



# Exploring and Explaining How Criminal Law Really Works

AFTER A CLERKSHIP WITH CHIEF JUDGE DOLORES SLOVITER of the U.S. Court of Appeals for the Third Circuit and a brief practice in corporate litigation, Darryl Brown practiced as a criminal defense attorney and was lead counsel in more than thirty jury trials in Georgia before beginning his teaching career. That experience triggered his sustained academic interest in criminal justice issues, which he developed while teaching at Washington and Lee University School of Law for several years before joining the Law School faculty in 2007, after visiting in 2004–05. While he has taught a range of courses including torts, voting rights, and trial advocacy, most of his teaching in recent years has focused in criminal law, criminal adjudication, evidence, and white collar crime.

Criminal justice issues have also been the focus of his scholarship. It was the messy reality of practice in courtrooms and law offices in particular that led to an examination, in a range of work,

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on how juries and lawyers interact with, and give meaning to, criminal statutes and rules of procedure.

A pair of early articles sought to describe processes of criminal jury decision-making and their normative legitimacy in comparison with comparable decisions by other legal actors, especially judges. In "Plain Meaning, Practical Reason and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes," 96 *Mich. L. Rev.* 1199 (1998), Brown starts with the observation that juries in most jurisdictions are given instructions much like those he saw Georgia juries guided by: informed of the statutes under which defendants are charged and then tasked with determining disputed facts, they are told little more than to "apply the law" to the facts to reach a verdict. As judges and lawyers know, that is often easier said than done. A voluminous literature on statutory interpretation describes a complicated process, informed by a range of considerations and interpretive methods, that face *judges* when they must "apply the law." Yet juries receive little guidance in what this task might entail and are sometimes faulted when their verdicts seem to reflect something other than plain-meaning application.

Brown examined how juries go about reaching verdicts in ordinary criminal cases and whether their reasoning, and statutory application choices, accorded with familiar theories of judicial statutory interpretation. Utilizing videotape and transcripts from jury deliberations in real and mock trials, supplemented by empirical studies of jury decision making, Brown described how juries interpret statutes and found their substantive considerations, interpretive strategies, and occasional errors or biases to compare favorably with judicial interpretation. Juries are, for example, often pre-disposed to plain-meaning application of statutes, but they look as well to considerations such as a statute's purpose. Despite their solid instincts, the complexity of the task suggested to Brown that juries might be aided by instructions that offered more guidance on the basics of statutory construction.

In "Jury Nullification Within the Rule of Law," 81 *Minn. L. Rev.* 1149 (1997), Brown extended this understanding of juries' decisions on law

application to consider whether decisions typically described as nullification could nonetheless be lawful. If nullification is a decision to acquit despite finding facts that support a guilty verdict under the applicable statute, such verdicts are typically described as violating the rule of law. But understandings of the rule of law, how law is constituted, and what law consists of have evolved from earlier views that understood law in narrow positivist and formalist terms—that is, a view that law consists, in criminal cases, only of a written statute that can be applied determinately or mechanically. Even positivist scholars such as H.L.A. Hart understood law to require at times reference to observable social practices, and Hart’s great critic, Ronald Dworkin, insisted law requires as well reference to “principles of personal and political morality [that] explicit decisions presuppose by way of justification,” so that it is possible that statutes can be “internally compromised” and “unprincipled.” Even jurists inclined toward plain meaning approaches to statutory application, such as Justice Scalia, concede that at least judges must have good reasons for applying statutes’ seeming plain meaning and should look for “any clear indication that some permissible meaning other than the ordinary one applies.” Thus, when juries turn to the same considerations for rejecting the plain-meaning application of a statute, their verdicts, which look initially like lawless nullification, can be understood instead as falling within the rule of law on the same terms that judicial decisions do.

