

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

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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 rivals in those enterprises. Because he was America's first celebrity criminal, all this was clear not only to Chicagoans but to much of the nation. 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 said: "But the government can't collect legal taxes from illegal money!" Actually, it could. So he was convicted and packed off to a federal penitentiary, where he died thirteen years later.<sup>1</sup>

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 to go after a criminal defendant because law enforcers suspect him of one crime (or, as in Capone's case, a set of

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<sup>1</sup>For the best accounts of Capone's exploits and the government's surprising means of putting a stop to them, see 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 (1927). Closer to home, Al's brother Ralph was convicted in 1929 on tax charges. BERGREEN, *supra*, at 363-65.

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 others receive.<sup>2</sup> “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,<sup>3</sup> and that resolution is

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<sup>2</sup>The leading case addressing this argument is *Wayte v. United States*, 470 U.S. 598 (1985). *Wayte* isn’t a pretext case, though it’s a variant. 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 600-02. Eventually, they obliged — whereupon the defendant claimed he was being prosecuted for writing the letters, not failing to register. *Id.* at 603-04. The Supreme Court made rejected the argument out of hand. *Id.* at 607-14.

<sup>3</sup>Again, in doctrinal terms the leading case is *Wayte*. *See supra* note 2. More conventional pretext claims appear in, e.g., *United States v. Sacco*, 428 F.2d 264 (9<sup>th</sup> Cir. 1970) (defendant claimed his prosecution for violating alien registration statute was motivated by his organized-crime associations); *United States v. Trent*, 718 F. Supp. 39 (D. Or. 1989) (defendant claimed his drug prosecution was motivated by his gang membership); *People v. Mantel*; 88 Misc.2d 439, 388 N.Y.S.2d 565 (N.Y. Crim. Ct. 1976) (defendant charged with building code violations, claimed that government had singled out proprietors of “sex shops”). *See also* WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, 4 CRIMINAL PROCEDURE §13.4( c), at 58-59.

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, see *Atwater v. Lago Vista*, 532 U.S. 318 (2001), and searches incident to arrest are permissible whenever the arrest is permissible. 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 (1996). There is a slight limit: under *Knowles v. Iowa*, 525 U.S. 113 (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, with a slight alteration that

generally tolerated in the academic literature as well.<sup>4</sup> Pretextual prosecutions are a widely accepted feature of our criminal justice system, and they are widely, albeit not quite universally, understood to be both legally and ethically permissible.

Notice that this standard debate assumes there is only one person with 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 arguments that have 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 their community and about the justice system: that a given murder has been solved, that the crime was 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 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

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scenario is perfectly constitutional: 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.

<sup>4</sup>Tolerated, but not generally embraced. 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 RANDALL KENNEDY, *RACE, CRIME, AND THE LAW*, 136-67 (1997). Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605 (1998); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001 (1998).

investigation, these signals are muddied. They may disappear altogether. Sometimes, there may be alternative sources of information: voters already knew who Capone was and what he did. But for most crimes and most criminals, those alternative sources do not exist.

And there is another, more obvious muddied signal to worry about, to another audience: 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 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”<sup>5</sup> — but the law’s messages are filtered through prosecutors’ litigation choices, and those choices can change the message dramatically.<sup>6</sup> 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, non-pretextual 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 job. The justice system loses the credibility it needs, and voters lose the trust *they* need to have in the

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<sup>5</sup>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 like 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 L. & SOC’Y REV. 179 (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 (2003).

<sup>6</sup>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*].

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. The pretext problem seems to be self-correcting at the local level — but definitely not at the federal level. Pretextual prosecutions are, at least in part, a federalism problem. And 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. It is very much in the Department's interest to be able to offer, both to Congress and to the public, three lists: (1) the terrorists who have been convicted and put away, (2) the crimes those terrorists have committed, and (3) the crimes they would have committed if they hadn't been stopped. The Department has tried to sell the first list, but it lacks credibility: almost all the people on it have been convicted of immigration crimes, not terrorism.<sup>7</sup> Because the second and third lists (if they even exist) are not backed up by criminal convictions, they aren't credible either.

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 terrorism.

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

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<sup>7</sup>See *infra* notes \_\_\_-\_\_\_ and accompanying text.

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 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 too 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.<sup>8</sup> Investigators caught Stewart in the lies for which she was convicted while

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<sup>8</sup>Richard Posner's book tells the story well. See RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 19-27 (1999).

investigating possible insider trading.<sup>9</sup> Perjury, obstruction, and false statements<sup>10</sup> are all crimes that, like tax evasion, must be enforced 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 their investigations, and their fame seemed to play a large role in the process that led to their prosecutions.<sup>11</sup>

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.”<sup>12</sup> 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 ginning up an investigation, why is it worth enforcing at all? But there is not necessarily anything untoward about enforcing some

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<sup>9</sup>See Constance L. Hays, *Prosecuting Martha Stewart: The Overview; Martha Stewart Indicted by U.S. on Obstruction*, N.Y. TIMES, June 5, 2003, at A1.

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

<sup>11</sup>On Clinton, see, e.g., JAMES B. STEWART, BLOOD SPORT: THE PRESIDENT AND HIS ADVERSARIES (1996); though 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., *Justice Tries to Give Herself a Black Eye*, WALL ST. J., Jan. 28, 2004, at A17 (editorial); Alan Reynolds, *Obstructing Justice: The Stewart Chase*, NATIONAL REVIEW ONLINE, June 24, 2003; Paul Craig Roberts, *Judicial System Casualty*, WASH. TIMES, Mar. 12, 2004, at A21. Cf. Joan MacLeod Heminway, 12 TEXAS J. WOMEN & THE LAW 247, 251 (2003) (suggesting the 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”).

<sup>12</sup>See, e.g. MICHELIN GUIDE TO FRANCE (2004).

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 — are not and 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 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 *unenforced*. As much dishonesty as our tax and litigation systems have, it 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 Owls”<sup>13</sup> — 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

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<sup>13</sup>These are the two most famously innocuous federal crimes. For the “Woodsy Owl” statute, see 18 U.S.C. §711a. The requirement that sellers (note: not everyone) not tear off mattress tags stems from several provisions of the U.S. 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 & n.264 (1997).

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 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. As Clinton’s case shows, 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 for prosecution.<sup>14</sup> If that conclusion is correct, the worst

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<sup>14</sup>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 case of an ordinary criminal defendant.” Testimony of Alan M. Dershowitz, House of Representatives Judiciary Committee, Dec. 1, 1998, available at <http://www.house.gov/judiciary/101308.htm>. 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.” Testimony of Jeffrey Rosen, House of Representatives Judiciary Committee, Dec. 1, 1998, available at <http://www.house.gov/judiciary/101305.htm>. 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 Clintonian 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

pretext cases may be self-detering: prosecutors do not prosecute because juries would not convict. After all, Starr's reputation was severely damaged by his investigation of the Lewinsky affair,<sup>15</sup> 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.<sup>16</sup> Starr's and Smaltz's travails suggest that the odds of the risk materializing may be smaller than is usually thought. Meanwhile, the severity of the 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. (Surely not Capone's.) Still, the presence of suspicion means *something*.

Another risk is much 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

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skepticism in action, see *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999).

<sup>15</sup>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, *Starr's Tenure As Independent Counsel Marked by Strongly Unfavorable Public Opinion*, The Gallup Organization, at <http://www.gallup.com/content/default.asp?ci=3529&pg=1>.

<sup>16</sup>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).

