The Demand Side of Overcriminalization – A Celebration of Bill Stuntz

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By Daniel Richman*

The unity of Bill Stuntz's character -- his profound integrity -- makes it easy to move from a celebration of his friendship (which I've treasured since we first met back in 1985) to one of his scholarship, for creativity, wisdom, and humility are strengths not just of Bill himself but of his work. Even as his broad brush strokes have fundamentally advanced our understanding of the interplay between substantive criminal law, criminal procedure, and criminal justice institutions over time, Bill's work – like Bill himself – welcomes and endures sustained engagement.[1] Humility is appropriate for me too as I offer some ruminations sparked by his scholarship. The academic's plight is to simultaneously worry about being uninteresting and about being wrong. My hope is to err on the side of error. And my methodology here will be much the same as it has been in a lot of my other work: I seek to entertain Bill, and perhaps to bait him into telling me why I'm wrong.

As Bill has noted, "criminal law's breadth" – the sheer amount of conduct it subjects to penal sanctions – "has long been the starting point for virtually all the scholarship" in the field.[2] Back in 2001, he powerfully laid out the agency problems at the heart of the "pathologies" that inappropriately expand the range and depth of American criminal law: "Legislators gain when they write criminal statutes in ways that benefit prosecutors. Prosecutors gain from statutes that enable them more easily to induce guilty pleas. Appellate courts lack the doctrinal tools to combat those tendencies."[3] Since then, Bill has elaborated his model, distinguishing between federal and local political dynamics,[4] and explaining how the loss of local democratic control over the criminal justice system has led to racial inequality in criminal justice outcomes.[5]

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1 See William J. Stuntz, Book Review: Christian Legal Theory, 116 Harv. L. Rev. 1707, 1744 (2003) ("Imagine how differently most law review articles would read if their authors admitted the possibility that they might be mistaken."); cf. Letter from Oliver Cromwell to the General Assembly of the Kirk of Scotland (Aug. 3, 1650), in The Writings and Speeches of Oliver Cromwell 3022-03 (Wilbur Cortez Abbott ed., 1939) ("I beseech you, in the bowels of Christ, think it possible that you may be mistaken."). I don't think Bill has ever before been compared to Oliver Cromwell.

2 William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 507 (2001) [hereinafter Stuntz, Pathological Politics]; see also Erik Luna, The Overcriminalization Phenomenon, 54 Am. U. L. Rev. 703 (2005); John Coffee, Does Unlawful Mean Criminal..., 71 B.U. L. Rev. 193 (1991); Sanford H. Kadish, The Crisis of Overcriminalization, 7 Am. Crim. L. Q. 17 (1968); Douglas Husak, Overcriminalization: The Limits of the Criminal Law (Oxford 2008).

3 Stuntz, Pathological Politics, supra note 2, at 528.

4 See Daniel C. Richman & William J. Stuntz, Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution, 105 Colum. L. Rev. 583 (2005).

5 William J. Stuntz, Unequal Justice, 121 Harv. L. Rev. 1969 (2008); see also William J. Stuntz, Fighting Crime: Race, Crime, and Democracy in America (2010) (draft).

Bill has never suggested that these systemic actors make their moves within a closed universe. Indeed, voters' willingness to reward just about any legislation that increases the scope or depth of criminal law lies at the heart of his "pathology,"[6] and he notes how "interest group pressure only aggravates the tendency toward ever broader liability rules."[7] His focus, however, has primarily been on the supply side of overcriminalization – the actors from within the system whose institutional purposes are served by more criminal law (and perhaps more criminal enforcement) than is appropriate for a well-functioning society. I suspect Bill's focus is quite right: More punitive and broader penal sanctions certainly tend to increase the discretion of police officers and prosecutors and, under a constitutional regime of largely unfettered bargaining, can be cashed out for search and seizure authority, cheaper adjudications, agency prestige, political capital and the like. That these transactions occur in a regime in which monitoring is particularly difficult makes them even more attractive to enforcement actors, for whom increased criminalization can thus become an unalloyed good.

Yet one might profitably supplement Bill's insights into why institutional actors might oversupply criminal law by exploring the *demand* side of overcriminalization – why, because criminal law offers a unique and unnecessarily bundled set of institutional and procedural characteristics for which there are no non-criminal substitutes, outsiders are liable to demand more criminal law than they need or would even want, were effective and durable alternatives available. While for actors within the system, the opacity of criminal law cloaks the self-dealing of agencies, so for outsiders, the shadow of criminal law offers some alluring shade for the advancement of agendas that are only contingently related to criminal law.

To be sure, criminal law comes with some expensive appurtenances – also known as "fundamental constitutional rights" – that tend to limit demand. As Carol Steiker has so insightfully explained, by raising "the cost to government of using the criminal process," the "revolution in criminal procedure" spearheaded by the Warren Court gave state and federal legislators good reason to devise civil avenues for attacking "what might be more plausibly classified as criminal conduct."[8] The chance to avoid adjudicative costs attributed to such criminal procedure rights as that to trial by jury and proof beyond a reasonable doubt will give a legislator or state official good reason to characterize a sanction or restraint as merely "regulatory" where all things are equal. Yet all things are rarely equal, particularly when institutional context is considered. My goal here is to explore the powerful countervailing forces that often make the criminal route more alluring. (In a semi-perfect world, these countervailing forces would balance each other out. We don't live in that world.)