In subsequent scholarship, Brown has moved on to examine why criminal law is used to address some instances of wrongdoing while civil remedies are used to address others, even when the latter misconduct is covered by criminal statutes. In “Street Crime, Corporate Crime, and the Contingency of Criminal Liability,” 149 *U. Pa. L. Rev.* 1295 (2001), Brown observes that criminal liability is not explained by culpability—that is, not all culpable actors are prosecuted. Nor do the familiar grounds for prosecutorial discretion—state resources limits, first-offense status, or resulting harm—fully explain when we choose to prosecute. Moreover, there is wide variance in the use across the landscape of crime, from white-collar to “street” settings.

Brown argues that the way we actually employ criminal liability demonstrates the contingency of criminal law, and culpability itself, on civil alternatives and social costs. Whether criminal law is used, in other words, depends on available alternatives to criminal punishment, including civil, administrative, and non-legal remedies, and it also depends on assessments about the social costs and benefits of criminal punishment, including the effects of punishment on third parties. These contingencies both produce and help explain some otherwise puzzling class-based disparities in criminal punishment. As Brown explains, we use criminal liability for “street” wrongdoing much more than we do for white-collar wrongdoing not because the former is morally worse or causes more harm, but because we have fewer alternative remedies for addressing street-crime and because the ancillary costs of criminal punishment are often more visible and salient in white-collar settings.

In a follow-up article, “Third Party Interests in Criminal Law,” 80 *Tex. L. Rev.* 1383 (2002), Brown explored further how the law sometimes explicitly accommodates concerns for the collateral consequences of punishment on third parties, despite its formal concern only with offenders’ culpability and harm caused to victims. Third-party interests, for example, now appear in both prosecutorial charging guidelines and judicial sentencing decisions as rationales for leniency. Punishment may be moderated because offenders are sole caregivers to young children or critical employers in a community, and the effects of prosecution on such actors, who are closely tied to others, may affect decisions to charge in the first place.

Although we now accommodate third-party interests by moderating prosecution and punishment, Brown observes that we do so haphazardly and unevenly across the spectrum of criminal practice. Brown argues that third-party effects should be more routinely and consistently considered. While these practices conflict with the formal clarity of theories that supposedly organize criminal law—retributivism and deterrence-oriented utilitarianism—considering the impact of punishment on third parties is necessary in order to fully understand, and perhaps control, the impact

of criminal law. Widespread enforcement in some relatively fragile communities, for example, may undermine the communities' human capital and social viability—offenders with criminal records are less attractive as employees and marriage prospects, for example. Moreover, mitigating third-party interests is necessary at times to maintain the legitimacy of criminal law, even as conflicting commitments to distributive fairness, retributive justice, and crime prevention sometimes necessitate punishment. The practice of criminal justice downgrades retributivism and deterrence commitments at times in order to view criminal law more as a pragmatic, administrative process that accommodates multiple, conflicting policy interests.

In more recent work, Brown has sought to reexamine the debate about “overcriminalization” and its implications for American criminal justice. The dominant story of American political process and criminal law is one of democratic dysfunction. Criminal law is a distinctive issue for legislatures and democratic politics generally. Legislators respond to strong majoritarian preferences that make votes against crime creation—or votes to repeal antiquated crimes—politically implausible. Thus criminal law is a “one-way ratchet:” it expands but does not contract. On this account, America’s excessive criminal codes are products of structural failures in political process and democratic institutions.

In “Democracy and Decriminalization,” 86 *Tex. L. Rev.* 223 (2007), Brown told the overlooked story of American jurisdictions’ long and continuing history of legislative decriminalization. State legislatures have long records of repealing or narrowing criminal statutes. Even as criminal law has expanded greatly in some directions, it has contracted—dramatically so—in other spheres of activity. And democratic processes, especially legislatures, have been responsible for much of that contraction. Legislatures repealed most consensual sex crimes (before the Supreme Court’s decision in *Lawrence v. Texas*), alcohol prohibition, many gambling offenses, a range of old mercantilist market regulations, and many “morals” crimes that were once widespread but gradually lost public favor, such as crimes of obscene literature, interracial marriage, and contraception distribu-