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 treat the crime as one that merits 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 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.<sup>17</sup> 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-

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<sup>17</sup>Until Lucky Luciano in the mid-1930s — whereupon he was promptly taken down by New York 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 was leading Franklin D. Roosevelt in nationwide polls. See RICHARD NORTON SMITH, THOMAS E. DEWEY AND HIS TIMES \_\_\_-\_\_\_ (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. See *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 86 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.

mindful pursuit of “The Great White Defendant.”<sup>18</sup> As Robert Gordon argues, that pursuit seems squarely at odds with the rule of law; it promotes “arbitrary and . . . politically motivated prosecution.”<sup>19</sup> 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 D.A.’s office pulled transcripts to identify and then investigate plausible perjurers for purposes of general deterrence. But when the D.A. 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 D.A. a villain.<sup>20</sup>

Monroe Freedman made a similar point thirty-seven years ago, in the course of challenging Attorney General Robert Kennedy’s efforts to “get” union boss Jimmy Hoffa.<sup>21</sup> 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, it to justify making virtually every citizen the potential victim of arbitrary discretion.<sup>22</sup>

Freedman went on to assert that prosecutors have an “ethical obligation” not to abuse their power

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<sup>18</sup>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 white defendants, nailing one for a high-profile violent crime is likely to be a real coup.

<sup>19</sup>Robert W. Gordon, *Imprudence and Partisanship: Starr’s OIG and the Clinton-Lewinsky Affair*, 68 *FORDHAM L. REV.* 639, 672 (1999).

<sup>20</sup>*Id.* at 672-73.

<sup>21</sup>Monroe H. Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 *GEO. L. J.* 1030 (1967).

<sup>22</sup>*Id.* at 1035.

by bringing “prosecutions that are directed at individuals rather than at crimes.”<sup>23</sup>

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 doing the targeting. And on that score, celebrity status is like “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 enforcement buck is to bring well-publicized cases.<sup>24</sup> 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 concern 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), there are only two signals law enforcers can send: Truth matters and lies will be punished. Or, presidents are above the law.<sup>25</sup> The second signal is, at the least, unattractive — the strongest argument made by those who favored Clinton’s impeachment.<sup>26</sup>

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<sup>23</sup>*Id.*

<sup>24</sup>*Cf.* Mark E. Matthews, “New IRS Publicity Strategy,” U.S. Attorneys’ Bulletin, at 15 (July 2001), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usab4904.pdf](http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4904.pdf)

<sup>25</sup>As Robert Gordon has argued, Starr could easily have avoided sending this unpleasant signal *without* investigating the Lewinsky affair. *See* Gordon, *supra* note \_\_\_, 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.

<sup>26</sup>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 the highest possible standards of integrity in all he does. Statement Submitted to the

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,<sup>27</sup> 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 about laws that ban sleeping under bridges. Similarly, in the political world, a host of legal requirements governing things like gratuities and campaign contributions apply 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,<sup>28</sup> and (not least) about the federal government’s competence.

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Comm. on Judiciary, U.S. House of Representatives by Leon N. Edney, Admiral, United States Navy (Retired), Dec. 1, 1998, available at <http://www.house.gov/judiciary/101304.htm>.

<sup>27</sup>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* (1952).

<sup>28</sup>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

The bottom line seems clear enough. As a prosecutorial strategy for enforcing white-collar crimes like those at issue in the Capone, Clinton, and Martha 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-detering, since juries (judges too) are free to acquit for any reason and are reasonably likely to acquit in the most sympathetic cases.

And 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. The same is true if the rules that govern sentences give prosecutors the 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.

Which is approximately 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 lost. 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.<sup>29</sup> 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

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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 the law does not function for rich mobsters. That is a disastrous signal for any legal system to send.

<sup>29</sup>88 Misc.2d 439, 388 N.Y.S.2d 565 (1976).

exactly a “suspect class” for equal protection purposes.<sup>30</sup> 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 irrebutable.<sup>31</sup>

There are very few cases like *People v. Kail*.<sup>32</sup> 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.<sup>33</sup> A spirited dissent cited and quoted *Mantel*.<sup>34</sup>

Based on the conventional debate about pretextual prosecutions, the combination of *Mantel* and *Kail* is close to ideal. *Mantel* establishes that pretextual targeting is fine, constitutionally speaking. *Kail* suggests that that proposition may not hold when 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*<sup>35</sup> is more typical. McFadden was stopped for riding his

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<sup>30</sup>*See id.* at 442-44, 388 N.Y.S.2d at 568-69.

<sup>31</sup>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. *Id.* at 463-71. How many such persons the claimant need identify is unclear, but probably substantial. 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 Steven Allen Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365 (1987).

<sup>32</sup>150 Ill.App.3d 75, 501 N.E.2d 969 (1986).

<sup>33</sup>*Id.* at 76-78, 501 N.E.2d at 980-82

<sup>34</sup>*Id.* at 78-80, 501 N.E.2d at 982-983 (Green, J., dissenting).

<sup>35</sup>238 F.3d 198 (2d Cir. 2001).

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.<sup>36</sup> *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.”<sup>37</sup> But it has been loath to tackle overcriminalization and oversentencing directly. Serious constitutional limits on substantive criminal law, apart from the occasional “privacy” decision<sup>38</sup> or crimes with some free-speech angle,<sup>39</sup> do not exist. Nor are there significant limits on legislatures’ ability to attach immodest sentences to modest crimes.<sup>40</sup>

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<sup>36</sup>*Id.* at 199-204.

<sup>37</sup>*Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 124 S.Ct. 2531 (2004).

<sup>38</sup>*See Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). 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 invalidated Connecticut’s criminal ban on contraceptives, might have signaled 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).

<sup>39</sup>*E.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>40</sup>*See Ewing v. California*, 538 U.S. 11 (2003) (life sentence under recidivist statute for theft of three golf clubs held constitutional); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (life sentence for possession of 672 grams of cocaine held constitutional). *But cf. Solem v. Helm*, 463 U.S. 277 (1983) (life sentence under recidivist statute for passing a bad check held unconstitutional). The bottom line from the Supreme Court’s proportionality cases is unclear, but the conventional wisdom is that, while *Solem* suggested serious constitutional limits might apply, *Harmelin* and *Ewing* suggest otherwise. For a good discussion that contrasts these cases with the more stringent proportionality-style limits on punitive damages, see Pamela S. Karlan, *Pricking the Lines: The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880 (2004).

With that large qualification, it appears that courts have it just about right — if, but only if, the chief problem with pretextual prosecutions is 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.<sup>41</sup> 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? Which 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.

In short, criminal prosecutions send signals to those who oversee the prosecutors. Pretextual prosecutions muddy the signals. That is not a problem in all pretext cases: Sometimes, voters and legislative oversight committees have good alternative sources of information about the relevant crimes and the relevant criminals. 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:

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<sup>41</sup>Starr’s successor ultimately issued a report asserting that the evidence it found “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, FINAL REPORT OF THE INDEPENDENT COUNSEL IN RE: MADISON GUARANTY SAVINGS & LOAN ASSOCIATION (Jan. 5, 2001) (available at <http://icreport.access.gpo.gov/final/>). Obviously, that conclusion fell well shy of vindication for the Clintons; equally obviously, the investigation — which occupied a majority of the Clinton presidency — did not yield any definitive finding of guilt.

The system as a whole functions best when, generally, 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 large problems 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 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. . . .

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.<sup>42</sup>

The analogy is not apt. Even during their heyday, there was good information, wholly apart from any criminal litigation, available on the makeup and conduct of the leading Families. And there were independent measures of the most serious crimes they committed — such as homicide.<sup>43</sup> Criminal prosecution and conviction were not necessary to tell the public that Capone's

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<sup>42</sup>Attorney General John Ashcroft, Prepared Remarks for the U.S. Mayors' Conference, Oct. 25, 2001 (available at [http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10\\_25.htm](http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_25.htm)).

<sup>43</sup>See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES (annual publication, available at <http://www.fbi.gov/ucr>). For excellent discussions of the UCR's history and significance, see Michael D. Maltz, *Bridging Gaps in Police Crime Data* (Bureau of Justice Statistics, 1999); Lawrence Rosen, *The Creation of the Uniform Crime Report: The Role of Social Science*, 19 SOCIAL SCIENCE HISTORY 215 (1995). 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* (1997); ERIC MONKKONEN, *MURDER IN NEW YORK CITY* (2001).

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. Likewise with 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 — or the excessive hunting of migratory birds.<sup>44</sup> And local district attorneys (they are the ones who enforce state criminal codes) frequently go after defendants for very 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, 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.

