

2008

The Political Economy of Criminal Law and Procedure: The Pessimists' View

Richard H. McAdams

Follow this and additional works at: https://chicagounbound.uchicago.edu/public_law_and_legal_theory

 Part of the [Law Commons](#)

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

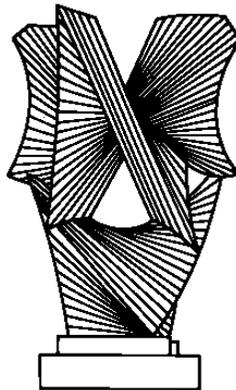
Recommended Citation

Richard H. McAdams, "The Political Economy of Criminal Law and Procedure: The Pessimists' View" (University of Chicago Public Law & Legal Theory Working Paper No. 243, 2008).

This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 243



THE POLITICAL ECONOMY OF CRIMINAL LAW AND PROCEDURE: THE PESSIMISTS' VIEW

Richard H. McAdams

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

October 2008

This paper can be downloaded without charge at the Public Law and Legal Theory Working Paper Series:
<http://www.law.uchicago.edu/academics/publiclaw/index.html> and
The Social Science Research Network Electronic Paper Collection.

THE POLITICAL ECONOMY OF CRIMINAL LAW AND PROCEDURE: THE PESSIMISTS' VIEW

Richard H. McAdams*

In *The Pathological Politics of Criminal Law*, Bill Stuntz provides a powerful critique of the modern American criminal justice system. Other commentators have criticized legislatures for constantly adding to an already overbroad set of criminal prohibitions. Stuntz explains the political dynamic that makes this outcome inevitable. The ultimate result is that the modern prosecutor defines what is criminal by her selection of cases to charge, while criminal legislation is a mere “side-show.” Stuntz concludes that this state of affairs is “lawless” and pathological. As a solution, he proposes that courts resurrect or expand certain constitutional doctrines to reclaim some of the power now wielded by prosecutors. In this core text, I summarize and comment on Stuntz’s argument.

I. THE PATHOLOGICAL POLITICS OF CRIMINAL LAW

A. The Political Economy of Over-Criminalization

Commentators contend that the scope of criminal law is unnecessarily broad and constantly expanding. Stuntz illustrates the point by counting the stark increase in the number of criminal offenses in a sample of jurisdictions. He notes how trivial some newer crimes are, such as negligent assault or endangerment or possession of burglar’s tools. Federal crimes include the unauthorized use of an image of “Woodsy Owl” and, under one interpretation of (mail) fraud, the awarding of graduate degrees to students whose work was plagiarized.¹ Let me add that federal crimes occur in what must be very common situations: knowing misstatements on mortgage or student loan applications, misapplying student loans or unauthorized use of food stamps, tax evasion, marijuana possession, and violation of copyright.

The constant creation of new offenses increases prosecutorial power in two ways. First, because it is impossible to prosecute anywhere close to the letter of the law, criminal overbreadth creates enormous discretion to select offenders. Second, over-criminalization enables “charge stacking,” where prosecutors charge multiple overlapping crimes for what is intuitively a single act. Double Jeopardy law adopts a technical view of what is the “same offense” for which one cannot be punished twice. As a result, when the legislature enacts multiple provisions that apply to a single act, the prosecutor can often choose to bring a multitude of charges. For fraud, a federal prosecutor may combine mail fraud and wire fraud statutes with more specific crimes for health care fraud, bank fraud, computer fraud, etc. Drug offenses often involve separate conspiracy, gun “use,” and money laundering crimes. When any one offense carries only a mild or moderate punishment, stacking charges allows the prosecutor to threaten a far more severe punishment, one that even the prosecutor considers to be disproportionate to the offense.

* Bernard D. Meltzer Professor of Law, University of Chicago Law School. The core text is based on William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001). Stuntz is the Henry J. Friendly Professor of Law at Harvard Law School. I thank Adam Cox, Adam Samaha, and Margareth Etienne for helpful comments on an earlier draft.