In addition to honoring Bill by adding a few brush strokes to his wonderful picture, I want to suggest that the solution to overcriminalization lies outside the criminal law as well as

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[6] Stuntz, Pathological Politics, supra note 2, at, 529-33.

[7] Id. at 553.

[8] Carol Steiker, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide, 85 Geo. L.J. 775, 780 (1997); see also Carol Steiker, The Limits of the Preventive State, 88 J. Crim. L. & Crim. 771 (1998); Daniel Richman, United States v. Salerno: The Constitutionality of Regulatory Detention, in Criminal Procedure Stories (Carol Steiker, ed. 2006); Erin Murphy, Paradigms of Restraint, 57 Duke L.J. 1321 (2008).

within it. The focus here will be to sketch out what moves in that direction would look like.[9] Insightful and provocative work by David Garland, John Simon, Jim Whitman and others[10] has quite properly focused on the cultural roots of our recourse to criminalization – and highly punitive criminalization at that. Like Bill, however, I think institutional dynamics have far more explanatory power than is often appreciated.

Why Criminalization Will be Sought by Those Who Might Prefer Something Else

Had we an accepted metric for figuring out when conduct can properly be subjected to criminal sanctions and to what degree, guarding against overcriminalization would be a lot easier. But we lack one. Markus Dubber has plausibly suggested that the fault lies (at least in part) in the Anglo-American conflation of law and police power.[11] Picking up on this point, Niki Lacey has noted the contrast with our more discerning cousins on the Continent, who worked hard to keep criminal law preoccupied with wrong-doing and culpability and relied on regulation to advance other state goals.[12] We made no effort in that regard and quietly allowed the police power to be "absorbed" within "law."[13] The result is intellectual chaos. As Douglas Husak recently noted, "The absence of a viable account of criminalization constitutes the single most glaring failure of penal theory as it has developed on both sides of the Atlantic."[14]

The scant attention Anglo-American legal development gave to drawing clear distinctions between the province of criminal law and that of civil regulation was partly a function of our general preference for procedural justice over a priori principles of substantive law. As Bill has often noted, our Constitution has a lot to say about how criminal law should be enforced but little about what criminal law should be. And our substantive criminal law developed first through the case-by-case pronouncements of common law judges and then by the varied articulations of incensed legislators. Sure, the Model Penal Code offered theoretical rigor to receptive jurisdictions (a category that certainly does include the federal system).[15] But our academics, I'm told, just don't get enough respect – compared to, say, those in Germany, France, and Italy.

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[9] While the focus here is on the United States, the argument that overcriminalization here is partially a function of peculiar doctrinal and institutional arrangements not found in, say, Europe, the approach may, in passing, offer some comfort to Europeans scared that they are on verge of taking "the punitive turn" down the American path See Nicola Lacey, The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies (2008). But see David Downes, Contrasts in Toleration – 20 Years On (Dec. 2008 paper) not so worried; http://vsr.ruhosting.nl/page24/files/Downes-ContrastsinTolerance.doc

[10] For an excellent review essay, see James Q. Whitman, The Comparative Study of Criminal Punishment, 1 Ann. Rev. Law Soc. Sci. 17 (2005).

[11] See Markus Dirk Dubber, The Police Power: Patriarchy and the Foundations of American Government (2005).

[12] Lacey, supra note 9, at 104 (on the Continent "this location of regulatory offenses within the framework of criminal law 'proper' would be regarded as most unsatisfactory. Rather than drawing the old police power within the modern framework of criminal justice, the modern governmental settlements of European codification of the early nineteenth century were inclined to separate out this form of social regulation within a discrete framework, leaving regulatory offenses as a more visible and autonomous manifestation of state power.").

[13] Lacey supra note 9, at 102.

[14] Douglas Husak, Overcriminalization: The Limits of the Criminal Law 58 (Oxford 2008).

[15] See Dixon v. United States, 548 U.S. 1, __ (2006) (when setting contours of the duress defense under federal criminal law, Court gives "no weight" to the Model Penal Code formulation).

Our tolerance for theoretically unrestricted criminal law is also a function of our historically weak states and the paucity of our institutional structures, i.e. the lack of regulatory actors other than cops, prosecutors and judges. From the Founding – and long before in Britain[16] – criminal justice institutions (however part-time) offered the promise of local control (through juries, venue rules, and decentralized enforcers) and the capacity for accepting new responsibilities on a discretionary basis.[17] These characteristics made them the perfect recourse for those who believed in minimal government but periodically desired a law for "just this one bad thing" with an off-the-rack enforcement regime. Darryl Brown recounts: "The early decades of the American republic continued earlier English and colonial practices of employing criminal law routinely as a means of local regulation."[18] To be sure, the New Deal and the growth of the administrative state brought a proliferation of public welfare offenses within the federal system. But the proliferation had deep roots, and a canny observer, like Francis Sayres, could look back and worry about the upcoming the flood as early as 1933.[19] Like those magic bags that seem to hold everything the magician puts in them without getting bigger, criminal justice institutions could assume any number of new assignments without necessarily acting on them. Such is the value of decentralized and highly discretionary authority. Over time, criminal law in the United States became what criminal justice actors did, nothing more.

