welcome, features of Duff’s work is its

²⁸ See Simon, *supra* note 15, at 146–47.

²⁹ *Id.*

³⁰ See generally II JEREMY BENTHAM, *Principles of Judicial Procedure, with the Outlines of a Procedure Code*, in WORKS OF JEREMY BENTHAM 1–188 (J. Bowring ed., 1837). Procedural concerns are also central to theories of restorative justice, but again the focus is adjudicative procedure (or alternatives to adjudication) rather than investigative procedure.

³¹ See R. A. DUFF, TRIALS AND PUNISHMENTS 99–143 (1986); see generally 3 ANTONY DUFF, THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL (2007) [hereinafter DUFF, THE TRIAL ON TRIAL]; R. A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW (2008) [hereinafter DUFF, ANSWERING FOR CRIME].

³² See generally DUFF, THE TRIAL ON TRIAL, *supra* note 31.

explicit engagement with the state.³³ A system of criminal law is a creation of a political community. Accordingly, criminal law theory should be approached as a branch of political theory. As a field, political theory is hardly indifferent to individuals—many specific political theories view the human individuals as temporally and normatively prior to any organized political community. But the field of political theory does not limit its inquiries to questions about human individuals. It is deeply concerned with the state, by which I mean the complicated array of public offices and institutions that govern a political community. Criminal law is the product of a state, and criminal law theory must concern itself with the state and not solely with the individual wrongdoer. If we understand criminalization and punishment as state activities, the important conceptual questions about these activities will include a number of questions about the nature and scope of police authority.

Curiously, the state's role in making and enforcing criminal law may have become obscured at the very moment that the state claimed *exclusive* authority for criminal law. The concept of crime is ancient, but the idea that crimes are uniquely public wrongs, to be identified as wrongs by the state and punished only by the state, arose only in the late eighteenth century. In an important recent book, Lindsay Farmer identifies Blackstone as the founding father of the concept of criminal law who still structures inquiries in criminal law theory today. According to Farmer, Blackstone offered the first “concise account of the [criminal] law as a body of rules unified by a common aim and conceptual structure.”³⁴ The *Commentaries* unified a diverse array of crimes that had been handled by different courts, separated substantive law from criminal procedure, and offered “a new taxonomy of crimes, articulated around the unifying concept of the public wrong.”³⁵ This last concept is of particular and enduring importance. It preserved the sense of moral violation that characterized much earlier understandings of crimes, but it made the state into the violated entity and gave the state (rather than an individual victim or his family) the right of reprisal.

The concept of crime as public wrong was not Blackstone's only influential and enduring contribution. His *Commentaries* also described criminal law almost wholly in terms of what we now call “substantive”

³³ See, e.g., DUFF, *ANSWERING FOR CRIME*, *supra* note 31, at 11 (noting that normative legal theory “depends on political theory—on an underlying normative conception of the state and its proper relationship to its inhabitants,” and setting forth the basic conception of the state that informs his own argument).

³⁴ FARMER, *supra* note 26, at 66.

³⁵ *Id.*

conduct rules, distinguishing them from “procedural technicalities.”³⁶ Substantive criminal prohibitions are widely applicable, and most often applied to private individuals, while the rules of criminal procedure most directly constrain state officials. Thus, a substance/procedure dichotomy, especially one that becomes a hierarchy with substance treated as more important, likely reinforces the view that private actors’ conduct should be the primary object of scrutiny in criminal law theory.

The mere observation that the substance/procedure dichotomy is historically contingent is a valuable antidote to a tendency of philosophers to treat criminal law as relatively stable across place and time. Theories of adjudicative procedure, including Duff’s work on criminal trials, are not quite ahistorical, but neither are they enmeshed in historical—or jurisdictional—specificity. Judges, courtrooms, and trials are ancient and venerable institutions, as noted above. Their contemporary incarnations share important dimensions with the courts that drew Bentham’s attention in the nineteenth century. Indeed, Duff’s account of the political functions of a trial could be applied to the trial of Socrates in Athens in 399 B.C. Was Socrates not called to answer for his alleged offenses (corrupting the youth), and punished only after his answer, or apology, was deemed insufficient?³⁷ The theorist who tackles trial procedure is thus not bound by the empirical details of a particular time and place. He can appeal to concepts as broad, as familiar, and as potentially universal as the concepts of crime and punishment themselves. Of course, as Duff acknowledges, criminal trials are fading from use in the twenty-first century; this reality is particularly stark in the United States.³⁸ There is thus some irony in the recent philosophical attention to the criminal trial, but perhaps we should expect by now that the owl of Minerva will fly only at dusk.³⁹

³⁶ “Procedural technicalities” is a modern phrase, used by Farmer to describe Blackstone’s efforts. *See id.* But several commentators trace the substance/procedure distinction to Blackstone or his student Jeremy Bentham. *See, e.g.,* Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 804–06 (2010); D. Michael Risinger, “Substance” and “Procedure” Revisited with Some Afterthoughts on the Constitutional Problems of “Irrebuttable Presumptions,” 30 UCLA L. REV. 189, 191–92 (1982).

³⁷ *See generally* I.F. STONE, *THE TRIAL OF SOCRATES* (1988).

³⁸ *See* Antony Duff, *A Criminal Law We Can Call Our Own?*, 111 NW. U. L. REV. 1491, 1498 (2017); Gregory M. Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609, 611–12 (2016) (discussing rarity of criminal trials and the prevalence of plea bargaining).

³⁹ The German philosopher Hegel famously doubted that humans could ever gain philosophical understanding of their own practices in time to reform them:

A further word on the subject of *issuing instructions* on how the world ought to be: philosophy, at any rate, always comes too late to perform this function When

There is thus some attention in criminal law theory to adjudicative procedures, though this attention is primarily focused on trials rather than the specific procedure that resolves most actual cases today—plea bargaining.⁴⁰ There is almost no attention given to investigative procedure, and one possible explanation is that investigative procedure is not a topic well suited to the field’s cross-jurisdictional, ahistorical aspirations. In comparison to courts and trials, police forces are relatively recent developments, and the specific rules governing police activity can vary considerably from one modern legal system to the next.⁴¹ In the United States, investigative procedure is largely, though not exclusively, a matter of federal constitutional law. Judicial interpretations of a few specific constitutional provisions generate minimum standards for police officers. And this field of law is itself of relatively recent vintage, with many key principles or concepts originating in judicial opinions decided in the last half-century. Thus, theorizing American investigative procedure might be viewed as a project in American constitutional theory—a worthy undertaking, maybe, but one very different from the work of criminal law theorists.⁴²

philosophy paints its grey in grey, a shape of life has grown old, and it cannot be rejuvenated, but only recognized . . . the owl of Minerva begins its flight only with the onset of dusk.