¹ Stuntz, *supra* note *, at 523-26.

Prosecutors threaten what by their own lights is unjust punishment to induce risk averse defendants, even those with a good chance of acquittal, to plead guilty.

Where the first effect of over-criminalization – overbreadth – is that prosecutors decide what is criminal, the second effect – what we might call “overdepth” – is that prosecutors decide what punishment the defendant receives. Overbroad crimes circumvent the role of the legislature. Police and prosecutors effectively define what is prohibited by their discretionary decisions to arrest and charge individuals. Charge-stacking circumvents the role of the jury by inducing defendants with strong cases to waive their right to a jury trial. Both shifts also circumvent the judge by taking away sentencing discretion. Unless changes are made, “we are likely to come ever closer to a world in which the law on the books makes everyone a felon and in which prosecutors and the police both define the law on the street and decide who has violated it.”²

Stuntz explains these developments by examining the incentives of the significant players in the criminal justice system. Legislators care about their constituents’ preferences, which concern less the content of criminal statutes than the outcome of crime. Unlike most legislative domains, there is little organized pressure to narrow criminal statutes because it is stigmatizing even to show concern that one may be accused. Police and prosecutors seek to maximize arrests and convictions (weighted for crime type); prosecutors also care about their win rate at trial. Both groups are an important lobby pressuring the legislature to expand criminal liability. The federal system presents a special case because unelected federal prosecutors are less responsive to the public than local prosecutors.

These incentives explain the “one-way ratchet” of ever widening criminal liability. Prosecutorial discretion is not the mere byproduct of resource constraints. Instead, legislatures intentionally write statutes to reach conduct they do not generally want punished because doing so makes it easier for prosecutors to reach actors the legislatures do want punished. Legislators do not worry about the downside of overbreadth – that prosecutors charge individuals for behavior the public believes is unobjectionable – because (a) elected prosecutors tend to avoid such prosecutions and (b) if the prosecutions occur, the public will blame the prosecutor rather than the legislature. Thus, legislatures fear blame if statutory underbreadth allows some bad actor the public wants punished to escape criminal liability, but not if the law is overbroad. As a result, legislatures prohibit more and more, delegating to prosecutors the decision of what conduct is criminal.

Here, it is important to see exactly how statutory overbreadth makes prosecution easier. Stuntz explains:

Suppose a given criminal statute contains elements *ABC*; suppose further that *C* is hard to prove, but prosecutors believe they know when it exists. Legislatures can make it easier to convict offenders by adding new crime *AB*, leaving it to prosecutors to decide when *C* is present and when it is not. Or, legislatures can create new crime *DEF*, where those elements correlate with *ABC* but are substantially easier to prove. . . . When [prosecutors enforce these crimes, they] are engaging in informal adjudication: they are not so much redefining criminal law (the real crime remains *ABC*) as deciding whether its requirements are met, case by case.³

² *Id.* at 511.

³ *Id.* at 519.

Thus, because burglary is hard to prove, the legislature authorizes criminal punishment for possession of burglar's tools (which are just any tools useful for a burglary, *e.g.*, a screwdriver) with intent to commit a burglary. Because drunk driving is hard to prove, legislatures punish the driver for the presence of open alcohol containers in her vehicle, whether or not she consumed alcohol. Because some of the traditional elements of fraud are hard to prove, Congress criminalizes the open-ended "intangible rights" standard which omits those elements.

