

ARTICLE

## Textual Rules in Criminal Statutes

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### INTRODUCTION

Twenty years ago, Professor William Stuntz wrote an article, *The Pathological Politics of Criminal Law*, that has become a classic of the field. His thesis was that criminal law is beset by political problems (mostly collusive incentives) that cause it to steadily expand, with ever more statutes criminalizing ever more conduct, and punishing more harshly as well:

[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones. . . .

So two kinds of politics drive criminal law. Surface politics, the sphere in which public opinion and partisan argument operate, ebb and flow, just as crime rates ebb and flow. Usually these conventional political forces push toward broader liability, but not always, and not always to the same degree. A deeper politics, a politics of institutional

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competition and cooperation, *always* pushes toward broader liability rules, and toward harsher sentences as well.<sup>1</sup>

This Article asks what these political patterns mean for statutory interpretation. If the text of criminal statutes is, due to the pathological political patterns Stuntz identified, unreasonably broad, does it make sense to be a textualist in the criminal law context? When criminal legislation is written instrumentally—designed to effectuate a regime of plea bargaining rather than to identify the conduct that a legislature actually wants stopped—what is a judge determined to act as a faithful agent to do? Or is the faithful agent model not the right one for such cases? What approach to interpreting criminal statutes would lead to just case outcomes? What approach would be best—if any would make a difference at all—for curbing the excesses of punitiveness in this era of crisis in U.S. criminal justice?

These issues have come up in an interesting array of prominent cases since the “textualist revolution” got underway. Consider, for example, *United States v. Marshall*,<sup>2</sup> a 1990s case in which the defendants faced five- or ten-year mandatory minimums for dealing LSD under statutory text that made the penalty turn on the weight of any “mixture or substance containing a detectable amount” of the drug.<sup>3</sup> The defense and dissent argued that this reading might work for heroin or cocaine (to which the statutory scheme also applied) but not for LSD because LSD is virtually weightless: it is sold in a variety of carrier mediums, such as blotter paper, sugar cubes, or orange juice, which vastly outweigh the LSD combined with them.<sup>4</sup> Applying the statutory language literally would mean a serious dealer could get a short sentence if he kept his LSD in pure form or on small pieces of blotter paper, while a minor dealer could get a long sentence if he used big pieces of blotter paper and a staggering one if he used sugar cubes or orange juice.<sup>5</sup> That isn’t so much tough on crime as just irrational. As Judge Richard Posner wrote in dissent,

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<sup>1</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001) (emphasis in original).

<sup>2</sup> 908 F.2d 1312 (7th Cir. 1990) (en banc), *aff’d sub nom.* Chapman v. United States, 500 U.S. 453 (1991).

<sup>3</sup> *Id.* at 1315 (quoting 21 U.S.C. § 841(b)(1)(A)(v), (B)(v)).

<sup>4</sup> *See id.* at 1315–16.

<sup>5</sup> *See id.* at 1315–16; *id.* at 1331–33 (Posner, J., dissenting).

“[E]ven the Justice Department cannot explain the why of the punishment scheme that it is defending.”<sup>6</sup>

But Judge Frank Easterbrook, writing for the Seventh Circuit en banc, stated that “[i]t is not possible to construe the words of § 841 to make the penalty turn on the net weight of the drug rather than the gross weight of carrier and drug.”<sup>7</sup> The only question, then, was whether LSD “sits on blotter paper as oil floats on water” or whether it blends with blotter paper in such a way as to constitute a “mixture.”<sup>8</sup> “Because the fibers absorb the alcohol,” Judge Easterbrook concluded, “the LSD solidifies inside the paper rather than on it.”<sup>9</sup> Judgment for the state. The Supreme Court, in an opinion authored by Chief Justice William Rehnquist, affirmed the judgment and the textualist reasoning on which it rested.<sup>10</sup> From the standpoint of rational sentencing policy—of retribution and deterrence, for example—the absorption chemistry of blotter paper should not determine a defendant’s fate. But the very point of textualism is to exclude such higher-order considerations of policy and purpose from the interpretive domain.

Or consider another case from the 1990s textualist revolution: *Brogan v. United States*.<sup>11</sup> Writing for the Court, Justice Antonin Scalia ruled that simply (but falsely) denying wrongdoing when questioned by federal investigators constitutes a “false statement” within the meaning of 18 U.S.C. § 1001:<sup>12</sup> “Whoever . . . knowingly and willfully . . . makes any false, fictitious or fraudulent statements . . . shall be fined . . . or imprisoned.”<sup>13</sup> Federal circuit courts had long recognized an exception to the literal application of the statute for the “exculpatory no” (a mere denial of guilt, like “I didn’t do it,” in response to an investigator’s questions)<sup>14</sup> since the tendency to blurt out a denial under sudden

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<sup>6</sup> *Id.* at 1333 (Posner, J., dissenting).

<sup>7</sup> *Marshall*, 908 F.2d at 1317 (citing 21 U.S.C. § 841(b)(1)(A)(v), (B)(v)).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Chapman*, 500 U.S. at 461–63.

<sup>11</sup> 522 U.S. 398 (1998).

<sup>12</sup> *Id.* at 400–02.

<sup>13</sup> *Id.* at 400 (quoting 18 U.S.C. § 1001).

<sup>14</sup> *See, e.g.*, *Moser v. United States*, 18 F.3d 469, 473–74 (7th Cir. 1994); *United States v. Taylor*, 907 F.2d 801, 803–05 (8th Cir. 1990); *United States v. Equihua-Juarez*, 851 F.2d 1222, 1225–26 (9th Cir. 1988); *United States v. Cogdell*, 844 F.2d 179, 182–85 (4th Cir. 1988); *United States v. Tabor*, 788 F.2d 714, 716–19 (11th Cir. 1986); *United States v. Fitzgibbon*, 619 F.2d 874, 876–77 (10th Cir. 1980); *United States v. Chevoor*, 526 F.2d 178, 182–83 (1st Cir. 1975); *Paterno v. United States*, 311 F.2d 298, 305 (5th Cir. 1962).

questioning is so instinctive that courts did not think that it rose to the level of studied lie that the statute was meant to target—plus, the absence of such an exception rendered a lot of people felons and made it easy for prosecutors to stack charges.<sup>15</sup> But, said the Supreme Court in 1998, “petitioner concedes that under a ‘literal reading’ of the statute he loses.”<sup>16</sup>

Was there any reason to depart from a literal reading? Not legislative purpose: “[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy.”<sup>17</sup> Not prudence: the risk of “prosecutorial abuse” through “overzealous prosecutors . . . ‘piling on’ offenses” is for Congress to consider, not the courts.<sup>18</sup> And not larger principles of criminal justice: “[I]t may well be” that, absent an “exculpatory no” exception, the statute is “harsh,” but the instances in which a court may override a statute’s text out of concern for punitive excess are only those “set forth in the Constitution.”<sup>19</sup> For example, punitive excess may rise in extreme cases to the level of an Eighth Amendment violation but cannot justify a limiting interpretation of a statute.<sup>20</sup>

At bottom, Mr. Brogan’s problem was that there was simply no *law*, as the Court understood the meaning of “law,” undergirding his position: “In sum, we find nothing to support the ‘exculpatory no’ doctrine except the many Court of Appeals decisions that have embraced it.”<sup>21</sup> But that was true only because the Court had already removed so many *types* of arguments—arguments, again, from purpose, prudence, and larger principles of criminal justice—from the category of “law.”

Or consider, for example, *Bond v. United States*<sup>22</sup> from 2014. Carol Bond put an irritant powder on her romantic rival’s car

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<sup>15</sup> See, e.g., *Cogdell*, 844 F.2d at 183–84 (“This test permits the broad use of section 1001 against false statements that impede normal governmental functions, while at the same time, protecting defendants from prosecutorial overkill or invasion of areas bordering on the constitutional protection against forced self-incrimination.”); *United States v. Bedore*, 455 F.2d 1109, 1111 (9th Cir. 1972) (“From the statutory history, it is evident that section 1001 was . . . [intended] only [to reach] false statements that might support fraudulent claims against the Government, or that might pervert or corrupt the authorized functions of those agencies to whom the statements were made.”).

<sup>16</sup> *Brogan*, 522 U.S. at 401 (quoting Brief for Petitioner at 5, *Brogan*, 522 U.S. 398 (No. 96-1579)).

<sup>17</sup> *Id.* at 403.

<sup>18</sup> *Id.* at 405.

<sup>19</sup> *Id.* at 407.

<sup>20</sup> *Id.*

<sup>21</sup> *Brogan*, 522 U.S. at 408.

<sup>22</sup> 572 U.S. 844 (2014).

door, mailbox, and doorknob.<sup>23</sup> Prosecutors indicted her for using a “chemical weapon” in violation of the Chemical Weapons Convention Implementation Act<sup>24</sup> on the grounds that the statute by its terms encompasses “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm.”<sup>25</sup> As the circuit court pointed out, that definition taken literally would turn every “kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache”<sup>26</sup>—yet the circuit court nonetheless upheld the conviction, as it did not think that it had any choice but to take the definition literally.<sup>27</sup>

One final example: In *Yates v. United States*<sup>28</sup> in 2015, John Yates got caught with fish that were shorter than federal regulations allowed and ordered a crew member to throw them back in the water to avoid a ticket.<sup>29</sup> Prosecutors charged him with destroying evidence under the Sarbanes-Oxley Act, a statute aimed at corporate document shredding, on the grounds that the statute by its terms encompassed “any record, document, or tangible object.”<sup>30</sup> As the prosecutors (and district and circuit courts) saw it, anything possessing a physical form is a “tangible object,” including a fish.<sup>31</sup>

Carol Bond and John Yates eventually won their cases in the Supreme Court—but only because a majority of the Court did not accept the textualist approach advocated by those on the other side.<sup>32</sup> And it was a close call: a number of the Justices took issue with the Court’s nontextualist approach (the cases provoked a flurry of concurrences and dissents),<sup>33</sup> the district and circuit courts endorsed the textualist approach, and, crucially, the prosecutors entrusted with the cases endorsed that approach. Judicial statutory interpretation, as I will argue at length later, is not the

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<sup>23</sup> *Id.* at 852.