G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 23 (Nisbet & Wood trans., 1991).

⁴⁰ For a thoughtful theoretical analysis of plea bargaining, albeit one probably too focused on empirical psychological research to be counted as a work in the philosophy of criminal law, see Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 *GA. L. REV.* 407, 409–11 (2008). Recent work by Joshua Kleinfeld gestures at a philosophical critique of plea bargaining, one that may elaborate the already familiar complaints that plea bargaining gives prosecutors too much power and juries—as representatives of the community—too little. See Joshua Kleinfeld, *Three Principles of Democratic Justice*, 111 *Nw. U. L. Rev.* 1455, 1484–85 (2017).

⁴¹ See, e.g., CLIVE EMSLEY, *THE GREAT BRITISH BOBBY: A HISTORY OF BRITISH POLICING FROM THE 18TH CENTURY TO THE PRESENT* 26–27 (2010); LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 27–28, 69 (1993). Although specific rules of procedure vary by jurisdiction, it is possible to generalize and identify a number of common principles. Forty years ago, Mirjan Damaska distinguished between a hierarchical model of authority and a coordinate model, associating the former with criminal procedure in continental Europe and the latter with Anglo-American criminal procedure. See Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 *YALE L.J.* 480, 481–82 (1975). A somewhat more recent comparative study contrasts U.S. law to that of England, France, and Germany. See Christopher Slobogin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, 22 *MICH. J. INT’L L.* 423, 424 (2001).

⁴² In actuality, the provisions of the United States Constitution that govern both investigative and adjudicative procedure have been mostly neglected by *soi-disant* constitutional theorists, so that “constitutional law” is one field and “criminal procedure” is another, with relatively little overlap between the two. For a discussion of this gap, see Louis

It remains unclear how much we should indulge or perpetuate the ahistorical, cross-jurisdictional aims of criminal law theory.⁴³ But even if there exist core concepts of crime and punishment that transcend time and place, the implementation of these concepts in the contemporary world is intrinsically bound up with particular types of state actions, including not only adjudication but also the activity of policing. And even if the precise regulations for police vary by country, certain core questions about police functions recur across many jurisdictions. Thus, the criminal law theorist has work to do on these topics. Across industrialized democracies, police investigate crimes and apprehend suspects. To accomplish these goals, they may have varying degrees of authority to search homes, to ask questions, to eavesdrop, to use deception, or to use force. How much authority they should have is, I suggest, a central question that criminal law theory should tackle. It is a question that deserves attention in its own right, insofar as criminal law theory is a branch of political theory and an examination of the nature and limits of political power.⁴⁴ But the scope of police authority is also an important dimension of two issues that already occupy much of the field of criminal law theory: criminalization and punishment. I shall say more about the ways in which policing bears upon each of these subjects in the next two Parts. Before taking up those questions, however, I briefly consider a missed opportunity in twentieth-century criminal law theory.

One notable work addressed criminalization, punishment, and investigative procedure all in one package, but its connections between procedure and other issues in criminal law theory have been overlooked by most readers. Herbert Packer's 1968 book, *The Limits of the Criminal Sanction*, was an early complaint about "overcriminalization," before that specific term was widely used.⁴⁵ Packer argued that society resorted to

D. Billionis, *Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice as Constitutional Law*, 52 UCLA L. REV. 979, 986–89 (2005). For an intriguing attempt to bridge it, see Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 103–12 (1988).

⁴³ See Nicola Lacey, *Philosophy, History, and Criminal Law Theory*, 1 BUFF. CRIM. L. REV. 295, 308–09 (1998) (questioning "the autonomy of philosophy" and arguing for a "contextual method" in which "criminal law theory [is] a task of social theory of which historical method is a central part").

⁴⁴ Although Mirjan Damaska's seminal work on comparative criminal procedure has not been embraced within the criminal theory canon, perhaps it should be. From a standpoint more sociological than philosophical, Damaska sought to show the ways in which different procedural approaches reflected differences in political culture. See Damaska, *supra* note 41, at 481 ("[D]ivergences in procedural arrangements are, to a considerable extent, related to larger divergences in the conception of the proper organization of authority characteristic of the Continent and the English-speaking world.").

⁴⁵ HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

criminal prohibitions far too often, even as he sought to defend the basic legitimacy of criminal law from philosophical critique.⁴⁶ Packer was not a philosopher, though he read and relied upon thinkers such as Bentham and Mill, and his book is addressed to “the Common Reader” as an argument about sound criminal justice policy.⁴⁷ But I don’t think there can be any doubt that Packer’s own work counts as criminal law theory. This is clearest, perhaps, in the first of the three parts of the book, which offered a theory of punishment and basic principles of criminalization. The second part of the book contrasted two models of the criminal process, not as a comparative study of different jurisdictions but as an effort to elaborate two normative visions competing within American law.⁴⁸ Importantly, the third and final part applied the “constraints of rationale and process” described earlier in the book and argued for specific limitations on the substantive criminal law.⁴⁹ That is, Packer used both the traditional fodder of criminal law theory and an analysis of criminal procedure to develop his account of what should properly be criminal.

Unfortunately for the history of criminal law scholarship, the reflections on investigative and adjudicative procedure in the middle part of Packer’s book had been published previously as an independent article, divorced from his inquiries into principles of criminalization and limitations on punishment.⁵⁰ And that is how his ideas have been received and understood: he is recognized for a groundbreaking effort to identify the values underlying various rules of criminal procedure, and a separate, unrelated (and unremarkable) effort to articulate a theory of criminalization and a theory of

⁴⁶ *Id.* at 364.

⁴⁷ *See id.* at 4.

⁴⁸ Packer surveyed both investigative and judicial procedure and distinguished between a Crime Control model, in which criminal procedures should be designed to remove innocent suspects from the process as quickly as possible and ferry all others to conviction and punishment as quickly as possible, and a Due Process model, in which criminal procedures should limit state power and establish repeated opportunities for judicial determination of both legal and factual guilt. *See id.* at 154–73.

⁴⁹ *Id.* at 4.

