

THE OVERCRIMINALIZATION PHENOMENON

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INTRODUCTION

Every year, additional crimes, increased punishments, and novel applications of the criminal justice system enter U.S. jurisprudence,¹ sometimes coming in a predictable frenzy analogous to other recurring events in American society, such as the bacchanalia of New Year's Eve or the annual "madness" surrounding the months of March (for college basketball fans) and April (for procrastinating taxpayers). Any expansion may appear gradual—another crime here and an enhanced sentence there—

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1. See, e.g., Michael Gardner, *New Year Brings a Lot of State Laws*, SAN DIEGO UNION-TRIB., Jan. 1, 2005, at A1 (reviewing new California laws); Ryan Keith, *New Laws Include Minimum Wage Hike*, CHI. SUN-TIMES, Jan. 1, 2005, at 6 (detailing new Illinois laws); *A New Year, a Slew of New Laws*, STAR-LEDGER (Newark, N.J.), Jan. 1, 2005, at 12 (describing new laws nationwide); Robert Tanner, *Diverse Laws Ring in the New Year*, MIAMI HERALD, Dec. 31, 2004, at A9 (listing new laws across nation); Amy F. Bailey, *New Laws Help Get the Lead Out*, GRAND RAPIDS PRESS, Dec. 22, 2004, at B7 (reporting on new Michigan laws). See generally Erik Luna, *Overextending the Criminal Law*, 25 CATO POL'Y RPT. 1 (2003) [hereinafter Luna, *Overextending*], available at http://www.cato.org/pubs/policy_report/v25n6/luna.pdf (Feb. 14, 2005) ("Nothing is certain, Ben Franklin once said, but death and taxes. Had he lived during our time, Franklin might have added a few other certainties—and almost assuredly among them would have been the concept of 'crime.'").

and the latest criminal provision or practice may seem trivial in effect. Over time, however, the United States has experienced a dramatic enlargement in governmental authority and the breadth of law enforcement prerogatives. Consider the following motley assortment:

- Delaware punishes by up to six months imprisonment the sale of perfume or lotion as a beverage.² In Alabama, it is a felony to maim one's self to "excite sympathy" or to train a bear to wrestle, while Nevada criminalizes the disturbance of a congregation at worship by "engaging in any boisterous or noisy amusement."³ Tennessee makes it a misdemeanor to hunt wildlife from an aircraft,⁴ Indiana bans the coloring of birds and rabbits,⁵ Massachusetts punishes those who frighten pigeons from their nests,⁶ and Texas declares it a felony to use live animals as lures in dog racing.⁷ In turn, spitting in public spaces is a misdemeanor in Virginia,⁸ and anonymously sending an indecent or "suggestive" message in South Carolina is punishable by up to three years imprisonment.⁹ Not to be outdone, the federal government prohibits placing an advertisement on the U.S. flag (or vice versa) within the District of Columbia, as well as the unauthorized use of the "Red Cross" emblem or the characters "Smokey Bear" and "Woodsy Owl."¹⁰ Moreover, innumerable local ordinances carry the possibility of criminal consequences, such as the jailable offense of failing to return library books in my hometown of Salt Lake City.¹¹

2. DEL. CODE ANN. tit. 4, § 901(6) (2001).

3. NEV. REV. STAT. 201.270(2) (2003).

4. TENN. CODE ANN. § 70-4-109(a) (2004).

5. IND. CODE § 15-2.1-21-13 (1998).

6. MASS. GEN. LAWS ANN. ch. 266, § 132 (2002).

7. TEX. PENAL CODE ANN. § 42.09(a)(7)-(8) (Vernon 2003); *see also id.* § 42.09(i) (Vernon Supp. 2004-05) (making offense a third degree felony if accused has violated the same provision twice before).

8. VA. CODE ANN. § 18.2-322 (Michie 2004).

9. S.C. CODE ANN. § 16-15-250 (Law. Co-op. 2003).

10. 4 U.S.C. § 3 (2000) (U.S. Flag); 18 U.S.C. § 706 (1988) (Red Cross); 18 U.S.C. § 711 (1988) (Smokey Bear); 18 U.S.C. § 711a (1988) (Woodsy Owl).

11. SALT LAKE CITY, UTAH, CODE chs. 11.36.100, 1.12.050 (2005), *available at* <http://www.slcgov.com/government/code/> (last visited Feb. 14, 2005). The list of oddball offenses is nearly endless, and "[s]ome crimes barely pass the laugh test." Luna, *Overextending*, *supra* note 1, at 1.

New Mexico makes it a misdemeanor to claim that a product contains honey unless it is made of "pure honey produced by honeybees." Florida criminalizes the display of deformed animals and the peddling of untested sparklers, as well as the mutilation of the Confederate flag for "crass or commercial purposes." Pretending to be a member of the clergy is a misdemeanor in Alabama, and Kentucky bans the use of reptiles during religious services. Maine prohibits the catching of crustaceans with anything but "conventional lobster traps," Colorado makes it a misdemeanor to hunt wildlife from an aircraft, and Texas declares it a felony to trip a horse or "seriously overwork" an animal. In turn, California forbids "three card monte" and, as a general rule, cheating at card games, while it's a crime in Illinois to camp on the side of a public highway or offer a movie for rent without clearly

- Nearly every American jurisdiction continues to add new offenses and enhanced punishments for certain “vices” involving voluntary transactions for desired goods and services (e.g., drugs and sex).¹² While many penal codes prohibit behaviors related to vice activity,¹³ some jurisdictions have gone even further by criminalizing, for example, the distribution of devices used for sexual stimulation.¹⁴ And after Congress passed legislation that expanded the ban on maintaining property for drug activity,¹⁵ lawmakers contemplated a pair of bills that would punish those who hold an “entertainment event” where drugs might be consumed.¹⁶ Worse yet, the federal government apparently recognizes few limits in its enforcement of drug laws, as demonstrated

displaying its rating. Add to those gems countless local offenses, such as playing frisbee on Galveston beaches after being warned by a lifeguard, molesting monarch butterflies in Pacific Grove, California, failing to return library books in Salt Lake City, or annoying birds in the parks of Honolulu.

Id. at 1, 15. *See, e.g.*, FLA. STAT. ch. 877.16 (2001) (banning display of deformed animal); FLA. STAT. ch. 791.013 (2001) (prohibiting sale of untested sparklers); FLA. STAT. ch. 256.10 (2001) (proscribing words or acts that “cast contempt upon the flags of the Confederacy”); ME. REV. STAT. ANN. tit. 12, § 6432 (West Supp. 2004) (criminalizing catching lobsters with anything but “conventional lobster traps”); COLO. REV. STAT. § 33-6-124(2) (2003) (banning wildlife hunting from aircraft); TEX. PENAL CODE ANN. § 42.09(a)(8),(10) (Vernon 2003) (prohibiting the tripping of horses and seriously overworking of animals); CAL. PENAL CODE § 332(a)-(b) (West 1999) (criminalizing certain card games and dishonesty); 605 ILL. COMP. STAT. 5/9-124 (2002) (prohibiting camping on the side of public highways); 720 ILL. COMP. STAT. 395/3, 395/4 (2002) (requiring official rating to be displayed on all videos for rent). *See also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 515-16 (2001) [hereinafter Stuntz, *Pathological Politics*] (listing strange laws).

12. *See* Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 528-33 (2000) [hereinafter Luna, *Principled Enforcement*] (providing examples of vice crimes); *see also* Stuntz, *Pathological Politics*, *supra* note 11, at 572-76 (discussing criminalization of vice).

13. This would include banning the possession of drug paraphernalia and making it a crime to loiter for drug or sex transactions. *See, e.g.*, FLA. STAT. ch. 893.145-.147 (2001) (declaring a broad range of items as paraphernalia when used to make or ingest drugs); ARK. CODE ANN. § 5-71-213 (Michie 1997) (establishing factors that constitute loitering).

14. *See, e.g.*, ALA. CODE § 13A-12-200.2 (Supp. 2004) (prohibiting the exchange of “any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value”), *upheld by Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1233 (11th Cir. 2004) (rejecting the argument that prohibition was unconstitutional).

15. *See* Illicit Drug Anti-Proliferation Act of 2003, Pub. L. No. 108-21, § 608(b)-(c), 117 Stat. 650, 691 (2003) (codified at 21 U.S.C. § 856 (Supp. 2004)) (adding “lease, rent, [and] use” to the types of proscribed activities).

16. *See* Clean, Learn, Educate, Abolish, Neutralize, and Undermine Production (CLEAN-UP) of Methamphetamines Act, H.R. 834, 108th Cong. § 305 (2003) (extending criminal liability to promoters of any “rave, dance, music, or other entertainment event” where the promoter knew or should have known that controlled substances would be used or distributed); Ecstasy Awareness Act of 2003, H.R. 2962, 108th Cong. § 2 (2003) (proposing a similar offense for “rave[s] or similar electronic dance[s]” applicable to anyone who gains monetarily from an event). *See generally* Jacob Sullum, Editorial, *When Holding a Party is a Crime*, N.Y. TIMES, May 30, 2003, at A27 (arguing against such legislation).

by the prosecution of medicinal marijuana providers¹⁷ and the exploitation of the anti-terrorism USA Patriot Act to investigate suspected drug offenders.¹⁸

- Countless petty offenses, civil infractions, and traffic ordinances are handled by law enforcement in the same fashion as serious offenses or are bootstrapped into quasi-crimes through legal fictions. Juveniles are not only liable for violations of the relevant penal code, but also for a variety of “status offenses” involving behaviors that are perfectly legal for adults—staying out late, smoking or chewing tobacco, drinking alcohol, having sexual relations, failing to attend class, and so on.¹⁹ What is more, police have been used to enforce a school’s internal rules of conduct, with children arrested for, *inter alia*, violating the student dress code.²⁰ Although juvenile justice systems are premised on the paternalistic goals of the state and the allegedly “civil” nature of the proceedings, the resulting penalty may be no different from standard criminal punishment: involuntary confinement.²¹ Equally important, the harm done to a child—including emotional and physical abuse at the hands of fellow delinquents and even state officials in juvenile detention centers—does not depend on whether the predicate offense is one of violence or of status.²²

17. See, e.g., Dean E. Murphy, *A California Cultivator of Medical Marijuana is Convicted on Federal Charges*, N.Y. TIMES, Feb. 1, 2003, at A14 (discussing the trial of Ed Rosenthal, who was convicted on federal drug cultivation and conspiracy charges despite growing marijuana pursuant to California’s medical marijuana law). But see *United States v. Rosenthal*, 266 F. Supp. 2d 1091, 1098 (N.D. Cal. 2003) (reducing Rosenthal’s sentence).

18. See, e.g., Eric Lichtblau, *U.S. Uses Terror Law to Pursue Crimes From Drugs to Swindling*, N.Y. TIMES, Sept. 28, 2003, at A1 (noting the Justice Department’s use of new powers in non-terrorism cases).

19. See, e.g., BARRY C. FELD, *CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION* 123-58 (2d ed. 2004) (discussing status offenses).

20. See, e.g., Sara Rimer, *Unruly Students Facing Arrest, Not Detention*, N.Y. TIMES, Jan. 4, 2004, at A1 (describing arrests of students in Toledo, Ohio school system, as well as additional arrests for turning out bathroom lights and throwing a tantrum while in “time-out”).

21. See, e.g., David M. Halbfinger, *Care of Juvenile Offenders in Mississippi is Faulted*, N.Y. TIMES, Sept. 1, 2003, at A13 (detailing abuses in Mississippi’s state-run facilities for juvenile delinquents).

22. See *id.* (reporting rampant physical abuse of children in such facilities). At one time, federal law effectively prohibited the imprisonment of status offenders. See *Juvenile Justice and Delinquency Prevention Act*, Pub. L. No. 93-415, § 223(a)(12), 88 Stat. 1109, 1121 (1975) (codified as amended in scattered sections of 42 U.S.C. and 18 U.S.C.) (conditioning state receipt of certain federal grant money on removal of juvenile status offenders from detention centers). However, Congress soon created a loophole to this ban, allowing for the detention of juvenile status offenders who violate any court order. *Juvenile Justice Amendments of 1980*, Pub. L. No. 96-509, § 11(a)(13), 94 Stat. 2750, 2759 (codified at 42 U.S.C. § 5633(a)(11)(A)(ii) (2000)). See also Halbfinger, *supra* note 21, at A13 (remarking that seventy-five percent of girls at a Mississippi training school were status offenders or probation violators).

- But minors are not the only ones treated like criminals for seemingly non-criminal behavior; individuals have been arrested for eating food and talking loudly on a cell phone near Metro stations in Washington, D.C.,²³ for instance, and low-level offenses such as loitering and violating subway rules have resulted in abusive strip-searches in New York City.²⁴ The U.S. Supreme Court has even put its imprimatur on full-fledged arrests for, respectively, refusal to identify one's self²⁵ and failure to wear a seatbelt.²⁶ In addition, law enforcement agents around the nation continue to use the local vehicle code and other low-level violations as pretexts to rummage around for unrelated offenses, most notably, to search motorists and pedestrians for drugs and guns.²⁷
- Over the past century, the federal government has slowly but surely secured a general police power to enact virtually any crime. Among other things, Congress has adopted repetitive and overlapping statutes, extended criminal liability to behavior that is already well-covered by state laws and local enforcement, and created newfangled but mostly superfluous offenses like "carjacking"²⁸ that deal with conduct addressed by existing provisions such as robbery and kidnapping.²⁹

23. See Lyndsey Layton, *Bitter Taste of Metro Arrest Lingers*, WASH. POST, Oct. 8, 2004, at B1, B3 (detailing arrests on the District of Columbia's Metro system for finishing a candy bar and talking loudly on a cell phone).

24. See, e.g., William Glaberson, *Suit Accuses Police in Brooklyn of Strip-Searches in Minor Cases*, N.Y. TIMES, Oct. 30, 2003, at A1 (reporting on a federal lawsuit alleging that police officers at Central Booking in Brooklyn routinely strip-searched misdemeanor arrestees, often in front of other detainees).

25. See *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 124 S. Ct. 2451 (2004) (upholding suspect's arrest for failing to provide his name to an officer pursuant to Nevada's "stop and identify" law).

26. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (affirming arrest and detention for non-jailable offense of failing to wear a seat belt).