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<sup>44</sup>On the federal code, see, *e.g.*, AMERICAN BAR ASSOCIATION, REPORT ON THE FEDERALIZATION OF CRIMINAL LAW (1998) [hereinafter FEDERALIZATION]. On state codes, see, *e.g.*, Stuntz, *Pathological Politics*, supra note \_\_\_\_, at 512-18.

Local district attorneys, elected by their home counties, enforce those criminal codes. Their case selection decisions are unreviewable.

Four key features of this system push against Capone-style pretextual prosecutions. First, a small but important portion of state criminal codes are politically mandatory.<sup>45</sup> 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 must be enforced systematically.

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.<sup>46</sup> During those same years, the number of felony prosecutions more than doubled.<sup>47</sup> Crime has fallen since the early 1990s, but dockets (and hence prison populations) have continued to grow, and

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<sup>45</sup>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*].

<sup>46</sup>BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS—1990, at 2 (1992).

<sup>47</sup>State-court felony filings rose 36% from 1978 to 1984. NATIONAL CENTER 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. NATIONAL CENTER 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.

prosecutors' offices have not caught up with the earlier increase.<sup>48</sup> Extreme docket pressure characterizes D.A.s' offices, particularly in the large cities where crime rates tend to be highest. Which means criminal litigation is rationed not only based on political necessity but also based on cost. "Detour" criminal investigations are expensive, even if the detour itself is cheap. District Attorneys cannot afford many (or any) expensive investigations. That is why high-end white-collar crime is (with a few rare exceptions)<sup>49</sup> a federal preserve; only the feds have the manpower 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

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<sup>48</sup>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 [hereinafter cited as 1992 SOURCEBOOK]. 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 [hereinafter cited as 2002 SOURCEBOOK] (available at <http://www.albany.edu/sourcebook/1995/pdf/t544.pdf>). Crime started to fall in 1991; that year America's inmate population stood at 1,216,654. *Id.* at 478 tbl. 6.1. By 2002, it had grown to 2,033,331 — an increase of more two-thirds. *Id.* The mushrooming of the prison and jail populations was partly due to lengthening 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* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS — 2001, at 2 (putting number of assistant prosecutors at 27,000, up from 20,000 in 1990).

<sup>49</sup>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. It remains to be seen what the fallout will be from this year's failed efforts to convict Tyco executives and lawyers. *See* Jonathan D. Glater, *Jury Finds Ex-Tyco Lawyer Not Guilty of All Charges*, N.Y. TIMES, July 16, 2004, at C1; *The Tyco Mistrial: An Unfortunate Ending; A Winding Trail to a Mistrial*, N.Y. TIMES, Apr. 3, 2004, at C1.

of serious crimes.<sup>50</sup>

Local police, on whom district attorneys must depend,<sup>51</sup> likewise must labor under severe resource constraints. That too 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. Local police cannot afford long, complex investigations. And 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.<sup>52</sup>

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;<sup>53</sup> there is also a good deal of publicity attached to the numbers in local jurisdictions. Responsibility for 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

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<sup>50</sup>The best discussion of white-collar crime investigations deals solely with federal investigations — a sign of how the federal government dominates the field. *See* KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985).

<sup>51</sup>While an increasing number of D.A.s' offices have developed their own investigative units, *see* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *NATIONAL SURVEY OF PROSECUTORS IN LARGE DISTRICTS*, 2001, at 2 tbl. 1 (2001) (reporting that staff investigators comprise 9.9% of the 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).

<sup>52</sup>*See* Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 26 *FORDHAM URB. L.J.* 573 (1999) (discussing "over the transom" model of police-prosecutor relations); *see also* Daniel C. Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 *COLUM. L. REV.* 749, 793 (2003) [hereinafter cited as Richman, *Prosecutors and Their Agents*] (noting varieties of police-prosecutor interaction).

<sup>53</sup>*See* sources cited note \_\_ *supra*.

information about a given D.A.'s performance, and they ensure that any District Attorney not already fixated on these reports will soon become so.<sup>54</sup> These D.A.s do not control the relevant yardstick. And they must defend their performance before the voters, every few years.<sup>55</sup>

That combination of political accountability and an independent performance measure matters in several different ways. Local prosecutors would focus on violent crimes and major thefts without the crime index, but the index — specifically, the publicity that it brings to crime statistics — pushes toward even more attention to 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 D.A.'s opponent in her next election has an incentive to publicize that fact. So voters will know it; they will get the impression that the D.A. and the local police are not paying enough attention to murders — even if a lot of those murderers were prosecuted for something else, just as Capone was charged and convicted for cheating on his taxes. The D.A. could of course try 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*.

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

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<sup>54</sup>See William Glaberson, *Caught Between the Law and the Written Word*, N.Y. TIMES, July 9, 2004, at 4 (noting 2004 civil suit in Brooklyn by ADA demoted and later fired by District Attorney Charles J. Hynes after ADA was quoted, while marketing his fiction book, as saying that Brooklyn was “the best place to be a homicide prosecutor” because it had “more dead bodies per square inch than anyplace else”).

<sup>55</sup>More than ninety-five percent of local district attorneys are elected. See John M. Dawson et al., U.S. Dep't of Justice, *Prosecutors in State Courts — 1992*, at 2 (1993).

affect the crime rate even more.<sup>56</sup> But prosecutors and police — so quick to take credit for crime drops — have to act like they are addressing the reported statistics. In other words, local prosecutors have an incentive to engage in charging practices that most efficiently deter violent crimes and felony thefts. And 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 also seems likely that pretextual charging is a poor means of achieving that goal.<sup>57</sup>

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*.<sup>58</sup> As we have already noted, prosecutors prosecute these crimes systematically and aggressively, meaning that, at least roughly, the crimes are enforced as

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<sup>56</sup>See generally Symposium, *Why Is Crime Decreasing?*, 88 J. CRIM. L. & CRIMINOLOGY 1173 (1998).

<sup>57</sup>This proposition might seem to run counter to the contemporary move toward “quality-of-life policing,” including police arrests for minor offenses as a tool for combatting more serious crimes. For two contrasting views of this style of police work, see GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996) (pro); BERNARD L. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001) (con). For the best analysis of the legal implications of these police tactics, see Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

The contradiction is less stark than first appears. The “broken windows” approach to law enforcement is geared toward policing, not prosecution. That is unsurprising: police arrests send different messages than do criminal convictions; the focus of criminal trials on the elements of the underlying crime illustrate the difference. Pretextual charging, in essence, treats trials like arrests — the particulars of the crime are a sidelight. That seems to us a plausible deterrent strategy for police and arrests, but not for prosecutors and trials.

<sup>58</sup>See Stuntz, *Criminal Law’s Shadow*, *supra* note \_\_\_, at 2563-64.

written. Legal definitions are not a cover for strategic charging patterns; rather, the legal doctrine actually defines the behavior that prosecutors seek to punish. And those legal definitions are reasonably consistent, across both time and place. That consistency may flow from another fact: these crimes also have *public* definitions. Burglary and kidnapping are not just technical legal terms; ordinary citizens know what those terms mean. That fact constrains state legislators. Members of Congress can redefine mail and wire fraud to mean, approximately, undisclosed breach of fiduciary duty (as they have), but no state legislature could redefine murder to include non-negligent 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 non-strategically. They must be enforced, roughly, as written. That is not a recipe for pretextual prosecution.

None of this is to say that state legislatures do not behave strategically, nor that state criminal codes are free 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 to exploit the opportunities those codes give them.<sup>59</sup>

These propositions hold true as a matter of theory; there is some empirical evidence that they also hold true in practice. Consider guilty plea rates. Given their severe budget constraints and given the charging opportunities that broad state criminal codes give them, local prosecutors should achieve plea rates that approach 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

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<sup>59</sup>*See id.* 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 \_\_, *passim*. That argument is, at best, only partly correct: it ignores the factors discussed in the text, which push toward much more accountability for local prosecutors than for their federal counterparts.