In theory, we thus have an inexhaustible supply of criminal law in the United States. As a constitutional matter, as well, thanks to the Framer's preoccupation with criminal procedure. Although Bill has given us a provocative glimpse of "a kind of criminal substantive due process" that would ensure that "the conduct criminalized was serious enough to justify *some* criminal punishment,"[20] this is not a doctrinal dog likely to bark in the foreseeable future (although every so often, it gets up and walks around).[21] Sorry, Bill – I'm happy to be wrong on this. As a result, the federal government and the States are thus substantially free to impose the same stigma and sanctions on the violator of any social policy that they impose on the robber, rapist, or murderer (with the exception of capital punishment). And they can use the same cops, prosecutors, and courts to do so.

This singularity of criminal enforcement institutions is something we take for granted,

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[16] See J. Beattie, Policing and Punishment in London 1660-1720 (OUP 2001); J. M. Beattie, Crime and the courts in England, 1660-1800 (OUP, 1986); P. King, Crime, Justice and Discretion in England 1740-1820 (OUP 2000)

[17] Eric Monkkonen notes how the Boston sewer department was essentially spun out of the city marshal's service in 1837. Eric H. Monkkonen, Police in Urban America, 1860-1920, at 47 (2004 ed.) (noting how when Boston incorporated in 1822, the city marshal was given general responsibility for matters affecting the "health, security, and comfort of the city," and that "[t]he only change in the power of the Boston marshal came in 1837, when the city created a separate department of sewers, run by a former deputy marshal.").

[18] Darryl K. Brown, Yick Wo and the Constitutional Regulation of Criminal Law, 2008 U. Ill. L. Rev. 1405, 1407.

[19] See Francis Bowes Sayre, Public Welfare, 33 Colum. L. Rev. 55, 84 (1933) ("With respect to public welfare offenses involving light penalties the abandonment of the classic requirement of menls rea is probably a sound development. But courts should scrupulously avoid extending the doctrines applicable to public welfare offenses to true crimes. To do so would sap the vitality of the criminal law.").

[20] William J. Stuntz, Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 66 (1997).

[21] See Lawrence v. Texas, 539 U.S. 558 (2003); California v. Lambert, 355 U.S. 225 (1957).

but shouldn't. Our readiness to extend criminal law beyond "core" harm-based concerns[22] did not necessarily (at least as an a priori matter) have to be accompanied by the assignment of these extended criminal functions to the same general jurisdiction enforcement agencies that handle regular crimes. One could imagine a system of subject-specific investigators bringing cases to "special" prosecutors housed in stand-alone agencies with limited missions – something like the litigating divisions in the Justice Department but far more self-contained. In such a world, specialized enforcement agencies could be equipped with specialized investigative and enforcement tools keyed to their particular subject matter, and prosecutors could even bring cases in special courts. We have largely rejected or ignored that model, however. Within the federal system, most prosecutions are brought by generalist U.S. Attorneys. Even the Justice Department's litigating divisions (like the Antitrust, Civil Rights and Tax divisions) are housed within an agency that has general federal criminal jurisdiction. Similarly, in the States, the vast majority of prosecutors are in general jurisdiction district attorneys offices and bring cases before general jurisdiction criminal judges.[23] Sure, prosecutors within the larger offices sometimes specialize, sometimes in units that proclaim their dedication to particular kinds of cases. And at the local level, some jurisdictions have experimented with specialty drug, gun and domestic violence courts.[24] Yet it is a fundamentally generalist system. And, everywhere, trials (to the extent they occur) will be before the ultimate general jurisdiction players: lay jurors whose response to the evidence (and readiness to convict) will be substantially driven by their views of the "seriousness" of the offense (or offender).[25]

The unreflective readiness of legislators to give these generalists new tasks has been a hallmark of American history since at least the Civil War. Efforts to target vice in ever so many of its forms have played a remarkably large role in the growth of the criminal docket. As Bill notes in his masterful upcoming book: "Between the late 1870s and 1933, American's criminal justice system fought a series of cultural battles in which criminal law – especially federal criminal law – was a key weapon: against polygamy, against state lotteries.., against prostitution, against opium-based drugs and, last, but definitely not least, against alcoholic drink."[26] Yet one also sees an easy creep from more mundane regulation to criminalization in *United States v. Grimaud*,[27] the watershed case that upheld the constitutionality of administrative crimes and paved the way for the proliferation of such provisions in the New Deal.[28] It arose

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[22] See generally Douglas Husak, Crimes Outside the Core, 39 Tulsa L. Rev. 755 (2004) (discussing ways to distinguish the "core" of criminal law from its "periphery"); see also Douglas Husak, 29 Oxford J. Legal Stud. 169, 171 (2009) (referring to "offences such as murder, rape, theft and the like" as the "core of the criminal law").

[23] For a survey of the degree to which state attorneys general get involved in what otherwise would be local prosecutions, see Rachel E. Barkow, Federalism and Criminal Law: What the Feds Can Learn from the States, __ Mich. L. Rev. __ (2010) (forthcoming).

[24] See generally Michael C. Dorf & Jeffrey A. Fagan, Problem-Solving Courts: From Innovation to Institutionalization, 40 Am. Crim. L. Rev. 1501 (2003); Phyllis Skloot Bamberger, Specialized Courts: Not a Cure-All, 30 Fordham Urb. L.J. 1091 (2003).

[25] See Daniel C. Richman, *Old Chief v. United States*: Stipulating Away Prosecutorial Accountability?, 83 Va. L. Rev. 939, 971-73 (1997) (citing studies).

[26] William J. Stuntz, Fighting Crime: Race, Crime, and Democracy in America, 161 (2010) (draft).

[27] 220 U.S. 506 (1911).