27. See *Whren v. United States*, 517 U.S. 806 (1996) (holding that an officer's subjective intent and ubiquity of traffic violations are legally irrelevant to Fourth Amendment inquiries so long as there was probable cause to believe that any law had been broken); David A. Harris, "Driving While Black" and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545-57 (1997) (criticizing *Whren* as legitimizing the stop of any American driver and arguing that police predominantly use this discretion against minority groups); WILLIAM BRATTON, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC 213-14, 227-29 (1998) (discussing New York City's crime reduction strategy of arresting low-level offenders, often in an attempt to search for or extract information about additional crimes); Bernard H. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) (critiquing the "broken windows" theory and New York City's order-maintenance policing).

28. See 18 U.S.C. § 2119 (2000) (imposing federal criminal liability on those who take motor vehicles by force, violence, or intimidation and "with the intent to cause death or serious bodily harm").

29. Compare *id.* (defining carjacking), with *Commonwealth v. Jones*, 267 Va. 284, 286, 591 S.E.2d 68, 70 (2004) (detailing Virginia's common law definition of robbery, which prohibits the taking of any property of another by violence or intimidation), and MODEL PENAL CODE §§ 222.1, 223.2 (1985) (defining robbery as inflicting or threatening to inflict

National lawmakers have also dispensed with traditional constraints on culpability when ostensibly acting on behalf of the public welfare.³⁰ The U.S. Supreme Court has long acquiesced to federal crimes that lack a *mens rea* requirement and instead impose liability in the absence of a guilty mental state (i.e., “strict liability”),³¹ and contemporary regulations often reject the historic limitations on vicarious criminal responsibility for the acts of others.³²

- The impact of this jurisprudential transformation has been exacerbated by the rise of the modern administrative state, erecting a vast legal labyrinth buttressed by criminal penalties in areas ranging from environmental protection and securities regulation to product and workplace safety. Many public welfare offenses, such as submitting an incorrect report³³ or serving in a managerial role when an employee violates agency regulations, expose otherwise law-abiding people to criminal sanctions. For example, a construction supervisor was sentenced to six months imprisonment under the Clean Water Act when one of his employees accidentally ruptured an oil pipeline with a backhoe,³⁴ and a Michigan landowner was recently convicted under the

serious bodily harm on another during the taking of another’s property), *and* *Spencer v. Commonwealth*, 42 Va. App. 443, 448, 592 S.E.2d 400, 402 (2004) (“[C]arjacking is a species of robbery.”).

30. Of course, state penal codes have also incorporated the concept of strict liability. *See, e.g., People v. Dillard*, 201 Cal. Rptr. 136 (Cal. Ct. App. 1984) (upholding a conviction for carrying a loaded firearm in a public place and deeming irrelevant defendant’s lack of knowledge that the weapon was loaded).

31. *See United States v. Park*, 421 U.S. 658, 663-64, 670-73 (1975) (observing that the Federal Food, Drug, and Cosmetic Act does not require conscious wrongdoing and affirming conviction of a chief executive officer for unsanitary food storage conditions); *United States v. Dotterweich*, 320 U.S. 277, 280-81, 285 (1943) (holding a corporate president criminally liable under same law without proof of a culpable mental state because he stood in “responsible relation” to the corporation’s distribution of mislabeled pharmaceuticals); *see also United States v. Balint*, 258 U.S. 250, 251-52 (1922) (refusing to read into a statute the common law requirement of a culpable mental state when legislative intent indicates that the statute’s purpose was to allocate risk to a certain class of actors).

32. *See* Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, 7 HERITAGE FOUND. LEGAL MEM. 1, 3-12 (2003) (discussing elimination of *mens rea* requirements and limitations on vicarious liability). Vicarious liability might be seen as connected to or as a subset of strict liability, although one authority rejects the notion that one necessarily flows from the other. WAYNE R. LAFAYE, *CRIMINAL LAW* 268-69, 269 n.22 (3d ed. 2000) (“There is no basis for assuming that vicarious liability necessarily follows from strict liability,” nor “for the assumption that vicarious liability can never be imposed for crimes requiring mental fault by the employee.”)

33. *See, e.g., 33 U.S.C. § 1319(c)(4)* (2000) (criminalizing the making of a false statement in any document required to be filed or maintained under the Clean Water Act); *United States v. Weitzenhoff*, 35 F.3d 1275, 1283-85 (9th Cir. 1993) (holding that a violation of the Clean Water Act does not require knowledge of relevant provisions or illegality of conduct).

34. *See United States v. Hanousek*, 176 F.3d 1116, 1120-22 (9th Cir. 1999) (upholding conviction of a supervisor under the Clean Water Act when a backhoe operator ruptured a pipeline because, *inter alia*, legislation was enacted for the public welfare); *see also United States v. Hanousek*, 528 U.S. 1102, 1103-04 (2000) (Thomas, J., dissenting from denial of

same statute for moving sand onto his property without a federal permit.³⁵

- In addition, the federal government has assumed unlimited authority to prosecute various forms of deception, with criminal statutes stretched to embrace garden-variety dishonesty, promise-breaking, and breaches of fiduciary duty.³⁶ In one case, a union leader was convicted of false statements for simply replying “no” when asked by federal investigators whether he had accepted a bribe,³⁷ while in another case a university professor was found guilty of mail fraud for granting degrees to students who had plagiarized their work.³⁸ Moreover, federal fraud statutes and laws such as the Travel Act³⁹ allow prosecutors to take a legal violation in another jurisdiction and literally “make a federal crime out of it.”⁴⁰ Not only have minor, infrequently

certiorari) (contending that the Clean Water Act’s criminal penalties and regulation of ordinary activity prevent it from being described as public welfare legislation); Rosenzweig, *supra* note 32, at 1-2, 4, 8, 10, 13-14 (describing and criticizing *Hanousek*).

35. See *United States v. Rapanos*, 376 F.3d 629, 632-33, 640-44 (6th Cir. 2004) (affirming defendant’s conviction under the Clean Water Act due to classification of his property as federally protected “wetlands”); see also Felicity Barringer, *Michigan Landowner Who Filled Wetlands Faces Prison*, N.Y. TIMES, May 18, 2004, at A20 (describing *Rapanos* case and discussing prosecutions under the Clean Water Act); Editorial, *Wetlands Desperado*, WALL ST. J., Aug. 23, 2004, at A12 (criticizing *Rapanos* case and disproportionate punishment). See generally James V. DeLong, *The New “Criminal” Classes: Legal Sanctions and Business Mangers*, in GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING 9 (Gene Healy ed., 2004) [hereinafter GO DIRECTLY TO JAIL] (noting that the Department of Justice had convicted 740 individuals and collected \$297 million in criminal penalties under federal environmental law by 1995); Timothy Lynch, *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*, in GO DIRECTLY TO JAIL, *supra*, at 45 (critiquing criminal prosecutions under federal environmental laws).

36. See, e.g., 18 U.S.C. § 1001(a)(2) (2000) (criminalizing false statements made pursuant to “any matter” within any branch of the federal government); 18 U.S.C. § 1341 (2000) (proscribing various fraudulent transactions utilizing the Postal Service or private interstate mail carriers); 18 U.S.C. § 1343 (2000) (prohibiting similar fraudulent transactions over interstate wire, radio, and television signals); 18 U.S.C. § 1346 (2000) (defining “scheme or artifice to defraud” under § 1341 and § 1343 as including a plan to “deprive another of the intangible right to honest services”). See also Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 289 (1998) (citing over three hundred federal proscriptions against fraud and misrepresentation).

37. See *United States v. Brogan*, 522 U.S. 398, 399-406 (1998) (affirming defendant’s conviction under 18 U.S.C. § 1001 for making a false statement regarding his receipt of bribes); see also Stuntz, *Pathological Politics*, *supra* note 11, at 551-52 (discussing *Brogan*’s interpretation of the federal false statements statute as an example of broad criminal liability used by prosecutors as leverage in negotiating guilty pleas).

38. See *United States v. Frost*, 125 F.3d 346, 363-70 (6th Cir. 1997) (reasoning that defendant professors deprived the institution of its intangible right to honest services); see also Stuntz, *Pathological Politics*, *supra* note 11, at 517 n.55 (offering *Frost* as an example of overextended mail fraud liability).

39. 18 U.S.C. § 1952 (2000).

40. See, e.g., *U.S. Senate Judiciary Committee Holds a Hearing on Federal Sentencing Guidelines*, 108th Cong. 5 (2004) (statement of Sen. Leahy) (criticizing tendency “to take whatever the latest issue was in the newspaper that day” and make it a federal offense in order to get “a great press release back home that allowed members of Congress to show

applied state laws been pursued as federal felonies,⁴¹ but defendants have also been convicted in U.S. District Court for violating the laws of *foreign nations*.⁴²

- Both federal and state governments have contributed over the past quarter century to a punishment binge of unprecedented size and scope. Although the downfall of the “rehabilitative ideal”⁴³ and the rise of determinate sentencing were supposed to herald an age of fairness and proportionality, the upshot has been a massive increase in punishment irrespective of theoretical justification or practical experience. Anti-recidivist statutes and “mandatory minimums” have been particularly popular, imposing stiff punishment regardless of all other considerations.⁴⁴ Some of the most notorious examples involve low-level drug offenders and other minor criminals sentenced to years or even decades in federal prison.⁴⁵ In one recent case, a young man

just how tough they are on crime”).

41. See, e.g., *United States v. Welch*, 327 F.3d 1081, 1090-1103 (10th Cir. 2003) (upholding, *inter alia*, a federal felony indictment for violation of Utah’s commercial bribery statute, a misdemeanor under state law).

42. See, e.g., *United States v. Pasquantino*, 336 F.3d 321, 324 (4th Cir. 2003) (en banc) (affirming a defendant’s federal conviction for violating Canadian tax law through the use of interstate wires), *cert. granted*, 124 S. Ct. 1875 (2004). See also *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003) (upholding federal conviction for violation of Honduran fishing regulations), *cert. denied*, 540 U.S. 1177 (2004); Ellen Podgor & Paul Rosenzweig, Editorial, *Bum Lobster Rap*, WASH. TIMES, Jan. 6, 2004, at A14 (criticizing the *McNab* prosecution and noting that the Honduran government believed that its laws had not been violated and had filed an *amicus curiae* brief in support of the *McNab* defendants).

43. See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 1-31 (1981) (discussing the rehabilitative model of penology, which viewed the goal of criminal sanctions as changing the convicted offender’s character).

44. California’s “Three Strikes” scheme may be the most infamous anti-recidivist law, with defendants receiving sentences of twenty-five years to life for, among other things, stealing a slice of pizza. See CAL. PENAL CODE § 667(e)(2)(A) (West 1999 & Supp. 2005) (requiring an indeterminate life sentence, with a mandatory minimum of at least twenty-five years, where the defendant has been convicted of any felony and has two or more prior serious or violent felony convictions); CAL. PENAL CODE § 1170(c) (West Supp. 2005) (same); Michael Vitiello, *Reforming Three Strikes’ Excesses*, 82 WASH. U. L.Q. 1, 2 (2004) (noting “extreme cases resulting in 25-years-to-life terms of imprisonment—cases involving petty third strikes like the theft of a bicycle or piece of pizza”); see also *Ewing v. California*, 538 U.S. 11, 28-31 (2003) (upholding twenty-five years to life sentence for the offense of stealing three golf clubs valued at twelve hundred dollars); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (affirming two consecutive twenty-five years to life sentences for two thefts of videotapes). See generally Vitiello, *supra*, at 4-17 (contending that the expense of California’s Three Strikes law far outweighs any benefits it provides); Anthony Kline, *Comment: The Politicalization of Crime*, 46 HASTINGS L.J. 1087, 1087-94 (1995) (discussing Three Strikes law’s troublesome consequences for the judiciary).

45. See, e.g., Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, 458 CATO POL’Y ANALYSIS 1, 17-19 (2002) [hereinafter Luna, *Misguided Guidelines*] (providing examples of lengthy mandatory sentences for drug offenses); see also 21 U.S.C. § 841(b) (2000) (establishing levels of mandatory minimum sentences for federal drug offenses). But cf. *United States v. Booker*, 125 S. Ct. 738 (2005) (holding that the federal sentencing guidelines violate the Sixth Amendment insofar as they require judges to increase punishment above the maximum allowable sentence based on the jury verdict alone).

convicted of selling marijuana on three occasions while carrying (but not brandishing) a firearm received a fifty-five year sentence even though the trial court described the punishment as “unjust, cruel, and even irrational.”⁴⁶

At first blush, these laws, cases, and anecdotes appear to lack a common thread that runs throughout, something that would justify their shared categorization. As will be suggested below, however, the key unifying theme is the government’s ready misuse of crime and punishment as concepts and the criminal justice system as an institution. Every augmentation provides officials a new legal instrument to apply against members of the so-called “criminal class” (many of whom look remarkably similar to the class of “normal” folks). Whether any given instance might be seen as abusive, of course, depends on an individual’s personal predispositions and intellectual commitments, whatever they may be. But in general, “American criminal law’s historical development has borne no relation to any plausible normative theory,” William Stuntz suggests, “unless ‘more’ counts as a normative theory.”⁴⁷ Instead, the above examples and others like them would be deemed unjustifiable under a number of philosophical traditions as inappropriate manipulations of the criminal sanction and the legal system. Each is a case in point of what I will term *overcriminalization*, a socio-political phenomenon that might be evaluated in the aggregate for causes, consequences, and correctives. In particular, Part I will offer an account of overcriminalization, while Part II will consider why the phenomenon occurs and what are the ensuing costs. Part III will briefly mention the various solutions tendered to date as well as their limitations. It will then examine a particular strand of moral philosophy—libertarianism—as a potential theoretical structure to confront

46. *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004); *see also* Angie Welling, *55-year Term Assailed*; *Utah Judge Reluctantly Hands the Mandatory Sentence to Offender*, DESERET MORNING NEWS, Nov. 17, 2004, at B1 (describing outrage over sentence and noting that twenty-nine former federal judges and prosecutors joined in Angelos’ argument that his punishment was unconstitutional). Ironically, defendant Angelos might have received another 78-97 months imprisonment prior to the Supreme Court’s *Booker* decision. *See Angelos*, 345 F. Supp. 2d at 1260-61 (holding Guidelines unconstitutional as applied to defendant). Ironfisted mandatory minimum sentences have emerged outside of the drug enforcement context as well, with, for instance, a defendant sentenced to fifteen years imprisonment for possession of a single bullet with neither a firearm nor nefarious motives. *See United States v. Yirkovsky*, 259 F.3d 704, 707 (8th Cir. 2001) (reasoning that although a sentence of fifteen years for possessing a single bullet “is an extreme penalty under the facts as presented to this court,” “our hands are tied in this matter by the mandatory minimum sentence which Congress established”); *see also United States v. Yirkovsky*, 276 F.3d 384, 385 (8th Cir. 2001) (Arnold, J., dissenting from denial of rehearing en banc) (suggesting “that on its face the sentence is grossly disproportionate to the offense for which it was imposed”); Luna, *Misguided Guidelines*, *supra* note 45, at 19 (detailing Yirkovsky’s case and noting that prosecutors used the threat of a lengthy sentence to attempt to extract information about other crimes).