In other work, Stuntz claims that legislatures circumvent constitutional rules of criminal procedure by expanding criminal law.⁴ The same process occurs here. The more straightforward way to make *ABC* easier to prove would be to lower the evidentiary standard to something below "proof beyond a reasonable doubt." But because the Supreme Court interprets the Constitution as mandating the higher standard,⁵ legislatures respond by changing the elements of the crime. To give a concrete example, assume that proof beyond a reasonable doubt means more than 90% likely. Suppose also that a person's having committed *AB* or *DEF* proves a 75% probability that she committed the original crime *ABC*. Requiring the prosecutor to prove *AB* or *DEF* beyond a reasonable doubt (to a 90% certainty) is the equivalent (assuming statistical independence) of proving *ABC* to a mere 67.5% probability (90% times 75%). If the legislature later makes *DE* a crime, and the existence of *DE* proves *ABC* to only a 50% certainty, then proof beyond a reasonable doubt of *DE* proves *ABC* only to a 45% probability (90% times 50%). Perhaps a standard so low – the defendant is more likely than not innocent of the original offense – seems implausible, but these percentages are merely averages. Stuntz's point is that the legislature trusts the prosecutor to use her discretion to prosecute only those individual whom she believes (with some unspecified probability) is guilty of the original offense *ABC*.

B. The Pathology of Overbroad and "Overdeep" Criminal Laws

One might reasonably ask what is wrong with the state of affairs Stuntz describes, given that the public might prefer this outcome. Stuntz offers two main reasons for calling the current system "pathological,"⁶ one substantive and one procedural.

Substantively, the current system does an increasingly poor job of sorting the guilty from the innocent. If criminal statutes condemned only behavior the public wants punished, then statutes would facilitate sorting. In the example above, if our real object of concern is behavior *ABC* and we only prohibit *ABC*, then we don't have to rely too much on the prosecutors' judgment. At least that is true if prosecutors cannot stack charges to the point where they easily induce guilty pleas from defendants with a good chance of acquittal. Without that ability, the system would sort out innocents because prosecutors would find it much harder to convince juries to convict the innocent of *ABC* than to convict the guilty. Under the current system, however, prosecutors find it about as cheap to convict the innocent. The key is that they exercise discretion in ways that are largely invisible to the public. When prosecutors convict someone of

⁴ See William J. Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996).

⁵ See *In Re Winship*, 397 U.S. 358 (1970).

⁶ Stuntz presents two other arguments I regard as secondary, though important. First, the current system leaves no room for the expressive function of criminal law because criminal statutes cannot signal condemnation of conduct if they routinely ban conduct that the public regards as undeserving of punishment. Second, the system facilitates the existence of vice crimes, such as prostitution and gambling, which the majority may favor only if it can choose targeted enforcement against political minorities over even-handed enforcement.

(what I call) “proxy” crime *AB*, no outside observer knows if the prosecutor had good reason to believe that omitted element *C* existed. When prosecutors stack charges to induce a guilty plea, outside observers don’t know if the prosecutor had good evidence of the defendant’s guilt. That no one knows when prosecutors do a bad job gives them no strong incentive to do a good job.

Procedurally, the system fails on rule of law grounds. Our ordinary procedure for regulating government officials involves the separation of power into different branches. Yet we are evolving to a system where prosecutors possess plenary power. Legislators delegate to prosecutors the power to select the small subset of formal prohibitions that will be enforced – to decide what is criminal. The prosecutor acts as the adjudicator when deciding whether to stack charges and thereby bring overwhelming pressure to plead guilty. In the few cases that go to trial, the jury decides whether the easily proved proxy crime – *AB* – exists but the prosecutor is the ultimate fact finder on whether the crucial omitted element – *C* – exists.

Vesting such power in prosecutors stands on its head the distinctive criminal law idea of the principle of legality, which demands advanced legislative definition of crime. One justification for the Anglo-American common law’s rejection of judicial crime creation (even while allowing judicial tort creation) is the need to give individuals notice of what conduct is criminal. But overbroad statutes and standardless prosecutorial discretion provide no better notice than retroactive crime creation. A second standard justification is the need to restrain arbitrary and discriminatory enforcement. Police can arrest and prosecutors can charge only when there is “probable cause” to believe the suspect has committed a crime, but if the category of crime is open to further judicial creation, then police and prosecutors could arrest and charge anyone on the grounds that they did something that a court might later recognize as criminal. Yet this justification also fails if police and prosecutors essentially decide what is criminal.

