Articles

Democracy and Decriminalization

Darryl K. Brown*

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

* Professor of Law and David H. Ibbeken Research Professor, University of Virginia School of Law. I completed much of the work for this Article while on the faculty of Washington and Lee University School of Law, where the Frances Lewis Law Center provided generous support. Special thanks to Rachel Barkow, Dan Richman, and Scott Sundby for insightful comments on earlier drafts, and to participants in law faculty workshops at Florida State University, University of North Carolina, Cardozo School of Law, and the Rothermere American Institute of Oxford University.


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 the 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.

3. See, e.g., ABA, THE FEDERALIZATION OF CRIMINAL LAW 7–11 (1997) (concluding that more than 40% of federal criminal statutes were enacted in the last thirty years); DAVID A.J. RICHARDS, SEX, DRUGS, DEATH AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION (1982) (examining the criminalization of homosexuality, commercial sex, drug use, and euthanasia from a human-rights perspective); GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., 2004) [hereinafter GO DIRECTLY TO JAIL] (discussing overcriminalization in six areas of law); Donald A. Dripps, Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies, 109 PENN. ST. L. REV. 1155 (2005) (arguing that overcriminalization, coupled with prosecutorial discretion, leads to the routine waiver of procedural rights by criminal defendants and the erosion of the relationship between conduct and punishment); Stuart P. Green, Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses, 46 EMORY L.J. 1533 (1997) (arguing that other scholars have overstated the extent of overcriminalization); Husák, Crimes, supra note 2, at 769 (delineating the differences between “core” criminal offenses and “peripheral” criminal offenses); V.F. Nourse, Rethinking Crime Legislation: History and Harshness, 39 TULSA L. REV. 925, 925 (2004) (arguing that overcriminalization is cyclical, pointing to a series of “wars on crime” throughout the twentieth century); Robinson & Cahill, Degradation, supra note 2, at 634 (“[I]t has become clear that most legislatures no longer use their criminal law codification power to promote broad and useful change, but have become ‘offense factories’ churning out more and more narrow, unnecessary, and often counterproductive new offenses.”); Stuntz, supra note 1, at 509 (“Criminal law’s expansion . . . is a constant, going back (at least) to the mid-1800s.”); Symposium, Overcriminalization: The Politics of Crime, 54 AM. U. L. REV. 541 (2005) (featuring articles by Ellen S. Podgor, John S. Baker, John Hasnas, Peter J. Henning, Erik Luna, Sara Sun Beale, Geraldine Szott Mootz, and Paul Rosenzweig); John S. Baker, Jr., Measuring the Explosive Growth of Federal Criminal Legislation, ENGAGE: J. FEDERALIST SOCIETY’S PRACTICE GROUPS, Oct. 2004, at 23, available at http://www.fed-soc.org/doclib/20070321_oct04.pdf (“Unclear mens rea requirements, combined with the ‘explosive’ growth in the number of federal crimes enacted since 1970, combine to create an environment of uncertainty and unpredictability over exactly what acts are criminal.”); Paul Rosenzweig, The Over-criminalization of Social and Economic Conduct (The Heritage Found., Legal Memorandmn No. 7, Apr. 17, 2003), available at http://www.heritage.org/Research/LegalIssues/lm7.cfm (“Historically, [criminal liability,] this most severe of societal sanctions has been reserved for conduct most deserving of condemnation—a limitation that has, in the past 100 years, been significantly eroded.”). This complaint has some history. See, e.g., Monroe H. Freedman, The Professional Responsibility of the Prosecuting Attorney, 55 GEO. L.J. 1030, 1034–35 (1967) (“[T]here are few of us who have led such unblemished lives as to prevent a determined prosecutor from finding some basis for an indictment . . . .”); Sanford H. Kadish, The Crisis of Overcriminalization, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 158 (1967) (“American criminal law typically has extended well beyond . . . fundamental offenses to include very different kinds of behavior, kinds which threaten far less serious harms, or else highly intangible ones about which there is no genuine consensus, or even no harms at all.”).

4. See, e.g., THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961) (discussing the high probability that legislative processes will exacerbate rather than calm
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.

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. Further, 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.

Part I of the Article unpacks the scholarly literature to identify several distinct complaints arising from democratic dysfunction in criminal law—duplicate offenses, prohibition of trivial or innocuous conduct, federalization of state crime, and the related problem of excessive punishment. It turns out that most criminalization of wholly innocent conduct either (a) is found in federal law, where the argument for dysfunctional crime politics is much stronger, or (b) constitutes trivial offenses that are almost never enforced. Perhaps more importantly—for it belies the picture of a one-way process that
Texas Law Review has created ever-broader criminal regulation of ordinary life—criminal law’s substantive scope is almost surely narrower in most respects than in the past, at least in its effect on most citizens.

Part II maps the biggest reasons for this. Legislatures have overlooked histories, especially in the twentieth century, of repealing criminal laws, and the cumulative effect of this practice has been the decriminalization of large swaths of personal and social life. Further, a close look at contemporary records of state legislatures suggests that criminal laws are not unusually easy to enact in the first place; I offer data documenting that legislatures routinely decline proposals for new crimes or greater punishments, and that bills proposing new crimes and punishments fail at roughly the same rate as all bills, which is the vast majority of the time (though failure rates vary from state to state).

Part III offers some explanations for why this picture, unexpected according to prevailing scholarly accounts, is a plausible and sustainable one. Legislation scholarship points toward a partial explanation. In many state legislatures, procedural frameworks—analagous to those Congress devised for a range of issues (but never for substantive criminal law reform)—moderate the greatest risks of dysfunctional criminal policy making. I identify several examples of states using various forms of commissions or legislative frameworks to improve the prospects for criminal law repeal or reform. A further explanation is legislatures’ roughly successful efforts to track majority preferences. Here comparative criminal law offers some insights on criminal laws widely adopted in other western democracies, but not in the United States, in large part because majority preferences (and substantial interest groups) do not support them. Prosecutors—elected in most jurisdictions—greatly limit the effective scope of criminal law in accord with democratic preferences, and courts have played roles as well in contracting the substantive scope of criminal law. Finally, to assess the impact of purported overcriminalization, Part IV considers briefly the effect of broad codes on prominent criminal justice problems, such as excessive incarceration and plea bargaining. I argue, based on charging, conviction, and sentencing data, that criminal statutes that are plausible candidates for repeal—i.e., those that can plausibly be called examples of overcriminalization—contribute little to the biggest problems in American criminal justice.

In short, if we look separately at substantive criminal law and sentencing law, we find America has singularly severe punishment policies but the reach of criminal statutes has contracted in many significant, formerly regulated realms; its growth often occurs where new forms of activity and harms justify additional regulation, such as computer-based conduct and white-collar or corporate activity (where civil regulation has also greatly increased). This is so because democratic governance works roughly as well for criminal law as it does for most other areas of social policy—which means it works surprisingly well for criminal law in light of the prominent accounts of criminal law politics.

I. Criminalization Complaints

Criticisms of overcriminalization capture several distinct complaints about the general growth of substantive criminal law. One is simply that codes have grown. Studies of the federal code document its dramatic growth in the last four decades, and every state code has expanded as well. As a rough measure of representative growth in state codes, Paul Robinson and Michael Cahill note that the Illinois Code went from less than 24,000 words in 1961 to approximately 136,000 in 2003—a six-fold increase. Bill Stuntz found that over the past 150 years, Virginia’s code grew from 170 to 495 offenses, and Massachusetts’s from 214 to 535.


7. See ABA, supra note 3, at 7–11 (concluding that more than 40% of federal criminal statutes were enacted in the last thirty years); Baker, supra note 3, at 26 (describing the expansion of federal criminal statutes from 1997 to 2003).


9. Stuntz, supra note 1, at 514. A look at past codes, however, suggests the limited utility of counting statutory provisions. The 1819 Virginia penal code, contained in § 14 in the 1819 Virginia Code, had only thirty-seven chapters (some defining multiple offenses), but its scope—and intrusion into daily life—was quite broad. See 1 THE REVISED CODE OF THE LAWS OF VIRGINIA; BEING A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY § 14, chs. 137–173 (Richmond, Thomas Ritchie 1819) (concerning crimes, prosecutions, and punishments). Various other sections criminalized riding armed in fairs or markets, selling goods before they arrived at market, swearing and cursing, simple drunkenness, disturbing church services, working on Sunday, adultery, fornication, buggery, and virtually every form of gambling or gaming (as well as the status of having no means of wealth or income except gaming), including playing billiards (or keeping a
Those numbers are suggestive but tell us little about the merits of that expansion. Some growth is good; circumstances change and law must adjust—we had little need for computer crimes forty years ago.\textsuperscript{10} Scholars mainly stress two detrimental types of criminal law growth. One is redundancy—multiple statutes that criminalize the same conduct in slightly different or more specific ways, often with varying punishments. Specific statutes within a jurisdiction are often redundant of more general ones, and much federal law is redundant of state offenses (overfederalization). The federal carjacking statute\textsuperscript{11} is a frequently cited example of interjurisdictional redundancy,\textsuperscript{12} though scholars have cited many other examples of intrajurisdictional and interjurisdictional redundancy—offenses of damaging specific kinds of property that duplicate a general property-damage statute.\textsuperscript{13}

\textsuperscript{10} The Council of State Governments is a policy association that among other things promulgates suggested legislation to state governments. 59 COMM. ON SUGGESTED STATE LEGISLATION, THE COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION xiii–xiv (2000), available at http://www.csg.org/programs/ssl/documents/2000.pdf. In each of the last several years, the council has published models for new criminal statutes on such emerging problems as computer security and “contamination,” identity fraud, “unauthorized entry of critical infrastructure” (such as power plants and water-treatment facilities), traffic-control-signal-preemption devices (banning devices that allow drivers to change traffic lights), fraud in drug-test results, and new forms of voyeurism and privacy invasion. See 59–67 COMM. ON SUGGESTED STATE LEGISLATION, THE COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION (2000–2008), available at http://www.csg.org/programs/ssl/pubs.aspx. Those new crime proposals, generated by policy professionals removed from the political pressures that elected representatives face and clearly designed to address changed circumstances and problems, suggest that some portion of new crime legislation is appropriate.


\textsuperscript{12} See Beale, supra note 1, at 755–56, 756 & n.31 (contending that the federal carjacking statute did not respond to a gap in state law but did create dual federal and state jurisdiction); Luna, supra note 1, at 708 (calling the federal carjacking statute “superfluous” because it “deal[s] with conduct addressed by existing provisions”); Daniel C. Richman & William J. Stuntz, Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution, 105 COLUM. L. REV. 583, 610 (2005) (citing Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 UCLA L. REV. 757, 772 (1999)) (suggesting that the carjacking statute arose out of political posturing by Congress).

\textsuperscript{13} See Robinson & Cahill, Model Penal Code, supra note 8, at 170 (citing Illinois statutes barring damage to library materials, animal facilities, delivery containers, and “anhydrous ammonia equipment”).
specific theft offenses that duplicate a general theft definition, and perhaps hundreds of federal fraud and false-statement offenses. Other overcriminalization arguments complain of overbreadth—statutes that criminalize conduct that most people believe to be innocent, innocuous, or trivial. Frequent examples of this type include the federal misdemeanors against unauthorized use of Smokey Bear’s image or against disturbing mud in a cave on federal land, and a long list of obscure, often comical state misdemeanors. Outdated morals offenses against adultery, fornication, and sodomy fit this category, as well as some gambling and alcohol offenses and crimes targeting outdated social problems, such as railroad trespass. Especially in federal law, some such crimes are more serious and carry substantial penalties. Expansive use of federal mail- and wire-fraud statutes to cover even breaches of fiduciary duty are notable examples.

14. See, e.g., Robinson & Cahill, Degradation, supra note 2, at 637 (citing duplicative theft provisions in Illinois and Kentucky). Robinson and Cahill, who have surely spent more time than anyone analyzing state criminal codes, note that in addition to a general theft offense, for example, the Illinois legislature (like others) has enacted specific theft offenses for theft of delivery containers, library materials, and other specified forms of property. See Robinson & Cahill, Model Penal Code, supra note 8, at 170 & nn.4 & 6 (citing 720 ILL. COMP. STAT. 5/16-1 (1993) (codifying general theft); id. at 5/16A-3(a) (codifying retail theft); and id. at 5/16B-2(a) (codifying library theft)).

15. See Jeffrey Standen, An Economic Perspective on Federal Criminal Law Reform, 2 BUFF. CRIM. L. REV. 249, 289 (1998) (counting 325 federal fraud or misrepresentation offenses); Stuntz, supra note 1, at 517 (noting that the federal criminal code includes 100 separate misrepresentation offenses).


17. See, e.g., Beale, supra note 1, at 750–53 (describing state morals legislation as a form of overcriminalization). Morals offenses are the focus of David A.J. Richards’s book-length critique of overcriminalization. See RICHARDS, supra note 3. This complaint is at least a generation old. See Kadish, supra note 3, at 160 (criticizing morals legislation as generally unenforced and open to discriminatory application).

18. See Stuntz, supra note 1, at 556 (citing Virginia’s many railroad-specific crimes). The failure of legislatures to repeal outdated statutes was a central concern of Guido Calabresi’s book, A COMMON LAW FOR THE AGE OF STATUTES (1982). See id. at 2 (“[L]aws are governing us that would not and could not be enacted today, and . . . some of these laws [that] not only could not be reenacted but also do not fit[] are in some sense inconsistent with[] our whole legal landscape.”).

Complaints about these two main types of crime expansion are related to other, ancillary concerns, such as code disorganization—many new provisions are scattered throughout statute books, outside of the criminal code. They are sometimes poorly drafted, which can lead to doctrinal incoherence, such as inconsistent use of mens rea terms, and to distributive injustice when comparable conduct is charged under similar statutes that yield different sentences.20

Redundancy and overbreadth have several potential ill effects, but they are largely distinct. Overbreadth inappropriately criminalizes normatively legitimate conduct. That infringes legitimate spheres of liberty, and it increases police and prosecutorial power by providing more grounds for arrest and conviction. Redundancy, by definition, does not expand criminal law’s scope; it “recriminalizes” conduct already prohibited, and most examples point to conduct that is appropriately barred—thief, assault, fraud, and the like.21 Courts have a few means to control prosecutor manipulation of the charging options created by overlapping offenses, through concurrent sentencing, merging offenses, and rules mandating that specific statutes supersede general ones or that those with lesser punishments for the same conduct trump more severe ones.22 But those doctrines are fairly weak, and redundant crimes, especially if coupled with sentencing variations for similar offenses, can also increase enforcement officials’ power. Expansive substantive law undermines criminal procedure restrictions because more crimes mean more bases for police to find probable cause to stop and arrest, and redundant crimes give prosecutors more power to choose statutes with easier proof requirements, to punish the same conduct multiple times, to effectively choose punishments when similar statutes carry different penalties, and thereby to gain bargaining leverage by increasing the risk of trial.23 That

20. See Robinson & Cahill, Degradation, supra note 2, at 635–38 (characterizing as “degradation” the proliferation of offenses that duplicate, and are sometimes inconsistent with, existing provisions; Paul H. Robinson et al., The Five Worst (and Five Best) American Criminal Codes, 95 NW. U. L. REV. 1 (2000) (evaluating the effectiveness of different states’ criminal codes).