tion. To this history, Brown added empirical evidence from a set of recent state legislative records that showed that contemporary legislatures decline to enact most bills proposing new or expanded criminal laws, including many that seem, on standard accounts, politically irresistible. The ratchet of crime legislation turns both ways, especially in state legislatures, and more than ninety percent of criminal law enforcement occurs at the state rather than the federal level. Moreover, while some examples of “overcriminalization” remain, data on charging, conviction, and sentencing practices suggest that what “overcriminalization” exists has little effect on criminal justice’s well recognized problems of excessive plea bargaining, racial disparities, and high incarceration rates. Most prosecutions and sentences are for familiar, non-controversial crimes (with some drug crimes being the arguable exception here), rather than for the sorts of offenses that would be widely recognized as “overcriminalization.”

Brown’s ongoing work continues to focus on what might be viewed as the political economy of criminal justice—the processes and institutions that shape criminal law’s substantive content but also its practice and its widespread effects. One work in progress looks at why the Supreme Court has never intruded on legislative decision-making and regulated substantive criminal law to anything near the degree it has chosen to regulate criminal procedure, and on how democratic processes, which work modestly well in revising criminal law, have worked so poorly in recent decades to keep incarceration rates in line with both American traditions and the standards of other advanced democracies.

In both past and current work, Brown has sought to bring new insights to old debates by questioning conventional wisdom and by looking beyond standard theories in an effort to understand how the institutions and institutional actors that shape criminal law actually function. His work, as a result, is fresh, provocative *and* grounded in reality, which is a rare combination in legal scholarship. ❧

## EXCERPTS

## Street Crime, Corporate Crime, and the Contingency of Criminal Liability

149 *U. Pa. L. Rev.* 1295 (2001)

THEORIES OF CULPABILITY AND PUNISHMENT IN CRIMINAL LAW seek to explain what conditions are necessary and sufficient for criminal punishment. Under a retributivist view, the defendant's fault or blameworthiness is not only necessary for punishment, but also functions as an affirmative, justifying reason to punish. Retributivism asserts a crucial role for criminal law's unique ability to express moral condemnation in addition to more concrete penalties, which civil sanctions often can inflict just as well. Retributivism implies that when the offender's conduct meets certain criteria, criminal punishment is not only justified but necessary; in fact, the state has a duty to pursue it. Deterrence, on the other hand, has no role for judgment of an offender's fault or culpability except to the extent that expressing such judgments furthers the deterrent effect of punishment. Deterrence theory, strictly conceived, does not look retrospectively at an offender's conduct for justification; its view is prospective, justifying a sanction as a means to reduce future wrongdoing.

Even when retributivism or deterrence offers affirmative, justifying reasons to punish offenders, however, in practice we seldom use criminal law to address such wrongdoing. Many considerations affect whether an offender will be charged and convicted beyond whether his conduct accords with the elements of a crime or defense. One aspect of this broader assessment is the jury judgment, which can assess an actor's particular circumstances to determine whether her actions are blameworthy or not. But this process of assessment also occurs at the initial stages of enforcement, when the police and prosecutors decide to arrest and charge, and it

is of even broader scope there. The assessment at that stage looks not only at the circumstances around the actor's conduct, but also takes account of a range of consequentialist concerns and practical considerations, such as management of limited resources. Further, such judgments are colored by social perspectives that help distinguish between otherwise similar instances of conduct. This broad range of criteria explains how the government answers the routine question that permeates criminal practice: when an offender has violated the law and a jury would convict her, on what grounds can the state decline to prosecute? Widespread declination is not fully explained by the common rationale of managing limited resources nor by the marginality of some criminal conduct, such as a first offense or causing minimal harm, because the state sometimes employs extensive civil remedies for serious wrongdoing covered by criminal statutes that is both intentional and imposes substantial harm.