To sum up the diagnosis: “Criminal law is . . . not law at all, but a veil that hides a system that allocates criminal punishment discretionarily.” Stuntz immediately adds “Not quite,” noting that defendants can go to trial and “sometimes win . . . by arguing that someone else committed the crime charged.” But in the final analysis, “[p]rosecutors decide what is a crime.”⁷

C. How to Return to the Rule of Law

Finding the patient diseased, Stuntz offers a dose of pessimism about potential cures. He rejects as unworkable the possibilities of eliminating prosecutorial discretion and de-politicizing criminal law through deference to experts. As the best of a limited set of options, he proposes that courts constitutionalize more of criminal law, curtailing legislative supremacy in that realm. He recommends three doctrinal mechanisms. The first tool is to expand the Due Process holding of *Lambert v. California*,⁸ requiring an element of notice of criminal liability. “[T]he question is not whether the defendant knew he was violating this particular statute, but rather whether the defendant knew that his behavior was, in some more general sense, out of line.”⁹ Thus, where the legislature bans activity that an ordinary citizen would not think of as criminal, the government would have to prove some functional notice. Second, Stuntz proposes that courts enforce a doctrine of desuetude, rendering criminal statutes void if they are not enforced for a period of time. Finally, Stuntz proposes that courts retain, under the Eighth Amendment, the discretion to

⁷ Stuntz, *supra* note *, at 599.

⁸ 355 U.S. 225 (1957).

⁹ Stuntz, *supra* note *, at 590.

give sentences that they regard as proportionate, even if less than a statutory minimum (or presumably more).

II. COMMENTARY AND CRITIQUE

A. The Principal-Agent Problem in Criminal Law

Stuntz's methodology is a global analysis of the political economy of the criminal justice system. He not only steps back from the legal doctrine and the idealized role of legal actors to examine their actual incentives and motivations, but he also attempts to perform his sophisticated description holistically, without holding any particular part of the system constant.

I want to emphasize Stuntz's investigation of "agency costs." These are costs that principals must incur monitoring and controlling their agents.¹⁰ Economists view the agency problem as central to some areas of law, such as corporations. Yet the concept mysteriously plays only a peripheral role in the economics of criminal law, which instead focuses on identifying optimal sanctions. A few papers apply agency theory to a particular actor, such as the prosecutor. By contrast, Stuntz considers the interaction of multiple agents – police, prosecutors, courts, and legislators. If one is going to apply agency cost theory, then surely it is correct to recognize that the criminal justice system consists of a complex set of agents with overlapping but partially independent domains of authority.

Indeed, the problems of *governmental* agents are arguably more severe than the ones that dominate corporate law scholarship because, first, market discipline is probably more reliable than electoral politics at driving into extinction an entity that is bad at controlling agency costs. Second, most agents in a firm are hierarchically arranged so that higher agents – *e.g.*, corporate officers – can fire the agents below them; possessing formal power over others, CEOs cannot pass blame on subordinates nearly as effectively as they could if the other agents were independent. Although there are some hierarchies of agents in criminal law (*e.g.*, chief and line prosecutors), most criminal justice agents, by contrast, are aligned horizontally, operating without formal control by others.

To understand the problem fully, we should consider all the agents whose unreviewable discretion can block or impede an offender's punishment. We must address not only the agents Stuntz identifies – police, prosecutors, courts, and legislators – but also some he neglects – grand and petite juries (who can refuse to indict or convict), the chief executive (who can pardon), and prison authorities (who determine actual confinement conditions), not to mention private parties, such as the media, private police, and bounty hunters. Our federalist system magnifies the problem because governmental actors exist at the federal, state, and local level. There is more to say about the complex motivations of police, which must differ throughout different levels of the bureaucracy and according to whether the force is unionized. There is also much left to explain about the *principal* in this principal-agent framework, *i.e.*, the public, which Stuntz describes as savvy in some ways (*e.g.*, understanding prosecutorial discretion) but naïve in others (*e.g.*, thinking that anything Congress prohibits is a serious problem).