[28] See Thomas W. Merrill & Kathryn T. Watts, Agency Rules with Force of Law, 116 Harv. L. Rev. 467, 501-02 (2002) ("*Grimaud* thus established what Congress could do: it could delegate power to an agency to adopt

out of the 1908 federal criminal prosecution of a California shepherd for violating the Interior Department's national forest grazing regulations. The 1897 Act authorizing the Interior Department to promulgate regulations to protect the lands under its stewardship had left it free to use either civil or criminal sanctions.[29] Thereafter, when the newly created Forest Service – led by the able Gifford Pinchot, who carefully nurtured his ties to the Attorney General[30] – assumed Interior's responsibilities and found civil injunctions inadequate, it simply prevailed on the Justice Department to replead the regulatory violations in grand jury indictments.[31]

The point is not that these diverse legislative and executive forays violate an authoritative normative vision of what should be criminal or what criminal cases ought to be pursued. We've never had anything resembling such a vision. Rather, our "strategy" has been to make broad legislative claims and to leave such matters to be worked out within executive enforcement institutions. And then – here's the twist – we shield enforcement decisions with broad norms of prosecutorial discretion and restrictions on informational monitoring, and we let enforcers tuck their expanded responsibilities into over-stuffed portfolios that generally include the worst and most obvious sorts of criminal conduct.

Consider how historically contingent institutional design affects the prosecution of offenses outside core criminality: A fraud or "public welfare" offense will usually be pursued with resources (and by prosecutors) that could just as easily be used against rapes, robberies, and murders, and by prosecutors and enforcement personnel who may have just gone after such obviously "real" crimes.[32] And the reputational capital that an agency develops going after "real" crimes gets deployed – consciously or not – across all the criminal cases it brings.[33] No prosecutor would be so stupid as to explicitly analogize a securities fraud or environmental crime to murder, rape or terrorism at a press conference, arraignment, or trial. Nor will anyone confuse Martha Stewart with Matty "the Horse" Ianniello of the Genovese Family. But the announcement that an indictment has been issued in a securities fraud case is made from the same podium as an announcement that a mob boss has been convicted

The expressive effects of legislative criminalization pale besides those of prosecutorial action for a number of reasons. For one thing, because criminal laws aren't self-executing, and we lack the German "principle of legality" that compels prosecution, a penal provision may

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regulations subject to criminal penalties, provided that Congress itself legislated the penalties.").

[29] See Logan Sawyer, Grazing, Grimaud, and Gifford Pinchot: How the Forest Service Overcame the Classical Nondelegation Doctrine to Establish Administrative Crimes, 24 J. L. & Pol. 171, 184 (2008).

[30] Id. at 193.

[31] Id. at 184-202.

[32] See Alice Ristroph, Criminal Law in the Shadow of Violence**,** from *The Law of Violence* (forthcoming Oxford University Press) "In the criminal law, violent crime seems to verify the need for, and justice of, the state's own violence in policing and punishment."), available at www.law.berkeley.edu/img/**Ristroph**(1).pdf*;* see also James Q. Whitman, The Comparative Study of Criminal Punishment, 1 Ann. Rev. Law Soc. Sci. 17, 29-30 (2005) (discussing relationship between criminal punishment and social traditions of violence).

[33] The same sort of cross-subsidy has historically supported extensions of federal criminal jurisdiction. See Kathleen J. Frydl, Kidnapping and State Development in the United States, 20 Stud. in Am. Pol. Dev. 18, 20 (2006) ("The quintessential crime against the person, kidnapping, furnished opportunity to those eager to project the formal power of the state.").

never have a life beyond the penal code. Therefore, it is often only after a prosecutor takes action that a statute – particularly one drafted some years earlier – enters the public consciousness. Moreover, when a prosecutor invokes a provision, she will always do so in the context of facts that she can select for their moral appeal.[34] This both enables the prosecutor to shape the contours of the doctrine and ensures maximum pressure behind the expansion of the criminal law. Still, much of the power of the speech comes from the identity of the speaker: Although generalist prosecutors may lack the specialized knowledge of their regulatory brethren across the civil-criminal divide, they are far better placed to make trans-substantive claims of moral blameworthiness.[35] And since prosecutors have more "skin" in the game, because of the opportunity costs of their cases, their claims of "criminality" have far more power to transform social norms than the assertions of a legislature that has an infinite supply of such epithets.[36]

As Bill has pointed out, prosecutors may have reasons for deploying the "criminal" label that have little do with culpability or social harm and much to do with building institutional or political capital. Moreover, their implicit claim that "crimes are crimes" can end up being a bridge too far. Early in the New Deal, the A.L.A. Schechter Poultry Corporation in Brooklyn emerged as a serious threat to the National Recovery Administration's program for the notoriously corrupt kosher poultry business. Government inspectors found serial violations of the Live Poultry Code's wage and hour provisions, sales of unfit and uninspected poultry, and they were themselves threatened with violence as they pursued these problems.[37] The Justice Department obtained an indictment against the four Schechter brothers and their firm on sixty criminal counts, gained a conviction on nineteen counts, and an affirmance on appeal.[38] When the case reached the Supreme Court, Justice McReynolds got defense counsel to explain the poultry's code's "straight killing" requirement – the seller was supposed to put his hand in the coop and take the first chicken he touched – then commented "'And it was for that your client

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[34] See Dan M. Kahan, Is Chevron Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469, 480 ("By paying close attention to the facts of the cases they select as vehicles for novel statutory readings, federal prosecutors can highlight the benefits and suppress the costs of the interpretations that they favor.").

