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Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution

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ESSAY

AL CAPONE'S REVENGE: AN ESSAY ON THE POLITICAL ECONOMY OF PRETEXTUAL PROSECUTION

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Most analyses of pretextual prosecutions—cases in which prosecutors target defendants based on suspicion of one crime but prosecute them for another, lesser crime—focus on the defendant's interest in fair treatment. Far too little attention is given to the strong social interest in non-pretextual prosecutions. Charging criminals with their "true" crimes makes criminal law enforcement more transparent, and hence more politically accountable. It probably also facilitates deterrence. Meanwhile, prosecutorial strategies of the sort used to "get" Al Capone can create serious credibility problems. The Justice Department has struggled with those problems as it has used Capone-style strategies against suspected terrorists. That is no surprise: Pretextual charging is primarily a phenomenon of the federal criminal justice system, where law enforcers are less politically accountable than in state justice systems. The solution is to make the federal justice system more accountable. A variety of forces are pushing in that direction; federal courts could help speed the process along with appropriate jurisdiction and statutory interpretation doctrines. If those things happen, pretext cases will become less common, and the justice system will be healthier.

INTRODUCTION

In 1931, Al Capone was the leading mobster in Chicago. He had violated the Volstead Act on a massive scale, bribed a large fraction of Chicago officialdom, and murdered various criminal competitors. Because he was America's first celebrity criminal, all this was clear to much of the nation, not just to Chicagoans. But his crimes were not easily proved in court. So federal prosecutors charged Capone not with running illegal breweries or selling whiskey or even slaughtering rival mobsters, but with failure to pay his income taxes. Capone was incredulous. When he heard about the tax charge, he reportedly called it "a lot of bunk," adding: "The government can't collect legal taxes from illegal

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money."[1] Actually, it could. So he was convicted and packed off to a federal penitentiary, where he died thirteen years later.[2]

Ever since, Al Capone has been the poster child for pretextual prosecution. It is common in the United States and especially common in the federal justice system for law enforcers to go after a criminal defendant because they suspect him of one crime (or, as in Capone's case, a set of crimes) and then to charge and convict him of a different crime, unrelated to and less severe than the first. That practice has generated a standard debate, and the debate has a standard resolution. The defendant claims the government is behaving arbitrarily, singling him out for different treatment than that which others receive.[3] "Pretext" is a dirty word; it connotes something shady and underhanded. The government responds that nonpayment of income taxes (or false statements, or mail fraud, or whatever the charged offense) is a legitimate crime, something for which any ordinary citizen might be prosecuted and punished if guilty. Surely the Al Capones of the world should not be immune from punishment for the small crimes they commit by virtue of their larger crimes. That government response almost always wins in court,[4] and that resolution is gen-

1. The quote appears in a host of sources; for recent examples on three continents, see Anniversaries, Times (London), Jan. 17, 2003, at 38; Avoiding Taxes Is as American as Apple Pie, Balt. Sun, July 4, 2004, at 5D; Mati Wagner, Gov't Takes Aim at Black Market, Jerusalem Post, Dec. 19, 2003, at 13.

2. For the best accounts of Capone's exploits and the government's surprising means of putting a stop to them, see generally Laurence Bergreen, Capone: The Man and the Era (1994); John Kobler, Capone: The Life and World of Al Capone (1971). Even in 1931, there were precedents for Capone's prosecution. A bootlegger named Manley Sullivan took his case to the Supreme Court, which decided in 1927 that the privilege against self-incrimination did not entitle him to decline to file an income tax return on the ground that all his income was from illegal sources. United States v. Sullivan, 274 U.S. 259, 263–64 (1927) ("It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime."). Closer to home, Al's brother Ralph was convicted in 1929 on tax charges. Bergreen, supra, at 363–65.

3. The leading case addressing this argument is Wayte v. United States, 470 U.S. 598 (1985). *Wayte* is not exactly a pretext case, though it's close. The defendant, along with 674,000 other young men, had illegally failed to register for the draft. But he had done something else: Repeatedly, the defendant wrote the Justice Department letters announcing that he would never register and daring them to prosecute him. See id. at 601 n.2, 604. Eventually, they obliged—whereupon the defendant claimed he was being prosecuted for writing the letters, not for failing to register. Id. at 603–04. The Supreme Court rejected the argument. Id. at 607–14.

4. Again, in doctrinal terms the leading case is *Wayte*. See supra note 3. More conventional pretext claims appear in, for example, United States v. Sacco, 428 F.2d 264, 271–72 (9th Cir. 1970), where the defendant claimed his prosecution for violating the alien registration statute was motivated by his organized crime associations. See also United States v. Trent, 718 F. Supp. 39, 39 (D. Or. 1989) (defendant claimed his drug prosecution was motivated by his gang associations); People v. Mantel, 388 N.Y.S.2d 565, 566 (1976) (defendant charged with building code violations claimed government had singled out proprietors of "sex shops"); 4 Wayne R. LaFave et al., Criminal Procedure § 13.4(c) (1999) (discussing pretextual prosecution and deferential "rational relationship" standard applied by the courts).

erally tolerated in the academic literature as well.[5] Pretextual prosecutions are a widely accepted feature of our criminal justice system, and they are widely, albeit not universally, understood to be both legally and ethically permissible.

Notice that this standard debate assumes that only one person has a legitimate interest in charging and convicting Capone for the crimes that actually motivated his prosecution and not for something else: Capone. The argument against pretextual prosecution—the argument for what one might call "truth in charging"—is based entirely on protecting *defendants'* interests. Or so we generally assume.

The assumption is wrong. There is a strong *social* interest in non-pretextual prosecution, and that interest is much more important than the "fairness to defendants" argument that has preoccupied the literature on this subject. Criminal charges are not only a means of identifying and punishing criminal conduct. They are also a means by which prosecutors send signals to their superiors, including the voters to whom they are ultimately responsible. When a murderer is brought to justice for murder rather than for tax evasion, voters learn some important things about

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An analogous issue arises with respect to pretextual searches. Imagine that a police officer has probable cause to believe the defendant has committed a traffic offense but wishes to investigate a drug crime. May the officer use her suspicion of the traffic violation to justify a search for drugs? The basic answer is yes: Arrests are permissible even for minor crimes, Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."), and searches incident to arrest are permissible whenever the arrest is permissible. See United States v. Robinson, 414 U.S. 218, 224 (1973). The officer's subjective intent (i.e., the fact that the reason for the search differs from its legal justification) is irrelevant. See Whren v. United States, 517 U.S. 806, 811 (1996) ("[O]nly an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred."). There is a slight limit: Under Knowles v. Iowa, 525 U.S. 113, 114 (1998), officers may not conduct searches incident to arrest before actually arresting the suspect—meaning that an officer may not stop a motorist for speeding, write out a ticket, then search the motorist's car for drugs before allowing him to go on his way. On the other hand, that scenario is perfectly constitutional with a slight alteration: If the officer first says, "You're under arrest" (for the traffic offense) and then searches the car, she is home free. If no drugs are found, the officer may simply say, "I changed my mind; you're free to go now." If drugs are found, the defendant may then be arrested on the drug charge.

5. The tolerance consists of a grudging silence; extended treatments of the issue are rare. For a recent exception, see Harry Litman, Pretextual Prosecution, 92 Geo. L.J. 1135 (2004). The one area in the literature where pretext is not tolerated is when it is associated with racial profiling—even in the absence of provable unconstitutional motivation. For good discussions, see generally Randall Kennedy, Race, Crime, and the Law (1997) (criticizing influence of race in pretextual arrests); Pamela S. Karlan, Race, Rights, and Remedies in Criminal Adjudication, 96 Mich. L. Rev. 2001 (1998) (describing and criticizing failure of Constitution to preclude pervasive use of racial profiling in pretextual highway stops); Richard H. McAdams, Race and Selective Prosecution: Discovering the Pitfalls of Armstrong, 73 Chi.-Kent L. Rev. 605 (1998) (same).

their community and about the justice system: that a given homicide has been committed in a particular way (if a criminal organization is involved, they may learn things about how the organization works and what kind of people comprise it); that the crime has been solved; that the police and prosecution have done a good job of assembling evidence against the killer, and so forth. If there is a legislative body that oversees the relevant law enforcement agencies, those same signals are sent to the legislative overseers. When a prosecutor gets a conviction—usually by inducing a guilty plea—for an unrelated lesser crime than the one that motivated the investigation, the signals are muddied. They may disappear altogether. Sometimes, there are alternative sources of information: Voters already knew who Capone was and what he did. But for most crimes and most criminals, even famous ones, those alternative sources do not exist.

Another audience also gets a muddied signal: would-be criminals. Instead of sending the message that running illegal breweries and bribing local cops would lead to a term in a federal penitentiary, the Capone prosecution sent a much more complicated and much less helpful message: If you run a criminal enterprise, you should keep your name out of the newspapers and at least pretend to pay your taxes.

In short, criminal litigation is not just a means of rationing criminal punishment. It is also a source of productive signals and valuable information. As a number of scholars have noted, criminal law has a "social meaning"[6]—but the law's messages are filtered through prosecutors' litigation choices, and those choices can change the message dramatically.[7] In the case of most pretextual prosecutions, the change is for the worse. Such prosecutions may lead criminals to underestimate the price of their crimes; they may also make it harder for voters and legislative oversight committees to trust the *good* information that comes from other, nonpretextual criminal cases. To a much greater extent than the literature has recognized, the political economy of criminal law enforcement depends on a reasonably good match between the charges that motivate prosecution and the charges that appear on defendants' rap sheets. When crimes and charges do not coincide, no one can tell whether law enforcers are doing their jobs. The justice system loses the credibility it

6. The leading articles in this vein are Dan M. Kahan, The Secret Ambition of Deterrence, 113 Harv. L. Rev. 413 (1999), and Dan M. Kahan, Social Influence, Social Meaning, and Deterrence, 83 Va. L. Rev. 349 (1997). For an interesting discussion of the implications of work such as Kahan's for criminal law scholarship, see Bernard E. Harcourt, After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis, 34 Law & Soc'y Rev. 179, 186–97 (2000). For a sharply critical analysis of this literature and of Kahan's work in particular, see Robert Weisberg, Norms and Criminal Law, and the Norms of Criminal Law Scholarship, 93 J. Crim. L. & Criminology 467, 470 (2003).

7. For a more extended discussion of this point, see William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 520–23 (2001) [hereinafter Stuntz, Pathological Politics].

needs, and voters lose the trust *they* need to have in the justice system. Individual agents and prosecutors pay only a tiny fraction of that price, which is why they continue to follow the Capone strategy. The larger price is paid only over time—by crime victims, by law enforcement agencies, and (not least) by the voting public. Somewhere, Big Al must be smiling.

Interestingly, local police agencies and district attorneys' offices tend to be a good deal more wary of paying that price than are federal agents and prosecutors. They operate in a world in which (for the most part) it is clear when a crime has occurred, what that crime is, and who (if anyone) will be responsible for pursuing it. Federal prosecutors have not had to live in such a world. Consequently, pretextual prosecutions are, at least in part, a federalism problem. And they are becoming a terrorism problem. The Justice Department, including the FBI and the many United States Attorneys' offices, is chiefly responsible for fighting the domestic portion of the War on Terror. And the Justice Department has invoked Al Capone's name frequently in that war, as it prosecutes terror suspects with any available criminal charge. Yet the strategy has left the Justice Department in a quandary. It would like to detail its successes by telling of the terrorists it has put away. But having never offered proof that those it has charged with immigration-related and other such offenses are really terrorists, the Justice Department lacks any external validation of its claimed success. Without any adjudication of a terrorist connection, *ipse dixit* is not enough.

The solution is not to abandon pretextual charging in terrorism cases; there may be no realistic alternative. But where there *are* alternatives, the law should give prosecutors incentives to avoid strategic charging practices. That would make federal criminal justice both more transparent and more politically accountable. It would also, over time, give federal officials the public credibility they need as they fight the War on Terror.

The balance of this Essay is organized as follows. Part I reviews the conventional debate about pretextual prosecutions. By the terms of that debate, this strategy is both sensible and fair. Part II then explores the connection between pretextual prosecution and federalism—why it is that local prosecutors seem to care more about the signals their cases send than do their federal counterparts. One lesson of this discussion is that the political economy of local criminal law enforcement is healthier than is sometimes thought. Federal criminal law enforcement is the problem; political constraints that rein in local prosecutors are much weaker in the federal system. Part III turns to terrorism, where the costs to the government of the Capone strategy have become both large and salient in recent months. Part IV returns to federalism, and explores some ways in which pretextual prosecution might be better controlled. There is some reason to believe the system is already moving in productive directions. Federal courts could help that process along, with more

sensible statutory interpretation doctrines in criminal cases—and by paying less attention to the fine points of jurisdictional elements. Ironically, a sensible criminal justice federalism is more likely to occur if the federal courts do not try to mandate it.

I. THE PRETEXT PROBLEM

Consider four characteristics of Capone's prosecution. First, the government came across evidence of a less serious crime while investigating more serious crimes. Second, the crime charged—tax evasion—is of a sort that requires some enforcement, but not much; the ratio of violations to prosecutions is bound to be high. Third, this lesser criminal charge was easier to prove than the more serious offenses that initially motivated the investigation. The fourth characteristic seems unrelated to the others, though in practice it often appears in pretext cases: Capone was a celebrity.

Capone's case did not prompt much public criticism, but other, more recent examples of this strategy have drawn more negative reactions. Think of Bill Clinton's impeachment and the investigation that led to it, or Martha Stewart's prosecution and conviction for false statements to federal investigators. Those cases also had the four characteristics just described. Clinton's perjury and obstruction of justice were a detour from a long-running investigation of ordinary white-collar fraud.[8] Investigators caught Stewart in the lies for which she was convicted while investigating possible insider trading.[9] Perjury, obstruction, and false statements[10] are all crimes that, like tax evasion, must be pursued occasionally. But only occasionally: For all of these offenses, the ratio of violations to prosecutions is very high. Likewise, these crimes are more easily proved than the more complex white-collar crimes that initially motivated the Clinton and Stewart investigations. (Banking and securities fraud cases rarely rest on evidence as strong as the famous blue dress.) Like Capone before them, both Clinton and Stewart were nationally known before they were the targets of criminal investigations, and their fame seemed to play a large role in the process that led to their prosecutions.[11]

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8. Richard Posner's book tells the story well. See Richard A. Posner, An Affair of State: The Investigation, Impeachment, and Trial of President Clinton 16–31 (1999).

9. See Constance L. Hays, Martha Stewart Indicted by U.S. on Obstruction, N.Y. Times, June 5, 2003, at A1.

10. Clinton was investigated and impeached for a combination of perjury and obstruction of justice. Stewart was convicted of violating the federal false statements statute and obstruction of justice.

11. On Clinton, see, for example, James B. Stewart, Blood Sport: The President and His Adversaries 41–179 (1996). Although Stewart's account was written well before the Lewinsky story broke, it captures the fervor of the people trying to take Clinton down. According to the conservative press, a similar fervor gripped the federal officials who pursued Martha Stewart. See Holman W. Jenkins, Jr., Editorial, Justice Tries to Give Herself a Black Eye, Wall St. J., Jan. 28, 2004, at A17 (noting that federal prosecutors

What is it about these cases that attracts so much criticism? Take the four listed characteristics in turn. First, law enforcers found evidence of a minor crime while looking for evidence of a major one. Michelin travel guides label some destinations "worth a trip"; others only "worth a detour."[12] People who work in prosecutors' offices and police agencies often draw a similar line. The list of crimes worth ginning up an investigation is fairly small; the number of crimes worth pursuing if discovered in the course of some *other* investigation is a good deal larger. This sounds fishy: If the minor crime wasn't worth initiating an investigation, why is it worth enforcing at all? Yet there is not necessarily anything untoward about enforcing some crimes in this way. "Detour" investigations are cheaper and likely to have a higher success rate than freestanding investigations. And by definition, detours involve suspects who may well be guilty of other crimes, so the risk of injustice is lower than in freestanding investigations: Whatever the odds were that Capone was innocent of the tax charge, the odds that he was *both* innocent of that charge *and* innocent of the crimes that first prompted his investigation must have been vanishingly small. Not a bad formula for enforcing marginal but necessary criminal prohibitions.

Which leads to the second feature of pretext cases. Plainly, tax evasion, perjury, false statements, and obstruction of justice—the crimes prosecuted in the Capone and Stewart cases and the crimes for which Bill Clinton was impeached—cannot be enforced across the board. Budget constraints do not allow for widespread enforcement. Were it otherwise, tens of thousands of civil lawsuits each year would produce perjury prosecutions (Clinton is far from the only civil litigant who shaded the truth in a deposition), and tax cheats would fill the federal prisons. Equally plainly, such crimes should not be left entirely *un*enforced. As much dishonesty as our tax and litigation systems have now, they would surely have a good deal more if neither litigants nor lawyers feared criminal sanctions for their lies.

This in-between quality—not like homicide or armed robbery, yet also unlike tearing the tag off a mattress or drawing counterfeit "Woodsy

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pursued Stewart because her "tabloid notoriety" ensured that "multiple parties [found] careerist value in picking on her"); Paul Craig Roberts, Editorial, Judicial System Casualty, Wash. Times, Mar. 12, 2004, at A21 (describing indictment, trial, and conviction of Stewart as "Kafkaesque" and "political persecution"); Alan Reynolds, Obstructing Injustice: The Stewart Chase, Nat'l Rev. Online, June 24, 2003, at http://www.nationalreview.com/comment/comment-reynolds062403.asp (on file with the *Columbia Law Review*) (maintaining that charging Stewart with making false statements seemed "more like a desperate way for her original accusers to save face than a serious effort to protect any real people from any real crimes"); cf. Joan MacLeod Heminway, Save Martha Stewart?: Observations About Equal Justice in U.S. Insider Trading Regulation, 12 Tex. J. Women & L. 247, 251 (2003) (suggesting that Stewart might have been singled out because she is "a very visible and controversial female public figure with political interests adverse to those of the Bush administration").

12. See, e.g., Michelin Travel Publications, The Green Guide to Sicily 2 (2d ed. 2001).

Owls"[13]—means that enforcing laws like the ones listed in the preceding paragraph requires a selection mechanism, some tool for separating the few cases where prosecution is appropriate from the many where it isn't. Random enforcement is a practical impossibility. It would mean, in practice, random *investigation*, and the large majority of investigations would yield no charge. Unless we are to have massive increases in law enforcement budgets, that level of inefficiency is intolerable. An obvious and obviously attractive alternative is to enforce such crimes when investigators find violations in the course of sniffing out other, more serious crimes. This too sounds fishy, as though the government were playing bait-and-switch with criminal punishment. But the "switch" is generally unplanned—no one thought about Lewinsky when the Whitewater investigation was gearing up, nor was Capone initially targeted because of his tax liability. And again, the practice of prosecuting some crimes only or primarily against defendants suspected of other, more serious crimes tends to minimize the worst injustices.

The third key feature of pretext cases goes to proof. Capone's tax evasion was easier to prove than his liquor violations (even though everyone knew about the latter). Martha Stewart's lies were more readily established than her (alleged) insider trading. And Bill Clinton's guilt was much more easily established with respect to perjury and obstruction—the "detour" crimes—than with respect to the Whitewater-based frauds that had been Starr's primary focus. Of course, proving guilt is what prosecutors are supposed to do. If there is a danger here, it is that the easily proved crimes were not serious enough to justify criminal punishment. If that is so, then the government is substituting an easily proved fake "crime" for a harder-to-prove real one.