To describe the actual working of criminal justice practice we need to uncover the criteria, beyond the legal elements, for imposing criminal culpability. Judgments of culpability are contingent not only upon the blameworthiness of an offender's acts, but also upon the perceived efficacy of criminal sanctions as a deterrent. Those assessments, in turn, depend on the alternatives to criminal law—public and private civil law, such as tort law or administrative regulation, as well as other social policy options, such as nonlegal crime prevention strategies like community youth programs and good corporate citizen campaigns. Further, use of criminal law hinges on the social costs of both crime and punishment. Finally, blameworthiness itself is not only weighed against these consequentialist concerns, but shaped by them.

Criminal law's expressive and retributive functions sometimes conflict because punitive approaches alienate offenders, reduce cooperation toward compliance, and may damage the legitimacy of law that is important for deterrence. Even when morally justified, retributivist sanctions can harm prevention efforts and reduce voluntary compliance. Faced with that irony, we sometimes decide to forgo prosecution of offenders for whom we have affirmative, justifying reasons to punish.

Retributivist and deterrent motives also conflict. Determinations of criminal culpability are contingent on the criminal law's civil alternatives and on its utilitarian costs and benefits. But this conflict is mediated inconsistently, so that criminal liability is distributed more unevenly among white-collar or corporate offenders than it is among street offenders. This is not because of hard distinctions in those realms—different sorts of offenders, crimes, and possible remedies—but because of how we have developed, or failed to develop, civil alternatives to criminal law in each sector and the ideological lens through which we make those alternatives appealing. Corporate and white-collar crime prosecution differs from street crime prosecution because of its different mix of retributive and deterrence concerns, which leads corporate crime policy to take greater advantage of our knowledge of how social norms interact with law, of the social costs that accompany punishment, and of the alternatives to criminal law. Criminal law is a comparatively minor tool for addressing white-collar wrongdoing. For street wrongdoing, in contrast, criminal law remains the dominant instrument. Our white-collar crime policy has a much better mix of regulatory strategies, civil remedies, and criminal sanctions than our street crime policy does. Our practice of punishment contributes to unproductive retributivism in street crime law. We could instead treat street crime more like white-collar crime by expanding nascent policies already tested on a local scale but that depart from the punitive trend that now characterizes street crime policy.

Criminal law has long traditions of both retributivist and consequentialist premises. Street crime law maintains a relatively stronger emphasis on moral culpability and expressive condemnation. Corporate crime policy, in contrast, takes place more in a deterrence mode. This distinction in organizing rationales has significant implications for criminal justice policy choices. It supports a division that keeps street crime policy oriented toward dysfunctional models that emphasize criminal sanctions, while corporate crime policy is oriented toward a regulatory model in which criminal law plays a significant but supporting role.

Consequentialist arguments have gained ground in criminal law, as they have in legal thought generally, in large part due to the rise of economic analysis. Dan Kahan has recently described how the opposed rhetorical modes of deterrence and expressive condemnation function politically in criminal law discourse. Deterrence serves to suppress the emotional and political content of criminal law's meaning, while expressive condemnation puts that content front and center, making it the object of heated political debate. Deterrence rhetoric cools passions—it sounds like rational policy talk. Expressive rhetoric heats passions—it is a tool in the battle over which political and moral values criminal law will serve.

The deterrence-expressiveness modulation occurs not only through time, as political disagreement grows or diminishes with regard to criminal law; it also occurs across the landscape of substantive criminal law. Criminal law's unique feature is its moral expressiveness and the traditional background of thinking about criminal law's expressive meaning is street crime. The dominant responses for wrongdoing on the street are the death penalty, the wide support for imprisonment evident in dramatically longer sentences, and the lower ages at which youthful offenders are punished as adults. While we use deterrence rhetoric sometimes in street crime discussions, an expressive and retributive moralism drives policymaking. Retributivism accords with the individualistic, autonomous view of street offenders, free of context that we described in contrast to corporate liability premises.