21. One exception is offense definitions, such as those in the federal mail-fraud statute, which are broad enough to capture both clear wrongdoing and more marginal or morally ambiguous conduct. See Coffee, Tort/Crime, supra note 19, at 202–06 (criticizing the expansive reach of the federal mail- and wire-fraud statutes as amounting to a criminalization of civil law principles of fiduciary duty).

22. See, e.g., Dixon v. State, 596 S.E.2d 147, 148–50 (Ga. 2004) (holding that the defendant could be punished only under the statute for misdemeanor statutory rape, not felony child molestation, due to lenity doctrines dictating that specific statutes trump general ones and lesser punishments prevail over greater ones). Such doctrines are of limited reach; prosecutors can sometimes avoid court supervision of this type by charging only the more severe offense, rather than multiple, overlapping offenses.

23. See William J. Stuntz, Substance, Process and the Civil-Criminal Line, 7 J. CONTEMP. LEGAL ISSUES 1, 7 (1996) [hereinafter Stuntz, Civil-Criminal Line] (explaining that the protections...
bargaining leverage leads to plea bargains inappropriately replacing trials and may play a role in wrongful convictions. Specifying these alleged effects of overcriminalization is important because I argue in the final Part that overbreadth—criminalizing innocent or innocuous conduct—has little effect in practice, save for small subsets of federal prosecution. Most claims of excessive criminalization relate to offenses that are trivial and rarely enforced. Likewise, redundancy probably plays a lesser role in adding to prosecutorial power and plea bargains than commonly assumed.

One feature of this debate merits emphasis. While many complaints about overcriminalization point to state codes, much critical literature focuses on federal criminal law. A few critiques focus exclusively on federal criminal law, and nearly all include federal law as dominant (often recurrent) examples of each form of the problem, whether it be excessive

of criminal procedure only encourage the legislature to create "bad" substantive rules that will enable law enforcement to bypass the procedural protections); William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 YALE L.J. 1, 7 (1997) (arguing that "overcriminalization" allows the government to eliminate many criminal procedure protections—traffic laws enable police to avoid probable-cause requirements, while antisodomy laws allow prosecutors to lower the amount of proof needed and induce guilty pleas in certain "problematic" sexual-assault cases). The recognition that wide-ranging criminal laws encourage and facilitate abusive enforcement discretion is not entirely new; scholars and activists raised similar arguments against morals crimes in the first several decades of the mid-twentieth century. See, e.g., HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 329 (1968) (arguing that enforcing laws against prostitution encourages police corruption and the "disgusting" use of police "decoys"); EDWIN M. SCHUR, CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY 114 (1965) (arguing that antihomosexuality laws "encourage[...]

24. See William J. Stuntz, Plea Bargaining and Criminal Law's Disappearing Shadow, 117 HARV. L. REV. 2548, 2554 (2004) (arguing that the prosecutor's sentencing preferences drive criminal-litigation outcomes more than the law because, unlike a civil plaintiff who seeks to maximize damages, the prosecutor does not have an incentive in many criminal cases to maximize the criminal penalty of the defendant); Ronald F. Wright, Trial Distortion and the End of Innocence in Federal Criminal Justice, 154 U. PA. L. REV. 79, 135–36, 146–50 (2005) (arguing that the primary cause of excessive plea bargaining is excessive prosecutorial power and proposing a measure of excessive plea bargaining).

25. See, e.g., ABA, supra note 3, at 7–11 (considering the growth of federal criminal statutes in the last thirty years); Baker, supra note 3a, at 25 (considering the growth of federal criminal law statutes over the same period and arguing that the ABA report used a flawed methodology); Green, supra note 3, at 1615 (arguing that the ultimate responsibility for preserving the moral integrity of the federal criminal law belongs to the legislators and prosecutors); Rosenzweig, supra note 3 (criticizing the increasing use of federal criminal law to regulate conduct affecting the public welfare that would have traditionally been dealt with by civil or tort law); cf. Richman & Stuntz, supra note 12 (arguing that expansive federal criminal statutes make pretextual prosecutions a bigger problem in federal than state law enforcement).

26. See, e.g., Beale, supra note 1, at 753–74 (discussing the overfederalization of the criminal law); Luna, supra note 1, at 717–19 (providing examples of offenses that federal law overcriminalizes); Stuntz, supra note 1, at 555–65 (discussing the relationship between Congress and the Supreme Court in writing and construing federal criminal statutes). Paul Robinson's work is an exception; he has devoted much exclusive attention to state criminal codes. See, e.g., Robinson et al., supra note 20 (proposing criteria by which to evaluate and rank the performance of all fifty-two American criminal codes).
punishment or criminalization of the trivial behavior and conduct best left to civil regulation. This distinction is important because overcriminalization is worse in the federal context: its costs are greater there and its amelioration less likely.

Scholars explain overcriminalization largely with an account of legislative failure and democratic-process dysfunction. Legislatures treat criminal law differently from most other topics of public policy—proposals for new crimes and increased punishments pass legislatures more easily than other types of legislation, while repeal or reform of crimes and punishment face unusually long odds for enactment. This is so, scholars argue, for understandable reasons: majority preferences lean strongly and consistently in favor of expanded offenses and more severe punishment. Interest-group influences work strongly in one direction: prosecutors are especially effective lobbyists for criminal law expansion and other interest groups lobby for

27. For arguments about the appropriateness of noncriminal regulation for conduct governed by criminal statutes, see, for example, PACKER, supra note 23, at 249–95 (arguing that criminal sanction is the law’s ultimate threat, and as such, should be reserved for what really matters, and that being punished for a crime is different from being regulated in the public interest or being forced to compensate another who has been injured by one’s conduct); Coffee, Tort/Crime, supra note 19, at 193 (contending that the blurring of the border between tort and crime predictably will cause injustice and will weaken the efficacy of the criminal law as an instrument of social control); Coffee, Paradigms Lost, supra note 19, at 1877 (reasoning that because society’s capacity to focus censure and blame is among its scarcest resources, the scope of the criminal law should be reduced by focusing it on a limited range of misbehavior); Green, supra note 3, at 1610 (arguing that “malum prohibitum harmfulness” can arise in the limited number of cases in which a regulated party’s failure to comply “either allows the party to achieve an unfair advantage over its law-abiding competitors or weakens the authority of legitimate governmental authority, and, by setting a bad example, encourages other actors to disobey the law”); Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 YALE L.J. 1795, 1802 (1992) (“I advocate the shrinking of the criminal law in order to fit it into its proper role in the law of sanctions, next to an expanding arena of punitive civil sanctions.”); and Stuntz, Civil-Criminal Line, supra note 23, at 40–41 (concluding that limits on criminal substance are needed to make criminal procedure mean something—one of the largest, yet least noticed implications of constitutionalizing the criminal process).

28. For a partial explanation why, see Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 COLUM. L. REV. 1276, 1285–1314 (2005) (describing trends in state legislation reducing sentences and arguing these trends are a function of budget constraints on state legislatures, for whom prison costs are a significant expense, while Congress faces no such fiscal discipline because federal incarceration is a negligible portion of the federal budget). See also Frank O. Bowman, III, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 COLUM. L. REV. 1315, 1346 (2005) (presenting a similar argument on how costs contain legislative judgments of incarceration rates).

29. See, e.g., ABA, supra note 3, at 16 (observing that federal crimes are usually enacted in order to achieve “political popularity,” not to meet an enforcement need); Erik Luna, Overextending the Criminal Law, in GO DIRECTLY TO JAIL, supra note 3, at 1, 5 (arguing that the primary cause of overcriminalization is “the one-way ratchet of law-and-order politics” where new crimes are added to the books as political candidates attempt to appear “tough on crime”).

30. See, e.g., Beale, supra note 1, at 774 (noting that it “sounds good” to voters to pass new criminal laws or harsher sentences).

specific crimes; shippers, for instance, seek a special theft-of-delivery-container offense for conduct covered by a general theft definition.\textsuperscript{32} High-profile crimes prompt legislatures to react with redundant statutes, and there is little downside to doing so. Rarely does an interest group of significant influence emerge to counter the influence of prosecutors, and legislatures can enact new crimes cost free—they need not repeal old ones or appropriate tax dollars. (Importantly, that is not true with sentencing increases; incarceration costs a lot of money, and that is some constraint on sentencing policy.) All these elements make criminal justice a singular case in the legislative process: criminal law expands unusually easily, and its contraction is unusually difficult.

The growth in raw numbers of offenses on the books is undeniable, but this story leaves out much about criminal law’s substantive evolution in recent decades. Criminal law has expanded to address legitimate new issues, such as computer-related crime. More importantly, it has \textit{contracted} in important respects in the last century thanks in large part to legislatures—reforms that continue in contemporary legislatures. Further, systematic study suggests that criminal law proposals enjoy a much more ordinary fate in legislatures—and pass no more readily than bills on other topics—than scholars suggest. To better see that picture, consider the findings from the data set of recent criminal law legislation in four states, followed by contemporary examples of criminal law repeal and a brief historical survey of criminal law’s shrinking scope in the last century.

II. Legislatures and Criminal Law

\textbf{A. The Evolution of Substantive Criminal Law}

The core of criminal law should remain fairly static. Core wrongdoing against persons, property, and the state are nearly universally criminalized over time. But we also expect law to adapt with technological and social change. Sometimes criminal law expands appropriately: we treated horse theft more harshly when horses were highly valuable;\textsuperscript{33} later, we devised offenses tailored for auto theft\textsuperscript{34} and now have broad statutes targeting officials and prosecutors are one of the most powerful lobbying groups in criminal law); Victoria F. Nourse & Jane S. Schacter, \textit{The Politics of Legislative Drafting: A Congressional Case Study}, 77 N.Y.U. L. REV. 575, 587–88 (2002) (describing prosecutors’ strong lobbying influence in Congress on criminal justice legislation); Stuntz, supra note 1, at 534 (noting that police and prosecutors are powerful lobbyists on criminal law issues).

\textsuperscript{32} See Robinson & Cahill, \textit{Degradation}, supra note 2, at 637 & n.16 (citing this example in Illinois).

\textsuperscript{33} See \textsc{Lawrence M. Friedman}, \textsc{Crime and Punishment in American History} 110–11 (1993) (identifying late-nineteenth-century Texas theft statutes that mandated harsher penalties for horse theft than for cattle or livestock theft).

\textsuperscript{34} See, e.g., \textsc{Tex. Penal Code Ann.} § 31.07 (Vernon 2003) (allowing for a defendant to be convicted of a state jail felony for unauthorized use of a motor vehicle even if an intent to actually steal the vehicle cannot be proved).
support for terrorism.\textsuperscript{35} Offenses must be updated to address technology—say, trespass via computer networks. Changing social mores can drive expansion: batteries against spouses and children once were not crimes.\textsuperscript{36} More significantly for present purposes, American criminal law also contracts, most often with respect to conduct for which the harm is more diffuse or debatable (especially when the victim is a voluntary participant), when society has other policy options for addressing disfavored conduct than criminal law.

A long view of criminal law’s evolution reveals a dramatic contraction of its scope, even as it has expanded in some respects. Colonial criminal law had a breadth and severity unimaginable now. A son who disobeyed his parents could face the death penalty; failing to attend church, working on Sundays (or even kissing one’s spouse on the Sabbath) were all crimes, as were the familiar range of consensual sexual offenses, bearing children out of wedlock, cursing, or failing to work on days other than Sunday.\textsuperscript{37} De Tocqueville marveled at Connecticut’s colonial penal code, with capital offenses for “[w]hosoever shall worship any other God than the Lord” and other commandments adopted wholesale from the Pentateuch, including blasphemy and adultery.\textsuperscript{38} (American courts affirmed blasphemy prosecutions into the 1920s.)\textsuperscript{39} Fornication brought a sanction of whipping or forced marriage; simple lying, using tobacco, serving more alcohol than the law authorizes or—for women—permitting oneself to be kissed brought lesser sentences of fines or flogging.\textsuperscript{40} Nonetheless, the more relevant comparisons are to more recent history. Taking as a baseline the period around the turn of the twentieth century, we find both widespread patterns of decriminalization throughout the last several decades and thereby a strong argument that criminal law’s reach into citizens’ lives is substantially less than it was less than a century ago, in large part due to legislative action.


\textsuperscript{36} See EVE S. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 62 (3d ed. 2002) (“The Massachusetts Body of Laws and Liberties, enacted by the Puritans in 1641, were the first laws in the world that expressly made domestic violence illegal.”).

\textsuperscript{37} FRIEDMAN, supra note 33, at 33–36, 41.

\textsuperscript{38} 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 39 (Philip Bradley ed., Henry Reeve trans., Vintage Books 1945) (1835). Crimes explicitly protecting Christianity were affirmed well beyond the colonial period. See, e.g., People v. Ruggles, 8 Johns. 290, 295 (N.Y. 1811) (rejecting constitutional arguments that blasphemy laws must punish “attacks upon the religion of Mahomet or the Grand Lama” to the same degree it punishes Christian blasphemy because “we are a Christian people”).

\textsuperscript{39} See, e.g., State v. Mockus, 113 A. 39 (Me. 1921) (applying a blasphemy statute).

\textsuperscript{40} 1 DE TOCQUEVILLE, supra note 38, at 39–40.
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 conduct, 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,

51. Id. at 578.
52. See Developments in the Law—Sexual Orientation and the Law, 102 HARV. L. REV. 1508, 1520 (1989) (stating that prosecutors primarily used sodomy statutes to include a lesser charge in rape or aggravated assault cases).
54. Sedition Act § 3; accord Espionage Act § 3 (making it a crime to, among other things, “willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty” during a time of war). Eugene Debs, among others, was famously sentenced to ten years in prison under these provisions. Debs v. United States, 249 U.S. 211, 212 (1919). The Espionage Act’s constitutionality was affirmed in Schenck v. United States, 249 U.S. 47, 52 (1919). The Sedition Act’s constitutionality was affirmed in Abrams v. United States, 250 U.S. 616, 618–19 (1919).
57. See PAUL S. BOYER, PURITY IN PRINT: THE VICE-SOCIETY MOVEMENT AND BOOK CENSORSHIP IN AMERICA 185–86, 192–98, 208–09 (1968) (describing the arrest and conviction of booksellers who sold Lady Chatterley’s Lover and An American Tragedy, and the import ban of Candide); FRIEDMAN, supra note 33, at 351 (same); Nelson, supra note 23, at 268–75 (recounting examples of censorship in New York in the 1920s and 1930s).
58. See FRIEDMAN, supra note 33, at 352–54 (describing changes in obscenity regulation and attributing liberalization to popular-culture shifts).
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. 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 restrictions 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

59. See *Eskridge*, supra note 41, at 338–41 (collecting municipal sex-offense ordinances between 1850 and 1950); id. at 174–204 (describing the evolution of First Amendment jurisprudence that narrowed the range of government regulation that infringes on broadened conceptions of protected liberty and autonomy).