47. Stuntz, *Pathological Politics*, *supra* note 11, at 508.

the phenomenon. Finally, Part IV will describe the theory's import for issues of criminal justice and present an application of the libertarian premise to a pending congressional bill.

I. DEFINING THE PHENOMENON

To be clear, the criminalization phenomenon has been the topic of legal scholarship for years. Renowned figures of criminal justice like Sanford Kadish and Herbert Packer have addressed the uniquely American penchant for crime and punishment,⁴⁸ with additional scrutiny provided by contemporary scholars such as John Coffee, William Stuntz, and many others.⁴⁹ Yet for all the ink spilled, the phenomenon persists to this day. A recent report concluded that the erratic body of federal law has now swelled to more than four thousand offenses that carry criminal punishment,⁵⁰ and other works have noted similar upsurges in the number of crimes at the state level.⁵¹ As suggested by the previous examples, however, overcriminalization is not merely a problem of too many crimes akin to an opera having "too many notes."⁵² Instead, it encompasses a broad array of issues, including: what should be denominated as a crime

48. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 250-366 (1969); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967). See also NORVAL MORRIS & GORDON HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* (1970) (addressing political misuse of the criminal justice system).

49. See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991) [hereinafter Coffee, *Reflections*]; John C. Coffee, Jr., *Hush!: The Criminal State of Confidential Information after McNally and Carpenter and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121 (1988); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875 (1992) [hereinafter Coffee, *Paradigms Lost*]; Stuntz, *Pathological Politics*, *supra* note 11; William J. Stuntz, *Reply: Criminal Law's Pathology*, 101 MICH. L. REV. 828 (2002); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996) [hereinafter Stuntz, *Civil-Criminal Line*]. See also John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 674 (1999) ("Throughout the twentieth century, particularly since 1970, federal law has further encroached on the domain of state and local crime."); Ellen S. Podgor, *Do We Need a "Beanie Baby" Fraud Statute?*, 49 AM. U. L. REV. 1031 (2000) (critiquing the contemporary trend of enacting statutes to cover every new instance of fraud).

50. John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUD. (2004), available at <http://www.fed-soc.org/Publications/practicegroupnewsletters/criminallaw/crimreportfinal.pdf>.

51. See, e.g., Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 170-73 (2003) (describing and criticizing expansion of criminal codes); Stuntz, *Pathological Politics*, *supra* note 11, at 515 ("[A]nyone 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.").

52. In the 1984 Academy Award-winning movie *Amadeus*, Emperor Joseph II complained that Mozart's opera had "simply too many notes." "Just cut a few," the Emperor suggested, "and it will be perfect." *AMADEUS* (Warner Bros. 1984).

and when it should be enforced; who falls within the law's strictures or, conversely, avoids liability altogether; and what should be the boundaries of punishment and the proper sentence in specific cases.

The treatment of these seemingly disparate state actions as a single, comprehensive phenomenon requires explanation, and for me, at least, an adequate rationale stems from the very nature of criminal law and the attendant power of enforcement. When society designates as "crime" particular acts accompanied by a sufficient degree of subjective awareness or intent, it makes a critical moral judgment about the wrongfulness of such conduct, the resulting harm caused or threatened to others, and the culpability of the perpetrators.⁵³ And when society punishes an individual for having committed a crime, the magnitude of the sentence represents a concomitant decision about the degree of wrongfulness, harmfulness, and culpability, all in service of the legitimate goals of punishment—namely, to prevent future criminality and/or to justly punish individuals for past misconduct.⁵⁴ Each of the assumptions underlying the denomination of crime and the determination of punishment can be deemed necessary but insufficient criterion to invoke the full power of the criminal justice system. Having the common cold may be potentially harmful in some sense—after all, who wants to catch another person's illness?—but it seems ridiculous to claim that the "perpetrator" harbors the degree of responsibility and his "conduct" evinces the type of wrongdoing necessary to justify labeling him a *criminal* subject to *punishment*.⁵⁵

Instead, the criminal sanction should be reserved for specific behaviors and mental states that are so wrongful and harmful to their direct victims or the general public as to justify the official condemnation and denial of freedom that flow from a guilty verdict. In fact, these consequences for the individual distinguish criminal justice from all other areas of law. The state

53. In his excellent discussion of the moral content of criminal law, Stuart Green defines these three essential concepts as follows:

[T]he term "culpability" refers to the moral value attributed to a defendant's state of mind during the commission of a crime Culpability reflects the degree to which an individual offender is blameworthy or responsible or can be held accountable Social harmfulness reflects the degree to which a criminal act causes, or risks causing, harm. "Harm" is normally defined as an intrusion into a person's interest Moral wrongfulness involves conduct that violates a moral norm or standard. Like social harmfulness, it refers to the moral content of a defendant's criminal act, rather than to the moral status of the actor. Killing, raping, and stealing all are morally wrongful acts.

Stuart Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1547-51 (1997) (internal citations omitted).

54. See, e.g., Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 207-27 [hereinafter Luna, *Punishment Theory*] (discussing traditional punishment theories).

55. See *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

authority to deprive freedom or even life itself—the most potent action any government can take against the governed—is *sui generis*. The process of civil justice redistributes wealth to compensate individuals for injuries of tort and contract, none of which is pleasant for the civil defendant. But it almost goes without saying that incarceration (or death, of course) is different in kind, rather than degree, from monetary dispossession,⁵⁶ involving an incomparable denial of human dignity and autonomy. The practical consequences of involuntary confinement (e.g., prison rape⁵⁷) only accentuate the distinction between acts and mental states identified as crime and those regarded as tort or contractual breach. Moreover, the stigma associated with the brand of “criminal” cannot be equated to the relatively mild designation of “tortfeasor” or “contract-breaker.”⁵⁸ Not only are convicted offenders viewed as outcasts subject to social scorn, but they are also deprived of the rights and benefits accorded to others, including the opportunity for political participation and gainful employment.⁵⁹ Given the moral gravity of decision-making in criminal justice and the unparalleled consequences that flow from such determinations, criminal liability and punishment must always be justifiable in inception and application.⁶⁰

56. See, e.g., Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 772-73 (2004) (“The most important difference between the criminal law and other bodies of law, or systems of social control that are not modes of law at all, is that the former subjects offenders to punishment.”); Stuntz, *Civil-Criminal Line*, *supra* note 49, at 24-25 (“Criminal punishment often means prison, and prison is both different from and worse than money damages.”). As demonstrated by modern juvenile justice systems, however, *de facto* criminal adjudication may be disguised as a civil proceeding. “[J]uvenile proceedings to determine ‘delinquency,’ which may lead to commitment to a state institution, must be regarded as ‘criminal,’” the U.S. Supreme Court declared nearly four-decades ago. “To hold otherwise would be to disregard substance because of the feeble enticement of the ‘civil’ label-of-convenience which has been attached to juvenile proceedings.” *In re Gault*, 387 U.S. 1, 49-50 (1967). Cf. *Hudson v. United States*, 522 U.S. 93, 99-100 (1997) (formulating a test to determine whether a proceeding is criminal or civil); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997) (discussing the difficult distinction between criminal and civil proceedings in determining what constitutes “punishment”).

57. See, e.g., Adam Liptak, *Ex-Inmate’s Suit Offers View Into Sexual Slavery in Prisons*, N.Y. TIMES, Oct. 16, 2004, at A1 (reporting on the brutal realities of prison rape); HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001), available at <http://hrw.org/reports/2001/prison/report.html> (last visited Feb. 19, 2005) (detailing personal accounts of inmate rape based on information from more than three hundred prisoners in thirty-four states).

58. Cf. SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 51 (1987) (arguing that crime involves a type of moral disapproval that does not necessarily attach to violations of the economic order); Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 546-48 (2004) (suggesting that punishment is designed to degrade an offender’s social dignity).

59. Symposium, *Beyond the Sentence: Post-Incarceration Legal, Social, and Economic Consequences of Criminal Convictions*, 30 FORDHAM URB. L.J. 1491 (2003).

60. See GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW xix (1978) (“[Criminal law’s] central question is justifying the use of the state’s coercive power against free and autonomous persons.”); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE

Overcriminalization, then, is the abuse of the supreme force of a criminal justice system—the implementation of crimes or imposition of sentences without justification. The phenomenon would certainly include far-fetched offenses like catching lobsters with something other than a “conventional” trap.⁶¹ Such crimes seem so deficient in harmful wrongdoing and beyond any legitimate rationale for state action as to flunk what I have previously described as the “laugh test.”⁶² It would also cover the full range of vice crimes and related offenses that continue to vex libertarians due to the absence of a cognizable violation of individual rights.⁶³ The same can be said for various economic offenses (e.g., criminal violations of certain antitrust laws) that are not merely extensions of the common law crime of larceny (e.g., embezzlement) but instead more “closely resemble[] acceptable aggressive business behavior” largely committed by “respectable people in the respectable pursuit of profit.”⁶⁴

In addition, overcriminalization may be seen in various legal devices that can expand criminal liability to individuals who hardly seem blameworthy, including strict liability offenses that dispense with culpable mental states,⁶⁵ vicarious liability for the acts of others without some evidence of personal advertence or even neglect,⁶⁶ and doctrines like conspiracy and its federal cousin, RICO,⁶⁷ that allow punishment for verbal collusion coupled with some scintilla of objective action. The phenomenon also comes in the form of grossly disproportionate penalties that bear no relation to the wrongfulness of the underlying crime, the harmfulness of its commission, or the blameworthiness of the criminal—such as a multiyear prison term for possessing a single bullet without a firearm or corrupt motive⁶⁸—

PHILOSOPHY OF LAW 1-27 (1968) (discussing the importance and principles of justification for punishment); Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335, 371-72 (2000) (asserting that “the liberty interest of citizens creates a presumption against the use of the criminal sanction, and that therefore criminal prohibitions stand in need of justification”); Husak, *Crimes Outside the Core*, *supra* note 56, at 773 (arguing that the enactment of crime and imposition of punishment must always be justified); Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151, 155-56 (1995) (similar).

61. See *supra* note 11 (citing Maine’s prohibition on catching lobsters with anything but “conventional lobster traps”).

62. See *id.*; Luna, *Overextending*, *supra* note 1, at 1.

63. See, e.g., *supra* note 143-56 (discussing libertarian understanding of individual rights); Luna, *Overextending*, *supra* note 1, at 15 (mentioning acts of prostitution, the possession, sale, or use of illegal drugs, and gambling as examples of vice).

64. KADISH, *supra* note 58, at 42, 50.

65. Luna, *Overextending*, *supra* note 1, at 15.

66. *Id.*

67. See Racketeer Influenced and Corrupt Practices Act (RICO), Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (2000)) (establishing criminal liability for members of organizations that engage in “racketeering activity”).

68. See *supra* note 46 (discussing the *Yirkovsky* case).

producing sentences that cannot contribute to the traditional goals of punishment in any meaningful sense.

The problem of overcriminalization may extend beyond the text of a given law as well, implicating the dubious application of the powers vested in lawmakers or enforcers. Superfluous offenses would fit within this group—duplicative penal code sections that simply retread the same conduct over and over again, for example, or new, allegedly necessary statutes (e.g., “carjacking”) that prohibit behavior already sufficiently addressed by existing law.⁶⁹ It would also include criminal provisions that go beyond the limited authority of a given jurisdiction, as demonstrated by the countless federal offenses that have only spurious connections to the constitutionally enumerated powers of Congress.⁷⁰ Likewise, this understanding of overcriminalization would incorporate abusive policing, such as state agents deploying the full weight of their authority to search and arrest based on trifling offenses or even civil infractions, which results in an overbearing and overreaching style of law enforcement worthy of the term “despotism.”⁷¹

In sum, this definition of the overcriminalization phenomenon consists of: (1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations. If this were a treatise, it would now be appropriate to provide a detailed discussion of why each of these categories and representative examples should be considered abuses of government authority. For instance, time might be spent analyzing the constitutional text and original understanding of federal jurisdiction on issues of criminal justice, discussing how Congress has the authority to criminalize truly national concerns connected to explicit provisions in America’s charter, such as treason and counterfeiting, but lacks a general police power to enact the type of comprehensive penal code found in the states. Specific federal offenses might then be examined, explaining why Congress exceeded its jurisdiction by criminalizing, for example, violations of boxer safety.⁷² Likewise, pages could be filled discussing how a voluntary transaction for illicit drugs and ingestion of the same is no more wrongful

69. See *supra* notes 28-29 and accompanying text (discussing carjacking).

70. See *infra* notes 164, 177-78 and accompanying text (detailing constitutional limits on congressional power).

71. See Stuntz, *Pathological Politics*, *supra* note 11, at 539 (suggesting that if crime is defined broadly enough, law enforcement officers have discretion to arrest “whomever they wish”).

72. See 15 U.S.C. §§ 6308-6309 (2000) (providing for fines or imprisonment for violations of the Professional Boxing Safety Act, 15 U.S.C. §§ 6301-6313 (2000), including provisions that require physician certification of boxers, renewal of boxer identification cards, and the reporting of boxer injuries to the appropriate registry).

than drinking a bottle of wine (or so the argument goes) and that no injury accrues to others so long as the consumer does not get behind the wheel. And, in fact, these types of arguments will be made below with regard to a bill currently pending in Congress.⁷³ But a relatively large body of scholarship, which I will simply adopt by reference,⁷⁴ challenges governmental power or prudence in each of the above categories and with regard to many of the particular instances of crime, punishment, or enforcement without justification.