In any event, Stuntz points the way toward a comprehensive analysis of the massive agency problems in the criminal system. His approach seems more economically fundamental

¹⁰ See, *e.g.*, Eric A. Posner, *Agency Models in Law and Economics*, in CHICAGO LECTURES IN LAW AND ECONOMICS 225 (Eric A. Posner ed., 2000).

than much of the law and economics scholarship, given that the multiplicity of agents means there is no one social planner to implement economic theories of optimal enforcement, nor any obvious way to coordinate among different agents.

B. Are We (Almost) All Felons?

Is Stuntz exaggerating when he says that the current system is “lawless,” that criminal statutes are a “side-show,” that we are coming “ever closer to a world in which the law on the books makes everyone a felon”? Stuntz is surely right about the direction of movement, that statutes grow in breadth and depth and therefore that prosecutors increasingly wield powers that at one time were allocated to different branches. But what we really want to know is (1) precisely how far we are along the continuum and (2) how much farther we will slide down the continuum before some political force pushes back.

As to the first question, we are somewhere on a scale defined by these endpoints: an ideal criminal code that does the best job possible of avoiding under- and over-inclusion, and the truly lawless nightmare of state actors who can decide at any point to impose an extended prison sentence on any citizen. Where exactly we are between them is an empirical issue. We need to know what percentage of Americans could now be convicted of a felony or some other category of offenses subject to serious punishment (committed within the relevant statute of limitations). Or, for what percentage is there a sufficiently plausible case that a prosecutor could induce a guilty plea? However rough the estimate, this is a key inquiry.

The second issue is how far down the continuum we will go. Stuntz implies that one day virtually everyone will be a felon. I am skeptical. Criminal law has been expanding for decades. Why is there no state law yet that simply makes lying of any sort a crime? Or failing to keep one’s promises? Indeed, there is a trend to *narrow* statutory rape laws to require an age gap between the perpetrator and victim. Stuntz also underestimates how much lobbying there is against expansion of criminal laws, given how much those laws regulate industry. And he may overestimate how far the public is willing to go. If a legislator proclaimed that a proposed bill would make 85% of her constituents felons, but that law-abiding citizens would benefit from giving prosecutors the discretion to target those she knows are deserving of punishment, I suspect that the public would oppose the bill. An optimist might say that the public prefers criminal law expansion for the purpose of effectively lowering the evidentiary standard from proof beyond a reasonable doubt (as explained above) and therefore the system will reach political equilibrium once we reach the desired lower standard for all crimes.

Perhaps Stuntz would plausibly counter that the public is unaware of the trend of criminal overbreadth, which occurs beneath the radar of media scrutiny. If the problem is the accumulation of low-salience statutes each one of which makes a felon of only, say, 5-20% of the public, then perhaps Stuntz’s dire prediction is accurate. In the end, this too raises empirical questions.

For now, I want to emphasize one of Stuntz’s related insights – the growth of proxy offenses. This strikes me as vitally important. I have argued for understanding “undercover” offenses exactly this way.¹¹ There is significant agreement that we should not punish individuals who commit crimes in a sting operation that they have not and likely would not commit outside a sting operation. If so, then the best explanation for why we generally do punish individuals who

¹¹ See Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. LAW & CRIMINOLOGY 107, 158-64 (2005).

offend in sting operations is that their undercover offense is evidence of an “external” offense. In Stuntz’s terms, selling drugs outside undercover operations is crime *ABC*, while selling drugs in undercover operations is *DEF*; we punish the otherwise harmless behavior *DEF* because we think it is correlated with *ABC*. What obscures this point, in my view, is that the undercover offense usually does *not* prove an external offense beyond a reasonable doubt. Yet that turns out to be perfectly ordinary under the proxy approach. It would obviously be constitutional for the legislature to criminalize selling drugs *in undercover operations*, even if the only reason to punish the behavior is that it proves to some lesser evidentiary standard something else – an external offense – we want to deter.