<sup>24</sup> 22 U.S.C. §§ 6701–6771.

<sup>25</sup> *Bond*, 572 U.S. at 851 (quoting 18 U.S.C. § 229F(8)(A)).

<sup>26</sup> *United States v. Bond*, 681 F.3d 149, 154 n.7 (3d Cir. 2012), *rev’d*, 572 U.S. 844 (2014).

<sup>27</sup> *Id.* at 155.

<sup>28</sup> 574 U.S. 528 (2015).

<sup>29</sup> *Id.* at 533–34.

<sup>30</sup> *Id.* at 534–36, 544 (quoting 18 U.S.C. § 1519).

<sup>31</sup> *See id.* at 534–35 (first citing *United States v. Yates*, No. 2:10-cr-66-FtM-29SPC, 2011 WL 3444093, at \*1 (M.D. Fla. Aug. 8, 2011); and then citing *United States v. Yates*, 733 F.3d 1059, 1064 (11th Cir. 2013)).

<sup>32</sup> *See Bond*, 572 U.S. at 860–66; *Yates*, 574 U.S. at 535–48.

<sup>33</sup> *See, e.g., Bond*, 572 U.S. at 867–73 (Scalia, J., concurring in the judgment); *Yates*, 574 U.S. at 552–70 (Kagan, J., dissenting).

only thing that matters in criminal law. Prosecutors are criminal law's first interpreters and, because of plea bargaining, typically its last interpreters as well. Judicial practice sets an interpretive stage, but the meaning of criminal statutes then depends on how prosecutors read them and whether defense attorneys can plausibly push back against those readings.

There is a reason for this odd conjunction of punitiveness and textualism—or, to be more precise, punitiveness and a certain kind of 1990s-style, rule-oriented textualism (more on that later)—in criminal cases. Pathological politics have textual consequences. When judges apply criminal statutes' text as written against the backdrop of the kind of politics Stuntz identified, the effect is to unleash statutes that are unreasonable as written. In short, the pathological politics of criminal law bear on statutory text and therefore on the merits and demerits, in the criminal context, of textualism. Textualism might have many virtues in other areas of law—my argument here is agnostic on that score—but it is an exceedingly problematic fit in criminal law. When the politics of criminal legislation leads to statutory text that is careless, judges have no means to correct the mistakes. When the text is unreasonably punitive, judges have no means to temper the punitiveness in application. When the text is instrumental, judges have no means to see past the instrumentalism.

That is the core argument—the argument of Part I. But it carries two further implications.

The first is about stakes—that is, about the connection between these relatively arcane questions of statutory methodology and the urgent issues of punitiveness and mass incarceration that afflict U.S. criminal justice today. As Part II argues, interpretive approaches in criminal law start with judges, but they don't end there; they fan out to prosecutors, defense attorneys, and juries and from appellate opinions to prosecutors' charging practices, trials, the vast array of trial court proceedings short of trials, jury deliberations, and, above all, plea bargains. Again, the issue is that criminal law exists in an odd political economy in which judges set the terms for how criminal statutes will be read but do not typically determine case outcomes. Judicial textualism unleashes throughout the system a technocratic punitiveness that contributes—marginally, but not insignificantly—to U.S. criminal law's present harshness. Ultimately, statutory methodology in criminal law is a doorway to a style of governance, and the style of governance that textualism fosters in the criminal system is

one of a machinelike bureaucracy that bleeds away the dignified commitment to judicial restraint and democratic authority for which textualism is rightly admired, leaving only bare, hard rules and a great deal of punishment.

The second implication is about the justifications on which textualism—or, at least, one traditional form of textualism—is based: justifications of democratic authority, judicial restraint, rule of law, and constitutional design. As Part III argues, the political structures that so distort criminal legislation also bear on these justifications. Some of the justifications supporting textualism do not make sense in the criminal context. Others become distorted. Others become weaker. And still others simply become very puzzling: What, for example, is a judge who wishes to act as a faithful agent to do about instrumental law—that is, law that was drafted with prosecutorial discretion and plea bargaining in mind and which is therefore not designed to be applied as written? Enforce it as written anyway? If what the legislation is really meant to do is empower prosecutors to secure plea bargains, does a faithful agent of the legislature effectuate that structure? Is doing so consistent with the rule of law? Part III works through these questions—and, of course, the existing literature about some of them—concluding that, while the considerations are complicated, the case for textualism is unusually weak in the criminal context. And it is weak on its own terms, on the basis of its own animating justifications.

Finally, a few provisos are necessary before the argument can get underway.

First, the term “textualism” might be too broad: textualist statutory methodologies come in different varieties, and some of them may have resources to deal with criminal law’s strange politics. My target here is a specific type of textualism, associated with Justice Scalia and Judge Easterbrook, that joins a broadly textual orientation to three more distinctive elements: a conviction that textual ambiguities should be resolved by reference to semantic rather than policy context;<sup>34</sup> a conviction that judges cannot deviate from clear text even if unreasonable in

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<sup>34</sup> See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73, 76 (2006) (arguing that, although textualists increasingly acknowledge context sensitivity in language, “[t]extualists give precedence to *semantic context*—evidence that goes to the way a reasonable person would use language under the circumstances. Purposivists give priority to *policy context*—evidence that suggests the way a reasonable person would address the mischief being remedied” (emphasis in original)).

application;<sup>35</sup> and a conception of legal interpretation and thus the judicial role under which it is inappropriate for considerations of policy, principle, or other values to bear on judges' duty to say what the law is.<sup>36</sup> Taking text seriously is, by itself, unsurprising and unobjectionable in all law; that is not my target. My target is the above combination of text and opposition to values-based judicial discretion. I would also suggest that it is this combination of ideas, and not merely an orientation to statutory text, that constitutes the new formalism that has had such profound impact on American law—but that is a large claim not defended here.

Second, I am not endorsing any one alternative to textualism. Criminal law's strange politics justify a more active judicial hand than Justice Scalia and Judge Easterbrook's textualism allows, but that does not necessarily mean purposivism of the legal process, Hart and Sacks sort, or constructive interpretation of the Dworkinian sort, or dynamic interpretation of the Eskridge sort.<sup>37</sup> It is a feature, not a bug, that this Article criticizes one very specific thing while leaving open a range of possible alternatives. The question ultimately is whether criminal statutes should be treated as a system of textually given, bare rules. What I mean to defend in the final analysis is the practice, under whatever label, of making equitable arguments about what criminal statutes mean.

Third, the facets of criminal law that I'm identifying as problematic for textualism are all contingent: they do not go to the nature of criminal law as an enterprise or apply to criminal legislation across all times and places. I do think that there are features of criminal law—its moral orientation, for example—that bear noncontingently on the proper interpretation of criminal statutes. But my argument here turns on considerations of political structure that could be otherwise. Yet this is not a shallow contingency, which could change with the political winds. It is grounded, as was Stuntz's, in structural features of politics—like the existence of plea bargaining and prosecutorial discretion, the

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<sup>35</sup> See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63–64, 68–69 (1994).

<sup>36</sup> See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 23–47 (Amy Guttman ed., 1997).

<sup>37</sup> See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); RONALD DWORKIN, *LAW'S EMPIRE* (1986); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).



interest-group character of U.S. democracy, and the limited funding for criminal justice—that are fairly stable.

Fourth, my arguments are mainly about contemporary criminal legislation. There is a fissure in criminal law between statutes that codified the common law and contemporary statutes. As Stuntz wrote:

[C]riminal law is not one field but two. The first consists of a few core crimes, the sort that are used to compile the FBI's crime index—murder, manslaughter, rape, robbery, arson, assault, kidnapping, burglary, larceny, and auto theft. The second consists of everything else. Criminal law courses, criminal law literature, and popular conversation about crime focus heavily on the first. The second dominates criminal codes.

These two fields have dramatically different histories. The law that defines core crimes derives from the common law of England. Save for auto theft, everything in the list of FBI index crimes was a crime in Blackstone's day. Along with the rest of criminal law, these crimes were all codified during the course of the nineteenth century, but their basic structure still bears the mark of their common law origins. . . .

. . . But when we turn our attention to the rest of criminal law, a very different picture emerges. For the most part, *this* criminal law was the product of legislation, not judicial decision. And the central feature of its history is growth.<sup>38</sup>

My arguments in this Article simply do not bear on statutes that straightforwardly codify the common law. At the same time, a lot rides on that word “straightforwardly” because many traditional crimes have been affected by contemporary patterns of legislation. The “core crimes” on Stuntz's list are rarely unaffected by contemporary legislative patterns.

#### I. POLITICAL DYSFUNCTION, TEXTUAL CONSEQUENCES

What are the pathological political structures that make the crafting of criminal law so dysfunctional, and how do they affect the text of criminal statutes? How does reading those statutes from a textual point of view then lead to an excessively punitive criminal system? The object of this section is to answer those questions. The argument, in brief, is that the making of criminal

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<sup>38</sup> Stuntz, *supra* note 1, at 512–13 (emphasis in original).

law suffers from a profound political imbalance between the parties affected by criminal legislation; collusive incentives that lead legislatures to write statutes designed to arm prosecutors and grease the wheels of plea bargaining rather than to define the conduct legislatures actually want to stop; and a lawmaking context that unleashes punitive impulses. The statutes that result would lead to a harsh system of criminal law even if regularly interpreted and applied by textualist judges. But they are not regularly interpreted and applied by judges; they are fed back into a bureaucratized criminal system aimed at mass justice and based on plea bargaining. The result, as explored in Part II, is a “them’s the rules” criminal system in which guilt is often automatic and equitable arguments cannot play a role.