It must be admitted, however, that my list is neither exhaustive nor universally adopted in academe; others may focus on harebrained offenses and redundant statutes, for example, while placing liability-expanding doctrines under a different heading.⁷⁵ Moreover, some of the categories and illustrations appear susceptible to a binary conclusion—the crime of prostitution is either justifiable or it is not—while other categories involve judgments of degree, such as the point at which punishment for a particular crime becomes excessive.⁷⁶ But one of the major deficiencies in existing analysis is the failure to see overcriminalization precisely for what it is: a broad phenomenon encompassing a multiplicity of concerns but always involving the unjustifiable use of the criminal justice system. By viewing the issues in isolation—the passage of silly crimes or the misapplication of vicarious liability or the imposition of disproportionate punishment, and so on—the bigger picture becomes lost, how government abuses its immense power in each situation as part of an alarming readiness to apply the criminal justice system without limitation throughout the entirety of American life.⁷⁷ And while some of the above categories and examples seem amenable to a thumbs-up/thumbs-down assessment while others raise

73. See *infra* notes 180-188 and accompanying text (discussing the Sensenbrenner Bill).

74. See, e.g., TASK FORCE ON THE FEDERALIZATION OF CRIM. L., AM. BAR ASSOC., REPORT ON THE FEDERALIZATION OF CRIMINAL LAW (1998) (analyzing and criticizing Congress' federalization of crime and punishment); STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS (1993) (critiquing drug criminalization); DOUGLAS N. HUSAK, DRUGS AND RIGHTS (1992) (questioning the legitimacy of state authority to punish adult drug users); Symposium, *Federalism and the Criminal Justice System*, 98 W. VA. L. REV. 757 (1996) (examining the relationship between federal and state criminal law enforcement); Symposium, *Federalization of Crime: The Roles of the Federal and State Governments in the Criminal Justice System*, 46 HASTINGS L.J. 965 (1995) (discussing the federalization of crime, as well as the increasing discretionary role of federal prosecutors and the politicization of crime and its damaging impact on state courts).

75. See, e.g., Stuntz, *Pathological Politics*, *supra* note 11, at 512-19 (focusing on, *inter alia*, trend toward more crimes, repetitive provisions, and exotic offenses).

76. Cf. *Harmelin v. Michigan*, 501 U.S. 957, 985-86 (1991) (Scalia, J., joined by Rehnquist, C.J.) (rejecting constitutional principle limiting prison sentences because of, *inter alia*, inadequate standards for when punishment has become disproportionate).

77. In Professor Kadish's words, "it is fair to say that until these problems of overcriminalization are systematically examined and effectively dealt with, some of the most besetting problems of criminal-law administration are bound to continue." KADISH, *supra* note 58, at 21.

questions of gradation, this does not mean that the latter should not qualify as overcriminalization. As with all matters of amount, there can be a large middle ground of dispute and yet substantial agreement at each end of a rational continuum. Although we can debate whether a year in prison for petty theft is justifiable, a life sentence for stealing a piece of pizza seems beyond the pale.⁷⁸

II. CAUSES AND CONSEQUENCES

If this understanding is accepted, questions remain as to why the overcriminalization phenomenon occurs and what are the resulting costs. Any number of accounts can be offered for America's propensity to use and abuse the criminal sanction, but let me offer some of the more plausible explanations. To begin with, the escalation of "law and order" politics in recent years has created a one-way ratchet in U.S. governance, churning out an ever-increasing number of crimes and severity of punishments.⁷⁹ As a rule, lawmakers have a strong incentive to add new offenses and enhanced penalties, which offer ready-made publicity stunts, but face no countervailing political pressure to scale back the criminal justice system.⁸⁰ Conventional wisdom suggests that appearing tough on crime wins elections regardless of the underlying justification, if only to provide another line on the résumé or potential propaganda for a grandstanding candidate, while it is difficult to recall a single modern politician who came into office on a platform of decriminalization or punishment reduction.⁸¹ As any competent political strategist knows, fear of crime can drive voters to the polls, and just as importantly, the potential benefits to powerful interest groups can fill campaign coffers.⁸² By

78. *Supra* note 44 (discussing Three Strikes cases).

79. *See, e.g., supra* notes 43-46 (describing America's punishment binge).

80. *See* Robinson & Cahill, *supra* note 51, at 169-73 (discussing the degradation of American criminal codes that occurs through the continuous stream of additions and amendments by legislators, particularly in response to interest-group lobbying and public outcry to high-profile cases). Professors Robinson and Cahill note that as a result of the "deluge of legislation," Illinois's criminal code is now twelve times longer than when it was originally enacted in 1961. *Id.* at 172.

81. *But see* Bulwa Demian, *Harris Defeats Hallinan After Bitter Campaign*, S.F. CHRON., Dec. 10, 2003, at A1 (noting that Terrence Hallinan, San Francisco's District Attorney until 2003, won consecutive victories in the 1990s despite touting one of the country's most progressive approaches to prosecution that included opposing the death penalty and supporting rehabilitative diversion programs and the legalization of marijuana).

82. For instance, after the horrific murder of twelve-year-old Polly Klaas by a recidivist with an extensive rap-sheet, the public's fear of violent crime seemed to offer California state officials no other option but to support the then-stalled Three Strikes bill. *See* Erik Luna, *Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 3-7 (1998) (describing the social and political environment that paved the way for Three Strikes). One California state senator confessed, "I don't think we have any choice [but to pass the Three Strikes law]," while another senator candidly admitted, "I'm going to vote for these turkeys because constituents want me to." *Id.* at 5 n.37. Moreover, one group with a professional and

contrast, individuals and organizations who oppose further augmentation of the penal code, including members of the criminal defense bar and civil liberties groups, can usually be ignored at virtually no political cost to those seeking elected office. And once codified, criminal provisions may be effectively unrepeatable.⁸³

Politicians have also become nimble in deploying the rhetoric of accepted justifications for state action in support of the otherwise unjustifiable. Lawmakers have claimed that the enactment of particular offenses and increased punishments will reduce crime through deterrence and incapacitation without supplying corroborating evidence, for example, or that such legislation will dole out what offenders “deserve” despite the weight of retributive arguments to the contrary.⁸⁴ Moreover, political demagogues can skillfully assert that whatever conduct is at issue produces the type of “harm” necessary for criminalization, when, in fact, the relevant behavior fails to infringe on any significant right or interest of others.⁸⁵ “Claims of harm have become so pervasive that the harm principle has become meaningless,” suggests Bernard Harcourt, as “the harm principle no longer serves the function of a *critical principle* because non-trivial harm arguments permeate the debate.”⁸⁶ Oftentimes, however, the real issue is one of symbolic or expressive politics, with groups seeking public recognition of the righteousness of their worldviews through the criminalization of behavior associated with their perceived enemies.⁸⁷

financial interest in incarcerating more criminals for longer periods of time—California’s prison guard union—poured money into the campaign for the anti-recidivist statute. See Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 436 n.242 (1997) (noting that the California Correctional Peace Officers Association (CCPOA) donated the second-highest amount in support of the Three Strikes bill); Fox Butterfield, *Political Gains By Prison Guards*, N.Y. TIMES, Nov. 7, 1995, at A1 (“[The CCPOA] has transformed itself into the most politically influential union in the state . . . to push not only for better benefits for its members but also for ever more prisons and tougher sentencing laws.”).

83. An interesting example is the continued existence of hoary anti-dueling statutes. See, e.g., MASS. ANN. LAWS ch. 265, §§ 3-4 (2002); MICH. COMP. LAWS §§ 750.171-.173 (2003); NEV. REV. STAT. § 200.410 (2003); OKLA. STAT. ANN. tit. 21, §§ 661-62 (West 2002); R.I. GEN. LAWS §§ 11-12-1, 11-12-4 (2002).

84. See Luna, *Punishment Theory*, *supra* note 54, at 250-58 (discussing the abuse of punishment theory for political purposes). Cf. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 414, 417 (1999) (suggesting that politicians make deterrence arguments “to minimize opposition to their preferred policy outcomes”).

85. For instance, the mere existence of pornography supposedly “harms” women, or so it is argued. See, e.g., Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 140-47 (1999) (discussing claims of “harm” in support of anti-pornography laws).

86. *Id.* at 113.

87. See generally JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (2d ed. 1986) (discussing the symbolic politics underlying alcohol prohibition); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984) (analyzing symbolic politics in the abortion debate); Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 63-91 (2002) (considering symbolic

Politicians figuratively “smash”⁸⁸ the face of the opposition by enacting crimes and punishments that express contempt for an alternative lifestyle, regardless of the harmfulness of the underlying act or culpability of the relevant actor.⁸⁹

The collapse of the harm principle, to use Professor Harcourt’s phrasing, can also be seen in the covert power of legal moralism and the modification of political dialogue on vice crimes. Religious notions of good and evil provided the original grounds for criminalizing behavior such as drug and alcohol use, gambling, prostitution, and a variety of consensual, non-commercial sexual activities.⁹⁰ For legal moralists, there could be no divide between crime and sin: “[T]he law must base itself on Christian morals and to the limit of its ability enforce them,” argued English jurist Lord Patrick Devlin, or “the law will fail.”⁹¹ Since the end of the Victorian age and its conception of virtue, many traditional vice crimes have become extinct, including the repeal of alcohol Prohibition in 1933 and, more recently, statutory and constitutional reforms on issues of sex.⁹² To a certain extent, legal moralism has been “properly killed off” and “the forces of superstition and oppression” repelled.⁹³ Various vice crimes remain to this day, however, while some offenses, such as those involving drugs, continue to swell in breadth and intensity. But any political reaffirmation or legislative expansion is not necessarily due to explicitly

politics in contentious issues such as gun control).

88. GUSFIELD, *supra* note 87, at 184-85.

89. As an aside, I was dismayed to discover that an amicus curiae brief in *Lawrence v. Texas* had cited and quoted my scholarship in support of the proposition that anti-sodomy statutes could be justified by their expressive content. Brief of Amici Curiae American Family Association et al. at 12-13, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102). The implication was patently false—the relevant article had described the various functions of law, including its use for symbolic or expressive purposes, without arguing that such functions were justifiable. Moreover, the brief failed to mention my express disclaimer within the article:

Let me reiterate, as to be clear on what is being said and, more importantly, what is *not* being said [T]he fact that law can serve a symbolic function apart from behavioral modification and has the power to delineate between socially acceptable conduct and repulsive nonconformity does *not* mean that it *should* be used in such a manner.

Luna, *Principled Enforcement*, *supra* note 12, at 545. Apparently (and thankfully), the brief had no effect on the Supreme Court’s decision. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down an anti-sodomy statute).

90. See, e.g., Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 407-11 (1963) (exploring the religious roots of morals legislation, such as bans on homosexuality, adultery, gambling, intoxication, etc.).

91. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 25 (1965).

92. See U.S. CONST. amend. XXI (repealing Prohibition); *Lawrence*, 539 U.S. at 558 (finding that an anti-sodomy law violated the Due Process Clause); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (striking down a statute banning the use of contraception by married persons as violating right to privacy).

93. Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 74-75 (1995).

moralistic arguments.⁹⁴ Instead, officials tend to rely on claims of harm in contemporary public debates—suggesting, for instance, that vulnerable people and society at large are “harmed” when someone, somewhere smokes marijuana or snorts cocaine.⁹⁵

Ironically, immorality in the philosophical sense (as compared to immorality from a purely religious or personal perspective) is no longer viewed by government as a prerequisite to invoke the criminal sanction.⁹⁶ In other words, behaviors need not be wrongful and harmful in any meaningful way and individuals need not be culpable before new crimes are enacted and their offenders punished. Rather, a legislator only has to point to some alleged need or hardship, no matter how minor or implausible, in order to rally his fellow lawmakers behind an otherwise unjustifiable penal statute. In the past few decades, easily exploited tropes like “corporate greed” have offered bumper sticker-style expressions that make even the most fanatical and foolish proposals impossible to stop. What is more, the margin between crime and tort has gradually disappeared, with behavior that only demanded financial compensation in the past now serving as grounds for imprisonment.⁹⁷ The end result has been the proliferation of an entire body of *morally neutral* criminal law, as Professor Kadish has described it,⁹⁸ including certain business and regulatory offenses that lack harmful wrongdoing as well as the doctrines of vicarious and strict liability, which dispense with individual culpability altogether. With these crimes and related principles, the only real source of legitimacy is their ratification by a democratic entity, while the only inducement for compliance is the generalized belief that laws should be obeyed backed by the threat of criminal enforcement. But even this slender justificatory foundation is undermined when the true basis for enactment and enforcement is unrelated to the ostensible rationale for the law, as when questionable crimes are used to search for other offenses or to squeeze money from the alleged criminal with an eye toward padding government budgets.⁹⁹

94. See Harcourt, *supra* note 85, at 139 (arguing that the harm principle has replaced the “1960s rhetoric of legal moralism”).

95. See *id.* at 172-76 (addressing the conflict between the early progressive arguments that drug use constituted “victimless crimes” and policies adopted a decade later that stressed a public health-based “harm reduction” agenda for illicit drugs).

96. See *supra* note 53 (providing a definition of the moral content of criminal law).

97. Professor Coffee’s scholarship is particularly enlightening on the blurred distinction between civil violations and punishable crimes. Coffee, *Reflections*, *supra* note 49; Coffee, *Paradigms Lost*, *supra* note 49.

98. KADISH, *supra* note 58, at 49-53; see also Green, *supra* note 53, at 1556-69 (analyzing how the concept of “moral neutrality” applies to different types of criminal activity, including strict liability and public welfare crimes, minor violations, and economic and regulatory crimes).