Corporate criminal law, in contrast, operates firmly in a deterrence mode. Corporate criminal law is part of an elaborate regulatory regime governing firms and commercial activity, and utilitarian thinking is the overwhelmingly dominant mode of analysis for administrative law. The deterrence framework has a couple of implications for corporate criminal law. First, deterrence talk cools passions about the political content of corporate criminal law. It thereby helps to take political contention and moral outrage about such crimes off the table of public debate because it chills moral evaluation of wrongdoing in commercial settings. This is not to say, of course, that it is a foolproof means for doing so, as the savings and loan scandal of a decade ago boiled over into a public debate carried out in expressive idioms.

Additionally, deterrence rhetoric implies that defendants are rational, reasonable actors who can be expected to respond sensibly to incentives. This is one reason why, for corporate wrongdoing, civil sanctions often seem appropriate substitutes for criminal sanctions. When all we are trying to do is deter bad conduct and foster socially desirable behavior, a civil fine can prompt a rational response from actors as well as a criminal one. Yet the rational actor implicit in the deterrence model adopts in a subtle way the social-being view of corporate actors noted above. If we are dealing with rational actors who we nonetheless recognize as vulnerable to social influence, then the incentives we set up for them should include factors present in their social setting. Thus, while the incentives we impose on street criminals are traditional punishments that also carry expressions of moral opprobrium, the options for corporate actors expand to include the much wider array of civil regulatory tools that not only punish, as civil fines do, but also change the offender's social environment to make offending less possible and less likely.

For instance, sanctions can take the form not only of traditional punishments like fines, but of voluntary pollution-reducing projects, reporting requirements, and other “enforced self-regulation” or “partial-industry intervention” mandates. These strategies change how offenders do the activity that led to crime in the first place, and they change the environment in which it is done by increasing supervision. That there is little objection to the lack of expressive power in such sanctions as pollution-reduction projects speaks to how thoroughly deterrence concerns trump retributive ones for white-collar wrongdoing.

When consequentialism dominates policies addressing wrongdoing and social harm, prevention and restitution goals take priority over judgments of culpability. Corporate regulation practice has responded to, and even led, scholarly literature critical of command-and-control punitiveness. Street crime regulation, with the exception of community policing strategies ... has been largely impervious to scholarly assessment or to reform strategies that have affected comparable areas of public policy. ❄

## Democracy and Decriminalization

86 *Tex. L. Rev.* 223 (2007)

ONE OF THE GREAT AND INTRACTABLE WEAKNESSES OF AMERICAN democracy is its inability to create and maintain rational criminal law policy. The politics of crime are perennially perverse: the electorate demands that legislatures enact more crimes and tougher sentences, and no interest groups or countervailing political forces lobby against those preferences. The political process of criminal law legislation is, as several leading scholars have characterized it, a “one-way ratchet.” Criminal codes expand but don’t contract. The result is ever-expanding codes that have moved us “ever closer to a world in which the law on the books makes everyone a felon.” This state of affairs does more than expose ordinary people to criminal punishment for innocuous behavior. It expands the discretion of prosecutors to the point of lawlessness because, with broad codes, they can effectively pick and choose offenders as well as offenses. It aggravates disparities in punishment because the same conduct is covered by multiple statutes carrying different sentences. It makes the criminal law incomprehensible to ordinary citizens. All these things undermine criminal law’s legitimacy.

That, in a nutshell, is the consensus account of American criminal law politics and democratic process. And it is a formidable consensus: many leading American criminal law scholars have contributed to this account, and law reviews have hosted symposia dedicated to “overcriminalization” and the dysfunctional politics that perpetuate it. Few offer much hope for failures of democratic process that seem to be structural and irreparable. Legislative processes not only cannot cool the passions of the electorate in the service of rational social policy, they may exaggerate those passions.