#### A. Political Imbalance

The making of criminal law exhibits profound political imbalance among the groups with an interest in the legislation. When Disney and Google square off over copyright law, with Disney pushing for more copyright protection and Google for less, both are powerful enough to make their interests heard.<sup>39</sup> That dynamic more or less holds in many other legislative arenas as well, such as organized labor versus organized capital, landlords versus tenants, and medical insurers versus the plaintiffs’ bar. The various groups’ power and money are often unequal but typically sufficient to ensure that all parties’ interests have some weight in the legislative process; that errors and accidents of drafting are caught and corrected; and that a bargaining process takes place in which no one’s interests can be altogether trampled, if only because the sides have to make trades based on their priorities.

But criminal offenders are politically unpopular (they are almost by definition accused of having done something that violates society’s basic norms), usually poor, disproportionately ethnic minorities, and often literally unable (due to felon disenfranchisement) to make themselves heard at the ballot box.<sup>40</sup> Furthermore,

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<sup>39</sup> Compare Brief for the Motion Picture Ass’n of America as Amicus Curiae Supporting Respondents at 31–34, *Golan v. Holder*, 565 U.S. 302 (2012) (No. 10-545), 2011 WL 3561888, at \*31–34 (urging the Court to uphold a statute extending copyright protection to certain works previously in the public domain), with Brief for Google, Inc., as Amicus Curiae in Support of Petitioners at 10–18, *Golan*, 565 U.S. 302 (No. 10-545), 2011 WL 2533006, at \*10–18 (urging the Court to strike down the statute).

<sup>40</sup> About 82% of state felony defendants in the seventy-five largest counties and 66% of federal defendants are represented by public defenders or assigned counsel, about 57% of prisoners are Black or Hispanic, and about 2.5% of the total U.S. voting-age population (one

though far too numerous as a group, criminal offenders are a small and scattered portion of the population, which makes it hard for them to be an effective interest group. There is also a timing problem: many of those who become criminal defendants do not anticipate that they will commit a crime, let alone be arrested for one; they, therefore, do not politically advocate at time one for their later interests at time two. Even those who do anticipate a chance of arrest—people involved in gangs, for example—operate in secret and thus cannot defend their interests in the democratic process. True, some organizations (the ACLU, for example) care about criminal defendants' interests, and white-collar defendants have more political power than most. Nonetheless, the people on the wrong side of the criminal justice system are, when conceptualized as a political interest group, extremely weak.

On the other side, prosecutors, police, and prison employees have all been shown to wield significant influence in favor of broader and more severe criminal law.<sup>41</sup> Prosecutors are especially significant because they are often involved in drafting criminal law (which obviously affects statutory text) and because many lawmakers are former prosecutors (which again affects statutory text).<sup>42</sup> These three groups are precisely the sort of organized, issue-focused interest holders most able to make their preferences felt in the legislative process. The imbalance between

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in forty adults) is disenfranchised because of a current or prior felony conviction. See CAROLINE WOLF HARLOW, BUREAU OF JUST. STAT., DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), <https://perma.cc/BYC7-FHCP>; E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUST. STAT., PRISONERS IN 2015, at 6 (2016), <https://perma.cc/72QB-UZRN>; Christopher Uggen, Ryan Larson & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, SENT'G PROJECT (Oct. 6, 2016), <https://perma.cc/HKL4-MBKH>.

<sup>41</sup> See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 276–306 (2013) (describing how the structure of the Department of Justice—which houses prosecutors, FBI agents, and prison employees—has led to severe federal criminal law).

<sup>42</sup> See Wendy Sawyer & Alex Clark, *New Data: The Rise of the “Prosecutor Politician”*, PRISON POLY INITIATIVE (July 13, 2017), <http://perma.cc/2MDG-3QN4> (“Of those in office at any point between 2007 and 2017, 38% of state attorneys general, 19% of governors, and 10% of U.S. senators had prosecutorial backgrounds.”). District-attorney associations have recently shown their ability to stop criminal-justice reform in its tracks. See, e.g., Julia O’Donoghue, *On Louisiana Criminal Justice Reform, Gov. John Bel Edwards, DAs Reach Partial Compromise*, TIMES-PICAYUNE (May 2, 2017), <https://perma.cc/4D4Y-7SLK> (reporting that the Louisiana District Attorney Association and prosecutors “persuaded the governor to shelve a proposed overhaul of felony sentencing”); see also Jan Moller, *Prison Sentence Reform Efforts Face Tough Opposition in the Legislature*, TIMES-PICAYUNE (May 16, 2012), <https://perma.cc/U783-FCCB> (quoting a Louisiana state senator as saying, “If you give a legislator the opportunity to go either with the Innocence Project or with their DA, guess what? They’re going to vote with their DA.”).

them and their counterparts on the criminal offending side is not like the imbalance between landlords and tenants or organized capital and organized labor. It is more like the imbalance between citizens and noncitizens.

What consequences does political imbalance have for statutory text? There are two.

First is carelessness: drafting mistakes will not be corrected or even noticed if no one in the legislative process has an interest in catching and correcting them and some power to deploy to that end. The LSD sentencing scheme in *Marshall* is an example so extreme as to be almost surreal. It was plainly an error. Sentencing LSD by carrier-medium weight rather than by dose, such that one dose in a sugar cube would lead to a longer sentence than a hundred in pure form, isn't tough on drugs or soft on drugs; it's just irrational. As Judge Posner wrote, "[T]he most plausible inference is that Congress simply did not realize how LSD is sold."<sup>43</sup> Well, where was the LSD lobby to point out the problem? The answer is that criminal enterprises whose membership operates in secret do not generally have lobbies. And what about correction once the problem had come to light? *Marshall* was, and is, a high-visibility case. The Supreme Court and Seventh Circuit, en banc, wrote opinions; the Justice Department was directly involved; and the Easterbrook-Posner clash made the case a staple of law school courses on legislation and statutory interpretation.<sup>44</sup> Surely, if any statutory error in criminal law were to lead to legislative change, it would be this one. Did it? No. The text at issue in *Marshall*—irrational, indefensible, known to all—is the same today as it was when the case came up in 1990.<sup>45</sup> Why? Because fixing bad statutory text isn't just a matter of knowing that it's bad. Someone has to notice, care enough about the problem to spend political capital fixing it, and have political capital to spend. Indeed, that difficulty of problem-solving is true of governance in many settings; it is a deep fact about politics.

The second consequence of political imbalance is that statutory text will often fail to reflect the give-and-take of political

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<sup>43</sup> *Marshall*, 908 F.2d at 1333 (Posner, J., dissenting).

<sup>44</sup> The case is in casebooks, including, for example, JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 252–68 (Robert C. Clark et al. eds., 3d ed. 2013).

<sup>45</sup> The offending text at issue in *Marshall* was the phrase “mixture or substance containing a detectable amount” in 21 U.S.C. § 841(b)(1)(A)(v) and (B)(v). Those two provisions contain the same text today.

compromise. Professor John Manning has influentially defended textualism on the grounds that only it preserves the political compromises ensconced in legislative texts.<sup>46</sup> That is a good argument when the opponents are Disney and Google. But in criminal law, the response is: *What* legislative compromises? Consider, for example, the legislative process that led to a one-hundred-to-one crack-to-powder cocaine sentencing differential. That differential was not the result of a negotiation among competing interests with, say, powder-cocaine dealers and users on one side, crack-cocaine dealers and users on another, and police and prosecutors on a third, all exerting pressure on legislators and ultimately hammering out a deal all sides could live with. “In congressional debates preceding passage of the bill,” Stuntz writes, “one member proposed a weight/sentencing ratio of twenty to one; another suggested fifty to one. One hundred to one, the ratio finally enacted, was the highest anyone proposed. Crack-powder legislation was the product of an auction, not a political compromise.”<sup>47</sup>

Lack of care and lack of compromise particularly characterize contemporary federal criminal law. Consider the breadth of the federal mail- and wire-fraud statutes, which, until recently, criminalized “basically, all serious breaches of fiduciary duty. . . . Professors who award degrees based on plagiarized work, and the students who do the work, are guilty. College applicants who lie on their applications are guilty. Political powerbrokers who use their influence to get government jobs for friends are guilty.”<sup>48</sup> Together with misrepresentation offenses, federal law currently criminalizes “most lies (and . . . almost-but-not-quite-lies) one might tell during the course of any financial transaction or transaction involving the government.”<sup>49</sup> This network of criminalization reflects no real political compromises at all, no effort to discern and specify with care *which* breaches of fiduciary duty and *which* false statements rise to a criminal level: “It is often said that ordinary lying is not a crime—a comment usually made by way of explaining the narrowness of the definition of perjury—but the statement is wrong: a good deal of ordinary lying fits

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<sup>46</sup> See Manning, *supra* note 34, at 92 (“Textualists (again, myself included) believe that the purposivist approach disregards the central place of legislative compromise embedded in both the constitutional structure and the corresponding congressional rules of legislative procedure.”).

<sup>47</sup> WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 173 (2013).

<sup>48</sup> Stuntz, *supra* note 1, at 524. The reach of the statute was recently cut back, but by the courts, not by Congress. See *Skilling v. United States*, 561 U.S. 358, 403–09 (2010).