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.<sup>60</sup> Nor do they labor under the severe budget constraints that local prosecutors face. Yet local prosecutors actually have lower guilty plea rates than their federal counterparts.<sup>61</sup> And both trial and acquittal rates for murder cases brought by local district attorneys' offices are high: a good deal higher than for felonies as a whole.<sup>62</sup> 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 for violent crimes and major thefts.<sup>63</sup> 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

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<sup>60</sup>There is some evidence that federal prosecutors do pursue such career goals in their case selection decisions. See Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259 (2000); Richard T. Boylan & Cheryl X. Long, *Size, Monitoring, and Plea Rate: An Examination of United States Attorneys* 14-17 (July 10, 2000) (suggesting that young prosecutors are prone to take cases to trial to acquire human capital unless they are closely monitored).

<sup>61</sup>In fiscal year 2000, 96 percent of federal felony convictions were by guilty plea. 2002 SOURCEBOOK, supra note \_\_, at 416 tbl. 5.17. The comparable figure in state cases was 95 percent. *Id.* at 448 tbl. 5.46.

<sup>62</sup>The plea rate for murder and nonnegligent manslaughter was only 58 percent. *Id.* Though the 2002 Sourcebook figures (based on a study of seventy-five counties) show a very low acquittal rate in murder cases, *id.* tbl. 5.57, the rate historically has been very high. The 2000 Sourcebook found that five percent of murder defendants were tried and acquitted, compared to one percent 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. 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, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1990, at 526, tbl. 5.51.

<sup>63</sup>A study of 75 counties showed 97 percent of felony drug convictions were by guilty plea. 2002 SOURCEBOOK, supra note \_\_, at \_\_\_ tbl. 5.57 (available at <http://www.albany.edu/sourcebook/1995/pdf/t557.pdf>). The plea rate for property offenses was almost as high: 96 percent. *Id.* Only 90 percent of convictions for violent crimes were by guilty plea. *Id.*

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 non-strategically 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 is the gap between the crimes their jurisdictions suffer and the criminal charges their prosecutors file.

### *B. Federal Prosecutions*

These patterns do not characterize the federal system. Federal prosecutors do not have primary responsibility for crime control in their jurisdictions. Consequently, their dockets include only a small proportion of politically mandatory crimes — the equivalent of FBI index crimes in a local D.A.’s office. Federal criminal law gives U.S. Attorneys and their assistants an enormous range of charging options: responsibility may be small, but jurisdiction is 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 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. 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. The responsibility is a consequence of local law enforcement agencies, to whom voters assign the job of crime control. The 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.<sup>64</sup> Even where they had the constitutional power to do so, federal and state governments had little interest in taking over that job.<sup>65</sup> Over time, local control has become the dominant characteristic of American criminal justice.

Federal prosecutors had their own sphere of exclusive responsibility, but historically that sphere was politically small potatoes outside of the national security area: 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<sup>66</sup> — 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

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<sup>64</sup>The rise of these local agencies, especially district attorneys' offices, has been a surprisingly neglected topic. For the best treatment to date, see GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2000).

<sup>65</sup>See generally Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1 (1996). 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' exclusive jurisdiction.

<sup>66</sup>Though 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 initiating slightly over 4,000 prosecutions per year, most of them for violations of the ban on interstate transportation of stolen automobiles. See Daniel C. Richman, *Violent Crime Federalism*, in 31 CRIME AND JUSTICE: A REVIEW OF RESEARCH \_\_, \_\_ (Michael Tonry ed., forthcoming 2004). Those 4,000 cases were a small fraction of the federal criminal docket's 87,300 cases, roughly 65 percent of which were for Prohibition violations. Edward Rubin, *A Statistical Study of Federal Criminal Prosecutions*, 1 LAW & CONTEMP. PROB. 494 (1934).

occupied the field. Ever since Repeal 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)<sup>67</sup> — has sought out other uses for its time and talents. That has created 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.<sup>68</sup>

Congress has been all too happy to meet that demand, especially in the past generation. Partly, that is because doing so was 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.<sup>69</sup> And the benefits of criminal legislation could 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 got a federal law of carjacking and domestic violence, and a lot else. Federal courts periodically try to rein in this expansion. We are in the midst of one such reining-in process now, leading to more rigorous application of jurisdictional elements;<sup>70</sup> a decade or two ago, the

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<sup>67</sup>For a 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 U.S. DEP'T OF JUSTICE, *BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS* (2000).

<sup>68</sup>*Cf.* Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 973 (1995) (Justice Department officials argue that Congress should criminalize conduct “even though it intends the jurisdiction it authorizes to exercised in a small percentage of cases,” and let “prosecutorial discretion” act as “the most important and effective brake on the federalization of crime”).

<sup>69</sup>See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 771-72 (1999).

<sup>70</sup>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 (2000) (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

focus was on ratcheting up intent standards for federal criminal statutes.<sup>71</sup> The end result of these judicial ventures is always modest. They leave federal criminal law more complex, but not narrower.

Little responsibility and large 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), and only 40% of these did criminal investigations.<sup>72</sup> The FBI — the sole agency whose task is general criminal law enforcement — had only 11,248 agents.<sup>73</sup> 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 States

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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). Accord Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 HASTINGS L.J. 573 (2004) (arguing that *Jones* and *Lopez* have had little impact).

<sup>71</sup>For the leading Supreme Court cases, see *Staples v. United States*, 511 U.S. 600 (1994) (finding that defendant must be aware of the nature of the weapon he possesses under federal weapons statute); *Ratzlaf v. United States*, 510 U.S. 135 (1994) (defendant charged under currency “anti-structuring” statute must know that he is illegally evading currency reporting statutes); *Liparota v. United States*, 471 U.S. 419 (1985) (defendant in food stamp fraud case must know that his conduct violates governing federal regulations). Within a few months of the Court’s decision, *Ratzlaf* was overruled by Congress. That seems to have prompted a change 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 \_\_\_, at 561-65.

<sup>72</sup>DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL LAW ENFORCEMENT OFFICERS, 2002 (Aug. 2003).

<sup>73</sup>*Id.* at 1.

Attorneys' offices around the country,<sup>74</sup> or by the smaller number of prosecutors in Main Justice.<sup>75</sup>

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 this case went federal. It may be as theatrical as Eliot Ness and Al Capone's tax prosecution. 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 that the local police catch with a with a gun in a designated high crime area are charged in federal court.<sup>76</sup> 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.<sup>77</sup> Yet instead of increasing its deployment in this area, the Bureau actually reduced it, leaving state and local police to pick up the slack.<sup>78</sup> The stickers remain, understood as more a vague expression of interest than a real

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<sup>74</sup>See U.S. DEP'T OF JUSTICE, EXEC. OFFICE U.S. ATTYS., ANNUAL STATISTICAL REPORT – FISCAL YEAR 2002, at 2 (reporting 5,304 asst. U.S. attorneys).

<sup>75</sup>See Richman, *Prosecutors and Their Agents*, supra note \_\_, at 759.

<sup>76</sup>See Daniel C. Richman, "Project Exile" and the Allocation of Federal Enforcement Authority, 43 ARIZ. L. REV. 369, 379 (2001) [hereinafter cited as Richman, *Project Exile*] (describing development of "Project Exile" in Richmond, Virginia, in 1997).

<sup>77</sup>See Warren St. John, *Today's Bank Robber Might Look Like a Neighbor*, N.Y. TIMES, July 3, 2004, A1; Abraham McLaughlin, *Bank bandits move in as busy FBI retreats: Bank heists were on the rise even before Sept. 11. Now the FBI is focusing its resources on terror front*, CHRISTIAN SCIENCE MONITOR, Apr. 18, 2002; Jodi Wilgoren, *Robbers Rediscover the Small-Town Bank*, N.Y. TIMES, Mar. 24, 2002, at 1.