63. 388 U.S. 1 (1967).

64. See id. at 6 & n.5 (listing states that abolished miscegenation crimes); Walter Wadlington, *The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1189 n.2 (1966) (noting that only seventeen states still had antimiscegenation laws in 1967).

65. See infra note 214 (discussing *Roper* and *Atkins* as well as earlier legislative constriction of death-penalty eligibility).

prohibition in 1931.67 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.68 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.69 It was followed, of course, by a sweeping legislative decriminalization in 1933 with the passage of the Twenty-First Amendment.70 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,71 of alcohol sales and use.72

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.73 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.74 Here again we find powerful interest

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68. Id.
69. FRIEDMAN, supra note 33, at 339–41.
70. For a history of Prohibition, see Roosevelt Proclaims Repeal; Urges Temperance in Nation, N.Y. TIMES, Dec. 6, 1933, at 1, reprinted in DRUGS IN AMERICA: A DOCUMENTARY HISTORY 155–57 (David F. Musto ed., 2002).
71. The prominent exceptions are probably increases in the legal drinking age to twenty-one and more severe drunk-driving sanctions. The reasons for aggressive prosecution of drunk driving are discussed infra text accompanying note 161.
72. See FRIEDMAN, supra note 33, at 341 (discussing the repeal of Prohibition as the first great victory in the “Lifestyle Wars” and the clear trend towards decriminalization of morals regulation following the repeal of Prohibition).
74. See The Associated Press, Kansas Liquor Laws Soon May Mirror Most in Nation, FIRST AMENDMENT CENTER, May 5, 2005, available at http://www.firstamendmentcenter.org/news.aspx?id=15249 (noting that since 2002, eleven states have repealed Sunday bans on liquor sales); Clifford J. Levy, Drink, Don’t Drink. Drink, Don’t Drink, N.Y. TIMES, Oct. 9, 2005, at 14 (noting that twelve states have recently scaled back restrictions on Sunday alcohol sales and only sixteen states have strict bans); Distilled Spirits Council of the United States, Sunday Spirit Sales: Rolling Back
groups—alcohol manufacturers, distributors, and retail stores—lobbying on the side of decriminalization.\textsuperscript{75} Another class of low-level crimes that some legislatures abandoned over the last two decades is minor traffic offenses; several states have rewritten those offenses as civil infractions instead of misdemeanors,\textsuperscript{76} despite the Uniform Vehicle Code's recommendation.\textsuperscript{77} This is surely an example of decriminalization with broad (but probably weak) popular support because it involves offenses that most people commit.

Interest-group and social-movement dynamics also explain the continuing contest over the legal status—governed by criminal and civil law—of midwifery practice. State law represents a patchwork of approaches that continues to be the topic of legislative consideration. About ten states prohibit midwifery practice and allow only physicians to assist in childbirth.\textsuperscript{78} Others limit midwifery in various ways through licensing statutes, sometimes limiting the practice to hospitals.\textsuperscript{79} Depending on the state, those prohibitions subject midwives to criminal prosecution for practicing medicine or midwifery without a license.\textsuperscript{80} At times, prosecution has been rigorous; in the 1970s, California ran a series of sting operations to prosecute midwives.\textsuperscript{81} In legislatures, physicians' groups have largely opposed legalizing midwifery, but in recent decades midwife advocates have nonetheless gained some liberty to practice—and to avoid criminal liability—in some states.\textsuperscript{82} Interestingly, a study of legislative debates on the Blue Laws, http://www.discus.org/issues/sunday.asp (listing states that in recent years have relaxed restrictions on Sunday alcohol sales).

\textsuperscript{75} Sara B. Miller, \textit{In Battle for Sunday, the "Blue Laws" are Falling}, CHRISTIAN SCI. MONITOR, Dec. 5, 2003, at 1.

\textsuperscript{76} See, e.g., CAL. VEH. CODE §§ 22351, 40000.1, 42001(a) (West 2000 & Supp. 2007) (denoting traffic offenses as noncriminal infractions); FLA. STAT. ANN. §§ 316.187(3), 316.189(4), 316.1895(10), 316.655, 318.13(3), 318.14(1) (West 2006 & Supp. 2007) (denoting speed-law violations as noncriminal infractions); 625 ILL. COMP. STAT. ANN. 5/16-104 (West 2002) (denoting Illinois speeding violations as noncriminal petty offenses, unless a person has been convicted for such an infraction three or more times in one year); NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., SUMMARY OF STATE SPEED LAWS (9th ed. 2006) (collecting state laws, penalties, and procedures on speeding and related traffic offenses, such as reckless driving and racing). For a bibliography of sources on decriminalization of traffic offenses, see Traffic Courts and Procedures Resource Guide, http://www.ncsconline.org/wc/CourTopics/ResourceGuide.asp?topic=Traffi.


\textsuperscript{79} Beckett & Hoffman, \textit{supra} note 78, at 131.

\textsuperscript{80} Id. at 134.

\textsuperscript{81} Id.

\textsuperscript{82} Id. at 133–35.
midwifery documents that even some opponents of midwifery express discomfort with criminal punishment for the practice.\(^{83}\) And fear of criminal sanction led midwife advocates to compromise in favor of more restrictive licensing schemes than they preferred.\(^{84}\)

More serious core crimes are also subject to reform or abolition, with the impetus sometimes from policy experts and sometimes from popular pressure and interest groups. An example of the former is the crime of conspiracy, which has ancient roots and continuing utility; conspiracy is a charge in more than a quarter of federal criminal indictments.\(^{85}\) Yet the Model Penal Code (MPC) offered a narrow approach to conspiracy that many states followed beginning in the 1960s and 1970s. States constrained conspiracy liability by following the MPC in permitting a conspiracy conviction to merge with the underlying offense, in rejecting the \textit{Pinkerton} doctrine (making conspirators liable for crimes of coconspirators),\(^{86}\) and in capping conspiracy sentences at the maximum for the underlying offense.\(^{87}\) Those limits are hardly the same as crime abolition, but they do demonstrate the ability of democratic lawmaking to resist easy routes of liability expansion due partly to the influence of policy-making elites.\(^{88}\)

For an example of crime abolition driven by popular sentiment, consider the very strong trend of decriminalizing certain weapons offenses. Over the

\(^{83}\)Id. at 150–51, 160.

\(^{84}\)Id. at 134–36.

\(^{85}\)See Beth Allison Davis & Josh Vitullo, \textit{Federal Criminal Conspiracy}, 38 AM. CRIM. L. REV. 777, 778 n.9 (2001) (finding that 20,132 of 70,114 federal criminal defendants in 1997 were charged under one of three conspiracy provisions). Conspiracy is also a common charge in state prosecutions. See Paul Marcus, \textit{Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area}, 1 WM. & MARY BILL RTS. J. 1, 9 (1992) ("[C]hange in the growing number of conspiracy prosecutions can be seen in large cities and small cities, in regions throughout the country, in the federal courts and in the state courts.").

\(^{86}\)Though the \textit{Pinkerton} doctrine is the rule in some significant portion of states, it draws its name from a federal case. See Pinkerton v. United States, 328 U.S. 640, 643 (1946) (allowing conspirators to be held liable for substantive crimes committed by coconspirators in furtherance of the conspiracy, even if they did not specifically agree to commission of those additional crimes).

\(^{87}\)See \textit{MODEL PENAL CODE} § 1.07 cmt. 2(b) (1962) (noting that at least sixteen jurisdictions had adopted or proposed provisions based upon § 1.07, which requires merger of conspiracy and a substantive offense); id. § 2.06 (rejecting \textit{Pinkerton}); id. § 2.06 cmt. 6(a) (noting that most states that have reformed their criminal codes reject \textit{Pinkerton}); id. § 5.05(1) (grading punishment for conspiracy by the punishment for the object offense). Contrast that last provision of varying penalties with the substantial penalties for conspiracy under federal statutes. See, e.g., 18 U.S.C. § 371 (2000) (providing for up to a five-year sentence under the general federal conspiracy statute); id. § 1951 (providing a twenty-year sentence for Hobbs Act conspiracies).

\(^{88}\)The United States Sentencing Commission, another mechanism for policy specialists, has adopted some of these limits in federal law through its power to draft sentencing guidelines. See U.S. \textit{SENTENCING GUIDELINES MANUAL} § 2X1.1(a)-(b)(2) (2006) (calibrating the conspiracy sentence by reference to the base-offense level of the substantive crime, undermining the federal law's rejection of the merger doctrine); \textit{see also} id. § 2X1.1 cmt. 2 ("Under § 2X1.1(a), the base offense level [for an attempt, conspiracy, or solicitation] will be the same as that for the substantive offense."); id. § 1B1.3 cmt. 2 (explicitly adopting a "relevant conduct" standard narrower than the \textit{Pinkerton} doctrine); id. § 3B1.2 (providing that a minimal participant has his sentence reduced by four offense levels, while a minor participant has his sentence reduced by two offense levels).
Democracy and Decriminalization

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—popularly labeled the Stand Your Ground law—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

89. 720 ILL. COMP. STAT. ANN. 5/24-1 (West 2002); KAN. STAT. ANN. § 21-4201 (2006); NEB. REV. STAT. § 28-1202 (2005); WIS. STAT. § 941.23 (2005). Those making the case for overcriminalization can cite Illinois’s statute, which makes it a misdemeanor to carry a “sling-shot.” 720 ILL. COMP. STAT. ANN. 5/24-1(a)(1).


91. See id. at 2, 7 (noting that a small majority of Missouri voters rejected a ballot referendum to legalize concealed weapons and that public opinion surveys show that slight majorities in many states oppose decriminalization of concealed weapons); see also NRA Institute for Legislative Action, http://www.nraila.org (detailing the NRA’s legislative successes and current lobbying efforts). For a detailed examination of this reform process and the role of interest groups in Missouri, as well as a history of this reform trend more broadly, see generally HORNER, supra note 90.


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


97. See Ann E. Freedman, Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses, 11 AM. J. GENDER SOC. POL’Y & L. 567, 587 (2003) (“An emphasis on criminal law remedies dominates much of our public discourse on domestic violence, as it does our preferred response to many other social problems.”); Betsy Tsai, The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation, 68 FORDHAM L. REV. 1285, 1291 (2000) (“In the 1990s, legislation strengthened the advances made in the 1980s, further acknowledging the need to classify domestic violence as a crime and providing a greater variety of remedies and sanctions.”); Battered Women & Feminist Lawmaking: Author Meets Readers, Elizabeth M. Schneider, Christine Harrington, Sally Engle Merry, Renée Römkens, & Marianne Wesson, 10 J.L. & POL’Y 313, 343–44 (2002) (“What is particularly telling is that the legalizing tendency [to regulate domestic battery by law] is so profoundly dominated by criminal law.”).


That policy shift echoed policies from decades earlier: around the turn of the twentieth century, many city police forces formally adopted “Golden Rule” policies—instead of arresting drunks or public-disorder offenders, they escorted them home or issued warnings. SIDNEY L. HARRING, POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865–1915, at 40 (1983); JAMES F. RICHARDSON, URBAN POLICING IN THE UNITED STATES 79–80 (1974). For much of 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.

Even drug crimes, a dominant category on criminal dockets and the subject of expansive criminal-legislation and sentencing increases in recent times, have been the subject of some reform. In the last eleven years, voters in nine states endorsed ballot initiatives or referenda decriminalizing the use


104. See FRIEDMAN, supra note 33, at 332–34 (recounting increases and decreases in age of consent for statutory rape in various states).
of marijuana for medicinal purposes. The effect of those changes is constrained because federal law continues to criminalize all marijuana use, and federal officials continue to enforce these federal crimes despite state-law changes and local public sentiment (a telling example of how varying structures of democratic institutions can yield different outcomes from the same popular preferences). In the wake of the Supreme Court’s decision in Gonzales v. Raich, state decriminalization is largely symbolic; we may see fewer such reforms for just that reason. But the reforms to date nonetheless demonstrate a notable democratic appetite for criminal law reform, and other examples will have real effects. Voters approved seventeen of twenty-two state ballot initiatives between 1996 and 2006 that either decriminalized some marijuana use, reduced drug-possession punishments, or mandated related reforms, such as limiting asset forfeiture or directing its proceeds to drug treatment. That public sentiment also supports moderate legislative reform of drug crimes, such as Colorado’s.

All of this suggests that despite scholars’ worries, accretion of criminal statutes in recent decades does not mean we are moving closer to a day that our state criminal codes make everyone a felon; legislatures can make major as well as minor reforms that contract criminal law without public opposition. The worry about the scope of criminal law touching widely in ordinary people’s lives was as legitimate—probably much more so—75 or 100 years ago when vice, speech/expression, explicit media, and lifestyle crimes (including bans on contraception and use of profanity) were at their peak. Prohibition made criminals of many Americans (and Prohibition continued locally in many areas long past 1933).


106. See Gonzales v. Raich, 545 U.S. 1 (2005) (upholding an application of the federal Controlled Substance Act to the intrastate cultivation and use of marijuana as within Congress’s power under the Commerce Clause).


108. See Boyer, supra note 57, at 33–40 (recounting early-twentieth-century censorship of printed materials that were considered obscene); Friedman, supra note 33, at 350–54 (examining the history of state control over pornography and obscenity); Nelson, supra note 23, at 273, 296 (examining the censorship of pornographic books and movies, which gradually began to decline in the 1960s).