Many theorists miss the pervasiveness of proxy offenses, that is, of the fact that modern criminal statutes commonly reach behavior that is merely correlated with the true object of concern. Consider three examples. Heidi Hurd and Michael Moore criticize hate crime penalty enhancements as violating retributivism.¹² In response to claims that hate-motivated crimes involve greater wrongdoing or harm than the same crime without the hate motive, they assert that the posited relationship is merely contingent, *i.e.*, that the hate motivation is only a “proxy” for the additional wrong or harm. Because “[p]roxies are almost always both over- and underinclusive of the phenomena for which they are proxies,” they are retributively unjustifiable.¹³ Paul Robinson and John Darley claim that, to maximize compliance with criminal law, criminal statutes should correspond to common intuitions about the moral wrongfulness of behavior.¹⁴ They therefore criticize criminal statutes that deviate from the pattern of moral intuitions they discover. Eric Posner and Adrian Vermeule criticize a common view about torture: that we should ban it without exception but allow *ex post* forgiveness in extreme situations that justify its use.¹⁵ They say instead that the case for specifying *ex ante* when torture is permissible “is identical to the argument in favor of the rule of law, an argument that appears to be decisive in every other setting.”¹⁶ They propose applying to torture the “baseline regime” of criminal law, where “the circumstances in which serious harms may be inflicted are specified *ex ante*, rather than being remitted solely to the discretionary mercy of juries, judges, and the executive after the fact.”¹⁷

Yet if Stuntz is right about criminal overbreadth and the existence of proxy offenses, then these scholars are misguided. Hurd and Moore may be right that proxies are retributively unjustifiable, but nowhere do they acknowledge that modern criminal law is rife with overbroad proxy offenses, *i.e.*, that their retributivist critique throws out a lot more than hate crimes. Similarly, if the public is content with overbroad criminal statutes that create vast prosecutorial discretion, then Robinson and Darley are wrong to claim that the moral authority of criminal law depends on its *statutes* matching the public’s moral intuitions. If the public focuses on legal outcomes, such as whom prosecutors convict, then public intuitions need only match those outcomes. Finally, if Stuntz is correct, then Posner and Vermeule are wrong to claim that the rule of law carries the day in “every other setting.” To the contrary, it is a regular feature of modern criminal law – part of the “baseline” – that our prohibitions are overbroad and that we avoid undesirable punishment solely through “the discretionary mercy” of various agents in the system,

¹² Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081 (2004).

¹³ *Id.* at 1086.

¹⁴ *See, e.g.*, PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY AND BLAME* (1996).

¹⁵ Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671 (2006).

¹⁶ *Id.* at 695.

¹⁷ *Id.* at 707.

particularly prosecutors. That the law prohibits all torture, without specifying some rare exception that could justify its use, makes torture exactly like scores of modern offenses.

C. Is More Constitutional Law Better?

Assuming Stuntz is correct in his descriptive claims, is it appropriate to call the current system *pathological*? And do his proposed solutions offer a cure? Related to both points is an ambiguity in Stuntz's account of the public. I read Stuntz as sometimes suggesting that the public is getting what it wants in the criminal justice system. If so, that raises both the normative question of why the public's tradeoffs are objectionable and the prescriptive question of how a little more constitutional law could finally suppress majoritarian forces. If, for example, the public is committed to prosecutors having maximal discretion, then surely the legislature will simply re-enact any law that the desuetude doctrine threatens to invalidate.

Yet Stuntz's normative critique is, I believe, sound. The concern for the rule of law and for "sorting" the guilty and innocent are different sides of the same coin. Beyond some point, giving agents more power undermines their incentives to act in the public interest. Because the public has limited information about prosecutors, for example, it monitors simple facts like the total number of prosecutions, the trial win percentage, and the conviction of high profile defendants. If prosecutors have sufficient power, to the point where they can convict the innocent almost as easily as the guilty, they can easily ensure a large number of convictions, a high trial win rate, and the conviction of specific individuals the public wants convicted. But they can accomplish these goals without paying much attention to sorting the innocent and guilty. At the same time, unchecked power is something subject to abuse, as where prosecutors target people they do not like or extract bribes from the innocent to refrain from prosecution.

