Overcriminalization

The Limits of the Criminal Law

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Preface

I have two central objectives in this book. Most obviously, I defend a theory of the limits of the penal sanction to combat the problem of overcriminalization. Still, it is important to recognize that this theory has an even broader application. A theory of criminalization is needed to justify the criminal laws we should retain, as well as to provide the criteria by which we should decide whether to enact even more penal legislation. Because I am more interested in retarding overcriminalization than in achieving these latter objectives, however, the theory I present consists in a number of constraints to limit the criminal sanction rather than a set of reasons to extend it. My second objective is to situate my effort in criminal theory and legal philosophy generally. This goal is no less important than the first. Although I frequently contend that too little work on the topic of criminalization has been done, I argue that the resources to produce such a theory can be found in the wealth of scholarship legal theorists have developed—even though these resources have not been exploited for this purpose.

Legal philosophers who specialize in criminal theory are roughly divisible into two camps. The first is composed of academic philosophers who are extraordinarily knowledgeable about moral responsibility and attempt to apply their insights to issues of criminal liability. Some write whole books (allegedly) about the criminal law while barely mentioning a single case or statute. The second camp is composed of law professors who know a great deal about statutes and cases but are not especially conversant with philosophy. Often their philosophical sophistication does not extend beyond their discussion of how their views would be received within the deterrence and retributive traditions. Of course, the writings of any given legal philosopher fall on a continuum between these two extremes. In any event, I believe that this book lies squarely in the middle of these two camps. I try to be firmly anchored in existing criminal law while drawing heavily from contemporary moral, political, and legal philosophy. Along the way, I also borrow freely from the empirical research of criminologists. I hope that my effort captures the best these disciplines have to offer. I aspire to produce a book that it neither too philosophical for legal theorists nor too legalistic for philosophers.

The second of my objectives accounts for my tendency to cite the relevant contributions of philosophers and legal academics. Readers who share my interest in both philosophy and law are well aware that philosophers use footnotes much less frequently than legal commentators. Because my inquiry is located at the intersection between these two disciplines, I initially sought to compromise in the number of my references. Eventually, my efforts became tilted toward the style favored in

law. My abundance of footnotes reflects the second of my ambitions. I situate my arguments in criminal law scholarship by building on the thoughts of a host of philosophers and legal theorists.

I have what surely is a fantasy about how a book on the topic of criminalization will be received. Philosophy generally—and legal philosophy as well—has increasingly become a specialized discipline whose practitioners speak exclusively to one another. Issues of relatively minor significance have given rise to an enormous literature while more central topics (like that pursued here) have received virtually no attention. Academic conferences have a predictable dynamic. Arguments are developed; objections are made; counterarguments are defended; everyone goes home to begin the cycle anew. The stakes are low, so no conclusions need be reached. I am persuaded that the topic of criminalization is different. Even if every argument I present is unsound, no reasonable person should contest the gravity of the problems I describe or the need to solve them. I hope that commentators will begin to work together to fill a huge chasm in legal thought: the absence of a respectable theory to help retard the process by which too much criminal law produces too much punishment. The practical need for such a theory is so enormous that legal philosophers cannot afford the luxury of raising objections to existing principles without endeavoring to offer better ideas than those they reject.

I believe my methodology is unremarkable. No one has proposed a means to make progress in normative inquiry without the ample use of thought-experiments. Imaginary cases are described to solicit the judgments of readers, and these responses are used to confirm or reject abstract principles or theories. This device is largely unavoidable, and I occasionally employ it here. Still, I avoid the wildly fanciful and unfamiliar hypothetical cases that have helped to give philosophy a bad reputation among legal theorists. I am skeptical that the reactions of respondents to these extraordinary cases should be given much credibility. Moreover, I do not engage in grand theorizing: the search for a unitary account of the function or purpose of the criminal law.[1] Although I frequently shift from the very general to the very specific, I resist *isms* generally and the most familiar isms in particular. I refer to my theory as criminal law *minimalism,* but I use this term more as a slogan than as the name of a unified account of the criminal law. The theory of criminalization I develop draws from both retributive and consequentialist traditions and proceeds from neither a liberal nor a conservative perspective. I believe that the continued use of these vague labels does a disservice to political and legal debate, and I aspire to produce an argument against overcriminalization that will be persuasive to commentators on all points along the political spectrum. Readers of every ideology are welcome to draw from my theory as they wish. Finally, I do not presuppose the truth of a particular approach to morality. I reject utilitarianism but otherwise remain noncommittal about the details or foundations of moral theory.

1. For a discussion of grand theorizing and those commentators who aspire to it, see R. A. Duff: "Theorising Criminal Law: A 25th Anniversary Essay," 25 *Oxford Journal of Legal Studies* 353 (2005).

Despite what is frequently written about "the practical turn" in philosophy, my survey of the landscape convinces me that the scholarship of most academics is decidedly *im*practical. This tendency is especially unfortunate among legal philosophers whose specialty provides us an ideal vantage point to identify injustice. Many of the jurisprudential debates to which we legal philosophers contribute have an abstract and remote application to real-world problems. The endless refinements of various modes of positivism are perhaps the best example of this phenomenon. I am not calling for a return to the days when academics were more directly involved in partisan politics. But our research should be more sensitive to the injustices that surround us.

Much of the impetus for this book was produced by my prior work about the justifiability of drug proscriptions. Over the years, I have struggled mightily to learn why the state might be justified in punishing persons who use drugs for recreational purposes. Clearly, this project cannot be completed unless one has a general idea of what would permit the state to punish anyone for anything. Pursuing this latter idea leads naturally toward the development of a theory of criminalization. I remain persuaded that the state lacks a good reason to punish drug users. In this book, however, drug prohibitions are merely an example of overcriminalization; they are not my central focus.

I have come to believe my thoughts about overcriminalization have been vindicated as a result of presenting my theory to several groups of philosophers and legal theorists. Respondents frequently ask how my theory applies to difficult cases where reasonable minds may differ. Clearly, I cannot explore each such matter in detail here. But I have become confident that the pros and cons of various controversial proposals are debated squarely within the framework I offer. I will have been largely successful in developing a viable theory of criminalization if the issues that are relevant to how particular questions should be resolved are readily expressed within the parameters I develop.

If the central argument of this book is correct, injustice is pervasive throughout the criminal domain. I have tried to maintain a sober and academic tone in describing this sorry state of affairs. Still, I can barely conceal my outrage about what I believe to be an injustice of monstrous proportions. The quality of a criminal justice system is an important measure of the value of a political community. Apart from waging war, no decision made by the state is more significant than its judgment about what conduct should be proscribed and how severely to punish it. Unfortunately, however, contemporary decisions about criminalization conform to no normative principles whatever. The criminal justice system that many commentators have worked so hard to improve is being used for perverse and immoral ends. The passivity of the community of legal philosophers (and the American public at large) in the wake of these atrocities is nothing short of tragic. We seem utterly unconcerned while hundreds of thousands of citizens little different from ourselves spend their most productive years in prison—at taxpayer's expense, I might add. Commentators should not remain silent about these injustices.

An author could use the topic of overcriminalization as the occasion to go almost anywhere in legal and political philosophy. The subject connects fairly directly to many other legal, political, and moral issues. I simply mention one

of many possible directions I did not take. Although I complain about injustice in our system of criminal law, I tend not to describe it in socioeconomic terms. It may seem impossible to write a book about injustice in the penal law without paying more attention to the fact that the vast majority of persons punished for criminal behavior are socially and economically disadvantaged. One may wonder, for example, why petty shoplifters are prosecuted vigorously while middle- and upper-income tax evaders are prosecuted infrequently—even though they cheat the government of greater sums of money than petty thieves manage to steal. These issues are of central importance. For the most part, however, I do not pursue them here. I am more anxious to demonstrate how the injustices associated with overcriminalization affect us all, rich and poor alike.

A simple roadmap of this book is as follows. Chapter 1 describes the general problem my theory is designed to address. I discuss the phenomenon of overcriminalization and why we should be worried about it. Although overcriminalization is pernicious for several reasons I mention briefly, its most objectionable consequence is the injustice caused by too much punishment. Chapters 2 and 3 introduce and develop my theory of criminalization. This theory consists in several constraints that limit the use of the criminal sanction. I argue that the constraints described in chapter 2 are internal to criminal law itself, and no respectable theory of the limits of the criminal sanction can afford to disregard them. The constraints defended in chapter 3 are somewhat different; they depend on a controversial normative theory imported from outside the criminal law. This theory describes the conditions under which the state is permitted to infringe the right not to be punished. In chapter 4, I examine three alternative theories of criminalization and argue that my account is superior to each of them. If the competitors to my account are as deficient as I believe, any problems in my theory are likely to seem more manageable. Still, I am painfully aware that many of the crucial arguments I sketch here are inconclusive. A great deal of additional work remains to be done. I only begin the enormous task of formulating a set of constraints to retard the phenomenal growth in the use of the penal sanction.

Contents

1

The Amount of Criminal Law

The two most distinctive characteristics of both federal and state systems of criminal justice in the United States during the past several years are the dramatic expansion in the substantive criminal law and the extraordinary rise in the use of punishment. My primary interest in this book is with the first of these features: the explosive growth in the size and scope of the criminal law. In short, the most pressing problem with the criminal law today is that we have too much of it. My ultimate ambition is to formulate a *theory of criminalization:* a normative framework to distinguish those criminal laws that are justified from those that are not. Applications of this theory provide a principled basis to reverse the trend toward enacting too many criminal laws. Overcriminalization is pernicious for several reasons I will mention briefly, but the most important of these reasons requires a discussion of the second of the foregoing developments: the massive increase in state punishment. I argue that overcriminalization is objectionable mainly because it produces too much punishment. The central problem with punishment is analogous to the central problem with the criminal law: We have too much of it. I say that we inflict *too much* punishment because many of these punishments are unjust. Punishments may be unjust on different grounds. Most commentators agree that many of the punishments imposed in the United States today are unjust because they are excessive—even when they are imposed for conduct that every reasonable person believes our criminal codes should proscribe. But we also have a great deal of unjust punishment for a more basic reason. A substantial amount of contemporary punishments are unjust because they are inflicted for conduct that should not have been criminalized at all. Or so I will argue.

This chapter contains four sections that show why a theory of criminalization is needed. In the first, I discuss these two distinctive features of our criminal justice system seriatim. We have lots of punishment and lots of criminal law. Although we have enormous amounts of both, we cannot say whether we have *too much* punishment or criminal law without a normative theory to tell us which punishments and criminal laws and justified. I defend a theory to help decide such matters in chapters 2 and 3. At present, I make only a presumptive and intuitive case for my thesis by showing that we have more punishment and more criminal law than seems sensible—and more than at other times or in other places. In the second section, I examine the complex relationship between these two phenomena. Expansions in the criminal law increase levels of punishment in obvious ways: by attaching criminal sanctions to conduct that had been permissible. But the process by which more criminal laws result in more punishments is not always straightforward. More

criminal laws cause more punishments because of realities about the penal process that legal philosophers frequently ignore. In the third section, I provide examples of dubious criminal laws and produce a rough classification of some of the new types of offense that legislatures have enacted. Unless a theory of criminalization is to be applied statute by statute, we need to understand the *kinds* of law to which this theory will be applied. In the fourth and final section, I focus in detail on a specific example of how more criminal law produces more punishment. No case can be perfectly representative of the trends I discuss, but the illustration I select contains many of the features that should persuade us of the injustice of overcriminalization. This chapter contains relatively little normative content. But if the arguments in this chapter are sound, I will have set the stage for the normative work that follows by demonstrating the need for a theory of criminalization to help reverse our tendency to enact too many criminal laws and to punish too many persons.

I: TOO MUCH PUNISHMENT, TOO MANY CRIMES

Eventually I will conclude that we have too much punishment and too many crimes in the United States today. We overpunish and overcriminalize. To say that we have *too much* of something implies a standard or baseline by which we can decide whether that amount is too little, not enough, or exactly right. For legal philosophers, *justice* provides the relevant standard. Before defending principles of justice to support my position, however, I must be content to make a presumptive and intuitive case in its favor by showing that we have extraordinarily high levels of punishment and tremendous amounts of criminal law. The fact that we have so much punishment and so many criminal laws is crucial in helping us to appreciate both the enormity and the urgency of the normative task before us. Reasonable persons should anticipate that levels of punishment and amounts of criminal law on this massive scale will prove impossible to justify.