⁵⁰ *See generally* Herbert Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

punishment.⁵¹ The third part of his book has dropped from view altogether.⁵² Perhaps *The Limits of the Criminal Sanction* does not make explicit enough the connection between its middle chapters and the more familiar philosophical inquiries that begin and end the book. Perhaps if Packer had lived a bit longer after the book's publication, he might have forced more attention to policing in the philosophy of criminal law.⁵³ Instead, his legacy is a deeply influential account of criminal procedure—one that nearly dominates theoretical reflections on investigative procedure, but not one that links investigative procedure to the usual inquiries of criminal law theory.⁵⁴

Again, those usual inquiries concern the substantive criminal law, and thus to some extent the theory/process divide is just a manifestation of the substance/procedure divide. But on this point we should note that outside the

⁵¹ Packer's models of criminal procedure are cited far more often than his theories of punishment or criminalization. A contemporaneous book review labeled *The Limits of the Criminal Sanction* "very disappointing" and "soporific"—but excepted the "very important" central third of the book, the section on criminal procedure. John Griffiths, *The Limits of Criminal Law Scholarship*, 79 YALE L.J. 1388, 1388 (1970). A recent essay on Packer's book, honoring the 40th anniversary of its publication, focuses exclusively on the models of the criminal process. Hadar Aviram, *Packer in Context: Formalism and Fairness in the Due Process Model*, 36 L. & SOC. INQUIRY 237 (2011). In contrast, Packer's "mixed" theory of punishment, combining deterrence and retributive concerns, is seen as a mere reprise of arguments first developed by John Rawls. See, e.g., Margaret Jane Radin, *The Jurisprudence of Death*, 126 U. PA. L. REV. 989, 1050 (1978). Packer's criminalization theory is seen as a straightforward consequentialist argument that does not fully defend its premises. See, e.g., HUSAK, *supra* note 11, at 59. None of these commentators address Packer's claim that the costs of enforcement must factor into the choice to use the criminal sanction.

⁵² Packer's substantive arguments are addressed in further detail in Part II below, but I note here that he began the last part of the book with a conjecture that may seem foolish in retrospect. Packer noted that the expansions of defendants' procedural rights made the use of the criminal sanction more costly and surmised that these costs could lead legislators to be more circumspect in their choices to criminalize. PACKER, *supra* note 45, at 245–46. In fact, the conventional wisdom now is that legislators took precisely the opposite tack, expanding the substantive criminal law to make enforcement easier even in the face of defendants' procedural rights. See generally William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

⁵³ Packer suffered a massive stroke in 1969, the year after *The Limits of the Criminal Sanction* was published, and never fully recovered. He died in 1972. See *Herbert Packer is Dead at 47; Stanford Law Professor*, N.Y. TIMES, Dec. 8, 1972, at 48.

⁵⁴ I should note that Packer's models drew critics from the start and that some commentators see his considerable influence on criminal procedure scholarship as a detriment of the field. See, e.g., John Griffiths, *Ideology in Criminal Procedure, or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970); Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 532 (1992) ("[P]erhaps nothing has dampened the spirit of criminal procedure scholarship more than the early unfortunate success of Herbert Packer's famous two models—crime control and due process. People have been searching for something else imaginative to say ever since.").

world of criminal law theory, among those who study doctrine and policy, there is frequent emphasis on the interactions between substantive criminal law and the rules of criminal procedure. This emphasis is a core theme of William Stuntz's influential work. Stuntz advanced a well-known argument that the Warren Court's efforts to restrict police authority had backfired by prompting legislatures to enact ever broader criminal codes and thus expand police discretion.⁵⁵ Slightly less famously, he also suggested that earlier, pre-Warren Court interpretations of the Fourth and Fifth Amendments were motivated by concerns about the excessive reach of substantive criminal law.⁵⁶ Stuntz's work was historical, explaining doctrinal developments rather than organizing concepts, and it was specific to the United States. It drew upon public choice theory and that field's insights into the incentives and interactions among various political actors, but it did not claim to be criminal law theory and has not been received as such. Stuntz's last work, like Packer's *The Limits of the Criminal Sanction*, seeks to convince a broad audience of the ills of current American criminal justice policy, linking the substantive criminal law with the law of criminal procedure.⁵⁷ My suggestion here is simply that the insight that drove so much of Stuntz's writing and influenced so many of his colleagues—that the substantive and procedural dimensions of criminal law should be studied in relation to one another—is an insight that should, at long last, reach the criminal law theorists.⁵⁸ Parts II and III address some of the questions that this insight might provoke.

II. CRIMINALIZATION AND ENFORCEMENT

What is a crime? What is the best conceptual account of bribery, or rape, or theft? What *should* be treated as criminal? These questions motivate much of criminal law theory. Scholars may offer general principles to guide all criminal legislation, or they may offer negative constraints to tell us when not to use criminal sanctions, or they may begin with particular offenses and

⁵⁵ See, e.g., WILLIAM STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 216, 265 (2011).

⁵⁶ See generally William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 *YALE L.J.* 393 (1995).

⁵⁷ See generally STUNTZ, *supra* note 55.

⁵⁸ See generally THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ (Skeel & Steiker eds., 2014) (detailing Stuntz's influence, including his effort to reconnect criminal procedure and substantive criminal law). I cannot develop the point fully here, but I note that Stuntz urged scholars to focus on the interaction of procedure and substance without questioning seriously the coherence of the dichotomy and without questioning the hierarchy in which "substantive" guilt takes precedence over procedural "technicalities." Thinkers inclined to theorize procedure might begin by reexamining the very substance/procedure dichotomy and the perception that substance is more important.

analyze the reasons for their criminalization.⁵⁹ For decades now, scholars have been especially troubled by expanding criminal codes and expanding prison populations so that modern theories of criminalization are largely efforts to address the problem of overcriminalization.⁶⁰ Scholars have suggested that we should decriminalize all conduct other than true “public wrongs,” for example, or that we resuscitate a harm principle that limits the substantive criminal law to conduct harmful to others.⁶¹ In this section, I develop the idea that we cannot decide whether to use the criminal sanction without contemplating enforcement considerations. When we decide to address a perceived social ill with a criminal law, we empower public actors in important ways. We empower the state to punish, as many theorists have recognized, but we also empower it to police: to monitor, to detain, to search, and to arrest. For many existing offenses, the strongest argument against criminalization is not the punishments these offenses carry, but the police authority they produce.

Broadly speaking, theories of criminalization address the question of what should be made criminal. The very form of the word—criminalize, as a verb—should draw our attention to the fact of human agency: acts are made criminal, rather than always already being so.⁶² Notwithstanding this opportunity to focus on the human construction of criminal law, most theories of criminalization identify an extra-legal standard to which human legislators should conform the criminal law. Some scholars adapt Blackstone’s concept of a “public wrong”; others give more attention to harm.⁶³ Lest these

⁵⁹ Packer undertook the first two projects, though he focused on the second. *See infra* Part I. Doug Husak’s noted recent book similarly focuses on the limits of the criminal law. *See* HUSAK, *supra* note 11, at 3 (“[T]he most pressing problem with the criminal law today is that we have too much of it.”). Gideon Yaffe’s study of attempts exemplifies the third approach. *See generally* GIDEON YAFFE, *ATTEMPTS IN THE PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* (2010).