109. See David E. Kyvig, Repealing National Prohibition 187–88 (1979) (stating that a few states and many counties remained dry after the ratification of the Twenty-First Amendment in December 1933).
comparisons that come from a preconstitutional culture, and hold aside as well Jim Crow laws that made criminals of African Americans in many parts of the country for innocuous conduct—and would have done so more often had those laws\textsuperscript{110} and the social practices supporting them been less effective in achieving high compliance.\textsuperscript{111} Criminal law has substantially contracted in all these realms of private, social, and morals-related conduct, even as it has expanded in other dimensions, such as regulatory crimes. Criminal law today often punishes too harshly, but criminal law's practical scope for most people—its regulation of most citizens' lives as opposed to its reach in white-collar and corporate contexts—is narrower than a century ago. The problem of punishing conduct that is widely viewed as wholly innocent is fairly minimal in practice. Because of criminal law's multiple levels of democratic responsiveness, those instances are isolated rather than systemic, and they are not plausibly worse than a century ago.

B. Legislative Failure to Enact Criminal Law Proposals

The foregoing picture is one of American legislatures—with help from courts and prosecutors—actively decriminalizing. But democratic institutions constrain criminal law—and resist the one-way ratchet—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.

To investigate this point, I compiled 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.\textsuperscript{112} Using

\textsuperscript{110} See, e.g., FRIEDMAN, supra note 33, at 94 (describing how “criminal provisions were a vital part” of the southern, post-Civil War “Black Codes,” which included crimes for failing to work, for enticing a worker away from his job, and for quitting a job while under contract to work).

\textsuperscript{111} For a short overview of vigilante activity used especially to enforce racial social codes, see FRIEDMAN, supra note 33, at 187-92.

\textsuperscript{112} Political scientists rate state legislatures by their degree of professionalization, and these states represent an example of the three categories—professional (Pennsylvania ranked 8th), hybrid (Texas ranked 13th), and citizen (Utah ranked 44th). POLITICS IN THE AMERICAN STATES 158 tbl.6-1 (Virginia Gray & Russel L. Hanson eds., 8th ed. 2004). States vary also in the percentages of bills they pass, from a low of less than 5% to a high of more than 60%. Pennsylvania is at the low end, with a passage rate of 2% in one recent year; Texas's rate was 24.7%; and Utah's rate was 54.6%. See 36 THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 120 tbl.3.19 (2004) [hereinafter 36 THE BOOK OF THE STATES] (providing data on the bill introductions and enactments for the fifty states in 2003). These three states vary as well by the number of legislative seats contested in recent elections. Pennsylvania’s percentage of contested is right at the mean of 61%, Utah is well above the mean at 74%, and Texas is well below the mean at 37%. POLITICS IN THE AMERICAN STATES, supra, at 166 tbl.6-2. On rankings of political ideology (1 = most liberal; 50 = most conservative), these states skew somewhat conservative: Pennsylvania is at the midpoint, with a rank of 25; Texas is ranked 31st; and Utah is 39th. Id. at 4 tbl.1-1. Finally, as measures of criminal justice policy, these states vary greatly both in their rates of incarceration and their sentencing policies. While the 2004 incarceration rate for all states was 432 per 100,000, Utah and
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),113 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.114 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

Pennsylvania were below the mean with rates of 246 and 329 per 100,000, respectively, while Texas was well above it with a rate of 694 per 100,000. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2004, at 4 (2005), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf. Texas has no state sentencing commission; in Utah, a commission issues voluntary guidelines, while in Pennsylvania a longer standing commission issues presumptive guidelines. See Richard S. Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 COLUM. L. REV. 1190, 1196–1200 (2005) (describing each state's sentencing policy).

113. Comparison data were available in all three states for 2003 and 2001 but not for earlier years, so the prior sessions studied are different for each state. No data on overall passage rates were available for Pennsylvania from 1997 to 2000; Texas has legislative sessions only in odd-numbered years.

Note on methodology: Each state's legislative-information service maintains a Web site of all bills introduced and passed by the legislature that are searchable by legislative session and subject-matter category. (Many states do not have Web sites searchable in this way, which was a key reason these states were selected for study.) I depended on the legislative services' categorization of bills by subject matter, and while all sort criminal procedure bills separately from criminal law bills (and I excluded the former), each uses somewhat different category names. I used four search categories in the Texas legislature's database: crimes—drugs; crimes—against morals; crimes—against persons; crimes—against property. See Texas Legislative Online, Bill Search, http://www.legis.state.tx.us/Search/BillSearch.aspx (providing different methods to search Texas Legislature bills online). Utah employs a “criminal code” category that is subdivided into “all legislation” and “passed bills” in its “bill search” database. See Utah State Legislature, Legislation Search, http://le.utah.gov/asp/billsintro/index.asp (providing different methods to search Utah legislation online). In Pennsylvania, criminal bills are categorized under both “crimes and offenses” and “crimes and offenses (18PaCS)” sessions in the Bill Topic Index at http://www.legis.state.pa.us/cfdocs/legis/home/bills/topindex.cfm?CiScope=2005_0.

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. The following chart summarizes these passage-rate findings.

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<th></th>
<th>2003 overall</th>
<th>2003 criminal law</th>
</tr>
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<tr>
<td>Pennsylvania</td>
<td>2%</td>
<td>6.4%</td>
</tr>
<tr>
<td>Texas</td>
<td>24.7%</td>
<td>17.5%</td>
</tr>
<tr>
<td>Utah</td>
<td>54.6%</td>
<td>64.5%</td>
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<th></th>
<th>2001 overall</th>
<th>2001 criminal law</th>
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<tr>
<td>Pennsylvania</td>
<td>8.1%</td>
<td>11.6%</td>
</tr>
<tr>
<td>Texas</td>
<td>28.8%</td>
<td>24%</td>
</tr>
<tr>
<td>Utah</td>
<td>50.7%</td>
<td>52%</td>
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<th></th>
<th>2002 overall</th>
<th>2002 criminal law</th>
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<tbody>
<tr>
<td>Utah</td>
<td>60.6%</td>
<td>44.8%</td>
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<table>
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<tr>
<th></th>
<th>2000 overall</th>
<th>2000 criminal law</th>
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</thead>
<tbody>
<tr>
<td>Utah</td>
<td>50.7%</td>
<td>35%</td>
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</tbody>
</table>

115. In Texas, passage rates for all bills ranged from 24.7% to 28.8% between 1997 and 2003. Rates for criminal law bills alone ranged from 17.5% to 24% in that period.

116. Utah's figures were: for 1997, 58.9% (overall) versus 47.5% (criminal law); for 2000, 50.7% (overall) versus 35% (criminal law); for 2001, 50.7% (overall) versus 52% (criminal law); for 2002, 60.6% (overall) versus 44.8% (criminal law); for 2003, 54.6% (overall) versus 64.5% (criminal law).

117. Pennsylvania's passage rates were: for 1996, 7.9% (overall) versus 7.3% (criminal law); for 2001, 8.1% (overall) versus 11.6% (criminal law); for 2003, 2% (overall) versus 6.4% (criminal law).

<table>
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<th>State</th>
<th>1999 overall</th>
<th>1999 criminal law</th>
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<tbody>
<tr>
<td>Texas</td>
<td>28.1%</td>
<td>22.6%</td>
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<table>
<thead>
<tr>
<th>State</th>
<th>1997 overall</th>
<th>1997 criminal law</th>
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<tr>
<td>Texas</td>
<td>26.7%</td>
<td>19.7%</td>
</tr>
<tr>
<td>Utah</td>
<td>58.9%</td>
<td>47.5%</td>
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</thead>
<tbody>
<tr>
<td>Pennsylvania</td>
<td>7.9%</td>
<td>7.3%</td>
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These data have weaknesses. Bills are not sorted by content beyond fitting a general “criminal law” category, and thus the data may include bills that both create or abolish crimes or that increase or decrease penalties. To address this weakness, I coded the content of all bills introduced in the 2003 sessions of each state’s legislature according to whether they raised or lowered penalties, created or abolished crimes, or made technical changes; I sought to correct for misleading weaknesses in the data, such as introduction of many sentence-reducing or crime-abolishing bills that fail, while crime-creating bills enjoy high passage rates. That analysis left the basic picture unchanged: passage rates for bills expanding crimes or sentences had comparable passage rates to the overall rates, and many such “politically irresistible” bills failed to make it out of legislatures.119

There appears to be little other empirical work examining legislatures’ action on criminal law bills, but these data suggest legislatures routinely decline to enact proposals that fit the stereotype of politically irresistible proposals for expanded liability and harsher sentences. Legislatures constrain criminal law, not merely by repealing outdated statutes (though often belatedly and haphazardly) but by declining to expand the criminal

119. For example, in the 2003 Texas legislative session, if one excludes the twenty-seven failed bills that proposed reducing sentences, narrowing crime definitions, or making prosecution more difficult in some way (one bill to reduce sentences passed), the passage rate for remaining criminal law bills rises from 17.5% to 19%, while the overall bill-passage rate that year was 24.7%. See 36 THE BOOK OF THE STATES, supra note 112, at 120 tbl.3.19 (providing data on the bill introductions and enactments for Texas and the other forty-nine states in 2003). In Pennsylvania’s 2003 session, only one bill would have narrowed a crime (by creating exceptions to firearms prohibitions), and it failed; none would have repealed crimes or lessened penalties. Id. Thus, the 93.6% of criminal law bills that failed to win passage that year would have expanded liability or punishment, or made technical changes. They included politically appealing bills, such as bans on selling drugs to a minor near a school or entering an occupied dwelling with intent to harm an inhabitant. See H.R. 358, Gen. Assem., Reg. Sess. (Pa. 2003) (entering with intent to harm); H.R. 17, Gen. Assem., Reg. Sess. (Pa. 2003) (selling drugs to minors).
code with provisions that would fit fully in the mainstream of contemporary prohibitions and punishment policy.

III. Structures of Democratic Governance of Criminal Law

A. Legislative Process, Majority Preferences, and Criminal Law Moderation

What explains the persistent record of decriminalization and noncriminalization? Failure is the norm for all legislative proposals because the legislative process is rife with "vetogates"—procedural points at which bills can be blocked. Vetogates provide occasions to kill a proposal without legislators formally voting on the bill. The prevailing scholarly argument is that bills creating criminal law have unusual advantages in overcoming the multiple hurdles to a bill's passage posed by logrolling, creation of new coalitions, and other strategic behavior that imperils typical legislation. But data on bill-passage rates suggest criminal law coalitions are not unusually easy to form, nor does an imbalance of interest-group power, lopsided public sentiment, and political salience of crime bills help broaden and stabilize these coalitions. And the historical account suggests those hurdles can be overcome at times to repeal criminal law.

I will offer only a partial explanation here. Two factors significantly contribute to constraining criminal law in the legislative process: the structure of legislative processes or "frameworks," especially when they facilitate input of professional staff on bill drafting, and—perhaps surprisingly at first, but less so in light of our decriminalization history—majoritarian preferences.

1. Expertise and Procedural Frameworks.—Legislatures vary greatly in their standard rules and organizational features, and they sometimes adopt special rules on specific legislative topics. Elizabeth Garrett has recently described models of "framework legislation" in Congress that structure

120. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 68 (2000); see McNollgast, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation, 80 GEO. L.J. 705 passim (1992) (McNollgast is the collective name used by Matthew McCubbins, Roger Noll, and Barry Weingast when writing together) (employing the concept of vetogates); see also Stuntz, supra note 1, at 549 (explaining why "many proposed criminal statutes do not pass").

121. See ESKRIDGE ET AL., supra note 120, at 68 (describing the hurdles proposed legislation faces).

122. See Luna, supra note 1, at 719 (observing that lawmakers face political pressure to be tough on crime but have no countervailing incentive to "scale back the criminal justice system"); see also Barkow, supra note 31, at 727–35 (describing the politics of sentencing policy); Beale, supra note 1, at 773 (explaining factors that lead to a "one way ratchet toward the enactment of additional crimes and harsher penalties"); King, supra note 1, at 301 ("[L]egislative adjustments to federal sentencing policy have been a one-way ratchet for twenty years . . .。"); Stuntz, supra note 1, at 509 ("How did criminal law come to be a one-way ratchet that makes an ever larger slice of the population felons . . .?"); id. at 547 (explaining why legislators tend to view criminal law as a "one-way ratchet").
decision making in particular policy areas to solve collective-action problems, increase or decrease powers of committees or other players, or make certain substantive outcomes more likely by, for example, insulating staff or bill drafters from partisan pressure. Congress’s creation of the United States Sentencing Commission to overhaul sentencing policy is one version of this practice and was adopted with just these sorts of goals in mind. Other federal examples include the budget process, the Base Realignment and Closure Act (which assigns initial decision making to an independent commission and limits Congress’s authority to change or reject the commission decisions), and fast-track trade legislation that structures Congress’s involvement in trade agreements negotiated by presidents.

States’ uses of framework laws are vastly understudied. Interestingly, however, some states in recent years have devised special procedures for criminal law issues that fit this framework description. Some states have established law-reform or crime commissions—not unlike those Congress has used for other policy topics (but never successfully for federal criminal law)—to which they delegate tasks of assessing needs for criminal law reform, proposing legislation, and analyzing legislators’ proposals.

Take two examples. The Virginia legislature charged its state crime commission in 2001 with proposing revisions to the criminal code, and in 2004 the legislature accepted the commission’s first set of recommendations and repealed a dozen rarely used criminal statutes. Those offenses were

124. See Barkow, supra note 31, at 718, 717–18 (describing a legislator’s hopes that the commission will reduce the risk of Congress “ politicizing the entire sentencing issue”); id. at 757 (noting the federal commission is “ universally recognized to be an ineffectual agency that has done little to change the tough-on-crime politics of sentencing at the federal level”).
125. Garrett, supra note 123, at 723.
126. Id. at 725.
127. Id. at 725–28.
128. Congress’s failure to successfully establish law-reform or crime commissions combined with Congress’s greater ability to reap publicity from symbolic legislative action help explain why the expansion of the federal code is so much greater than state codes. See Stuntz, supra note 1, at 546 (noting that because Congress can more easily generate publicity than state legislatures, Congress tends to make symbolic statements with its criminal legislation rather than pay attention to the preferences of prosecutors and the police).
130. See VA. STATE CRIME COMM’N, supra note 100, at 1 (summarizing the legislature’s instruction to the crime commission, through House Joint Resolution 687, to propose revisions to the criminal code); see also id. at attachment 1 (providing the text of House Joint Resolution 687).
the sort scholars often complain about—silly offenses, such as the unlawful use of "Official Tourist Information" or bringing dogs onto the Capitol Square, and antiquated ones, such as jumping off railroad cars. They also included the more serious theft, fraud, and conversion offenses noted above. This reform legislation also fixed some of the sorts of drafting problems that criminal-code experts, such as Paul Robinson, often urge. The commission proposed, and the legislature adopted, a consistent definition of "mandatory-minimum" sentence, which had formerly varied across provisions. It moved noncrime statutes out of the criminal code and adopted a comprehensive penalty structure for felony sentencing.