I begin with a brief account of the extent of punishment in the United States today, as data about our punitive practices are widely publicized by contemporary criminologists and are relatively easy to comprehend. Rates of incarceration provide the most familiar measure of the scale of state punishment. About 2.2 million persons were locked up in federal and state jails and prisons in 2005, a rate of 737 inmates per 100,000 residents. As a result, 1 in every 138 residents is incarcerated. An estimated 1 in 20 children born in the United States is destined to serve time in a state or federal prison at some point in his life.[1] Minorities are disproportionately represented behind bars: 12.6% of all black men ages 25 to 29 are in jails or prisons, compared with 1.7% of similarly aged whites.[2]

Although rates of incarceration generally are used to measure the extent to which a society is punitive, a better indication may be the number of persons under

1. These data are drawn from the U.S. Department of Justice, Bureau of Justice Statistics: *Sourcebook of Criminal Justice Statistics* (2005), tables 6.13 and 6.29.

2. For an overview of the racial impact of criminal justice policies, see Michael Tonry: *Malign Neglect: Race, Crime, and Punishment in America* (New York: Oxford University Press, 1995).

the control and supervision of the criminal justice system—a figure that includes probation and parole. Political trends and state budgets have less impact on the number of individuals under correctional supervision, because courts must impose *some* sort of sentence on persons convicted of a crime. Our tendency to ignore probation and parole when assessing the magnitude of punishment probably reflects how accustomed we have become to our punitive policies; many citizens are under the mistaken impression that probation and parole are lenient alternatives to punishment rather than modes or kinds of punishment. In any event, the number of individuals under the control and supervision of the criminal justice system grew rapidly in the last quarter of the 20th century, and continues to grow in the first few years of the 21st. Approximately 4.2 million additional persons are currently on probation, and 784,000 are on parole in the United States—for a grand total of over 7 million.[3] These individuals are subject to incarceration if they violate the terms under which they were placed on probation or paroled.

One way to grasp the magnitude of these figures is to compare them with those at other times and places. The enormous scale of punishment in the United States today is relatively recent. Our rate of imprisonment has soared since 1970, when it stood at 144 inmates per 100,000 residents. The size of the prison population has nearly quadrupled since 1980, an expansion unprecedented in our history.[4] Comparisons with other nations tell a similar story. Although the incidence of incarceration is increasing in many places, the United States has by far the highest rate in the world—nearly five times higher than that of any other Western industrialized country. Because about 8 million people are behind bars throughout the globe, one-quarter of these are jailed or imprisoned in the United States. Probably no nation—and certainly no democracy—has ever tried to govern itself while incarcerating so high a percentage of its citizenry. Commentators have struggled to identify the social and political forces that explain what might be called United States exceptionalism: why we resort to punishment more readily than other countries generally and Western European countries in particular.[5]

The sheer number of persons under the control and supervision of the criminal justice system reveals only part of what is worrisome about our tendency to overcriminalize. Contemporary punishment not only is commonplace in the United States but also is distinctive in its harshness relative to Western European countries. Even at its best, prison life is boring and empty, and overcrowding has made many aspects of incarceration worse. Inmates are assaulted by guards and by other inmates, and homosexual rape is not uncommon.[6] Prisoners retain virtually no

3. *Sourcebook: op. cit.*, note 1, table 6.1.

4. Admittedly, one explanation for our historically high rate of incarceration is the fact that institutionalization of the mentally ill is much less routine than in previous eras. See Bernard E. Harcourt: "Should We Aggregate Mental Hospitalization and Prison Population Rates in Empirical Research on the Relationship between Incarceration and Crime, Unemployment, Poverty, and Other Social Indicators?" (forthcoming, available at *http://ssrn.com/abstract_id=880129*).

5. For one such attempt, see James Q. Whitman: *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford: Oxford University Press, 2003).

6. See Mary Sigler: "By the Light of Virtue: Prison Rape and the Corruption of Character," 91 *Iowa Law Review* 561 (2006).

privacy rights.[7] The unwillingness of citizens to support penal reforms indicates that they welcome or at least tolerate these deplorable conditions as part of the sentence itself. Prison rape, for example, is likely to elicit sarcasm in social circles that express horror at sexual abuse in the outside world.[8]

Between 600,000 and 700,000 inmates are released from prison each year, but the negative effects of their punishments do not end at this time. Ex-offenders lose political, economic, and social rights.[9] Approximately 4 million such persons are currently disqualified from voting; several states also deem them ineligible to be elected to public office or to serve as jurors. Many of these individuals are explicitly denied benefits under welfare and entitlement programs. Ex-offenders face difficulties finding employment and housing. They emerge from prison with financial debts, as increasing numbers of states attempt to offset the expense of operating their criminal justice system by requiring defendants to pay for the costs of trying, incarcerating, and monitoring them.[10] Each of these collateral consequences retards reintegration into society and helps to spin the revolving doors of justice. Almost two-thirds of all ex-offenders convicted in state court are rearrested within three years, and one-third return to prison because of parole violations.

Almost everyone regards punishment as a *necessary* evil. Indeed, some quantum of punishment *is* necessary. But is the vast amount of punishment we inflict really necessary to achieve a greater social good—like crime reduction? Before we become outraged by our eagerness to punish, we must remember that crime remains at unacceptable levels throughout the United States today. Crime exacts a terrible toll both on its victims and on society generally. Still, it is a myth to suppose that we need more punishment than other countries because we suffer from more crime. International crime victim surveys indicate that our offense rates since the 1990s have not tended to be higher than those in other Western countries. *Violent* crime is more prevalent in the United States, although a few other countries suffer from levels that are roughly comparable.[11]

Admittedly, crime rates have plummeted overall since 1992, although no theory has attracted a consensus about why this is so.[12] Even though many laypersons regard the causal link between increased amounts of punishment and decreased amounts of crime as obvious, few criminologists are persuaded that the former has had a major impact on the latter. Most conclude that the policies implemented by our criminal justice system, including increasingly severe sentences, can explain only a small

7. See Donald T. Kramer, et al., eds.: *Rights of Prisoners* (Colorado Springs: McGraw-Hill, 2nd ed., 1993).

8. California Attorney General Bill Lockyer openly joked that he would "love to personally escort [Enron Chairman Kenneth Lay] to an eight-by-ten cell that he could share with a tattooed dude who says, 'Hi, my name is Spike, honey.'" See "Investigating Enron," *Wall Street Journal* (November 30, 2001), p.A14.

9. See Nora V. Demleitner: "Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences," 11 *Stanford Law & Policy Review* 153 (1999).

10. See Adam Liptak: "Debt to Society Is Least of Costs for Ex-Convicts," *New York Times* (Feb. 23, 2006), p.A1.

11. See Franklin E. Zimring and Gordon Hawkins: *Crime Is Not the Problem: Lethal Violence in America* (New York: Oxford University Press, 1997).

12. For a useful survey of competitive explanations, see Alfred Blumstein and Joel Wallman, eds.: *The Crime Drop in America* (Cambridge: Cambridge University Press, 2000); see also Franklin E. Zimring: *The Great American Crime Decline* (Oxford: Oxford University Press, 2006).

part of the dramatic crime drop in the United States during the past several years. Perhaps the best reason to be skeptical that lengthier punishments have played a central role is the fact that similar decreases in crime have occurred throughout the entire Western industrialized world, yet only the United States has substantially increased its quantum of punishment.[13] Even in the United States, crime rates have fallen just as much in those jurisdictions that have not increased the size of their prison populations so dramatically. Nor are significant amounts of crime prevented by incapacitation, as repeat offenders who become eligible for long sentences tend to be well beyond the age at which they commit the most crimes.[14] Despite initial appearances, these findings may not be counterintuitive. Social scientists have amassed a wealth of evidence to show that people are law-abiding mainly because they internalize social norms, not because they are deterred by their fear of arrest and prosecution.[15] It is hard to see how the immense amount of punishment we inflict could be necessary to achieve a greater social good.

If the extraordinary amount of punishment we impose is not a necessary evil, is it an evil at all? According to utilitarians such as Jeremy Bentham, *all* punishment is an evil.[16] I join retributivists, however, in holding the controversial proposition that deserved punishments are *not* an all-things-considered evil. As I tentatively suggest in chapter 2, deserved punishments implicate but do not violate our rights; no net evil is perpetrated when persons are treated as they deserve. But punishment is deserved only when it is just, and my ambition is to demonstrate that a great many of the punishments we impose are *un*just. Of course, any theory of just and unjust punishments is bound to generate disagreement. In case readers are less persuaded by normative than by economic arguments, it is worth noting that principles of justice are not the only ground on which to oppose the recent growth in rates of incarceration.[17] Commentators who prefer to assess social institutions in terms of their costs and benefits should be equally appalled by the extent of punishment in the United States today, as the price tag of our criminal justice system should disturb any taxpayer who demands to get his money's worth. The cost of federal and state prisons in 2003 was over $185 billion.[18] When the collateral costs on prisoners, their families, and their communities are included in the equation, the money expended on our punitive policies is astronomical. No social benefit can justify this staggering expenditure of resources.

These economic considerations will play only a minor role in the arguments I develop throughout this book. My central focus is on the *injustice* rather than the cost of overcriminalization. Still, no one should underestimate the importance of economic factors in shaping—and ultimately in changing—our policies. Legal philosophers may join me in protesting against injustice, but I predict that the

13. See Michael Tonry: *Thinking about Crime: Sense and Sensibility in American Penal Culture* (New York: Oxford University Press, 2004), p.33.
14. See Daniel S. Nagin: "Deterrence and Incapacitation," in Michael Tonry, ed.: *The Handbook of Crime and Punishment* (Oxford: Oxford University Press, 1998), p.345.
15. See Tom Tyler: *Why People Obey the Law* (New Haven: Yale University Press, 1990).
16. Jeremy Bentham: *Principles of Morals and Legislation* (London: Methuen, 1970), p.158.
17. See Louis Kaplow and Steven Shavell: *Fairness versus Welfare* (Cambridge: Harvard University Press, 2002).
18. See *Sourcebook: op. cit.*, note 1, table 1.1 (2003).

exorbitant costs of our punitive practices will prove to be the more decisive factor in eventually reforming our criminal justice system.[19] It is surprising that more of these changes have not already taken place. Remarkably, our penal policies seem to be immune from the cost-benefit scrutiny that is routinely applied to many other state institutions. Perhaps we must suffer from a major economic recession before we will make significant improvements in our criminal justice system.

In contrast to these familiar statistics about the increase in state punishment throughout the United States, comparable data about the growth of the substantive criminal law are much harder to present and evaluate. The extent of criminalization (and thus of overcriminalization) is largely a function of the breadth or reach of the criminal law, and we have no simple way to measure this variable at a given time or place. That is, no statistic can express whether or to what extent one jurisdiction criminalizes more or less than another.[20] This determination would be possible in extreme cases—as when the prohibitions of one society are a subset of those in another. But in all cases in the real world, no single metric of criminalization exists. Suppose, for example, one country proscribes sodomy but permits the use of alcohol, and a second has the opposite set of laws. Which country has more criminalization? As far as I can see, there is no "right answer" to this question. It is not even clear what additional information might be helpful in trying to resolve it. Might we attempt to decide which of these two societies contains more criminalization by counting the number of people who would like to engage in given illegal behaviors but for their prohibition? Would the strength of their preferences be relevant as well? These variables, at least, might be quantified. But a difficulty with this purported solution is apparent. Existing law shapes the extent and strength of our preferences. One would anticipate that the number of people who like to consume given substances, and the strength of their desire to do so, would be affected by whether this conduct was presently legal or illegal. This same difficulty prevents outsiders from making authoritative judgments about the extent of criminalization in a foreign land.