The risk is both real and important, but it should not be overstated. The likelihood that a prosecutor will make too much of a minor crime may be particularly great when the prosecutor has only one case on her docket—an unfortunate characteristic of the old independent counsel model.[14] Even there, the Clinton case suggests that there is some protection against the risk of criminal punishment based on trumped-up technicalities. Not only did the Senate acquit; experienced lawyers testified during the House impeachment hearings that no factually similar case could possibly yield a conviction—indeed, that no such case would be brought

13. These are the two most famously innocuous federal crimes. For the "Woodsy Owl" statute, see 18 U.S.C. § 711a (2000) (banning manufacture, use, or reproduction of the character or of the associated slogan: "Give a Hoot, Don't Pollute"). The requirement that sellers (note: not everyone) leave mattress tags intact stems from several provisions of the United States Code and federal regulations. For a detailed analysis and defense of that rule, see Stuart P. Green, Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses, 46 Emory L.J. 1533, 1610–14 & n.264 (1997).

14. H. Geoffrey Moulton, Jr. & Daniel C. Richman, Of Prosecutors and Special Prosecutors: An Organizational Perspective, 5 Widener L. Symp. J. 79, 83–84 (2000).

for prosecution.[15] If that conclusion is correct, the worst pretext cases may be self-deterring: Prosecutors do not prosecute because juries would not convict if given the chance. And in the rare cases where deterrence fails, prosecutors may pay a steep price. Starr's reputation was severely damaged by his investigation of the Lewinsky affair,[16] and Donald Smaltz did himself no favors by hounding Mike Espy over his receipt of Super Bowl tickets from lobbyists—another independent counsel investigation that led to an acquittal.[17] Starr's and Smaltz's travails suggest that the odds of conviction and punishment on trivial charges may be smaller than is usually thought. Meanwhile, the severity of that risk—the degree of overpunishment when the prosecution wins—is mitigated by the existence of the background crime: Again, in all the cases mentioned above, investigators suspected the target of other, more serious offenses than those charged. That suspicion may have been unjustified in Clinton's case—or in Stewart's (although surely not in Capone's). Still, the presence of suspicion means *something.*

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15. After exploring the various gradations of perjury, Alan Dershowitz testified that "the false statements of which President Clinton is accused fall at the most marginal end of the least culpable genre of this continuum of offenses and would never even be considered for prosecution in the routine cases involving an ordinary defendant." Consequences of Perjury and Related Crimes: Hearing Before the House Comm. on the Judiciary, 105th Cong. 85 (1998) (statement of Alan M. Dershowitz, Felix Frankfurter Professor of Law, Harvard Law School). In the same hearing, Jeffrey Rosen testified that "neither the independent counsel nor anyone else, to my knowledge, has been able to identify a case where a defendant was prosecuted, let alone convicted, for peripheral statements in a civil proceeding." Id. at 97 (statement of Jeffrey Rosen, Associate Professor of Law, George Washington University Law School). If Dershowitz and Rosen are correct, and we know of no reason to believe otherwise, then either prosecutors have shown remarkable restraint or juries are unwilling to convict on such charges.

Juries are not alone in their skepticism of inflated charges for marginal misconduct; appellate courts may be as skeptical, or nearly so. For a good example of such judicial skepticism in action, see United States v. Sun-Diamond Growers, 526 U.S. 398, 406–07 (1999) (expressing worry that allowing charges to be brought under a broad reading of the "illegal gratuity statute" might result in criminalization of innocuous behavior).

16. The Gallup Organization commented that Starr

> le[ft] the office as one of the most negatively evaluated public figures measured in Gallup Poll annals. About two-thirds of Americans said they had a negative opinion of Starr earlier [in 1999], after the impeachment crisis was over, and the same number said they disapproved of the job he did as independent counsel. Other measures taken during 1998 and early 1999 show the degree to which the American public distrusted both his motives and his decisions.

Frank Newport, The Gallup Organization, Abstract, Starr's Tenure as Independent Counsel Marked by Strongly Unfavorable Public Opinion (Oct. 19, 1999), at http://www.gallup.com/content/default.asp?ci=3529&pg=1 (on file with the *Columbia Law Review*).

17. On Espy's acquittal, see Neil A. Lewis, Espy Is Acquitted on Gifts Received While in Cabinet, N.Y. Times, Dec. 3, 1998, at A1. For a scathing assessment of Smaltz's behavior, see Robert W. Gordon, Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair, 68 Fordham L. Rev. 639, 672–73 (1999) ("[T]he jury acquitted Espy on all counts precisely because they saw how fanatically imprudent it was [for Smaltz] to blow up Espy's small-scale sins into major felonies.").

Another risk is a good deal larger. Suppose Clinton had been not an incumbent President but an ex-Governor and possible future Senator from Arkansas. Suppose further that his likely sentence, were he convicted of fraud in connection with Whitewater and the looting of Madison Guaranty Savings & Loan, would be very long: say, twenty years in a federal prison. Now suppose the prosecution offered him a guilty plea for Monica-related perjury and obstruction with very little prison time, perhaps in exchange for helpful testimony against other defendants. Under those circumstances, a conviction for the "crimes" arising out of the Lewinsky affair seems quite possible, even likely—and it does not depend on any jury's willingness to conclude that those crimes merit punishment. Notice, though, that *this* risk is not peculiar to pretext cases. On the contrary, it is present whenever (1) multiple criminal offenses can be charged—which they always can, with or without a "detour" crime—and (2) the difference between the potential sentence for the potential top count and the sentence available for lesser charges is substantial—which it usually is, at least in federal cases. Liberal joinder rules and harsh sentencing guidelines pose that risk, not prosecutorial pretexts.

The fourth feature of cases like Capone's, Clinton's, and Stewart's goes not to the crimes but to the targets. Other mobsters sold booze, killed rivals, and bought local politicians, but no one received the kind of law enforcement attention that Capone got. Not coincidentally, no other mobster had Capone's national reputation.[18] So too with Bill Clinton and Martha Stewart. Plainly, celebrity prosecution is a different phenomenon than pretextual prosecution. But the two phenomena seem to overlap surprisingly often. Perhaps it is worth considering them in tandem.

This prosecutorial focus on celebrities sounds fishiest of all; it smacks of the phenomenon Tom Wolfe described in *The Bonfire of the Vanities* when he wrote of prosecutors' single-minded pursuit of "The Great

18. At least until Lucky Luciano rose to fame in the mid-1930s—whereupon he was promptly taken down by Manhattan District Attorney Thomas E. Dewey, who thereby became America's first celebrity prosecutor. The Luciano case made Dewey, who was then in his mid-thirties and had held no higher public office, an instant presidential prospect: In 1939, he led Franklin D. Roosevelt in nationwide polls. See Richard Norton Smith, Thomas E. Dewey and His Times 189–206, 285–86 (1982).

The Capone pattern has held ever since. Frank Costello won nationwide fame when he testified before the Kefauver Commission in the spring of 1951. Shortly afterward, Costello was convicted of tax evasion. Costello v. United States, 350 U.S. 359 (1956). John Gotti offers a more contemporary example of the phenomenon. By comparison, Anthony Accardo—the heir to much of Capone's organization—never spent a night in jail and died peacefully at age eighty-six in 1992. See Dale A. Oesterle, Early Observations on the Prosecutions of the Business Scandals of 2002–03: On Sideshow Prosecutions, Spitzer's Clash with Donaldson over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation, 1 Ohio St. J. Crim. L. 443, 450 n.25 (2004). Mobsters do well to keep their names out of the papers. Those with more of a taste for publicity tend to pay for their fame.

White Defendant."[19] As Robert Gordon argues, that pursuit seems squarely at odds with the rule of law; it promotes "arbitrary and . . . politically motivated prosecution."[20] Gordon continues:

> I expect that most of us would have no objection to a random audit of civil perjury, something like an IRS random audit of tax returns, in which the DA's office pulled transcripts to identify and then investigate plausible perjurers for purposes of general deterrence. But when the DA singles out a public figure for exemplary punishment for behavior that in most would draw a minor sanction or a pass, the object of the lesson looks like a martyr and the DA a villain.[21]

Monroe Freedman made a similar point thirty-seven years ago, in the course of challenging grudge-based prosecutions like Attorney General Robert Kennedy's efforts to "get" union boss Jimmy Hoffa.[22] Freedman began by challenging the argument that,

> if the individual is in fact guilty of the crime with which he is charged, the motive of the prosecutor is immaterial. This contention overlooks the fact that there are few of us who have led such unblemished lives as to prevent a determined prosecutor from finding some basis for an indictment or an information. Thus, to say that the prosecutor's motive is immaterial, is to justify making virtually every citizen the potential victim of arbitrary discretion.[23]

Freedman went on to assert that prosecutors have an "ethical obligation" not to abuse their power by bringing "prosecutions that are directed at individuals rather than at crimes."[24]

One obvious response is that *all* prosecutions are directed at individuals; we do not prosecute criminal conduct in the abstract. The question cannot be whether to target individuals, but whether a particular criterion is a legitimate ground for targeting. And on that score, celebrity status resembles "worth a detour": Both are less problematic sorting devices than first appears. Crimes like perjury, obstruction, and tax evasion must be enforced only occasionally; more systematic enforcement is unaffordable. If what happens in *most* cases—nothing—is the just result in *all* cases, such crimes can never be punished. And if only a few such cases can be brought, the best way to maximize the deterrent bang for the law

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19. Tom Wolfe, The Bonfire of the Vanities 491 (1987). Concern for Great White Defendants might seem strange in a system whose prison population is as heavily African American as is ours. But in truth it isn't strange at all: In a world where there aren't many rich white defendants, nailing one for a high-profile violent crime is likely to be a real coup.

20. Gordon, supra note 17, at 672.

21. Id. at 672–73.

22. Monroe H. Freedman, The Professional Responsibility of the Prosecuting Attorney, 55 Geo. L.J. 1030 (1967).

23. Id. at 1034–35.

24. Id. at 1035.

enforcement buck is to bring well-publicized cases.[25] What better way to guarantee publicity than to pick defendants whose every move will be covered by every news outlet? When a high public official like Clinton is involved, this calculus is reinforced by another. Once a president is even technically guilty of criminal dishonesty and the crime is known (both to investigators and to the public), law enforcers can send only two signals: Either truth matters and lies will be punished, or presidents are above the law.[26] The second signal is, at the least, unattractive—the strongest argument made by those who favored Clinton's impeachment.[27]

A version of that argument applies as well to high corporate officers and rich celebrities who are sometimes investigated for business crimes. High-end white-collar defendants like Michael Milken or Martha Stewart became celebrities in part because they got more than their share of the benefits of American prosperity. If legal protections for property and contract rights are of any value at all in a capitalist economy,[28] it seems fair to conclude that such people have gotten a very good deal from the legal system. Holding them to a somewhat higher standard of integrity than less prosperous souls seems a reasonable quid pro quo. As for the claim that this approach violates the rule of law, many white-collar crimes (securities violations are an obvious example) are necessarily a kind of class legislation, since only members of the relevant class engage in the regulated transactions—the flip side of Anatole France's famous line

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25. Cf. Mark E. Matthews, New IRS Publicity Strategy, U.S. Attorneys' Bulletin, July 2001, at 15, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4904.pdf (on file with the *Columbia Law Review*) (noting that since surveyed taxpayers wanted to hear about tax evasion prosecutions, IRS must do better job of publicizing enforcement efforts).

26. As Robert Gordon has argued, Starr could easily have avoided sending this unpleasant signal without investigating the Lewinsky affair. See Gordon, supra note 17, at 648–50. Starr first learned of Clinton's affair with Lewinsky before Clinton was deposed in the Paula Jones case. Had Starr quietly passed word to Clinton's lawyers that news of the relationship was out, and that any perjury in the deposition would be taken seriously by the independent counsel's office, the story might have played out very differently. Clinton could have settled the Jones case then, or taken a default judgment and litigated damages—an especially attractive move for him, as it is not obvious that there were damages. There would have been no perjury or obstruction of justice to investigate.

27. There were a number of examples of this argument at the Clinton impeachment hearings; the best (in our view) was the testimony of the holder of the Distinguished Leadership Chair at the Naval Academy, who testified that, as Commander-in-Chief, the President must be held to tbe highest possible standards of integrity in all he does. See Consequences of Perjury and Related Crimes, supra note 15, at 76–78 (statement of Leon A. Edney, Admiral, U.S. Navy (Ret.)).

28. This was the central insight of the early legal realists: Property and contract rights are not neutral and natural, and a Hobbesian state of nature would have a very different distribution of wealth than a modern capitalist legal order. For the classic argument, see Robert L. Hale, Freedom Through Law: Public Control of Private Governing Power 3–12 (1952) (arguing that by assigning and enforcing legal rights of property and contract, the law does not just protect existing rights but actually contributes to economic inequality).

about laws that ban sleeping under bridges.[29] Similarly, in the political world, a host of legal requirements governing things like gratuities and campaign contributions applies only to those who hold or seek public office and not to those they represent. Is a ban on highly publicized perjury and obstruction of justice, enforced by prosecuting only public figures, really so different?

Celebrity mobsters raise fewer justice concerns. If there is a problem with the disparity between Capone's fate and the fate of less well-known criminals, the problem lies in the latter cases, not the former. Besides, famous criminals make ideal defendants for rarely (but still occasionally) enforced crimes. One of the best-known men of his time, Al Capone was famous precisely for his ability to live outside the law's commands. Prosecuting such a man for cheating on his taxes sent several useful messages: about the importance of paying taxes, about the rule of law,[30] and last but not least, about the federal government's competence.

The bottom line seems clear enough. As a prosecutorial strategy for enforcing white-collar crimes like those at issue in the Capone, Clinton, and Stewart cases, pretextual targeting appears to be both fair and reasonable. Some crimes must be enforced sparingly, yet still enforced. Enforcing such crimes against defendants suspected of other crimes conserves investigative resources and reduces the risk of serious injustice. And enforcing such crimes against public figures amplifies the law's deterrent signal. At the same time, the worst kinds of pretextual prosecution are self-deterring, since juries and judges alike are free to acquit for any reason and are reasonably likely to acquit in the most sympathetic cases.

While there is a basic unfairness in some pretext cases—Clinton is an example in our view, though Capone and Stewart are not—the unfairness goes not to pretext but to the content of substantive criminal law. If the criminal law of dishonesty is too broad, Clintonian transgressions will sometimes lead to undeserved prison terms, with or without pretexts.[31] The same is true if the rules that govern sentences give prosecutors the

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29. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Anatole France, The Red Lily 95 (Winifred Stephens trans., 1927) (1894).

30. Notice the irony. Conventional application of rule-of-law arguments would cut the other way: Capone was held to a different and more exacting standard than most of the population, and he was punished much more severely than ordinary tax cheats of his time, or of our time, for that matter. Yet failing to punish Capone, treating him just like the average tax cheat who gets away with his crime, would have sent the signal that rich mobsters are above the law. That is a disastrous signal for any legal system to send.

31. The risk is even greater when criminal law is let loose on sexual morality. See, e.g., Richard Gid Powers, Broken: The Troubled Past and Uncertain Future of tbe FBI 62–70 (2004) (discussing the prosecution of champion boxer Jack Johnson for violating the Mann Act). Powers notes that:

> Parkin [Johnson's prosecutor] admitted that while Johnson the "individual" may have been unfairly singled out for prosecution, "it was his misfortune to be the foremost example of the evil in permitting the intermarriage of whites and blacks

power to threaten more years in the penitentiary than anyone thinks fair in order to extort guilty pleas to the sentences they want. The proper way to deal with those dangers is to limit substantive law, not to regulate prosecutors' motives. If crimes are fairly defined and sentences are fairly calibrated, the motives will take care of themselves.

This is essentially what courts have concluded. There has been scattered litigation in Capone-like cases over the years, with defendants raising various constitutional challenges to their prosecutions. Save for a few exceptional cases, the challenges have failed. Two obscure state court decisions capture the lay of the land. *People v. Mantel* was a prosecution for criminal violations of New York's building code.[32] The defendants ran a Times Square sex shop. They claimed that prosecutors were targeting sex shops instead of enforcing the building code across the board. The court treated the claim contemptuously, noting that sex shop proprietors were not exactly a "suspect class" for equal protection purposes.[33] There are a lot of cases like *Mantel*; claimants lose even when they can show (as the *Mantel* defendants could not) membership in some suspect class. The presumption of proper prosecutorial motive is virtually irrebuttable.[34]

There are very few cases like *People v. Kail*.[35] As part of a police crackdown on prostitution, officers in Champaign, Illinois were instructed to arrest suspected prostitutes for anything and everything in the criminal code and local ordinances. Kail was a prostitute in Champaign. She was arrested for riding a bicycle without a bell, in violation of a local criminal ordinance. A search incident to arrest turned up some drugs, for which Kail was later convicted. The *Kail* court overturned the conviction, on the legally dubious ground that the arrest violated the Equal Protection Clause.[36] A spirited dissent cited and quoted *Mantel*.[37]

Based on the conventional debate about pretextual prosecutions, the combination of *Mantel* and *Kail* is close to ideal. *Mantel* establishes that

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> . . . he has violated the law. Now it is his function to teach others the law must be respected."

Id. at 69. Johnson's case is a particularly chilling example of the underside of celebrity prosecution and the high cost of overcriminalization.

32. 388 N.Y.S.2d 565 (1976).

33. See id. at 566–69.

34. The key case is United States v. Armstrong, 517 U.S. 456 (1996), which holds that, in order to obtain discovery, the complaining defendant must point to similarly situated persons who could have been prosecuted but were not. How many such persons the claimant need identify is unclear, but the number is probably substantial. To prevail, the defendant must also show that the prosecutorial policy was motivated by a discriminatory purpose. Id. at 463–71. Successful claims are almost impossible to find. For an excellent analysis of the problem—written nearly a decade before Armstrong, but still on point—see generally Steven Allen Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. Pa. L. Rev. 1365 (1987).

35. 501 N.E.2d 979 (Ill. 1986).

36. Id. at 980–82.

37. Id. at 982–83 (Green, J., dissenting).

pretextual targeting is fine, constitutionally speaking—unless, as in *Kail*, the nominal charge is, well, nominal. Targeting people like Capone is not a problem, unless the charges are transparently trumped up.

The real problem is that *Kail*'s insight is rarely taken seriously. The Second Circuit's approach in *United States v. McFadden*[38] is more typical. McFadden was stopped for riding his bicycle on a sidewalk. He was searched "incident to arrest" (though it seems implausible that the police actually planned to arrest him for riding his bike); the search turned up a gun—which, since McFadden had a prior felony conviction, led to a federal charge under the felon-in-possession statute. The Second Circuit affirmed his conviction.[39] *McFadden* may apply only to searches; it could be that a criminal prosecution for the bicycle offense would have led to a different result. But probably not. The Supreme Court has aggressively regulated most aspects of criminal procedure; the latest example is the constitutionalization of procedures used for finding so-called "sentencing facts."[40] That aggressiveness does not apply, however, to overcriminalization and oversentencing, both of which the Court has been loath to tackle directly. Serious constitutional limits on substantive criminal law, apart from the occasional "privacy" decision[41] or crimes with some free speech angle,[42] do not exist. Nor are there significant limits on legislatures' ability to attach immodest sentences to modest crimes.[43]

With that large qualification, it appears that courts have it just about right—if, but only if, the chief problem with pretextual prosecutions is

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38. 238 F.3d 198 (2d Cir. 2001).

39. Id. at 199–204.

40. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding it unconstitutional to remove from the jury any fact—other than fact of prior conviction—that increases penalty "beyond the prescribed statutory maximum"); Blakely v. Washington, 124 S. Ct. 2531, 2536–37 (2004) (holding that the "statutory maximum" referred to in *Apprendi* "is not the maximum sentence a judge may impose after additional facts, but the maximum he may impose without any additional findings").