New Jersey's Law Revision Commission also had some success in cleaning up some redundant or outdated crimes, conflicting sentencing ranges, and poor organization in its code. The legislature adopted its recommendations to revise awkward crime definitions; to repeal duplicative crimes on marijuana growing, on persuading others to take drugs, and on a range of other provisions; and to decriminalize several offenses that are "regulatory in nature and can be adequately addresse[d] through civil remedies," including a few trivial offenses, such as selling ship tickets without indicating the ship's country of origin.

Note these reforms succeeded even though these state commissions are fairly weak as legislative frameworks. The legislatures were not restricted to up-or-down votes on the commission reports but still adopted them in bulk. To be sure, this is not proof that all legislatures are consistently effective at keeping codes coherent and up-to-date. Robinson has documented they do not, and variations in states' legislative procedures, as well as the absence...
or ineffectiveness of such commissions in many states, would predict as much. But these examples demonstrate a mechanism and capacity for repeal and reform of criminal provisions that scholars criticize, despite the fact that those changes are hardly pressing issues on legislative or interest-group agendas, nor are they triggered by high-profile news events. Commissions help legislatures achieve reform that is less likely under regular rules and procedures. The ratchet of criminal legislation can turn both ways.

Variations on this model appear elsewhere. Most states have now established commissions to study and make recommendations on their sentencing policies. Some have already succeeded in prompting sentencing reform such as that described above, and a key tool they employ to prompt reform is financial-impact analysis of sentence enhancements that show legislatures the likely cost of incarceration policies. Further, states periodically organize special bodies to review their codes and propose comprehensive reform, a process that sometimes provides the impetus for wide-ranging code reform similar to that prompted by the Model Penal Code. Illinois and Kentucky both recently created commissions to study and offer

example, perhaps among many, is OKLA. STAT. ANN. tit. 72, § 6-1 (West 2005) (making it a felony to impersonate a veteran by wearing a Congressional Medal of Honor and falsifying supporting documents).

138. Cf. Garrett, supra note 123, at 748 ("Frameworks can be seen as precommitment devices enacted to constrain lawmakers . . . and to make certain legislative outcomes more likely."); id. at 749 ("Frameworks can . . . change the dynamics of bargaining . . . or they can make certain actions more costly in political terms . . . ").


141. See Barkow, supra note 31, at 804–11 (discussing state commissions’ use of financial-impact statements).
reform strategies for their bloated codes (though neither has yet led to reform).142

2. **Majoritarian and Interest-Group Preferences.**—Many of the larger shifts toward decriminalization seem not to have required specialized legislative frameworks. Instead, a strong inference from the historical evidence is that legislatures have been responsive over the last century to majoritarian and interest-group preferences for lifting restrictions on liberty of consensual sexual conduct, expressive conduct, gambling, gun possession, and alcohol use, as well as to adopting noncriminal policies for social problems related to these activities. That nearly all harmful conduct—or conduct that majorities consider wrongful—is covered by existing criminal law and most new proposals are redundant may explain why criminal law bills do not overcome familiar hurdles to passage. Criminal law defines limits on citizen liberty, and contemporary codes likely define all the liberty deprivation that contemporary majorities support.

Consider that some possibilities for expanded criminalization never even make it as far as a legislative proposal or even an interest group’s argument. What legislators, social movements, and interest groups do not propose as criminal prohibitions give us another insight on the democratic constraints limiting criminal law. But how do we identify agenda items that never arise, laws that are never drafted? We can do so only indirectly and partially, but comparative criminal law is one means to identify conduct that could be criminalized but is not (even when it is disfavored). Relatively little comparative scholarship focuses on the substantive scope of criminal law (as opposed to procedure and punishment policy), but where scholars have addressed these questions, we see other western democracies criminalizing conduct that American jurisdictions do not.

Germany criminalizes not only offensive or provocative language but the expression of certain ideas, such as insults to religious denominations or minority groups, arguments against democratic government, and denial of the Holocaust.143 The last is also a crime in many democracies including Israel, Austria, Belgium, Switzerland, and the Netherlands; France criminalizes public denial of crimes against humanity, including minimizing the number

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Most of those laws were enacted recently, in the 1980s and 1990s, to supplement existing criminal laws against racial discrimination. Canada also criminalizes (far more broadly than American hate-crimes offenses) core political speech when it contains expressions of racial hatred or bias that threaten equality, dignity, and multiculturalism norms, and it is also more restrictive of pornography distribution.

Germany, like other European nations, also has expansive criminal law against “insult”—offenses that protect personal dignity and respect, and that punish using expressions such as “jerk,” using the informal pronoun for “you,” and gesturing insultingly by giving “the finger” (routinely enforced with fines over $1,100). European nations also legally protect privacy in ways American law does not; in France it is a crime to post nude pictures of another on the Internet, and press publication of facts about another’s private life can be contravention—a petty criminal offense. The British criminalize theft of trade secrets, postal or telephone harassment, electronic surveillance, and disclosure of confidential information more broadly than American law does, and have a rigorous enforcement regime for the crime of watching television without a license. Many European countries have expanded crimes and penalties for private pornography possession, especially for images of children.


146. See KROTOSZYNSKI, supra note 143, at 52–92 (describing the framework under which the Canadian Supreme Court has evaluated the legitimacy of content-based restrictions on freedom of expression under the Canadian Charter of Rights and Freedoms). Among other cases, Krotoszynski discusses R. v. Zundel, [1992] 2 S.C.R. 731, 743 (Can.), in which the majority noted that although Parliament is free to “criminalize the dissemination of racial slurs and hate propaganda,” those criminal statutes must be drafted so that they do not “stifle a broad range of legitimate and valuable speech.” See KROTOSZYNSKI, supra note 143, at 64–68, 91–92.

147. Whitman, supra note 144, at 1296–1304. Interestingly, German scholars, like their American counterparts, urge the contraction of criminal codes so as not to criminalize such conduct, but without success. Id. at 1301–02.


149. See Peter Alldridge, The Public, the Private and the Significance of Payments, in PERSONAL AUTONOMY: THE PRIVATE SPHERE AND CRIMINAL LAW, supra note 144, at 79, 83 (citing statutes).

150. See TV Licensing - Detection and Penalties, http://www.tvlicensing.co.uk/information/detectionandpenalties.jsp (explaining that British law requires all owners of television sets to pay for an annual license and noting that individuals may face prosecution and a fine for failing to acquire a license).

Much European criminalization of expressive conduct would run afoul of First Amendment doctrine in the United States, which may explain legislators' and interest groups' relative disinterest in pushing for such laws. But there is probably something more at work. First Amendment doctrine has not prompted interest groups to decline to push for other criminal prohibitions barred by the doctrine. Proposed crimes regarding flag burning, hate speech, and pornography possession are all recent examples.152 It seems rather that American democratic inputs—social movements and interest groups—have little inclination to criminalize topics of offensive speech to the degree Europeans do. Perhaps partial credit goes to law's—i.e., the First Amendment's—educative function, its effect on shaping public sentiment about the appropriate scope of liberties, and government regulation.

Another example is sexual harassment, conduct that has become increasingly disfavored and increasingly defined and regulated by law in recent decades in both the United States and Europe. Abigail Saguy, in an insightful comparative study of sexual-harassment regulation, shows that such regulation took the form of criminal law in France but not in the United States.153 She attributes those divergent paths to the different legal and conceptual influences on, and lawmaking opportunities available to, the feminist groups who worked for sexual-harassment laws in each country. Sexual discrimination was barred civilly along with racial discrimination in title VII of the 1964 Civil Rights Act,154 and American feminists used lobbying and the common law process to expand the definition of discrimination to include sexual harassment.155 French feminists, with little opportunity for lawmaking through litigation in a civil law system, took advantage of a 1991 reform of the penal law to lobby for crimes of sexual harassment. Instead of American-style arguments built on analogies to racial discrimination and focused on the workplace, they framed their arguments within the rhetorical categories of French political culture as addressing abuse of hierarchical authority.156

From this contrast, it seems that American law opted against criminal regulation of sexual harassment in part as a result of path dependence but


155. Saguy, supra note 153, at 1100–09.

156. Id. at 1109–12.
also because arguments for criminalization simply were not likely to resonate persuasively in American political debate. That predisposition is a form of majoritarian constraint on criminal law, one strengthened in some contexts by the opportunity to regulate disfavored conduct through other means.  

B. Executive Branch Actors and Democratic Responsiveness

If a key measure of overcriminalization is whether its scope and effect accords with majoritarian preferences, laws on the books do not tell the full story. Democratic regulation of criminal justice does not end with legislatures. The vast bulk of criminal law—state criminal law—is administered by prosecutors who are elected by local constituencies.  

As Dan Richman and Bill Stuntz recently described, state prosecutors' accountability combines with the salience of crime as a local political issue and constraints on enforcement budgets to give state prosecutors relatively little practical discretion on a large portion of their dockets. Homicides, robbery, burglary, assault, auto theft, and some drug crimes are politically mandatory crimes for prosecutors to pursue—as are some lesser crimes, especially drunk driving and, often, domestic violence—even if the odds of obtaining a conviction in any given case are fairly long. That consumes most of police and prosecutors' time and budgets. State prosecutors depend on police to provide them with cases; police, busy with violent and other politically mandatory crimes as well as order-maintenance policing, have little time for silly, antiquated crimes.

157. Note this discussion focuses on legislative criminalization and leaves aside the large topic of distinctions in enforcement patterns across jurisdictions. One observation on prosecution discretion is revealing, however. European countries have several times charged air-traffic controllers with manslaughter for their role in airplane crashes, an option American prosecutors rarely, if ever, pursue. See, e.g., Don Phillips, Air Traffic Controllers Charged in German Collision, INT'L HERALD TRIB., Aug. 8, 2006, available at http://www.iht.com/articles/2006/08/07/news/swiss.php (discussing the prosecution of eight air-traffic controllers by a Swiss prosecutor).


162. State prosecutors still have some discretion—witness local prosecutors' recent creativity with drug courts, diversion programs, and other dispositional alternatives. In 2000, half of all
Historically, patterns in discretionary enforcement vary. Prosecutors mostly ignored crimes against homosexual sex, fornication, or prostitution for decades, then dramatically stepped up enforcement in many locales for several years. Sodomy prosecutions jumped in the early twentieth century before declining again.\textsuperscript{163} Liquor prosecutions in Virginia jumped in the 1920s to briefly become the most prosecuted felony.\textsuperscript{164} The federal Mann Act was aggressively used in the 1910s and 1920s to combat prostitution and even fornication but was nearly a dead letter by the 1960s;\textsuperscript{165} prosecutorial campaigns against prostitution and red-light districts rose and declined with public sentiment and social-movement campaigns.\textsuperscript{166} Those variations do not refute the Richman-Stuntz thesis; they demonstrate instead that what crimes are politically mandatory (or at least politically appealing) to prosecutors vary as public opinion and interest-group pressures shift.

Note those constraints are not solely a product of prosecutors’ accountability. They are also a function of legislatures’ decisions to limit prosecutors’ budgets. What legislatures give with one hand—expansive, redundant codes—they restrict with the other by limiting prosecutors’ resources, so that they cannot enforce every crime on the books. Those limits have several effects; one is that they encourage plea bargaining over trials, which allows processing of more cases within a limited budget. But budget limits also greatly constrain some effects of code growth, and this is likely legislatures’ intent. While tight budgets are a function of allocation decisions in light of resource constraints, restricting agency budgets is also a familiar legislative strategy to limit enforcement—an observation familiar to administrative law,\textsuperscript{167} where legislative opposition to enforcement policy is more common than in criminal law. But legislators (and the public) express little such opposition to most criminal enforcement both because there is a large

prosecutors had some form of “community prosecution” program, which often includes facilitating social-service-agency involvement, increasing nonpunitive remedies, such as diversion programs, and license or building-code enforcement. See John S. Goldkamp et al., Community Prosecution Strategies: Measuring Impact 2–7 (2002) (listing programs); see also Bureau of Justice Assistance, U.S. Dep’t of Justice, Defining Drug Courts: The Key Components (2004) (describing prosecutors’ nontraditional roles in drug courts).

\textsuperscript{163} Friedman, supra note 33, at 344.
\textsuperscript{164} Id. at 340.
\textsuperscript{165} Id. at 325–28, 343; see also Anne M. Coughlin, Of White Slaves and Domestic Hostages, 1 Buff. Crim. L. Rev. 109, 109–10 (1997) (comparing arguments that led to the Mann Act).
\textsuperscript{166} Friedman, supra note 33, at 328–29.
\textsuperscript{167} See Julian Ku & John Yoo, Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute, 2004 Sup. Ct. Rev. 153, 191 (“Congress also has any number of formal and informal tools for placing political pressure on agencies to reverse unwanted actions[, including] reduc[ing] agency budgets for enforcement.”); Joe Sims & Deborah P. Herman, The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Intended Consequences Applied to Antitrust Legislation, 65 Antitrust L.J. 865, 885 n.70 (1997) (noting that Congress could “choose less aggressive or expansive enforcement by simply reducing agency budgets”); Paul B. Smith & Milo C. Mason, Making Tough Choices Easier: Compliance and Enforcement 102, Nat. Resources & Env’t, Spring 2004, at 3, 5 (stating that congressional cuts to agencies’ budgets hampers enforcement).
realm of universally accepted enforcement (traditional core crimes) and because resource constraints, plus accountability, are so effective at keeping prosecutors from doing much else.

The combination of political accountability and budget constraints gives state prosecutors a small practical range for pursuing prosecutions with little public support.\textsuperscript{168} That is a key reason why overcriminalization scholarship pays a lot of attention to statutes on the books and much less to prosecutions under antiquated or trivial statutes. There is rarely a pattern of prosecutions under such statutes; we have only rare outliers, such as the sodomy prosecution of John Lawrence in Harris County, Texas.\textsuperscript{169} Overcriminalization can happen on the books because it is so constrained in practice.

Democratic accountability also explains the occasional small, local pattern of enforcing obscure or controversial statutes. In the 1990s an Idaho prosecutor won convictions of several pregnant teenage girls and their boyfriends for fornication; punishments were community service and parenting classes.\textsuperscript{170} The prosecutions (which didn’t continue long) were a strategy to deter teenage pregnancy and related social problems,\textsuperscript{171} most were prosecuted only after applying for public assistance.\textsuperscript{172} The prosecutions drew criticism in national media,\textsuperscript{173} but it is likely the local electorate was not strongly opposed; the prosecutor won reelection a few months after securing

\textsuperscript{168} Those twin constraints are possible because prosecution is now monopolized by public prosecutors, and the maintenance of those constraints may explain why American jurisdictions are firm in resisting any efforts to return to even a limited role for private prosecutors. \textit{See}, \textit{e.g.}, State v. Culbreath, 30 S.W.3d 309, 318 (Tenn. 2000) (dismissing indictments because a public prosecutor allowed a private attorney, paid by a private group, to act as a special prosecutor and initiate charges with little public supervision).