<sup>78</sup>Fox Butterfield, *As Cities Struggle, Police Get By With Less*, N.Y. TIMES, July 27, 2004, at 10; Akilah Johnson, *FBI Passing on Bank Robberies*, SUN-SENTINAL, June 21, 2004, (The FBI's shift from fighting such crimes as drugs and whitecollar offenses to counterintelligence and counterterrorism means there are fewer agents to investigate bank

commitment. And such understandings surely apply to the ubiquitous FBI warnings — on videos, and soon CDs — to digital pirates.<sup>79</sup> The FBI does pursue some such cases.<sup>80</sup> But expectations of extreme selectivity give the agency the luxury of simultaneous “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,<sup>81</sup> 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.<sup>82</sup> 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

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robberies a job increasingly being left to local police.”); Gary Fields & John R. Wilke, *FBI's New Focus Places Burden on Local Police: With Terror as Top Priority, Feds Pull Resources From Core Crime Fighting*, WALL ST. J, June 30, 2003.

<sup>79</sup>Paul Bond, *FBI Pumps Up Warning Volume in Get-Tough Policy on Pirating*, CHICAGO SUN-TIMES, February 21, 2004, at 30; Jeff Leeds, *FBI Logo to Grace Music CDs*, L.A. TIMES, Jan. 16, 2004, at C10.

<sup>80</sup>See Justin Fenton, *FBI Seizes Computer of UM Student in Raid; Search at Fraternity House Part of Vast Piracy Sweep*, BALTIMORE SUN, Apr. 24, 2004, at B1.

<sup>81</sup>See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 U.C.L.A. L. REV. 757, 771-773 (1999) [hereinafter Richman, *Federal Criminal Law*] (discussing the rewards of criminal lawmaking).

<sup>82</sup>*Id.* at 781.

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?<sup>83</sup> The same question can be asked of the current wave of corporate scandals. Many have been prosecuted as a result.<sup>84</sup> But how can the public or Congress judge whether the federal government has overshot or undershot the mark in its criminal enforcement response?<sup>85</sup>

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.<sup>86</sup> 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 his agency's statistics by referring a lot of cases for prosecution under the federal Dyer

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<sup>83</sup>See Committee on Gov't Operations, *Combatting Fraud, Abuse, and Misconduct in the Nation's Financial Institutions: Current Federal Efforts Are Inadequate*, H.R. Rep. No. 100-1088, at 18-20 (1988) (criticizing Justice Department for insufficient zeal in prosecuting fraud cases arising out the savings and loan crisis); CHECK KITTY CALAVITA ET AL., *BIG MONEY CRIME: FRAUD AND POLITICS IN THE SAVINGS AND LOAN CRISIS* (1997).

<sup>84</sup>See Corporate Task Force, *First Year Report*, available at [http://www.usdoj.gov/dag/cftf/first\\_year\\_report.pdf](http://www.usdoj.gov/dag/cftf/first_year_report.pdf).

<sup>85</sup>See Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937 (2003); See also Stephen Labaton, *Downturn and Shift in Population Feed Boom in White-Collar Crime*, N.Y. TIMES, June 2, 2002, at \_\_\_.

<sup>86</sup>See Richman, *Federal Criminal Law*, supra note \_\_\_, at 789.

Act, which covered interstate car thefts.<sup>87</sup> U.S. Attorneys would occasionally balk at taking these “cheap” cases,<sup>88</sup> but they constituted between a sixth and an eighth of all federal prosecutions from 1964 to 1970.<sup>89</sup> The combination of prosecutorial resistance — particularly in large cities where U.S. Attorneys offices thought they had better things to do<sup>90</sup> — 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.<sup>91</sup> All Kelley was able to do was note an increased emphasis on white collar and organized crime investigations, and concede that there was “no way to precisely measure the benefits of this change in investigative emphasis.”<sup>92</sup> But this was enough.

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 tout its achievements and justify additional funding. And the tension continues to be 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

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<sup>87</sup>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”).

<sup>88</sup> 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 not significant impact on things.” *Id.*

<sup>89</sup>*Id.* at 106.

<sup>90</sup>*Id.* at 105.

<sup>91</sup>WILSON, *THE INVESTIGATORS*, *supra* note \_\_, at 173-74.

<sup>92</sup>*Id.* at 174.

crime rates in those areas. It simply recites numbers of convictions and amounts of recoveries and fines.<sup>93</sup>

What happens when an enforcement bureaucracy has broad jurisdiction, is small enough to avoid responsibility for going after every crime (even every serious crime) within that jurisdiction, but 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.<sup>94</sup> Along the way, all sorts of statutory violations may turn up — offenses that fall far short of the suspicions that first triggered the inquiry. New ones will be created each time an interviewee lies to investigators.

The temptation to actually charge these violations grows as the investigation progresses. The threat of charges, *any* charges — the more easily proven, 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) will see little marginal gain from further investigative investments. The pressure to bring any provable charge will be even greater if reports of the investigation appear in the media, and papers are sold by asking whether and when “X” is going to be indicted.<sup>95</sup>

The pressure to bring any provable charge against a previously identified target has also

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<sup>93</sup>2003 DOJ Performance and Accountability Report, Pt. 2, Strategic Goal Two, available at <http://www.usdoj.gov/ag/annualreports/ar2003/p2sg2.htm>.

<sup>94</sup>*See generally* Richman, *Prosecutors and Their Agents*, *supra* note \_\_.

<sup>95</sup>*See* Oesterle, *supra* note \_\_, at 451 (“Prosecutors in complex business scandal trials 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.”).

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.<sup>96</sup> But prosecutions under those state laws seems to be rare. Cases brought under equivalent federal statutes are common. And 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). That federal prosecutors would prefer this theory to one that required them to prove some *quid pro quo* is obvious. The readiness of federal courts to accept the theory is less obvious, but as Ralph Winter has noted,<sup>97</sup> a result of favorable facts — the whiff of corruption that attracted the prosecutor's attention to begin with. Only the Supreme Court, the court least likely to focus on the facts, balked at the theory. And it was thereafter overruled by Congress:<sup>98</sup> which, as Bill Eskridge has shown, only overrules Court decisions that *narrow* federal criminal statutes, never decisions that broaden those statutes.<sup>99</sup>

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<sup>96</sup>See, e.g., CAL. PENAL CODE §466, which specifically includes crowbars and screwdrivers among the banned tools.

<sup>97</sup>See Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945 (1993); see also Dan Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L.REV. 469, 479-80 (1996) (discussing prosecutors' "power of initiative").

<sup>98</sup>See Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171 (1977); *McNally v. United States*, 483 U.S. 350 (1987) (rejecting intangible rights theory); 18 U.S.C. §1346 (reinstating intangible rights theory).

<sup>99</sup>See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 343-53 (1991). Eskridge found that criminal law cases were the largest single category of Congressional overrides, at 18 percent. *Id.* at 344 tbl. 4. And the federal government was the most common beneficiary of Congressional overrides (25 percent), while criminal defendants were among the least common (2 percent). *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 non-federal officials.<sup>100</sup> 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<sup>101</sup> — 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 introduce a large level of complexity into federal crimes. 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.<sup>102</sup> The

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<sup>100</sup>Though 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 \_\_\_ and accompanying text, 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.

<sup>101</sup>For the latest effort at the working-out, see *Sabri v. United States*, 124 S.Ct. 1941 (2004).

<sup>102</sup>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 \_\_\_-\_\_\_ (1994). It was self-consciously designed for pretextual targeting — for catching a category of criminals, not defining a type of

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 set out to enforce such a statute systematically, anymore than the federal government could try to identify all those who deprive someone of “the intangible right of honest services.”<sup>103</sup> Such statutes define not crimes but hooks, legal forms that authorize legal punishment 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. And 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

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banned conduct.

<sup>103</sup>18 U.S.C. §1346.

we saw in June 2004, when the State Department took heavy criticism for undercounting.<sup>104</sup> 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. But the FBI is plainly “on the hook” if a terrorist attack occurs, in a way that is untrue of just about any other publically 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, and 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 from other areas.<sup>105</sup> And it has invoked Al Capone to show the extent of its commitment to use every possible tool against the terrorists.

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 later by the USA Patriot Act) have not been without controversy.<sup>106</sup> And the government’s interpretation of the statute’s mens rea element may allow the conviction of people who were not

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<sup>104</sup>See R. Jeffrey Smith, *State Dept. Concedes Errors in Terror Data*, WASH. POST, June 10, 2004, at A17; U.S. STATE DEP’T, PATTERNS OF GLOBAL TERRORISM 2003 (as revised, June 2004), available at <http://www.state.gov/s/ct/rls/pgtrpt/2003/>.