[35] See Gerard E. Lynch, The Role of Criminal Law in Policing Corporate Misconduct, 60 L. & Contemp. Probs. 23, 54 (1997) ("The EPA or SEC lawyer may be better able to compare each case with other violations of securities or environmental laws, in terms of its importance to operating honest capital markets or protecting environmental quality, but the prosecutor is better equipped to compare the violation with other types of crime in terms of the moral blameworthiness of conduct, the degree of departure from general standards of citizenship, and the equity of imposing stigmatizing punishment.").

[36] See Mariano-Florentino Cuéllar, The Institutional Logic of Preventive Crime 34 (2008) ("Unlike other agencies, the bureaucracies charged with crime prevention are likely to enjoy a greater degree of political insulation and influence owing to the perceived sensitivity of their law enforcement missions and their ability to strategically leverage responsibilities widely perceived as involving high social value.").

[37] See Peter H. Irons, The New Deal Lawyers 87 (1982)

[38] United States v. A.L.A. Schechter Poultry Corp., 76 F.2d 617 (2d Cir. 1935), rev'd, 295 U.S. 495 (1935). The Second Circuit opinion in *Schechter* was written by Judge Martin Manton, who had just missed being appointed to the Supreme Court, and who later became the first federal judge convicted of receiving bribes. United States v. Manton, 107 F.2d 834 (2d Cir. 1939) (affirming conviction); see also David R. Stras, Pierce Butler: A Supreme Technician, 62 Vand. L. Rev. 695, 710 n.112 (2009). Bill *loves* these sorts of details. And *Schechter* is one of his favorite cases. Bill recently reminded me that another of his favorite New Deal cases, the "Hot Oil" case, *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), arouse out of a National Industrial Recovery Act regime that threatened code violators with criminal prosecution. We sometimes forget the extent to which criminal law was used as a leading edge for federal regulatory regimes from the very start.

was convicted?'" Counsel replied: "'Yes, and fined and given a jail sentence.'"[39] The rest is history.[40]

Still, the idea that a prosecutor's office – not the courtroom – is the place where discussions what is "really" criminal runs deep. Particularly in the rarified world of white collar enforcement that Kenneth Mann and Jerry Lynch have captured so insightfully,[41] the standard defense pitch starts by explaining how the alleged conduct, though "technically" covered by a criminal provision does not rise to the level of a "real" crime. Indeed, this tack is pursued to a fault.[42]

The thickness of the prosecutorial portfolio, the privileged status of certain of its component parts, and the opacity of the criminal enforcement regime have consequences that go far beyond expressive effects and that can be quite material. Consider the effects on investigative or prosecutorial tactics. A standard story starts when some technique or tactic is permitted for an especially egregious offense – terrorism or child pornography, for instance. Over time, the argument "isn't [some other] offense just as bad" gains power, particularly when accompanied by the assumption that enforcers will pick out only the really "bad" instances of the new offense. Prosecutors or agents/police who move from one unit to another will tout the virtues of the new tool, but word will get out even without personnel shifts because of the common hierarchy and culture. And before long, the extraordinary tactic becomes just another criminal enforcement tool. Outside the federal system, the vehicular stops that the police make for felonies soon get made for misdemeanors.[43] Within the federal system, PATRIOT ACT subpoenas get used in cases having nothing to do with terrorism[44] and insider trading cases get investigated with the sort of electronic surveillance previously reserved for mobsters and drug traffickers.[45] While none of these tactics is necessarily inappropriate on the facts, the pooling

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[39] Irons, supra note 37, at 99.

[40] See A.L.A. Schechter Poultry v. United States, 295 U.S. 495 (1935) (finding poultry industry regulations to be outside Congress's Commerce Clause authority and to be unconstitutional delegations of congressional power).

[41] See Kenneth Mann, Defending White-Collar Crime (1985); see also Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 Ford. L. Rev. 2117 (1998).

[42] Two recent executives at the Southern District of New York U.S. Attorney's office have noted: "In our experience, it is not uncommon for defense counsel to seek non-criminal or deferred resolutions when, in view of the charging precedent of the office, prosecutorial practice and the facts and circumstances of the case, such request is not realistic." See Lev L. Dassin and Guy Petrillo, Pre-Charge Presentations to a U.S. Attorney's Office and the Department of Justice (2010) (draft).

[43] See Atwater v. City of Lago Vista, 532 U.S. 318 (2001); Wayne A. Logan, Street Legal: The Court Affords Police Constitutional Carte Blanche, 77 Ind. L.J. 419, 458 (2002) ("[B]y disavowing any need to correlate reasonableness with offense gravity, the *Atwater* majority missed an opportunity to provide legislatures with an incentive to undertake critical reexaminations of their criminal codes, a task that is long overdue"); see also Sameer Bajaj, Note: Policing the Fourth Amendment: The Constitutionality of Warrantless Investigatory Stops for Past Misdemeanors, 109 Colum. L. Rev. 309 (2009).

[44] See, e.g., Eric Lichtblau, U.S. Uses Terror Law to Pursue Crimes from Drugs to Swindling, N.Y. Times, Sept. 28, 2003 (detailing federal government expansive application of investigatory powers granted to it under the PATRIOT Act); see also Risa Berkower, *Sliding Down a Slippery Slope? The Future Use of Administrative Subpoenas in Criminal Investigations*, 73 Fordham L. Rev. 2251 (2005) (explaining the increasing availability of administrative subpoenas to criminal investigators).