99. Examples include dubious traffic violations that are enforced solely to collect the

The greatest boon for law enforcement from overcriminalization is not purely financial, however, but rather professional and structural: increasing an officer's power and thus the potential for career advancement. Although law enforcers are generally charged to "do justice," they are not neutral and detached entities within the legal system, wholly indifferent to outcomes in particular cases or net results over time. Like all other professionals, police and prosecutors seek the personal esteem and promotion that accompany success, typically measured by the number of arrests for the former and convictions for the latter.¹⁰⁰ To put it bluntly, beat cops do not become homicide detectives by helping little old ladies across the street, and district attorneys are not reelected for dismissing cases or shrugging off acquittals. As Professor Stuntz has forcefully argued, the more crimes on the books, the more behavior that is restricted (and restricted in more ways), and the more punishment for a particular offense, the more clout police and prosecutors can exercise in the criminal justice system.¹⁰¹ By eliminating a hard-to-prove element or by making the offense one of strict liability, crimes become easier to establish at trial. And by raising the potential punishment—which can be done by, among other things, increasing the attached penalties, enacting an anti-recidivist statute, or charging a single course of conduct as multiple crimes (i.e., "charge stacking")—defendants are provided a strong disincentive to press their luck in court. All of this boosts the authority of police and prosecutors, allowing them to wield a bigger stick throughout the criminal process, and often leaves the accused little choice but to accept a plea bargain, which leads to more and cheaper convictions and, therefore, happier law enforcement officials. And when law enforcers are happier, so are lawmakers.¹⁰²

The one government body that could check political excesses and curb the overcriminalization phenomenon, the American judiciary, has largely

underlying fine or to search automobiles for contraband, as well as bogus regulatory and corporate crimes that are used as leverage to obtain large monetary settlements. See, e.g., Harris, *supra* note 27, at 561-63 (noting that in Volusia, Florida, "deputies aimed not only to make arrests, but to make seizures of cash and vehicles, which their agency would keep," with African Americans and Hispanics constituting more than seventy percent of all drivers stopped along a stretch of I-95).

100. See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 519 (2001) (stating that police organizations, like bureaucracies, tend to measure success quantitatively—by the number of citations issued, arrests made, and crimes solved—as opposed to more qualitative assessments); Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 347 n.46 (2003) (mentioning that conviction percentages are a large part of election or promotion in state and federal attorney's offices) (quoting REP. OF THE ILL. SENATE MINORITY LEADER'S TASK FORCE ON THE CRIM. JUST. SYS. 20 (2000)).

101. Stuntz, *Pathological Politics*, *supra* note 11, at 519-20, 531; Stuntz, *Civil-Criminal Line*, *supra* note 49, at 14-15.

102. See Stuntz, *Pathological Politics*, *supra* note 11, at 510, 528 (describing the natural alliance between legislators and prosecutors that contributes to overcriminalization).

failed to do so. The legal restrictions imposed on the power to criminalize and punish are far and few between, with the only vigorous substantive boundaries set in areas like speech and reproductive freedom. In contrast, more apt and generally applicable limitations—such as judicially imposed *mens rea* and actual notice requirements, barriers against shifting evidentiary burdens to the defense, and bans on status offenses and severe punishments—have become “derelict[s] on the waters of the law.”¹⁰³ For a variety of reasons, including the anxiety of appearing to be a *Lochner*-esque super-legislature, the courts have been hesitant to limit the political branches in their enactment and enforcement of substantive crimes and punishments.¹⁰⁴ It has even been argued that by strictly regulating the process of investigation and prosecution—often called the “criminal procedure revolution” in the law of search and seizure, confession, and legal representation—the judiciary has inadvertently encouraged politicians to overcriminalize.¹⁰⁵ While the Fourth Amendment generally requires that police have probable cause to search or arrest for an offense, for instance, and the Fifth Amendment restricts custodial interrogation of suspected criminals, these provisions have no bearing on what can be a crime in the first place.¹⁰⁶ As a result, if it proves difficult to uncover a particular

103. See *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting) (criticizing the majority’s imposition of a notice requirement as a deviation from the “strong current of precedents”). Compare *Robinson v. California*, 370 U.S. 660, 667 (1962) (striking down the crime of being a drug addict), with *Powell v. Texas*, 392 U.S. 514, 535 (1968) (upholding the crime of public intoxication). Compare also *Solem v. Helm*, 463 U.S. 277, 284 (1983) (striking down a sentence of life imprisonment without the possibility of parole for a recidivist convicted of passing a bad check for \$100), with *Rummell v. Estelle*, 445 U.S. 263, 265 (1980) (upholding a sentence of life imprisonment with the possibility of parole for a recidivist convicted of obtaining \$120.75 by false pretenses), and *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (upholding a sentence of twenty-five years to life for a recidivist convicted of stealing approximately \$150 worth of videotapes), and *Ewing v. California*, 538 U.S. 11, 20 (2003) (upholding a sentence of twenty-five years to life for a recidivist convicted of stealing three golf clubs).

104. See Stuntz, *Civil-Criminal Line*, *supra* note 49, at 5 (noting that serious substantive review of ordinary legislation has passed from the scene); see also *Lockyer*, 538 U.S. at 76 (holding that governing legal principles give legislatures broad discretion in determining the appropriate sentence for a crime); *Ewing*, 538 U.S. at 25 (noting the Court’s traditional deference to legislative policy choices and upholding California’s Three Strikes law as being within the boundaries of the Eighth Amendment).

105. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7 (1997) (arguing that criminalization reduces the cost of criminal procedure doctrines such as the probable cause requirement and the beyond a reasonable doubt standard and thereby gives the government an incentive to expand the scope of criminal law); Stuntz, *Civil-Criminal Line*, *supra* note 49, at 7-8 (explaining that criminal procedure rules without substantive limits may encourage the government to expand the scope of criminal liability).

106. See, e.g., *supra* notes 23-27 and accompanying text (discussing investigations and arrests for trivial behavior and supporting search-and-seizure jurisprudence). See Stuntz, *Civil-Criminal Line*, *supra* note 49, at 13 (observing that constitutional law leaves the definition of “crime” to politicians). Cf. *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in judgment) (suggesting that the Constitution does not require adoption of any one particular penological theory and that

offense consistent with the Constitution, lawmakers need only pass a statute that criminalizes conduct that is related but easier to detect and investigate, such as the precursors of the targeted behavior. Although the explanatory value of this claim can be debated, the bottom line remains the same: By and large, the overcriminalization phenomenon has gone unchecked by the courts.

So what are the consequences? As with the causes of overcriminalization, the resulting costs are numerous—but again, let me suggest just a few. Distended penal codes of vast criminal liability have a degenerative effect on an adversarial system in which law enforcers are not impartial bystanders but instead interested parties aggressively seeking arrests and convictions.¹⁰⁷ For prosecutors, overcriminalization produces a dangerous disparity of power, with, for instance, extreme sentences via mandatory minimums applied as leverage to squeeze out information or guilty pleas.¹⁰⁸ Prosecutorial supremacy through overcriminalization is troubling enough when the underlying crime and attached penalties are tenuous to begin with. But it also emasculates the constitutional rights of the accused—the presumption of innocence, the right to trial by jury, the requirement of proof beyond a reasonable doubt, and so on—threatening prolonged sentences for those who demand their day in court. It seems no stretch to argue that defendants are literally *punished* for exercising their rights.¹⁰⁹ The menace of excessive punishment is most alarming, however, when it is used to extract pleas from those with legitimate claims of innocence or excuse.¹¹⁰

As for the police, overcriminalization leads to immense discretion to stop motorists or pedestrians through legal pretexts, concealing discriminatory

courts should generally defer to legislatures and their policies).

107. *Supra* notes 100-102 and accompanying text.

108. *See, e.g.,* Luna, *Misguided Guidelines*, *supra* note 45, at 9-10, 17 (discussing prosecutorial use of potentially draconian punishment to extract information or guilty pleas); *United States v. Green*, 346 F. Supp. 2d 259, 265 (D. Mass. 2004) (arguing that federal prosecutors are “addicted to plea bargaining to leverage its law enforcement resources to an overwhelming conviction rate,” resulting in a system “heavily rigged against the accused citizen”).

109. *See, e.g., Green*, 346 F. Supp. 2d at 313 (arguing that harsh federal punishment has “dramatically reduced the use of criminal trials, in part by placing a heavy punitive price on those who exercise their right to a jury trial”); *United States v. Angelos*, 345 F. Supp. 2d 1227, 1232 (D. Utah 2004) (noting that the defendant “faced the choice of accepting 15 years in prison or insisting on a trial by jury at the risk of a life sentence”).

110. *See, e.g.,* C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, 18 CRIM. JUST. 15, 17 (Spring 2003) (noting that a social psychological experiment showed that “innocent ‘defendants’ were more likely to accept plea bargains when they faced a number of charges or when the probable severity of punishment was great”); Paul Craig Roberts, *The Causes of Wrongful Conviction*, 7 INDEP. REV. 567, 568-73 (Spring 2003) (suggesting that coercive plea bargaining leads to wrongful convictions), available at http://www.independent.org/pdf/tir/tir_07_4_roberts.pdf.

enforcement based on race, class, or ethnicity.¹¹¹ As David Harris has observed, few drivers travel more than three blocks without breaking some traffic law,¹¹² thus supplying a pretense for a drawn out detention and search. In fact, the all-encompassing nature of today's codes appears little different from a single statute declaring that law enforcement may pull over any car or stop any pedestrian at any time for any reason or, for that matter, no reason at all. More often than not, African Americans and Latinos are the subjects of such enforcement through the process of racial profiling or, as it is sometimes labeled with derision, "D.W.B."—"Driving While Black (or Brown)."¹¹³

At the level of political theory, broad and opaque discretion is difficult to square with notions of democratic legitimacy and produces a sort of secret law on the streets that is unrecorded and inaccessible, cannot be publicly debated by a fully informed citizenry, and thus prevents elected officials from being held accountable for their actions and those of their subordinates.¹¹⁴ But it also allows police and prosecutors to externalize the costs of enforcement on minorities whose grievances are never aired or, even worse, are totally ignored by government. In this sense, overcriminalization authorizes law enforcers to levy a regressive "racial tax,"¹¹⁵ an unwritten but very real burden for being poor and of color. It should be no surprise that many in the minority community do not trust government agents, regardless of good intentions—and as a consequence, both public officials and society at large will pay a significant price for the racial effects of overcriminalization: Mistrusting citizens are less likely to assist law enforcement and to obey legal commands, which undermines the efforts of police and prosecutors and, paradoxically, renders the law counterproductive.¹¹⁶

111. See Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 766-67 (2002) [hereinafter Luna, *Drug Exceptionalism*] ("Consistent with the Fourth Amendment, police may stop vehicles for any traffic violation, even if the officer was really just pulling over minority motorists in pursuit of illegal drugs."); Stuntz, *Civil-Criminal Line*, *supra* note 49, at 11-12 (noting enormous police discretion given that probable cause to make a stop for a trivial traffic violation is constitutionally indistinguishable from probable cause that a suspect committed a much larger offense).

112. Harris, *supra* note 27, at 557-58.

113. See, e.g., Erik Luna, *Foreword: The New Face of Racial Profiling*, 2004 UTAH L. REV. 905, 907 (mentioning "D.W.B." phenomenon).

114. See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1112-17 (2000) [hereinafter Luna, *Transparent Policing*] (analyzing theoretical and practical problems associated with law enforcement discretion).

115. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 158-60 (1997) (discussing prejudiced law enforcement as a form of "racial tax").

116. See, e.g., Erik Luna, *Race, Crime, and Institutional Design*, 66 LAW & CONTEMP. PROBS. 183, 185-87 (2003) [hereinafter Luna, *Institutional Design*] (arguing that police officer misconduct founded on racial prejudice breeds citizen distrust and forms a basis for racial solidarity against law enforcement); Luna, *Transparent Policing*, *supra* note 114, at 1156 (detailing negative consequences stemming from citizen-law enforcement distrust).

Overcriminalization also encourages the misallocation or waste of limited resources, especially when the underlying rationale, such as the pursuit of vice crime, is deemed trivial or untenable by most political theories. “[O]ne can examine side effects of the effort to enforce morality by penal law,” Louis Schwartz suggested some forty years ago.¹¹⁷ “Are police forces, prosecution resources, and court time being wastefully diverted from the central insecurities of our metropolitan life—robbery, burglary, rape, assault, and governmental corruption?”¹¹⁸ Despite the intervening decades, the most reasonable response remains the same: Rather than squandering public funds on the largely futile policing of voluntary transactions between prostitutes and their clientele, for instance, law enforcement could be utilizing these resources to track down real sex offenders like child molesters and rapists. The ancillary expenses of overcriminalization should be considered as well—not only the more than twenty thousand dollars per year¹¹⁹ that is spent to incarcerate each inmate, but also the financial, emotional, and social costs when otherwise productive individuals are unable to contribute to society, when families are left without breadwinners, and when neighborhoods are decimated by the loss of entire generations of young men. Add to the tab yet another social cost: Overcriminalization involving vice (and, in fact, any other lucrative industry) has the tendency to breed graft and corruption among those who are supposed to enforce, rather than break, the law.¹²⁰

Moreover, the billions of dollars sunk into the “war on drugs” could be applied to a genuine conflict of profound consequences—the “war on terror” and the hunt for violent extremists whose avowed goals include mass homicide. Ironically, the federal government has spent substantial time and resources to promote the idea that simple drug offenses finance terrorist organizations, attempting to show an unbroken line between someone who buys a bag of marijuana and those who seek to destroy the United States.¹²¹ But apparently the brains behind this campaign have

117. Louis B. Schwartz, *Morals Offense and the Model Penal Code*, 63 COLUM. L. REV. 669, 671 (1963).

118. *Id.*

119. See James J. Stephan, *State Prison Expenditures, 2001*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 1 (2004), available at <http://www.ojp.usdoj.gov/bjs/abstract/spe01.htm> (last visited Feb. 20, 2005) (quoting average annual operating costs in 2001 as \$22,650 per state inmate and \$22,632 per federal inmate).

120. See, e.g., Stuntz, *Pathological Politics*, *supra* note 11, at 572-76 (describing the perverse effects of criminalizing vice, particularly with respect to prostitution and gambling).

121. See James Dao, *The War on Terrorism Takes Aim at Crime*, N.Y. TIMES, Apr. 7, 2002, § 4, at 5 (quoting drug enforcement administrator’s belief that illegal drug production and terrorism are connected); Press Release, Office of National Drug Control Policy, National Youth Anti-Drug Media Campaign Links Drugs and Terror: Drug Czar John Walters Issues Call to Action to Keep America’s Youth Drug-Free (Feb. 3, 2002), available at http://www.ourdrugfreekids.org/WhiteHouse_News/MediaCampain_Terror.htm (last

missed the inherent flaw in their argument: It is not the drugs, their users, or even the dealers but instead the lawmakers and enforcers who have made illegal transactions so incredibly profitable by criminalizing drugs and drug activity, thus fostering a black market worth tens of billions of dollars, all tax-free. To put it another way, terrorists are not lining their pockets from the distribution of alcohol or tobacco, although this certainly could happen if government were to (re)criminalize these substances.