<sup>105</sup>See Testimony of Laurie E. Ekstand & Randolph C. Hite (General Accounting Office) before the Subcomm. on Commerce, Justice, & the Judiciary; Sen. Approps. Comm., “FBI Transformation: FBI Continues to Make Progress in Its Efforts to Transform and Address Priorities,” Mar. 23, 2004 (GAO-04-578T); Office of the Inspector General, U.S. Dep’t of Justice, Federal Bureau of Investigation: Casework and Human Resource Allocation,” Audit Rep. 03-37 (Sept. 2003).

<sup>106</sup>See *Humanitarian Law Project v. U.S. Dep’t of Justice*, 352 F.3d 382 (9<sup>th</sup> Cir. 2003); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 11 (2003).

fully aware that they were aiding a terrorist group. Yet the statute does at least demand that a connection to terrorism (at least on the part of the organization) have been shown, either judicially or administratively. The same cannot be said, however, 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.<sup>107</sup> And 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 quantities of grocery coupons, collecting fraudulent welfare payments, swiping credit numbers and hawking unlicensed T-shirts.”<sup>108</sup>

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”) — alleged that the Justice Department had overstated its statistics for terrorism cases and convictions in order, among other things, to justify its budget request.<sup>109</sup> A General Accounting Office inquiry conducted in response to these allegations found that, of 288 convictions classified by the Department as terrorism-related for fiscal 2002, at least 132 had been misclassified, and the “overall accuracy of the remaining 156 convictions is questionable.”<sup>110</sup> In its January 2003 report the GAO chided the Department: “Without reliable

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<sup>107</sup> 9/11 Commission, Entry of the 9/11 Hijackers into the United States, Staff Statement No. 1 (presented Jan. 26, 2004) [http://www.9-11commission.gov/hearings/hearing7/staff\\_statement\\_1.pdf](http://www.9-11commission.gov/hearings/hearing7/staff_statement_1.pdf)

<sup>108</sup> 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.

<sup>109</sup> [Phila. Inquirer article not available on Nexis; we’ll run it down]; see also Mark Fazlollah & Peter Nicholas, *Justice Department Inflates Terror Conviction Statistics; Report Includes Cases of Drunks on Planes*, PITTSBURGH POST-GAZETTE, Dec. 16, 2001, at A10.

<sup>110</sup> Gen. Accounting Office, *Justice Department: Better Management Oversight and Internal Controls Needed to Ensure Accuracy of Terrorism-Related Statistics* (GAO-03-266), at 6

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."<sup>111</sup> And critics accused the Department of "blur[ring] the line between terrorists and common criminals" and deliberately "sabotag[ing]" anti-terrorism efforts.<sup>112</sup>

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 pleas obtained." When pressed as to whether the *charges* had been related to terrorism, Ashcroft responded that "these are individuals that we believe were related to terrorism. The criminal charges are not always. Some of the criminal charges are related, for example, to document fraud."<sup>113</sup> At a October 2003 Senate Judiciary hearing, the chief of the Department's Criminal Division stepped gingerly around the issue. He asserted that "[s]ince the attacks of September 11<sup>th</sup>, we've charged 284 defendants as a result of terrorism investigations,"<sup>114</sup> 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 ensure if we were to charge the terrorism offense.<sup>115</sup>

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(2003).

<sup>111</sup>*Id.* at 14.

<sup>112</sup>Alexander Gourevitch, *Body Count: How John Ashcroft's Inflated Terrorism Statistics Undermine the War on Terrorism*, WASHINGTON MONTHLY, June 2003.

<sup>113</sup>Hearing of the Commerce, Justice & State Subcomm. House Appropriations Comm.: Fiscal Year 2004 Appropriations for the Justice Department, Mar. 6, 2003 (Colloquy between Attorney General Ashcroft and Rep. Serrano) (congressman expresses concerns about decreased federal enforcement outside terrorism related areas).

<sup>114</sup>Senate Judiciary Committee Hearing: Criminal Terrorism Investigations and Prosecutions, Oct. 21, 2003 (Federal News Service transcript), at 14 (testimony of Christopher Wray).

<sup>115</sup>*Id.* at 23.

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 anti-terrorist referrals since September 30, 2001, this one found that only 879 people had been convicted, and only 373 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.<sup>116</sup>

The Justice Department did not even wait for the formal release date for the TRAC report for its chief spokesman to fire back: “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. This strategy has proven to be an effective method of deterring and disrupting potential terrorist acts.”<sup>117</sup> The spokesman explained:

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

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<sup>116</sup>TRAC, Criminal Terrorism Enforcement Since the 9/11/01 Attacks (Dec. 8, 2003), accessed at <http://trac.syr.edu/tracreports/terrorism/report031208.htm> (12/8/03).

<sup>117</sup>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](http://www.usdoj.gov/opa/pr/2003/December/03_opa_670.htm).

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.<sup>118</sup>

Mark 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 suited to the War against 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.<sup>119</sup> 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 still neutralize the threat, as occurred when Sheik Abdel Rahman and others were prosecuted for plotting to blow up a number of New York City landmarks in 1993.<sup>120</sup> Yet in that case, an FBI informant had infiltrated the group, a piece of investigative success that can rarely be replicated.

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, provide leverage for the government to obtain cooperation from defendants; it can also incapacitate targets without resort to material witness warrants, immigration detentions, and

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<sup>118</sup>*Id.*

<sup>119</sup>Statement of Patrick Fitzgerald, U.S. Attorney, N.D.Ill., before the National Commission on Terrorist Attacks Upon the United States, June 16, 2004, available at [http://www.9-11commission.gov/hearings/hearing12/pfitzgerald\\_statement.pdf](http://www.9-11commission.gov/hearings/hearing12/pfitzgerald_statement.pdf).

<sup>120</sup>*United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999).

other non-criminal processes that (according to some) are amenable to even greater misuse. The government can also satisfy its discovery obligations without revealing valuable intelligence (so long as it's not exculpatory) when it brings these stripped-down cases.<sup>121</sup>

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. And 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.<sup>122</sup>

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. 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' incentive was to (1) select targets (based on whatever criteria prosecutors wish to

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<sup>121</sup>The same considerations often arise in espionage cases. *See* *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950) (perjury conviction). *See also* Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation, U.S. Dep't of Justice, Final Report (2000) (discussing Wen Ho Lee case).

<sup>122</sup>*See generally* Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1417-24, 1436-38 (2002).

advance), (2) pursue whatever charges would maximize the odds of conviction, and (3) claim success in the most extreme 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 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 Mob defendant who was nailed for killing too many migratory birds, 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 signals: when we say we've taken down a terrorist, we truly *have* taken down a terrorist. That means, among other things, reducing prosecutors' incentive to follow the Capone strategy everywhere else.

#### IV. PRETEXT AND FEDERALISM (REPRISE)

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 need it for the fight against terrorism. But it needs to be minimized *apart from* terrorism cases. 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 push against 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.”<sup>123</sup> Plainly, counterterrorism is the priority among priorities. At a March 2004 Senate appropriations hearing, when asked why, with approximately 12,000 agents,

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<sup>123</sup>Transformation of the FBI Following 9/11, Hearing of the Commerce, Justice, State & Judiciary Subcomm., House Appropriations Comm., June 3, 2004 (Federal News Service) (testimony of John Pistole, Executive Asst. Director for Counterterrorism, FBI); *see also* FBI Oversight, Terrorism, and other Topics, Hearing of Sen. Judiciary Comm. May 20, 2004 (testimony of FBI Dir. Robert Mueller) (Federal News Service) (“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.”).