<sup>49</sup> Stuntz, *supra* note 1, at 517.

within the definition of one or another federal felony.”<sup>50</sup> The only real limitation on the mail- and wire-fraud statutes and other federal misrepresentation statutes is the jurisdictional hook: the crimes are defined as broadly as federal power allows them to be.

Another example: consider the sheer frequency with which federal criminal statutes use the word “any.” Promiscuous “anys” are the bane of federal criminal law. Here, for example, is Sarbanes-Oxley’s destruction-of-records provision—which, along with its strings of overlapping nouns and verbs (obviously intended to encompass as many types of objects and actions as it imaginably could), contains no fewer than five “anys” in eighty-two words:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in *any* record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of *any* matter within the jurisdiction of *any* department or agency of the United States or *any* case filed under title 11, or in relation to or contemplation of *any* such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.<sup>51</sup>

The same is true of the federal bribery statute (“Whoever [ ] directly or indirectly, corruptly gives, offers or promises *anything* of value to *any* public official . . . .”)<sup>52</sup> or the federal false statements statute applicable to financial institutions (“Whoever knowingly makes *any* false statement or report . . . for the purpose of influencing in *any* way the action [of a financial institution] . . . .”).<sup>53</sup> Courts do not always read the word “any” literally. They do not always do so in contract law, for example.<sup>54</sup> To do so in criminal law is a choice, and a choice that U.S. legal culture made differently not long ago. Nearly all federal circuit courts once read the federal false-statements statute just quoted, for example, to contain an implicit materiality requirement: “Whoever knowingly makes any [material] false statement or report . . . .”<sup>55</sup>

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<sup>50</sup> *Id.* at 517–18.

<sup>51</sup> 18 U.S.C. § 1519 (emphasis added).

<sup>52</sup> 18 U.S.C. § 201(b) (emphasis added).

<sup>53</sup> 18 U.S.C. § 1014 (emphasis added); *see also* the discussion of *United States v. Wells*, 519 U.S. 482 (1997), *infra* note 57.

<sup>54</sup> *See generally, e.g.*, *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage Co.*, 442 P.2d 641 (Cal. 1968).

<sup>55</sup> 18 U.S.C. § 1014.

was the reigning understanding.<sup>56</sup> But it is obviously in prosecutors' interest to oppose that reading, and the Supreme Court turned against it in *United States v. Wells*,<sup>57</sup> a case decided in the same 1990s era of technocratic punitiveness as *Brogan* and *Marshall*.

And now? I have sometimes practiced criminal defense at a large, urban courthouse. In my experience, a sort of amnesia has settled over the profession. The statutory approach of cases like *Brogan*, *Marshall*, and *Wells* represented an active and deliberate effort to promote a particular interpretive theory: a group of lawyers and judges exquisitely aware of American law's equity-and-purpose traditions sought to change how statutory interpretation is done. But formalism and literalism are permanent temptations of the lawyerly soul; it takes effort to prevent them from overtaking the field. It was once the case that part of coming to law school was being educated in a culture of interpretive flexibility. Students' first instinct was to literally apply textual rules, and professors took it as one of their duties to induct students into a legal culture in which "mechanical jurisprudence" was something to be mocked.<sup>58</sup> But cultural memory fades and, with it has gone the memory of nonliteral interpretive possibilities that once seemed obvious.

That is particularly true when one is dealing not with learned visionaries of the law like Justice Scalia and Judge Easterbrook

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<sup>56</sup> See *Wells*, 519 U.S. at 486 n.3 (collecting cases).

<sup>57</sup> 519 U.S. 482 (1997). The decision was 8–1, with Justice John Paul Stevens arguing in dissent that, back in 1948 when the statute was enacted, "Congress looked to the courts to play an important role in the lawmaking process by relying on common-law tradition and common sense to fill gaps in the law." *Id.* at 509 (Stevens, J., dissenting). Back then, "a different view of statutory interpretation held sway," *id.* at 509, but, alas, "[t]he Court's approach to questions of statutory construction has changed significantly since that time." *Id.* at 510.

<sup>58</sup> As late as 1986, Professor Ronald Dworkin could write:

The dissenting opinion [in an 1889 case] argued for a theory of legislation more popular then than it is now. . . . It proposes that the words of a statute be given what we might better call their acontextual meaning, that is, the meaning we would assign them if we had no special information about the context of their use or the intentions of their author. . . . Law students reading his opinion now are mostly contemptuous of that way of constructing a statute from a text; they say it is an example of mechanical jurisprudence.

DWORKIN, *supra* note 37, at 17–18 (discussing *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889)). *Marshall* was decided just four years later. How times change! And how quickly, once the change takes hold, the past is forgotten. Judge Easterbrook knew he was challenging custom; my students today just assume the literal approach. They have no idea that their peers, from the victory of legal realism in the 1930s until the resurgence of text-and-rule formalism in the 1990s, regarded that approach as something to be mocked.

but with the ordinary lawyers and judges who staff the criminal justice system. When I have worked with students in criminal litigation, for example, they typically cannot imagine *not* taking the word “any” literally. When I have presented those same anti-literal arguments in courtrooms, older prosecutors and judges are unfazed, while young prosecutors not only reject the argument (which is their job) but often display confusion at the very proposal (which would have been considered incompetence thirty years ago).

Thus, all those reckless “anys” in criminal statutes have become categorical by drift, as one generation’s revolution has become the next generation’s assumption. Understandings and practices once common in the field have been forgotten. The result is that the punitive scope of criminal statutes has broadened.

Note as well that the rule of lenity is no solution to problems like those promiscuous “anys.” The rule of lenity is often disregarded in criminal cases, but, when it matters at all, the context is typically that of ambiguous statutory language. Those “anys,” like many other instances of carelessly sweeping statutory language in criminal law, are not ambiguous in the ordinary sense. They are instances of clear text that cannot mean what it says. The rule of lenity, as conventionally understood, is no help.

## B. Collusive Incentives

The pathology that led to Stuntz’s famous title, *The Pathological Politics of Criminal Law*, was actually not the pathology of political imbalance but that of perverse and collusive incentive structures.<sup>59</sup> To understand this second pathology, we must pause over two procedural factors even more unique to the criminal system than its radically imbalanced politics: plea bargaining and prosecutorial discretion. The former refers to prosecutors’ capacity to settle criminal cases without juries or trials by trading reduced charges or lenient sentencing recommendations for confessions. The latter refers to prosecutors’ nearly unlimited discretion to choose whether to bring charges and what charges to bring. The two together mean that, even if new legislation made everyone with two eyes a felon, the effect would not necessarily be to increase the number of people charged. It would only mean that prosecutors could choose to prosecute almost anyone and, upon doing so, could secure a conviction with minimal cost, time, risk

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<sup>59</sup> See Stuntz, *supra* note 1, at 529–45.



of defeat at trial, jury supervision of the facts, and judicial supervision of the law. The combination of plea bargaining and prosecutorial discretion is the engine of bureaucratic criminal justice.

But the engine runs on leverage: it cannot function unless the underlying substantive law threatens but does not require severity. One way to provide leverage is through large sentencing ranges with exceptional harshness at the top end. Another is through lax double jeopardy standards and flexible understandings of what constitutes a single crime or count. But, as Stuntz famously demonstrated, the most important means of giving prosecutors leverage is to fill the statute books with capaciously defined and overlapping crimes. When a given course of conduct can be charged under different headings—when lying on mortgage application documents, for example, can be charged as “falsification of records,” “bank fraud,” “manipulative and deceptive devices,” or, depending on the state of double jeopardy law and the details of the conduct, combinations or multiple counts of those charges<sup>60</sup>—defendants will plead guilty in exchange for prosecutors bringing fewer and less serious charges than the maximum available to them. The advantage of this type of plea bargaining (known as “charge bargaining”) is that, unlike sentence bargaining, it requires virtually no judicial cooperation: prosecutors can do it almost entirely on their own. But it does not work in a statutory vacuum; it requires broad, overlapping definitions of crimes that make guilt as easy to establish as possible. What makes plea bargaining work is substantive criminal law.

Will legislatures provide the necessary kind of substantive criminal law? As Stuntz argued, both prosecutors and legislatures have an interest in a low-cost, high-conviction criminal system.<sup>61</sup> Prosecutors want to get through their caseload (which is often considerable, especially at the state level) and above all want to

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<sup>60</sup> See 18 U.S.C. § 1519 (“Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document or tangible object . . .”); 18 U.S.C. § 1344 (“Whoever knowingly executes, or attempts to execute, a scheme or artifice . . . to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution . . .”); 15 U.S.C. § 78j (“It shall be unlawful for any person, directly or indirectly . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device.”); see also 18 U.S.C. § 1348 (“Whoever knowingly executes, or attempts to execute, a scheme or artifice . . . to obtain . . . any money or property in connection with the purchase or sale of . . . any security of an issuer . . .”).

<sup>61</sup> Stuntz, *supra* note 1, at 537–38.

win, since high conviction rates indicate professional success.<sup>62</sup> Legislatures want effective crime enforcement on the cheap, which means that they too want high conviction rates and no trials, so long as prosecutors don't go after the kinds of people who would create political problems in the next election—and prosecutors never have to, no matter what the statutes say, because of prosecutorial discretion.<sup>63</sup> Broad, redundant, harsh criminal statutes do not mean that everyone gets charged any more than low speed limits mean that everyone gets a ticket. Such statutes only mean that when prosecutors do bring charges, they win, and the win doesn't cost much.