⁶⁰ *See generally* ANTONY DUFF ET AL., *THE BOUNDARIES OF THE CRIMINAL LAW* (2010); JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* (1984); *see also* HUSAK, *supra* note 11, at 120 (“[A] theory of criminalization is needed to provide a principled basis to reverse the tendency [toward] more and more punishment.”); PACKER, *supra* note 45, at 364 (“[W]e resort to [criminal law] in far too indiscriminate a way . . .”).

⁶¹ *See, e.g.*, Janine Young Kim, *Rule and Exception in Criminal Law (Or, Are Criminal Defenses Necessary?)*, 82 *TUL. L. REV.* 247, 274–75 (2007) (noting the emphasis on public wrong in academic criminal law theory, and arguing that a different emphasis on harm prevention actually drives criminal justice policy).

⁶² Acts, not people, are the usual objects of the verb under the modern definition of “criminalize,” but as Lindsay Farmer notes of an earlier understanding, to criminalize is “to turn a person into a criminal.” FARMER, *supra* note 26, at 4–5. The modern usage may obscure the extent to which criminal law does still turn persons into criminals. *See* Ristroph, *supra* note 21, at 162–64.

⁶³ *See generally* JOEL FEINBERG, *THE MORAL LIMITS OF CRIMINAL LAW: HARM TO*

approaches be confused, much ink is spilled to explain the difference between wrongs and harms.⁶⁴ Notably, these various efforts all identify what is to be criminal by identifying conduct or consequences that the theorist would wish out of existence. But the criminal law does not work like that. It is certainly not a perfect deterrent, and as noted earlier, it is not self-executing. The criminal law identifies conduct as eligible for punishment, and it authorizes (but rarely requires) law enforcement to investigate allegations of said conduct, to gather evidence of it, and to arrest persons suspected of engaging in the prohibited conduct. So when we pass a new statute, we should not pretend that we are waving a magic wand that will make the defined conduct disappear.⁶⁵ We are instead empowering an enforcement mechanism, and the choice to criminalize should weigh both the expected benefits and the expected costs of enforcement.

Hints of the argument I am making here have arisen in earlier scholarship, but without much impact. Herbert Packer made suggestions along these lines in *The Limits of the Criminal Sanction*—but not in the section drawn from his “Two Models” article, so these suggestions have received little attention. In Chapter Fifteen, somewhat misleadingly titled “The Search for Limits: Profit and Loss,” Packer identified a number of ways in which the realities of criminal enforcement generated normative constraints on the substantive criminal law.⁶⁶ The chapter’s title is somewhat deceptive because while some of Packer’s concerns are simple consequentialist, cost-benefit arguments, others appeal to near-categorical claims about individual rights and the limits of state power. In consequentialist terms, Packer argued that remote or trivial harms should not be addressed by the criminal law, for the costs of enforcement are not worth the gain.⁶⁷ But he also criticized the use of criminal sanctions to perform “covert functions,” such as official harassment of persons who, in the state’s assessment, are not quite worth the effort of formal prosecution.⁶⁸ The criminalization of minor offenses often serves simply to license police

OTHERS (1984); Tatjana Hornle, *Theories of Criminalization*, 10 CRIM. L. & PHIL. 301 (2016) (reviewing A.P. SIMESTER & ANDREW VON HIRSCH, *CRIMES, HARMS AND WRONGS: ON THE PRINCIPLES OF CRIMINALISATION* (2011)); MICHAEL MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* (1997).

⁶⁴ See generally SIMESTER & VON HIRSCH, *supra* note 63; Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992).

⁶⁵ See Husak, *supra* note 18, at 469 (describing “the common mistake that the criminal law operates by preventing certain forms of conduct” and cautioning against the pretense that the state has “a magic wand” to make proscribed conduct disappear).

⁶⁶ PACKER, *supra* note 45, at 270–95.

⁶⁷ *Id.* at 270–77.

⁶⁸ *Id.* at 293.

officers to hassle bothersome persons until they go away (or stop being bothersome). Such harassment, Packer claimed, “is objectionable because it constitutes in effect punishment without determination of guilt.”⁶⁹

A few glimpses, but only glimpses, of similar concerns with enforcement appear in Doug Husak’s otherwise powerful argument for limits on the substantive criminal law. Husak identifies four constraints “internal” to the criminal law and three additional “external” constraints.⁷⁰ Internal constraints come “from within criminal theory itself: from the general part of the criminal law, and from reflection about the nature and justification of punishment.”⁷¹ Specific internal constraints include the principles that criminal offenses must be designed to address a nontrivial harm or evil; that they must address wrongful conduct; that they must impose only deserved punishment; and finally, that those who wish to criminalize conduct bear the burden of proof of showing that the other constraints are satisfied.⁷² What Husak calls “external” constraints on the criminal law are those derived from political theory rather than the criminal law itself. They specify conditions that must be satisfied in order to overcome the important right not to be punished.⁷³ Taking inspiration from so-called “intermediate scrutiny” in American constitutional law, Husak enumerates three requirements of criminal legislation: it must serve a substantial state interest; it must directly advance that interest; and it must do so by means no more extensive than necessary.⁷⁴ Tellingly, Husak notes that internal constraints on the criminal law are addressed primarily to those who are punished, while external constraints are addressed to all members of a political community.⁷⁵ Not much turns on the classification of criminalization principles as internal or external, but Husak’s labels illustrate the view that considerations of political theory are external to the field of criminal law theory. In any event, Husak is surely right to look for an account of the appropriate scope of the criminal law that considers and addresses the entire political community.

If we are to view criminal law as a form of state action that should be justifiable to the whole community, then we must consider the social and

⁶⁹ *Id.*

⁷⁰ HUSAK, *supra* note 11, at 55.

⁷¹ *Id.* at 103.

⁷² *See id.* at 66, 82, 100 (respectively discussing nontrivial harm and wrongfulness constraints, desert constraint, and burden of proof constraint).

⁷³ *Id.* at 120. As I suggest in this essay, there is no reason to think of conditions of legitimate punishment as “external” to criminal law or criminal law theory, but not much turns on the labels internal/external in Husak’s theory.

⁷⁴ HUSAK, *supra* note 11, at 132.