41. See Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding unconstitutional a state law regulating private sexual conduct between members of the same sex, but not members of the opposite sex); Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that abortion is a fundamental privacy right); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (invalidating state ban on contraceptives on ground of marital privacy). These cases are not primarily about the scope of substantive criminal law; rather, their focus is on the scope of sexual and reproductive freedom. It might have been otherwise: *Griswold*, which gave birth to the relevant line of cases, seemed to signal judicial willingness to overturn statutes that criminalize innocuous or widely tolerated behavior. For a brief exploration of that road not taken, see William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 68–69 (1997).

42. See, e.g., Texas v. Johnson, 491 U.S. 397, 420 (1989) (conviction for flag desecration beld unconstitutional).

43. See Ewing v. California, 538 U.S. 11, 30–31 (2003) (affirming life sentence under recidivist statute for theft of three golf clubs); Harmelin v. Michigan, 501 U.S. 957, 994–96 (1991) (affirming life sentence for possession of 672 grams of cocaine). For an excellent discussion that contrasts these cases with the more stringent proportionality-style limits on punitive damages, see generally Pamela S. Karlan, "Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment, 88 Minn. L. Rev. 880 (2004).

the risk of convictions on trumped-up charges. But there are other, more serious problems. The public had a strong interest in knowing whether Bill Clinton was guilty of any more-than-technical crimes in connection with the Whitewater Development Corporation and Madison Guaranty Savings & Loan. The Lewinsky investigation left that issue murky.[44] Did Starr's office go for the blue dress because Clinton was guilty of serious but hard-to-prove fraud, or only because a sex scandal was a ticket to headlines and talk shows? This leads to another important public interest: Voters needed to know whether Starr and his staff were doing their jobs well—which depended mostly on what they did or didn't find out about Whitewater, not about Monica. Wholly apart from the harm it did to our politics, the Lewinsky investigation left unresolved the central question that needed resolving in the public's mind—Clinton's guilt or innocence of Whitewater-related charges—and made it harder to evaluate the independent counsel's investigation of that central question.

Muddied signals are not always a problem in pretext cases: Sometimes, voters and legislative oversight committees have good alternative sources of information about the relevant crimes and the relevant criminals. After all, everyone knew what Capone was up to. Where that is so, prosecutors can maximize some mix of the odds of conviction and the extent of punishment and ignore the nature of the crime charged. But where substitute signals are absent, pretextual targeting may prove quite costly. Notice too that individual prosecutors do not internalize the relevant costs: The line prosecutor gets much of the benefit of a conviction; if the conviction is for the wrong crime, the costs of that mistake will be borne over time by the prosecutor's office, by other law enforcement agencies, and by the voters. This creates a serious problem of political economy. The system as a whole functions best when prosecutors charge for the crime that motivated the investigation, but individual prosecutors may prefer pretextual charges.

Again, the political economy problem does not exist everywhere. For example, it is (or was—such cases are mostly a thing of the past) not such a large problem when the defendant is a leading figure in a Mafia family. Perhaps that is why the Capone strategy arose in cases like Capone's. As John Ashcroft explained, in the course of justifying the use of similar tactics against suspected terrorists:

> Attorney General [Robert] Kennedy made no apologies for using all of the available resources in the law to disrupt and dismantle organized crime networks. Very often, prosecutors were aggressive, using obscure statutes to arrest and detain suspected mobsters. One racketeer and his father were indicted for lying

44. Starr's successor ultimately issued a report finding the available evidence "insufficient to prove to a jury beyond a reasonable doubt that either President or Mrs. Clinton knowingly participated in any criminal conduct . . . or knew of such conduct." See Robert W. Ray, Independent Counsel, 1 Final Report of the Independent Counsel In re: Madison Guaranty Savings & Loan Association 155 (Jan. 5, 2001).

> on a federal home loan application. A former gunman for the Capone mob was brought to court on a violation of the Migratory Bird Act. Agents found 563 game birds in his freezer—a mere 539 birds over the limit.
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> . . . .
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> Robert Kennedy's Justice Department, it is said, would arrest mobsters for "spitting on the sidewalk" if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.[45]

The analogy is not apt. Even during the Mob's heyday, the press and public could obtain good information on the makeup and conduct of the leading families, without regard to any criminal litigation. And there were independent measures of the most serious crimes those families committed—including homicide.[46] Criminal prosecution and conviction were not necessary to tell the public that Capone's organization existed, who belonged to it, or how much of a threat it was. In that setting, prosecutions for bagging too many migratory birds may have been socially costless. Not so with respect to terrorism, where accurate information is very hard to come by and independent measures may not exist. In *this* context, prosecutions for spitting on sidewalks may prove very costly indeed.

II. PRETEXT AND FEDERALISM

Historically, pretextual prosecutions of Mafia dons were almost always federal prosecutions. The same is true today of prosecutions of would-be terrorists. The pretext problem seems closely tied in some manner to federalism.

This fact should seem puzzling. State and federal codes alike contain long lists of crimes like tax evasion, perjury, obstruction of justice, and the excessive hunting of migratory birds.[47] Local district attorneys

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45. Attorney General John Ashcroft, Prepared Remarks for the U.S. Mayors Conference (Oct. 25, 2001), available at http://www.usdoj.gov/ag/speeches/2001/agcrisis remarks10_25.htm (on file with the *Columbia Law Review*).

46. See Fed. Bureau of Investigation, U.S. Dep't of Justice, Uniform Crime Reports (UCR): Crime in the United States, available at http://www.fbi.gov/ucr/ucr.htm (on file with the *Columbia Law Review*). For excellent discussions of the UCR's history and significance, see generally Lawrence Rosen, The Creation of the Uniform Crime Report: The Role of Social Science, 19 Soc. Sci. Hist. 215 (1995); Michael D. Maltz, Bureau of Justice Statistics, U.S. Dep't of Justice, Bridging Gaps in Police Crime Data (Sept. 1999), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/bgpcd.pdf (on file with the *Columbia Law Review*). With respect to homicide data in particular, it is worth noting that the two leading histories of crime in America both treat the UCR's homicide statistics as reliable. See Roger Lane, Murder in America: A History 242 (1997); Eric H. Monkkonen, Murder in New York City 10–11, 185 (2001).

47. On the federal code, see, e.g., Am. Bar Ass'n, Report on the Federalization of Criminal Law 91 appx. C (1998). On state codes, see, for example, Stuntz, Pathological Politics, supra note 7, at 512–18.

(who enforce state criminal codes) frequently go after defendants for serious crimes for which those defendants cannot easily be convicted—which sounds like prosecuting Capone for bootlegging—and losing. Broad criminal codes and hard-to-convict criminal defendants should, in theory, generate lots of Capone-like prosecutions for more easily proved offenses. That plainly happens in federal court. But Capone-type cases are rare in state courts. If we are to solve the pretext problem, we must first understand why that is so.

A. *Local Prosecutions*

Most regulatory systems are enforced by a mixture of government sanctions and private litigation. Securities law, environmental law, and employment discrimination law all have this character, and there are many more examples. Criminal law enforcement does not work this way: The government has a monopoly on it. State legislatures write their states' criminal codes. Local district attorneys, elected by their home counties, enforce those criminal codes. Their case selection decisions are unreviewable.[48]

Four key features of this system push against Capone-style pretextual prosecutions. First, a small but important part of state criminal codes are politically mandatory.[49] Local prosecutors do not have the option of ignoring violent felonies and major thefts. The same is true, at least in some measure, of distribution of hard drugs. No district attorney can ignore these crimes in order to go after particular targets or pursue some personal agenda—at least not if she wants to keep her job. It is important to understand why that is so: These crimes are politically mandatory *both* because they are important to voters *and* because local prosecutors are politically accountable for dealing with them. Other provisions of state criminal codes give prosecutors options; these provisions create obligations.

Second, there are enough of these politically mandatory crimes to occupy all or nearly all of local prosecutors' time and manpower. This has not always been true; there have been periods in American history when district attorneys' offices had a good deal of slack. But any slack has long since disappeared, as the following data suggest. In 1974, there were 17,000 local prosecutors in the United States. By 1990, that number had grown to 20,000.[50] During those same years, the number of felony prose-

48. See, e.g., Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 382 (2d Cir. 1973).

49. On the significance of this point for plea bargaining, see William J. Stuntz, Plea Bargaining and Criminal Law's Disappearing Shadow, 117 Harv. L. Rev. 2548, 2563–64, 2567–68 (2004) [hereinafter Stuntz, Criminal Law's Shadow].

50. Bureau of Justice Statistics, U.S. Dep't of Justice, Prosecutors in State Courts—1990, at 2 (1992).

cutions more than doubled.[51] Crime has fallen since the early 1990s, but dockets (and hence prison populations) have continued to grow, and prosecutors' offices have not caught up with the earlier increase.[52] Extreme docket pressure characterizes DAs' offices, particularly in the large cities where crime rates tend to be highest. It follows that criminal litigation must be rationed not only based on political necessity but also based on cost. "Detours" themselves may be cheap, but the investigations that give rise to them are expensive, and district attorneys cannot afford expensive investigations. That is why high-end white-collar crime is (with a few rare exceptions)[53] a federal preserve; only the feds have the man-

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51. State court felony filings rose 36% from 1978 to 1984. Nat'l Ctr. for State Courts, State Court Caseload Statistics: Annual Report 1984, at 189–90 tbl.35 (1986). They rose an additional 51% from 1985 to 1991. Nat'l Ctr. for State Courts, State Court Caseload Statistics: Annual Report 1991, at 37 tbl.1.25 (1993). It seems safe to assume that filings rose between 1984 and 1985 as well, but even if they held constant, the number of felony cases more than doubled between the late 1970s and the early 1990s.

This massive increase in local criminal dockets was a response to the massive increase in crime rates that America suffered between about 1960 and 1975: more than 200%, according to the FBI's numbers. See The Disaster Ctr., United States Crime Rates 1960–2000, available at http://www.disastercenter.com/crime/uscrime.htm (last visited Jan. 12, 2005) (on file with the *Columbia Law Review*). That massive crime wave coincided with (and perhaps was partly caused by) a decline in the prison population; the number of inmates in America's prisons fell 13% between 1960 and 1970, Margaret Werner Cahalan, Bureau of Justice Statistics, U.S. Dep't of Justice, Historical Corrections Statistics in the United States, 1850–1984, at 29 tbl.3-2 (1986), while the crime rate more than doubled. The number of prisoners rose in the 1970s, but not enough to compensate for the increase in crime. See id. (showing 34% rise in inmate population between 1960 and 1980). By the 1980s, there was enormous political pressure on local district attorneys to close the gap.

52. The number of state court felony convictions is a good proxy for the size of local criminal dockets. The year 1990 saw 829,344 felony convictions in state courts. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics—1992, at 527 tbl.5.49 (1993). By 2000, that number had grown to 924,700. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics—2002, at 447 tbl.5.44 (2003) [hereinafter 2002 Sourcebook]. Crime started to fall in 1991; that year, America's inmate population (those either in jail or prison) stood at 1,216,664. Id. at 478 tbl.6.1. By 2002, it had grown to 2,033,331—an increase of more than two-thirds. Id. The mushrooming of the prison and jail populations was partly due to inmates serving longer sentences, but only partly: Average sentence length in state criminal cases (federal prisoners are a small fraction of the total; their average sentence length is thus a small factor in these trends) rose a mere 16% between 1993 and 1999. Id. at 505 tbl.6.37. Plainly, the number of defendants prosecuted for serious crimes has continued to grow even as crime has fallen.

The number of prosecutors has increased substantially during this time—but not substantially enough to catch up with the huge docket increases of the 1980s. See Carol J. DeFrances, Bureau of Justice Statistics, U.S. Dep't of Justice, Prosecutors in State Courts, 2001, at 2 (2002) [hereinafter DeFrances, Prosecutors 2001] (putting number of prosecutors at 27,000, up from 20,000 in 1990).

53. The exceptions are not so rare in New York; the Manhattan District Attorney's office has both a history of pursuing white-collar crime and some expertise at that enterprise. Even in that office, however, the pressure to bring winning cases (especially when the cases occupy so much time and energy) limits the white-collar docket significantly. And the commitment of incumbent DA Robert Morgenthau to white-collar

power to deal with the long, intricate paper trails, and only the feds can afford to initiate and pursue major investigations without being certain that those investigations will turn up evidence of serious crimes.[54]

Local police, on whom district attorneys must depend,[55] also labor under severe resource constraints. That reinforces district attorneys' tendency to avoid detours. "Detour" crimes tend to arise in long, complex investigations, where police and prosecutors are working together to go after a particular set of targets: Think Al Capone, Bill Clinton, or Martha Stewart. Local police cannot afford long, complex investigations. For much the same reason, local cops and local prosecutors rarely work together on an investigation; the norm is for police to hand a case off to prosecutors—more a relay race than a team sport.[56]

Third, district attorneys are subject to performance measures that reinforce their tendency to concentrate on a small list of politically important crimes. The FBI's crime index measures the incidence of nine offenses: murder, manslaughter, rape, arson, kidnapping, aggravated assault, robbery, burglary, and auto theft. The FBI publishes reports about the number of index crimes nationwide;[57] there is a good deal of publicity attached to these numbers in local jurisdictions.[58] Responsibility for

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prosecutions has been squarely criticized by those seeking to unseat him in 2005. See Robert Kolker, Happy 85th Birthday, Bob Morgenthau, N.Y. Magazine, July 26, 2004, at 44, 47 (noting criticism of Morgenthau's "special interest in Wall Street" by his leading challenger, Leslie Crocker Snyder); Greg Sargent, Young Scions Gun for an Old Prosecutor, N.Y. Magazine, Nov. 22, 2004, at 14, 14 (quoting Donald Trump Jr., a Snyder supporter, as noting: "While white-collar crime is important, we need someone who will really prosecute criminals—rapists and killers.").

54. The best discussion of white-collar crime investigations deals solely with federal investigations—a sign of how the federal government has dominated the field. See generally Kenneth Mann, Defending White Collar Crime: A Portrait of Attorneys at Work (1985).

55. While an increasing number of district attorneys' offices have developed their own investigative units, see Carol J. DeFrances, Bureau of Justice Statistics, U.S. Dep't of Justice, State Court Prosecutors in Large Districts, 2001, at 2 tbl.1 (2001) (reporting that staff investigators comprise 9.9% of total personnel in prosecutors' offices in large districts (defined as those serving populations of 500,000 or more)), the independent investigative capabilities of even those offices remain comparatively small because of trial preparation responsibilities.

56. See Elizabeth Glazer, Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime, 26 Fordham Urb. L.J. 573, 574 (1999); see also Daniel C. Richman, Prosecutors and Their Agents, Agents and Their Prosecutors, 103 Colum. L. Rev. 749, 793 (2003) [hereinafter Richman, Prosecutors and Their Agents] (noting varieties of police-prosecutor interaction).

57. See sources cited supra note 46.

58. The St. Petersburg, Florida, Chief of Police recently noted:

> The UCR data represents the official level of crime in the community. These reports and the news media stories about them can have a significant impact on the community. They often serve as grist for the political mill—local elections have been greatly influenced by crime reports. In some cases, the careers of police chiefs and sheriffs have been affected in either positive or negative ways by these statistics.

these numbers falls heaviest on police forces, who report not to district attorneys but to mayors and city councils. But as the primary and often the only source of the local district attorney's cases, the local police are also a potentially loud source of information about a given DA's performance, and they ensure that any district attorney not already fixated on these reports will soon become so.[59] These DAs do not control the relevant yardstick, and they must defend their performance before the voters every few years.[60] The upshot is that both police departments and DAs' offices are held responsible for increases in serious crime.[61]

That combination of political accountability and an independent performance measure matters in several different ways. Local prosecutors would go after violent crimes and major thefts even without the crime index. Pressure by victims and the sheer obviousness of a body lying in the street, a destroyed building, or a hospitalized citizen would see to that. But the index—specifically, the publicity that it brings to crime statistics—focuses even more attention on those offenses, since local voters will hear about whether their number is rising or falling, and by how much. Another effect matters more. The fact that crime statistics are out there and will be reported gives local prosecutors a strong incentive to prosecute the relevant crimes "straight up" rather than pretextually. If the number of murders in a given jurisdiction is two or three times the number of murder prosecutions, the DA's opponent in her next election has an incentive to publicize that fact.[62] Voters will know it;

Darrel W. Stephens, Measuring What Matters, *in* Nat'l Inst. of Justice, NCJ No. 170610, Measuring What Matters: Proceedings from the Policing Research Institute Meetings 55, 56 (Robert H. Langworthy, ed., 1999), available at http://ncjrs.org/pdffiles1/170610-2.pdf (on file with the *Columbia Law Review*) [hereinafter Measuring What Matters]. This is not to say that UCR data offers a satisfactory method of judging police performance or even of measuring a community's perception of crime. See George Kelling, Measuring What Matters: A New Way of Thinking About Crime and Public Order, *in* Measuring What Matters, supra, at 27, 27; John J. DiIulio, Jr., Rethinking the Criminal Justice System: Toward a New Paradigm, *in* Performance Measures for the Criminal Justice System, Princeton University Study Group 1 (Bureau of Justice Statistics ed., 1993).

59. For an example of district attorneys' strong interest in the public's perception, see William Glaberson, Caught Between the Law and the Written Word, N.Y. Times, July 9, 2004, at B4 (discussing 2004 civil suit by ADA demoted and later fired for calling Brooklyn "the best place to be a homicide prosecutor" because it had "more dead bodies per square inch than anyplace else").

60. In 2001, chief prosecutors were elected in all jurisdictions except Alaska, Connecticut, New Jersey, and the District of Columbia. DeFrances, Prosecutors 2001, supra note 52, at 2.

61. The movement for community prosecution has only heightened this trend. See Catherine M. Coles, Community Prosecution, Problem Solving, and Public Accountability: The Evolving Strategy of the American Prosecutor 28–29 (John F. Kennedy Sch. of Gov't, Harvard Univ., Working Paper No. 00-02-04, 2000), available at http://www.ksg.harvard.edu/criminaljustice/publications/community_prosecution.pdf (on file with the *Columbia Law Review*) [hereinafter Coles, Community Prosecution].

62. We are quite aware that the results of a single high-profile case can loom larger in the minds of the electorate in a district attorney race than an office's overall performance. See Alan Abrahamson, Garcetti Is Named Winner over Lynch, L.A. Times, Nov. 22, 1996,

they will get the impression that the DA and the local police are not paying enough attention to murders—even if many of those murderers were prosecuted and convicted for something else (and punished severely), just as Capone was charged, convicted, and punished for cheating on his taxes. The DA could try, of course, to shift blame somewhere else, but that strategy would not work very well since voters understand that she, and she alone, controls criminal prosecutions in her county. The politically smart move is to maximize not convictions *of murderers*, but convictions *for murder*.[63]

The crime index may matter in one more way. The availability of good crime data makes local prosecutors' offices responsible, at least in part, for the ups and downs of the rates of crimes that comprise the index. Sure, other factors like the economy or local demography probably affect the crime rate more than prosecutorial strategies do.[64] But prosecutors and police—so quick to take credit for crime drops—have to act like they are addressing the reported statistics. Prosecutors thus have an incentive to engage in the charging practices that most efficiently deter index crimes: violent felonies and major thefts. The most efficient deterrent signal is the simplest one—punishing killers for killing, thieves for stealing, kidnappers for kidnapping, and so forth. Criminals, or at least some of them, may pay attention to the price of crime, but few study it with great care. If criminals are punished for different crimes than the ones that caused prosecutors to go after them, the punishment sends would-be criminals a confused signal; any deterrent effect on the underlying crime is diluted. It seems likely that elected district attorneys prefer to maximize the deterrent effect on the crimes that are best measured; it

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at B1 (noting role of O.J. Simpson case in close Los Angeles district attorney election); Steve Lipsher, Bryant Prosecutor Relieved After Close Call: Eagle County's Mark Hurlbert Retains His Seat After Trailing Newcomer Bruce Brown at One Point. He Vows to Make Changes, Denver Post, Nov. 4, 2004, at B4 (noting role that dismissed case against Kobe Bryant played in close election that ultimately returned DA to office). But the absence of overall performance issues actually supports our point. Indeed, the high political stakes of these prosecutions makes it even more interesting that pretextual charges are not brought in these situations.