A closer look at the contemporary practice as well as the history of American crime legislation, however, undermines this account of intractable democratic dysfunction. An overlooked story in the history

of American criminal law is the ongoing process of decriminalization. State legislatures, in fact, have long and continuing records of repealing or narrowing criminal statutes, reducing offense severity, and converting low-level crimes to civil infractions. Even as criminal law has expanded greatly in some directions, it has contracted—dramatically so—in other spheres of activity. And democratic processes and institutions, especially legislatures, have been responsible for much of that contraction. The ratchet of crime legislation turns both ways. Moreover, evidence of state legislative records suggests that contemporary legislatures decline to enact most bills proposing new or expanded criminal laws, including many that seem, on standard accounts, politically irresistible.

Consensual sex was a topic of widespread criminalization in the Progressive era around the turn of the twentieth century. In that era every state that did not already criminalize sodomy passed legislation doing so. In many states, nonmarital, consensual sex and adultery were criminalized, sometimes at the felony level, as was some sexual conduct by married couples. But consensual sex has been an equally active topic for *decriminalization* since the early 1970s, largely by legislative repeal. Illinois repealed its sodomy law in 1962. Connecticut did so in 1967 (only two years after it unsuccessfully argued for the constitutionality of its criminal ban on contraception distribution in *Griswold v. Connecticut*). Between 1971 and 2001, legislatures in twenty-five states and the District of Columbia followed suit. (In another ten states, state supreme courts held that sodomy statutes violated state constitutions. In none of those states did legislatures succeed in amending state constitutions to allow sodomy prohibitions.) That widespread trend toward decriminalization left only fifteen jurisdictions with sodomy statutes on the books at the time *Lawrence v. Texas* declared such statutes unconstitutional. And that trend occurred despite the statutes' rare use against consensual sex (which might generate public disapproval) and despite their utility for prosecutors in sexual-assault cases that are difficult to prove under more appropriate rape or assault statutes.

Comparably, Congress, states, and localities in the late nineteenth and early twentieth centuries also widely criminalized expressive con-

duct, especially when sexually suggestive (including lewd dress and cross-dressing) but also when overtly political. At the height of World War I, Congress severely criminalized speech critical of the U.S. government with the Espionage Act of 1917 and the Sedition Act of 1918. The statutes made it a felony offense to, among other things, use “disloyal, profane, scurrilous, or abusive language” about the U.S. government, flag, or armed forces. Yet in the wake of the war’s end, Congress repealed most of the statutes’ provisions. Congress and federal officials also barred explicit or obscene publications. Film and book censorship, mostly focused on obscene and immoral content, was aggressively enforced in many jurisdictions in the 1920s and 1930s through criminal prosecutions as well as civil actions; targets famously included such novels as *Lady Chatterley’s Lover*, *An American Tragedy*, and *Candide*. Those activities were also decriminalized in the latter part of the twentieth century through a mix of legislative and judicial action. Contemporary examples of jurisdictions seeking to regulate obscene and explicit conduct or media—especially outside of child pornography—pale in comparison to such regulation seventy-five years ago, even though First Amendment doctrine provides some (much diminished) basis for such restrictions.

One finds the same pattern with respect to criminalization of contraception, which was prohibited or restricted by federal law and in a patchwork of states a century ago. (Merely advocating repeal of laws restricting contraception could result in criminal conviction for “breach of the peace.”) But by the time of *Griswold v. Connecticut*, most had been repealed; only Massachusetts restricted contraceptive use with anything like the severity of Connecticut’s criminal statute barring use and distribution of contraceptives even to married couples. A comparable story describes the history of criminal miscegenation statutes. Interracial marriage was criminalized in at least thirty states at the midpoint of the twentieth century. In the fifteen years before the Supreme Court declared such statutes unconstitutional in *Loving v. Virginia*, half of those states repealed their miscegenation bans, a trend the Court noted in support of its decision. (We will note this same pattern below with respect to restric-

tions on the use of capital punishment: state legislative reform led the way for constitutional interpretation restricting punishment.)