⁷⁵ *Id.* at 120–21.

political costs that ensue when we choose criminalization over other measures (or over doing nothing).⁷⁶ It is important to clarify the term “costs” here. The criminal law is expensive, but its costs are not simply monetary. Many of the most relevant costs are intangible harms⁷⁷ to individual and social interests: loss of liberty or dignity; separations of families; and opportunity costs for the larger community. Some of these costs may be incurred as soon as a statute is passed (a statute criminalizing sodomy inflicts an expressive harm by its very existence, for example), but most of the costs of the criminal law are the costs of enforcement: the costs of policing, adjudication, and punishment. Though Husak favors the language of justice over that of costs,⁷⁸ a concern with the costs (or shall we say the burdens) of the criminal law, especially the costs of punishment, seems to motivate much of his argument.⁷⁹ Occasionally and all too briefly, he alludes to the costs of policing as well.⁸⁰

The worry about the price of enforcement is illustrated well by Husak’s discussion of the burden of proof constraint—the requirement that those who favor criminal legislation bear the burden of proof of defending it. This constraint may be understood as a default assumption that criminal law is harmful (or costly, in my loose usage). In elaborating the harms of the criminal law, Husak emphasizes punishment. He imagines a proposed criminal prohibition of doughnut consumption, motivated by a state interest in reducing obesity.⁸¹ To justify such a law, Husak argues, it is not enough to say that the law will actually reduce obesity and persons have no right to

⁷⁶ See generally Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323 (2004). One need not endorse the particular “regulatory impact assessment procedure” recommended by Brown to appreciate his broader claim that criminal justice policy choices should take into account the various tangible and intangible costs of criminal law. See *id.* at 335; see also PACKER, *supra* note 45, at 270–71.

⁷⁷ The word “harm” is somewhat problematic, too, given that criminal law theorists distinguish among many kinds of negative conditions: harms, wrongs, injustices, and so forth. I use “harm” in a non-technical sense that would encompass all those negative conditions.

⁷⁸ Husak seems to limit the term costs to financial considerations. See HUSAK, *supra* note 11, at 7–8. But “costs” seems to me the best word to capture all of the negative consequences that flow from adopting a criminal sanction: burdens, harms, injustices, lost opportunities, and also dollars spent.

⁷⁹ Stuart Green notes that the cost inquiry “finds its way only partially, and then not explicitly, into [Husak’s] theory.” Stuart P. Green, *Is There Too Much Criminal Law?*, 6 OHIO ST. J. CRIM. L. 737, 744 (2009). It is true that Husak does not explicitly frame his constraints as inquiries into costs, and indeed he would probably resist my terminology as too close to the language of utilitarianism and economic theory. Still, I think it is fair to characterize Husak’s powerful book as an argument that whatever we gain from our criminal law, it is not worth the tremendous tolls—financial and intangible—we currently pay.

⁸⁰ See, e.g., HUSAK, *supra* note 11, at 13.

⁸¹ *Id.* at 101–02.

eat doughnuts.⁸² We must also consider the general right not to be punished; it is not clear that reducing obesity can justify the infringement of that right.⁸³ In other words, we ask not only whether the conduct in question is conduct we wish to eliminate, but also whether a criminal prohibition is worth the costs of enforcement.

All of this is reasonable enough, but it should be noted that punishment is not the only burden imposed by the criminal law—it is not the only thing the defender of a criminal statute should have to justify. With each new offense, we have to get from crime to punishment; we have to detect the doughnut-eaters, arrest them, and prosecute them. And just as persons have interests in not being punished, they have interests in not being surveilled, arrested, detained, and tried.⁸⁴ Part of the problem with the doughnut ban is the authority it gives to police officers and prosecutors. This authority is problematic in at least two respects: when the authority to arrest (or prosecute) is actually exercised, it imposes burdens on the individual and society; and even when the authority is not exercised, the possession of broad authority gives police and prosecutors discretion that might be troubling in itself.

Husak is, of course, cognizant of these concerns. But he addresses police power and the investigative process only briefly, giving far more attention to punishment than to other enforcement considerations.⁸⁵ Happily, though, nothing in his theory of criminalization forecloses inquiries into investigative procedure. In the remainder of this section, I elaborate a few more ways in which questions about police authority intersect with questions about the scope and content of substantive criminal law. This discussion provides, I hope, a sketch for further research—I identify more questions here than I offer answers.

Most broadly, policing is quite often intrusive, so to enact a criminal statute is to authorize intrusion. Importantly, the intrusions of policing are not usually subject to the *ex ante* adjudicative constraints that apply to punishment. The warrant “requirement” notwithstanding, most police action does not require prior judicial approval. Acting on her own judgment alone, an officer may watch a person, or stop him, or ask him questions, or detain

⁸² *Id.* at 102.

⁸³ *Id.*

⁸⁴ The burdens of adjudicative procedures are detailed in MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

⁸⁵ See HUSAK, *supra* note 11, at 13 (“[T]he growth in the scope of the criminal law is worrisome even when it does not culminate in conviction and punishment . . . Arrest shares with punishment many of the features that make the latter so difficult to justify.”); *id.* at 21–22 (discussing how police and prosecutorial discretion generates excessive punishment).

him briefly or not so briefly, or even take him into custody. All of these familiar components of policing are intrusive, and it is not surprising that those who receive police attention will often resist it. Of course, resistance typically triggers even greater police authority. A suspect who flees an officer becomes even more suspicious, and with greater suspicion police may take more intrusive measures to stop the suspect. A suspect who actually resists arrest becomes a legitimate target of police force—even deadly force, and even if the offense of arrest was as minor as selling loose cigarettes, jaywalking, or eating doughnuts.⁸⁶

Here, I should note that the law of criminal procedure is largely transsubstantive, meaning that the same procedural rules apply no matter what underlying substantive offense is being investigated.⁸⁷ Several recent deaths of unarmed black men at the hands of police officers illustrate the consequences of transsubstantive procedural rules—and also the ease with which police responses to minor offenses can escalate to deadly force.⁸⁸ Transsubstantivity has been criticized from two perspectives: from those who argue that restrictions on police should be relaxed when terrorism or other serious crimes are at stake and from those who argue that restrictions on the police should be heightened for the investigation of minor offenses.⁸⁹ Perhaps the principle of transsubstantivity should be abandoned or modified. Perhaps instead we should simply decriminalize many minor offenses. But our current regime, which criminalizes a vast range of conduct and preserves the principle of broad and transsubstantive procedural power, may be the worst of all worlds. In any case, normative theories of criminalization should take account of the fact of transsubstantive procedure.

Even beyond the principle of transsubstantivity, some (or most) of the rules of investigative procedure might just be bad rules. To recognize but avoid this problem, theorists of the substantive criminal law could simply stipulate a just investigative (and adjudicative) process. Theorists of punishment sometimes adopt this strategy, stipulating humane and just prison conditions before articulating a defense of punishment. Leaving aside the circularity in such arguments, here my key point is that we cannot stipulate

⁸⁶ See Ristroph, *supra* note 3, at 1191–1212.

⁸⁷ See William Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2140 (2002).

⁸⁸ Briefly, the observation of any offense, no matter how minor, yields the power to make an arrest, which includes the power to use force if necessary to effect the arrest. Ristroph, *supra* note 3, at 1203–07.