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.”<sup>124</sup> And 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<sup>125</sup> — 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/Public Corruption Indictments” and that he was “embarrassed by the fact that this office has not convicted an elected official of corruption since 1988.”<sup>126</sup> When his email became public, the Justice Department’s spokesman made clear for the record: “All 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.”<sup>127</sup>

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

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<sup>124</sup>The Transformation of the FBI, Hearing of the Commerce, Justice, State & Judiciary Subcomm., Senate Appropriations Comm, Mar. 23, 2004 (Federal News Service) (testimony of FBI Dir. Robert Mueller, under questioning by Sen. Judd Gregg).

<sup>125</sup>GAO, FBI Transformation, *supra* note \_\_, at 30-31 (3/23/04 report)

<sup>126</sup>Doug Donovan, *DiBiagio Voices Frustration Over Pace of Top Cases; Critics See Confidential Comments as Proof of U.S. Attorney’s Political Motives*, BALTIMORE SUN, July 15, 2004, at A1.

<sup>127</sup>*Id.*; see Doug Donovan & Laura Sullivan, *Democrat Demands DiBiagio Resign*, BALTIMORE SUN, July 16, at \_\_; Eric Rich, *Md. Prosecutor Accused of Playing Politics*, WASH. POST, July 16, 2004, 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. See Doug Donovan, *DiBaggio Gets Formal Rebuke from His Boss*, BALTIMORE SUN, July 17, 2004, at A1.

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.<sup>128</sup> 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.<sup>129</sup> And, in June 2004, a bi-partisan group of senators gained Judiciary Committee approval for the “Criminal Street Gang Abatement Act,” which would significantly increase the sentences for long series of crimes when committed by those within “street gangs.”<sup>130</sup> 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 terrorism, leaves federal law enforcers substantially more resource-constrained. Another kind of constraint arises from the still-growing federal commitment to fighting violent crime. For the most part, that commitment is played out through partnerships between federal officials and local law enforcement personnel. Anytime 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, assumption may not hold. More likely, the political factors that constrain local officials also constrain their federal partners when the two

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<sup>128</sup>See Marsha Shuler, *FBI Plans Task Force in BR Area; Public Corruption Targeted*, THE ADVOCATE (Baton Rouge, La.), May 11, 2004, at A1 (Republican congressman running for Senate in Louisiana takes credit for establishment of a six-agent FBI public corruption task force).

<sup>129</sup>Project Safe Neighborhoods and Gun Violence, Hearing, Senate Judiciary Comm., May 13, 2003 (FDCH Political Transcripts).

<sup>130</sup>S. 1735 (approved in S. Jud. Com 6/24/04). [Sent to Senate 7/6. Should be law by time this is published.]

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.<sup>131</sup> That cuts down on the risk from pretextual targeting.

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 extension of Project Safe Neighborhoods; the new part 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, and the number of violent firearms crimes."<sup>132</sup> 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.<sup>133</sup> 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 pre-commitment 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' location on high rungs of corporate or political ladders, and thereby deflect 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

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<sup>131</sup>See Richman, *Project Exile*, supra note \_\_.

<sup>132</sup>Dep't of Justice Press Release, 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](http://www.usdoj.gov/opa/pr/2004/June/04_ag_438.htm); 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.

<sup>133</sup>See Richman, *Project Exile*, supra note \_\_.

who lost their jobs due to criminal investigations. Growing resource constraints, the rise of organizations 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.<sup>134</sup> The federal false statements statute covers concealment, not just lies;<sup>135</sup> it also covers unadorned false denials of guilt, even where no one was misled by the denial.<sup>136</sup> “Extortion” includes street robberies,<sup>137</sup> accepting bribes,<sup>138</sup> and blackmail.<sup>139</sup> Money

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<sup>134</sup>The key provision is 18 U.S.C. §1346, which states simply: “For purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” For the best discussion of their breadth of this statute, see John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort / Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991).

<sup>135</sup>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.”

<sup>136</sup>*See Brogan v. United States*, 522 U.S. 398 (1998).

<sup>137</sup>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

laundering covers pretty much any handling of money or property that is connected to criminal activities.<sup>140</sup> And federal sentences, especially for anything touching on guns or drugs, are infamously severe.<sup>141</sup> All of which invites 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 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. Overbroad federal crimes and overly harsh federal sentences — crime definition probably matters more than excessive sentences, though both matter — encourage a mindset that makes criminal law enforcement an enterprise in targeting criminals, not punishing crimes.

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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).

435 U.S. at 373.

<sup>138</sup>*See* *Evans v. United States*, 504 U.S. 255 (1992).

<sup>139</sup>*See, e.g.*, *United States v. Jackson*, 180 F.3d 55 (2d Cir. 1999) (prosecution of Bill Cosby's illegitimate daughter for her efforts to extort money from him by threatening to tell the tabloid press that he was her father).

<sup>140</sup>*See* 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 (2000); Jimmy Gurule, *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 (1995).

<sup>141</sup>There are too many sources to cite for this proposition. For the best general critique of the federal sentencing guidelines, see KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998). For the best discussion of the racial impact of federal drug sentences, see David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (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 JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

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.<sup>142</sup>

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.<sup>143</sup> 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 better protects innocents than any legal doctrine restricting charging decisions could).<sup>144</sup> The harm, rather, goes to the political economy of federal law 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

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<sup>142</sup>See William H. Webster, Review of the Internal Revenue Service’s Criminal Investigation Division (I.R.S. Pub. No. 3388 (4-1999) (1999). In the wake of the 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, Criminal Investigation, National Operations Annual Report, FY 2001, available at [www.ustreas.gov/irs/ci/annual\\_report\\_2001/annual\\_report\\_2001.htm](http://www.ustreas.gov/irs/ci/annual_report_2001/annual_report_2001.htm).

<sup>143</sup>See Stuntz, *Criminal Law’s Shadow*, supra note \_\_\_, at 2563-64.

<sup>144</sup>See Richman, *Prosecutors and Their Agents*, supra note \_\_\_, at 796 (noting how separation of prosecutorial and investigative authority works to limit errors of commission); see also C.F. Larry Heinmann, *Understanding the Challenger Disaster: Organizational Structure and the Design of Reliable Systems*, 87 AM. POL. SCI. REV. 421, 427 (1993) (serial systems, requiring approval of several components before agency actions can be taken are less prone to type I errors than parallel systems).

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 work. 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. 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*<sup>145</sup> 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.<sup>146</sup> The FBI agents investigating Brogan either were uncertain that he could be convicted of violating that statute, or wanted to ensure 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.<sup>147</sup>

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<sup>145</sup>522 U.S. 398 (1998).

<sup>146</sup>29 U.S.C. §186.

<sup>147</sup>*Id.* at 409-10 (Ginsburg, J., concurring in the judgment).

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.<sup>148</sup>

*Brogan* presents an issue of institutional design: how to construct a system that will (1) police and prosecute labor racketeering effectively, and (2) do so transparently enough that would-be racketeers, political monitors, and the voting public will be able to tell whether the system is doing that job well or poorly. This is an important question, but not a hard one. Advancing those two goals requires that four conditions be satisfied. First, responsibility for labor racketeering should be assigned to a single set of police and prosecutorial agencies, so that voters and other monitors know who deserves credit if the system is working and whom to blame if it isn’t. Second, the relevant criminal law needs to be fairly clear — not in order to give notice to criminals, but in order to give notice to the public of what crimes are being punished. Third, the law needs to capture the relevant conduct with a fair measure of accuracy. In *Brogan*’s context, these first three conditions are all satisfied. The federal government is responsible for labor racketeering; neither voters nor district attorneys would expect these cases to end up in state court. And the labor racketeering statute is both reasonably clear and nonstrategic.<sup>149</sup> Which leads to the fourth condition: Labor racketeers should be prosecuted *under that law*. Not so that the Brogans of the world will be treated kindly enough, but so that the relevant law-enforcement personnel can

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<sup>148</sup>*Id.* at 400-04, 406-08 (majority opinion); *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).

<sup>149</sup>The statute bars payments to employees “in excess of their normal compensation for the purpose of [influencing] any other employees in the exercise of the right to organize and bargain collectively,” 18 U.S.C. §186(a)(3), and payments to any union official “with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as [an] officer or employee of such labor organization.” *Id.* §186(a)(4). Payees are covered along with payors. Section 186(c) offers a list of nine exceptions to this ban; the exceptions are defined in considerable detail. *Id.* §186(c).

send the right signals: both to union bosses inclined to sell out their men, and to voters inclined to wonder whether law enforcers are doing their jobs.