63. See Coles, Community Prosecution, supra note 61, at 10 (noting that under the "felony case processor strategy" that has dominated large offices, prosecutors focus on core violent crimes and major thefts, and their "operational goal becomes maximizing the felony conviction rate"). Note: the felony conviction rate, not the conviction rate.

Along similar lines, James Eisenstein and Herbert Jacob long ago noted the following working rule in local prosecutors' offices: "The charges on which [defendants] are convicted must be about as near to the original charges as is customary." James Eisenstein & Herbert Jacob, Felony Justice: An Organizational Analysis for Criminal Courts 47 (1977). The baseline assumption is conformity with the original charge; deviation from that baseline requires some justification. The usual original charge is the offense of arrest, which is ordinarily fixed by the police, not by the prosecutor's office.

64. See generally Symposium, Why Is Crime Decreasing?, 88 J. Crim. L. & Criminology 1173 (1998) ("Taken together, [the symposium] articles make clear that there is no single cause or explanation for the recent decline in crime . . . .").

also seems likely that pretextual charging is a poor means of achieving that goal.

The fourth factor may be the most important. For the state law crimes that are punished most consistently—basically, FBI index crimes plus distribution of serious drugs—state criminal law functions *as law*.[65] As we have already noted, prosecutors prosecute these crimes systematically and aggressively, meaning that, at least roughly, the crimes are enforced as written. Legal definitions are not a cover for strategic charging patterns. Murder, manslaughter, robbery, and aggravated assault—all these crimes have conduct and intent terms that roughly correspond to the behavior prosecutors seek to punish. Those legal definitions are reasonably consistent, across both time and place—one reason why these crimes are good vehicles for comparing crime rates. Consistent, nonstrategic crime definition may flow from another characteristic index crimes share: They also have *public* definitions. Burglary, kidnapping, and rape are not just technical legal terms; ordinary citizens know what those terms mean.[66] That fact constrains state legislators. Members of Congress can redefine mail and wire fraud to mean, roughly, undisclosed breach of fiduciary duty (as they have), but no state legislature could redefine murder to include nonnegligent homicide. Voters would think such an enterprise silly, or worse. Jurors might refuse to apply the strategic definitions.

In sum, politically accountable local district attorneys must spend the bulk of their time enforcing a small number of serious crimes. Those crimes are defined nonstrategically. They must be enforced, roughly, as written. That is not a recipe for pretextual prosecution.

At first blush, the rise of "community policing"—and the associated (though less commented on) rise of "community prosecution"—might seem to change that state of affairs. The 1980s and 1990s saw many police departments, particularly in urban areas, move toward new problem-oriented policing techniques and away from simple call-and-response case processing.[67] That meant more police involvement in patrolled areas, and broader and deeper relationships with local residents and businesses. It also meant more enforcement of what were previously thought to be minor crimes—vandalism, vice, various sorts of loitering—both in order to make troubled neighborhoods more livable for their residents and as a means of reducing *major* crimes.[68] Beginning in the 1990s, many

65. See Stuntz, Criminal Law's Shadow, supra note 49, at 2563–64.

66. See Stephens, supra note 58, at 57 ("One useful aspect [of the UCR] is that it provides a relatively simple method of classifying criminal incidents that are brought to the attention of the police by the public. Even with the limitations, it provides a common language that most people, police officers and citizens alike, can understand.").

67. For the classic treatment, see generally Herman Goldstein, Problem-Oriented Policing (1990).

68. For two contrasting views of this style of police work, compare George L. Kelling & Catherine M. Coles, Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities (1996), with Bernard E. Harcourt, Illusion of Order: The False Promise

prosecutors' offices followed this same pattern of greater involvement with local communities, more "say" in charging practices by crime victims, greater attention to "quality of life" offenses—all characteristic of the same problem-solving approaches police departments had adopted.[69]

Notice that one common feature of some kinds of community policing and prosecution is the enforcement of low-level crimes as a means of catching and punishing criminals guilty of much worse offenses. The classic example comes from the New York subway system: Stepped-up enforcement of minor crimes like turnstile jumping led police to offenders with outstanding warrants on major crimes, and serious subway crime fell sharply.[70] That approach—going after "broken windows" offenses in order to get at other, worse crimes—sounds like the Capone strategy. But it is actually Capone in reverse: Turnstile jumping wasn't a convenient substitute charge to take the place of major felonies. Rather, it allowed police to catch people who could then be convicted of those major felonies.[71] It is as if the tax investigation had led to homicide, conspiracy, and bootlegging charges against Capone, instead of the other way around. In such cases, the prosecuted offense is the "real" one, not a pretext.

Aside from these reverse-pretext cases, the biggest effect of community policing and prosecution is to encourage prosecutors to enforce allegedly "minor" crimes *non*-pretextually, not as stand-ins for something else.[72] When Police Chief William Bratton wrote about going after turnstile jumpers, he made it clear that the chief goal of the enterprise was to

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of Broken Windows Policing (2001). For the best analysis of the legal implications of these police tactics, see generally Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551 (1997).

69. For a good account of the rise of community prosecution and its relationship to community policing, see Coles, Community Prosecution, supra note 61, at 17–22, 32–35; see also Am. Prosecutors Research Inst., The Changing Nature of Prosecution: Community Prosecution vs. Traditional Prosecution Approaches (Feb. 2004), available at http://www.ndaa-apri.org/pdf/changing_nature_of_prosecution.pdf (on file with the *Columbia Law Review*) (surveying extent to which community prosecution methods have been adopted).

70. See William J. Bratton, Great Expectations: How Higher Expectations for Police Departments Can Lead to a Decrease in Crime, *in* Measuring What Matters, supra note 58, at 11, 13.

71. "[A]bout one in seven of people arrested for fare evasion was wanted on a warrant" for another offense. Id. at 13.

72. As Catherine Coles put it:

> But where police have moved into community policing, and where prosecutors have direct contacts with citizens, this demand [for community prosecution] increasingly takes the form of requests for prosecutors to handle not just felonies, but also offenses such as prostitution, low-level drug dealing, aggressive panhandling, intimidation of elderly residents by juveniles, and other quality-of-life crimes that affect local neighborhoods.

Coles, Community Prosecution, supra note 61, at 22.

stop people from jumping the turnstiles.[73] That means more docket pressure—recall the data that show caseloads rising while crime was falling through the 1990s[74]—leaving prosecutors less time for "detour" prosecutions. Greater community involvement in prosecution also generally means that local prosecutors must pay more attention to crime victims.[75] That too tends to work against pretexts: Victims are likely to care about punishing the crimes that victimize them, not other, unrelated offenses.

State codes remain full of "crimes" that invite strategic prosecution. Overcriminalization is a problem at the state and federal levels alike. But it matters much less at the state level, because the prosecutors who enforce those overbroad state codes have little time or incentive to exploit the opportunities those codes give them.[76] The data generally support that proposition.[77] Consider guilty plea rates. Given their severe budget constraints and the charging opportunities that broad state criminal codes leave to them, local prosecutors should achieve plea rates approaching one hundred percent. If a murder case looks like a possible acquittal, the prosecutor should find another charge that carries a prison term that can be pinned on the defendant; if enough charges are stacked together, inducing a plea should be easy even if the odds of conviction are low. Federal prosecutors do not have to prosecute (and convict) particular defendants, at least not many of them; their relative unaccountability leaves them free to pursue their own agendas, such as obtaining trial experience.[78] Nor do they labor under the severe budget constraints that local prosecutors face. All of which should lead to lower guilty plea rates in federal court. Yet federal prosecutors actually have

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73. See Bratton, supra note 70, at 12 (calling farebeating "a petty crime that can collectively amount to a colossal theft").

74. See supra note 52 and accompanying text.

75. See Coles, Community Prosecution, supra note 61, at 16–17.

76. See Stuntz, Criminal Law's Shadow, supra note 49, at 2565–68 (contrasting federal and state crimes and prosecutions). One of us has argued in earlier work that state and federal legislators alike have incentives to define crimes strategically, and that local and federal prosecutors alike have incentives to exploit those strategically defined crimes. See Stuntz, Pathological Politics, supra note 7, *passim*. That argument is only partly correct: It ignores the factors discussed in this Essay, which push toward much more accountability for local prosecutors than for their federal counterparts.

77. To the extent that local prosecutors truly embrace the community prosecution model, the issue of pretextual prosecutions and the accountability problems raised by them become more salient. See Coles, Community Prosecution, supra note 61, at 18, 20.

78. There is some evidence that federal prosecutors do pursue such career goals in their case selection decisions. See, e.g., Edward L. Glaeser et al., What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes, 2 Am. L. & Econ. Rev. 259 (2000) (arguing that federal prosecutors seek certain cases to develop their legal skills and connections); Richard T. Boylan & Cheryl X. Long, Size, Monitoring, and Plea Rate: An Examination of United States Attorneys 15–16 (July 10, 2000), available at http://fmwww.bc.edu/RePEc/es2000/0089.pdf (on file with the *Columbia Law Review*) (suggesting that young prosecutors are prone to take cases to trial to acquire human capital unless they are closely monitored).

higher guilty plea rates than their local counterparts.[79] Both trial and acquittal rates for murder cases brought by local district attorneys' offices are high, a good deal more so than for felonies as a whole.[80] These data suggest that, at least in high-crime cities and counties, "truth in charging" is a fairly strong norm and that district attorneys in those high-crime jurisdictions prefer to charge serious crimes and lose than to charge unrelated lesser crimes and win.

There may be a partial exception in drug cases, which is why the guilty plea rate in drug cases is higher than the rate for violent crimes and major thefts.[81] No good external measures of drug crime exist; there is no way to know how many sales of cocaine or heroin occurred in a given jurisdiction over a given period of time. That may explain why pretextual prosecutions—say, charging someone believed to be a dealer with possession of amounts that, in someone else's hands, might be shrugged off as user quantity—are more common than in street-crime cases.

As the drug example suggests, this system is far from perfect. But at least for core crimes, meaning violent felonies and major thefts, the legal and political systems seem to reinforce one another. The law functions as law: These core crimes seem to be defined nonstrategically and in rough accord with public definitions. Prosecutors generally charge the crimes they believe defendants have committed, even when that practice poses a significant risk of acquittal. And voters know how large or small the gap is between the crimes their jurisdictions suffer and the criminal charges their prosecutors file.

B. *Federal Prosecutions*

These patterns are pretty much absent from the federal system. Federal prosecutors do not have primary responsibility for crime control in their jurisdictions. Consequently, their dockets include only a small number of politically mandatory crimes—the equivalent of FBI index crimes in a local DA's office. Federal criminal law gives U.S. Attorneys and their

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79. In fiscal year 2000, 96% of federal felony convictions were by guilty plea. 2002 Sourcebook, supra note 52, at 416 tbl.5.17. The comparable figure in state cases was 95%. Id. at 448 tbl.5.46.

80. The plea rate for murder and nonnegligent manslaughter was only 58%. Id. at 448 tbl.5.46. Though the *2002 Sourcebook* figures (based on a study of seventy-five counties) show a very low acquittal rate in murder cases, id. at 455 tbl.5.57, the rate historically has been relatively high. The *2000 Sourcebook* found that 5% of murder defendants were tried and acquitted, compared to 1% of felony defendants overall. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics—2000, at 463 tbl.5.53 (2001). The *1990 Sourcebook* found that nearly one-third of murder cases that went to trial ended in an acquittal—roughly double the acquittal rate for felony trials in general. See Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics—1990, at 526 tbl.5.51 (1991).

81. A study of seventy-five counties showed 97% of felony drug convictions were by guilty plea. 2002 Sourcebook, supra note 52, at 455 tbl.5.57. The plea rate for property offenses was 96%. Id. Only 90% of convictions for violent crimes were by guilty plea. Id.

assistants an enormous range of charging options: The scope of responsibility may be small, but jurisdiction is quite large. The combination means that federal prosecutors have both the time and the authority to do what they want, including pursuing investigative detours. It also means they tend to think about criminal prohibitions as tools for nailing the targets of federal investigations, not as rules they must enforce systematically. Again, that tendency encourages detour prosecutions. Performance measures like the FBI's crime index do not exist for federal crimes; the absence of such measures reinforces the importance of prosecutors' preferences in charging practices. Last but not least, federal criminal law is not at all like the state laws that define violent crimes and major theft offenses. Murder and robbery statutes cover murders and robberies, as those terms are generally understood. Federal fraud offenses, by contrast, cover a great deal more than core fraud. This distinction is not merely technical. All American codes are filled with strategically defined crimes. In the states, those crimes are mostly ignored. In the federal system, they are the staples of criminal litigation. These strategically defined crimes give prosecutors, who are already inclined toward pretextual charging strategies, a great many opportunities to engage in those strategies.

Begin with the two central truths of federal criminal law enforcement: a very small sphere of responsibility coupled with a very large sphere of jurisdiction. Minimal responsibility is a consequence of local law enforcement agencies, to whom voters assign the job of crime control. Maximal jurisdiction is due to the interplay of Congress and federal law enforcers.

Responsibility first. Local police forces and prosecutors' offices have been in charge of crime control since those agencies first came on the scene during the first half of the nineteenth century.[82] Even where they had the constitutional power to do so, federal and state governments had little interest in taking over that job.[83] Over time, local control has become the dominant characteristic of American criminal justice.

Federal prosecutors have had their own sphere of exclusive responsibility, but historically that sphere was politically modest apart from na-

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82. The rise of these local agencies, especially district attorneys' offices, has been a surprisingly neglected topic. For the best treatment to date, see generally George Fisher, Plea Bargaining's Triumph: A History of Plea Bargaining in America (2003).

83. See generally Adam H. Kurland, First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction, 45 Emory L.J. 1 (1996) (discussing history of federal criminal law and federal criminal jurisdiction). For a striking early example of federal reluctance, see United States v. Bevans, 16 U.S. (3 Wheat.) 336 (1818). The defendant, William Bevans, was a Marine "acting as sentry" on board the U.S.S. Independence, which was then anchored in Boston Harbor. Bevans murdered a cook's mate on board the ship. In an opinion by Chief Justice John Marshall, the Supreme Court overturned his federal conviction, explaining that while Congress could have passed a murder statute specifically covering federal warships, it had not yet done so. Consequently, the matter was left to Massachusetts's exclusive jurisdiction. Id. at 391.

tional security cases: counterfeiting and immigration crimes instead of murders and rapes. That sphere of exclusive federal responsibility was numerically as well as politically small. Prohibition left in its wake a sizeable federal enforcement bureaucracy[84]—not nearly large enough to take over primary responsibility for ordinary law enforcement, but too large to confine itself to areas where federal criminal law occupied the field. Ever since the repeal of Prohibition in 1933, that federal bureaucracy—the various investigative and prosecutorial agencies that make up the Justice Department (with some important components from other Cabinet agencies, notably Treasury, thrown in for good measure)[85]—has sought out other uses for its time and talents, creating a kind of bureaucratic demand for broad federal criminal jurisdiction to give FBI agents and Assistant United States Attorneys interesting things to do with their time.[86]

Congress has been all too happy to meet that demand, especially in the past generation. Partly, that is because doing so has been cheap. When the Justice Department asks for some new criminal prohibition, there is rarely much interest-group opposition, so the inertia threshold that limits other kinds of legislation tends to be low.[87] And the benefits of criminal legislation can be substantial: Congress can take a symbolic stand against some new crime fad without worrying much about consequences, since local police and prosecutors retain real responsibility. That is how we've ended up with federal laws against carjacking, domestic violence, and a lot else.[88] Federal courts periodically try to rein in this

84. However, the bureaucracy was mostly devoted to the enforcement of the Volstead Act, not other federal crimes. Thus, the FBI had only about 400 agents in 1930; they were responsible for "secur[ing]" convictions in slightly more than 4,300 prosecutions that year, most of them for violations of the ban on interstate transportation of stolen automobiles. See J. Edgar Hoover, Report of the Director of the Bureau of Investigation, *in* Annual Report of the Attorney General of the United States for the Fiscal Year 1930, at 79, 80–81 (1930). Those 4,300 cases were a small fraction of the federal criminal docket's 87,300 cases, roughly 65% of which were for Prohibition violations. Edward Rubin, A Statistical Study of Federal Criminal Prosecutions, 1 Law & Contemp. Probs. 494, 497 tbl.1 (1934).

85. For a (pre-Homeland Security) discussion of the various federal police agencies and their interactions with local police agencies, see Daniel C. Richman, The Changing Boundaries Between Federal and Local Law Enforcement, *in* 2 Criminal Justice 2000: Boundary Changes in Criminal Justice Organizations 81, 93–99 (Nat'l Inst. of Justice, ed., 2000), available at http://www.ncjrs.org/criminal_justice2000/vol_2/02d2.pdf (on file with the *Columbia Law Review*).

86. Cf. Jamie S. Gorelick & Harry Litman, Prosecutorial Discretion and the Federalization Debate, 46 Hastings L.J. 967, 973 (1995) (arguing that Congress should criminalize conduct "even though it intends the jurisdiction it authorizes to be exercised in a small percentage of cases," and let "prosecutorial discretion" act as "the most important and effective brake on the federalization of crime"). Gorelick and Litman held top Justice Department positions at the time their article was published.

87. Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 UCLA L. Rev. 757, 771–72 (1999) [hereinafter Richman, Federal Criminal Law].

88. See id. at 772 ("There are perceived political rewards for supporting all criminal legislation, particularly if aimed in the direction of some recent outrage, and political penalties for opposing or seeking to narrow all such laws.").

expansion. We are in the midst of one such reining-in process now, leading to more rigorous application of jurisdictional elements;[89] a decade or two ago, the focus was on ratcheting up intent standards for federal criminal statutes.[90] The end result of these judicial ventures is always modest. They leave federal criminal law more complex, but not narrower.

Little responsibility and vast jurisdiction mean that federal law enforcers must exercise an extraordinary degree of investigative and prosecutorial discretion in deciding when, and against whom, to invoke that jurisdiction. Congress has seen to that by coupling promiscuous criminalization with a fairly small enforcement bureaucracy. As of June 2002, there were only about 93,000 federal law enforcement officers (compared to more than 700,000 state and local officers),[91] and only 40% of them conducted criminal investigations.[92] The FBI—the sole agency whose task is general criminal law enforcement—had only 11,248 agents.[93] The extent to which agents from the various federal agencies collaborate with federal prosecutors will vary, but federal prosecutions can be brought only by the five thousand-plus prosecutors in United

89. The case that spawned this trend is, of course, United States v. Lopez, 514 U.S. 549 (1995). *Lopez* was a constitutional decision, but its biggest impact has been in cases involving the interpretation of statutory jurisdictional elements. See Jones v. United States, 529 U.S. 848, 850–51 (2000) (holding arson of owner-occupied dwellings not within the scope of the federal arson statute because such dwellings are not "used in" interstate "commerce"). Since *Jones*, lower federal court decisions restricting interstate commerce elements of various federal crimes have become a good deal more common. But perhaps not as common as the Supreme Court would have it: Brannon Denning and Glenn Reynolds studied lower court applications of *Lopez* and its progeny, and found evidence of "willful judicial foot-dragging." Brannon P. Denning & Glenn H. Reynolds, Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts, 55 Ark. L. Rev. 1253, 1256 (2003); see also Craig M. Bradley, Federalism and the Federal Criminal Law, 55 Hastings L.J. 573, 574–75 (2004) (noting general refusal of federal courts to extend *Lopez* and progeny to other cases).