⁸⁹ See, e.g., Sherry Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness,”* 98 COLUM. L. REV. 1642, 1645 (1998) (arguing for more restrictive Fourth Amendment rules for investigations of minor offenses); Stuntz, *supra* note 87, at 2162 (arguing for “a kind of regulatory swap” in which police have greater authority for some types of investigation and more restricted authority for others).

the intrusions out of policing altogether, just as we cannot stipulate the harms out of punishment altogether. Even under the ideal rules of investigative procedure, we can expect intrusions by the police. Police intrusions cannot be limited to the actually guilty. Even under ideal conditions, they will sometimes be imposed on the merely suspicious but actually innocent. A theorist concerned to justify actual criminal laws must address the inevitable enforcement costs. Some costs will be incurred whatever the rules of investigative procedure, and current costs are particularly high given our existing rules of investigative procedure.

Again, to enact a criminal statute is to authorize intrusion—but only to authorize it, in most cases. That is, a criminal statute does not create a binding enforcement obligation on police officers (or prosecutors). Instead, it creates a space for discretion, and a theory of criminalization must contemplate police and prosecutorial discretion. Some theorists contrast law with discretion, a dichotomy itself possible only if we do not count enforcement measures as part of the law itself. For example, Markus Dubber has sought to highlight an older understanding of the term “police”—not the law enforcement agents we know today, but police as in “the police power,” a broad power “to govern men and things” in pursuit of aims as broad as peace, decency, tranquility—or civil order. Though we no longer speak of this general power to govern in terms of “police”—legislative prerogative might be a more modern term—the underlying principle of all-purpose regulatory power continues to influence criminalization choices. As legislatures enact broad and ill-defined prohibitions, law enforcement officials gain greater leeway to pick and choose among possible defendants.

Dubber sees this enduring influence of “police power” as the contamination by law of discretion.⁹⁰ But philosophers should reassess the supposed distinction between law and discretion in the context of criminal law. The direct (and probably intended) effect of most substantive criminal laws is the authorization of official discretion. This effect is far more likely, and easier to verify, than deterrent effects, a morally just distribution of punishment, or any of the other usual promised payoffs of criminal law. A statute criminalizing cocaine possession does not guarantee that no one will possess cocaine; it may or may not decrease instances of possession. The statute will authorize punishment of a person who possesses cocaine, but it

⁹⁰ See generally MARKUS DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (2005). Farmer explains that Blackstone did not really know what to do with the police power, treating it as “a residual category which includes . . . crimes that do not seem to fit within other categories of public justice: bigamy, Egyptians, common nuisances, idle and incorrigible rogues” FARMER, *supra* note 26, at 73.

certainly does not guarantee it. What the statute does is simply to empower police and prosecutors. Police now have the power to investigate and arrest those they suspect of possessing cocaine; prosecutors have the power to file charges and pursue convictions on the basis of the statutorily defined conduct. Neither police nor prosecutors are legally bound to catch every cocaine possessor. And when a police officer declines to make an arrest (though a statute would authorize one) or a prosecutor declines to pursue conviction, we do not typically label such decisions “nullifications” of the law as we do sometimes speak of juries nullifying law.⁹¹ We do not speak of police nullification or prosecutorial nullification because police and prosecutorial discretion are just part of the law.

With discretion, of course, comes the potential for discrimination. It is all too well established that police and prosecutorial discretion yield patterns of racially disparate treatment, in which minorities are more likely to receive the greatest investigative scrutiny, the most serious charges, and the heaviest penalties.⁹² Criminal law theorists are hardly indifferent to the well-documented racial disparities in the criminal justice system, but nor are they presently equipped to say much about these disparities. Racial biases are very rarely visible on the face of criminal statutes. They operate through the processes of enforcement—processes beyond the present scope of criminal law theory.

A few other implications of theorizing enforcement are worth noting. First, some observers might view the measures necessary to enforce some types of criminal laws as categorically unacceptable. Think especially of the criminal regulation of sexual conduct. Decades ago, the criminal prohibition of the use of contraception was seen as problematic, in part because it invited police into the bedroom.⁹³ Similarly, some of the strongest objections to sodomy laws focused not on the penalties imposed to enforce such laws, but on the investigative measures they authorized.⁹⁴ Second, and relatedly,

⁹¹ *But see* Roger Fairfax, *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011) (claiming to coin the term “prosecutorial nullification,” but giving it a meaning narrower than my usage here).

⁹² *See generally* Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202 (2007); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011).

⁹³ *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marital relationship.”).

⁹⁴ For an illuminating discussion of the enforcement concerns that surrounded *Griswold* and other efforts to limit criminal regulation of sexual conduct, see Melissa Murray, *Griswold’s Criminal Law*, 47 CONN. L. REV. 1045, 1061–63 (2015). To be sure, enforcement concerns are hardly the only objection at stake; sodomy bans might be said to inflict an

enforcement considerations are often relevant to the drafting of criminal statutes. Put differently, we should think about policing not just when we decide what should be criminal, but also when we decide how to address a given problem through the criminal law. To borrow again from Herbert Packer, consider a New York City law that prohibits smoking in bed in a hotel.⁹⁵ That provision, Packer argued, could not be enforced without unacceptably intrusive surveillance and invasions of privacy. “Alternatively,” suggested Packer, “the solution might have been to make it criminal to cause a fire by smoking in bed, regardless of the amount of harm done. That kind of prohibition would at least have been enforceable, whether or not it was enforced.”⁹⁶

Finally, enforcement practices are relevant to the scope and definitions of affirmative defenses—most obviously, to claims of entrapment. A claim of entrapment may be a claim about the defendant’s responsibility, but it is equally or more a direct complaint about the propriety of the state’s investigative procedures. And if criminal law theory is indifferent to investigative procedure, it should not surprise us that entrapment is not often scrutinized by criminal law theorists.⁹⁷ In the United States, even doctrinalists or others working outside the parameters of philosophical inquiry tend to neglect entrapment: the entrapment defense is so narrowly defined by courts and so rarely successful for defendants that it has all but disappeared from scholarly discourse.⁹⁸ But consider entrapment in a non-technical sense—the layman’s worry about the deliberate facilitation of offenses by police. As an investigative practice, the facilitation of crime is very common indeed.⁹⁹ Whatever the contours of positive law, normative criminal law theory should address the implications of such investigative practices on a defendant’s liability for punishment.¹⁰⁰ To do so, philosophical

expressive harm even if violations are never investigated and never prosecuted. But the enforcement powers generated by such bans was a significant part of the objection to them.

⁹⁵ PACKER, *supra* note 45, at 271.

⁹⁶ *Id.* at 272.