[45] News coverage of Galleon case in SDNY

of criminal cases without concern for proportionality can be disconcerting. This is doubly true when the criminal law has expanded beyond into realms traditionally enforced by civil law.

Showing a causal link is difficult, especially when one tries to connect constitutional development to political change and bureaucratic choice. Yet I wonder whether the creep of enforcement tactics from one offense to another not just mirrors, but is actually promoted by, the "transsubstantive" state of criminal procedure doctrine that Bill has rightfully highlighted.[46] That courts draw no "distinctions among crimes . . . when it comes to regulating criminal investigations,"[47] surely affects the calculus of enforcers deciding whether to import a tactic from one area to another.

The ability of agencies that pursue "real" crime to attract and maintain funding and resource commitments also has repercussions outside the core. Public safety is not exactly a non-negotiable part of governmental budgets. Indeed, it has been interesting to watch state and local governments cut back on their criminal justice expenditures in the wake of the recent economic downturn.[48] But support for general criminal enforcement agencies – local police and prosecutors; the FBI and federal prosecutors – certainty has a durable strength that agencies lacking their core crime portfolio can only envy. And the relative opacity of those agencies, the high fixed cost of the informational networks (i.e. the local police patrol beat; the federal relationships with local enforcers), and the apparently low marginal cost of extending beyond the core crime mission makes these agencies alluring sites for policy entrepreneurs seeking public commitments in those extended areas.

What we've thus done is made criminal enforcement the envy of anyone with a policy agenda, even a policy agenda that, all things being equal, they would have preferred to pursue with non-criminal means. And the intervention of agencies that, via legislative and theoretical abdication, we have placed in charge of sorting for "real" criminality will often be sought less for features intrinsic to criminalization than for those that have been bundled into criminal enforcement only contingently.

The problem occurs at all levels of government and is not new. Decades ago, Sandy Kadish bemoaned how the criminal process had become "overburdened" by the imposition on prosecutors and police of the duty to provide various "social services to needy segments of the community."[49] Although the obligation to pursue non-support complaints, he offered as an example, "is performed by police and prosecutors with some success, it is done reluctantly and usually less effectively than by a civil agency especially designed to handle the service. In addition, it is performed at a sacrifice to those primary functions of protecting the public against

[46] William J. Stuntz, O. J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment, 114 Harv. L. Rev. 842 (2001).
[47] Id. at 843.
[48] See Judith Greene & Marc Mauer, Downscaling Prisons: Lessons from Four States (Sentencing Project 2010); Pew Center on the States, Prison Count 2010: State Population Declines for the First Time in 38 Years (March 2010).
[49] Sanford H. Kadish, The Crisis of Overcriminalization, 7 Am. Crim. L. Q. 17, 27-28 (1968).

dangerous and threatening conduct which only the criminal law can perform."[50] Yet as Kadish surely knew, any such civil agency would face vagaries of public funding and political support that criminal justice agencies would never face. Perhaps the relative sanctity of criminal justice expenditures (at least until the current recession) is endemic to California. Kay Levine recently noted in a piece exploring how California prosecutors have been using statutory rape charges as leverage for child support payments: "In an age where funding for social services is constantly on the decline and law and order programs seem to be the only measures garnering bipartisan support, criminal justice agencies may be the only institutions with the financial resources to take on seemingly intractable social problems."[51] Yet Jonathan Simon (writing from California) has plausibly suggested the phenomenon is national, reporting that "prosecutors operating mainly at the local level have found themselves pulled to act in a wider sphere of governance that was largely abandoned by the retreat of welfarism."[52]

Not only will funding be stickier when a policy is pitched as a criminal enforcement project but it will come with institutional and fiscal multipliers because of the priority that other organizations, public and private, give to cooperation with crime-fighting institutions. Consider Nancy Wolf's account of mental health courts: "By invoking the court's power and legitimacy [and presumably that of the prosecutors bringing the cases], mental health courts may more effectively jump queues or circumvent access barriers and, as such, be more successful in getting mentally ill offenders into treatment."[53]

We see the same phenomenon on the federal side, particularly in the white collar area. Not only do prosecutors and agents get their phone calls returned a whole lot quicker than regulators but they are also less exposed to shifting political winds on the virtues of regulation. Even as the Bush Administration's ambivalence about financial regulation led to diminished numbers and perhaps diminished zeal among front-line investigators at the Securities and Exchange Commission,[54] federal prosecutors were racking up convictions in financial fraud prosecutions.[55] And any reduction in resources committed to white collar prosecutions during this period can more fairly be attributed to counterterrorism and other criminal priorities.[56] In short, anyone wanting more zealous public enforcement in the capital markets during the Bush

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[50] Id. at 30.

[51] See Kay Levine, The New Prosecution, 40 Wake Forest L. Rev. 1125, 1211 (2005).

[52] Jonathan Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear 72 (Oxford 2007).

[53] Nancy Wolff, Courts as Therapeutic Agents: Thinking Past the Novelty of Mental Health Courts, 30 J. Am. Acad. Psychiatry L. 431, 433 (2002).