Examining these incentives, Stuntz concludes that, underneath criminal law's "surface politics" of tough-on-crime versus soft-on-crime, which ebbs and flows, there is a "deep politics" of institutional incentives that leads criminal legislation to steadily expand.<sup>64</sup> At bottom, what has happened in the political economy of criminal law is a breakdown in the structure of checks and balances: "[E]ach branch is supposed to check the others," Stuntz writes, but "[i]nstead, the story of American criminal law is a story of tacit cooperation between prosecutors and legislators. . . . Prosecutors are better off when criminal law is broad than when it is narrow. Legislators are better off when prosecutors are better off."<sup>65</sup> And the judiciary? The point of plea bargaining is to avoid the judiciary—and juries along with them. Broad statutes squeeze out the third branch.

A point that I think Stuntz overlooks is that a regime of plea bargaining demands criminal statutes that are not only broad but also rule-like—a criminal law of rules rather than standards—because standards tend to leave guilt in doubt, while rules can be drafted in such a way that, in many cases, guilt is manifest. In *Wells*, for example, the Supreme Court held that bank-statement fraud does not require showing materiality; any knowingly false statement will do.<sup>66</sup> That is a ruling about substantive criminal law, but the most important thing about it is its procedural effect. Materiality is a standard; there are arguments to be had about whether a given lie is material. "No telling lies," by contrast, is a

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<sup>62</sup> See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2470–72 (2004).

<sup>63</sup> Cf. Stuntz, *supra* note 1, at 529–33.

<sup>64</sup> *Id.* at 523–29.

<sup>65</sup> *Id.* at 510.

<sup>66</sup> *Wells*, 519 U.S. at 489–500.

rule: so long as the facts are sufficient to show that the defendant made a false statement and knew it, the defendant has no real moves to make. In a world with a materiality requirement, people who lie in ways that are arguably immaterial have some leverage: they can either insist on trial or—by threatening to insist on trial—secure more generous plea deals, which in turn means that prosecutors are less likely to charge them in the first place. In a world without a materiality requirement, people who lie in any way to a bank have no reasonable choice but to plead guilty, which makes those cases slam dunks and, in turn, makes plea bargains easy to obtain. Thus, standards throw a monkey wrench in a regime of plea bargaining. A criminal law of “What did you know and when did you know it?” is a criminal law that favors prosecutors.

What effect does this second pathology—this pathology of incentives—have on criminal statutes’ text? First is that criminal statutes’ text is predictably broader and easier to prove than any reasonable conception of criminal justice would support. But more theoretically important is this: the text of criminal statutes often does not specify what legislatures actually want to see punished. Legislatures have an incentive to write text that is not *meant* to be followed to the letter.

In a classic article, Professor H.L.A. Hart considered the challenge for legal positivism posed by open-ended legal rules like “no vehicles in the park.”<sup>67</sup> Surely that rule should not be taken to forbid strollers and wheelchairs; does that imply a necessary connection between what the law is and what it ought to be? Hart thought no, Professor Lon Fuller thought yes,<sup>68</sup> and the example has been a staple of jurisprudential writing ever since. Let’s think about that example from a criminal law perspective. If “no vehicles in the park” were interpreted to include strollers and wheelchairs, and if the law were enforced, there would be a parents’ lobby and a disability lobby to press for legislative change. But if “no vehicles in the park” were given to prosecutors as an instrument by which to fight drug dealing in the park (say the drugs were being sold from motorized scooters) and never enforced against parents or the handicapped, who would press to fix it? The statute could even define “vehicle” to include “any artificial mode of carriage whatsoever” or “any artifact with wheels” (which

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<sup>67</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1957).

<sup>68</sup> Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663–64 (1958).

would include even children's toys), and however obvious it is that no legislature would want to see that law enforced according to its terms, there would be no reason to fix it so long as prosecutors used it only to go after drug dealers.

In fact, the situation is worse than there being merely no reason to fix it: There would be good reason to draft it in just that way because one of the law's advantages would be that prosecutors would not have to prove anything about drugs—neither that the defendant had drugs (thus avoiding Fourth Amendment problems) nor that the defendant intended to deal them (thus avoiding mens rea problems). And what if someone were to go by on a bicycle, or even a motorized scooter, who did not appear to be a drug dealer? Police and prosecutors would be free not to enforce the law.

Far-fetched? Maybe not. That is essentially how the U.S. criminal system works with respect to speeding tickets and other traffic violations. It is also how federal misrepresentation statutes can “criminalize, basically, all serious breaches of fiduciary duty” and “most lies (and, as just noted, almost-but-not-quite-lies) one might tell during the course of any financial transaction or transaction involving the government.”<sup>69</sup> Collusive incentives give legislators an incentive to write law that does not accurately describe the thing they mean to stop. The statutes do not mean what they say. Rule-oriented textualism is a bad fit for statutes that do not mean what they say and are not meant to be enforced according to their terms.

### C. Crime at Retail, Crime at Wholesale

There is a third pathology in the politics of making criminal law that bears on the quality of statutory text in a somewhat looser way. The pathology has to do with psychological patterns and institutional competencies. When judges make law interpretively in the context of criminal cases, they hear from both sides.<sup>70</sup> They see the faces and sometimes hear the stories of the defendants. And they take issues at retail (at the level of the case) rather than at wholesale (at the level of the rule). By contrast, legislatures in the criminal context do not typically hear from both sides—there is no defense attorney paid to make a case for the accused—and they always work at wholesale.

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<sup>69</sup> Stuntz, *supra* note 1, at 524, 517.

<sup>70</sup> *See id.* at 541.

One effect of these retail/wholesale differences is to make criminal offenders faceless abstractions in legislative contexts—“the kidnapper,” “the drug dealer,” “the carjacker.” Empirical research into intuitions about criminal guilt and punishment show that people tend to be harsher when thinking about crimes in the abstract, as when they vote, and milder when thinking about concrete situations, as when they serve on juries.<sup>71</sup> It is not totally clear why. One reason, I suspect, is patterns in how empathy and fear work. Individual defendants present as human beings who have done wrongs, which makes it possible to see their humanity alongside their wrongs and to appreciate that, for all but a few of them, their criminality is something they did rather than something they are.<sup>72</sup> What flows into the empty space of the faceless offender is a set of images that come from fear and condemnatory anger. Legislators are people too, subject to the same patterns of thought that lead most people’s intuitions to be more severe at wholesale. The difference is that legislators, unlike judges, always work at wholesale.

In addition, the question that criminal legislation typically presents is different from the one that criminal cases typically present. Criminal law has a fundamentally suppressive character; it is a series of “thou shalt nots” coupled with punishments. Not all law has that character: commercial legislation might be about structuring a market, educational legislation about holding schools to account, health and welfare legislation about distributing scarce resources. But in criminal legislation, the question that legislators face is, “How determined am I to condemn and put a stop to this evil?” In such a context, the degree of one’s severity can seem to be a measure of one’s commitment to the victims and rights violated by the crime. The legislator who opts for narrower and milder rather than broader and harsher prohibitions with respect to, say, child pornography can easily be seen as indifferent to the wrongness of child pornography and to the children hurt by it. The logic of a certain crude form of utilitarianism particularly bends in this direction: If one’s sole goal is to stop a

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<sup>71</sup> Cf. Matthew B. Kugler, Friederike Funk, Judith Braun, Mario Gollwitzer, Aaron C. Kay & John M. Darley, *Differences in Punitiveness Across Three Cultures: A Test of American Exceptionalism in Justice Attitudes*, 103 J. CRIM. L. & CRIMINOLOGY 1071, 1086–88 (2013) (discussing concrete factors in cross-cultural views of sentencing).

<sup>72</sup> See Jennifer L. Goetz, Dacher Keltner & Emiliana Simon-Thomas, *Compassion: An Evolutionary Analysis and Empirical Review*, 136 PYSCH. BULL. 351, 366–67 (2010) (discussing how compassion shapes moral judgment).

certain type of crime, why shouldn't the answer to every legislative question be "more"? (Students who describe themselves as utilitarian, in my experience, typically opt for harsh punishment on just this logic.) By contrast, the legal question presented to a judge in the guilt stage of a criminal case is not "How do I put a stop to this evil?" but "Is the defendant's behavior the kind of evil that this statute is designed to suppress?" That shift in question opens up pathways to nuance and mildness less clearly available in abstract rulemaking contexts.

Political pressures specific to the criminal context also tend to put legislators in a problematic position and judges in a better one. Criminal offenders are politically unpopular, and not just because of tough-on-crime cultural politics in the United States. That politics ebbs and flows, but serious crime is by its nature an attack on the social order; Emile Durkheim argued that societies define as criminal that which "offends the strong, well-defined states of the collective consciousness."<sup>73</sup> It is just a fact of human social life, Durkheim thought, that normally acculturated people will be alarmed and excited to condemnation in the face of such threats: "[C]rime disturbs those feelings that in any one type of society are to be found in every healthy consciousness," spurring a "passionate reaction," the satisfaction of which through punishment is "expiation."<sup>74</sup> This aspect of crime's nature intersects in a disturbing way with the electoral logic of democratic politics: politicians are presented with an evil that the public wants stamped out, and elected politicians must please their constituencies.

By contrast, the courage incident to the judicial office has always been connected to protecting the rights of criminal defendants. As Justice Scalia has written: "Judges are sometimes called upon to be courageous. . . . Their most significant roles, in our system, are to protect the individual criminal defendant."<sup>75</sup> To note this is not to exaggerate judges' compassion for criminal defendants. One cannot teach or practice criminal law without noticing how often judges give criminal defendants the back of their hand. Furthermore, many judges are elected and must please constituencies too. But as a relative matter, judges are better positioned to act on defendants' behalf than legislators, and the ideal of

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<sup>73</sup> EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 39 (W.D. Halls trans., 1984) (1933).

<sup>74</sup> *Id.* at 34, 48, 46 (emphasis omitted).