Finally, overcriminalization dilutes the moral force of the criminal justice system. As previously discussed, the term “moral” in this context does not mean personal or non-secular morality, but instead refers to the philosophical morality embodied in the collective norms of American life on the proper use of public stigma, incarceration, and even state-imposed death. The deployment of the criminal sanction for behavior that seems harmless or unworthy of public censure tends to weaken the moral force of criminal law, perhaps to the verge of insignificance for some members of society. The border of criminality becomes hard to discern as a question of deterrence and even harder to justify as a matter of desert. When the law struggles to distinguish between proper and prohibited, the criminal sanction cannot achieve its bona fide goals, such as preventing harmful behavior or imposing just punishment, and instead appears as nothing more than an administrative dictate. And when the criminal law assumes moral neutrality, it loses the very justification for depriving human liberty.

III. POTENTIAL SOLUTIONS

If one accepts the foregoing understanding of overcriminalization, its causes, and its consequences, the discussion naturally turns to a search for answers: What is to be done? How can the phenomenon be contained or even reversed? In recent years, some of the brightest minds working in the field of criminal justice have offered a number of potential solutions. The first and most frequently discussed option involves the constitutionalization of substantive criminal law, thereby imposing the judiciary as a check on the political branches’ insatiable appetite for more crimes and harsher punishments. William Stuntz has considered the implementation or revitalization of constitutional principles that would limit the power of lawmakers to criminalize and punish as well as cabin the discretionary authority of law enforcers. These doctrines would include: (1) a prerequisite of functional notice when government seeks to prosecute trivial offenses; (2) a culpability constraint that requires a minimum *mens rea* for behavior that is not obviously wrongful; (3) a rule of desuetude that

visited Feb. 23, 2005) (describing the Office of National Drug Control Policy’s initiative to educate Americans about the link between illicit drug use and terrorism).

renders unenforced crimes inoperative; and (4) a judicial power to review the charging and sentencing decisions of political actors.¹²²

Another in-court solution is provided by Claire Finkelstein, who focuses on the notion of an offense and the subsequent infringement upon individual liberty, pointing to the presumption of innocence and the prohibition against double jeopardy as judicially cognizable restrictions on crime and punishment. Government must have a theoretical justification for any use of the criminal sanction, and for Finkelstein, the harm principle supplies the content for such a theory.¹²³ The most recent suggestion—and maybe the most ambitious and challenging—is offered by Markus Dubber. He argues for a “fresh start”¹²⁴ in the area of constitutional criminal law based on the transcendental values of human dignity and autonomy, requiring a reconceptualization of crime and punishment in the form of judicially recognized limiting principles for *mens rea*, affirmative defenses, and sentencing.¹²⁵ All told, the solutions presented by Professors Dubber, Finkelstein, and Stuntz are entirely commendable, which, quite frankly, is unsurprising given the authors’ scholarly stature. But, alas, they all suffer from the same pragmatic obstacle: Without a seismic change in American jurisprudence and/or revolution on the bench, these ideas seem unlikely to be adopted by the courts.

An alternative approach involves the non-judicial “depoliticization” of substantive criminal law. Once again, Professor Stuntz delivers useful analysis of this option, which envisions the shifting of authority to define crimes in the first instance from lawmakers to non-political experts in criminal justice.¹²⁶ Stuntz mentions the success of the Model Penal Code, an archetype for reforming substantive criminal law promulgated some half-century ago and subsequently implemented in whole or in part by jurisdictions across the nation.¹²⁷ Another example is found in the U.S. Sentencing Commission, a body of scholars and jurists who crafted the current punishment scheme in federal courts, the U.S. Sentencing Guidelines.¹²⁸ But Professor Stuntz is quick to note the drawbacks with

122. See Stuntz, *Pathological Politics*, *supra* note 11, at 579-82, 587-98 (outlining possible solutions to the problem of overcriminalization); Stuntz, *Civil-Criminal Line*, *supra* note 49, at 31-38 (detailing a minimum *mens rea* requirement and the rule of desuetude as potential constitutional limits).

123. See Finkelstein, *supra* note 60, at 358-93 (detailing constitutional theory pursuant to the notion of harm).

124. Dubber, *supra* note 58, at 529.

125. See *id.* at 530-70 (describing constitutional theory premised on human dignity and autonomy).

126. See Stuntz, *Pathological Politics*, *supra* note 11, at 582-87 (discussing means to depoliticize criminal law).

127. See *id.* at 583 (explaining appeal of the Model Penal Code project to law reformers).

128. See Luna, *Misguided Guidelines*, *supra* note 45, at 4-5 (briefly describing genesis of federal sentencing reform).

both instances of non-judicial depoliticization: The achievements of the Model Penal Code occurred during a relatively short and historically exceptional period, when reform efforts were politically welcome and eventually embraced by lawmakers.¹²⁹ “Certainly there is no sign in legislative halls of a renewed interest in criminal code revision,” Stuntz concludes.¹³⁰ In turn, the U.S. Sentencing Guidelines have generated intolerable levels of arbitrariness and severity in punishment and thus near unanimity “on one point: The Guidelines have produced bad outcomes.”¹³¹ To me, the injustices of federal sentencing are made all the more troubling by the prospect that the Model Penal Code’s many accomplishments through depoliticization will be forgotten under the abysmal failures of the Guidelines.¹³²

Against this background, it seems academically perilous to enter the fray, at least without some apprehension. After all, the overcriminalization debate has been simmering for generations, and the solutions proffered to date have been both highly thoughtful and highly unlikely to succeed. Nevertheless, I would like to outline one more possibility. Rather than a judicial curative or some other approach that takes the issue out of the hands of lawmakers and law enforcers, my “solution” (in the loosest sense of the word) suggests an intellectual device to help politicians and their constituents confront questions of crime and punishment. The goal is to provide a vision of how officials *should* act, presumably what they would do if they took their jobs seriously and in the absence of the pressures that produce the overcriminalization phenomenon. This proposal is aimed at political actors along the lines of Paul Brest’s *Conscientious Legislator’s Guide to Constitutional Interpretation*¹³³ or, more apropos, *The Honest Politician’s Guide to Crime Control* by Norval Morris and Gordon Hawkins.¹³⁴ But unlike these notable works, the following is only a brief, preliminary sketch that cannot offer a programmatic solution for government officials. Instead, it recommends a point of departure for those intimately involved or concerned with the criminal sanction, a type of mental exercise that should be undertaken before another crime or more punishment is added to the books. The relevant premise is *libertarianism*.

All too frequently and always unfairly, libertarians are lampooned as wild-eyed conspiracy buffs sitting on a cache of weapons, waiting for the

129. See Stuntz, *Pathological Politics*, *supra* note 11, at 584 (asserting that “[a]t most, the M.P.C. offered a convenient focal point for reform efforts [and] a means of temporarily paring down criminal codes”).

130. *Id.* at 585.

131. *Id.* at 586.

132. See Luna, *Misguided Guidelines*, *supra* note 45 (offering broad critique of the Guidelines).

133. 27 STAN. L. REV. 585 (1975).

134. MORRIS & HAWKINS, *supra* note 48.

coming Armageddon between citizen militia and authoritarian state. This caricature is not only false, but it also attempts to marginalize adherents to a theory that is thoughtfully advocated and consistently applied across all issues. For comparison, consider the flip-flops of American political liberals and political conservatives on matters of criminal justice: While the former group bemoans various morals offenses involving, *inter alia*, sexual activity but promotes nearly every conceivable economic crime, the latter group grumbles about overcriminalization of business yet is more than willing to regulate what an individual does with his own body. In contrast, libertarians oppose every form of excessive government authority, regardless of whether it emanates from liberals or conservatives, Republicans or Democrats. As Robert Weisberg writes, "Libertarians in the United States have always nicely confounded our sense of how some controversial political issues, like criminal justice, are supposed to align with ideological divides."¹³⁵ They are, "in a sense, the most ideologically consistent of political figures, opposing state social engineering on all fronts."¹³⁶ Libertarianism does not object to the overcriminalization of business out of a Gordon Gekko-style belief that "greed is good";¹³⁷ nor does libertarianism oppose vice crimes simply because its proponents are pot-smoking, prostitute-loving, atheistic homophiles. Instead, it is a theory premised on the belief that all government intrusions into the lives of individuals are inherently suspicious and require justification, particularly when authorities seek to deprive human liberty.¹³⁸ And for this reason, libertarianism provides the ideal theoretical foil for considering issues of crime and punishment, resisting as it does the use of the criminal justice system when one political group or the other would yield new powers to the state without a fight.

The overarching libertarian tenet is *individualism*, that the human being is the fundamental unit of analysis. The typical basis for this claim is non-consequential and deontological, with the inviolability of individuals founded on the inherent dignity of humans as rational agents with self-awareness, free will, and the ability to devise a life plan.¹³⁹ Modern libertarians often follow the Enlightenment tradition of individualism as a categorical imperative, "reflect[ing] the underlying Kantian principle that

135. Robert Weisberg, *Foreword: A New Agenda for Criminal Procedure*, 2 BUFF. CRIM. L. REV. 367, 380-81 (1999).

136. *Id.*

137. WALL STREET (20th Century Fox 1987).

138. See DAVID BOAZ, LIBERTARIANISM: A PRIMER 16-19 (1997) (introducing the key concepts of libertarianism and the idea that "the burden of explanation should lie with those who would take rights away").

139. See *id.* at 61-64 (emphasizing that rights are not a gift from government but rather possessed by virtue of an individual's humanity and his ability to reason and act responsibly).

individuals are ends and not merely means,” in Robert Nozick’s phrasing, and “they may not be sacrificed or used for the achieving of other ends without their consent.”¹⁴⁰ In other words, the fact that a particular action may be good for another person or society in general can never serve as grounds for denying an individual’s dignity and personal autonomy. But libertarianism can also be theorized from a consequential and, in particular, rule-utilitarian perspective, with the inviolability of the individual based upon the beneficial consequences that flow from its universal recognition. Nineteenth-century libertarian icon John Stuart Mill concluded that “the individual is sovereign”¹⁴¹ based on his own rendition of Benthamite utilitarianism, while modern luminary Richard Epstein espouses a fundamental principle of libertarianism because “the consequences for human happiness and productivity” are “so powerful that it should be treated as a moral imperative, even though the most powerful justification for the rule is empirical, not deductive.”¹⁴²

But regardless of whether the inviolability of the individual stems from moral obligation or beneficial outcomes, this libertarian imperative necessitates certain rights and guiding principles for the interaction among individuals and between individuals and government. As usually described in the literature, a *right* is held by the individual and serves as a constraint on the action of all others, whether they are private citizens or representatives of the state.¹⁴³ Rights establish absolute limits on how an individual may be treated, and as such, they must be respected at all times by other members of society. For deontological libertarians, rights exist prior to the state rather than being established by fictive social contract, and just as importantly, they limit the shape and authority that government can assume under this contract, with individuals and collectives having an affirmative moral duty not to violate the rights of others through their actions. And because human dignity is inherent and draws no exception among beings, all individuals must be bearers of *equal* rights. In the words of David Boaz, “The progressive extension of dignity to more people—to women, to people of different religions and different races—is one of the great libertarian triumphs of the Western world,”¹⁴⁴ and “[t]he kind of equality suitable for a free society is *equal rights*.”¹⁴⁵

Libertarianism and its conception of rights thereby establish fixed

140. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 30-31 (1974) [hereinafter NOZICK, *ANARCHY*].

141. JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 14 (John Gray ed., 1998).

142. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 59 (1995).

143. See, e.g., BOAZ, *supra* note 138, at 16 (describing libertarian conception of individual rights).

144. *Id.* at 16.

145. *Id.* at 63 (emphasis in original).

boundaries for private and public action. Of course, a fully developed libertarian theory would provide a much longer explication on the meaning of human dignity and the inviolability of the individual, as well as a detailed account of the specific rights and principles that emanate from this understanding. But let me provide just a brief description of those libertarian rights and principles that directly impact the designation of crime and punishment and the implementation of a criminal justice system, beginning with the idea of *self-ownership*. An individual literally owns himself—the corporeal entity known as the human body as well as the intellect, knowledge, skills, and so forth, constituting the non-corporeal self. He has an absolute right to control the use of his person, to exercise this right consistent with the equal rights of others, and to be free from someone else using his person without consent.¹⁴⁶ As a result, the individual is at liberty to do or not do whatever he chooses with his physical body and intangible personality so long as it does not infringe upon the rights of others. To many libertarians, the right of self-ownership is a corollary of the Kantian categorical imperative and the inviolability of the individual: If fundamental human dignity requires that a person be treated as an end in himself and never used as a means to others' ends, he must own himself in the sense of being able to determine his own ends and act upon them as a rational agent with free will.¹⁴⁷ To hold otherwise—that an individual cannot use his body and personality as he sees fit—would mean that the entity making and enforcing the relevant proscription, rather than the affected person himself, controls and uses the individual to serve its own ends (e.g., fulfilling some policy).

Self-ownership leads to further personal liberties typically described as “property rights.”¹⁴⁸ As argued by libertarian theorists from Locke to Nozick, an individual has the right to the products resulting from self-ownership, including a right to the fruits of “mixing his labor,”¹⁴⁹ knowledge, skills, and so on, with natural resources. If people own themselves, both their physical bodies and non-corporeal abilities, then they must also own the products generated by their bodies and talents. These products include familiar notions of property, like buildings and

146. See MILL, *supra* note 141, at 14 (arguing that an individual's autonomy over his body and mind are absolute).

147. See, e.g., NOZICK, ANARCHY, *supra* note 140, at 30-31 (declaring that the individual is “inviolable” and cannot be sacrificed for other's ends without consent).

148. See BOAZ, *supra* note 138, at 65-67 (illustrating how all rights can be seen as property rights and that self-ownership inherently implicates the ownership of property).