⁹⁷ *But see* Andrew Ashworth, *Testing Fidelity to Legal Values: Official Involvement and Criminal Justice*, in *CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART* 310–22 (Stephen Shute & A.P. Simester eds., 2002) (discussing entrapment); *id.* at 300 (noting that entrapment is a topic outside of “the mainstream”).

⁹⁸ *See* T. Ward Frampton, *Predisposition and Positivism: The Forgotten Foundations of the Entrapment Doctrine*, 103 *J. CRIM. L. & CRIMINOLOGY* 111, 111–14 (2013) (discussing counterterrorism sting operations in which suspects were invited to join highly improbable plots, then arrested, and noting the consistent failure of entrapment claims).

⁹⁹ *See generally* Murphy, *supra* note 5.

¹⁰⁰ For a relatively recent study of these issues by a criminal law theorist, see Gideon Yaffe, “*The Government Beguiled Me*”: *The Entrapment Defense and the Problem of Private Entrapment*, 1 *J. ETHICS & SOC. PHIL.* 2 (2005).

scholarship must incorporate policing into its conception of what counts as criminal law.

III. CONDITIONS FOR PUNISHMENT

Punishment theory occupies a considerable portion—some would charge, an oversized portion—of criminal law theorists’ attention.¹⁰¹ Scholars have developed various accounts of the justification of punishment, most drawing upon retributive principles, deterrence considerations, or some combination of the two. Usually, arguments in punishment theory are explicitly or implicitly moral rather than political: they tend to appeal to moral intuitions or invoke moral principles rather than engage in analysis of political actors and institutions. Punishment theory, like the rest of criminal law theory, tends to neglect the state.¹⁰² And thus it has neglected the state officials who make punishment possible, including the police.

But punishment—at least, the kind that interests criminal law theorists—is a form of state action, and the legitimacy of punishment is a question about the legitimacy and limits of state power. To impose the uniquely coercive burdens of punishment, the state must show that it has identified and prosecuted a wrongdoer in accordance with certain rules. In this section, I sketch briefly an argument that compliance with rules of investigative procedure is a condition for legitimate punishment.¹⁰³ The sketch is probably too brief—and my view too unconventional—to persuade many readers to adopt this reading of the law of investigative procedure. No matter. For purposes of this essay, I want only to illustrate that policing questions can, and should, be tackled by punishment theorists.¹⁰⁴

As an initial matter, let us rephrase slightly the question of punishment theory. “When [or why, or how] is punishment justified?” is an inquiry that reifies punishment. It treats punishment as an institution already existing in the world, and subtly assumes that this institution must be justified one way or another. It obscures the specific agents who choose to punish; indeed, it obscures the fact that punishment is a choice. Suppose we asked instead, “Under what conditions may the state impose punishment?” Now, at least, we have a small reminder that punishment is the act of an agent—or rather, of multiple agents—and not an impersonal, inevitable event.¹⁰⁵ Like other

¹⁰¹ See, e.g., GARDNER, *supra* note 11, at vii (claiming that the philosophy of criminal law “had been too dominated by anxieties about the justifiability of punishment”).

¹⁰² See Ristroph, *supra* note 14, at 1040–43.

¹⁰³ I develop this argument at greater length in Alice Ristroph, *Conditions of Legitimate Punishment*, in *THE NEW PHILOSOPHY OF CRIMINAL LAW* (Flanders & Hoskins eds., 2016).

¹⁰⁴ For more detailed elaborations of these arguments, see *id.* and Ristroph, *supra* note 20.

¹⁰⁵ In emphasizing the agents of punishment, I do not mean to endorse the view that an

state actions, punishment is complex; it involves both broad policy choices (to enact criminal legislation, for example) and multiple individual judgments (by police, prosecutors, judges, and others). The theorist who seeks to justify the end result of these multiple judgments, such as the confinement of a person in prison, must recognize the path that has brought the prisoner to her penalty.

Punishment theorists tend to depict the path to punishment as beginning with the offense: a person violates a duly enacted criminal statute. And on many accounts, the path ends as soon as it begins. Guilt is treated as a necessary and sufficient condition for punishment. Certainly that is the implication of most retributive claims that punishment is deserved suffering, desert being based upon the offense itself. Consequentialist theories are somewhat more demanding, in that they examine not only whether an offense was committed but also whether punishment is likely to deter. But neither approach typically examines the enforcement process.¹⁰⁶

As a matter of existing law and longstanding tradition, though, guilt is not in fact the only condition for legitimate punishment. A person who engages in prohibited conduct, but who is never prosecuted or convicted, may not be punished within the bounds of the law. Whatever wrongs the target of a lynch mob may have committed, we do not view his hanging as an act of legitimate punishment. Similarly, a guilty defendant who violated an invalid law—a ban on flag burning, perhaps—is not properly punishable. A guilty defendant whose trial is conducted by a clearly biased judge is not punishable.¹⁰⁷ The ideal of due process, along with several other specific provisions of the Constitution, imposes various conditions on punishment that have little to do with guilt.¹⁰⁸ Among these conditions are constraints on the investigative process. A guilty defendant may not be punished if the only evidence of his crime is a compelled confession. That is a relatively uncontroversial view of the Fifth Amendment, but the same reasoning should

act is properly called punishment only if a designated agent intends it as such. See Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 167–68 (2006).

¹⁰⁶ One commentator has suggested that inattention to procedural matters is almost constitutive of retributive theory. Speaking of Herbert Morris's well-known "benefits and burdens" or "fair play" account of punishment, Jeffrie Murphy wrote: "Although this theory does not involve deep notions of inner wickedness, it may still properly be called retributive because it is a nonconsequentialist theory of punishment that bases the justification of punishment on considerations of justice or (non-procedural) fairness." Jeffrie G. Murphy, *The State's Interest in Retribution*, 1994 J. CONTEMP. LEGAL ISSUES 283, 290 (1994).

¹⁰⁷ See *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991) (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

¹⁰⁸ It does not solve the problem to say that legal guilt is the necessary and sufficient condition for punishment, unless we define legal guilt to include a conviction pursuant to the rules of both adjudicative *and* investigative procedure.

apply to violations of the Fourth Amendment. A guilty defendant should not be punished if the state cannot prove his crime at all or if the state can prove his crime only with evidence obtained through an illegal search or seizure.¹⁰⁹

If punishment theorists notice the state at all, they tend to take procedural justice for granted: they assume that the criminal prohibition in question has been validly enacted, and they assume that the wrongdoer has been properly identified, tried, and convicted.¹¹⁰ These assumptions allow the theorist to isolate one moment—the moment the sanction is imposed—and evaluate that action alone. I am sympathetic to the view that even when all conditions of procedural justice are satisfied, the imposition of a coercive sanction still needs further justification. But it is strange that so much intellectual energy should be spent on a single moment of the criminal justice process and unfortunate that the intellectual talents of criminal law theorists have not grappled more extensively with criminal justice as a process.