<sup>75</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989).

standing up for criminal defendants is part of judges' conception of their role in a way that it is not part of legislators' conception of their role. Of the many problems besetting American criminal law and contributing to mass incarceration, judicial harshness is very far from the main one.

Finally, judges in criminal cases operate under a set of constitutional and statutory constraints with no legislative parallel. I am often asked why nontextual interpretive approaches do not free judges to make criminal law harsher as easily as it frees them to make criminal law milder. The answer is that judges occasionally do enlarge criminal law's reach by interpretation, but they do so rarely and to limited effect because judges are hemmed in both by the constitutional principle that judges cannot create crimes (including by statutory enlargement)<sup>76</sup> and by the interpretive principle of the rule of lenity.<sup>77</sup> Empirical research shows that judges are vividly aware of these constraints and take them seriously.<sup>78</sup> The two together mean that judges can interpretively constrict a criminal statute but cannot enlarge it. Judges' interpretive power is thus mostly one-way. Legislatures, by contrast, can just as easily expand criminal law as contract it.

What are the implications of this abstract rulemaking context and the psychological patterns it invites for criminal statutes' text? Simply that the statutes will often be excessively and thoughtlessly punitive—more thoughtless and more punitive than those same legislators would have written in more concrete and textured circumstances. Eighteenth- and nineteenth-century Enlightenment thinkers were often great fans of code law and critics of common law, in part because they regarded so highly the abstract rationality of code-based lawmaking.<sup>79</sup> But in criminal law, the code-based approach puts legislatures at their worst, and the case-based approach puts courts at their best.

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<sup>76</sup> See, e.g., *Skilling*, 561 U.S. at 415 (Scalia, J., concurring) (noting the long-accepted principle that the federal judiciary has no legitimate “power to define new federal crimes”).

<sup>77</sup> See, e.g., *id.* at 410–11; Stuntz, *supra* note 1, at 561–65.

<sup>78</sup> See Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1331–32 (2018).

<sup>79</sup> See, e.g., Letter from Jeremy Bentham to James Madison (Sept. 1817), <https://perma.cc/4G7L-KJVT> (offering to codify the entirety of U.S. common law on the grounds that only a rational legal code is worthy of an Enlightenment republic).

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Bringing these threads together, what one sees is a set of political pathologies that are not all unique to criminal law, but that are in combination quite distinctive and that will predictably be felt in the text of legislation. Collusive incentives mean that everyone with power has a stake in making statutes textually overbroad and overharsh—indeed, unreasonably broad and harsh not just from the standpoint of general principles of criminal justice but also from the standpoint of what legislatures actually want to see punished. The psychological and electoral context means that legislators will often be at their worst in the criminal context. And political imbalance means that there will typically be no lobby to push back against the punitive and careless overbreadth.

The effect of rule-oriented textualism in criminal law is thus to unleash a set of statutes that are predictably broader, harsher, and more carelessly drafted than any reasonable legislature would want to see enforced. One reason criminal lawyers have something distinctive to contribute to the “statutory interpretation wars”<sup>80</sup> is that, when criminal lawyers think about statutory interpretation, they have in view, not the great landmark statutes of the age, but these ugly, messy afterthought statutes by which legislators empower executive officials to deal with a group of people who are hated at retail and powerless at wholesale. Should that matter? If a theory of statutory interpretation is just an abstract ideology, immune to facts on the ground, perhaps not. But if a theory of statutory interpretation is supposed to be an instrument of good governance, then arguments like these—arguments about theory’s consequences—should matter. Why be a textualist in an area of law in which statutory text is so predictably bad?

## II. TEXTUALISM AND PUNITIVENESS

What do technical arguments about statutory interpretation have to do with punitiveness? Does focusing on the refined interpretive work that is mainly the province of appellate courts shed light on the vast criminal justice machine churning out thousands of sentences for every one appellate case like *Brogan*, *Chapman*, *Bond*, or *Yates*?

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<sup>80</sup> Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1756 (2010).



The answer is that statutory method sets into motion a procedural cascade that affects criminal justice at every level. Purposive and other nontextualist interpretive methods at the top of the system foster a sensible and often merciful orientation to considerations of what criminal law is for throughout the system. Rule-oriented textualism at the top unleashes a punitiveness at the bottom that is no less harsh for being technocratic.

For example, consider *Brogan*—the case of the “exculpatory no” in federal false-statements law.<sup>81</sup> A case like *Brogan* is visible, judicially managed, and rare. But if the meaning of “any false, fictitious or fraudulent statements”<sup>82</sup> is understood literally—if there is no “exculpatory no” exception, nor an exception for trivial or immaterial falsehoods, because “any” just means “any,” full stop<sup>83</sup>—then defense attorneys have no argument to make when their client has, say, lied about having an affair in the course of an interrogation about whether he cheated on his taxes. That means that there is no argument to make on the defendant’s behalf at trial, no chance to tell a judge or jury that he is not the sort of person that the statute is meant to target—no room for defense attorneys to maneuver. That, in turn, means that the defendant, as a practical matter, must plead guilty—and not on favorable terms—because the defense has no leverage. If, however, there is a real question about whether the defendant’s false statement is the kind of wrong that the statute is meant to target, a defense attorney would have the option of putting the issue to a judge and then (if he has any skill) a jury, which would mean that he might win at trial. That possibility means that if his case were to plead, it would do so on terms that are more favorable to the defendant. These are crucial differences in a criminal system in which 95% of felony convictions are obtained via plea<sup>84</sup> and in which there are hundreds of mechanically handled misdemeanors for every one felony.<sup>85</sup>

The effect of a case like *Brogan* on plea bargaining is even more vivid in mass justice settings. I have sometimes practiced criminal defense at an urban courthouse that processes thousands of cases per year involving mostly poor defendants accused

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<sup>81</sup> See *supra* notes 11–21 and accompanying text.

<sup>82</sup> *Brogan*, 522 U.S. at 400 (quoting 18 U.S.C. § 1001).

<sup>83</sup> *Id.* at 400–01.

<sup>84</sup> See STUNTZ, *supra* note 47, at 7.

<sup>85</sup> See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 629–31 (2014).

mainly of violent and property crimes. In thinking about an interpretive approach's concrete effects in criminal law, it's important to focus on these settings because they are the origin points from which mass incarceration comes and because statutory interpretation is different at the top and bottom of the legal system.

My courthouse is an ecosystem of mechanically applied textual rules, not because of the interpretive ideology of nationally known judges but because it is a bureaucracy, and rule-oriented textualism is the form of governance that bureaucracies find congenial.<sup>86</sup> What that statutory method means in an urban courthouse like mine is that defendants who violated a rule but have good equitable arguments to offer find themselves with no legal room to maneuver. The issue might be (as it was for one of my clients) whether to revoke conditional release based on a statute that reads: "In the event the person violates any of the conditions of such order, the court shall revoke the conditional release."<sup>87</sup> That is precisely the *Brogan* issue—a perfect mirror of the very top of the legal system from the very bottom. Does it matter, legally speaking, if the violation was minor, understandable, or unconnected with the crime that landed my client in conditional release in the first place? On a text-and-rule approach, the answer is no. On an equity-and-purpose approach, the answer is yes. And so it goes in innumerable other cases because a "them's the rules" interpretive approach is highly punitive in a massive, machine-like bureaucracy whose widgets—the things at the end of the production line—are punishments.

Purposive and other nontextualist interpretive approaches, by contrast, are antibureaucratic. They are a monkey wrench in the machine because they make guilt nonmechanical. They primarily avail those criminal defendants who have good equitable cases to offer but are technically guilty in a rule-and-text system.

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<sup>86</sup> Max Weber famously argued that bureaucracies govern by means of general rules applied to particular cases, as opposed to prudential judgment, individualized moral evaluation, or a "concrete balancing of interests." MAX WEBER, *ECONOMY AND SOCIETY* 217–26, 267, 290, 758–63, 956–58, 973–75 (Guenther Roth & Claus Wittich eds. & trans., 1978) (1922). It is odd that Weber's understanding of bureaucracy and modern formalists' preference for non-discretionary forms of law should line up this way. Justice Scalia's mission was to curb judicial abuse, not to make the world safe for bureaucracy. But I wonder if he ended up doing both.

<sup>87</sup> Sexually Dangerous Persons Act, 725 ILL. COMP. STAT. 205/9(e) (2013).

They help, in other words, precisely those with the best claims of justice against mass incarceration's excesses.<sup>88</sup>

Thus, judges' approach to statutory interpretation does carry consequences for the punitiveness of U.S. criminal law, even in cases that plead out and never see a trial, let alone an appeal. In the criminal system, judges do not direct most case outcomes. But they set expectations for how substantive criminal law will be read, and what follows their statutory style is a procedural cascade in favor of mechanical guilt on the text-and-rule approach or nonmechanical and individualized assessment on the equity-and-purpose side. The whole system of criminal justice bends and flexes with the approach taken to statutory interpretation. The turn to rule-oriented textualism has thus underwritten a technocratic punitiveness that contributes to the present crisis of American criminal justice—a marginal factor, to be sure, but not an insignificant one.

There is one major difference in statutory interpretation as one shifts from major federal appellate cases like *Brogan*, *Marshall*, *Yates*, and *Bond* to run-of-the-mill plea-bargained cases in state courts—but it is not one that casts rule-oriented textualism in a favorable light. When I discuss the ideas in this Article with judges and scholars who endorse formalist approaches in statutory interpretation, they often respond by pointing out resources within their tradition that could, in their view, blunt or overcome the problems on which my arguments focus. And they suggest that I have confused rule-oriented textualism with literalism. Now, I think there is a marked tendency among formalists to exaggerate the extent to which the subtle resources they cite would really work and, indeed, to exaggerate the airspace between rule-oriented textualism and mere literalism.<sup>89</sup> (Justice Scalia was on the wrong side of *Brogan*, *Chapman*, *Yates*, and—with respect to the relevant issues of statutory interpretation—*Bond*. Evidently, rule-oriented textualism produces literalist absurdities some of the time.) But set those doubts aside. Perhaps the sophisticated text-and-rule advocates are right: perhaps their interpretive tradition contains sophisticated resources with which to overcome my objections.