90. See, e.g., Staples v. United States, 511 U.S. 600, 619–20 (1994) (finding that federal weapons statute requires that a defendant must have been aware of nature of weapon he possessed); Ratzlaf v. United States, 510 U.S. 135, 136–37 (1994) (holding that currency "anti-structuring" statute requires proof that defendant must have known he was illegally evading currency reporting requirement); Liparota v. United States, 471 U.S. 419, 433–34 (1985) (bolding that food stamp fraud statute requires proof that defendant knew his conduct violated governing federal regulations). Within a few months of the Court's decision, *Ratzlaf* was overruled by Congress. That seems to have prompted a cbange in the Court's posture; the Justices have been much less willing to expand on federal mens rea requirements since 1994 than previously—and much less willing to limit federal criminal liability rules that go to conduct as well. For a discussion of the relevant cases, see Stuntz, Pathological Politics, supra note 7, at 561–65.

91. Daniel Richman, The Right Fight, Boston Rev., Dec. 2004/Jan. 2005, at 6, 7 [hereinafter Richman, Right Fight].

92. Bureau of Justice Statistics, U.S. Dep't of Justice, Federal Law Enforcement Officers, 2002, at 1 (2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fleo02.pdf (on file with the *Columbia Law Review*).

93. Id.

States Attorneys' offices around the country,[94] or by the smaller number of prosecutors in Main Justice.[95]

No federal agency has the manpower to make even a sizeable dent in the criminal activity that falls within its statutory jurisdiction. Hence the need for selection mechanisms. Just about every federal prosecution carries with it a story about why the case went federal. It may be as theatrical as Eliot Ness's targeting of Al Capone. Or as personal as "the fraud victim decided to call the FBI instead of the local police, and the agent who answered the phone thought the case sounded interesting." Or as institutional as a federal program in which all predicate felons whom the local police catch with a gun in a designated high-crime area are charged in federal court.[96] But—outside of a few highly specialized areas—there will be some story that goes beyond the fact that the defendant committed a crime falling within federal jurisdiction.

For evidence of how robust expectations of federal enforcement discretion are, one need go no farther than the nearest bank, where stickers proclaim the FBI's commitment to going after bank robbers. Bank robberies were recently on the rise.[97] Yet instead of increasing its deployment in this area, the Bureau actually reduced it, leaving state and local police to pick up the slack.[98] The stickers remain, understood more as a vague expression of interest than a real commitment. Such understandings surely apply to the ubiquitous FBI warnings—on videos, and soon

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94. See Executive Office for U.S. Attorneys, U.S. Dep't of Justice, United States Attorneys' Annual Statistical Report 2 (2002), available at http://usdoj.gov/usao/reading_room/reports/asr2002/02_stat_book.pdf (on file with the *Columbia Law Review*) (reporting 5,304 assistant U.S. attorneys).

95. See generally Richman, Prosecutors and Their Agents, supra note 56 (examining the working interaction between prosecutors and law enforcement agents).

96. See Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369, 379 (2001) [hereinafter Richman, Project Exile] (describing development of "Project Exile" in Richmond, Virginia, in 1997, which provided for federal prosecution of every gun arrest by the local police for which there was federal jurisdiction).

97. See Abraham McLaughlin, Bank Bandits Move In as Busy FBI Retreats, Christian Sci. Monitor, Apr. 18, 2002, at 3 (reporting that nationwide bank robberies rose from 6,599 in 1999 to 7,217 in 2000 to 8,259 in 2001); Jodi Wilgoren, Robbers Rediscovering the Small-Town Bank, N.Y. Times, Mar. 24, 2002, at 1 (noting that bank robberies rose 82% in small towns and 27% in unincorporated rural areas, compared to 17% overall).

98. See, e.g., Fox Butterfield, As Cities Struggle, Police Get By with Less, N.Y. Times, July 27, 2004, at A10 (noting the increasing pressure on local police departments due to budget cuts and increased responsibility); Gary Fields & John R. Wilke, FBI's New Focus Places Burden on Local Police, Wall St. J., June 30, 2003, at A1 (reporting that "police departments across the country must fill the void left by reassigned FBI agents"); Akilah Johnson, FBI Passing on Bank Robberies, S. Fla. Sun-Sentinel, June 21, 2004, at 1B ("The FBI's shift from fighting such crimes as drugs and white-collar offenses to counterintelligence and counter-terrorism means there are fewer agents to investigate bank robberies—a job increasingly being left to local police.").

CDs—to potential digital pirates.[99] The FBI does pursue some such cases,[100] but expectations of extreme selectivity give the agency the luxury of simultaneously "selling" its intellectual property for political gain and avoiding the massive resource commitment that would come with having a real "beat" in this area.

This extreme disjunction between federal jurisdiction and federal resources has bred a norm of radical underenforcement. The norm is self-reinforcing. It reduces the cost to Congress of adding more crimes to the federal code,[101] which in turn adds to the degree of underenforcement—and gives agents and prosecutors still more options, more crimes to pursue or not as they wish. The peculiar structure of the federal prosecutorial establishment reinforces this front-line discretion. The U.S. Attorneys' offices that bring the huge majority of federal criminal cases are, in theory, under the control of Main Justice. Officials in different administrations periodically try to assert that control.[102] They regularly fail. Field offices preserve their independence by leveraging their connections to local officials and by playing off supervision by Main Justice against oversight by Congress.

Nor are federal prosecutors constrained by meaningful performance measures. Crime rates, either measured by the FBI's crime index or by victimization surveys, offer important information about how well local law enforcers are doing their jobs. No equivalent exists for federal officials. Partly, that is because most federal crimes are primarily the job of those local officials. Where expectations of federal activity are greater, the measures of criminal activity are far more elusive. This was one lesson of the Savings and Loan scandals of the late 1980s and early 1990s. The value of collateral plummeted and banks failed. Some of this could be attributed to criminal fraud, but how much?[103] The same question can be asked of the current wave of corporate scandals. Many have been prosecuted as a result,[104] but how can the public or Congress judge

99. See, e.g., Paul Bond, FBI Pumps Up Warning Volume in Get-Tough Policy on Pirating, Chi. Sun-Times, Feb. 21, 2004, at 30; Jeff Leeds, FBI Logo to Grace Music CDs, L.A. Times, Jan. 16, 2004, at C10.

100. E.g., Justin Fenton, FBI Seizes Computer of UM Student in Raid: Search at Fraternity House Part of Vast Piracy Sweep, Balt. Sun, Apr. 24, 2004, at 1B.

101. See Richman, Federal Criminal Law, supra note 87, at 765–66 & n.40 (describing how the Justice Department and FBI used existing statutes when they made white-collar crime a priority in the mid-1970s).

102. Id. at 781.

103. See H.R. Rep. No. 100-1088, at 18–20 (1988) (criticizing Justice Department for insufficient zeal in prosecuting fraud cases arising out of the savings and loan crisis); Henry N. Pontell & Kitty Calavita, The Savings and Loan Industry, *in* Beyond the Law: Crime in Complex Organizations (18 Crime & Just.) 203 (Michael Tonry & Albert J. Reiss eds., 1993) (arguing that crime and fraud played a major role in the savings and loan crisis).

104. See Corporate Fraud Task Force, First Year Report to the President 2.2 (July 22, 2003), available at http://www.usdoj.gov/dag/cftf/first_year_report.pdf (on file with the *Columbia Law Review*) (recounting corporate fraud prosecutions in 2002–2003); see also Corporate Task Force, Second Year Report to the President 3.2–3.15 (July 20, 2004),

whether the federal government has overshot or undershot the mark in its criminal enforcement response?[105] To ask the question is to recognize that it cannot be satisfactorily answered.

Those who take an interest in monitoring the performance of federal enforcers are hard pressed to ascertain levels of activity and effectiveness. They still try. Indeed, those who take the insouciance with which Congress passes substantive criminal law statutes as the sole measure of its interests in the area sorely underestimate the degree to which Congress monitors and endeavors to influence enforcement performance and priorities.[106] Yet federal enforcers do have considerably more flexibility than their local cousins when it comes to how they account for their performance.

Back in the 1960s and early 1970s, for example, the FBI under J. Edgar Hoover was able to bulk up agency statistics by referring a lot of cases for prosecution under the federal Dyer Act, which covered interstate car thefts.[107] U.S. Attorneys would occasionally balk at taking these "cheap" cases,[108] but they constituted between a sixth and an eighth of all federal prosecutions from 1964 to 1970.[109] The combination of prosecutorial resistance—particularly in large cities where U.S. Attorneys' offices thought they had better things to do[110]—and the end of the Hoover era, however, soon led to a massive shift in FBI resources. Without resistance from Congress, Director Clarence Kelley was able to launch a "quality case program" in 1975, under which the statistics touted by Hoover sharply declined.[111] Kelley explained the decline by noting an increased emphasis on white-collar and organized crime investigations and conceded that there was "no way to precisely measure the benefits of this change in investigative emphasis."[112] But that was enough.

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available at http://www.usdoj.gov/dag/cftf/2nd_yr_fraud_report.pdf (on file with the *Columbia Law Review*).

105. See generally Geraldine Szott Moohr, An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime, 55 Fla. L. Rev. 937, 973 (2003) ("Depending solely upon criminal law to control corporate crime is misguided, at best."); Stephen Labaton, Downturn and Shift in Population Feed Boom in White-Collar Crime, N.Y. Times, June 2, 2002, at 1 (noting a marked increase in white-collar crimes).

106. See Richman, Federal Criminal Law, supra note 87, at 789–93.

107. See James Q. Wilson, The Investigators: Managing FBI and Narcotics Agents 172 (1978) (recounting congressional testimony by Hoover boasting of "another record . . . set with the recovery of 32,076 automobiles").

108. James Eisenstein, Counsel for the United States: U.S. Attorneys in the Political and Legal Systems 22 (1978). One U.S. Attorney at the time defended his selectivity: "You cannot prosecute every violation of the law that is brought to you. . . . There were a lot of cheap prosecutions available which could have just shot your statistics sky high, but would have had no significant impact on things." Id.

109. Id. at 106 tbl.6.2.

110. See id. at 105.

111. Wilson, supra note 107, at 173–74.

112. Id. at 174.

The federal enforcement bureaucracy continues to struggle with the tension between quality and quantity—the desire to use enforcement discretion to further broader programmatic or political (not necessarily partisan) goals against the desire to tout its achievements and justify additional funding. The tension is greatest in the white-collar area, where demonstrations of a high level of activity carry the promise of political gain and general deterrence. The Justice Department's annual *Performance and Accountability Report*, for example, doesn't even pretend to measure the effect of its fraud or corruption prosecutions on crime rates in those areas. It simply recites numbers of convictions and amounts of recoveries and fines.[113]

What happens when an enforcement bureaucracy has broad jurisdiction, is small enough to escape responsibility for going after every crime (even every serious crime) within that jurisdiction, and wants to make as big a splash as possible with its cases—for political, institutional, and personal gain? One thing that happens is the frequent reliance on Al Capone-like strategies. Because federal enforcers can strategically invest their resources, they have the luxury of looking into areas of possible criminal activity before it is clear what, or whether, crimes have been committed. A company restates its earnings and its stock price plummets. A newspaper prints allegations of municipal corruption. These will require the expenditure of considerable investigative resources and often sustained cooperation between agents and prosecutors.[114] Along the way, all sorts of statutory violations may turn up—offenses that fall far short of the suspicions that first triggered the inquiry. Indeed, a new crime occurs each time an interviewee lies to investigators.[115] Needless to say, such easy-to-prove crimes can often be generated with only modest effort from the investigating agents.

The temptation to actually charge these add-on crimes grows as the investigation progresses. The threat of charges, *any* charges—the more easily proved, the better—pushes targets and witnesses alike to cooperate. As time passes, the temptation to bring any provable charge against the main target will grow, as an enforcer looking to move on to the next case (and to reap the personal and professional rewards of having obtained a conviction) sees little marginal gain from further investigative investments. The pressure to bring any provable charge will be even greater if

113. See Office of the Attorney Gen., U.S. Dep't of Justice, FY 2003 Performance and Accountability Report, Pt. 2, Strategic Goal Two: Enforce Federal Criminal Laws (Jan. 2004), available at http://www.usdoj.gov/ag/annualreports/ar2003/pdf/p2sg2.pdf (on file with the *Columbia Law Review*).

114. See generally Richman, Prosecutors and Their Agents, supra note 56 (describing dynamics of interaction between federal prosecutors and federal enforcement agents).

115. See 18 U.S.C. § 1001 (2000) (criminalizing false statements on any matter within the jurisdiction of a federal agency).

reports of the investigation appear in the media, and papers are sold by asking whether and when "X" is going to be indicted.[116]

The pressure to bring any provable charge against a previously identified target has also led federal prosecutors to push the substantive law to relax the burden of proof. This is not a uniquely federal phenomenon. Legislation criminalizing the possession of burglars' tools, for example, does the same thing and can be found in state penal codes.[117] But prosecutions under those state laws seem to be rare. Cases brought under equivalent federal statutes are common. Sometimes federal prosecutors creatively develop new charging doctrines—without waiting for legislative action—that eliminate the need to prove elusive facts. The fact that a local official sold his discretionary power for personal gain no longer needs to be proved; only that he took money without reporting it. That constitutes mail fraud, because it deprives the citizenry of the intangible right to his honest services (and inevitably someone, somewhere along the way, mailed a letter).[118] Obviously, federal prosecutors would prefer this theory to one requiring them to prove some quid pro quo. The readiness of federal courts to accept the theory is less obvious, but as Ralph Winter has noted, favorable facts—the whiff of corruption that attracted the prosecutor's attention to begin with—go a long way.[119] Only the Supreme Court, the court least likely to focus on the facts, balked at the theory.[120] And it was thereafter overruled by Congress,[121] which, as Bill Eskridge has shown, overrules only Court decisions that *narrow* federal criminal statutes, never decisions that broaden those statutes.[122]

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116. See Oesterle, supra note 18, at 451 ("Prosecutors in complex business scandal cases now seem quite content to turn to sideshow prosecutions very quickly in order to sate public pressure for justice and to avoid the high risks of a main show prosecution.").

117. See, e.g., Cal. Penal Code § 466 (West 1999) (including specifically crowbars and screwdrivers among the banned tools).

118. Charles F.C. Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Geo. L.J. 1171, 1176 (1977).

119. See Ralph K. Winter, Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America, 42 Duke L.J. 945, 955–56 (1993) (citing instances where proof of failure to disclose bas led courts to find violations of federal criminal law statutes); see also Dan M. Kahan, Is *Chevron* Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469, 479–80 (1996) (discussing prosecutors' "power of initiative").

120. See McNally v. United States, 483 U.S. 350, 356 (1987) (rejecting intangible rights theory). For a more recent case in which the Supreme Court rejected an intangible property theory previously accepted by lower courts, see Scheidler v. Nat'l Org. for Women, 537 U.S. 393 (2003).

121. See 18 U.S.C. § 1346 (2000) (reinstating intangible rights theory).

122. See William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 343–53 (1991) (describing "characteristics of Supreme Court decisions that render them most likely to be overridden"). Eskridge found that criminal law cases were the largest single category of congressional overrides, at 18%. Id. at 344 tbl.4. The federal government was the most common beneficiary of congressional overrides (25%), while criminal defendants were among the least common (2%). Id. at 348 tbl.7.

The use of a theory as baroque as intangible rights deprivation to go after something as straightforward as bribery is not a product simply of prosecutors' desire to cut evidentiary corners. It is also a result of the oft-noted constitutional limitations on federal criminal jurisdiction. When federal prosecutors started to use the mail fraud statute to go after local corruption, there *was* no federal bribery statute covering nonfederal officials.[123] A federal bribery statute was thereafter passed, but it required proof of some nexus—the precise nature of which has yet to be worked out in the courts[124]—to federal funding. Notice the disjunction between the conduct that seems worthy of prosecution—to the public, to Congress, and to prosecutors themselves—and the constitutional doctrines supporting federal jurisdiction. That disjunction means that federal crimes will rarely have public definitions, even when the crime is a federalized version of some traditional state law crime like bribery. Federal jurisdictional elements thus serve mainly to make federal crimes more complex. Virtually all federal crimes are a combination of the core prohibited conduct and the conduct that brings the case within the scope of federal power—and those two things are generally unrelated. "Fraud" might mean something to ordinary voters, but "mail fraud" likely will not. "Bribery" will; "federal program bribery" will not (particularly when the connection to a federal program is far from clear). The list goes on.

All of which means that, while a state legislature might not feel free to redefine core crimes, Congress can do so. Intangible rights mail fraud is the classic example; there are many others. Consider the Travel Act, whose sole conduct element is crossing a state line.[125] The substance of the crime lies in the intent term: It covers travelers who pass between states with the purpose of committing or assisting the commission of various state law crimes, including minor ones such as gambling. No federal enforcement agency could possibly enforce such a statute systematically, any more than the federal government could identify all those who deprive someone of "the intangible right of honest services."[126] Such statutes define not crimes but hooks, legal forms that authorize legal punish-

123. To be sure, the government might have used either the Hobbs Act, 18 U.S.C. § 1951, which covers "extortion," oddly defined to include bribery, see infra note 167, or the Travel Act, 18 U.S.C. § 1952, which criminalizes the use of "any facility in interstate or foreign commerce" with intent to commit a wide range of state or federal crimes, including bribery.

124. For the Court's latest effort at working out the precise nature of the nexus between bribery and federal funding, see Sabri v. United States, 124 S. Ct. 1941, 1945–46 (2004).

125. 18 U.S.C. § 1952. The Travel Act was the centerpiece of the anti-Mafia legislative program put forward by the Kennedy Justice Department. See Nancy E. Marion, A History of Federal Crime Control Initiatives, 1960–1993, at 28–30 & tbl.2.3 (1994). It was self-consciously designed for pretextual targeting—for catching a category of criminals, not defining a type of banned conduct.

126. 18 U.S.C. § 1346.

ment but do not explain or justify it. The *reasons* for that punishment lie outside the law.

Anyone who reads a fair number of federal indictments has seen this phenomenon in action. While these indictments are not quite exercises in Law French, their operative charging language often seems thoroughly divorced from the worst aspects of the alleged conduct. If the strained language of federal law does not clearly announce why someone deserves to go to prison, the temptation for prosecutors to pick the most accommodating statute, to care less about what is being charged than about whether a conviction can be obtained, becomes even greater.

In such a system, Capone-style tactics are the rule, not the exception. Local criminal law enforcement is primarily a "what" enterprise; the goal is to go after particular classes of conduct. Federal law enforcement is more a "who" enterprise: The goal is to nail given (always shifting) classes of offenders. That wouldn't work locally, because local officials would be punished for ignoring the "what." For federal officials, no equivalent system of accountability exists.

III. PRETEXT AND TERRORISM

Enter terrorism. Terrorism is something the public cares about (to put it mildly) and hence pays attention to—it's like homicide (indeed, it often *is* homicide), not like mail fraud. It also has a public definition: politically or religiously motivated violence against civilians. And, importantly, it has an external measure. Like FBI index crimes, terrorist attacks are carefully counted, not just nationally but internationally, with considerable attention paid to such data, as we saw in June 2004, when the State Department took heavy criticism for undercounting.[127] And terrorism, particularly of the international variety, is something for which the federal government is plainly responsible. To be sure, the feds cannot meet the threat by themselves.[128] But the FBI is plainly "on the hook" if a terrorist attack occurs, in a way that is untrue of just about any other publicly recognized crime.