Notice that a broad false statements statute, one that makes it easy to “sting” a defendant the way federal agents stung Brogan, retards these goals. It encourages both agents and prosecutors to go for the easy conviction at the cost of muddying the signals criminal litigation sends. 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 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 D.A.s 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;<sup>150</sup> state and local government employees are bound by a law that bans bribe-taking by those who work in government enterprises that receive more than \$10,000 of federal money per year.<sup>151</sup> 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

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<sup>150</sup>See 18 U.S.C. §201(b) (bribery); *id.* §201( c) (gratuities). For the leading case on the meaning of these statutes, see *United States v. Sun Diamond Growers of California*, 526 U.S. 398 (1999).

<sup>151</sup>18 U.S.C. §666.

aid received? What nexus must there be between the federal money and the corrupt activity?<sup>152</sup> All of which 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.<sup>153</sup> Even after the enactment of the program bribery statute, they continued to use the fraud laws against local corruption, 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 are taking money on the sly.<sup>154</sup> Notice, vagueness, and the like may be serious concerns in a few

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<sup>152</sup>*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 remain uncertain.

<sup>153</sup>*See* Ruff, *supra* note \_\_.

<sup>154</sup>For examples, see Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. LEGIS. 153, 190-97 (1994); Todd E. Molz, Comment, *The Mail Fraud Statute: An Argument for Repeal by Implication*, 64 U. CHI. L. REV. 983, 1000-02 (1997); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137 (1990). 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 Edward J. Imwinkelreid & Ephraim Margolin, *The Case for Admissibility of Defense Testimony About Customary Political Practices in Official Corruption Cases*, 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 \_\_.

cases, but only in a few cases.<sup>155</sup> 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 enforced. 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 common-sensical restrictions on substantive legal liability, as cases like *Brogan* suggest.<sup>156</sup> 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 there is a still larger problem with 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

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<sup>155</sup>*Cf.* *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc) (rejecting vagueness challenge 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 (2d Cir. 1982); *see also id.* at 141-44 (Winter, J., dissenting). Oddly, federal judges seem especially inclined to worry about vagueness in prosecutions of *state* government officials. *See, e.g., United States v. Brumley*, 116 F.3d 728, 733-35 (5<sup>th</sup> Cir. 1997) (en banc); *id.* at 736-47 (Jolly, J., dissenting). Judge Raggi, concurring in *Rybicki*, pointed out why this 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* 354 F.3d at 153 n.3 (Raggi, J., concurring in the judgment) (citing state statutes).

<sup>156</sup>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 recent example involving the federal statute that deals with use of firearms to commit drug crimes, see *Muscarello v. United States*, 524 U.S. 125 (1998); *id.* at 139-44 (Ginsburg, J., dissenting).

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, leave uncertain which cases go where. If local officials are corrupt, local voters don't know whom to 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 decade, 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.<sup>157</sup> The federal government announced that it was going to take charge of that problem.<sup>158</sup> A healthy legal system would applaud such a move: federal

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<sup>157</sup>In June 1996, the New York Times ran a detailed series on the subject, focusing on three church arsons in particular. Ronald Smothers, *Burnings of Black Churches Tries the Souls of Southern Towns: Alabama; Out of Ashes, Many Blessings*, N.Y. TIMES, June 23, 1996, Sec. 1, at 14; Emily Yellin, *Tennessee; For One Congregation, Trying to Regain a Sense of Confidence*, N.Y. TIMES, June 23, 1996, Sec. 1, at 14; Robyn Meredith, *North Carolina; Mixed Opinions About Role of Racial Hatred*, N.Y. TIMES, June 23, 1996, Sec. 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.

<sup>158</sup>See U.S. Attorneys' Bulletin, *Church Arsons and Hate Crimes* (Feb. 1998) (issue devoted to National Church Arson Task Force), available at [www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usab4602.pdf](http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4602.pdf).

officials were making themselves 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.<sup>159</sup> 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,<sup>160</sup> whether it broadcast its services on local radio stations,<sup>161</sup> whether some of its members or Sunday School materials crossed state lines,<sup>162</sup> or (our personal favorite) whether the church owned a recreational vehicle.<sup>163</sup> 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.<sup>164</sup>

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.<sup>165</sup> The current approach to federalism in criminal law retards it. And to no discernible good

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<sup>159</sup>Congress responded with the Church Arson Prevention Act, 18 U.S.C. §844(e), but that Act too requires substantial attention to jurisdiction. For a good example, see *United States v. Corum*, 362 F.3d 489 (8<sup>th</sup> 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.

<sup>160</sup>*See United States v. Terry*, 257 F.3d 366 (4<sup>th</sup> Cir. 2001) (finding federal jurisdiction primarily because the church ran a not-for-profit day care center).

<sup>161</sup>*See United States v. Rayborn*, 312 F.3d 229 (6<sup>th</sup> 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 (9<sup>th</sup> Cir. 2003) (concluding that, while most church burnings would not give rise to federal jurisdiction, burning of "megachurches" might lead to a different result).

<sup>162</sup>*See Rayborn*, *supra*; *Terry*, 257 F.3d at 373 (King, J., concurring in the judgment).

<sup>163</sup>This is one of the facts cited in support of federal jurisdiction by the Sixth Circuit in *Rayborn*.

<sup>164</sup>Not most, according to a Ninth Circuit panel. *See Lamont*, 330 F.3d 1249.

<sup>165</sup>The Supreme Court understands this point, at least sometimes. *See New York v. United States*, 505 U.S. 144, 169 (1992) (accountability diminished when citizens cannot easily

end: in a world with 12,000 FBI agents and 700,000 local police officers,<sup>166</sup> 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 free-lance, 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*<sup>167</sup> 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 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”),<sup>168</sup> 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 on raising the cost of prosecuting “detour” crimes like false statements and mail fraud, 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

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determine which level of government is responsible for a particular regulatory decision).

<sup>166</sup>See sources cited note \_\_\_ supra.

<sup>167</sup>514 U.S. 549 (1995).

<sup>168</sup>See supra note \_\_\_ and accompanying text.

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 monitor how well 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.

There is one more issue that needs addressing. Federal sentencing doctrine also 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. Solving *that* problem would require a wholesale revision of federal sentencing doctrine. That wholesale revision may be about to happen, thanks to the Supreme Court’s decision striking down some kinds of guidelines sentencing in *Blakely v. Washington*.<sup>169</sup>

*Blakely* may be a good thing for another reason as well. The federal sentencing guidelines were designed to promote “real offense” sentencing — sentencing according to all “relevant conduct,” not just the conduct that generated criminal liability.<sup>170</sup> Real offense sentencing acts as a kind of subsidy of pretextual charging: prosecutors can charge crime *X* and sentence the defendant based on crimes *X*, *Y*, and *Z*. That makes criminal litigation less transparent, and criminal charges more strategic. If *Blakely* leads to a more straightforward charged-offense sentencing regime, it will have advanced the cause of effective, politically accountable federal law

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<sup>169</sup>124 S.Ct. 2531 (2004); *see also* *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>170</sup>For a good description and critical analysis, see David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403 (1993).

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.<sup>171</sup> That does not promote responsible lawmaking. 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.

## V. CONCLUSION

Pretextual prosecutions like the one that nailed Al Capone are indeed a problem, but not for the reasons generally supposed. A world where the government prosecutors “detour” crimes is probably, on balance, a slightly fairer world than the alternatives from defendants’ perspective. The larger problem goes not to fairness, but 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

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<sup>171</sup>Congress passed the Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902, in 1994. In 1997, the number of criminal prosecutions under the Act, nationwide, was zero. FEDERALIZATION, *supra* note \_\_\_\_, at 20.

crime. And it is hard (though, as we have seen, not impossible) for federal crimes to have the immediacy of a body in the street or a battered victim. But 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.