149. JOHN LOCKE, TWO TREATISES OF GOVERNMENT ch. 5, § 27 (Mark Goldie ed., 2000); NOZICK, ANARCHY, *supra* note 140, at 174; see also MURRAY N. ROTHBARD, POWER AND MARKET: GOVERNMENT AND THE ECONOMY 1 (1970) [hereinafter ROTHBARD, POWER] (noting that a free society assumes the existence of a property right in one's person, the fruits of one's labor, and the resources one finds and uses or converts through this labor).

commodities—the barn a farmer builds and the crops he grows on his homestead—but also myriad forms of intellectual property, such as the song a musician composes or the novel an author writes. Moreover, when an individual owns certain property, he must also have the right to use, control, and transfer that property consistent with the rights of others.¹⁵⁰ If something (e.g., an apple) is an individual's property (e.g., Anne's), that person necessarily has the right to decide the disposition of that property (i.e., Anne has the right to eat, sell, or give away her apple).¹⁵¹

But libertarianism's interpretation of property rights premised upon self-ownership extends beyond the crabbed, colloquial understanding of the term and encompasses a much broader vision of personal freedom. As Boaz argues in his libertarian primer, "all human rights can be seen as property rights, stemming from the one fundamental right of self-ownership, our ownership of our own bodies."¹⁵²

The right to self-ownership leads immediately to the right to liberty; indeed, we may say that "right to life" and "right to liberty" are just two ways of expressing the same point. If people own themselves, and have [the right] . . . to take the actions necessary for their survival and flourishing, then they must enjoy freedom of thought and action. . . . Freedom of the press—including, in modern times, broadcasting, cable, electronic mail, and other new forms of communications—is the aspect of intellectual freedom that oppressive governments usually target. And when we defend freedom of the press, we are necessarily talking about property rights, because ideas are expressed *through* property—printing presses, auditoriums, sound trucks, billboards, radio equipment, broadcast frequencies, computer networks, and so on.¹⁵³

Boaz applies this analysis to the ever-contentious "right to privacy" first articulated by the Supreme Court some four decades ago.¹⁵⁴ Instead of

150. See BOAZ, *supra* note 138, at 66-67 (claiming that the right to self-ownership carries with it the right to acquire and exchange property in order to fulfill needs and desires).

151. See, e.g., JAN NARVESON, *THE LIBERTARIAN IDEA* 64 (1988) (describing the "out-and-out" definition of property rights as "'x is A's property' means 'A has the right to determine the disposition of x'").

152. BOAZ, *supra* note 138, at 68; see also NOZICK, *ANARCHY*, *supra* note 140, at 179 n.* ("one *first* needs a theory of property rights before one can apply any supposed right to life"); ROTHBARD, *POWER*, *supra* note 149, at 238 ("[N]ot only are property rights also human rights, but in the profoundest sense there *are* no rights but property rights. . . . The 'human' rights of the person that are defended in the purely free-market society are, in effect, each man's *property right* in his own being, and from *this* property right stems his right to the material goods that he has produced.").

153. BOAZ, *supra* note 138, at 65; see generally MILL, *supra* note 141 (providing libertarian argument for freedom of expression based on rule-utilitarianism).

154. See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding that a statute prohibiting the distribution and use of contraceptives was unconstitutional because it impinged on the right of privacy in marital relationships).

pointing to “penumbras, formed by emanations”¹⁵⁵ from various constitutional provisions, the doctrine would appear more sensible and theoretically robust if, for instance, it considered laws against consensual homosexual activity to be violations of self-ownership—an individual’s right to do as he pleases with his own body.¹⁵⁶

So far, this interpretation of libertarianism offers a theory of self-ownership and property rights of the individual and precludes violations of these rights by public and private actors. But in what circumstances may the state or another citizen justifiably intrude upon someone’s life? In particular, when may non-consensual force be used against an individual? For libertarians, the answer is derived from a commitment to taking rights seriously and thus ensuring their enforceability: The use of force is only permissible to prevent violations of individual rights or to retaliate against such infringements.¹⁵⁷ All people have an obligation not to instigate aggression against the rights of others, sometimes referred to as the nonaggression axiom.¹⁵⁸ The prohibition against non-consensual belligerent force is a prerequisite of any civilized society, establishing the rule that interactions among people must always be premised on the power of human reason and free choice rather than the product of fear or fraud. But when a person imposes his will on another and violates that individual’s rights, the aggrieved victim or the government in his stead may respond in kind.¹⁵⁹

This permissible preventative or retaliatory action, however, must be proportionate to the violation of the right, more or less, reestablishing the status quo of rights prior to the infringement.¹⁶⁰ If Alex snatches Anne’s

155. *Id.* at 484.

156. BOAZ, *supra* note 138, at 69-70; *see also* NOZICK, *ANARCHY*, *supra* note 140, at 58 (taking the position that an individual may choose or permit another to do anything to himself).

157. *See, e.g.*, John Hospers, *Retribution: The Ethics of Punishment*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 191 (Randy E. Barnett & John Hagel III eds., 1977) [hereinafter *ASSESSING THE CRIMINAL*]:

Libertarians consider it immoral for any individual to interfere forcibly in the life of another *unless* that other person has first forcibly imposed his will on someone. When that happens, the victim is entitled to respond according to the rule. . . . that the aggressor himself has implicitly laid down. . . . [Likewise, there] is nothing contrary to libertarian doctrine in an act of self-defense.

158. *See* BOAZ, *supra* note 138, at 74-75 (describing this axiom).

159. *See* MILL, *supra* note 141, at 13-14 (discussing the “harm principle,” which provides that the prevention of harm to others is the sole justification for state interference with personal liberty).

160. The idea of proportionality in punishment is typically associated with retributivism, although it can also be based on utilitarian theory. *See, e.g.*, JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 49-55 (3d ed. 2004) (discussing retributive and utilitarian conceptions of proportionality). Most importantly for present purposes, however, libertarian scholarship has espoused proportionality as a limiting principle. *See, e.g.*, Murray N. Rothbard, *Punishment and Proportionality*, in *ASSESSING THE CRIMINAL*, *supra* note 157, at 259-70 [hereinafter Rothbard, *Punishment*]; NOZICK, *ANARCHY*, *supra* note 140, at 62-63

apple without her consent, Alex has violated her property rights, and either Anne or the state can take back the apple by force, if necessary, as well as engage in requisite actions to restore the equal rights of all. But neither Anne nor the state should confiscate Alex's fifty-acre apple orchard or, worse yet, cut out his *Adam's apple*. Although we can debate the appropriate amount of commensurate force in this context—especially if Alex has already eaten Anne's apple, which happened to be uniquely delicious—the intrusion on Alex's property rights in his orchard and self-ownership of his throat would seem, under virtually any moral hierarchy, grossly disproportionate to the right violated by pilfering a piece of fruit.

Libertarians forward additional principles that stem from their theory of justice, a number of which appear relevant for issues of crime and punishment:

- Personal rights of property require *free markets* in order to be meaningful, allowing individuals to exercise these rights by engaging in voluntary exchanges of goods and services through mutual agreement.¹⁶¹ Libertarians extol the virtues of production and transaction—the social as well as individual benefits of allowing private citizens to use their talents and profit through consensual dealings—as best exemplified by the enormous socio-economic strides made in the Western world through free trade among free nations and free citizens. These benefits were achieved not by centralized decision-making but through the spontaneous order of innumerable individuals voluntarily coordinating their actions. As a general rule, then, government should not “forbid capitalist acts between consenting adults.”¹⁶²
- Throughout history, however, state authority has tended to expand as far as possible, often at the hands of despots. Because the justification for invading individual liberty is quite limited, libertarians adamantly support the idea of *limited government*.¹⁶³ For the American brand of libertarianism, this has meant: (1) the separation of powers among legislative, executive, and judicial branches of government, arranging each as an institutional check on the others and thereby assuring that no single body could oppress the people through the concentration of authority; (2) the division of power between local and national governments, both setting the two levels of governance as checks against each other and guaranteeing a degree of local rule responsive

(discussing a rule of proportionality).

161. See BOAZ, *supra* note 138, at 17-18 (noting libertarian argument for free markets).

162. NOZICK, *ANARCHY*, *supra* note 140, at 163.

163. See BOAZ, *supra* note 138, at 17 (“[l]imited government is the basic political implication of libertarianism”).

to individual and community concerns; and (3) the constitutional enumeration of the powers vested in national government, thus denying federal authorities a general police power and limiting their jurisdiction to only those issues of nationwide importance.¹⁶⁴

- To the extent that government acts within its authority and does not violate the rights of individuals, official commands must comport with *the rule of law*.¹⁶⁵ This much-debated ideal¹⁶⁶ requires, at a minimum, that any law: (1) should be expressed in general terms; (2) should be available to affected parties; (3) should be prospective rather than retroactive; (4) should be clear and understandable; (5) should not produce contradictory commands; (6) should not require the impossible; (7) should not frequently change; and (8) should be congruent with its enforcement.¹⁶⁷ By requiring unambiguous terms for all laws as well as consistency in their enforcement, the rule of law also limits the discretion of authorities and the potential for arbitrary or prejudicial state action, thus ensuring the libertarian demand for equal rights among all individuals.¹⁶⁸

164. See U.S. CONST. arts. I-III (dividing powers among the legislative, executive, and judicial branches of the federal government); U.S. CONST. art. I, § 8 (enumerating specific powers of Congress); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); see also THE FEDERALIST NO. 9, at 37-38 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2003) (claiming that the best form of republican government includes, *inter alia*, the "regular distribution of power into distinct departments" and "the introduction of legislative balances and checks"); THE FEDERALIST NO. 10, at 47 (James Madison) (suggesting that the delegation of national and international issues to the federal government and local issues to the state governments produces a class of representatives that are acquainted with and responsive to both sets of issues); THE FEDERALIST NO. 17, at 80-81 (Alexander Hamilton) (proposing that the regulation of "[c]ommerce, finance, negotiation, and war" should lie with the federal government and that the "administration of private justice between the citizens of the same state, the supervision of agriculture, and [similar concerns]" should lie with the state and local governments); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 177-78, 185 (1960) (recounting how the preference for limited government played a major role in the development of the Constitution and explaining that the Framers sought to create a structure that assigned specific powers to different parts of government and limited the overall power of any one of those parts).

165. See BOAZ, *supra* note 138, at 17 (providing libertarian argument for the rule of law).

166. See Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 1-2 (1997) (commenting that the meaning of the rule of law has always been contested and is "less clear today than ever before").

167. See LON L. FULLER, THE MORALITY OF LAW 39 (1969) (listing these criteria for lawmaking and arguing that a failure to follow them "results in something that is not properly called a legal system at all"); see also Fallon, *supra* note 166, at 8-9 n.27 (providing five similar elements for the rule of law and noting that they are consistent with Fuller's criteria).

168. See generally Erik Luna, *Cuban Criminal Justice and the Ideal of Good Governance*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 529, 583-95 (2004) (providing a detailed discussion of the rule of law).

- Finally, libertarianism is a theory of *peace*.¹⁶⁹ This does not mean pacifism, a turning of the other cheek when an individual or a nation is threatened. Free people will always exercise self-defense to protect their rights. But libertarians understand that warfare has brought “death and destruction on a grand scale, disrupted family and economic life, and put more power in the hands of the ruling class,” Boaz observes, “which might explain why the rulers did not always share the popular sentiment for peace.”¹⁷⁰ To the greatest extent possible, libertarianism seeks peaceful solutions respectful of individual rights rather than needless pain and suffering.

IV. THE LIBERTARIAN PREMISE

To be sure, the above description of libertarianism has glossed over important nuances and belied the differences among distinct versions of libertarian theory. It also has failed to address significant critiques, such as controversies over the initial acquisition of property and the distribution of natural resources, potential theoretical problems on issues ranging from taxation to suicide, and claims that libertarianism is merely anarchism in disguise. Although libertarians have compelling responses to each criticism, this article is not the place to hash out the iterative, almost *ad nauseam* arguments and counterarguments. And while the theoretical variations prove fascinating—deontological versus utilitarian, for instance, and left-libertarianism versus right-libertarianism—the distinctions are not relevant for present purposes. Instead, the foregoing discussion has simply provided a rough sketch of libertarian theory that allows us to reflect on its implications for criminal justice and its potential as an intellectual tool to rein in the overcriminalization phenomenon.

Libertarianism envisions a criminal justice system established for one singular purpose: to protect the rights of individuals. An appropriate definition of crime, Randy Barnett and John Hagel suggest, “focuses on the violation of rights and, in particular, the fundamental right of all individuals to be free in their person and property from the initiated use of force by others.”¹⁷¹ Although libertarian theory permits victims to respond to infringements of their rights as well as to take steps in self-defense against threatened violations, it usually is assumed that individuals prefer to entrust these defensive and responsive activities to the state, thus providing the rationale for a system of criminal justice manned by police, prosecutors,

169. BOAZ, *supra* note 138, at 18.

170. *Id.*

171. Randy E. Barnett & John Hagel III, *Assessing the Criminal: Restitution, Retribution, and the Legal Process*, in *ASSESSING THE CRIMINAL*, *supra* note 157, at 11; *see id.* (“If this right is violated, an imbalance is created between the offending party and the victim.”).

and judges.¹⁷² But the authority of state actors is necessarily limited by the rationale for a criminal justice system at the outset—to protect and vindicate the rights of individuals. The very notion of a “victimless” crime is a non sequitur for libertarians, as there can be no actionable offense without a violation of an individual’s rights. The fact that a crime has some untoward effect on others or society as a whole does not create a new “right” enforceable by third parties or the state. Only specific, direct violations of an individual’s self-ownership and property rights may justify the use of non-consensual force against an aggressor.¹⁷³

For libertarians, the result is a system of criminal justice with strictly circumscribed powers. Along these lines, Nozick famously posits a “minimal” or “night-watchman” state, “limited to the narrow functions of protection against force, theft, fraud,” and similar acts.¹⁷⁴ “[A] more extensive state,” Nozick argues, “will violate persons’ rights not to be forced to do certain things” and thus “is unjustified.”¹⁷⁵ Moreover, whatever actions are taken by government officials must be jurisdictionally authorized, proportionate to the underlying threatened aggression or violation of individual rights, and respectful of the liberties held by those on the receiving end of non-consensual force. The state must recognize the constitutional provisions that limit its ability to investigate and prosecute crime, including the rights of a suspect or accused individual—who may, in fact, be totally innocent of any criminal conduct and is presumed as such as a matter of law. Investigative techniques, like police searches and custodial interrogations, must not only comply with procedural requirements of the Constitution but must also be commensurate to the alleged wrongdoing that justifies state intervention at the start. Likewise, any punishment imposed on a convicted criminal must be proportionate to his violation of the victim’s rights, given that an offender is also a bearer of rights and has only forfeited them to the extent that he has infringed upon the liberty of others.¹⁷⁶ The national government faces additional constraints, as it must

172. See, e.g., Rothbard, *Punishment*, *supra* note 160, at 264-65 (discussing the “almost universal inclination” to utilize a legal system rather than one of private justice). But see ROTHBARD, *POWER*, *supra* note 149, at 1-9 (providing argument for a free market of defensive force).