The catastrophic nature of the September 11 attacks has changed the federal playing field still more. Now we are unwilling to wait for attacks to occur; we demand that federal enforcement agencies work to prevent them from happening, not just by improving their intelligence capabilities but by prosecuting the terrorists before they actually strike. The Justice Department agrees, and its top officials have regularly made "prevention" a mantra to justify their requests for additional powers and to explain what has become a massive redeployment of resources away

127. See R. Jeffrey Smith, State Dept. Concedes Errors in Terror Data, Wash. Post, June 10, 2004, at A17; U.S. Dep't of State, Patterns of Global Terrorism 2003 (rev. June 22, 2004), available at http://www.state.gov/s/ct/rls/pgtrpt/2003/33771.htm (on file with the *Columbia Law Review*).

128. See Richman, Right Fight, supra note 91, at 7 (describing the federal government's need for state and local assistance in the fight against terrorism).

from other areas.[129] And it has invoked Al Capone to show the extent of its commitment to use every possible tool against the terrorists.[130]

But, of course, therein lies the problem, for this strategy has made it exceedingly hard to tell what success the feds have had against the threat of terrorism, or even whether the people so prosecuted have any relationship to terrorism at all. The prosecutions the government has brought under the "material assistance" statute (first enacted in 1996, and given more teeth by the USA PATRIOT Act)[131] have not been without controversy.[132] And the government's interpretation of the statute's mens rea element may allow the conviction of people who were not fully aware that they were aiding a terrorist group. Yet the statute does at least demand that a connection to terrorism (on the part of the organization) be shown, either judicially or administratively. The same cannot be said about "terrorism-related" prosecutions for crimes that lack any terrorism element.

The nature of the crimes believed to be characteristic of terrorists and their supporters has made the challenge of assessing preventive prosecutions even harder. The 9/11 plotters made use of false identification documents.[133] The use of such documents will often be a federal crime, but every prosecution of such conduct can hardly be ascribed to the War on Terror. Nor can all prosecutions of other kinds of criminal activity that, according to federal authorities, have been used to support terrorist groups: "stealing and reselling baby formula, illegally redeeming huge

129. See Office of the Inspector Gen., U.S. Dep't of Justice, Audit Rep. No. 03-37, Federal Bureau of Investigation Casework and Human Resource Allocation (Sept. 2003), available at http://www.usdoj.gov/oig/audit/FBI/0337/final.pdf (on file with the *Columbia Law Review*); Office of the Inspector Gen., U.S. Dep't of Justice, Audit Report No. 04-39, The Internal Effects of the Federal Bureau of Investigation's Reprioritization (Sept. 2004), available at http://www.usdoj.gov/oig/audit/FBI/0439/final.pdf (on file with the *Columbia Law Review*); U.S. Gen. Accounting Office, No. GAO-04-578T, FBI Transformation: FBI Continues to Make Progress in Its Effort to Transform and Address Priorities 20–33 (Mar. 23, 2004), available at http://www.gao.gov/new.items/d04578t.pdf (on file with the *Columbia Law Review*) [hereinafter GAO, FBI Transformation].

130. Gail Gibson, Al-Qaida Battle Likened to Mob Fight: Officials Say Strategy Used Against Mafia Could Work on Terrorists, Balt. Sun, Oct. 29, 2001, at 6A; Kevin Sack, Chasing Terrorists or Fears?, L.A. Times, Oct. 24, 2004, at A1.

131. See USA PATRIOT Act §§ 803, 805, 810, 18 U.S.C. §§ 2339, 2339A, 2339B (Supp. II 2003).

132. See United States v. Afshari, No. 02-50355, 2004 U.S. App. LEXIS 26430 (9th Cir. Dec. 20, 2004) (upholding indictment charging material support in form of charitable contributions); Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 404–05 (9th Cir. 2003) (addressing vagueness of prohibition of material support in the form of "training" and "personnel"), vacated en banc by Nos. 02-55082, 02-55083, 2004 US App. LEXIS 26530 (9th Cir. Dec. 21, 2004); David Cole, The New McCarthyism: Repeating History in the War on Terrorism, 38 Harv. C.R.-C.L. L. Rev. 1, 11 (2003) (suggesting that the statute may violate the "guilt by association" principle and that "the distinction between association and material support is illusory").

133. 9/11 Commission, Staff Statement No. 1, Entry of the 9/11 Hijackers into the United States 2 (Jan. 26, 2004), available at http://www.9-11commission.gov/staff_statements/staff_statement_1.pdf (on file with the *Columbia Law Review*).

quantities of grocery coupons, collecting fraudulent welfare payments, swiping credit numbers and hawking unlicensed T-shirts."[134]

The Bush Administration has had middling success dealing with the problem. In December 2001, a *Philadelphia Inquirer* article—drawing on data from the Transactional Records Access Clearinghouse (TRAC)[135]—alleged that the Justice Department had overstated its statistics for terrorism cases and convictions in order, among other things, to justify its budget request.[136] A General Accounting Office (GAO) inquiry conducted in response to these allegations found that, of 288 convictions classified by the Justice Department as terrorism related for the fiscal year 2002, at least 132 had been misclassified, and the "overall accuracy of the remaining 156 convictions is questionable."[137] In its January 2003 report, the GAO chided the Justice Department: "Without reliable terrorism related conviction data, DOJ and the Congress's ability to accurately assess terrorism related performance outcomes of our criminal justice system and the results of efforts to combat terrorism will be limited."[138] And critics accused the Justice Department of "blur[ring] the line between terrorists and common criminals" and deliberately "sabotag[ing]" antiterrorism efforts.[139]

At a March 2003 House Appropriations hearing, Attorney General Ashcroft noted that "212 criminal charges" had been brought "related to terrorism" and "108 convictions or guilty please [sic]" obtained." When pressed as to whether the *charges* had been related to terrorism, Ashcroft responded that "these are individuals that we believe are related to terrorism. The criminal charges are not all—some of the criminal charges are related, for example, to document fraud."[140] At an October 2003 Senate

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134. John Mintz & Douglas Farah, Small Scams Probed for Terror Ties: Muslim, Arab Stores Monitored as Part of Post-Sept. 11 Inquiry, Wash. Post, Aug. 12, 2002, at A1.

135. On its website, the Transactional Records Access Clearinghouse ("TRAC") identifies itself as "a data gathering, data research and data distribution organization associated with Syracuse University." TRAC, About Us, at http://trac.syr.edu/aboutTRAC general.html (last visited Oct. 21, 2004) (on file with the *Columbia Law Review*); see Amy Jeter, Finding That Federal Data Online, Am. Journalism Rev., Sept. 1998, available at http://www.ajr.org/Article.asp?id=3449 (on file with the *Columbia Law Review*).

136. Mark Fazlollah & Peter Nicholas, U.S. Overstates Arrests in Terrorism, Phila. Inquirer, Dec. 16, 2001, at A1; see also Mark Fazlollah & Peter Nicholas, Justice Department Inflates Terror Conviction Statistics, Pittsburgh Post-Gazette, Dec. 16, 2001, at A10.

137. U.S. Gen. Accounting Office, No. GAO-03-266, Justice Department: Better Management Oversight and Internal Controls Needed to Ensure Accuracy of Terrorism-Related Statistics 6 (Jan. 2003), available at http://www.gao.gov/new.items/d03266.pdf (on file with the *Columbia Law Review*).

138. Id. at 14.

139. Alexander Gourevitch, Body Count: How John Ashcroft's Inflated Terrorism Statistics Undermine the War on Terrorism, Wash. Monthly, June 2003, at 37, 39.

140. Fiscal Year 2004 Appropriations for the Justice Department: Hearing Before the Subcomm. on Commerce, Justice, State & Judiciary of the House Comm. on Appropriations, Mar. 6, 2003, (colloquy between Attorney General Ashcroft and Rep. Jose Serrano), LEXIS, FDCH Political Transcript.

Judiciary hearing, the Chief of the Justice Department's Criminal Division stepped gingerly around the issue. He asserted that "[s]ince the attacks of September 11th, we've charged 284 defendants as the result of terrorism investigations,"[141] but quickly qualified that assertion:

> [T]here are a number of terrorism investigations where the decision that is made at the charging stage to charge the defendant with a non-terrorism crime in order to protect . . . national security and classified information that may be exposed, sources and methods and that sort of thing, that may be jeopardized by the criminal discovery that would ensue if we were to charge the terrorism offense.[142]

The issue reared its head again in December 2003, when TRAC—whose efforts to ascertain federal enforcement patterns have created quite a stir in a system accustomed to vague federal claims of "priorities"—issued another analysis of departmental data. Looking at terrorist or antiterrorist referrals since September 30, 2001, this one found that only 879 people had been convicted, and only 373 of those were sentenced to prison, most for quite short terms. TRAC noted:

> [L]ooking at several more of the small number of "terrorism" cases that resulted in sentences of five or more years, it is clear that as defined by the government terrorism covers a lot more than an attempt to blow up an airplane. If properly implemented, this broader definition of terrorism may be a useful way for the government and the public to understand what is being done and not done in this sensitive area. If improperly used, however, the mis-labeling of cases could undermine the legitimacy of government efforts by turning the "terrorist" label into a convenient method to justify government actions sought for other purposes. If that happens, it also could undermine the effort of the courts to treat defendants in a fair and just way and make judging the effectiveness of the government extremely difficult.[143]

The Justice Department did not even wait for the formal release date of the TRAC report for its chief spokesman, Mark Corallo, to fire back. As Corallo explained:

> TRAC's methodology and analysis simply is not compatible with the reality of the Justice Department's efforts to prevent terror in the 21st century. In fact, the TRAC study ignores the value of early disruption of potential terrorist acts by proactive prosecution of terrorism-related targets on less serious charges.

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141. Criminal Terrorism Investigations and Prosecutions: Hearing Before the S. Comm. on the Judiciary, Oct. 21, 2003, (testimony of Christopher Wray), LEXIS, Federal News Service Transcript.

142. Id.

143. TRAC, Criminal Terrorism Enforcement Since the 9/11/01 Attacks (Dec. 8, 2003), at http://trac.syr.edu/tracreports/terrorism/report031208.html (on file with the *Columbia Law Review*).

> This strategy has proven to be an effective method of deterring and disrupting potential terrorist acts.
>
> Years ago, the government knew Al Capone was a powerful organized crime boss, yet we prosecuted him with tax evasion to remove him from the streets. Today, in order to protect the lives of Americans at the earliest opportunity, the government may charge potential terror suspects with lesser offenses to remove them from our communities. The fact that many terrorism investigations result in less serious charges does not mean the case is not terrorism-related. Moreover, pleas to these less serious charges often result in defendants who cooperate and provide invaluable information to the government—information that can lead to the detection and prevention of other terrorism-related activity. . . .
>
> Often, there is no clear line between terrorism and other criminal activity such as money laundering, identity theft, visa fraud, or immigration violations. So-called "sleepers" are difficult to identify as they seek to blend in with minimal illegal activity until they are activated. This Administration's strategy of preventing terrorism has helped protect America for over two years since the attacks of September 11, 2001. Our commitment to preventing another attack on U.S. soil has not, and will not, waver.[144]

Corallo's statement captures the essence of the problem. Confronted with the greatest security challenge it has faced in recent years, the federal law enforcement bureaucracy has turned to the strategy it used to bring down Capone and dozens of other mob figures. And, indeed, that strategy is particularly well-suited to the War on Terror. Among the hallmarks of the 9/11 plot and Al Qaeda operations generally are low-profile cells of individuals who do not conspicuously violate the law until they are ready to inflict catastrophic damage or assist those who do.[145] To be sure, it is sometimes possible to grab terrorists at a point in their planning such that the government can clearly prove their intentions and still neutralize the threat, as occurred when Sheik Abdel Rahman and others who were prosecuted for plotting to blow up a number of New York City landmarks in 1993.[146] Yet in that case, an FBI informant had infiltrated the group—a piece of investigative success that can rarely be replicated.

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144. Press Release, Dep't of Justice, Statement of Mark Corallo, Director of Public Affairs, Regarding TRAC Study (Dec. 7, 2003), available at http://www.usdoj.gov/opa/pr/2003/December/03_opa_670.htm (on file with the *Columbia Law Review*).

145. See Statement of Patrick J. Fitzgerald, U.S. Attorney, N.D. Ill., Before the National Comm. on Terrorist Attacks upon the United States, Al Qaeda Panel 3, 6 (June 16, 2004), available at http://www.9-11commission.gov/hearings/hearing12/pfitzgerald_statement.pdf (on file with the *Columbia Law Review*) ("The al Qaeda network is . . . effective because it has great patience . . . and al Qaeda's cell structure may often provide that the first evidence of a criminal intent may be the terrorist attack itself.").

146. United States v. Rahman, 189 F.3d 88 (2d Cir. 1999).

If they can be criminally prosecuted before they strike, the provable offenses of those seeking to commit terrorist acts will thus be relatively minor. Bringing such cases can disrupt terrorist plans and provide leverage for the government to obtain cooperation from defendants; it can also incapacitate targets without resort to material witness warrants, immigration detentions, and other noncriminal processes that (according to some) are amenable to even greater misuse. Moreover, the government can satisfy its discovery obligations without revealing valuable intelligence (so long as it's not exculpatory) when it brings these stripped-down cases.

Yet this strategy has left the Administration hard pressed to demonstrate to Congress and the public that it has effectively used the massive resources that have been committed to counterterrorism. Repeated assurances that the right people are being prosecuted for the right reasons, and that terrorist plans are being foiled or "disrupted," have their limits when such matters are not subject to any external check. Moreover, emerging patterns of minor charges being brought against Arab Americans or Middle Eastern nationals, in the absence of proven terrorist links, will surely provide grist for those disposed to claim ethnic profiling.[147]

The point is not that the Justice Department should abandon the Al Capone approach to counterterrorism prosecutions. After all, there may be no realistic alternative. For prosecutors going after mobsters, the Capone strategy was a convenience. For prosecutors trying to take down would-be terrorists it is probably a necessity, given the near impossibility of proving planned acts of terrorism before the plans bear their awful fruit. And the downsides of strategic charging—especially the risk of a rogue prosecutor going overboard while trying to make a name for himself—are substantially lower in terrorism cases due to the centralized control that Main Justice exercises in this area.[148] If ever Capone were a model for prosecutors, it should be a model here.

But the Capone strategy does carry a price, and the price needs to be better understood. For decades, federal prosecutors have worked in a system that offered a host of strategic charging options, little clear responsibility, and no external performance measures. In that kind of system, prosecutors' incentives were to (1) select targets (based on whatever criteria prosecutors wish to advance), (2) pursue whatever charges would maximize the odds of conviction, and (3) claim success in the most ex-

147. See generally Samuel R. Gross & Debra Livingston, Racial Profiling Under Attack, 102 Colum. L. Rev. 1413, 1417–24, 1436–38 (2002) (discussing various efforts by the Justice Department to interview thousands of Middle Eastern men ages eighteen to thirty-three in order to gather information on terrorist organizations).

148. The precise role that Main Justice played in causing and curing misconduct in a recent Detroit terrorism prosecution has yet fully to emerge. See Danny Hakim & Eric Lichtblau, After Convictions, the Undoing of a U.S. Terror Prosecution, N.Y. Times, Oct. 7. 2004, at A1 (describing how, after a scathing internal inquiry, the Justice Department moved to dismiss charges in case that officials had long touted as conspicuous success); Richard Serrano & Greg Miller, Terrorism Case Shows U.S. Flaws in Strategy, L.A. Times, Oct. 12, 2004, at A1 (reporting on the implosion of the "seemingly brilliant prosecution").

treme terms possible. Congress's incentive was to give prosecutors as many charging options as possible. For some time now, everyone in this dysfunctional system has been doing what comes naturally.

Doing what comes naturally is not a strategy for maximizing prosecutors' credibility over time, but then there was never much need to maximize credibility: There were no performance claims that the public or congressional overseers cared deeply about. Now, prosecutors are living in a different world. Terrorism is the Justice Department's chief responsibility. Voters and oversight committees care deeply about the question of whether federal officials are meeting that responsibility. Credibility matters. The Justice Department would be much better off today had it let Capone go, along with the bird-killing Mob defendant and assorted high-profile, white-collar targets of the last few decades.

Of course, that is water under the bridge. For now, the job is to find ways to rebuild federal law enforcers' ability to send the right signal: When we say we've taken down a terrorist, we truly *have* taken down a terrorist. That means, among other things, reducing prosecutors' incentives to follow the Capone strategy everywhere else.

IV. Discouraging Pretextual Prosecution

So pretextual prosecution is indeed a problem, not of fairness, but of political economy. This problem has no neat solution. Pretextual charging cannot be abolished—federal law enforcers may need it for the War on Terror. But its use needs to be minimized in cases that do *not* involve terrorism. How is that supposed to happen? To some degree, it may already *be* happening. The key mechanism is accountability. Several important trends in federal criminal law enforcement push toward increasingly accountable and transparent policing and prosecution. Unfortunately, current trends in statutory interpretation and federal criminal jurisdiction push the other way.

Recall the four factors that tend to minimize Capone-style prosecutions in state courts: a clear sphere of responsibility, constrained resources, external performance measures, and unstrategically defined "core" crimes. At least in the recent past, none of those four features of local prosecutors' offices has applied to federal prosecutors' offices. That may be changing. A variety of forces are pushing toward clearer lines of responsibility for federal law enforcement officials—especially for the FBI. Consequently, those officials are operating under substantially greater resource constraints than they have experienced in the past. Federal law enforcers are still not as constrained, either politically or financially, as their local counterparts, but the movement is very much in that direction. Joint initiatives with federal and local officials working together (usually to deal with some form of criminal violence or drug crime) may also impose greater political constraints on federal officials. And at least in a couple of areas, federal law enforcers are increasingly subject to external performance measures.

These trends do not solve the pretext problem, though they *are* likely to mitigate it, perhaps substantially. The fourth factor remains: A number of core federal crimes are defined strategically. That invites prosecution for a nominal "crime" distinct from the conduct that federal agents and prosecutors are seeking to punish. Here, the solution does not lie in promising enforcement trends but in changed legal doctrine. Ironically, narrowing federal criminal liability rules would be easier if federal jurisdiction were broadened.

Begin with expanding federal enforcement responsibilities. In recent testimony before a House appropriations subcommittee, an FBI official highlighted the Bureau's need to "focus on those areas where there is not a strong state or local presence in terms of criminal investigative work." "[R]ight now," he continued, "that is counterterrorism, counterintelligence, and those major investigative areas in white collar crime, organized crime, public corruption, things that other people just don't do."[149] Plainly, counterterrorism is the priority among priorities. At a March 2004 Senate appropriations hearing, when asked why, with approximately 12,000 agents, the Bureau was "only dedicating 2,500 to the effort," Director Mueller assured his questioner that the shift of even more agents was being considered, and that agents doing criminal work could always be pulled in, to ensure that every terrorism case gets addressed.[150] A recent GAO study shows that agents indeed spent less time on violent and white-collar crime cases than was originally allocated, as they were redirected to counterterrorism-related matters[151]—a sign that resource constraints are hitting the FBI in a way they haven't before.