I do not doubt that political philosophers might defend a normative theory of human rights, an account of what is important to human flourishing, or the like. We can identify states that have better or worse records in using the criminal law to violate whatever interests we take to be central or fundamental. Although all such views are controversial, that is not the main obstacle to using them to measure the extent of criminalization in a given time or place. To my mind, the greater barrier is that relatively little of the conduct proscribed by criminal laws is directly protected by a plausible theory of human rights. Two states can be equally good (or bad) in preserving human rights, even though one contains substantially more criminal law than the other.

19. When legislators are made to understand the costs of different punitive policies, they are less likely to prefer sentencing severity. See Rachel E. Barkow: "Administering Crime," 52 *UCLA Law Review* 715 (2005).

20. For an early attempt to gauge the degree of criminalization, see Donald Black: *The Behavior of Law* (London: Academic Press, 1976). For a more recent effort, see Geraldine Szott Moohr: "Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws," 54 *American University Law Review* 783 (2005).

Without a metric to quantify the degree of criminalization, the sheer number of criminal statutes is often taken to be a surrogate for it. But the volume of criminal statutes, although clearly relevant to my inquiry, is a very imperfect measure of the amount of criminalization. In the first place, it is doubtful that the number of distinct statutes in a jurisdiction maps on to the number of distinct crimes it contains. To illustrate the distinction between the number of crimes and the number of statutes, consider the most frequently enforced law in our federal code today: that pertaining to controlled substances. Intuitively, I suspect that laypersons would regard the distribution of marijuana, for example, as a different crime from the distribution of heroin. One might naturally suppose that the former activity would breach a different statute than the latter. In fact, however, both the distribution of marijuana and the distribution of heroin violate the very same statute. Suppose, however, that a jurisdiction enacted separate laws to proscribe the distribution of each substance it bans. The number of statutes would multiply exponentially, although no more criminalization would result. I doubt that we should say the latter jurisdiction contained more *crimes,* or *criminalized* more than the former. It has created more statutes but has not changed the scope of the conduct prohibited.

Further difficulties arise if we take the number of statutes to be a crude approximation of the amount of criminalization. Surprisingly, no one seems prepared to estimate the number of criminal statutes that currently exist in the United States. This fact alone is cause for alarm. Although the criminal codes of most states gained some semblance of order in the 1960s and 1970s when they became patterned after the influential Model Penal Code, they have steadily deteriorated ever since. Still, they are far more systematic than what is loosely called the Federal Criminal Code, which can only be described as an incoherent mess.[21] It is hard to exaggerate the complete lack of structure in federal law. No instructor's manual for a complex technological gadget can begin to rival the unintelligibility of federal penal law. Ronald Gainer, once Associate Deputy Attorney General in the Department of Justice, describes the current state of federal criminal law as follows:

> Federal statutory law today is set forth in the 50 titles of the United States Code. Those 50 titles encompass roughly 27,000 pages of printed text. Within those 27,000 pages, there appear approximately 3,300 separate provisions that carry criminal sanctions for their violation. Over 1,200 of those provisions are found jumbled together in Title 18, euphemistically referred to as the "Federal Criminal Code."[22]

To compound the problem, many of the most serious federal offenses do not appear in the Federal Criminal Code. Major espionage offenses, for example, are

21. The so-called Code is aptly described as a "national disgrace" by Julie R. O'Sullivan: "The Changing Face of White-Collar Crime: The Federal Criminal 'Code' Is a Disgrace: Obstruction Statutes as Case Study," 96 *Journal of Criminal Law and Criminology* 643, 643 (2006).

22. Ronald Gainer: "Federal Criminal Code Reform: Past and Future," 2 *Buffalo Criminal Law Review* 45, 53 (1998).

buried in the midst of regulations pertaining to atomic energy.[23] Federal offenses are hard to find or enumerate. And the situation gets worse each month.

Some commentators hazard greater estimates of the number of federal crimes than Gainer. According to one theorist, approximately 300,000 federal regulations are enforceable through civil or criminal sanctions by the combined efforts of as many as 200 different agencies.[24] New regulations are routinely followed by perfunctory language that indicates that any person who fails to comply is subject to criminal prosecution. The factors that lead regulators to seek criminal rather than civil sanctions when legal rules are broken remain a source of controversy and uncertainty.[25] But whatever the exact numbers of criminal offenses may be, the figure is bound to rise before it falls. Criminal laws are relatively easy to enact but far more difficult to repeal. A criminal statute is more likely to fall into desuetude than to be removed by a deliberate legislative act, as the publicity that would be generated by the prospects of repeal might galvanize whatever support remains in its favor.[26] In any event, counting the number of statutes tends to understate the explosive growth in the scope of the criminal law. Because much of the recent expansion consists in amendments to existing statutes (and, as we will see, may be located outside criminal codes altogether), we cannot meaningfully say that the number of crimes has doubled, tripled, or multiplied tenfold.[27]

Despite the formidable difficulties in measuring the extent of criminalization, we can count the words or pages in criminal codes to illustrate the trend. Paul Robinson and Michael Cahill employ this method to demonstrate the expansion in the criminal code of Illinois—even though commentators (including Robinson himself) tend to rank the overall quality of this state code as well above average.[28] When enacted in 1961, the Illinois Code contained less than 24,000 words. By 2003, that number had swelled to more than 136,000—a sixfold increase in only 42 years.[29] To be sure, greater verbosity does not guarantee that the criminal sphere is expanding. More words may indicate that the scope of liability has narrowed, because offenses may be described with greater specificity. Thus they cover less behavior, even though they contain more words. Conversely, the net of liability can be widened without adding any words—or even without adding any new offenses. More criminalization can result if the

23. *Id*., p.66.

24. This estimate is attributed to Stanley Arkin in John C. Coffee: "Does 'Unlawful' Mean 'Criminal'?: Reflections on the Disappearing Tort/Crime Distinction in American Law," 71 *Boston University Law Review* 193, 216 n.94 (1991).

25. For a useful study, see Keith Hawkins: *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford: Oxford University Press, 2002).

26. See Note: "Desuetude," 119 *Harvard Law Review* 2209 (2006).

27. "The amendment process has increasingly degraded American criminal codes." Paul H. Robinson and Michael T. Cahill: "Can a Model Penal Code Second Save the States from Themselves? 1 *Ohio State Journal of Criminal Law* 169, 170 (2003).

28. Paul H. Robinson, et al: "The Five Worst (and Five Best) American Criminal Codes," 95 *Northwestern University Law Review* 1 (2000).

29. Robinson and Cahill: *op. cit*., note 27, p.172 n.16.

judiciary decides to expand the interpretation of existing offenses.[30] Through this process, greater criminalization may ensue without any legislative action at all.[31]

In fact, the most notorious example of overcriminalization in the past century required painfully few words. The infamous "principle of analogy" in the Soviet Union under Stalin provided "if any socially dangerous act is not directly provided for by the present Code, the basis and limits of responsibility for it shall be determined by application of those articles of the Code which provide for crimes most similar to it in nature."[32] Pursuant to this law, any "socially dangerous act" became a crime. As this example demonstrates, overcriminalization can be a consequence of a single statute. Nothing quite so draconian has taken place in the United States.[33] My general point is that an increase in the number of words contained in criminal codes is but one of many imperfect measures of the unmistakable trend toward greater criminalization. No one figure can tell an accurate story about the size and scope of the criminal law.[34]

Despite the imprecision in quantifying the phenomenon, we have many reasons to be concerned about our tendency to enact so many criminal laws and to punish so much behavior. Only one of these reasons is the central focus of this book, but a comprehensive discussion of overcriminalization would examine several others. I give them only brief attention here. First, commentators have long emphasized the importance of placing prospective defendants on *notice* about whether their conduct is criminal. Persons should not be forced to guess at their peril about whether their behavior has been proscribed, and must be afforded a fair opportunity to refrain from whatever conduct will incur penal liability.[35] Because of the number and complexity of criminal statutes, however, potential lawbreakers may not receive adequate notice of their legal obligations.[36] Law exists largely to guide behavior, but this objective is undermined in our climate of overcriminalization. Who among us

30. *State in the Interest of M.T.S.*, 609 A.2d 1266 (1992), provides one example. A New Jersey sexual assault statute proscribed acts of sexual penetration in which the actor uses physical force or coercion. This statute was interpreted (or reinterpreted) so that its elements were satisfied by any act of nonconsensual sexual penetration, effectively eliminating force as an independent statutory requirement.

Other illustrations of novel statutory interpretation produce grossly disproportionate punishments. In *Michigan v. Waltonen,* 728 n.w.2d 881 (2006), a statute proscribing first-degree criminal sexual conduct whenever "sexual penetration occurs under circumstances involving the commission of any other felony" was construed to authorize a sentence of up to life imprisonment when a man committed adultery by inducing a married woman to engage in consensual sex by giving her Oxycontin pills. Michigan's Supreme Court has held that it is for the legislature, not the courts, to decide when statutory interpretation produces an absurd result.

31. The contribution expansive judicial interpretations of existing statutes makes to the phenomenon of overcriminalization has led some commentators to argue for a rule of lenity in construing criminal statutes. See Zachary Price: "The Rule of Lenity as a Rule of Structure," 72 *Fordham Law Review* 885 (2004).

32. See Harold Berman: *Soviet Criminal Law and Procedure* (Cambridge: Harvard University Press, 2nd ed., 1972), p.22.

33. For a rough analogue in Anglo-American law, consider the common-law offense of "conspiracy to corrupt public morals" as discussed in *Shaw v. DPP,* [1962] A.C. 220.

34. Thus some commentators allege that complaints about overcriminalization suffer from the "I know it when I see it" syndrome. See Moohr: *op. cit.*, note 20, p.784.

35. See *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

36. See Susan Pilcher: "Ignorance, Discretion and the Fairness of Notice: Confronting 'Apparent Innocence' in the Criminal Law," 33 *American Criminal Law Review* 32 (1995).

can pretend to understand the language of criminal offenses? State and federal law have come to resemble the tax code, which is beyond the comprehension of laypersons and can be navigated only with the assistance of a skilled attorney. All too often, expertise is unhelpful in fathoming the contents of the criminal law. Because of the phenomenal growth in the number of offenses, even professors and practicing attorneys who have spent most of their careers wrestling with the intricacies of the criminal law are familiar with only a fraction of the statutes to which we are subject. In the wake of this confusion and uncertainty, the need for a defense of ignorance of law becomes imperative—a defense that would be unnecessary if almost everyone could be expected to know the laws that apply to them.[37] No reasonable person can pretend that this development is for the better.

In addition, our expanding criminal justice system incurs massive opportunity costs. Is there no better use for the enormous resources we expend on criminalization and punishment? Money and manpower are diverted from more urgent needs when police, prosecutors, and courts enforce laws that our best theory of criminalization would not justify. These resources could be to reduce taxes, improve schools, or prevent the crimes we really care about.[38] Criminal justice expenditures in large states such as California already outstrip funding for public education. Except for those who profit from the "prison-industrial complex," everyone agrees that these priorities are misplaced.[39]

Some commentators speculate that lack of respect for law constitutes the most pernicious consequence of overcriminalization. Particular rules and regulations perceived to be stupid are ignored or circumvented by law-abiding citizens. The impact probably extends beyond the single law in question. One would expect public confidence in our entire criminal justice system to wane when individuals are punished for violating laws that a sizable percentage of the citizenry deems to be unfair. Although ample anecdotal evidence supports this hypothesis, the claim that overcriminalization breeds general disrespect for law is surprisingly difficult to confirm empirically. We cannot perform a controlled experiment in which we compare the amount of respect for law in two jurisdictions that differ only in the amount of criminal law they contain. But it is clear that punishments deter partly through the stigmatizing effects of a criminal conviction. Stigma, however, is a scarce resource that dissipates quickly. The state cannot effectively stigmatize persons for engaging in conduct that few condemn and most everyone performs.[40] As the scope of criminal liability expands, stigma is depleted and deterrence most likely is eroded.