\textsuperscript{171} \textit{See} Morris, \textit{supra} note 170 (quoting prosecutor’s explanation that the prosecutions addressed the area’s high teenage-pregnancy rate and the risk that children of single teen mothers are more likely to go to jail later in life).

\textsuperscript{172} Meinzer, \textit{supra} note 170, at 166.

\textsuperscript{173} \textit{See}, \textit{e.g.}, Ellen Goodman, Op-Ed., \textit{Victims of the War on Sin}, BOSTON GLOBE, July 14, 1996, at 43 (arguing that the prosecutions were motivated by a concern for teen pregnancy’s effect on public finances, rather than teen welfare); Editorial, \textit{Strange Happenings}, S.F. EXAMINER, Aug. 6, 1996, at A14 (characterizing the prosecutions as “war against unwed teen parents”).
The example supports the broader point. Because state criminal law enforcement is accountable to local constituencies, prosecutions under seemingly outdated statutes may accord with local majoritarian preferences, and those preferences may be based on a policy rationale beyond simply moral opposition to fornication. Even outlier prosecutions, then, might not be properly characterized as examples of overcriminalization. American criminal law is fragmented among fifty states, which fragment enforcement among localities. We should expect the sort of policy variation and experimentation that characterizes (and is a virtue of) federalism.175

Federal practice is different and worse. Even there, scholars concede that much-maligned statutes on carjacking or Smokey Bear’s image are rarely or never enforced.176 But federal prosecutors have much more practical discretion arising from bigger budgets, less democratic monitoring, and the power they gain from a rigid sentencing regime.177 That discretion is most problematic when it combines with one specific sort of statutory breadth—expansive fraud and regulatory offenses that define undisputed wrongdoing but also capture some marginal or innocuous conduct.178 The problem is worst where prosecutorial discretion is greatest—the small, unique but prominent (and now formally defunct) practice of independent counsels, who rigorously pursue marginal wrongdoing under broad false-

175. Cf. Herbert Wechsler, Codification of Criminal Law in the United States: The Model Penal Code, 68 COLUM. L. REV. 1425, 1427 (1968) (explaining that the MPC drafters did not seek national uniformity because “substantial differences of social situation or of point of view among the states should be reflected in substantial variation in their penal laws”).
176. See Stuntz, supra note 1, at 546 (discussing Congress’s tendency to enact symbolic crimes that “generate very few federal prosecutions”).
177. See id. at 566 (“Recall legislatures’ tendency to add crimes but not to subtract them: new crimes are common; removal of old ones is rare. Over time, prosecutors’ range of options only grows. With it grows prosecutors’ ability to avoid giving courts the opportunity to place a judicial gloss on criminal statutes.”); Rosenzweig, supra note 3 (criticizing the defendant’s conviction for negligent discharge of a pollutant in United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999) as indicative of Congress’s expansion of the reach of federal criminal laws to new regulatory areas). For a counterargument that prosecutions like that in Hanousek are appropriate, see Steven P. Solow & Ronald A. Sarachan, Criminal Negligence Prosecutions Under the Federal Clean Water Act: A Statistical Analysis and an Evaluation of the Impact of Hanousek and Hong, 32 ENVTL. L. REP. 11,153, 11,157–59 (2002).
178. See Coffee, Tort/Crime, supra note 19, at 201 (“Once everything wrongful is made criminal, society’s ability to reserve special condemnation for some forms of misconduct is either lost or simply reduced to a matter of prosecutorial discretion.”); Coffee, Paragons Lost, supra note 19, at 1881 (“Public concern about a newly perceived social problem... triggers a societal reflex... [of] the adoption of new criminal legislation.... [It]s little-noticed consequence is to expose a significant portion of the population... to potential entanglement with the criminal law during the ordinary course of their professional and personal lives.”); Rosenzweig, supra note 3 (“Congress has exercised precious little self-restraint in expanding the reach of federal criminal laws to new regulatory areas.”)
statements statutes or the like. More common arguable abuses also arise under broad fraud and regulatory statutes, and federal offenses that duplicate state crimes, such as drug or weapons offenses, can result in disparate sentencing for criminal conduct. Those problems are real and worthy of scholarly and political attention, but bear in mind their exceptionalism. Much overfederalization is contained within widely supported offenses (drug trafficking or gun use during crimes) rather than marginal ones, even though the sentencing disparities are troubling. And problematic fraud and regulatory prosecutions make up a small fraction of federal practice, which itself constitutes perhaps five percent of American criminal law. Those problems are hardly representative of the general scope or effects of overcriminalization.

179. See Richman & Stuntz, supra note 12, at 590–91 (discussing the increased likelihood that a prosecutor will make too much of a minor crime when she has only one case on her docket); Jeffrey Rosen, Overcharged: An Indefensible Indictment, NEW REPUBLIC, Nov. 4, 2005, at 15 (noting the rarity of prosecutions solely for unsworn false statements and criticizing federal special prosecutors for inappropriately pursuing such charges).

180. Note that there is not uniform scholarly agreement on whether much-criticized examples of federal prosecutions are unmerited, inappropriate, or common. See Kathleen F. Brickey, Charging Practices in Hazardous Waste Crime Prosecutions, 62 OHIO ST. L.J. 1077 (2001) (defending environmental-crime prosecutions); Solow & Sarachan, supra note 177, at 11,157–59 (arguing that environmental prosecutions like Hanousek are appropriate).


182. Thirty-six percent of federal cases in 2001 included a charge for drug offenses, 85% included felony charges, and 7.5% included weapons charges. (About 94% of drug cases were for trafficking rather than possession.) BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK FOR CRIMINAL JUSTICE STATISTICS 2003, at 418 tbl.5.17 [hereinafter 2003 SOURCEBOOK].

183. About 11.7% of all federal cases in 2001 were fraud cases (9,028 of 77,145), id., and presumably most of those were not controversial cases of marginal, ambiguous, or innocuous conduct. All “regulatory offenses” accounted for 1.5% of federal criminal cases in 2001 (1,166 of 77,145). Id. And white-collar crime is the one area scholars have suggested may be undercriminalized. See Beale, supra note 1, at 780 (explaining why overcriminalization is less likely in white-collar contexts and why we may have “too little white collar crime enforcement”); Richard J. Lazarus, Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law, 83 GEO. L.J. 2407, 2454 n.218, 2511 & n.448 (1995) (calling the Occupational Health and Safety Act undercriminalized and arguing for reform of environmental criminal law rather than the drastic reaction of noncriminalization).

184. Less than 5% of all prosecutions are federal and less than 10% of all inmates are in federal prisons or jails. In 2003, the federal prisons and jails held 165,800 inmates, while state prisons and jails held 1,912,800. 2003 SOURCEBOOK, supra note 182, at 479 tbl.6.2. On those numbers, federal prisoners account for about 8% of the nation’s inmates in 2003. As for prosecutions, there were 62,152 federal criminal cases filed in 2000, while there were 924,700 felony convictions in state courts the same year; federal cases equal 6.7% of that state figure, which excludes misdemeanors and felony charges not yielding conviction. Id. at 407 tbl.5.10, 449 tbl.5.44; see also Tom Stacy & Kim Dayton, The Underfederalization of Crime, 6 CORNELL J.L. & PUB. POL’Y 247 (1997) (arguing that the federal share of overall law enforcement is shrinking).
Enforcement patterns arising from democratically accountable state prosecutors explain a final point as well. Because most obscure or superfluous statutes in criminal codes are effectively nullified by prosecutors, legislatures' incentives to update codes and repeal antiquated statutes are greatly reduced. If American jurisdictions had mandatory-prosecution policies, coupled with investigatory resources to pursue most violations, legislatures would likely repeal crimes much more quickly that no longer accord with majoritarian preferences. (One suspects it wouldn't take many prosecutions of Girl Scout troops for misusing Smokey Bear's image to move Congress to repeal that crime.) But legislators have little incentive to do so because police and prosecutors, taking signals from local electorates, largely do it for them, and legislatures make sure they do by constraining enforcement budgets. To be sure, effective repeal by nonenforcement is not the same as actual repeal. Outdated, poorly conceived, and duplicative statutes, as noted, can generate doctrinal confusion on mens rea requirements, allow disparate treatment of similar offenders, and facilitate occasional vindictive prosecutions as well as muddy criminal law's expressive and moral force. But the democratic responsiveness of executive-branch officials nonetheless helps explain why legislatures are not more vigilant about keeping criminal codes in accord with popular sentiments. They achieve much of that goal indirectly through prosecutors' budgets and accountability, rather than directly by repeal or careful code drafting. Some are explicit about this delegation of code maintenance to the executive branch. A Washington state statute urges prosecutors not to enforce "Antiquated Statute[s]" that "serve[] no deterrent or protective purpose in today's society" and have "not been recently reconsidered by the legislature."186

C. Courts and Democratic Responsiveness

As noted above, many of the Supreme Court decisions that constitutionally barred crimes or punishments occurred in the wake of state legislative trends repealing such laws. State supreme courts similarly overturned criminal prohibitions and often prompted no legislative or popular backlash to reinstate those crimes. Both of those patterns accord with an increasingly prominent thesis about American courts and majoritarian preferences. Rather than being countermajoritarian institutions, American courts rarely get far ahead of public opinion on controversial issues. Michael Klarman’s landmark book From Jim Crow to Civil Rights makes this argument in what had previously seemed the unlikely context of the

185. In the federal context, Dan Richman has described additional tools Congress uses to influence enforcement, including use of oversight committees, constraints on investigative agencies' jurisdictions and budgets, funding prosecutor jobs for specific agendas, and requiring Main Justice approval for some prosecutions. Richman, supra note 12, at 791–805.

constitutional law of race relations. The same thesis may explain *Lawrence v. Texas*: the Court’s ban on sodomy crimes followed rather than led popular opinion. William Nelson offered a similar thesis to explain New York state courts’ changing interpretation of several morals-related criminal statutes through the middle decades of the twentieth century. Nelson described New York courts as strictly enforcing criminal morals offenses, such as obscenity restrictions on media, in accord with popular support for such enforcement in the early part of that century. As public opinion shifted, Nelson detailed shifts in courts’ interpretation of statutes not only of obscenity offenses and other crimes implicating free-speech values but even domestic violence and nonstranger rape crimes, which he characterized as functionally decriminalized by a range of interpretative choices that made those offenses difficult to enforce. Similarly, even the Warren Court’s criminal procedure decisions may be understood as more majoritarian than traditionally thought.

Viewed this way, we can understand other trends in courts’ doctrinal construction of crime and punishment rules as adjustments that track shifts in popular sentiment. Consider two federal examples. Federal judges notoriously little discretion under sentencing guidelines before *United States v. Booker*. But even here, scholars found patterns of courts using their modest interpretive tools within the guidelines to temper excessive sentences. And in the context of federal regulatory or white-collar crime

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187. See Michael J. Klarmann, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (2004); see also Michael J. Klarmann, Brown, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7, 10 (1994) (“[A] variety of deep-seated social, political, and economic forces . . . would have undermined Jim Crow regardless of Supreme Court intervention . . .”); Michael J. Klarmann, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 6 (1996) (suggesting that the Supreme Court frequently “takes a strong national consensus and imposes it on relatively isolated outliers” and infrequently resolves divisive issues such that “roughly half the country supports the Court’s determination”). For a comparable argument that the Supreme Court’s Establishment Clause decisions correspond with popular sentiments and views of dominant political coalitions, see John C. Jeffries, Jr. & James E. Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279 (2001).


189. See Nelson, supra note 23, at 266 (making findings “about how socio-political forces influenced the law’s treatment of sexual immorality and gender-related violence in New York”).

190. Id. at 269–75.

191. Id. at 277–311.


194. See Frank O. Bowman, III & Michael Heise, Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences, 86 Iowa L. Rev. 1043, 1049 (2001) (suggesting that downward movement in federal drug sentences is partly the result of discretionary choices by
prosecutions, federal courts have a clear pattern of interpreting hundreds of criminal statutes to contain strict mens rea requirements. Those constructions make prosecutions more difficult by giving defendants an ignorance-of-the-law defense. Many of the statutes courts have restricted in this way are the type of expansive provisions on obscure or marginal fraud conduct that are commonly the focus of overcriminalization complaints; statutes that criminalize unsworn false statements, health and safety violations, misapplication of student-loan funds, unauthorized use of food coupons or recorded phone conversations, and the like. One way judges, prosecutors, defense counsel, and probation officers who perceive that drug sentences are often too high); see also Andrew D. Leipold, Why Are Federal Judges So Acquittal Prone?, 83 WASH. U. L.Q. 151 (2005) (describing federal judges' abilities to find facts in ways that mitigate harsh mandatory sentences).

195. See Sharon L. Davies, The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance, 48 DUKE L.J. 341, 346–47 (1998) ("Ignorance or mistake of law has already become an acceptable excuse in a number of regulatory and nonregulatory settings, particularly in prosecutions brought under statutes requiring proof of 'willful' conduct on the part of the accused."). Davies catalogs at least 160 statutes that are at risk of similar treatment based on the reasoning that the mens rea term "willful" requires proof that defendant knew his conduct was unlawful. Id. at 347. Her view of this development is different from mine for present purposes: she criticizes this development as an unsound abrogation of the traditional rule that ignorance of the law is no excuse.

196. See Coffee, Tort/Crime, supra note 19, at 246 (describing the sentencing determination as "the only point in our criminal justice system where it remains feasible to preserve the distinction between 'true' crimes and public welfare offenses"); Coffee, Paradigms Lost, supra note 19, at 1879 ("[A] breach of fiduciary duty, standing on its own, should not fall within the purview of the criminal law at all . . . ."); Rosen, supra note 179 (noting the rarity of prosecutions solely for unsworn false statements and criticizing federal special prosecutors for inappropriately pursuing such charges).


198. See United States v. Ladish Malting Co., 135 F.3d 484, 490 (7th Cir. 1998) (holding that criminal violation of workplace-safety regulations under Occupational Safety and Health Act (OSHA) § 17(c), 29 U.S.C. § 666(e) (1994) requires proof the defendant had "awareness of the essential facts and legal requirements"); McLaughlin v. Union Oil Co., 869 F.2d 1039, 1047 (7th Cir. 1989) (holding that a violation of OSHA "is not willful when it is based on a nonfrivolous interpretation of OSHA's regulations").