[54] See General Accountability Office, Securities and Exchange Commission: Greater Attention Needed to Enhance Communication and Utilization of Resources in the Division of Enforcement, 17-24 (March 2009), available at www.gao.gov/new.items/d09358.pdf ; Securities and Exchange Commission, Office of Inspector General, Program Improvements Needed Within the SEC's Division of Enforcement (Sept. 29, 2009), available at http://www.sec-oig.gov/AuditsInspections/Reports.html. See also Donald C. Langevoort, The SEC and the Madoff Scandal: Three Narratives in Search of a Story (SSRN draft September 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1475433

[55] See Daniel Richman, Political Control of Federal Prosecutions, 58 Duke L.J. 2087 (2009).

[56] See Daniel Richman, Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem, 57 DePaul L. Rev. 295, 314 n.90 (2008) (highlighting sketchy and somewhat contradictory evidence as to the extent of criminal resources committed to white collar prosecutions during the Bush Administration).

years (the lack of which we are now coming to regret) would have reached for criminal sanctions far more than any rational sanction model would dictate.[57]

Note that criminal justice institutions themselves have played a passive role in my account so far, which has instead focused on the unique allure of those institutions to external players. This isn't the way things work, of course. Prosecutors themselves can misuse, even abuse, their privileged portfolios. There may be short-term political gains – to the prosecutor personally or to her office – from putting all sorts of temporary "public enemies" on the same moral plane as "other" criminals. More generally, interesting and probably true stories can be told of legislators passing symbolic penal statutes and of criminal enforcers self-dealing, protecting turf, and trying to increase their bureaucratic authority and budgets by overusing the "criminal" label.[58] But explorations of such agency problems ought not be at the expense of inquiries of institutional demand pathologies of the sort sketched out here.

Indeed, there are yet more demand pathologies, for the possibility of extending the criminal justice mission into what otherwise might be regulated areas is attractive not simply to proponents of enhanced regulatory activity but also to foes of any government intervention. Take public corruption. The mantra of opponents to campaign finance or lobbying reform – whether in Washington, D.C. or a state capital – is that the bad behavior that reform proposals would target through prophylactic regimes can simply be prosecuted, should actual instances occur.[59] They drive the point home by regularly passing overlapping criminal statutes that explicitly target the bad behavior. So too with gun regulation, where the need for state and federal prosecutions of gun-toting felons has been a key plank of anti-firearms regulation forces.[60] Note how the best-case scenarios for a regulatory regime can thus be picked off and assigned to the criminal process.

Criminalization – not just symbolic legislation but actual prosecutions – thus can become a sweet spot for both those favoring maximal government action and those favoring minimal. Rather than offering an extreme option in a graduated spectrum of sanctions and regulatory

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[57] See John C. Coffee, Jr., Law and the Market: The Impact of Enforcement (2007 draft) (highlighting value of public enforcement), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=967482

[58] Sam Buell does a lovely job laying out the standard agency critique – and highlighting some of its inadequacies – in Samuel W. Buell, The Upside of Overbreadth, 83 N.Y.U. L. Rev. 1491, 1513-19 (2008).

[59] See, e.g., Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604, 642 (1996) (Thomas, J. concurring) (quoting with approval the argument by appellants in *Buckley v. Valeo*: "If a small minority of political contributions are given to secure appointments for the donors or some other *quid pro quo*, that cannot serve to justify prohibiting all large contributions, the vast majority of which are given not for any such purpose but to further the expression of political views which the candidate and donor share. Where First Amendment rights are involved, a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent." (quoting Brief for Appellants in *Buckley v. Valeo*, O. T. 1975, Nos. 75-436 and 75-437, pp. 117-118); Testimony of Roger Pilon, Cato Institute, before the House Committee on House Administration: Constitutional Issues Related to Campaign Finance Reform (July 22, 1999) (1999) ("If there is quid-pro-quo corruption, then let the Justice Department investigate it. All the evidence suggests, however, that money buys access, it does not buy votes."), available at http://www.cato.org/testimony/ct-rp072299.html

[60] See Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369 (2001).

choices, criminal prosecution ends up as the natural point of first resort for all too many players of this perverse political game. And the odds that actual enforcement patterns – the institutional choices that we rely on in lieu of serious thinking about the criminal/civil divide – will reflect a serious engagement with overcriminalization concerns become slim indeed.

The demand side pathology has a curious side effect with respect to legislative control and political accountability. Those who measure legislative control of criminal enforcement by looking only at the specificity of penal statutes miss the rich array of mechanisms that legislators regularly deploy to influence enforcement decision making: funding, oversight hearings, institutional design, and, particularly in the federal system, involvement in personnel selection.[61] Still, they have a point, at least relatively speaking: Broad norms of prosecutorial discretion and independence make criminal enforcement actors harder to monitor than other governmental actors. Yet it is precisely this shade that legislators and others find so alluring when they can't or don't want to draw the line between what is criminal and what isn't.

One can argue that criminal prosecutions are simply the gold standard for state action in the United States, and that the centrality (and severity) of penal sanctions are just features of the larger "culture of control" that David Garland has so insightfully explored.[62] Yet, as Garland himself has noted, we should attend to the structural and political sources that contribute to our distinct culture,[63] and the (tentative) suggestion here is that the historically contingent institutional arrangements highlighted above are more a cause than an effect of that culture (though they are probably both). At the very least, we should recognize how our distinct institutional mechanisms reinforce the social dynamics that social theorists have sketched out.

Relieving Pressure on the Demand Side

Just as consideration of the institutional demand side of criminalization makes the pathologies of criminal law seem even worse than Bill has portrayed, so too might it offer new avenues for relief. Bill has suggested that the overcriminalization problem could be solved either by deregulating criminal procedure or by constitutionalizing the borders of criminal law.[64] Perhaps there is another avenue, more true to our process-orientation: reducing the allure of criminal law by providing institutional alternatives.