Keith Hylton and Vic Khanna emphasize the last point – the danger of corruption – in justifying pro-defendant rules of criminal procedure.¹⁸ An individual with unchecked powers of criminal law enforcement can credibly threaten the innocent with punishment in order to extract bribes. They point to the criminal standard of proof – beyond a reasonable doubt ("PBRD") – as constraining this corruption by making it more costly for the prosecutor to convict the innocent than the guilty. Hylton and Khanna also recognize that prosecutors could circumvent PBRD by prosecuting an individual serially, wearing her down with the state's superior resources. Thus, they justify the double jeopardy limitation as a mechanism to prevent this circumvention. Yet Stuntz shows how the Double Jeopardy Clause (as interpreted) is not sufficient to serve this end. Instead of prosecuting defendants again after an acquittal, charge-stacking allows prosecutors to wear down defendants by threatening them with a series of charges *all at once*, prompting the risk-averse to plead guilty even if they stand a reasonable chance of acquittal at trial.

There is no reason to think that the public desires this state of affairs. More likely, the public is unaware of the new power that prosecutors exercise. This is why I said previously that, if a legislator advocated a bill on the grounds that it would make felons of 85% of the public, thus creating even more prosecutorial discretion, then most of the public would oppose it. Thus, if we are moving ever closer to that result, there is no reason to think it satisfies some public desire.

If the public is unaware of the current trend toward prosecutorial power, then there is also reason to believe that courts could succeed in halting the trend. Contrary to my suggestion above,

¹⁸ See Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV. 61 (2007).

the public will not circumvent a desuetude doctrine by supporting re-enactment of old statutes if they do not actually support limitless prosecutorial power. Similarly, Stuntz's proposed notice requirement would usefully force the government to publicize unconventional crimes. He doesn't say how, but in some contexts the government provides notice via public service announcements, the posting of signs, and the practice of merely warning first offenders. Thus, prosecutors could no longer extract guilty pleas from defendants for "non-intuitive" crimes that they and the public did not know nor have reason to know existed.

Requiring re-enactment of unused statutes and publicity for unconventional crimes arguably reinforces democracy by ensuring the popularity of criminal enforcement. However, Stuntz's sentencing limitation is more troubling to majoritarian ideals because it is easier to believe the public supports higher sentences than the judiciary. Yet the sentencing proposal is essential to prevent charge-stacking, which the first two solutions seem not to address. The good news is that a little bit of second guessing on sanctions could go a long way. Courts might effectively undermine charge-stacking by lowering the sentences only in the few such cases that go to trial. If judges refuse to impose the full sentences authorized or even required by multiple overlapping charges, they will rob prosecutors of the leverage that induces guilty pleas even from defendants with a good chance of acquittal. Nonetheless, to justify this solution requires addressing the arguments for the ideal of majoritarianism.

In the end, Stuntz's work raises but does not fully answer an essential empirical question: What percentage of Americans could today be convicted of a felony? Stuntz suggests that the percentages are already sufficiently high that prosecutors now effectively decide who is a criminal. I am enough of a pessimist to find this answer plausible, but only further research can answer the point with confidence.

Readers with comments may address them to:

Professor Richard H. McAdams
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
rmcadams@uchicago.edu

The University of Chicago Law School
Public Law and Legal Theory Working Paper Series

For a listing of papers 1–99 please go to <http://www.law.uchicago.edu/academics/publiclaw/1–199.html>