The priority extends to prosecutors as well. In July 2004, the Maryland U.S. Attorney inartfully told his staff that by November 6 (four days after the general election), he wanted "Three 'Front Page' White Collar/

149. Transformation of the FBI Following 9/11: Hearing Before the Subcomm. on Commerce, Justice, State & Judiciary of the House Comm. on Appropriations, June 3, 2004, (testimony of John Pistole, Executive Asst. Director for Counterterrorism, FBI) LEXIS, Federal News Service Transcript; see also FBI Oversight, Terrorism, and Other Topics: Hearing Before the S. Comm. on Judiciary, May 20, 2004, (testimony of Robert Mueller, Director, FBI), LEXIS, Federal News Service Transcript ("We're not doing as many bank robberies. We're not doing the smaller white-collar criminal cases, the bank embezzlements under a couple of hundred thousand.").

150. The Transformation of the FBI: Hearing Before the Subcomm. on Commerce, Justice, State & Judiciary of the S. Comm on Appropriations, Mar. 23, 2004, (testimony of FBI Director Robert Mueller under questioning by Sen. Judd Gregg), LEXIS, Federal News Service Transcript.

151. See GAO, FBI Transformation, supra note 129, at 29–31 (charting the redirection of agents from other areas to counterterrorism). But see U.S. Gov't Accountability Office, No. GAO-04-1036, FBI Transformation: Data Inconclusive on Effects of Shift to Counterterrorism-Related Priorities on Traditional Criminal Enforcement (Aug. 2004), available at http://www.gao.gov/new.items/d041036.pdf (on file with the *Columbia Law Review*) [hereinafter GAO, Data Inconclusive] (describing as "inconclusive" the data regarding "whether shifts in the priorities after September 11 have had an effect on overall federal efforts to combat drug crime").

Public Corruption Indictments" and that he was "embarrassed by the fact that this office has not convicted an elected official of corruption since 1988."[152] When the email became public, the Justice Department's spokesman made clear for the record: "All of our United States attorneys know that our top priority is fighting terrorism. . . . There are other important issues such as public corruption, yes, but our top priority is the prevention of terrorist attacks and I'm sure that the U.S. attorney in Maryland is well aware of that."[153]

Outside the terrorism area, the scope of federal responsibility is less clear—and the picture is complicated by the growing opportunity cost of counterterrorism efforts. Congress seems not to recognize that this opportunity cost exists; the congressional message to federal law enforcement has been to do more of everything. The pressure to go after all forms of white-collar crime remains strong—indeed, that pressure has intensified since the Enron and WorldCom scandals. So does the pressure to investigate and prosecute government corruption.[154] And Congress continues to press for more federal involvement in violent crime cases. A May 2003 hearing gave members of the Senate Judiciary Committee a chance to celebrate Project Safe Neighborhoods—the Administration's umbrella term for a variety of local programs that use federal agents and prosecutors against gun violence.[155] And, in June 2004, a bipartisan group of senators gained Judiciary Committee approval for the Criminal Street Gang Abatement Act, which would target "criminal street gangs" (loosely defined) with new offenses, higher sentences, and additional federal resources.[156] One needs to look long and hard (and with more success than we have had) to find any evidence of a former priority that legislators or law enforcers have abandoned since 9/11.

This unwillingness to relinquish any federal responsibility, coupled with the demands of the criminal justice "front" on the War on Terror,

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152. Doug Donovan, DiBiagio Voices Frustration over Pace of Top Cases, Balt. Sun, July 15, 2004, at 1A.

153. Id.; see also Doug Donovan & Laura Sullivan, Democrat Demands DiBiagio Resign, Balt. Sun, July 16, 2004, at 1A; Eric Rich, Md. Prosecutor Accused of Playing Politics, Wash. Post, July 16, 2004, at B1. In immediate response to the leaked email, Deputy Attorney General James Comey, citing the need to protect "the credibility of this Department, particularly in matters involving public corruption," ordered that no corruption indictments go forward in Maryland without his personal approval. Doug Donavan, DiBiagio Gets Formal Rebuke from His Boss, Balt. Sun, July 17, 2004, at 1A. Citing "family" reasons, DiBiagio has since announced that he will not be seeking reappointment as U.S Attorney in 2005. Stephanie Hanes, U.S. Attorney DiBiagio Resigns, Balt. Sun, Dec. 4, 2004, at 1A.

154. See Marsha Shuler, FBI Plans Task Force in BR Area: Public Corruption Targeted, Advocate (Baton Rouge, La.), May 11, 2004, at 1A (reporting that Republican congressman running for Senate in Louisiana took credit for establishment of a six agent FBI public corruption task force).

155. Project Safe Neighborhoods: America's Network Against Gun Violence: Hearing Before the S. Comm. on the Judiciary, 108th Cong. (2003).

156. S. 1735, 108th Cong. (2004).

leaves federal law enforcers substantially more resource constrained. Another kind of constraint arises from the still-growing federal commitment to fighting violent crime.[157] For the most part, that commitment is played out through partnerships between federal officials and local law enforcement personnel. Any time federal and local officials work together on some governance matter, the tendency is to assume that federal officials are driving the train. But in this setting—where only the local cops generally know who ought to be targeted, and decide which arrests should be pursued federally—the assumption may not hold. More likely, the political factors that constrain local officials also constrain their federal partners when the two groups work together on crimes that fall within the locals' sphere of primary responsibility. The result is a trade: The locals get federal dollars and considerable say in which cases get prosecuted; the feds have to work within the bounds of local political accountability.[158] That tradeoff cuts down on the risk from pretextual targeting. The local thug singled out for prosecution for the easily proven federal offense of being a felon in possession of a weapon[159] may feel aggrieved. But the reason for his selection will likely have some connection to a comprehensive *local* enforcement strategy. The outlines of the federal end of this strategy will often emerge with a clarity not found in other areas, as federal prosecutors working in close collaboration with local authorities find themselves under considerable pressure to announce precisely what kinds of cases they will take.[160]

At least in some respects, the Justice Department has embraced this accountability. Consider the "Violent Crime Reduction Initiative" that the Attorney General announced in June 2004. This initiative involves teams of federal agents and prosecutors assigned to fifteen cities to work with the local authorities targeting violent crime. The idea is an exten-

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157. See GAO, Data Inconclusive, supra note 151, at 18–20 (finding that violent crime referrals to U.S. Attorneys' offices increased by 29% between 2001 and 2003 because increased activity by ATF more than offset the decreased FBI activity in the area).

158. See Richman, Project Exile, supra note 96, at 403 (discussing advantages and disadvantages to "letting federal, state, and local enforcers in each district negotiate the boundaries of their interaction without legislative inference").

159. 18 U.S.C. § 922(g) (2000); see also Daniel C. Richman, *Old Chief v. United States*: Stipulating Away Prosecutorial Accountability?, 83 Va. L. Rev. 939, 943–44 (1997) (discussing ease of conviction for the offense).

160. A recent study noted:

> [S]tanding Federal-local task forces necessarily involve prosecutors and investigative agents in potentially more sophisticated cases, larger caseloads, and a more structured organizational environment . . . . They also must contend with an urban landscape whose interlocking crime and law enforcement patterns are dense and complex, and where greater scrutiny by other law enforcement professionals (and the media) exists. These factors may tend to produce a decisionmaking process that is likely less casual than elsewhere.

Malcolm Russell-Einhorn et al., Federal-Local Law Enforcement Collaboration in Investigating and Prosecuting Urban Crime, 1982–1999: Drugs, Weapons, and Gangs 113 (May 2000), available at http://www.ncjrs.org/pdffiles1/nij/grants/201782.pdf (on file with the *Columbia Law Review*).

sion of Project Safe Neighborhoods; what's new is the clarity of the mission. The goals of the initiative, according to the head of ATF, "are to decrease, within six months, the number of homicides, number of firearms related to homicides, number of violent crimes and number of violent firearms crimes."[161] The risk with these programs has always been that local officials (supported by their members of Congress) would turn them into unlimited draws on federal resources.[162] Given that risk, ATF's specification of these parameters is notable evidence that the government is voluntarily taking on the kind of scrutiny that organizations like TRAC bring to its conduct in the terrorism context.

Such precommitment strategies cannot work everywhere. Particularly in the white-collar crime area, demonstrating precisely what law enforcers have accomplished remains a large challenge. The temptation is to dodge the challenge by pointing to the defendants' exalted positions on corporate or political ladders, thereby deflecting attention from the charged offense. Yet as the opportunity cost for each prosecution grows—that is what the growing emphasis on terrorism (*and* corporate crime, *and* violent crime) means—the Justice Department will need to do better than simply counting the number of politicians and business executives who lost their jobs due to criminal investigations. Growing resource constraints, the rise of organizations like TRAC that can contradict grandiose law enforcement claims, the increasing number and importance of federal-local partnerships, and the growing sense of federal responsibility for particular crime problems (including but not limited to terrorism)—all these things are likely to push federal officials toward a focus on crimes rather than criminals and toward unstrategic charging practices rather than pretextual ones.

Right now, the biggest obstacle to this healthy state of affairs is the law. Too many federal crimes—including offenses that are regularly prosecuted; this is not just a matter of doctrinal technicality—are defined both broadly and strategically (not the same thing). Instead of specifying the conduct that law enforcers or legislators actually wish to punish, these statutes seem designed to facilitate convictions in cases where the real crime lies somewhere else. "Fraud" in federal criminal law covers a wide and diverse array of corrupt practices in both the public and private sectors.[163] The federal false statements statute covers concealment, not just

161. Press Release, U.S. Dep't of Justice, Justice Department Announces New Violent Crime Reduction Initiative (June 24, 2004), available at http://www.usdoj.gov/opa/pr/2004/June/04_ag_438.htm (on file with the *Columbia Law Review*); see Jonathan D. Silver, City Takes Aim at Gun Crimes; Federal Partnership Expected to Result in Stiffer Sentences, Pittsburgh Post-Gazette, July 12, 2004, at B4.

162. See Richman, Project Exile, supra note 96, at 401 (citing Democrats' concerns that such programs would result in "fewer federal resources for Washington to deploy against targets that only Washington had the means (and possibly the inclination) to pursue").

163. The key provision is 18 U.S.C. § 1346, which states simply: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to

lies;[164] it also covers unadorned false denials of guilt, even where no one was misled by the denial.[165] "Extortion" includes street robberies,[166] accepting bribes,[167] and blackmail.[168] Money laundering covers pretty much any handling of money or property that is connected to criminal activities.[169] And federal sentences, especially for anything related to guns or drugs, are infamously severe.[170] All this amounts to an invitation to federal agents and prosecutors to look on federal crimes and sentences not as *laws* that define criminal conduct and its consequences but as a *menu* that defines prosecutors' options. Federal law enforcers decide

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deprive another of the intangible right of honest services." For the best discussion of the breadth of this statute, see generally 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).

164. 18 U.S.C. § 1001(a)(1) includes within its coverage anyone who "falsifies, conceals or covers up by any trick, scheme, or device a material fact."

165. See Brogan v. United States, 522 U.S. 398, 410 (1998) ("Thus, when the interview ended, a federal offense had been completed—even though, for all we can tell, Brogan's unadorned denial misled no one.").

166. The Hobbs Act, 18 U.S.C. § 1951, covers "robbery" and "extortion." In United States v. Culbert, 435 U.S. 371 (1978), the Court rejected the argument that only robbery and extortion that constituted racketeering were covered by the Act:

> Nothing on the face of the statute suggests a congressional intent to limit its coverage to persons who have engaged in "racketeering." To the contrary, the statutory language sweeps within it all persons who have "in any way or degree . . . affect[ed] commerce . . . by robbery or extortion." 18 U.S.C. §1951(a) (1976 ed.). These words do not lend themselves to restrictive interpretation; as we have recognized, they "manifest . . . a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence," Stirone v. United States, 361 U.S. 212, 215 (1960).

Culbert, 435 U.S. at 373.

167. See, e.g., Evans v. United States, 504 U.S. 255, 258–59 (1992) (holding that public official's acceptance of a bribe constituted extortion under Hobbs Act).

168. See, e.g., United States v. Jackson, 180 F.3d 55, 69 (2d Cir. 1999) (applying federal extortion statute in blackmail prosecution of woman claiming to be Bill Cosby's illegitimate daughter, who attempted to obtain money from him by threatening to tell the tabloid press that he was her father).

169. See Jimmy Gurulé, The Money Laundering Control Act of 1986: Creating a New Federal Offense or Merely Affording Federal Prosecutors an Alternative Means of Punishing Specified Unlawful Activity?, 32 Am. Crim. L. Rev. 823, 824 (1995) (describing broad definition of money laundering); Teresa E. Adams, Note, Tacking On Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?, 17 Ga. St. U. L. Rev. 531, 532–33 (2000) (describing wide range of behavior used as basis for charging defendants with money laundering).

170. There are too many sources to cite for this proposition. For the best general critique of the Federal Sentencing Guidelines, see generally Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 7–8 (1998). For the best discussion of the racial impact of federal drug sentences, see generally David A. Sklansky, Cocaine, Race, and Equal Protection, 47 Stan. L. Rev. 1283, 1285–97 (1995). And for an interesting comparison between America's (and especially the federal system's) harsh sentencing doctrines and the more lax sentences that prevail in Western Europe, see generally James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe 3–17 (2003).

whom to send up the river, then select the appropriate items from the menu in order to induce a guilty plea with the desired sentence. The precise contours of the crime matter only insofar as they affect litigation tactics or plea bargaining stances. Overly broad federal crimes and overly harsh federal sentences—crime definition probably matters more than too tough sentencing rules, though both matter—encourage a mindset that makes criminal law enforcement an enterprise in targeting criminals, not punishing crimes.

For evidence of the cost of that mindset, one need look no farther than the history of criminal enforcement of the federal tax laws. The success of the Capone case inspired a long tradition of tax prosecutions against mobsters, drug dealers, and corrupt officials. While popular with prosecutors gunning for elusive targets, these "illegal source" cases came at a price: Ordinary tax cheats received little prosecutorial attention. Since ordinary tax cheats knew this, the role of criminal tax enforcement in curbing tax evasion was vastly diminished.[171]

The solution is for federal criminal law to function like, say, the state law of homicide. Murder and manslaughter statutes roughly define the conduct that prosecutors actually punish; authorized sentences under those statutes correspond to the sentences prosecutors actually wish to impose on the defendants they prosecute.[172] Consequently, prosecutors use those statutes to punish the specified conduct—not to nail offenders who are guilty of some other, harder-to-prove crime. The fact that so much of federal criminal law falls so far short of that standard does little harm to the legitimate interests of criminal defendants. Few innocents are targeted by the FBI and United States Attorneys' offices (notice that both entities have to agree on the targeting, which protects innocents better than any realistic legal doctrine restricting charging decisions could).[173] The harm, rather, goes to the political economy of federal law

171. See William H. Webster, Review of the Internal Revenue Service's Criminal Investigation Division 11–17 (Apr. 1999), available at http://www.ustreas.gov/irs/ci/ci_structure/webster_report.pdf (on file with the *Columbia Law Review*) (faulting I.R.S. Criminal Investigation Division for giving insufficient attention to its primary mission of promoting voluntary tax compliance and focusing too heavily on illegal source cases). In the wake of the Webster review, the I.R.S. took measures to recenter its criminal efforts on tax compliance. It remains to be seen whether the new focus on terrorist financing will derail that effort. See Internal Revenue Service, FY 2004 Criminal Investigation Annual Business Plan, available at http://www.irs.gov/compliance/enforcement/article/0,,id=118127,00.html (on file with the *Columbia Law Review*) (noting Criminal Investigation Division's efforts, since Sept. 11, 2001, against domestic and international terrorism).

172. See Stuntz, Criminal Law's Shadow, supra note 49, at 2563–64 ("For crimes at the top of the severity scale, law defines both criminal liability and punishment . . . .").

173. See Richman, Prosecutors and Their Agents, supra note 56, at 796 (noting how separation of prosecutorial and investigative authority works to limit errors of commission); see also C.F. Larry Heimann, Understanding the Challenger Disaster: Organizational Structure and the Design of Reliable Systems, 87 Am. Pol. Sci. Rev. 421, 427 (1993) (noting that serial systems, which require approval of several components prior to agency action, are less prone to errors than parallel systems).

enforcement. Voters and legislative overseers can best assess how well prosecutors do their jobs in a world in which criminal law functions as law, not as a menu. Criminals are most efficiently deterred when the price of their crimes is publicly and transparently attributed to the crimes that prompt their prosecutions. And federal prosecutors, for their part, have more credibility in a system where crimes are both defined and enforced unstrategically. That credibility, in turn, comes in handy in the one area where the Capone strategy probably remains essential: counterterrorism. Federal criminal law reform might (or might not) be a boon to federal defendants. It is a necessity for the federal government.

Wise law reform need not mean a wholesale rewriting of Title 18 of the federal code.[174] There is a great deal of room for productive change around the edges of the doctrine, in the territory where federal courts generally work. Unfortunately, current trends in the law of statutory interpretation and federal jurisdiction—two of those "around the edges" territories—make productive change harder, not easier. *Brogan v. United States*[175] offers a good example. James Brogan was a corrupt union boss who took bribes from employers to sell out his union members. There is a federal labor racketeering statute that targets such conduct.[176] The FBI agents investigating Brogan either were uncertain that he could be convicted of violating that statute or wanted to guarantee his cooperation in their investigation. Justice Ginsburg's concurring opinion describes what happened next:

> Two federal investigators paid an unannounced visit one evening to James Brogan's home. The investigators already possessed records indicating that Brogan, a union officer, had received cash from a company that employed members of the union Brogan served. (The agents gave no advance warning, one later testified, because they wanted to retain the element of surprise. . . .) When the agents asked Brogan whether he had received any money or gifts from the company, Brogan responded "No." The agents asked no further questions. After Brogan just said "No," however, the agents told him: (1) the Government had in hand the records indicating that his answer was false; and (2) lying to federal agents in the course of an investigation is a crime. . . . Brogan divulged nothing more. Thus, when the interview ended, a federal offense had been completed—even though, for all we can tell, Brogan's unadorned denial misled no one.[177]

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174. To get a sense of the challenges of wholesale reform in this area, see Charles R. Wise, The Dynamics of Legislation: Leadership and Policy Change in the Congressional Process 21–24 (1991). See generally Symposium, Toward a New Federal Criminal Code, 2 Buff. Crim. L. Rev. 1 (1998).

175. 522 U.S. 398 (1998).

176. 29 U.S.C. § 186 (2000).

177. *Brogan*, 522 U.S. at 409–10 (Ginsburg, J., concurring in the judgment) (citations omitted).

Brogan was charged and convicted of both labor racketeering and violating the federal "false statements" statute. The case made its way to the Supreme Court on the question whether Brogan's "exculpatory no" fell within the terms of the latter prohibition. By a vote of 7 to 2, the Court held that it did, on the ground that the false statements statute had no explicit exemption for unadorned denials of guilt.[178]

By construing the false statements statute so broadly, the *Brogan* Court made it easy for federal law enforcers to use that statute as a substitute for harder-to-prove labor racketeering charges. That muddies the signals federal criminal litigation sends, and it makes federal law enforcement less transparent—to union bosses inclined to sell out their men, to the voters, and to Congressional oversight committees. It would be better for federal judges to raise the cost of prosecuting classic "detour" crimes like false statements, perhaps by applying a strong form of the rule of lenity to those crimes. In *Brogan*, the Court did exactly the opposite: It made detour prosecutions cheaper and left the rule of lenity[179] weaker.