199. See United States v. Bates, 96 F.3d 964, 970 (7th Cir. 1996) (construing 20 U.S.C. § 1097(a) (1994), which makes it a crime to knowingly and willfully misapply federally insured student-loan funds, to require proof that an accused exercised unauthorized control over such funds with knowledge that such an exercise was a violation of the law), aff'd, 522 U.S. 23, 33 & n.7 (1997) (noting, however, that the question of whether a defendant had to have knowledge of illegality was not before the Court).

200. See Liparota v. United States, 471 U.S. 419, 425 (1985) (holding that a person accused of knowing possession of food stamps in a manner unauthorized by 7 U.S.C. § 2024(b)(1) (1982) must be shown to have known the possession was unlawful); United States v. Marvin, 687 F.2d 1221, 1227–28 (8th Cir. 1982) (same).
to view these interpretive trends by courts is as an effort to rein in excessive federal criminalization and to decrease the odds that such statutes will be used to convict defendants whose conduct would widely be viewed as innocent or insufficiently wrongful to merit criminal punishment.

On this account, courts serve as a third mechanism to moderate criminal law in accord with changing social views on appropriate criminalization. That is especially important to explain the one area of substantial decriminalization that legislatures did not lead: crimes that implicated First Amendment liberties. Crimes that limit free-expression values, from radical political advocacy and civil rights protests to pornography and artistic or personal expression, are notable categories of activity that were substantially decriminalized in the twentieth century more by courts than legislatures. Yet three observations suggest that the Supreme Court was not decriminalizing speech-related conduct in the face of strong public opposition.

First, there are few indicia that the Court is notably more in conflict with majoritarian preferences and dominant political opinion on First Amendment topics than it has been on racial equality issues or elsewhere. The Court has been notably solicitous, for instance, of legislative and executive actions that restrict speech in times of perceived crisis, such as the Red Scares of the early 1920s and 1950s. Second, recent scholarship on the intellectual history of free speech has described the influence of social movements (such as the Free Speech League founded around 1900) and elite opinion that urged deregulation of both obscenity and political speech, and presaged doctrinal changes toward those ends. Court decisions barring

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201. See United States v. Wuliger, 981 F.2d 1497, 1502–03 (6th Cir. 1992) (holding that knowledge of the illegality of wire interception is an element of the offense described in 18 U.S.C. § 2511(1)(d) (1988)).

202. See MARTIN H. REDISH, THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA 41 (2005) (noting the Supreme Court’s reluctance to directly address whether the activities of the House Un-American Activities Committee were unconstitutional); Vincent Blasi, The Pathological Perspective and the First Amendment, 85 COLUM. L. REV. 449, 483 (1985) (noting that the Supreme Court’s free-speech doctrine in the early twentieth century may have undesirably legitimized congressional action). For examples of Court decisions upholding convictions under state and federal statutes that criminalize political speech, see, for example, Dennis v. United States, 341 U.S. 494, 510 (1951) (upholding convictions under the Smith Act for conspiring to overthrow the government by organizing for the Communist Party); Gitlow v. New York, 268 U.S. 652, 672 (1925) (affirming New York state’s criminal speech statute); Abrams v. United States, 250 U.S. 616, 624 (1919) (affirming a Sedition Act conviction); In re Debs, 249 U.S. 211, 217 (1919) (affirming Eugene Debs’s conviction under the Espionage Act for a political speech praising socialism and criticizing World War I); Frohwerk v. United States, 249 U.S. 204, 210 (1919) (affirming an Espionage Act conviction); and Schenck v. United States, 249 U.S. 47, 53 (1919) (affirming an Espionage Act conviction for speech against the draft).

crimes of speech-related conduct generated little of the sustained social-movement opposition sparked by decisions on abortion, school prayer, or even some criminal procedure rulings. Finally, popular culture seems to have largely endorsed many of the speech-related liberties courts evolved in the last several decades. Risqué clothing, books, periodicals, music, movies, advertising, and other media once banned by obscenity laws meet with considerable success in the marketplace and provide cultural support for the dramatic contraction of obscenity regulation. Some components of First Amendment liberties likely remain countermajoritarian—decriminalization of flag burning and perhaps of some radical political speech are examples. Also, given constitutional leeway, we would probably see some local political communities regulating in all these areas despite a national consensus in favor of decriminalization. Nonetheless, in the largest area in which courts are responsible for decriminalization without legislative leadership, it is still plausible to view this form of decriminalization as an example of courts working within the rough parameters of democratic preferences. Like prosecutorial decisions not to enforce statutes, courts that overturn or narrowly interpret criminal laws take pressure off of legislatures for decriminalization by doing some of the work for them. Courts’ contributions, like those of state prosecutors, seem to do more to keep criminal law’s substantive reach in rough accord with majoritarian preferences than to depart from those preferences.

IV. Overcriminalization and Criminal Justice’s Biggest Problems

Despite the constraint of democratic preferences, the facts remain that over the last several decades criminal codes’ overall growth outstripped their contraction. At the same time, incarceration rates have risen dramatically, and a range of much-discussed problems worsened, including excessive plea bargaining and incarceration, racial disparities, and the small, but significant, problem of wrongful convictions. If overcriminalization criticisms are really

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205. See FRIEDMAN, supra note 33, at 350–54 (describing the weakening of obscenity regulation in the twentieth century and attributing it to changes in popular culture); FELICE FLANERY LEWIS, LITERATURE, OBSCENITY, & LAW 225–47 (1976) (describing the trend toward greater legal protection and social acceptance of explicit or obscene materials).

206. See Robinson & Cahill, Model Penal Code, supra note 8, at 170–72 (noting an increase in “designer offenses”); Robinson et al., supra note 20, at 2 (noting that many states have altered their criminal codes through ad hoc amendments since the 1960s and ’70s).
complaints about how we make and maintain criminal law—or put differently, about democratic governance of criminal law—then how much blame does the growth of criminal law share for this state of affairs?

Relatively little. Consider three prominent sets of problems.

A. Incarceration Rates

There is a wide scholarly consensus that American incarceration rates are excessive and racially skewed, and that sentencing policies are overly rigid. Expansion of substantive criminal law deserves little blame for this. The dramatic growth in incarceration rates is mostly a function of sentencing laws rather than new crimes, coupled with greater enforcement of mostly long-standing, familiar crimes, not outdated ones with little popular support.

Data on state felony convictions suggest that convictions focus overwhelmingly on traditional crimes about which there is little criminalization debate. In 2002, there were just over one million felony convictions in state courts. Eighty-five percent of those were for traditional crimes of violence (murder, sexual assault, robbery, and aggravated assault), property (burglary, car theft, and other larceny or fraud offenses), or drugs. The remaining fifteen percent mostly included uncontroversial nonviolent crimes, such as receiving stolen property or vandalism.

To be sure, these broad categories obscure some risks of overcriminalization. They lump together multiple definitions of theft, arson, and other crimes that might cause the sorts of effects that scholars rightly worry about, such as disparate sanctions for comparable offenders or excessively light proof burdens for prosecutors. Nonetheless, the data strongly suggest that pursuit of obscure, marginal, or controversial crimes is a statistically negligible problem, at least at the felony level. Occasional, outlier crimes—felony punishment for breaches of private fiduciary duties or

207. See, e.g., MARC MAUER, RACE TO INCARCERATE 182–87 (1999) (noting that overcrowding in prisons has led to an increase in crime in some communities); MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 49–80 (1995) (noting racial disparity in prisons); SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 219–48 (Michael Tonry & Kathleen Hatlestad eds., 1997) (noting that sentencing policies have increased racial disparity in prisons). On incarceration rates, see generally WILLIAM J. CHAMBLISS, POWER, POLITICS, AND CRIME 5 (1999) (noting that the number of people in U.S. prisons increased from 320,000 to 1.7 million between 1980 and 1999) and ROY WALMSLEY, WORLD PRISON POPULATION LIST (3d ed. 2002), available at http://www.homeoffice.gov.uk/rds/pdfs/r166.pdf (listing incarceration rates in several countries worldwide).


209. Id. at 46 tbl.4.3.

210. Id.

211. Multiple statutes that criminalize prohibited conduct, such as drug sales and arson under several definitions, are also not distinctive to the United States. See FLOYD FEENEY, GERMAN AND AMERICAN PROSECUTIONS: AN APPROACH TO STATISTICAL COMPARISON 60–65 (1998) (comparing the elements of drug crimes and arson in Germany with the same crimes in the United States).
for making false statements under oath—are still legitimate causes for concern, but they are not substantial systemic problems and they are concentrated in the federal system.\textsuperscript{212}

Thus, note this misleading correlation: we have an increase in the number of crimes and a corresponding increase in incarceration. But virtually none of the incarceration increase of the last twenty-five years comes from the new substantive crimes added during that period; it comes from new punishment policies.\textsuperscript{213} The incarceration increase comes almost entirely from decisions to punish long-standing crimes more harshly; sentences for newly created crimes seem to add a statistically insignificant increment to incarceration rates.\textsuperscript{214} And Bernard Harcourt’s current work

\textsuperscript{212} Federal prosecutions are more diverse, and overcriminalization is worse there in many respects. Still, 3.9\% of federal cases included a violent-crime charge and 36.5\% included a drug trafficking or possession charge; 11.7\% included fraud charges and 1.5\% included alleged regulatory offenses. See 2003 \textsc{SOURCEBOOK}, supra note 182, at 418 tbl.15 (determining these percentages by dividing the stated category by all offenses terminated in U.S. federal district courts). The latter two categories are the focus of complaints of overexpansive crimes that cover marginal wrongdoing, and presumably only a subset of each category is controversial.

\textsuperscript{213} The arguable exception might be drug crimes, especially if we count federal criminalization of state drug crimes as substantive expansion. The same basic drugs were criminalized before incarceration-rate increases, but some important alterations to those drug crime statutes, such as the federal crime of crack-cocaine possession and distribution, see \textit{generally} David A. Sklansky, \textit{Cocaine, Race, and Equal Protection}, 47 \textsc{Stan. L. Rev.} 1283 (1995), surely account for some portion of incarceration increases. Still, these are not wholly new crimes or outdated ones.

\textsuperscript{214} Recent years have seen a modest sentencing countertrend: more than half the states have reformed sentences in the direction of leniency in the last several years. They did so by various means—often by eliminating mandatory minimums, increasing judicial discretion in sentencing, or replacing incarceration with treatment for some drug offenders. See \textsc{Campbell}, supra note 139, at 15 (listing examples of sentencing reform and recounting legislators’ reasons for such reform, including impact on tight state budgets of rising incarceration costs); \textsc{Donna Lyons}, \textit{State Crime Legislation in 2004}, at 1–4 (2005) (listing seventeen states, including New York, Hawaii, Indiana, Virginia, Pennsylvania, Connecticut, Georgia, and Michigan, that have reduced drug sentences by increasing treatment options, eliminating mandatory minimums, and increasing parole opportunities); \textsc{Donna Lyons}, \textit{State Crime Legislation in 2003}, at 1–3 (2004) (listing similar sentence-reduction legislation in several states, including Delaware, Colorado, Kansas, and Oregon); \textsc{Donna Lyons}, \textit{State Crime Legislation in 2002}, at 5–7 (2003) (recounting similar reforms in California, Michigan, Mississippi, and other states); \textsc{Piper et al.}, supra note 105, at 4–5, 39–40 (listing fourteen states that reduced sentences, mostly for drug crimes, in 2001 and 2002); Fox Butterfield, \textit{With Cash Tight, States Reassess Long Jail Terms}, \textsc{N.Y. Times}, Nov. 10, 2003, at A1 (describing sentencing reforms in “about 25 states”). For links to the actual state-legislation-enacting reforms, see the National Conference of State Legislatures Web site at http://www.ncsl.org/programs/legismgt/legman.htm.

suggests that even recent incarceration-rate increases are not overincarceration relative to rates in the first half of the twentieth century if we aggregate prison and mental-hospital confinement. That combined measure of confinement was highest in the mid-twentieth century; current prison incarceration increases only substitute criminal confinement for the dramatic drop in institutionalization of the mentally ill, so that recent combined confinement measures merely match those of a half century ago. Harcourt’s data imply that recent punishment increases, in context, do not demonstrate an unprecedented “over” incarceration shift.

B. Selective Prosecution and Racial Disparities

Selective prosecution and racial disparities are also prominent, persistent problems, but here as well the increasing breadth of substantive law is a minimal factor. The causes of racial disparities are many. One of the most significant is likely differences in ease and cost of investigation between, for example, street-based drug markets and trade that occurs more privately in homes and offices. Others may be racial profiling, bias in prosecutorial discretion, and (for the small percentage of cases that go to juries and for which the evidence is close) jury bias. Duplicate crime for serious offenders, limited the reach of those mandates, increased early-release possibilities for some classes of previously sentenced offenders as well as future offenders, and expanded drug-treatment options that are prerequisites for sentence reductions. See 2004 N.Y. Laws 3907–27. In 1998 Michigan reformed its mandatory life-without-parole statute for large-quantity drug dealers. For a description of such trends in Minnesota, see Richard S. Frase, Sentencing Guidelines in Minnesota, 1978–2003, 32 CRIME & JUST. 131 (2004) (noting that the punitive trend in Minnesota policy has slowed since 1993).

Legislatures have also limited the scope of the death penalty. Between 1981 and 2004, thirteen states enacted statutes that eliminated juvenile offenders from capital-punishment eligibility (and Washington state did so by judicial decision). See VICTOR L. STREIB, JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973–FEBRUARY 28, 2005, at 7 (2005) (listing states that have raised the minimum age for the death penalty since 1981); see also Roper v. Simmons, 543 U.S. 551, 579 (2005) (listing in Appendix A state statutes and a court decision that raised the minimum age for the death penalty to eighteen). Between 1986 and 2001, eighteen states enacted statutes removing mentally retarded offenders from death-penalty eligibility; bills to do the same passed in one or both houses of other state legislatures but failed to become law. See Atkins v. Virginia, 536 U.S. 304, 313–16 (2002) (listing states that removed mentally retarded offenders from capital-punishment eligibility).


216. See William J. Stuntz, Race, Class, and Drugs, 98 COLUM. L. REV. 1795 (1998) (discussing the differential treatment of crimes involving crack and powder cocaine in terms of the socioeconomic class of the offenders).

217. See McClesky v. Kemp, 481 U.S. 279 (1987) (refusing to reverse a Georgia death sentence despite appellant’s claim that there are disparities in the assignment of capital punishment based on the race of the murder victim and the race of the defendant). See generally David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal
definitions have little or no effect on racial profiling, but profiling is facilitated by expansive codes—especially traffic codes, which give police grounds to stop most people (and thus anyone they choose) for minor infractions who are then investigated for major ones.