200. Susan Bandes, *The Heart Has Its Reasons: Examining the Strange Persistence of the American Death Penalty* (January 2008)
201. Susan Bandes, *After Innocence: Framing Wrongful Convictions* (January 2008)
202. Ariel Porat, *Expanding Restitution: Liability for Unrequested Benefits* (January 2008)
203. Adam B. Cox, *Deference, Delegation and Immigration Law* (February 2008)
204. Ariel Porat and Alon Harel, *Aggregating Probabilities across Offences in Criminal Law* (March 2008)
205. Jonathan S. Masur, *Process as Purpose: Administrative Procedures, Costly Screens, and Examination at the Patent Office* (March 2008, revised July 2008)
206. Eric A. Posner and Cass R. Sunstein, *Should Green house Gas Permits Be Allocated on a Per Capita Basis?* (March 2008)
207. Eric A. Posner, *Human Welfare, Not Human Rights* (March 2008)
208. Susan Bandes, *Victims, “Closure,” and the Sociology of Emotion* (March 2008)
209. Cass R. Sunstein, *Is OSHA Unconstitutional?* (March 2008)
210. Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*
211. Lee Fennell, *Slices and Lumps* (March 2008)
212. M. Todd Henderson, *Citing Fiction* (March 2008)
213. Jacob E. Gersen and Eric A. Posner, *Soft Law* (March 2008)
214. Christopher R. Berry and Jacob E. Gersen, *The Unbundled Executive* (March 2008)
215. Cass R. Sunstein and Reid Hastie, *Four Failures of Deliberating Groups* (April 2008)
216. Adam M. Samaha, *Judicial Transparency in an Age of Prediction* (April 2008)
217. Stephen J. Choi, Mitu Gulati, & Eric A. Posner, *Which States Have the Best (and Worst) High Courts?* (May 2008)
218. Cass R. Sunstein, *Two Conceptions of Irreversible Environmental Harm* (May 2008)
219. Jonathan R. Nash, *The Uneasy Case for Transjurisdictional Adjudication* (June 2008)
220. Adam B. Cox and Thomas J. Miles, *Documenting Discrimination?* (June 2008)
221. Susan Bandes, *Emotions, Values and the Construction of Risk* (June 2008)
222. Jonathan R. Nash, *Taxes and the Success of Non-Tax Market-Based Environmental Regulatory Regimes* (July 2008)
223. Thomas J. Miles and Cass R. Sunstein, *Depoliticizing Administrative Law* (June 2008)
224. Eric A Posner, *Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law* (July 2008)
225. Thomas J. Miles and Eric A. Posner, *Which States Enter into Treaties, and Why?* (July 2008)
226. Cass R. Sunstein, *Trimming* (August 2008)
227. Jonathan R. Nash, *The Majority That Wasn’t: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements* (August 2008)
228. Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism* (August 2008)
229. Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold* (August 2008)
230. John Bronsteen, Christopher Buccafusco, and Jonathan Masur, *Happiness and Punishment* (September 2008)
231. Adam B. Cox and Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence* (September 2008)
232. Daniel Abebe and Jonathan S. Masur, *A Nation Divided: Eastern China, Western China and the Problem of Global Warming* (September 2008)
233. Irina D. Manta, *Privatizing Trademarks (abstract only)* (September 2008)

234. Paul J. Heald, Testing the Over- and Under-Exploitation Hypothesis: Bestselling Musical Compositions (1913–32) and Their Use in Cinema (1968–2007) (September 2008)
235. Brian Leiter, Nietzsche's Naturalism Reconsidered (September 2008)
236. Paul Heald, Optimal Remedies for Patent Infringement: A Transactional Model (September 2008)
237. Cass R. Sunstein, Beyond Judicial Minimalism (September 2008)
238. Bernard E. Harcourt, Neoliberal Penalty: The Birth of Natural Order, the Illusion of Free Markets (September 2008)
239. Bernard E. Harcourt, Abolition in the U.S.A. by 2050: On Political Capital and Ordinary Acts of Resistance (September 2008)
240. Bernard E. Harcourt, *Supposons que la discipline et la sécurité n'existent pas* ~ Rereading Foucault's *Collège de France* Lectures (with Paul Veyne) (September 2008)
241. Richard H. McAdams, Beyond the Prisoner's Dilemma: Coordination, Game Theory and the Law (October 2008)
242. Dhammika Dharamapala, Nuno Garoupa, and Richard H. McAdams, Belief in a Just World, Blaming the Victim, and Hate Crime Statutes (October 2008)
243. Richard H. McAdams, The Political Economy of Criminal Law and Procedure: The Pessimists' View (October 2008)