Decriminalization in these areas manifests a trend in public culture that legislatures (and courts) often reflect through law reform. We see the same pattern in gaming regulation, which is regulated by a mix of criminal and civil statutes. Nevada prohibited all gambling in 1909; it repealed that prohibition in 1931. Others followed to lesser degrees. In the 1930s twenty-one states legalized race tracks and betting on races. In the 1940s and '50s, most states decriminalized pari-mutuel betting and low-stakes charity gaming. By 1996, forty states allowed pari-mutuel betting, thirty-eight had state lotteries, and twenty-six had casinos. Note that gambling is the kind of activity that standard theories of legislative process would predict to be a likely candidate for decriminalization. Strong interest groups exist to lobby for legalized gambling, and states stand to gain revenue from gaming activity. Gambling is voluntary, consensual conduct, and government has other means to address the core criminal harms associated with gambling, such as control of gaming operations by organized crime groups.

National alcohol prohibition, instituted in 1919 with the passage of the Nineteenth Amendment and the Volstead Act (along with similar state statutes criminalizing alcohol distribution), was a sweeping criminalization that followed years of local moves to criminalize alcohol distribution. It was followed, of course, by a sweeping legislative decriminalization in 1933 with the passage of the Twenty-First Amendment. That repeal left alcohol regulation again as a state and local decision, and the trend since the 1930s has been a steady decline in criminalization, in most respects, of alcohol sales and use.

One component of post-Prohibition alcohol law is “blue laws” that restrict alcohol sales, often along with other retail activity, and that are often enforced with low-level criminal penalties. The trend here is similar and for similar reasons. Legislative action on laws governing Sunday alcohol and retail sales has been uniformly in one direction in recent years: deregulation and decriminalization. Here again we find powerful

interest groups—alcohol manufacturers, distributors, and retail stores—lobbying on the side of decriminalization.

For an example of crime abolition driven by popular sentiment, consider the very strong trend of decriminalizing certain weapons offenses. Over the last two decades, most states have abolished crimes of carrying concealed weapons, which often carried felony penalties for repeat offenses. Currently, only four states still criminalize carrying concealed firearms and other weapons. The reason for this trend is not hard to discern: the National Rifle Association (NRA) has led a concerted effort to convince every state legislature to change the carrying of concealed weapons from a crime to a statutory right. Other groups have opposed these reforms, and public opinion has been roughly split in many jurisdictions, yet the NRA's campaign has met with consistent success. Similar interest-group dynamics explain the decriminalization that occurred when Congress failed to reauthorize the federal assault-weapons ban in 2004.

The same interest groups also drive legislatures to (modestly) decriminalize other conduct through expansion of defenses. In 2005, Florida enacted a statute that eliminated any duty for one employing force in self-defense to retreat even from public places instead of using force when it is safe to do so. That change makes legal what was once a criminal use of force. This reform is less meaningful for present purposes but worth noting. It shows again how powerful interest groups sometimes lobby for decriminalization; the NRA pushed the Florida law and plans the same campaign in other states. It also demonstrates how criminal liability can contract even for violent crimes when the debate is framed in a politically appealing way.

On this latter point, consider how legislatures have explicitly decriminalized other core violent-crime conduct. Intrafamily assault and battery was the subject of decriminalization for a period in the mid-twentieth century. In 1962, New York modeled a trend of that period followed by many states when its legislature passed a statute allowing domestic-violence victims to bring civil actions in family court rather than filing criminal complaints (the act *required* criminal courts to transfer proceedings to

the family court) so that judicial responses to domestic violence would focus on reconciliation and treatment rather than criminal punishment. Through the 1960s and 1970s, courts used the statute to transfer the full range of violent conduct to a civil forum—burglary, weapons, harassment, and assault-with-intent-to-commit-incest charges were handled civilly. The pendulum has swung the other way more recently; today, we mostly treat domestic violence again as a criminal matter. But the history nonetheless reveals a pendulum rather than a one-way ratchet: criminal law ebbs and flows in response to public opinion and social movement pressure.