But most of these disparities arise under offenses that are not plausible candidates for abolition and thus do not arise from overcriminalization. Save for some petty traffic offenses—which, despite some movement toward decriminalization, remain the segment of state codes best described as overcriminalized—the list of crimes that facilitate this discretion and that we would be willing to decriminalize is probably minimal. Discretion, and bias in its use, is an inevitable risk under any statute. Note that selective enforcement and disparities in outcomes occur even under crimes for which there is universal support—although one wonders if sentencing for those crimes would find more public disapproval if enforcement were more evenly distributed across race and class. No one urges decriminalization of murder (though some oppose the death penalty for it), yet some of the strongest evidence of racial bias arises from capital murder prosecutions. Few oppose criminalizing cocaine distribution (though, again, many urge punishment reform), yet some of the most compelling data on racial disparities arise from enforcement of this prohibition.

Here again, a prominent part of this disparity problem is federal law. Broad statutes, such as fraud and false-statement offenses, and wide prosecutorial discretion raise the odds of selective enforcement. And federalization of conduct already covered by state offenses increases the odds of disparate sentencing outcomes because federal penalties far exceed most state ones. On this point the critical scholarly consensus seems sound. But in the overall problem of racially disparate prosecution and sentencing patterns, overcriminalization in state codes seems to play a small part.
C. Wrongful Convictions and Plea Bargaining

A final pair of prominent issues in criminal justice is wrongful convictions and increasingly high rates of plea bargaining along with correspondingly shrinking numbers of trials. Overcriminalization seems to have no relation to the first, save to the extent it does to the second. That is, the only factor scholars and advocates point to as a cause of wrongful convictions that might implicate overcriminalization is prosecutorial power to coerce risk-averse, innocent defendants into guilty pleas.221

Expansive codes contain more offenses with varying penalties that prosecutors can leverage in bargaining, but there is little evidence that unnecessarily expansive (or duplicative) provisions affect plea practice much.222 A range of other factors drive plea bargaining and would likely push it to its current levels even if codes contained less substantive redundancy and criminalization of marginal conduct. Caseload increases on prosecutors, defenders, and judges encourage all those players to favor bargains over trial.223 Strong evidence can prompt prosecutors to offer few or

221. Many organizations that focus on the problem of wrongful conviction place the blame on specific types of evidence, rather than on the parties’ relative bargaining power during plea negotiations. See The Innocence Project – Understand the Causes: Unreliable/Limited Science, http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php (noting that a major cause of wrongful conviction is forensic examinations with high error rates, such as serology and hair comparison); see also GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT: RECOMMENDATIONS ONLY (2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf (recommending forensic reforms to protect the wrongly accused in Illinois); Wrongfully Convicted: Learning from the Mistakes that Send Innocent People to Prison, http://www.dredmundhiggins.com/ (attributing wrongful convictions to false confessions and false snitch testimony). On the risks of bargains inducing pleas from innocents, see Oren Gazal-Ayal, Partial Ban on Plea Bargains, 27 CARDOZO L. REV. 2295, 2297-302 (2006). For an innovative, insightful analysis in federal courts, see Wright, supra note 24, at 135 (linking inaccurate case outcomes to prosecutorial power in plea bargaining).

222. See generally Bordenkircher v. Hayes, 434 U.S. 357 (1978) (holding that a prosecutor is not constitutionally prohibited from reindicting a defendant in order to charge under a harsher law when the defendant chooses to proceed to trial rather than accept a plea offer); William J. Stuntz, Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law, in CRIMINAL PROCEDURE STORIES 351, 377–78 (Carol S. Steiker ed., 2006) (providing a portrait of plea practice after Bordenkircher and emphasizing the role of the prosecutor in selecting which crimes to charge).

223. See GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 111–36, 175–80 (2003) (noting that judges went along with plea bargaining to make room for increasing civil dockets); MILTON HEUMANN, PLEA BARGAINING 144–48 (1978) (noting judges’ and defense attorneys’ active participation in plea bargaining); Stuntz, supra note 24, at 2553–55 (describing docket pressures and resource constraints on prosecutors and noting that prosecutors’ budgets and staff have not kept pace with caseload increases). For a measure of docket pressure on federal trial judges, see 2003 SOURCEBOOK, supra note 182, at 405 tbl.5.8 (noting criminal cases per judge rose from 63 in 1982 to 104 in 2003). Ron Wright, however, in an insightful analysis of federal cases, finds pleas increase as prosecutorial resources increase. Wright, supra note 24, at 85, 129–37. The relative inefficiency of jury trials as a result of constitutional mandates is a factor. See Stephen J. Schulhofer, Is Plea Bargaining Inevitable?, 97 HARV. L. REV. 1037, 1106 (1984) (noting that plea bargaining is considered inevitable because of the common scholarly opinion that jury trials are inefficient).
no discounts for pleas, while defendants with something to trade—information on other offenders—can negotiate for better deals. Drastic plea discounts—the difference between sentences after pleas and those after trial—create much of the prosecutorial power to compel bargains. That ability comes from two sources. The first is determinate sentencing rules, so defendants know the charges at trial carry a fixed range of punishment more severe than those offered in the bargain. The second is a criminal code expansive enough to give prosecutors options to reduce their initial charges to ones that describe the conduct but carry lighter sentences. The question for the criminalization debate, then, is whether a code is unnecessarily expansive—whether prosecutors’ bargaining power is increased by use of outdated, marginal, or unnecessarily duplicative code provisions.

The evidence suggests the answer is no. In the large majority of cases, at least, most charges—both those initially charged and those defendants are convicted upon—do not arise from offense definitions that even most scholars (let alone legislators or voters) would find easy candidates for repeal. As an initial indicator, recall that most felons, especially in state systems, serve sentences for familiar violent, drug, and property crimes. But we need a closer look at charging, pleas, and sentences to get a better idea of whether unnecessarily duplicative statutes play a role in these dispositions—giving prosecutors too many charging options—as well as to assess whether much conduct is punished beyond these familiar forms of criminal activity.

A close look at a typical state system confirms the national aggregate data described above on that point. Ron Wright and Rodney Engen recently published a detailed empirical study of charging and sentencing practices in North Carolina. Their focus was the effect of “depth” in the state code—the range of statutory offenses prosecutors have for charging each type of offender—as well as sentencing “distance” among those options, meaning the distinction among the presumptive sentencing ranges for those various statutes under the state’s sentencing guidelines. They found that both

224. See FISHER, supra note 223, at 224 (“[P]rosecutors and defendants will settle successfully on a deal whenever the sentence a defendant faces after trial ... exceeds the sentence the prosecutor offers on a plea.”); Gazal-Ayal, supra note 221, at 2298–99 (explaining how a prosecutor can reach a guilty plea in even a very weak case by offering a substantial discount); Stuntz, supra note 222 (discussing prosecutorial discretion and the dynamics of plea bargaining after Bordenkircher); Wright, supra note 24, at 109 (noting that large plea discounts might distort defendants’ perceptions of their options and cause some to forgo a trial despite strong defenses).

225. Charges bargaining may occur when prosecutors drop some counts from several initial charges or reduce a single initial charge to a lesser included offense—say, assault with a weapon to simple assault.

226. See supra note 209 and accompanying text.


228. Id. at 1939–40.
features have an effect.\textsuperscript{229} Generally, the more depth in the code (meaning the more offense definitions prosecutors can choose from with respect to particular conduct, such as assault or theft) \textit{and} the greater the distance between the fixed sentencing zones among those charging options, the more likely it is for prosecutors and defendants to reach bargains on charge and sentence reductions.\textsuperscript{230}

That tells us part of the story: the more offense definitions a code provides, the more likely we are to see bargains.\textsuperscript{231} Their project did not entail the other half that is important for assessing overcriminalization: whether much of that code depth arises from legislatures criminalizing inappropriately or being unable to repeal outdated statutes that prosecutors add to their charging arsenals. The statutes they focus on in considerable detail—charging options for robbery, assault, kidnapping, burglary, and drug crimes—suggest that the statutes driving most of the docket are the core of routine criminal law. And a deeper look at the data set confirms that impression and roughly tracks the national aggregate data. Thirty-seven percent of North Carolina felony convictions for fiscal year 2000–2001 were for property offenses, thirty-four percent were for drug crimes, and eighteen percent were for crimes against persons.\textsuperscript{232} Six of the remaining eleven percent were for noncontroversial crimes of weapons offenses and various habitual offenses (such as drunk driving and assault); five percent were undefined.\textsuperscript{233}

Looking within each of those categories, we find most prosecutions occur under a fairly small set of statutes that define and grade different versions of similar conduct in familiar and acceptable ways. Three-quarters of the property offenses were defined by eleven crimes—two degrees of burglary, larceny, and auto theft; three degrees of arson offenses, forgery, and embezzlement; and the like.\textsuperscript{234} Although overlapping with regard to some conduct—usually deliberately because some are lesser included offenses of others—they are not plausible candidates for repeal and thus cannot be called examples of overcriminalization. The same is true for

\begin{itemize}
\item \textsuperscript{229} Id. at 1940.
\item \textsuperscript{230} Id. at 1976.
\item \textsuperscript{231} Wright and Engen imply this practice is fairly benign. Rather than suggesting prosecutors overcharge and coerce unfair bargains, they find offense options provide opportunities for charge reductions that allow parties to reach a mutually acceptable “market clearing price” to forgo trial. \textit{Id}. at 1955.
\item \textsuperscript{232} N.C. SENTENCING \& POLICY ADVISORY COMM’N, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS 15–16 (2002). Wright and Engen used data from fiscal year 1999–2000, Wright \& Engen, \textit{supra} note 227, at 1957, but detailed data from 1999 to 2000 on actual offenses making up offenses in broader categories (crimes against person, property, etc.) are not currently available from the North Carolina sentencing commission, so I rely on 2000–2001 data here.
\item \textsuperscript{233} N.C. SENTENCING \& POLICY ADVISORY COMM’N, \textit{supra} note 232, app. D at 66–68 tbl.1.
\item \textsuperscript{234} Id. app. D at 67 tbl.1. The property crimes not noted above are breaking and entering and fraud; the remaining 24% of property convictions were for “other property crimes,” \textit{id.}, which could include statutes that are plausible candidates for the overcriminalization label. Data on what offenses make up the “other property crimes” group are not available.
\end{itemize}
crimes against persons. The variations among assault, homicide, rape, and robbery statutes are all widely accepted grading distinctions—first- versus second-degree murder; voluntary versus involuntary manslaughter; armed versus nonarmed robbery; assault with or without a deadly weapon, with or without injury, with or without intent to kill; and rape versus indecent liberties with a child.\textsuperscript{235} The picture for drug crimes is similar: about 85% of those convictions were for drug sale or delivery, possession with intent to distribute, or simple possession (for which less than one in ten offenders received an incarceration sentence).\textsuperscript{236} There may be examples of a small number of prosecutions in the remaining miscellaneous cases that fit the concerns of overcriminalization scholars, but these offense data, in addition to Wright and Engen's analysis of charge discounts, suggest that little plea bargaining is a result of indefensible code expansiveness, rather than inevitable and largely desirable distinctions in conduct definitions. Quirky and outdated code sections seem to have little real-world effect on felony dispositions.

The history of plea bargaining confirms this conclusion. George Fisher's definitive study found plea bargaining grew from an almost non-existent practice to a dominant one over the nineteenth century largely due to rigid sentencing laws, not broad codes.\textsuperscript{237} Mandatory sentences eliminate judicial discretion and allow prosecutors to control the discount for pleas over trials, and thus, bargaining first emerged in liquor cases, where sentences were determinate.\textsuperscript{238} Other changes supported bargaining's growth—caseload pressures on judges and prosecutors, and changing evidence rules that made trial (and trial testimony) more risky for defendants.\textsuperscript{239} But plea bargaining arose before codes started their expansive growth. While more crimes add to prosecutors' charge-stacking options, it is the sentencing implications of those charges—whether they carry mandatory penalties and whether sentences on separate charges will run concurrently—that make charge-stacking and bargaining a powerful force.

Again, the federal system is more suspect than the state systems. Even post-\textit{Booker},\textsuperscript{240} federal sentences remain more rigid than states' (mandatory-minimum statutes are unaffected by \textit{Booker}), and the case for abolishing overbroad and redundant serious offenses is stronger there. Even so, Fisher's detailed empirical analysis attributes to the expansive federal code no such
Moreover, the point remains for the vast bulk of criminal law, which occurs in state systems. Leaner, more coherent substantive codes would likely have only modest effects on prosecutorial bargaining power and practice; other factors would still drive much plea bargaining.

V. Conclusion

Many state criminal codes are scattered with redundant, outdated, and trivial offenses, and the federal code surpasses the worst state code. But that does not mean the story of democratic construction of substantive criminal law is as bleak as many scholars suggest, nor are bloated codes' effects as significant. Little conduct is criminalized, and even less is enforced, that majorities think is wholly innocent. And when majority preferences change about conduct that is criminalized, legislatures often find their way to repealing such provisions. When a minority of legislatures does not, courts sometimes do it for them, and prosecutors make sure law in action matches those preferences even if law on the books does not. States vary in their capacity to reform their codes, but the glass is plausibly viewed as at least half full. There are plenty of examples of states improving that capacity, especially through the design of legislative processes—framework laws and the use of expert commissions—that point the way for more states to more effectively manage and monitor criminal law.

Legislatures' work on criminal law seems little worse than other perennial topics in which legislative products are open to criticism as being wasteful, serving minority interests at the expense of common ones, or violating a normative ideal. Democratic lawmaking is messy and rarely accords with a single, coherent theory of how any policy—taxation, securities, environmental regulation, or criminal law, say—should be organized. But a significant number of states are finding ways to improve legislative outcomes on criminal lawmaking, and their records even before recent framework or commission structures were not noticeably different from their records in other policy areas.

The full details of criminal law defy description within a coherent normative theory, but holding aside pockets of federal practice and some unenforced, mostly minor state laws, its broad sweep roughly accords with majoritarian preferences. If this is true, criminal law's substantive reach is not likely to undermine its public legitimacy; majorities seem to have little problem with many provisions scholars complain about. Other effects of criminal law's haphazard growth—inconsistent terminology, publication of offenses outside the criminal code, varying punishments for similar crimes—are continuing issues. But they are largely separate from the core concern of

241. See Fisher, supra note 223, at 120, 116–54 ("The federal criminal code... has expanded to cover more and more conduct... But the real footprint... is measured not by the reach of the code, but the number and type of cases actually filed.").
overcriminalization—punishing trivial or innocent conduct and unduly enhancing prosecutorial power. And they provide little support for an argument of democratic dysfunction that is unique to criminal law. Legislatures have an undervalued history of reforming crime definitions, prosecutors constrain those offenses even more in practice, and procedural innovations show the possibility, and perhaps the promise, for improving legislative governance of criminal law.