37. See Douglas Husak and Andrew von Hirsch: "Culpability and Mistake of Law," in Stephen Shute, John Gardner, and Jeremy Horder, eds.: *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993), p.157. Reasonable mistakes about the content of statutes are so pervasive that one commentator has suggested that ignorance of law might be a justification rather than an excuse. See Re'em Segev: "Justification, Rationality and Mistake: Mistake of Law Is No Excuse? It Might Be a Justification!" 25 *Law and Philosophy* 31 (2006).

38. See Alexander Natapoff: "Underenforcement," 75 *Fordham Law Review* 1715 (2006). Clearly, the phenomenon of underenforcement is more prevalent for some offenses than for others. For example, only six persons have been convicted of perjury for lying to Congress in the last sixty years. See P.J. Meitl: "The Perjury Paradox: The Amazing Under-Enforcement of the Laws Regarding Lying to Congress," 25 *Quinnipiac Law Review* 547 (2007).

39. See Joel Dwyer: *The Perpetual Prison Machine* (Boulder: Westview, 2000).

40. See Douglas Husak: "The 'But Everybody Does That!' Defense," 10 *Public Affairs Quarterly* 307 (1996).

Moreover, the growth in the scope of the criminal law is worrisome even when it does not culminate in conviction and punishment. The number and scope of criminal laws provide police with increased powers to arrest—powers that were exercised on some 14 million occasions in 2004.[41] Arrest shares with punishment many of the features that make the latter so difficult to justify. Even when defendants are not prosecuted, the experience of arrest is embarrassing, costly and inconvenient. The opportunity for unjustified arrests is among the factors that have led courts to find vagrancy and loitering statutes to be unconstitutional. The lives of ordinary citizens are more likely to be unfairly disrupted in any jurisdiction guilty of overcriminalization.[42]

Finally, the increase in criminalization is destructive of the rule of law itself—an important point to which I will return on several occasions. At this time, I mention just one of many ways—by no means the most important—that the quantity of criminal law undermines the principle of legality. Legal theorists typically construe the rule of law to require that criminal statutes be enacted by legislatures and contain an exhaustive description of the conduct proscribed.[43] Increasingly, however, the behavior that is prohibited cannot be ascertained without straying beyond the boundaries of criminal statutes and examining noncriminal laws. In other words, the criminal law *outsources*. I provide just two examples of the need to look beyond criminal codes to identify the content of offenses. First, consider the circumstances under which persons are criminally liable for their *omissions*. Although the Model Penal Code stipulates that "no conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State,"[44] it subsequently provides that persons may be criminally liable for a failure to act when "a duty to perform the omitted act is otherwise imposed by law."[45] Contract and tort law may provide the source of the duty that is "otherwise imposed." As a result, expansions in the domains of noncriminal law can (and do) enlarge the boundaries of the criminal law as well. Next, consider the countless *possession* offenses contained in criminal codes, such as those that pertain to controlled substances. The public health law, and not the criminal code itself, often specifies whether a particular substance is controlled.[46] Thus amendments to noncriminal laws can (and do) alter the content of the criminal law. Although other examples could be provided,[47] liability for both omissions and possession demonstrates how increasing criminalization jeopardizes the rule of law itself.

41. *Sourcebook: op. cit.*, note 1, table 4.1 (2004).

42. For a nice discussion of how unenforced criminal statutes can have a significant impact in civil law—especially family law—see Hillary Green: "Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Legislation," 16 *Yale Law and Policy Review* 169 (1997).

43. For a critical assessment of the principle of legality in criminal law, see Peter Westen: "Two Rules of Legality in Criminal Law," 26 *Law and Philosophy* 229 (2007).

44. Model Penal Code, §1.05(1).

45. Model Penal Code, §2.01(3)(b).

46. See Markus Dirk Dubber: "The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process," in Antony Duff and Stuart Green, eds.: *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford: Oxford University Press, 2005), p.91.

47. See Paul H. Robinson and Michael T. Cahill: "The Accelerating Degradation of American Criminal Codes," 56 *Hastings Law Journal* 633 (2005).

For each of these reasons (and for many others as well), the phenomenon of overcriminalization should trouble us all. Because the foregoing problems can be so important, I do not allege that excessive punishment is *necessarily* the central objection to overcriminalization. The connection between these two phenomena is contingent. Perhaps my concerns reflect the peculiar American penal context, characterized by its striking reliance on imprisonment. One could easily imagine a regime in which sentences were generally less severe and normally noncustodial, and where the stigma of a criminal conviction was relatively mild when minor offenses are committed. Overcriminalization would still be worrisome for the reasons on which I focus. In such a system, however, other grounds for objecting to this phenomenon would become more salient: for instance, the freedom-limiting, anxiety-producing, and guilt-inducing effects the criminal law may have on those who take its demands seriously, even apart from the threat of punishment. Increased criminalization can deter lawful and even commendable behavior on the margins of the conduct the state intends to prohibit. These factors make overcriminalization troublesome everywhere.

In our current political climate, however, I maintain that overcriminalization is objectionable principally because it produces too much punishment. Thus my foremost complaint is different from those I have briefly described. My central concern is that overcriminalization results in unjust punishments. The primary victims of this injustice are the persons who incur penal liability. That is, the main problem with overcriminalization derives from its impact on those who are punished, rather than from its effects on taxpayers, our culture of compliance, the rule of law, or society generally. Injustice is most glaring when defendants are sentenced for conduct that should not have given rise to criminal liability at all—in other words, when punishments are imposed for conduct that fails to satisfy our best theory of criminalization. If the central argument in this book is correct, a great many of the punishments inflicted in the United States today are unjust according to this criterion.

Overcriminalization often causes substantial injustice even to persons who deserve some degree of punishment for their behavior. An adequate theory of criminalization should include a *principle of proportionality,* according to which the severity of the sentence should be a function of the seriousness of the crime. Injustice occurs when punishments are disproportionate, exceeding what the offender deserves. I claim that overcriminalization frequently produces disproportionate punishments, although this contention will be more difficult to substantiate. No one should profess to know how to *anchor* a penalty scale—how to assign the precise quantum of punishment deserved by particular offenders who commit given offenses such as larceny or rape.[48] Perhaps for this reason, except when the death penalty is at stake, courts have all but abandoned attempts to preclude excessive punishments by applying a principle of proportionality.[49] By any reasonable measure, however, the absence of an effective principle of proportionality has

48. For a discussion of difficulties in anchoring a penalty scale, see Andrew von Hirsch and Andrew Ashworth: *Proportionate Sentencing* (Oxford: Oxford University Press, 2005), pp.141–143.

49. See Youngjae Lee: "The Constitutional Right Against Excessive Punishment," 91 *University of Virginia Law Review* 677 (2005).

produced shocking injustices, and overcriminalization has contributed to these results. I argue that overcriminalization makes disproportionate punishments all but inevitable, however we resolve the formidable problem of anchoring our penalty scale. If my allegations are correct, too much criminal law produces too much punishment. The main reason we should care about this phenomenon is because we should care about injustice and its victims.

Why do we punish so many and criminalize so much? These phenomena are puzzling, because they have come at a time when conventional wisdom favors lesser amounts of governmental intervention. If we hope to reverse these pernicious trends, we must try to understand the forces that have helped to create and sustain them. An adequate account should contain two parts: First, it must identify the sociopolitical factors that have caused our predicament. Second, it must explain why academic commentators have been relatively silent about our plight. I briefly discuss the first matter here and return to the lack of scholarly interest in this topic in chapter 2.

As I have indicated, criminologists debate the empirical realities that contribute to our current situation.[50] Although no consensus has emerged, a hodgepodge of loosely related factors is worth mentioning briefly. Commentators uniformly complain about the extent to which criminal justice in the United States has become *politicized*.[51] The highly democratic character of criminal justice in the United States is the cause of many of its best and worst features.[52] For example, nowhere else do legislatures micromanage decisions about sentencing and parole, and few other Western industrialized countries elect their prosecutors or judges.[53] The input of academic experts rarely is solicited and is likely to be ignored on those few occasions when it is sought.[54] We tend to be unilateralists about criminal justice; we neither know nor care about the successes and failures of other countries, and we feel no need to defend our policies to those who disagree with us.[55] In addition, the extraordinary focus on capital punishment in the United States distracts attention from draconian practices that fall short of the death penalty.[56] Perhaps most important, neither political party has been willing to allow the other to earn the reputation of being tougher on crime. Legislators hope to

50. Older mechanisms of social control have broken down, creating more pressures for criminal sanctions. See David Garland: *Mass Imprisonment in the United States: Social Causes and Consequences* (London: Sage, 2001).

51. See, for example, Sara Sun Beale: "What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law," 1 *Buffalo Criminal Law Review* 23 (1997); Marie Gottschalk: *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006); and Sara Sun Beale: "The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness," 48 *William & Mary Law Review* 397 (2006).

52. See Samuel Walker: *Popular Justice: A History of American Criminal Justice* (New York: Oxford University Press, 2nd ed., 1999), p.6.

53. Tonry: *op. cit*., note 13, p.10.

54. "Policy makers in the field of criminal justice should pay more attention to academic criticism." George Fletcher: "The Fall and Rise of Criminal Theory," 1 *Buffalo Criminal Law Review,*" 275, 281 (1998).

55. Continental scholars have written more about overcriminalization. See, for example, Nils Jareborg: "What Kind of Criminal Law Do We Want?" in Annika Snare, ed.: *Beware of Punishment* (Oslo: Scandanavian Research Council for Criminology, 1995), p.17.

56. See Dirk van Zyl Smit: *Taking Life Imprisonment Seriously* (The Hague: Kluwer Law International, 2002).

be perceived as "doing something" to combat unwanted behaviors. Tabloids and the popular media thrive on accounts of how offenders "get away" with crime by escaping through loopholes and technicalities. Policies are enacted most easily when they are unopposed, and no significant organization wants to represent the "crime lobby" by protesting our eagerness to resort to criminalization and punishment.[57] Apart from these few random observations, I propose to leave to sociologists and political scientists the surprisingly difficult task of identifying the empirical forces that have led us to punish so many and to criminalize so much. I am more concerned to understand these developments from the perspective of a legal philosopher. In chapter 2, I attempt to explain why academic commentators have tended to neglect our predicament.

Throughout this book, my complaints about too much crime and too much punishment frequently refer to a specific example—the crime of illicit drug possession.[58] I select this example for a simple reason. At the present time, drug offenses constitute the single most important manifestation of our tendency to criminalize too much and to punish too many.[59] A few statistics tell the story. In 2004, approximately 1,745,000 persons were arrested for drug offenses in the United States.[60] About 82% of these were arrested for simple possession.[61] Over 410,000 drug offenders are in jails and prisons across the country—about the same number as the entire prison population in 1980.[62] Nearly one of every five prisoners in America is behind bars for a nonviolent drug offense.[63] This figure has climbed dramatically. In 1986, about 18 of every 100,000 American citizens were imprisoned for a drug offense; that ratio had jumped to 63 a decade later.[64] Persons convicted of drug trafficking account for about 16% of all offenders serving a life sentence. A theory of criminalization has the potential to bring about major reforms in our treatment of drug offenders, with ramifications that would echo throughout the entire system of criminal justice.

To a lesser extent, I focus on gun control. My reasons for selecting this example are very different. Several commentators believe our regime of gun control is woefully inadequate to protect innocent persons from the harms caused by guns, and they favor massive expansions in the criminal law to punish gun owners. Many

57. Nonetheless, we should not be quick to conclude that the United States adopts its harsh policies because voters demand them. By 2006, less than 1% of Americans named crime as their top political concern. On this issue, politicians have tended to lead rather than to follow public opinion. In fact, most citizens are remarkably uninformed about the trends I have described. They grossly underestimate the extent of punishments that are imposed and favor greater moderation when educated about the true degree of sentencing severity. See Julian V. Roberts, et al.: *Penal Populism and Public Opinion* (New York: Oxford University Press, 2002).

58. 21 U.S.C. §841(a) (2002). State laws proscribe the same conduct.