173. See Barnett & Hagel, *supra* note 171, at 15 (theorizing that an action should be defined as criminal only if it violates the individual rights of identifiable persons).

174. NOZICK, *ANARCHY*, *supra* note 140, at ix.

175. *Id.*

176. See, e.g., Barnett & Hagel, *supra* note 171, at 13 (reasoning that a criminal has a right to be punished only to the extent of his transgression); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363 (1981) (arguing that the punishment imposed on a criminal for a wrongful act should be the product of the magnitude of the act’s wrongfulness and the criminal’s degree of responsibility); NOZICK, *ANARCHY*, *supra* note 140, at 62-63 (making similar argument).

comply with the limits imposed by the charter of its existence.¹⁷⁷ Federal lawmakers have “no general right to punish murder committed within any of the states,” Chief Justice John Marshall once explained, and “cannot punish felonies generally.”¹⁷⁸ As a final point, libertarianism’s aversion to warfare in the traditional sense carries over to domestic statutes and policies pursued with a militaristic mentality and intensity in execution. Under libertarian theory, for instance, any demagogic declaration of a “war on crime” would be inherently suspicious, and a war-like zealotry in law enforcement would be virtually indefensible.

So how might the preceding interpretation of libertarianism and its implications for criminal justice help stem the tide of overcriminalization in the United States? The idea would be for government officials to begin their consideration of a particular action—such as a proposed law or an occasion for enforcement—from the perspective of libertarianism, examining whether the action in question is consistent with self-ownership, equal rights of individuals, limited government, and other relevant principles. This libertarian premise would provide a starting place for discussion and induce political actors to explain their decisions against the background of a theory that, more than any other, strictly constrains the powers of government. It advances a presumption in favor of individual liberty and against state action, a mental exercise of sorts that presses for justification when a proposal would be deemed unjustifiable by libertarianism. Officials may disagree with the premise, of course, but at least they will do so by reference to (presumably acceptable) alternative political theories and announced justifications for their actions.¹⁷⁹

The so-called Sensenbrenner Bill,¹⁸⁰ currently pending in the House of

177. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803) (asserting that the Constitution defines and limits the power of Congress, that these limits must be respected, and that congressional action exceeding these limits is unconstitutional); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (noting that the enumeration of federal powers is “acknowledged by all”).

178. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426, 428 (1821) (Marshall, C.J.); see also *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (“Under our federal system, the States possess primary authority for defining and enforcing the criminal law When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction.”) (citations omitted).

179. As such, the libertarian premise indirectly supports previous arguments for transparency in criminal policy-making through publicly deliberated and theoretically justified decisions. Luna, *Principled Enforcement*, *supra* note 12, at 562-89; Luna, *Institutional Design*, *supra* note 114, at 202-08; Luna, *Transparent Policing*, *supra* note 114, at 1163-67.

180. Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, H.R. 1528, 109th Cong. (2005). It should be noted that the Sensenbrenner Bill was being considered by the House Judiciary Committee just as this article was going to press—and if the proposed legislation passes, of course, there may be substantial changes in its ultimate form.

Representatives, provides a useful example. Among other things, this proposal would impose a mandatory minimum sentence of five years imprisonment (and a ten-year mandatory minimum sentence for a second conviction) for distribution, attempted distribution, or conspiracy to distribute an illegal drug within one thousand feet of a school, college, university, playground, public housing facility, youth center, public swimming pool, video arcade, public library, daycare facility, or any hospital or clinic that provides drug treatment.¹⁸¹ From the libertarian premise, the Bill's problems seem patent: The criminalization of voluntary exchanges for desired goods by consenting adults infringes on individual self-determination, property rights, and the principle of free markets. Certainly, a state might punish an individual for driving under the influence of drugs, due to the very real threat to other people's lives and property from an intoxicated motorist. It might also make it a crime to sell drugs to minors, based on the belief that children lack the ability to consent to such transactions. But the Sensenbrenner Bill prohibits, in Nozick's words, "capitalist acts between consenting adults,"¹⁸² an idea that is totally anathema to libertarianism.

Moreover, this proposal would take the unprecedented measure of making any drug activity in almost any populated area subject to a federal sentence of at least five years imprisonment.¹⁸³ With its elongated list of predicate locations, extended further by a radius of more than three football

181. *Id.* §§ 2(c), 2(d), 4. Among other things, the Bill would also impose a mandatory minimum sentence of ten years imprisonment for the distribution, attempted distribution, or conspiracy to distribute any illegal drug (including anything greater than five grams of marijuana) by someone over the age of twenty-one to an individual under the age of eighteen, *id.* § 2(a); make a second conviction for underage drug distribution or a first such conviction by someone with a prior felony drug conviction (state or federal) punishable by life imprisonment, *id.* § 2(b); demand a mandatory minimum sentence of ten years imprisonment for any parent committing a drug trafficking offense in or near the presence of their minor child, *id.* § 2(k); require a three-year mandatory minimum sentence for parents who witness or learn about drug trafficking near the presence of their minor child but who fail to report the offense to law enforcement within twenty-four hours and do not provide full assistance in the investigation, apprehension, and prosecution of the offender, *id.* § 2(m); reduce "safety valve" relief from mandatory minimum sentences for first-time drug offenders, *id.* §§ 2(n)(1), 3, 6; and purge much of the post-*Booker* judicial discretion in sentencing. *Id.* § 2. For a detailed analysis of the Bill, see Families Against Mandatory Minimums, *Summary of HR 1528 "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005,"* available at <http://www.famm.org/pdfs/Sensenbrenner%20Bill%202005%20Summary%20LATEST.pdf>.

182. NOZICK, ANARCHY, *supra* note 140, at 163.

183. In his congressional testimony on a prior version of the Sensenbrenner Bill, Professor Frank Bowman argued that the effect of the proposed legislation would be "to impose five-year minimum mandatory sentences on virtually any drug offense committed anywhere in an urban area." *Hearings on H.R. 4547 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 108th Cong. (2004) (statement of Prof. Frank O. Bowman III), available at <http://judiciary.house.gov/media/pdfs/bowman070604.pdf>.

fields, the Bill's practical effect is to create a new jurisdictional bubble over every American city. Anyone who distributes (or conspires or attempts to distribute) a doobie almost anywhere in Manhattan commits a federal crime punishable by no less than a half-decade in prison. Apparently, only drug activity occurring in, for instance, midwestern cornfields or southwestern deserts would avoid the wrath of federal law. Such legislation is contrary to the principles of limited government and narrow congressional powers, looking instead like the usurpation of a *de facto* police power by federal lawmakers. And because of the potentially smothering effect of national legislation, the Bill could largely preempt local solutions to local drug problems in disregard of the uniquely American wisdom of libertarian-style "federalism."¹⁸⁴

The jurisdictional breadth of the Sensenbrenner Bill is also likely to produce disturbing consequences in its execution. The sheer quantity of drug transactions and consumption in the United States as well as the limits of federal resources¹⁸⁵ would make it impossible for the law to be enforced to the hilt or even with some semblance of uniformity. As a result, federal agents and prosecutors would be afforded a tremendous amount of discretion in the application of the Bill's provisions. Such a possibility is not only inconsistent with the libertarian emphasis on rule of law values, but given the practical reality of drug enforcement on the streets and in courtrooms, it may also contravene libertarianism's requirement of equal rights. African Americans account for approximately one-third of all drug-related arrests nationwide and one-half of state court convictions and federal prison sentences for drug offenses—despite the fact that blacks constitute little more than ten percent of the country's population and a similar proportion of all drug users.¹⁸⁶ The Sensenbrenner Bill may be race

184. Cf. *supra* note 164 and accompanying text (explaining that American federalism contemplates a division of power between federal and state governments and anticipates that states and localities will respond to individual and community concerns).

185. Cf. Luna, *Drug Exceptionalism*, *supra* note 111, at 769-71 (discussing the widespread use of drugs in the United States and the expenditure of government resources).

186. See BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS [ONLINE], at tbl. 4.10 (Kathleen Maguire & Anne L. Pastore eds., 30th ed. 2004) [hereinafter SOURCEBOOK], at <http://www.albany.edu/sourcebook/> (last visited Feb. 25, 2005) (on file with the American University Law Review) (indicating that in 2002 blacks made up 324,517, or 33.5 percent, of all drug arrests in the United States); *id.* at tbl. 5.45 (showing that in 2000 blacks accounted for fifty-three percent of all drug convictions in state courts); *id.* at tbl. 6.53 (noting that of the 85,800 federal drug prisoners in 2003, blacks comprised 39,015—the sum of 36,662 men and 2,353 women—or forty-five percent of those prisoners); POPULATION DIVISION, U.S. CENSUS BUREAU, ANNUAL RESIDENT POPULATION ESTIMATES OF THE UNITED STATES BY SEX, RACE AND HISPANIC OR LATINO ORIGIN: APRIL 1, 2000 TO JULY 1, 2002 (2003), at tbl. 2, available at http://www.census.gov/popest/archives/2000s/vintage_2002/NA-EST2002-ASRO-02.html (last visited Feb. 25, 2005) (indicating that the United States population was 288,368,698 as of July 1, 2002, and that blacks represented 36,746,012, or 12.7 %, of that figure).

neutral on its face, but minority citizens would surely bear the bulk of its burdens.

Finally, libertarianism could not tolerate the severe punishments required under the proposal. As mentioned above, the voluntary decision to engage in transactions for drugs is beyond the legitimate powers of government, at least to the libertarian. But regardless of one's theoretical disposition, it seems utterly mind-boggling that an individual who passes a joint to a friend might be subject to a mandatory five-year federal prison sentence. Even if an infringement of a "right" were assumed, the punishment would be grossly disproportionate to the violation. In the federal system, the average sentence is little more than a year of imprisonment for larceny, less than two years for burglary or fraud, and slightly more than three years for assault or manslaughter.¹⁸⁷ As such, an individual convicted under the Sensenbrenner Bill—regardless of the drug and amount distributed—would spend more time in federal prison than someone who burglarizes a home, assaults an innocent victim, or even takes the life of another. It is difficult to conceive of any moral scale, let alone one based on libertarian theory, that would permit this ugly disparity. Proponents of such punishment might rationalize it as part of America's ongoing drug war and argue that, as with all wars, extreme measures may be required. Libertarians, of course, would find this excuse preposterous, given that the "war" itself is unjustified in its inception and, worse yet, is waged by the government against its own people. Moreover, the costs are staggering: more than ten billion dollars spent on drug enforcement per year by the federal government alone; more than 1.5 million Americans arrested for drugs each year; and more than 300,000 inmates and half of all federal prisoners serving time for drug crime.¹⁸⁸ These types of consequences provide the precise reason why libertarians always endeavor against war-like behavior.

Stepping back for a moment, it must be admitted that asking government officials to evaluate their actions based on the libertarian premise may have no better chance of success than any other solution offered to date. But the hope is that a non-court imposed solution would be more palatable to

187. See SOURCEBOOK, *supra* note 186, at tbl. 5.31 (showing that in U.S. District Courts in 2002 the average prison sentence was 15.2 months for larceny, 21.1 months for burglary, 20.0 months for fraud, 39.3 months for assault, and 39.6 months for manslaughter).

188. See SOURCEBOOK, *supra* note 186, at tbl. 1.13 (indicating that the federal government spent \$11,397,000,000 in 2003 for drug control purposes, allocated \$12,082,300,000 for 2004, and requested \$12,648,600,000 for 2005); *id.* at 4.1 (noting that 1,538,813 people were arrested for drug offenses in 2002); *id.* at 6.52 (showing that of the 141,543 federal prisoners in 2002, 77,658, or 54.9 %, were incarcerated on drug offenses); BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, KEY FACTS AT A GLANCE: NUMBER OF PERSONS IN CUSTODY OF STATE CORRECTIONAL AUTHORITIES BY MOST SERIOUS OFFENSE, 1980-2001, at <http://www.ojp.usdoj.gov/bjs/glance/tables/corrttyptab.htm> (last visited Feb. 25, 2005) (on file with the American University Law Review) (indicating that approximately 246,100 people are serving time in state prisons for drug offenses).

lawmakers and law enforcers, appealing to their mental faculties rather than judicially curtailing their authority. The power of persuasive reasoning can be quite strong, and libertarianism happens to be “inspiring as well as right.”¹⁸⁹ And as confirmed by the sponsors of this symposium—the Heritage Foundation¹⁹⁰ and the National Association of Criminal Defense Lawyers¹⁹¹—a seemingly peculiar but nonetheless potent coalition of interests may be forming to apply reasoned arguments and political influence to curb government excesses in criminal justice. If nothing else, the libertarian premise offers one potential tool for these efforts.

But regardless of whether one accepts my interpretation of libertarianism as a theory and potential intellectual device for public and private actors, there is now a growing consensus that the overcriminalization phenomenon does, in fact, exist and should be confronted sooner rather than later, as demonstrated by the topic of this law review issue and the passionate yet thoughtful responses of the contributors. Needless to say, it is becoming more difficult for the various political and ideological camps to ignore the ever-expanding reach of the criminal sanction and the ever-increasing authority of law enforcement. American society may be fast approaching a watershed point—what one recent book aptly (sub)titles “the criminalization of almost everything”¹⁹²—making the call of this symposium all the more urgent.

189. NOZICK, *ANARCHY*, *supra* note 140, at ix.

190. See <http://www.heritage.org> (official website of the Heritage Foundation).

191. See <http://www.criminaljustice.org> (official website of the National Association of Criminal Defense Lawyers).

192. GO DIRECTLY TO JAIL, *supra* note 35.