We find the same political change of strategy with regard to public drunkenness and related street-disorder conduct. In the 1960s and 1970s, there was a notable (but not nationwide) movement among states to decriminalize public drunkenness and treat intoxication as a public health problem. Strategies of order-maintenance policing in the 1990s swung the pendulum back toward prosecution of small-scale public-disorder conduct in many jurisdictions, but this policy oscillation is another example of legislatures' capacity to contract criminal law.

On top of such broad trends and oscillating policy approaches to social problems, a more modest approach to criminal code reform, driven by government staff rather than social movements or interest groups, contributes to ongoing decriminalization. In 2004, Virginia abolished clearly wrongful but rarely prosecuted theft and fraud offenses, such as conversion of military property, sale of goods of another with failure to pay over proceeds, and overvaluation of property for purposes of influencing lending institutions (as well as sillier offenses, such as the crime of jumping from railroad cars). In 2003, Alabama redefined some felony thefts as misdemeanors by raising the amount required to make a theft punishable as a felony; Colorado raised amounts for a range of theft and fraud offenses a few years earlier (changes that make a rough effort at adjusting crime definitions for inflation). Colorado also abolished most loitering offenses (preserving only a ban on loitering on school grounds), repealed crimes of circulating political material without identifying the sponsor, downgraded the status of a harassment-by-stalking offense, and

reduced penalties for some drug offenders. Years earlier, many states lowered the age of consent for sex, thereby abolishing the crime of statutory rape when it involved older teenagers.

Democratic institutions constrain criminal law in another way as well. They decline to enact criminal statutes as a means to address social problems and reduce disfavored conduct. More than scholars typically imply, this occurs by legislatures considering but failing to enact criminal law proposals. Consider what we learn from databases of all criminal law bills introduced in a dozen sessions, over several years, from legislatures in three states—Pennsylvania, Texas, and Utah—whose legislatures and criminal justice policies represent a cross section across several parameters. Using data from each state’s legislative information service, I compiled data sets of all criminal law bills both introduced and passed in twelve recent legislative sessions of these three legislatures (2003 and 2001 for all three states, and the most recent prior sessions available for each before 2001); from that I calculated passage rates of bills on criminal law topics. This allows a comparison of criminal-law-bill-passage rates with existing data on each legislature’s overall bill-passage rate. That comparison is one way to measure whether criminal law proposals enjoy unusual legislative success.

The results show that criminal law bills succeed roughly as often as—in fact, probably slightly *less often than*—legislative proposals on other topics. Criminal-law-bill-passage rates were *lower* than the overall bill-passage rates in eight of the twelve legislative sessions studied. In Texas, criminal law bills had lower enactment rates than those for all bills in all four sessions studied. In Utah, criminal law bills had lower passage rates in three of the five years studied. Only in Pennsylvania was the criminal-law-bill-passage rate higher than the overall rate more often than not; it was higher in two of the three years studied (2003 and 2001 but not in 1996). Some of the differences in either direction are negligible, but the overall impression is that criminal law legislation does not have unusual success rates in these three legislatures with distinct internal procedures and political cultures.

What explanations account for this overlooked story of American decriminalization and noncriminalization? One is, perhaps surprisingly, majoritarian and interest-group pressures on legislatures; interest groups and popular opinion often support and sometimes drive decriminalization. Legislatures in fact criminalize relatively little conduct that most people think should be completely unregulated. Another is the little-noticed influence of policy expertise and structural choices in legislative process, such as legislatively appointed law-reform commissions. The odds of success for reform proposals initiated by professional staff improve with special procedural mechanisms employed by legislatures—mechanisms that legislation scholars have examined in some detail with regard to Congress in a range of civil law and policy areas, but have noted less in state legislatures and have largely ignored with regard to criminal law. And finally, when legislatures leave outdated crimes on the books, other components of democratic governance compensate: politically accountable prosecutors rarely prosecute (and thus effectively nullify) many crimes the public cares little about—and that scholars complain about. ❧

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#### WORKS IN PROGRESS

- “Yick Wo and the Constitutional Regulation of Criminal Law”
- “The Multifarious Politics of Capital Punishment: A Response to Smith”