59. Drug offenses clearly play this role in the United States, but other examples may provide better illustrations of overcriminalization in other countries. In the United Kingdom, for example, anti-social behavior orders (ASBOs) are a troubling development. These orders extend the reach of the criminal law by making it a criminal offense to breach the terms of what is supposedly not a criminal order. See the several essays in Andrew Simester and Andrew von Hirsch, eds.: *Incivilities: Regulating Offensive Behaviour* (Oxford: Hart Pub. Co., 2006).

60. *Sourcebook: op. cit.*, note 1, table 4.1 (2004).

61. *Id.*, table 4.29.

62. *Id.*, tables 6.0001 and 6.56.

63. *Id.*

64. *Id.*, table 6.30.

reasonable politicians, like former Senator Chafee of Rhode Island, would ban the manufacture, sale, and home possession of all handguns within the United States.[65] This suggestion is not heretical. About 35% of the American public favors a law that would ban the possession of handguns, except by the police or other authorized persons.[66] These proposals would cause a nearly unprecedented expansion in the volume of conduct subjected to criminal liability, as firearms are possessed in about 40% of households throughout the United States today.[67]

Many citizens who enthusiastically favor criminal laws to punish illicit drug users vehemently oppose criminal laws to punish gun possession. The converse is true as well. Many persons who are critical of criminal laws against drug users believe the state should do more to punish gun owners. Principled reservations about employing the criminal sanction in these areas cut across conventional ideological divides. Liberals and conservatives do not really differ about *how often* the state should resort to punishment; instead, they disagree mainly about *what* the state should punish. I focus on the specific examples of drug and gun control because objections to the use of the penal sanction that are widely appreciated in one context tend to be downplayed in the other. A theory of criminalization is needed to help us take a principled approach to both of these controversial and emotionally charged issues.

II: HOW MORE CRIMES PRODUCE INJUSTICE

Few knowledgeable persons contest the existence of the two trends I have described. The rise in the number of persons under the supervision of the criminal justice system as well as the expansion in the scope of the substantive criminal law can scarcely be doubted, even if the latter phenomenon resists precise quantification.[68] What is more difficult to discern, however, is the exact connection between these two developments. Intuitively, the relation seems apparent. As new crimes are enacted, more and more conduct becomes subject to criminal liability. Persons are sentenced for behavior that had been legally permissible at an earlier time. As a result, larger numbers of individuals face arrest, prosecution, and punishment. This simple and intuitive account *does* explain much of the rise in the scale of punishment. But this explanation is incomplete. In this section I describe a more complex mechanism to understand how greater amounts of criminal law produce greater amounts of punishment. I contend that this mechanism is worrisome not only because it causes too much punishment but also because it is destructive of the rule of law.

65. See, for example, Nicholas Dixon: "Why We Should Ban Handguns in the United States," 12 *St. Louis University Public Law Review* 243 (1993).

66. *Sourcebook: op. cit.*, note 1, table 2.65 (2005).

67. See James Jacobs: *Can Gun Control Work?* (Oxford: Oxford University Press, 2002), p.164.

68. Admittedly, some scholars *do* doubt that the criminal law has expanded significantly in size and scope, even though they agree that our criminalization decisions conform to no acceptable normative theory. For the best defense of this skeptical position, see Darryl K. Brown: "Rethinking Overcriminalization" (forthcoming, available at SSRN: *http://ssrn.com/abstract=932667*).

I do not want to overstate my case, so it is best to introduce a few qualifications at the outset. In the first place, the trend toward increasing criminalization is not uniform or constant. The criminal law has contracted as well as expanded; some types of behavior once punished no longer incur criminal liability. Colonial America employed the penal sanction primarily to repress sexuality, preserve religious orthodoxy, and control slaves.[69] Crimes against drunkenness, tippling, and various kinds of extravagances were once relatively common.[70] Obviously, few of these proscriptions still exist. Many "morals" offenses have not been explicitly repealed but rarely are enforced. For example, fornication remains criminal in 11 jurisdictions and adultery in 24—some of which continue to regard the latter as a felony.[71] A surprising number of states retain laws against profanity.[72] Although criminal liability still is used to combat prostitution in most parts of the country, prosecutions are sporadic. Still, many offenses widely enforced a few generations ago have disappeared altogether.[73] The most spectacular example of explicit repeal of a criminal offense is the Twenty-First Amendment, which ended the nation's ill-conceived 14-year experiment with the prohibition of alcohol distribution.

In addition, some of the recent expansions in the size and scope of the criminal sanction are welcome. A few offenses that clearly are desirable are of fairly recent vintage. In England, for example, rape could not be perpetrated between husband and wife until 1991. I am sure there are additional areas in which we still are guilty of *under*criminalization. For the most part, however, I am less concerned to indicate what new crimes are needed than to identify existing offenses that a respectable theory of criminalization would not allow. But even though my primary interest in defending a theory of criminalization is to hold back the tide of criminal law, we should keep in mind that a set of principles is also required to justify those penal offenses we should retain—as well as to identify those we have reason to enact. We need to decide not only whether we have too much criminal law already but also whether we should add even more.

Moreover, I do not allege that the growth of the criminal law is the only or even the most significant factor in explaining the increased size of the prison population. The most important reason our jails and prisons are filled is because punishments for existing offenses have become far more severe.[74] About 132,000 persons are currently serving life sentences; this number has grown at a rate that far outpaces the overall rise in the prison population during the past decade. Approximately 28% of these lifers are denied all chance of parole or early

69. See Samuel Walker: *Popular Justice: A History of American Criminal Justice* (New York: Oxford University Press, 2nd ed., 1999), pp.21–25.

70. See Alan Hunt: *Governing Morals: A Social History of Moral Regulation* (Cambridge: Cambridge University Press, 1999).

71. Melissa J. Mitchell: "Comment: Cleaning Out the Closet: Using Sunset Provisions to Clean up Cluttered Criminal Codes," 54 *Emory Law Journal* 1671, 1676 (2005).

72. See Sara Sun Beale: "The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization," 54 *American University Law Review* 747 n.6 (2005).

73. A number of examples are provided by Brown: *op. cit.*, note 68.

74. See David M. Zlotnick: "The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion," 57 *Southern Methodist University Law Review* 211 (2004).

release, causing an unprecedented increase in the age of the average inmate.[75] International comparisons reveal the harshness of sentencing in the United States. Terms of incarceration are roughly 5 to 10 times as long as those imposed in France or Germany for similar crimes,[76] and offenses tend to be graded more seriously than in other places.[77] The past 20 years have seen novel changes in sentencing practices not replicated elsewhere in the world. The fate of the most substantial innovation—mandatory sentencing guidelines—remains uncertain.[78] But each of the most significant developments to have survived (at least for now) increases rather than decreases the severity of punishments: "three strikes" laws for recidivists, "truth in sentencing" provisions that prevent early release from prison, and mandatory minimums. The Supreme Court has allowed defendants to be imprisoned for life without possibility of parole for possessing 672 grams of cocaine,[79] and recently has decided that individuals may be jailed for offenses as trivial as driving without a seatbelt.[80] These innovations expand the number of people under the control and supervision of the criminal justice system without the need to enact any new offenses.

Finally, more statutes could not produce more punishment unless other officials in the criminal justice system cooperate to achieve this outcome. No one should make inferences about the size of the prison population simply by reading legal codes. Changes in rates of punishment would not occur unless statutes are enforced. Of course, some offenses are neglected by citizens as well as by officials, even if they are highly publicized. The Violence Against Women Act, passed with great fanfare in 1994, is a case in point. In 1997, the number of prosecutions brought under the Act was exactly zero,[81] even though the incidence of violence against women was probably unchanged. Bans of assault weapons provide another illustration. The initial enactment of (and subsequent failure to renew) this law attracted tremendous media attention. But almost 90% of the owners of the approximately 300,000 assault weapons in California failed to register their arms after the ban became operative. Rates of compliance were even lower in Cleveland, Boston, and New Jersey—where only 947 of between 100,000 and 300,000 assault weapons were registered, despite the dearth of prosecutions.[82] It is difficult, however, to find reliable data about the policies used by police and prosecutors to decide whether to enforce laws in different jurisdictions throughout the United States. Some offenses, like drunk driving and acquaintance rape, almost certainly

75. Data about the number of persons serving terms of life imprisonment are from Adam Liptak: "To More Inmates, Life Term Means Dying Behind Bars," *New York Times* (Sunday, October 2, 2005), p.A:1.

76. Whitman: *op. cit*., note 5, p.57.

77. As Whitman shows, "while the drive in American law has been to reclassify more and more matters of 'disorderly conduct' or 'violations' as crimes, the tendency in continental Europe has been exactly the opposite." *Id*., p.83.

78. A series of Supreme Court decisions has thrown the constitutionality of mandatory sentencing guidelines into grave doubt. See *United States v. Booker,* 533 U.S. 924 (2005). The guidelines now are said to be advisory. For the most recent (so far) account of what "advisory" means, see *Rita v. U.S*., 127 S.Ct. 2456 (2007).

79. *Harmelin v. Michigan,* 501 U.S. 957 (1991).

80. *Atwater v. City of Lago Vista,* 533 U.S. 924 (2001).

81. American Bar Association: *The Federalization of Criminal Law* (1998), p.20.

82. See David Kopel and Christopher C. Little: "Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition," 56 *Maryland Law Review* 438, 459 (1997). See also Jacobs: *op. cit*., note 67, p.164.

are enforced more vigorously than in previous eras. Arrest and prosecution for many other offenses, like drug possession, varies tremendously from one time and place to another. Overall, however, there is little evidence that decreased levels of enforcement have counterbalanced the tendency for greater numbers of crimes to produce greater amounts of punishment.

Despite these cautionary remarks, it is patently clear that more criminalization produces more punishment in a straightforward manner: by expanding the type of conduct subjected to liability. The incidence of punishment is at unprecedented levels partly because defendants are convicted of crimes that did not exist a few generations ago.[83] The majority of those incarcerated under federal law today were sentenced for conduct that was not proscribed in the highly influential Model Penal Code. Indeed, most of the recent growth in our prison population involves nonviolent offenders. Even when more behavior is not punishable, the category of persons who face criminal prosecution has widened. The most obvious examples are juveniles[84] and white-collar offenders,[85] each of whom had relatively little to fear from the criminal justice system until the last quarter of the 20th century, but recently have become more common prosecutorial targets.[86] Moreover, the criminal law now extends deeply into the home, proscribing acts of domestic violence once regarded as private.[87]

In addition, expanded doctrines of joint criminality punish individuals who play a relatively minor role in crimes perpetrated by others. The most notorious example is the *Pinkerton* doctrine, which makes conspirators liable for the offenses committed by their co-conspirators, as long as these offenses are in furtherance of the conspiracy and within the scope of the unlawful project.[88] As a result, the number of substantive crimes committed by conspirators mushrooms out of all proportion to culpability and desert. Like the other crimes or doctrines on which I focus, conspiracy is a familiar weapon in the state's arsenal; perhaps one-quarter of all federal prosecutions involve a conspiracy charge.[89] Yet many commentators deem the offense unnecessary and have called for its abolition.[90]

Some new offenses enlarge the scope of criminalization in ways that are not obvious to laypersons. Most notably, many recent statutes impose *strict liability*—usually defined as an offense containing one or more material elements that do

83. Most important, almost no drug offenses existed prior to 1914. See David F. Musto: *The American Disease: Origins of Narcotic Control* (Oxford: Oxford University Press, 3rd ed., 1999).

84. See Franklin E. Zimring: *American Juvenile Justice* (New York: Oxford University Press, 2005). For example, the National Minimum Drinking Age Act, passed in 1984, effectively subjected millions of young drinkers to criminal penalties finally, the net of criminal law has been extended to public schools. See New York Civil Liberties Union: "Criminalizing the Classroom: The Over-Policing of New York City Schools," *http://www.aclu.org/pdfs/racialjustice/overpolicingschools-20070318.pdf*.

85. See Stuart Green: *Lying, Cheating, and Stealing: A Moral Theory of White Collar Crime* (Oxford: Oxford University Press, 2006).

86. According to Whitman, the state of affairs in which all forms of status-immunity to criminal liability are viewed as inegalitarian represents "an expression of an authentic American ideal." *Op. cit*., note 5, p.46.