None of this should be taken as an effort to turn the attentions of theorists away from punishment. To the contrary, I suggest that punishment looms over the criminal justice process from start to finish and that we misunderstand the law of policing if we do not acknowledge that. Elsewhere, I have questioned the widespread view that constitutional criminal procedure exists primarily to regulate police officers.¹¹¹ It is more accurate to see constitutional challenges to investigative conduct as a form of legally sanctioned resistance to punishment:

The prototypical Fourth or Fifth Amendment claim alleges police misconduct, to be sure, but the immediate goal of such a claim is not better policing. Instead, the prototypical claim is an individual's act of resistance against state coercion: it is an effort to avoid punishment by claiming that the state has overstepped its powers. Importantly, this act of resistance is itself constitutionally sanctioned by the Bill of Rights—even if the defendant is guilty Compliance with specified investigative procedures is a constitutional requirement to be met before the state may punish. Thus it is open to individual defendants to resist punishment by alleging an unreasonable search or seizure, or an unconstitutional interrogation.¹¹²

¹⁰⁹ See, e.g., Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. REV. 1559, 1564 (1996) ("Limits on searches and interrogation, like juries and the right to confront adverse witnesses, are only means to the larger end of preventing punishment not authorized by judgment rendered after a fair trial.").

¹¹⁰ See, e.g., Murphy, *supra* note 106, at 296 ("Once the liberal state had a criminal properly in its clutches (i.e., after he has been found guilty of what has properly been made a crime) that state would be allowed to punish him in part for those character defects that he reveals that are inconsistent with a liberal community.").

¹¹¹ See Ristroph, *supra* note 20, at 1556–64.

¹¹² *Id.* at 1582–83.

I should distinguish two strands of my argument here, one of which may seem somewhat more palatable than the other. First, I have suggested that adherence to proper investigative procedure is a condition for legitimate punishment. This suggestion directly counters Justice Cardozo's argument that criminals should not go free on the grounds that the constable has blundered.¹¹³ The idea that non-blundering constables are a prerequisite for legitimate punishment will not be embraced by ardent critics of exclusionary rules, but this strand of my argument is likely to be accepted by at least some theorists of punishment who simply stipulate to just procedures.¹¹⁴ One could accept legitimate policing as a condition for legitimate punishment and leave it wholly to the state to address any constabulary blunders, perhaps by empowering courts to exclude *sua sponte* illegally seized evidence. That is not the American approach, which allows individual defendants to seek the suppression of illegally obtained evidence but also allows defendants to waive such claims. Indeed, American law treats constitutional challenges to police conduct as waived or defaulted if the defendant fails to raise them in a timely manner.¹¹⁵ This structure underlies the second strand of my argument, the one likely to meet even more objection from criminal law theorists: the characterization of constitutional challenges to investigative procedure as a form of legally sanctioned resistance to punishment.

For scholars invested in devising justifications for punishment, the concept of legal, permissible resistance to punishment will likely provoke discomfort. And in more practical terms, resistance to punishment may invite images of violence toward state officials. But legal resistance is principled resistance, and easily distinguished from physical resistance against police officers or flight from prosecution. As I have elaborated elsewhere,

[o]ne should not be misled if defendants or their beleaguered attorneys sometimes view constitutional protections simply as furniture to be thrown in the prosecutor's path. A motion to suppress unconstitutionally obtained evidence is very different from the many illicit ways one might try to avoid conviction and punishment, such as efforts to destroy evidence, intimidate witnesses, or bribe state officials. The Bill of Rights articulates principled limitations on the state's coercive power, and to stand a chance of success the defendant who moves to suppress evidence must frame his resistance in terms of those principles. . . .

It is significant, on my account, that several of the Constitution's limitations on the power to punish are framed as individual rights. Rights are but one of several mechanisms to limit state power (and they are not necessarily the most effective alternative). In contrast to structural constraints such as the separation of powers, rights

¹¹³ See *People v. Defore*, 150 N.E. 585, 588 (N.Y. 1926).

¹¹⁴ See, e.g., *Murphy*, *supra* note 106, at 296 (defending punishment once the state has "a criminal properly in his clutches").

¹¹⁵ See generally *Wainwright v. Sykes*, 433 U.S. 72 (1977).

invite an individual, standing alone, to articulate a claim about the appropriate scope of state power. Rights invite principled challenges to the state that are at least initially bottom-up rather than top-down (or horizontal); they invite the subjects of the state to initiate the mechanism of limitation.¹¹⁶

Even with these elaborations, I realize that the prospect of resistance to punishment, and especially the suggestion that some forms of such resistance might be legally authorized, will doubtless draw some critics. Rights of resistance are controversial.¹¹⁷ I offer this brief account of investigative procedure as a forum for resistance only to illustrate the potential impact of a bigger horizon for criminal law theory. By considering all of criminal law, “substance” and “procedure” together, we are likely to understand better each piece of it, and we are likely to appreciate better the challenges of justification. Even theorists hostile to a right to resist punishment, such as those who advocate a duty to submit to or even facilitate one’s own punishment, must defend their views in light of all that goes into the state’s efforts to punish, including its investigative methods.

CONCLUSION

The sprawling reach of the substantive criminal law has hardly made prohibited acts disappear, but it does authorize a vast range of coercive state actions. These coercive state actions inflict considerable harm, often for little benefit. But we may overlook the harms of the criminal law, or confuse its purported aspirations with its actual achievements, if we locate the law wholly in substantive prohibitions. Criminal law theorists do just that, purporting to offer philosophies of “the criminal law” but excluding policing and enforcement as part of the law that they are theorizing. I have previously suggested that this approach “may be the peculiar outlook of people who do not often encounter the law in its more prosaic manifestations.”¹¹⁸ The police officer is the most prosaic representation of the criminal law, as the then-Dean of Duke Law School observed in 1934: “Criminal law in a democracy is a . . . difficult concept. By some it is personified in terms of the policeman, who is familiarly known to many southern negroes as ‘The Law.’”¹¹⁹ The phrase “southern negroes” is dated, but the insight is not: “The Law” is constituted by enforcement practices at least as much today as it was a century ago. And racial minorities are still more likely to be the targets of

¹¹⁶ Ristroph, *supra* note 20, at 1596.

¹¹⁷ See generally Ristroph, *supra* note 20; Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CAL. L. REV. 601 (2009).

¹¹⁸ Ristroph, *supra* note 21, at 160.

¹¹⁹ Justin Miller, *Criminal Law—An Agency for Social Control*, 43 YALE L.J. 691, 692 (1934).

that law. Racial bias in policing is but one of the contemporary criminal justice problems to which theorists could be more relevant, if they would simply acknowledge all of criminal law.