The larger problem has to do with federal criminal jurisdiction. Strict jurisdictional requirements are supposed to narrow federal criminal law. The actual effect is in the other direction; we would likely have both narrower and more transparent federal criminal prohibitions if jurisdictional restrictions were relaxed. Take an example from the law of public corruption. Obviously, someone in America's criminal justice system needs to police the honesty of state and local officials. Local district attorneys are unlikely to do that job well, both because corruption cases take a lot of time and manpower to develop, and because the DAs often have close ties to would-be defendants. A functionalist approach to federalism would conclude that the FBI and U.S. Attorneys should handle this class of crimes, that we should have a general federal bribery statute that extends to all government officials. But the law of federal criminal jurisdiction is anything but functionalist. So we have bribery and gratuity statutes for *federal* officials;[180] state and local government employees are bound by a law that bans bribe-taking by those who work in government

178. Id. at 400–04, 406–08 (opinion of the Court); id. at 408–09 (Ginsburg, J., concurring in the judgment). Justices Stevens and Breyer dissented, relying on the fact that the "exculpatory no" doctrine had won the adherence of the great majority of lower federal courts that had considered the issue. Id. at 419–20 (Stevens, J., dissenting).

179. For the two best discussions of the rule of lenity, see generally Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 Sup. Ct. Rev. 345; Zachary Price, The Rule of Lenity as a Rule of Structure, 72 Fordham L. Rev. 885 (2004). Both Kahan and Price focus on the rule's effects on lawmakers and law enforcers, not on criminal defendants. That runs contrary to the traditional view, which sees the rule as a means of ensuring that individual defendants have "fair warning" of the crimes with which they are charged. For the classic discussion, see generally Livingston Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748 (1935).

180. 18 U.S.C. § 201(b) (2000) (bribery); id. § 201(c) (gratuities). For the leading case on the meaning of these statutes, see United States v. Sun-Diamond Growers, 526 U.S. 398, 404–12 (1999).

enterprises that receive more than $10,000 of federal money per year.[181] A large fraction of the litigation under this "program bribery" statute is devoted to jurisdictional questions: What is the proper government entity for purposes of measuring the amount of federal aid received? What nexus must there be between the federal money and the corrupt activity?[182] All of this is both costly to prosecutors and a distraction from the core enterprise of punishing corrupt politicians.

It gets worse. Before the program bribery statute, federal prosecutors used the "intangible rights" doctrine to make the mail and wire fraud statutes into de facto bribery statutes.[183] Even since the enactment of the program bribery statute, they have continued to use the fraud laws against local corruption,[184] partly because of jurisdictional convenience. That means a large fraction of federal bribery cases are prosecuted under fraud statutes that (because they *are* fraud statutes, not bribery statutes) do not require proof of a "quid pro quo"—the key element in most bribery cases. This arrangement has a number of serious problems. The least of them is the subject that increasingly dominates the mail fraud literature: concerns about whether politician-defendants have "fair notice" that they might be straying into legally questionable territory when they take money on the sly.[185] Notice, vagueness, and the like may be serious

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181. 18 U.S.C. § 666.

182. Cf. Sabri v. United States, 124 S. Ct. 1941 (2004), in which the Court rejected a facial challenge to the constitutionality of the program bribery statute, holding that Congress acted within the scope of its power under the Spending Clause. It is not clear what message *Sabri* conveys with respect to the nexus between federal money and the bribery: The Court stressed the facial nature of the defendant's challenge, see id. at 1948–49, so the fate of as-applied challenges remains uncertain.

183. See Ruff, supra note 118, at 1181–86.

184. See Pub. Integrity Section, U.S. Dep't of Justice, Report to Congress on the Activities and Operations of the Public Integrity Section for 2002, at 30–31, available at http://www.usdoj.gov/criminal/pin/AR_Final_2002.pdf (last visited Jan. 31, 2005) (on file with the *Columbia Law Review*) (discussing federal case alleging fraud against local government official).

185. For examples, see Geraldine Szott Moohr, Mail Fraud and the Intangible Rights Doctrine: Someone to Watch over Us, 31 Harv. J. on Legis. 153, 190–97 (1994) ("The mail fraud statute fails the notice test because the term 'honest services' does not clearly state the content of criminal conduct."); Gregory Howard Williams, Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud, 32 Ariz. L. Rev. 137, 151 (1990) ("The floating definition of 'a scheme to defraud' does not give fair notice to those persons potentially subject to it."); Todd E. Molz, Comment, The Mail Fraud Statute: An Argument for Repeal by Implication, 64 U. Chi. L. Rev. 983, 1000–02 (1997) ("The broad language of the mail fraud statute fails to identify what conduct it outlaws."). Concerns about vagueness have yielded a variety of proposals to limit the scope of "intangible rights" fraud. For one of the more interesting examples, see generally Edward J. Imwinkelried & Ephraim Margolin, The Case for the Admissibility of Defense Testimony About Customary Political Practices in Official Corruption Prosecutions, 29 Am. Crim. L. Rev. 1 (1991).

Criticism of private sector mail fraud cases has tended to focus more on the economic cost of overregulation. For the best example of such criticism, see Winter, supra note 119, at 954–57.

concerns in a few cases, but only in a few cases.[186] The bigger problem is one of political structure. Neither voters nor members of Congress can easily tell what the federal law enforcement bureaucracy is enforcing when the description of crimes so poorly fits the conduct that is actually punished. In a world where laws governing fraud, misrepresentation, and bribery do not conform to the ordinary meaning of those terms, monitoring is impossible and strategic prosecution is inevitable.

Notice the combination of legal rules that produces this state of affairs. Courts are loath to impose even commonsensical restrictions on substantive legal liability, as cases like *Brogan* suggest.[187] But those same courts enforce jurisdictional elements strictly, thereby creating incentives for prosecutors to seek and for Congress to supply jurisdictionally convenient catch-all crimes, which is what mail and wire fraud have become. Prosecutors shop around for the most favorable jurisdictional grant. The substance of the relevant crime becomes an afterthought.

And yet another problem arises out of the current judicial craze for strict enforcement of jurisdictional elements. That kind of federalism cuts *across* crimes, not *between* them. It thus defeats political responsibility and accountability instead of reinforcing those goals. In a well-functioning system of criminal law enforcement, voters, politicians, and law enforcers would all know which officials are responsible for enforcing which crimes. Bribery by state and local officials would either rest with local district attorneys or with their federal counterparts. Jurisdictional analyses of the sort popular today, whether under the Spending Clause or the Commerce Clause, create uncertainty; it is hard to tell which cases go where. If local officials are corrupt, local voters don't know whom to

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186. Cf. United States v. Rybicki, 354 F.3d 124, 132 (2d Cir. 2003) (en banc) (rejecting vagueness cballenge to the federal "intangible rights" statute, where the fraudulent scheme involved the payment of bribes to insurance adjusters to treat certain claims more favorably). Notice that *Rybicki* involved a private actor, not a public official. For a classic example of public sector "intangible rights" mail fraud that raises a colorable vagueness claim, see United States v. Margiotta, 688 F.2d 108, 141–44 (2d Cir. 1982) (Winter, J., dissenting). Oddly, federal judges seem especially inclined to worry about vagueness in prosecutions of state government officials. The Fifth Circuit, sitting en banc, concluded that "genuine difficulties of vagueness" would attend the mail fraud statute were it applied to conduct not already barred by state law—and reached that conclusion in a case involving a corrupt state administrative law judge. See United States v. Brumley, 116 F.3d 728, 735 (5th Cir. 1997) (en banc). Three dissenting judges would have gone farther and barred mail fraud prosecutions of state officials altogether, partly due to vagueness concerns. See id. at 736–47 (Jolly, J., dissenting). Judge Raggi, concurring in *Rybicki*, pointed out why this marriage of vagueness doctrine and federalism is odd: A number of state statutes use the same language as the federal "intangible rights" statute; so if the latter is unconstitutionally vague, the same holds true of the former. See *Rybicki*, 354 F.3d at 153 n.3 (Raggi, J., concurring in the judgment) (citing state statutes).

187. That same tendency is reinforced by the "dueling dictionaries" approach to federal criminal statutes: When the meaning of some term is at issue, the side with the most references wins; policy arguments go by the boards. For a striking example involving the federal statute that deals with use of firearms to commit drug crimes, see Muscarello v. United States, 524 U.S. 125, 127–32 (1998); id. at 139–44 (Ginsburg, J., dissenting).

blame. If politics is cleaner than it once was, voters don't know who deserves credit. That is not a healthy system.

Meanwhile, attention is diverted from two enterprises that need all the attention they can get: *defining* crimes well, in a way that fairly captures the prohibited conduct without disabling prosecutors from proving guilt, and *allocating* crimes well, so that local and federal prosecutors alike can use their time and talents to the best advantage. Crime definition is a hard and important task, with useful roles to be played by both members of Congress and federal judges. Over time, the best equilibrium is probably one in which Congress defines the general conduct terms, judges define exceptions and defenses (and, often, mens rea), and Congress reacts when it disapproves of interstitial judicial lawmaking. For most of American history, that is how criminal law worked. But in the federal system for the past few decades, it has worked very differently. Congress writes broad criminal prohibitions, without exceptions or defenses, and judges cannot touch them—save for their jurisdictional elements.

This problem extends well beyond public corruption cases. In the mid-1990s, a wave of arsons hit black churches in the South.[188] The federal government announced that it was going to take charge of that problem.[189] In a healthy legal system, such a move would generate applause: The federal government was making itself responsible for an easily measurable crime, with officials unable to control the measurement process and with media and public scrutiny of the results guaranteed. But instead of encouraging this step, federal courts undermined it with a demanding (and vague) construction of the arson statute's "affecting commerce" element.[190] As a result, jurisdiction has dominated federal litigation in the area, with reported opinions focusing on whether the church that was torched also ran a day care center,[191] whether it broadcast its services on

188. In June 1996, the *New York Times* ran a detailed series on the subject, focusing on three church arsons in particular. Robyn Meredith, North Carolina: Mixed Opinions About Role of Racial Hatred, N.Y. Times, June 23, 1996, § 1, at 14; Ronald Smothers, Alabama: Out of Ashes, Many Blessings, N.Y. Times, June 23, 1996, § 1, at 14; Emily Yellin, Tennessee: For One Congregation, Trying to Regain a Sense of Confidence, N.Y. Times, June 23, 1996, § 1, at 14. For a follow-up story a few months later, see Church Fires Show Racism, A Panel Says, N.Y. Times, Oct. 10, 1996, at A20.

189. See generally Church Arsons and Hate Crimes, U.S. Attorneys' Bulletin, Feb. 1998, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4602.pdf (on file with the *Columbia Law Review*) (issue devoted to National Church Arson Task Force).

190. Congress responded with the Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (codified at 18 U.S.C. § 844(e) (2000)), but that Act too requires substantial attention to jurisdiction. For a good example, see United States v. Corum, 362 F.3d 489, 493 (8th Cir. 2004), where the chief question was whether the defendant made anti-Semitic threats over the phone—not whether he burned the synagogue in the incident that led to the filing of federal charges.

191. See United States v. Terry, 257 F.3d 366, 369–70 (4th Cir. 2001) (finding federal jurisdiction primarily because the church ran a not-for-profit day care center).

local radio stations,[192] whether some of its members or Sunday school materials crossed state lines,[193] or (our personal favorite) whether the church owned a recreational vehicle.[194] Naturally, the legal consequences of any or all of these factors remain unclear; the only thing that can safely be said is that some church arsons fall within federal jurisdiction—but only some.[195]

This is lunacy. Federalism is not an end in itself; it is a means of ensuring proper constraints on government. Clear lines of responsibility and political accountability advance that goal.[196] The current approach to federalism in criminal law retards it. And to no discernible good end: In a world with 11,000 FBI agents and 700,000 local police officers,[197] there is no danger that the federal government will trample on the interests of state and local governments in punishing crime. There *is* a danger that federal agents and prosecutors will freelance, advancing their own reputations and careers at the expense of the system's goals. Both *Brogan*'s "plain language" approach to substantive crime definition and the jurisdiction fetish we have seen since *United States v. Lopez*[198] actually increase that danger. Crimes are more broadly defined and less transparent than they otherwise would be, and litigation focuses more on jurisdiction than on the conduct and intent elements that justify criminalization.

If fostering enforcement accountability is the goal, the approach of the church arson cases is completely backward. Better to say that, in areas where federal officials have assumed primary responsibility for law enforcement, jurisdictional restraints should be *relaxed*, not tightened. At the margin, that would tend to steer federal prosecutors toward areas where federal criminal law enforcement is most socially useful. If the crime is plausibly within the scope of some Article I federal power—and, by the standards applied outside criminal law, *all* crimes are plausibly

192. See United States v. Rayborn, 312 F.3d 229, 234 (6th Cir. 2002) (finding federal jurisdiction in part because the church broadcast its services on local radio); cf. United States v. Lamont, 330 F.3d 1249, 1255 (9th Cir. 2003) (noting that most church arsons would not give rise to federal jurisdiction, and posing the question whether burning of "mega-churches" might lead to a different result).

193. See *Rayborn*, 312 F.3d at 234–35 (noting, in support of federal jurisdiction, that some churchgoers may have crossed state lines); *Terry*, 257 F.3d at 373 (King, J., concurring in the judgment) (concluding that interstate contacts including the receipt of Sunday school materials from another state were sufficient to establish federal jurisdiction).

194. This is one of the facts cited in support of federal jurisdiction by the Sixth Circuit in *Rayborn*, 312 F.3d at 235.

195. Not most, according to a Ninth Circuit panel. See *Lamont*, 330 F.3d at 1255 (noting that "the ordinary activities of a church do not affect interstate commerce, or indeed commerce at all").

196. The Supreme Court understands this point, at least sometimes. See New York v. United States, 505 U.S. 144, 169 (1992) (noting diminished accountability when citizens cannot easily determine which level of government is responsible for a particular regulatory decision).

197. See sources cited supra notes 91–92.

198. 514 U.S. 549 (1995).

within the scope of one or another federal power—and if local officials do not regularly prosecute it ("things that other people just don't do"),[199] federal jurisdiction should be as broad as possible. Where jurisdictional elements already exist, they should be given the most liberal possible construction, in order to steer litigation toward more productive channels. Meanwhile, statutory interpretation should focus less on plain language arguments and more on the kind of open-ended criminal justice policy arguments that, not so long ago, dominated judicial opinions in this area. And more on raising the cost of prosecuting "detour" crimes like false statements and mail fraud, in order to push prosecutors away from those crimes and toward the offenses that motivated their investigations. Finally, courts and Congress alike need to encourage truth in labeling for criminal statutes, so that fraud statutes punish fraud, bribery statutes punish bribery, and *no* statutes punish everything under the sun. Not so that defendants are treated better, but so that federal law enforcers can know their job, and voters can see how well or poorly they do it.

Broad jurisdiction would have another information-forcing effect: Federal law enforcement officials would have to publicly say where they are putting their resources and, critically, where they are *not*—without using uncertain jurisdiction as an excuse. That might make federal enforcement decisions both more transparent and more predictable. Which, in turn, would allow local officials to make better decisions about the allocation of *their* resources. This kind of institutional politics-based federalism is likely to protect state and local prerogatives better, over time, than any judicial construction of the Commerce Clause.

One more issue needs addressing. Federal sentencing doctrine contributes to the pretext problem. Inflated sentences for detour crimes (by any reasonable measure, *most* federal sentences are inflated) encourage prosecutors to charge those crimes instead of the offenses that prompted their investigations. The Federal Sentencing Guidelines' "relevant conduct" or "real offense" orientation makes that problem worse.[200] The Guidelines were designed to promote sentencing according to all the defendant's criminal conduct, not just the conduct that generated criminal liability.[201] Real offense sentencing acts as a kind of subsidy of pretextual charging: Prosecutors can charge crime X and have the defendant sentenced based on crimes X, Y, and Z—even when crime X is fairly small and crimes Y and Z are very large. That makes criminal litigation less transparent and criminal charges more strategic.

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199. See supra note 149 and accompanying text.

200. See U.S. Sentencing Guidelines Manual §§ 1A1.1, 1B1.3 (2004); Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33, 93–94 (2003).

201. For a good description and critical analysis, see generally David Yellen, Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines, 78 Minn. L. Rev. 403 (1993).

At first blush, the Supreme Court's recent decision in *United States v. Booker*[202] seems to reinforce that state of affairs. Justice Breyer's opinion (one of the two majority opinions in *Booker*) includes a long hymn of praise to real offense sentencing.[203] Preserving judges' right to sentence based on uncharged conduct appears to have been a central motivation behind Breyer's reconfigured Guidelines.[204] But the reconfiguration may lead to consequences different from (and, in our view, better than) those its author intended.

Breyer's opinion in *Booker* converts the Guidelines into, well, guidelines—not mandatory rules. Sentencing judges are free to vary from Guidelines sentencing ranges, subject to appellate review under a soft "reasonableness standard."[205] What that means in practice depends on how federal judges exercise their new-found sentencing discretion—and on Congress's willingness to stay its legislative hand. Discretion might be used to reduce excessive sentences for detour crimes. It might also be used to scale back sentences in cases where the gap between charged conduct and uncharged conduct is especially large: where only minor crimes are proved, while major offenses lie in the background. If those two things happen and if courts of appeals affirm the relevant sentences, we might see the emergence of sentencing law that is both less harsh and more transparent. *Booker* could end up advancing the cause of effective, politically accountable federal law enforcement.

That cause, in turn, may be the key to bringing federal sentences down to reasonable levels. One reason Congress feels free to pass harsh sentencing rules is that those rules cost little. Most federal crimes are rarely, if ever, enforced. Consequently, when they pass some new federal crime or sentencing enhancement, members of Congress might reasonably believe the new rule will apply only to a handful of cases. That does not promote responsible lawmaking. If federal sentences were more transparent and if a larger slice of federal criminal law enforcement dealt with cases for which federal officials have primary responsibility—so that congressional drafters know when drafting sentencing rules that the rules will be frequently applied—Congress would likely draft more reasonable sentencing rules. Over time, federal sentencing law would become less a vehicle for political posturing and more a means of defining punishments that fit the relevant federal crimes.

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202. No. 04-104, 2005 WL 50108 (U.S. Jan. 12, 2005).

203. See id. at *19 (opinion of Breyer, J.) ("Congress' basic statutory goal—a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction." (emphasis in original)).

204. See id. at *20 (opinion of Breyer, J.) (discussing examples of sentencing disparity based on uncharged conduct that would result if the Court were to require jury findings of Guidelines sentencing factors).

205. Id. at *26 (opinion of Breyer, J.).

CONCLUSION

Pretextual prosecutions like the one that nailed Al Capone are indeed a problem, but not for the reasons generally supposed. The troubling part has little to do with fairness to defendants and much to do with the challenge such tactics pose to the system's ability to police the police—to monitor the government's efforts to combat crime. Actually, the problem is smaller than that: The federal government is where the worry arises; political and other forces do a pretty good job of controlling local police and prosecutors.

As to that smaller problem, there is reason to hope that things may work out, if not optimally, at least tolerably well. The key is political accountability. The federal law enforcement system will never have the accountability of its local counterparts. Federal officials are appointed, not elected. The issues on which their political masters rise and fall are usually not related to crime. And it is hard (though, as we have seen, not impossible) for federal crimes to carry the same immediacy as a body in the street or a battered victim. Even so, federal officials can be held to a far greater degree of responsibility than they have faced for the past three quarters of a century. Whatever its faults, one large and important virtue of the War on Terror is that it makes that goal more achievable. Other political forces are working in the same direction. The result may be, over time, fewer Al Capones—and better federal law enforcement.

The biggest fly in the ointment has to do with substantive law. The overexpansion of the federal criminal code and the current judicial obsession with the bounds of federal criminal jurisdiction, taken together, invite pretextual enforcement. Federal crimes need narrowing, and federal jurisdiction needs broadening—two needs that seem at odds but actually reinforce one another. If both of those things happen in the years to come, we may finally witness the emergence of something America has never had: a functioning criminal justice *system*, with boundaries between its various police and prosecutorial agencies drawn according to principles of political responsibility and comparative advantage. That would help solve the pretext problem. It would also make American criminal justice more democratic, and more just.