87. See Jeannie Suk: "Criminal Law Comes Home," 116 *Yale Law Journal* 2 (2006).

88. *Pinkerton v. United States,* 328 U.S. 640 (1946).

89. See Neil Kumar Katyal: "Conspiracy Theory," 112 *Yale Law Journal* 1307, 1310 (2003).

90. See the references in Joshua Dressler: *Understanding Criminal Law* (Lexis/Nexis, 4th ed., 2006), p.457.

not require culpability or *mens rea*.[91] Many persons are unaware that these crimes exist. But even those who know the law can be liable for these offenses by making a mistake of fact—even a *reasonable* mistake of fact—about whether their conduct falls within the terms of the prohibition. These statutes widen the range of conduct subject to punishment, as long as *conduct* is understood to include the mental as well as the physical dimension of crime. To the chagrin of many commentators, few strict liability crimes allow due diligence of the defendant as an excuse.[92] The proliferation of these offenses is among the primary factors that led Andrew Ashworth to lament that English criminal law has become a "lost cause."[93] This sentiment is equally apt in the United States.

Although this simple explanation of how more crimes produce more punishment suffices in a great many cases, a deeper analysis of the relationship between these two phenomena is needed. A more complete picture emerges if we understand where power *really* is allocated in our criminal justice system today. By inquiring where power really is located, I mean to identify those officials who make the decisions with the greatest impact on outcomes—that is, on whether or to what extent given individuals will actually be punished. The answers, I am sure, are police and prosecutors.[94] Obviously, no one will face punishment unless he is arrested, and the authority to arrest lies almost solely with the police.[95] This power is almost wholly discretionary; only in exceptional circumstances can police be required to make an arrest. Once an arrest has taken place, prosecutors make the crucial decision whether to bring charges.[96] If they proceed, they must determine which charge(s) to bring, whether to allow a plea bargain, and what bargain to accept. Most of these decisions conform to no discernable principle and cannot be reviewed.[97] Efforts to curb *judicial* discretion have been largely successful—perhaps *too* successful, judging by the scholarly opposition to sentencing guidelines. As many theorists have pointed out, however, few institutions are able to eliminate discretion altogether. More typically, discretion shifts from one place to another, finally settling where it is least visible. At the present time, discretion resides largely in police and prosecutors.

Understanding the mechanism by which discretionary powers allow too much law to produce too much punishment requires a more detailed analysis of the

91. According to some commentators, approximately half of all existing crimes in the United Kingdom satisfy this definition of strict liability. See A. P. Simester and G. R. Sullivan: *Criminal Law: Theory and Doctrine* (Oxford: Hart Pub. Co., 2000), p.165.

92. See Jeremy Horder: *Excusing Crime* (Oxford: Oxford University Press, 2004), chap. six.

93. Andrew Ashworth: "Is the Criminal Law a Lost Cause?" 116 *Law Quarterly Review* 225 (2000).

94. These answers are not novel. In 1940, Justice Jackson alleged that a federal prosecutor has "more control over life, liberty, and reputation than any other person in America." See Jackson's "The Federal Prosecutor," 24 *Journal of the American Judicature Society* 18, 18 (1940). For a more contemporary treatment that includes a discussion of administrative agencies with responsibilities of law enforcement, see Andrew Ashworth and Michael Redmayne: *The Criminal Process* (Oxford: Oxford University Press, 3rd ed., 2005), pp.142–146.

95. See Markus Dirk Dubber: *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005).

96. See Michael Edmund O'Neill: "When Prosecutors Don't: Trends in Federal Prosecutorial Declinations," 79 *Notre Dame Law Review* 221 (2003).

97. See Mark Osler: "This Changes Everything: A Call for a Directive, Goal-Oriented Principle to Guide the Exercise of Discretion by Federal Prosecutors," 39 *Valparaiso Law Review* 625 (2005).

realities of the penal process. Our criminal justice system could not survive if the majority of defendants insisted on a trial at which their guilt would have to be proved beyond a reasonable doubt.[98] Many of our policies and practices—including much of the substantive criminal law itself—are designed to facilitate plea bargains by inducing defendants to forego trials and plead guilty.[99] These devices have accomplished their intended effect; roughly 95% of adjudicated cases result in guilty pleas.[100] If defendants were well informed and their lawyers were skilled and experienced, many commentators believe the rate of convictions obtained through guilty pleas would be even higher.[101] Although countless philosophers of law have devoted their careers to formulating principles of justice that protect persons accused of crime, few appear concerned about how the prevalence of plea bargaining blunts the impact of their principles in the real world.[102] When defendants enter guilty pleas, no rule or doctrine can compensate for injustice in the substantive criminal law. In particular, plea bargains remove the power of juries to acquit—perhaps the most important means by which citizens have succeeded in reforming the penal justice system.[103]

Prosecutors have a variety of means to persuade defendants to plead guilty, and increased criminalization provides them with one of their most powerful weapons. As I show in greater detail later, criminal codes include several relatively new overlapping offenses, frequently designed to circumvent problems of obtaining reliable evidence. Some of these recent crimes involve maximum punishments of astonishing severity, despite the fact that they do not seem to be especially serious. As long as these offenses contain distinct elements, no rule or doctrine automatically prevents the state from bringing several charges simultaneously, even though, from the intuitive perspective of a layperson, the defendant has committed but a single crime. Hence these offenses allow prosecutors to *pile on* or *charge stack*—to bring a number of charges against a defendant for the same underlying conduct. Obviously, offenders face a far more severe potential sentence when multiple charges are brought against them. Prosecutors need to make credible threats that these sentences will be imposed if defendants stubbornly assert their innocence. For these threats to accomplish their objective and induce guilty pleas, the punishments defendants receive through plea bargains must be discounted—that is, made considerably more lenient than would be imposed in a trial. Even when a defendant is tried and acquitted on all but one of several charges, he probably will be deemed not to have "accepted responsibility" and may receive a longer sentence

98. See George Fisher: *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (Stanford: Stanford University Press, 2003).

99. See Stephanos Bibas: "Plea Bargaining Outside the Shadow of Trial," 117 *Harvard Law Review* 2463 (2004).

100. Rachel E. Barkow: "Separation of Powers and the Criminal Law," 58 *Stanford Law Review* 989, 1047 n.310 (2006).

101. In federal law, William Stuntz says "the rate would approach 100%." See William Stuntz: "Plea Bargaining and Criminal Law's Disappearing Shadow," 117 *Harvard Law Review* 2548, 2568 (2004).

102. See Russell L. Christopher: "The Prosecutor's Dilemma: Bargains and Punishments," 72 *Fordham Law Review* 93 (2003). Christopher describes the incompatibility between plea bargaining and a retributive theory of punishment but defends the novel conclusion that this incompatibility undermines the latter rather than the former.

103. See Thomas Andrew Green: *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* (Chicago: University of Chicago Press, 1985).

than would have been imposed if he had pled guilty to the single offense for which he is convicted.[104] Thus defendants who behave rationally have a tremendous incentive to bargain and plead guilty to a subset of the charges in exchange for having the other offenses dropped. As we have seen, most defendants are sufficiently self-interested to respond appropriately to these incentives.[105]

Of course, the Double Jeopardy clause of the Constitution protects defendants from suffering more than one punishment for the same offense. But this protection is limited. In the first place, the Supreme Court allows the imposition of multiple punishments for the same offense if expressly authorized by the legislature.[106] In some contexts—such as drug offenses—legislatures routinely authorize the additional sentence. Moreover, double jeopardy protection is narrowed by judicial decisions about when two offenses are "the same." When the legislature has not made its intention clear, the Supreme Court continues to implement the controversial *Blockburger* test, which provides that offenses are different if and only if each requires proof of some fact that the other does not.[107] This test merges lesser-included offenses into their aggravated counterparts, so prosecutors cannot, for example, charge a defendant with the separate crimes of simple assault and assault with a deadly weapon. Still, this test offers no protection to defendants when prosecutors bring multiple charges that contain distinct elements. For this reason the *Blockburger* test has been roundly criticized by commentators, many of whom favor a less mechanical means to decide when persons may be subjected to more than one punishment for the same offense.[108] At the present time, however, the Double Jeopardy clause is construed to give prosecutors enormous leverage to use the abundance of overlapping offenses to secure guilty pleas from defendants.[109]

Few knowledgeable commentators are prepared to defend the justice of plea bargaining. The practice has been denounced as "absolutely and fundamentally immoral," "a disaster," "unfair and irrational," and "outrageous."[110] Presumably, plea bargaining survives because no one knows how our penal system could function without it. The most glaring injustice occurs when those who plead guilty did not violate the law at all, even though it is impossible to know what percentage of those

104. See Rachel E. Barkow: "Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing," 152 *University of Pennsylvania Law Review* 33, 98 (2003).

105. In particular, empirical evidence confirms that defendants who are averse to uncertainty are easily exploited by prosecutors and are more likely to plead guilty. See Uzi Segal and Alex Stein: "Ambiguity Aversion and the Criminal Process," 81 *Notre Dame Law Review* 1495 (2006).

106. *Missouri v. Hunter,* 459 U.S. 359 (1983).

107. *United States v. Blockburger,* 284 U.S. 299 (1932).

108. See Michael S. Moore: *Act and Crime* (Oxford: Oxford University Press, 1993); and George Thomas: *Double Jeopardy: The History, the Law* (New York: New York University Press, 1998).

109. The "real offense" provisions of the Federal Sentencing Guidelines sought to block this result by punishing defendants for what really happened. In many cases, the guidelines require multiple counts relating to the same harm to be aggregated, lessening the discretion of prosecutors to increase a defendant's sentence by bringing multiple charges. See Jacqueline E. Ross: "Damned Under Many Headings: The Problem of Multiple Punishment," 29 *American Journal of Criminal Law* 245 (2002). The fact that the Federal Sentencing Guidelines are no longer mandatory provides federal prosecutors with greater opportunities to impose more severe punishments by increasing the number of counts in an indictment.

110. See the references in Christopher: *op. cit.*, note 102, p.96.

punished are actually innocent of all charges.[111] We *do* know, however, that plea-bargaining contains structural features that render it "marvelously designed to secure conviction of the innocent."[112] In any event, many of those who *are* guilty of a crime would receive less severe punishments if each of the offenses with which they were charged were justified by our best theory of criminalization. Even if only *one* of the multiple charges in an indictment includes a statute that is beyond the proper reach of the criminal sanction, more defendants will have reason to plead guilty—and thus be punished—than if *each* statute conformed to our criteria of criminalization. And those who would plead guilty in either event will face more severe punishments in cases in which the indictment includes an offense that fails our test and should not have been criminalized. Defendants are motivated to plead guilty because they are threatened with a sentence that is more severe than could have been imposed if our best theory of criminalization were implemented. *Perhaps,* as a result of prolonged bargaining, many defendants receive exactly the sentences they deserve—no more and no less. No one should profess to know, as it is hard to say what severity of punishment *is* deserved for particular crimes. If defendants who plead guilty often *are* punished proportionate to their desert, however, defendants who go to trial alleging their innocence are almost certain (if convicted) to be punished excessively. We should not tolerate our criminal justice system if it punishes proportionate to desert only when defendants plead guilty. I conclude that overcriminalization almost inevitably produces disproportionate punishments, even when offenders have actually violated a criminal statute that everyone agrees to be a legitimate use of the penal sanction. Although a theory of criminalization might not reduce the incidence of plea bargaining overall, it might reduce the injustice caused by it.

Of course, too much criminal law leads to too much punishment even without encouraging plea bargains. No commentator has analyzed the connection between these two trends more astutely than William Stuntz, and I draw heavily from his work throughout the next two sections. Stuntz begins by noting that "anyone who studies contemporary state or federal criminal codes is likely to be struck by their scope, by the sheer amount of conduct they render punishable."[113] Offenses are so far-reaching that almost everyone has committed one or more at some time or another; the criminal law no longer distinguishes "us" from "them." Perhaps over 70% of living adult Americans have committed an imprisonable offense at some point in their life.[114] As a result, Stuntz alleges we are steadily moving "closer to a world in which the law on the books makes everyone a felon."[115] Although more criminal law produces more punishment, it could easily produce even more punishment than we have already.