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<sup>88</sup> Professor Josh Bowers argues, similarly, that some criminal defendants are legally guilty but normatively innocent and that prosecutors should use “equitable discretion” not to prosecute in such cases. See generally Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010).

<sup>89</sup> See Scalia, *supra* note 31, at 23–25 (defending textualism as formalism).

The problem is that the version of rule-oriented textualism that prevails in the ordinary criminal courthouses of the criminal justice machine is not the subtle stuff of visionary jurists like Easterbrook and Scalia. It's a kind of "them's the rules" approach one might get from the TSA at the airport or test administrators at a standardized exam. For purposes of statutory theory, it's important to examine rule-oriented textualism at its best. But when it comes to theory's consequences, the question is how a statutory method affects the everyday practice of the ordinary, overworked, underpaid lawyers and judges who make up most of the criminal bar. Criminal defendants cannot access textualism at its best. They cannot afford it. One of the things that money buys in law is statutory nuance. Textualism at the top of the legal profession means literalism at the bottom.

### III. PATHOLOGICAL POLITICS AND TEXTUALIST VALUES

Rule-oriented textualism was built on ideas about democratic legitimacy. The very thesis of Justice Scalia's *A Matter of Interpretation* is that textualism is a democracy's interpretive methodology because it restores lawmaking authority to legislatures.<sup>90</sup> "[T]he Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation," Scalia writes, because what the common law judge is fundamentally doing is "playing king," and what's wrong with that is a little "trend in government that has developed in recent centuries, called democracy."<sup>91</sup> When a common law mentality is brought into statutory interpretation, "under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires."<sup>92</sup>

Scalia's rule-based orientation rests on these same democratic ideas. Textualism is not necessarily rule-oriented: text can express principles and standards as easily as it can rules. But principles and standards inevitably invite judges to think in terms of values. If a statute says that police in a violent encounter may use only "proportional" force or the level of force "a reasonable person would think necessary," judges cannot help but draw on some understanding of proportionality and reasonableness to apply the legislative directive to a case. A requirement that the

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<sup>90</sup> See Scalia, *supra* note 36, at 9–14.

<sup>91</sup> *Id.* at 14, 7, 9.

<sup>92</sup> *Id.* at 17–18.

president be thirty-five years old, by contrast, does not invite reference to values. Thus, a textualism motivated as Scalia's is—a textualism aimed at reducing values-based judicial discretion—must be *joined* to a law of rules if it is to accomplish its antidiscretionary mission.

Scalia did this in *The Rule of Law as a Law of Rules*—and did it so smoothly that it is easy to overlook the separateness of the two elements, textualism and rule orientation, being joined. The rhetorical device was threefold. First was to frame the debate about rules just as he had framed the debate about text, as the rule of law versus judicial discretion: “It is this dichotomy between ‘general rule of law’ and ‘personal discretion to do justice’ that I wish to explore.”<sup>93</sup> Second was to ally the rule of law with democracy: “In a democratic system, of course, the general rule of law has special claim to preference, since it is the normal product of that branch of government most responsive to the people.”<sup>94</sup> Third was to advance the idea—a heterodox idea in a legal system as suffused with principles and standards as the U.S. one—that the rule of law is a law of rules.

There are, in other words, two perennial debates in statutory theory—between rules and standards, on the one hand, and between text and purpose on the other. The two are orthogonal; there is no necessary connection between them. Scalia's genius was to marry a formalist legal methodology grounded in the twin pillars of text and rules to a forceful and moving conception of democratic legitimacy. Rule-oriented textualism of the type I critique in this Article thus emerges as the answer to a question: What mode of judging most empowers legislatures and most restrains judges? The answer is that judges should treat statutes as repositories of textually expressed rules and apply those rules without regard to the values on which the judges think the rules are based. And why read statutes that way? Because values-based judicial discretion is undemocratic. Democratic theory is thus the normative foundation of the text-and-rule approach, at least in the Scalia-Easterbrook tradition.

I do not mean in this argument to take issue with rule-oriented textualism's conception of the judicial role in a democracy. I am, for present purposes, agnostic on that score. My claim is that, because of criminal law's peculiar political economy, the

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<sup>93</sup> Scalia, *supra* note 75, at 1176.

<sup>94</sup> *Id.*

democratic shoe in the criminal context is on the other foot: the text-and-rule approach to statutory interpretation is less democratic than at least some nontextualist approaches.

To see why, we must first resist the seductive but serious oversimplification of thinking that “democracy” just means “legislatures”—that democracy is whatever legislatures do. That intuition—call it the “intuition for parliamentary supremacy”—is not the whole truth about democracy for at least four reasons that are all at issue in criminal law. First, legislative processes can themselves be flawed in ways that undermine democratic governance.<sup>95</sup> Second, democratic government in the American tradition requires checks and balances, not just legislative power.<sup>96</sup> Third, democratic government presupposes those rights necessary for democracy itself to function (e.g., political equality and freedom of speech).<sup>97</sup> Fourth, legislative processes and other governmental systems are ultimately means by which to effectuate the end of self-government, and the judgment of whether a society is functionally democratic must ultimately be a holistic judgment about whether the people within that society are genuinely self-governing.<sup>98</sup> Each of these four ideas is associated with a rich body of democratic theory.<sup>99</sup> Let us take them up in turn with special reference to the pathological politics of criminal law.

As to flaws in legislative processes themselves, criminal legislation suffers from a *Carolene Products*–John Hart Ely problem of the first order. Footnote four of *United States v. Carolene Products*<sup>100</sup> famously suggested that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”<sup>101</sup> Where democratic processes break down in ways that constrict a group’s

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<sup>95</sup> See HART & SACKS, *supra* note 37, at 693–98, 705–06.

<sup>96</sup> See *id.* at 682.

<sup>97</sup> See *id.* at 708.

<sup>98</sup> See *id.* at 710–13.

<sup>99</sup> See Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1465 (2017) (distinguishing theories of democracy that see democracy “in terms of governmental processes,” “in terms of advancing liberal values,” and “in terms of collective self-determination, popular sovereignty, and self-government, and therefore focus[ed] on whether the views of the people who make up the political community are reflected in their law”).

<sup>100</sup> 304 U.S. 144 (1938).

<sup>101</sup> *Id.* at 152–53 n.4. *Carolene Products* and Ely were focused on judicial review, not statutory interpretation, but the arguments, I submit, fit both contexts.

access to government (imagine, for example, a majority voting away a minority's right to vote), an active judicial hand is not anti-democratic but "representation-reinforcing."<sup>102</sup> Judges in such cases are not substituting their own values for those of the people's representatives but protecting the democratic political process itself.

With that argument in mind, consider the situation of criminal defendants and convicts competing in the legislative arena with prosecutors (whose interests are aligned with legislators), police, and prison personnel. On one side is a group of governmental officials with distorted and collusive incentives who collectively constitute a substantial portion of the political class. On the other side is a group of people who are typically poor and often ethnic minorities, who must operate in secret and therefore cannot advocate publicly for their interests, who often do not know that they will be members of the interest group in question, who are widely hated, who can legally be discriminated against in employment and other contexts, and—the Elyian kicker—who often lose upon conviction the very right to vote. Criminal defendants are one of the purest examples in American politics of a discrete and insular minority subject to structural disadvantages in the political process. In these circumstances, it is representation reinforcing for judges to take a larger role. And while Ely had in mind judicial review and not statutory interpretation, his argument applies as much to the one as to the other.

Second, the U.S. democratic tradition has never been one of pure parliamentary supremacy but one of checks and balances, and criminal legislation is disordered in ways that lead to largely unchecked executive power. Plea bargaining and prosecutorial discretion mean that legislatures have an incentive to pass criminal statutes designed to empower prosecutors rather than identify wrongdoing that the legislature actually wants stopped. Thus the legislature and executive collude rather than check each other: "Legislatures are no check on prosecutorial power, because legislators and prosecutors mostly share the same interests."<sup>103</sup> So falls one branch. But that isn't all; plea bargaining substantially excludes the judiciary from overseeing criminal justice. So falls the next branch. Even that isn't all; this structure disables not only the judiciary but also the criminal jury because trial juries

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<sup>102</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87–88, 102 (1980).

<sup>103</sup> Stuntz, *supra* note 1, at 599.

have no place in a world of plea bargains. That might not seem so significant in the twenty-first century, as we have become accustomed to the jury's diminishment, but it would have been seen as significant at the Founding: the jury was understood at that time as a directly popular check on all three branches of government, rooted in a participatory understanding of democracy in which the people take the reins of government directly rather than through representatives.<sup>104</sup> To disable the jury is also to move criminal cases out of a physical space—the courtroom—guaranteed as public by the Constitution<sup>105</sup> and into a closed-door world of lawyers and officials. This disables the public and media as a final source of oversight.

Thus crumbles the whole structure of checks and balances. In effect, legislatures vacate their responsibility to write fully specified law and, in so doing, empower prosecutors to evade judges, juries, media, and the voting public in exactly the context—crime and punishment—in which unchecked executive power is most fearsome. Just what is democratic about that?