Criminal enforcers (tautologically) have a monopoly over the state's harshest coercive sanctions. Against whom should this sanction be deployed? That question – extended to include all instrumental uses of criminal sanctions, including information gathering – ought to be at the heart of any discussion about what conduct should be criminalized and to what extent. If we are not going to be systematic in having such a discussion, we might still obtain a regime reflecting revealed societal preferences by relying on the choices made by accountable enforcement agencies. (I'm talking theory here.) When criminal sanctions are simply the

[61] See Richman, Federal Criminal Law, supra note
[62] David Garland, Culture of Control (2001).
[63] See David Garland, Concepts of Culture in the Sociology of Punishment, 10 Theoretical Criminology 419, 437 (2006).
[64] William J. Stuntz, Substance, Process, and the Civil-Criminal Line, 7 J. Contemp. Legal Issues 1, 29 (1996).

second-best preference of those who would prefer a regulatory, social services, or some other non-criminal regime, but can't obtain it, overcriminalization – however normatively measured – is bound to occur. That our harshest sanctions are used only because less harsh alternatives are unavailable – that certain securities fraud cases are prosecuted because public and private civil enforcement are underfunded or procedurally obstructed;[65] that drug treatment is more easily provided to addicts who are prosecuted than to those who simply seek help – makes no sense at all. We therefore ought to try to reduce this aspect of demand, and to consider how criminalization can crowd out and displace non-criminal processes and institutions.

One key to such demand reduction lies in recognizing the features we have bundled together with criminal sanctions that need not be exclusive to that regime. Sometimes unbundling will be particularly hard because of the relationship that Bill has highlighted between criminal defense rights and exercises of government power. Because criminal defendants have speedy trial rights that civil parties lack, criminal cases will be on a fast adjudication track that regulatory action can't match. Criminal proceedings will also dominate where potential informational sources can invoke their Fifth Amendment right against self-incrimination, since the threat of prosecution (or the promise of immunity against prosecution) will be a powerful information-forcing tool. But we could be a lot more open to effective information gathering mechanisms on the civil side, doing what we can to bridge the huge gap between civil processes and the search warrants, grand jury subpoenae, and other such tools available only to prosecutors.

I suspect, for example, that a truly independent ethics commission with adequate resources and subpoena power would not be able, by itself, to clear up the self-dealing in Albany, Springfield, or any other state capital in the intense competition for "most corrupt."[66] Because most troubling transactions are the ones that participants are least likely to tell the truth about, even under oath, only the threat or reality of criminal prosecution and imprisonment will likely shake this information loose. (Bill would probably argue that anti-snitching norms are now stronger in state capitals than in some Mafia families. But he can be harsh.) Yet subpoena power and the manpower to analyze compelled disclosures might well make recourse to the criminal law less necessary. And while those who would starve regulatory agencies will indeed get less regulation, they will likely end up with more criminal prosecutions as well. The goal here should be a number of institutional half-way houses, not a desert with criminal sanctions as the only shelter.

We have similarly given too little attention to the development of efficient public institutions charged with finding facts and inflicting stigma outside of the criminal justice process. Because of defamation laws and the prohibitive cost of civil litigation, a person's criminal record is often the only source of public information about his past. And the private or public official who wants a record of someone's misdeeds maintained in the public domain will often see criminal prosecution as the only solution. It's often far easier (and cheaper) to have someone prosecuted than to terminate them with cause. This is not to say that libel law and

[65] See Christine Hurt, The Undercivilization of Corporate Law, 33 J. Corp. L. 361 (2008).
[66] See Gail Collins op ed., N.Y. Times, Feb. 14, 2010.

barriers to litigation don't have social benefits. The point is simply that these and other institutional limitations of the civil process funnel close cases to the criminal side.

Even public discourse has become impoverished. Consider how many discussions of the morality of a public figure's behavior soon degenerate into arguments about whether the behavior constitutes a "crime." Or how often criminal procedure's foundational "presumption of innocence" drives debates about a candidate or appointee's qualifications.[67] And because recourse to the criminal process leads to the underdevelopment of the very noncriminal norms that would condemn behavior without declaring it worthy of prosecution, the funnel widens over time.

Jonathan Simon suggests that the state has deployed the rubric of crime itself as a tool of governance: "When we govern through crime, we make crime and the forms of knowledge historically associated with it – criminal law, popular crime narrative, and criminology – available outside their limited original subject matter domains as powerful tools with which to interpret and frame all forms of social action as a problem for governance."[68] Perhaps. Ours is indeed a culture that has become all too quick to criminalize what we don't like. But if we decoupled certain criminal enforcement privileges from the criminal label we might substantially reduce recourse to the label, and to the sanctions and stigma that attend it.

As Bill has long noted, the degree to which we rely on criminal enforcers to sort out conduct that is "really" criminal from that which isn't certainly challenges standard "rule of law" notions. And judges and legislators ought to take on a lot more of this responsibility. But while we are waiting for these reluctant actors, we should give more thought to the socio-legal vacuums that criminal enforcers will rush in or be recruited to fill. Recognizing the degree to which diverse institutional and political factors push toward overinvestment in the criminal process might lead us spend our money more wisely.

[67] Dennis E. Curtis, Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings: The Fake Trial, 65 S. Cal. L. Rev. 1523, 1525 (1992).
[68] Simon, supra note 52, at 17.