111. For some estimates, see Barry Scheck, Peter Neufeld, and Jim Dwyer: *Actual Innocence* (New York: Signet, 2001); see also Samuel R. Gross et al.: "Exonerations in the United States 1989 through 2003," 95 *Journal of Criminal Law and Criminology* 523 (2005).

112. Albert W. Alschuler: "Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas," 88 *Cornell Law Review* 1412, 1414 (2003).

113. William Stuntz: "The Pathological Politics of Criminal Law," 100 *Michigan Law Review* 506, 515 (2001).

114. In addition to the examples I describe, this figure includes shoplifting and driving while intoxicated. See Dwyer: *op. cit.*, note 39, p.188.

115. *Op. cit.*, note 113, p.511.

I cite here just three examples of how the expanding net of criminal liability threatens to ensnare us all. Several possible examples could be used; I select the following because the class of offenders differs markedly in each illustration.[116] First and perhaps most notably, about 90 million living Americans have used an illicit drug, an activity for which many could have been sent to prison if detected and prosecuted. Even occupants of our highest offices have engaged in felonious drug use; recall that George W. Bush dismissed allegations of frequent cocaine abuse as a "youthful indiscretion." Significantly, however, he did not call for an end to criminal penalties for similar indiscretions by the youth of today. Second, astronomical numbers of young adults have engaged in music piracy. According to some estimates, 52% of Internet users between the ages of 18 and 29 commit this crime by illegally downloading approximately 3.6 billion songs each month.[117] The No Electronic Theft Act of 1997 makes the sharing of over $1,000 worth of copyrighted material a federal offense that can result in three years' imprisonment.[118] To date, prosecutions for not-for-profit copyright infringements have been exceedingly rare, but some commentators predict more aggressive enforcement in the future.[119] Internet gambling provides my final example of the ubiquity of criminal behavior. Millions of citizens in the United States place bets from their home computers on Internet casinos. The law on this phenomenon is in a state of flux. Under existing statutes, individuals who gamble online are not guilty of any crime—although Congress periodically entertains bills to proscribe their behavior. But the Unlawful Internet Gambling Enforcement Act of 2006 prohibits American banks from transferring money to Internet gambling sites.[120] Moreover, the very operation of these casinos is unambiguously prohibited under the Federal Wire Act.[121] The ownership of offshore Internet casinos that do business in the United States includes many of the most prestigious investment firms in the world: Fidelity, Merrill Lynch, Goldman Sachs, Morgan Stanley, and others. It is hard to see why these investment companies are not punishable for aiding and abetting these illegal activities. Only prosecutorial discretion prevents criminal liability from extending to the highest reaches of mainstream society. As these examples show, what tends to characterize many of us who have evaded punishment is not our compliance with law but the good fortune not to have been caught, the discretion of authorities in failing to make arrests or bring charges, or the resources to escape criminal penalties in the event we are prosecuted.

116. For an additional example, drivers who misinform a police officer that they did not realize how fast they were speeding violate the federal false statement statute. See Alexandra Bak-Boychuk: "Liar Liar: How MPC §241.3 and State Unsworn Falsification Statutes Fix the Flaw in the False Statement Act (18 U.S.C. §1001)," 78 *Temple Law Review* 453 (2005).

117. See Tia Hall: "Music Piracy and the Audio Home Recording Act," *Duke Law and Technology Review* 23 (2002).

118. Public Law No. 105–147, 111 Stat. 2678.

119. See I. Trotter Hardy: "Criminal Copyright Infringement," 11 *William & Mary Bill of Rights Journal* 305 (2002).

120. 31 U.S.C. §5366 (2006).

121. The Wire Act of 1961 makes it illegal to use a "wire communication facility for the transmission in interstate or foreign commerce of bets or wagers." 18 U.S.C. §1084 (2003).

These examples support Stuntz's claim that the substantive criminal law itself rarely functions to define prohibited conduct or the consequences of disobedience. Instead, statutes are mainly "a means of empowering prosecutors"[122]; they serve "as items on a menu from which the prosecutor may order as she wishes."[123] What *do* prosecutors order from the extensive menu legislators prepare? No one should profess to know the answer with any certainty, and generalizations are perilous.[124] Stuntz admits, "there is no developed social science literature on what prosecutors maximize, probably because the solution is too complex to model effectively."[125] In any event, no sensible prosecutor aspires to convict the largest number of people or to impose the harshest sentences authorized by law. Criminal statutes are so pervasive that prosecutors have little choice but to decide which crimes are worth enforcing and which are not. The factors that contribute to the laws prosecutors will enforce and the sentences they will seek through plea bargains include "voters' preferences, courthouse customs, the prosecutor's reputation as a tough or lenient bargainer, [and] her own views about what is a proper sentence for the crime in question."[126] Obviously, these variables will differ from case to case. Whatever their motivations may be, Stuntz concludes that prosecutors rather than legislators are "the criminal justice system's real lawmakers."[127]

Jeffrey Standen offers an excellent example of the array of options made available to federal prosecutors by the maze of criminal statutes.[128] Suppose an officer of a publicly held corporation uses confidential information to make trades in his company's stock over a period of years, yielding more than $100,000 in profits that are deposited in his private bank account. The possible charges that prosecutors may bring include multiple counts of some combination of mail fraud, racketeering offenses, securities violations, money laundering, and a host of others. Possible sentences span from a period of supervised probation to a term of imprisonment of about six years. As this example indicates, the content of criminal statutes does not impose a significant constraint on prosecutors. Their charging decisions give them the power to control whether and to what extent persons will pay for their crimes.[129]

122. Stuntz: *op. cit.*, note 101, p.2563.
123. *Id.*, p.2549.
124. Sometimes discretion is used in ways no one could reasonably have anticipated. Martha Stewart provides a well-known example. In 2004, Ms. Stewart was convicted of making false statements to federal officials who were investigating her sale of ImClone stock after her broker advised her that the CEO of ImClone had sold some of his own stock in the company. Ms. Stewart asserted her innocence of insider trading, a crime with which she was not charged. Her allegation of innocence, according to the novel theory adopted by the federal prosecutor, was designed to help prop up the value of stock in her own company, Martha Stewart Omnimedia. I do not claim that prosecutors or judges misconstrued the relevant statutes in this case. The main problem lies in the broad language of the statutes themselves, and thus in the enormous discretion they confer. For a general discussion, see Ellen S. Podgor: "Jose Padilla and Martha Stewart: Who Should Have Been Charged with Criminal Conduct?" 109 *Penn State Law Review* 1059 (2005).
125. Stuntz: *op. cit.*, note 101, p.2554 n6.
126. *Id.*, p.2554.
127. Stuntz: *op. cit.*, note 113, p.506.
128. Jeffrey Standen: "An Economic Perspective on Federal Criminal Law Reform," 2 *Buffalo Criminal Law Review* 249, 252–254 (1998).
129. *Id.*, p.256.

What is worrisome about delegating so much authority to prosecutors? Surely the objection cannot be that prosecutors fail to use their power to punish even more individuals than are sentenced at the present time. From the perspective of a legal philosopher, the answer is simple. Even when exercised wisely, this discretionary power, unchecked and unbalanced by other branches of government, is incompatible with the rule of law. This deterioration in the rule of law produces injustice. Because real power in our criminal justice system is not exercised in conformity with any principle that commentators have been able to formulate, no one is able to answer the question that legal realists like Oliver Wendell Holmes identified as fundamental to understanding what the law *is*. According to Holmes, the law consists in "prophecies of what the courts will do in fact, and nothing more pretentious."[130] Without endorsing the whole school of jurisprudence Holmes sought to defend, he clearly articulated the central concern of laypersons who make inquiries about the law. Holmes recognized that experts who profess to know the law should be able to make a fairly accurate "prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court."[131] But these predictions become notoriously unreliable in a system in which real power, and the decisions that govern the fate of individuals, is wielded with so much discretion.

Remarkably, few criminal theorists are vocal in protesting this erosion of the principle of legality, despite their enthusiasm about the ideal of establishing a government of laws and not of men. Whatever the ideal of the rule of law might entail, it seemingly means that the distinction between conduct that is and is not punished should depend primarily on the content of the laws that legislatures enact. No one, however, should hazard a prediction about who will be sentenced simply by examining criminal statutes. The *real* law—the law that distinguishes the conduct that leads to punishment from the conduct that does not—cannot be found in criminal codes. Even those police and prosecutors who pledge fidelity to the rule of law could not hope to honor their commitment because they receive almost no guidance from legislators about what they really are expected to do. The number and scope of criminal laws guarantee that neither police nor prosecutors will enforce statutes as written. As Stuntz observes, "the greater the territory substantive criminal law covers, the smaller the role that law plays in allocating criminal punishment."[132] We are already well past the point at which statutes are the dominant factor in explaining who will or will not incur criminal liability. As a result, one might conclude that the substantive criminal law itself is not very important in the context of our system of criminal justice.[133] As Stuntz bluntly concludes, "criminal law is not, in any meaningful sense, law at all."[134]

130. Oliver W. Holmes: "The Path of the Law," X *Harvard Law Review* 457 (1897). Reprinted in Harvard Law Review: *Introduction to Law* (Cambridge: Harvard Law Review Association, 1968), pp.50, 54.
131. *Id.*, p.51.
132. Stuntz: *op. cit.*, note 101, p.2550.
133. See Douglas Husak: "Is the Criminal Law Important?" 1 *Ohio State Journal of Criminal Law* 261 (2003).
134. William J. Stuntz: "Correspondence: Reply: Criminal Law's Pathology," 101 *Michigan Law Review* 828, 833 (2002).

The consequences of this erosion in the rule of law are monumental, jeopardizing several of the normative principles held dear by legal theorists. Philosophers of law rarely discuss how the discretion of police and prosecutors affects their theories of punishment and criminalization.[135] For example, many commentators believe that criminal justice should implement a theory of desert, which includes (*inter alia*) the principle of proportionality introduced earlier: the severity of the punishment imposed on the offender should be proportionate to the seriousness of his crime. This principle was (and continues to be) a pivotal rationale for adopting guidelines that remove sentencing discretion from judges.[136] Two persons with relevantly similar criminal histories who commit the same offense should receive comparable sentences. Clearly, the principle of proportionality is violated when relevantly similar defendants are punished to different degrees. But violations of this principle can also occur when some but not all relevantly similar offenders are arrested, or when some but not all relevantly similar arrestees are prosecuted. Unfortunately, the latter two deviations from the principle of proportionately are commonplace today.

The relative lack of protest about the violations of proportionality in the latter circumstances probably reflects the long-standing obsession among legal philosophers with the judicial branch of government.[137] Although *judicial* discretion has long been recognized to be the enemy of the rule of law,[138] theorists have not tended to apply their reservations about the legitimacy of discretion to other officials in our criminal justice system. Police and prosecutors, no less than judges, are and ought to be subject to the rule of law. Any progress that has been made to ensure that judges impose proportionate sentences is undermined by the failure to take the rule of law seriously at earlier stages of the criminal process. In hindsight, it is doubtful that courts were the best place to find deviations from the principle of legality. Because judicial behavior is so public, it is not surprising that courts have a better track record than other criminal justice institutions in preserving the rule of law.

The drug war provides an example of how the combination of overcriminalization and prosecutorial discretion erodes the rule of law and undermines the principle of proportionality. When serving as a federal prosecutor in New York, Rudolph Giuliani sought to keep drug dealers "off balance" by instituting "federal day": one day each week chosen at random in which street-level drug dealers arrested by local police were prosecuted in federal rather than state court, where sentences are far more severe.[139] Despite the notorious difficulties implementing a principle of proportionality, no person would contend that the same criminal behavior becomes more serious and should be punished more harshly because it happens to be perpetrated on a Tuesday rather than on a Wednesday—especially

135. For an exception, see Ashworth and Redmayne: *op. cit.*, note 94, chap. 6.
136. See Andrew von Hirsch, Kay A. Knapp, and Michael Tonry: *The Sentencing Commission and Its Guidelines* (Boston: Northeastern University Press, 1987).
137. See Jeremy Waldron: *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999).
138. See Ronald Dworkin: *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), pp.31–37.
139. See Beale: *op. cit.*, note 72, p.765 n98.

when notice is deliberately withheld about the date on which the longer sentences will be imposed. I do not allege that this draconian tactic violates the law. Instead, the problem lies with the law to which this strategy conforms.