Third, with respect to the rights that democratic governance presupposes, I think it is difficult to maintain that U.S. criminal legislation today does a good job of advancing the causes of equality, individual liberty, or the rule of law. The racial character of mass incarceration offends the cause of equality. The country's astonishing incarceration rate offends the cause of liberty. And the strategic use of prosecutorial discretion, plea bargaining, and broad criminalization offends the rule of law; the consequence of making criminal law so broad as to criminalize socially normal forms of misbehavior is to equip executive officials with vast discretionary power and subject many or most citizens to the standing possibility of executive interference. To lodge that level of unchecked power over individuals in the executive is antidemocratic.

Finally, turning to the ideal of democracy as collective self-determination and popular sovereignty—from the particular governmental processes that are democracy's means to the ideal of self-government that is democracy's end—rule-oriented textualism makes criminal law alien to the people living under it. At the center of a "We the People" conception of democracy is an

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<sup>104</sup> See Laura I Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1417 (2017).

<sup>105</sup> U.S. CONST. amend. VI.



“authorial ideal”:<sup>106</sup> the community living under the law must be able to rationally see itself as the law’s author.<sup>107</sup> Yet American criminal statutes, taken at face value, are commonly inconsistent with ordinary social norms. For example, the age of sexual consent in California is eighteen years old and there is no close-in-age exception: two seventeen-year-olds who have sex have, as a legal matter, raped one another.<sup>108</sup> But, in the United States, the average age at which people lose their virginity is seventeen.<sup>109</sup> Another example: when smoking marijuana was criminal in the vast majority of states, more than a third of Americans admitted to having smoked it.<sup>110</sup> Such statutes, literally interpreted and regularly enforced, would make the law alien to the people who are supposed to be its author. Pathological politics has created a criminal law that we cannot experience as our own.

I can imagine an objection to this line of argument: “Maybe criminal statutes are indeed broad and severe,” the objection might go, “and maybe it’s unfortunate that they are. But it is nonetheless the case that overbreadth and severity are what legislatures *want* and, in turn, what the tough-on-crime U.S. public wants. Respecting that overbreadth and severity therefore *is* democratic.” Criminal law, the argument concludes, might be a context in which democracy is not at its best, but that doesn’t make criminal legislation undemocratic.

This argument has a sort of deflationary appeal. It seems worldly and hardheaded, which can make it seem true. But it is false. The empirical evidence on public opinion indicates that the American public, evaluating criminal cases at retail (in the context of specific fact patterns), consistently favors less severe punishments than those dictated by American law.<sup>111</sup> Even at

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<sup>106</sup> Kleinfeld, *supra* note 99, at 1472.

<sup>107</sup> See Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1385 (2017) (“The fundamental idea [behind deliberative democracy] is one of authorship: where the community makes the law out of its own convictions, the community can truly be seen as self-governing; the people can rationally see themselves as the law’s author.”).

<sup>108</sup> CAL. PENAL CODE § 261.5 (West 2021).

<sup>109</sup> See Ctrs. for Disease Control & Prevention, *Key Statistics from the National Survey of Family Growth*, (Apr. 20, 2017), <https://perma.cc/K8LW-3W6J>.

<sup>110</sup> See Lydia Saad, *In U.S., 38% Have Tried Marijuana, Little Changed Since '80s*, GALLUP (Aug. 2, 2013), <https://perma.cc/Q2RF-4S5X>.

<sup>111</sup> In one illustrative study, subjects were given a set of real-world fact patterns involving crimes of varying severity and then asked to assign whatever sentences the subjects believed appropriate. The subjects gave consistently and significantly more lenient sentences than the law in fact prescribes. Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1576 (2017).

wholesale, broad and severe criminal drug laws are unpopular,<sup>112</sup> as are broad and severe copyright laws (very few people really think copyright infringers should go to prison for up to five years per count, as the FBI warning at the beginning of every movie threatens).<sup>113</sup> It seems unlikely that this same public would favor criminalizing the kind of “marginal middle-class misbehavior” that criminal law routinely does criminalize.<sup>114</sup> Nor, presumably, would they favor sentences as irrational as the LSD sentencing scheme in *Marshall*, nor prosecutions as contrary to social norms as *Bond* and *Yates*. Nor would they likely favor an overall arrangement of substance and procedure designed to empower prosecutors with vast discretion and evade jury trials.

Actually, given the political structures in which criminal statutes are written, one cannot even say that statutory text genuinely reflects the views and values of *legislatures*, since the statutes are commonly written to give prosecutors leverage rather than to describe the wrongs that legislatures actually want to eliminate. I concede that legislatures might genuinely favor an overall arrangement of criminal justice under which prosecutors use broad and severe criminal statutes as tools with which to secure plea bargains (thus providing a lot of criminal convictions at a low price). But that is too thin a reed to support the idea that applying particular criminal statutes in a rule-and-text way better reflects democratic values than would a less textualist approach.

I can imagine a second objection: “You underestimate the problem of judges just ‘making it up’—pretending to interpret the law but really rewriting it to suit their values. Maybe criminal legislation is textually flawed, but judicial power unconstrained by formal methods is worse than those flaws.” I acknowledge the force of this concern, but I think that it’s crucial to realize that typical criminal statutes are different from the kind of landmark statutes that often motivate concerns about judicial usurpation. A major case about, say, how to interpret the Affordable Care Act could, in a stroke, alter the balance of rights and duties for millions of people after hundreds of elected officials spent months negotiating on behalf of hundreds of millions of constituents, who were themselves engaged in intensive public debate. When

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<sup>112</sup> See Pew Rsch. Ctr., *America’s New Drug Policy Landscape* (Apr. 2, 2014), <https://perma.cc/CRL6-WCWW>.

<sup>113</sup> See JOE KARAGNIS & LENNART RENKEMA, AM. ASSEMBLY, COPY CULTURE IN THE U.S. & GERMANY 30–31, 40–41 (2013), <https://perma.cc/L6TM-6KR7>.

<sup>114</sup> Stuntz, *supra* note 1, at 509.

rule-oriented textualists find something democratically objectionable about judicial power in such a context, they have a point.

But criminal cases just aren't like that. A big case might narrow the reach of the federal complicity statute ("Whoever . . . aids, abets, counsels, commands, induces or procures [an offense against the United States] . . . is punishable as a principal.")<sup>115</sup> such that, if two people are engaged in a crime together and one of them pulls a gun that the other doesn't know about, the latter person is only guilty of the initial crime, not the additional gun crime.<sup>116</sup> Statutory interpretation in criminal law typically involves significant considerations of justice but at a very small and tightly constrained scale. It is not a context in which complaints of judicial usurpation make sense.

In sum, the democratic arguments on which rule-oriented textualism substantially rests do not work in the criminal context. What is really democratic is to read criminal statutes equitably and flexibly enough to reinforce representative government for a group otherwise denied full access to the political process; to preserve the system of checks and balances, including jury trials, that constrain executive power; to protect the individual rights on which democratic government is based; and to keep the law in application consistent with ordinary social norms so that democratic citizens can recognize the law as their own. In short, equity and purpose are, in criminal law, more democratic than text and rules.

#### CONCLUSION

The basic claim of this Article is a "bad fit" claim. The cello is a great instrument, but it's a bad fit if you're playing the blues. Rule-oriented textualism may have many virtues in other areas of law, but it's a bad fit for criminal law. Furthermore, the reasons that it is a bad fit for criminal law track features of criminal law's peculiar politics that are moderately distinctive taken individually and quite distinctive taken as a set.

The structure of this argument suggests that approaches to statutory interpretation should be sensitive to the distinctiveness of other areas of law as well. If the reasons relevant to an interpretive approach's merits are partly department-of-law specific, it follows that interpretive approaches cannot be evaluated without

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<sup>115</sup> 18 U.S.C. § 2(a).

<sup>116</sup> See *Rosemond v. United States*, 572 U.S. 65, 70–81 (2014) (analyzing 18 U.S.C. § 2).

regard to the department of law in which they are applied. That is indeed the larger perspective on statutory interpretation that I wish to advance in this Article—that there is value in thinking about statutory interpretation from the standpoint of the particular departments of law whose statutes are at issue rather than in the abstract and for all of law. Criminal law thus offers a useful perspective in the statutory interpretation wars. And since criminal law is such a significant part of the overall structure of law—not so much a room in the cathedral as a wing—it should unsettle sweeping theories of statutory interpretation that cannot accommodate criminal law’s special features.

At the same time, “distinctive” does not mean “unique.” There are other areas of law that share at least some of criminal law’s peculiarities, and there are areas of law that do not. What makes rule-oriented textualism such a bad fit for criminal law is the combination of dysfunctional legislative politics with a comprehensively moralized form of law—that is, a form of law for which moral concerns lie not only at the root of the field (which might be true of many areas of law) but also characterize virtually every individual application, token, occurrence, or issuance of the field. Rule-oriented textualism is a bad fit for areas of law with dysfunctional politics and highly moralized content.

Are there other areas of law for which those two features hold? Immigration and refugee law might be an example. There, as in criminal law, the group most affected by the law is typically unable to avail itself of the democratic process, and the moral goals of the law seem to be fairly close to the surface. A “refugee,” for example, is statutorily defined as someone unable or unwilling to return to his or her home country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>117</sup> Much of that definition involves moralized language. By contrast, securities law seems like an area in which the moral purposes of the law are less immediately relevant to legal interpretation; the various groups with an interest in the legislation have access to the democratic process, and those competing interests hammer out compromises in the form of legislative rules, which judges might best respect by enforcing them as written.

Ultimately, however, I am agnostic about which departments of law outside the criminal domain are best paired with which

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<sup>117</sup> 8 U.S.C. § 1101(a)(42)(A).

statutory method because, if this Article's argument is right, the choice of statutory method within an area of law requires fairly detailed knowledge of how that area of law works. Legal scholarship is filled with theories of how particular departments of law do and should function. The unanswered question is what those theories mean for statutory interpretation.