The incompatibility between the rule of law and the discretionary powers of police and prosecutors may be described more generally. Consider a straightforward and specific question a layperson might pose to someone who professes an expertise in criminal law: How will the law react to a person who uses or sells small quantities of marijuana? Theorists should be embarrassed by their inability to answer this question, because their knowledge of the criminal law—and even their specialty in drug policy—will not enable them to respond confidently. I assume that laypersons are raising Holmes's question when they ask how the law will react to a marijuana offender. I doubt that they are narrowly fixated on what *courts* will do to this individual, but this does not detract from the point I have in mind. Although Holmes defined the law as the set of prophecies of what *judges* will do, I am sure he did not intend to disregard the behavior of other officials in our criminal justice system. I assume Holmes meant only that courts could not act unless police and prosecutors brought a case before them, and judges have the final authority to specify the content of the law by convicting or acquitting. The layperson, then, should be understood to inquire how each stage of the criminal justice system will respond to a marijuana offender. Will he be caught? Will he be arrested? Will he be prosecuted? Will he be punished? If so, how severe will his punishment be? Why are theorists unable to answer these simple questions? I hope no one will reply that the addressees of these questions are only *theorists* who have little familiarity with the nuts and bolts of the criminal law. This reply *cannot* be adequate, because even practitioners with an encyclopedic knowledge of the criminal law would not be able to make a very accurate prediction about the fate of the marijuana offender.[140] The real explanation for their ignorance lies elsewhere.

Of course, knowledgeable commentators may be able to recite a few statistics in addition to those mentioned already. About 25 million Americans use marijuana each month; one is arrested every 42 seconds; 786,000 people were arrested for marijuana violations in 2005, more than double the number in 1993.[141] Of those prosecuted for marijuana offenses, 88% were charged with mere possession and tens of thousands were sent to jail. These data, however, do not reveal how many offenders were not detected at all, or were detected but not arrested because police were willing to look the other way. And what happens after an arrest is made? Here, at least, one would hope that knowledge of the criminal law should come into play. Even at this stage, however, predictions are remarkably tenuous. The variables that lead to decisions about whether an arrestee will be charged are not clear. Some prosecutors believe that low-level offenders are not worth charging; others pursue them with zeal. The charges offenders will face are also difficult

140. One commentator describes this state of affairs as producing "'vagueness in practice.' While they are not doctrinally or textually vague, underenforced laws *functionally* raise the same concerns. Citizens receive little or no notice as to what constitutes unlawful (as in 'sanctionable') conduct." Edward K. Cheng: "Structural Laws and the Puzzle of Regulating Behavior," 100 *Northwestern University Law Review* 655, 660–661 (2006).

141. See Federal Bureau of Investigation: *Crime in the United States,* (2005), table 29.

to ascertain. Some prosecutors routinely offer plea bargains to arrestees willing to implicate sellers higher in the distribution chain; others do not. Federal law, at least, purports to remove discretion in sentencing by imposing mandatory minimums on defendants who are guilty of distributing specified quantities of drugs. But mandatory sentences are easily evaded by such devices as fact bargaining and charge bargaining.[142] How frequently do these evasions occur? No one should profess to know with any degree of certainty.

We *do* know that such factors as location and race significantly affect the probability that marijuana users and sellers will be punished. Our system of law practices "justice by geography." There is a wide disparity in the growth of marijuana arrests from one county to another—from a 20% increase in the 1990s in San Diego to a 418% spike in King County, Washington.[143] Contemporary statistics about racial disparities are especially shocking. Although whites and blacks are roughly comparable in their rates of illicit drug use, blacks are arrested, prosecuted, and punished for drug offenses far more frequently and harshly than whites.[144] Recent studies show that African-Americans make up 14% of marijuana users generally but account for nearly one-third of all marijuana arrests. The public does not seem outraged about these inequities; citizens and officials alike are quite complacent about this apparent perversion in the rule of law. In all probability, however, the drug war would have ended long ago but for exercises of discretion that spared suburban whites from prison at the same rate as that for inner-city blacks.

Drug prohibitions are not the only example of how the unfettered exercise of discretion is capable of obliterating the rule of law. Although hardly paradigmatic of serious criminal offenses,[145] the statutes governing motor vehicles can be used to illustrate the same point.[146] Everyone is roughly aware of the scope and complexity of traffic laws. In the state of New Jersey, which is fairly typical in most respects, the Motor Vehicle and Traffic Regulations span some 180 pages of dense text. Although the applicable statutes are relatively easy to find, few drivers are aware of the details of many of the regulations that pertain to them. But widespread ignorance of the law is not the main difficulty on which I focus. Instead, the problem is the remarkable *breadth* of the statutes. Even those who know the law find it is nearly impossible to drive for a period of time without committing some infraction or another.[147] A policeman who follows a driver for several minutes is bound to find probable cause to stop him. Even those few individuals who happen to be familiar with the content of the regulations cannot anticipate what

142. Some of the maneuvering around these provisions is described by Stephen J. Schulhofer and Ilene H. Nagel: "Plea Negotiations under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-*Mistretta* Period," 91 *Northwestern University Law Review* 1284 (1997).

143. See Ryan S. King and Mark Mauer: "The War on Marijuana: The Transformation of the Drug War in the 1990s" (May, 2005), *http://www.sentencingproject.org/pdfs/waronmarijuana.pdf*.

144. See Jamie Fellner: "Punishment and Prejudice: Racial Disparities in the War on Drugs," 12:2 *Human Rights Watch* (May 2000).

145. Many states construe most traffic offenses as civil infractions rather than misdemeanors.

146. See Illya Lichtenberg: "Police Discretion and Traffic Enforcement: A Government of Men?" 50 *Cleveland State Law Review* 425 (2002–2003).

147. See David Harris: "Car Wars: The Fourth Amendment's Death on the Highway," 66 *George Washington Law Review* 556 (1998).

conduct will lead the police to detain them. After being pulled over, no one can predict what behavior will result in a summons. If cited, it is hard to say whether appearance in traffic court will increase or decrease the penalty.

Speed limits provide an illustration of how the rule of law has been jeopardized. Exactly how fast *is* a driver permitted to travel on a given highway? Posted limits offer little guidance; most motorists exceed them routinely. Even if someone is driving below the posted limit, he may be cited if weather conditions are deemed to be sufficiently hazardous. In other words, the fate of drivers is almost entirely in the hands of police. To make matters worse, the handful of motorists who *do* obey the letter of the law may expose themselves and others to heightened levels of risk, because accidents are minimized when motorists follow the flow of traffic rather than conform to posted speed limits. It is hard to understand why this state of affairs has not given rise to howls of protest from those theorists who take the rule of law (as well as safety) seriously. Perhaps commentators neglect this topic because of the minor penalties that are imposed. In any event, traffic offenses per se are not the phenomenon to which I hope to call attention. The more significant problem is that the criminal law generally has come to resemble traffic offenses in many crucial respects.

Thus I take for granted that those who teach and theorize about the criminal law would be unable to answer the simple and straightforward questions I have borrowed from Holmes. If knowledge of the criminal law consists in the ability to make reliable forecasts about what conduct will be punished, it follows that no one knows the law. Experts in the criminal law cannot make accurate predictions about potential offenders because the fate of such persons is not a function of the law at all. The *real* criminal law, as Holmes would construe it, is formulated by police and prosecutors. The realization that police and prosecutors wield such discretion is nothing new. What *is* new is the power to arrest and prosecute nearly everyone—a power that derives from the ever-expanding scope of criminal statutes as written. The combination of these phenomena—unchecked discretion coupled with all-encompassing offenses—is destructive of the rule of law. This combination produces too much punishment directly, by proscribing conduct that a defensible theory of criminalization would place beyond the reach of the penal sanction. And this combination produces too much punishment indirectly, by allowing prosecutors to stack charges in order to induce defendants to plead guilty by threatening to sentence them in excess of their desert. And all too often, defendants who exercise their right to be tried and found guilty beyond a reasonable doubt *are* punished in excess of their desert. Although unquestionably beneficial to those who enjoy the discretionary authority bestowed, it is impossible to believe that the combination of these phenomena results in justice.[148]

What might be done to enhance the rule of law in the criminal arena?[149] I have no simple advice to give. Clearly, no system of criminal justice can or should aspire

148. For a more optimistic view of the effects of overcriminalization, see Kyron Huigens: "What Is and Is Not Pathological in Criminal Law," 101 *Michigan Law Review* 811 (2002).

149. For a survey of some possible solutions, see Donald A. Dripps: "Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies," 109 *Penn State Law Review* 1155 (2005).

to eliminate discretion altogether.[150] But we can hope to eliminate the inevitability that discretion will be exercised without regard for the rule of law.[151] Although realistic progress toward this goal must be incremental, one promising proposal calls for the principled enforcement of the criminal law as written.[152] Police might be required to arrest for the offenses they detect, and prosecutors might be required to charge the most serious provable offense—or be prepared to explain publicly why they have failed to do so.[153] Alternatively, prosecutors might be required to show that some number of other defendants in factually similar cases within the same jurisdiction have been treated similarly.[154] In other words, police and prosecutors might be encouraged to act more like judges. Clearly, however, the number and scope of existing statutes precludes these solutions. A better theory of criminalization can help to address this problem. If we cannot expect authorities to defend their decisions about why given statutes are selectively enforced—like those prohibiting drug use, music piracy, and Internet gambling, for example—we should be reluctant to enact statutes that give authorities this discretion in the first place.

Principled enforcement could help to salvage the rule of law were it not threatened by overcriminalization. It is crucial to recognize, however, that even a good-faith implementation of a minimalist theory of criminalization would represent only a small step toward the ideal of principled enforcement. To a large extent, society is "self-policing." The bulk of police and prosecutorial work is *reactive,* responding to information provided by citizens about the occurrence of criminal activity. Different measures of the incidence of crime—those drawn from victim surveys rather than from law enforcement agencies—reveal that most crimes are unreported. In 2004, for example, over 57% of crimes involving personal and property victimization were not reported to the police.[155] Conformity to principle will not rectify this situation. If we hope to enhance the rule of law, so that the content of offenses provides a more reliable indicator of who will actually be punished or unpunished, the public must be more willing to report crimes to the authorities. In a free society, I have little to say about how to improve this situation—except to speculate that citizens might become more cooperative if they believe the criminal law is just.[156] Improving the substantive criminal law is essential both to reducing the incidence of unjust punishment and to restoring the rule of law itself.

150. For the classic account of these matters, see Kenneth Culp Davis: *Discretionary Justice* (Urbana: University of Illinois Press, 3rd ed., 1976).

151. Lessons might be learned from our European neighbors, many of which (allegedly) implement a rule of compulsory prosecution. For some useful observations, see Heike Jung: "Criminal Justice: A European Perspective," *Criminal Law Review* 237 (1993).

152. In a memorandum of September 22, 2003, Attorney General John Ashcroft directed federal prosecutors to "charge and pursue the most serious, readily provable offense" (subject to several exceptions). For a discussion, see Amie N. Ely: "Note: Prosecutorial Discretion As an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to 'Seek Justice,'" 90 *Cornell Law Review* 237 (2004).

153. See the model of transparent policing endorsed by Erik Luna: "Principled Enforcement of Penal Codes," 4 *Buffalo Criminal Law Review* 515 (2000).

154. See William J. Stuntz: "The Political Constitution of Criminal Justice," 119 *Harvard Law Review* 780, 838 (2006).

155. *Sourcebook: op. cit*., note 1, table 3.33 (2004).

156. See Paul H. Robinson and John M. Darley: *Justice, Liability & Blame* (Boulder: Westview Press, 1995).