

Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response

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We know prosecutors take advantage of overcriminalization. Yet we also know they do much to mitigate it. So much, in fact, that they largely keep overcriminalization from becoming a salient political problem that could generate a political response such as code revision. If every law were enforced vigorously, there would be public backlash. But the outrageous laws largely lie in desuetude, for familiar reasons.¹ To be sure, this is not always true, and that's why some overcriminalization—of particular sorts, meaning overlapping or redundant crimes and excessive punishment—are still problems that occur randomly and periodically. (How much each sort is a problem is both hard to detect and, because it is a normative call, hard to judge.) Much of overcriminalization's effect is low visibility; it occurs at the level of plea bargaining as in *Bordenkircher v. Hayes*²: prosecutors use overlapping or excessive statutes to force plea bargains. But while there is a problem that needs a remedy, there is also evidence of substantial constraint in prosecutor practice.

I want to venture an additional explanation—on top of more familiar ones—for why prosecutors exercise some restraint in charging and generally exploiting overcriminalization. Then, I want to suggest a different route to addressing what I think is the key aspect of overcriminalization that prosecutors exploit, which is not criminalization of innocent or marginally wrongful conduct but redundant criminalization of clearly wrongful activity.

I.

Criminal law is overwhelmingly state law, and its administration is a significant public policy endeavor for states, which means the insights of competitive federalism could provide some insights on criminal law policy's evolution. On a stylized set of assumptions,³ the theory of competitive federalism

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¹ See, e.g., Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005) (describing how local politics and budget constraints keep state prosecutors focused on priority crimes).

² 434 U.S. 357 (1978).

³ For a description of those assumptions, see William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L. J. 201, 208–09 (1997). For an argument that those assumptions often do not hold

posits, in brief, that jurisdictions compete with each other to produce various public goods, including regulation (such as environmental law) and public services, at optimal levels, because they compete with each other to attract residents and industry. States whose policies generate an appealing regulatory environment should attract employers, and those whose policies generate good quality of life through provision of public services, benefits, and regulations should attract residents. States that lose in this competition should be forced, by this market pressure among jurisdictions, to improve their policies.

Of course, things can be more complicated than this initial picture suggests. Some of these goals may conflict. The regulatory environment that businesses seek may not provide the benefits that residents seek. Jurisdictional competition literature is filled with debates about races-to-the-top versus races-to-the-bottom. In the competition on environmental regulation, for instance, states may reduce regulatory obligations to attract industry at a cost of reduced quality of life (including, e.g., air and water purity or landscape integrity) for residents. Environmental law is one contest in which commentators have argued state competition produced a race for the bottom that needed to be solved by federal regulation that supersedes the regulatory outcomes of state competition.⁴

Despite its complications, the jurisdictional competition thesis might seem an appealing explanatory theory for contemporary criminal justice policies generally and an important influence on prosecutors in particular. Criminal law is an important regulatory and policy endeavor for states seeking to improve and maintain an attractive environment and quality of life for residents and businesses. Holding aside retribution goals, criminal law's dominant public purpose is to improve public safety and welfare by reducing crime. State criminal justice policies could be in competition with each other and, if approaches vary, over time some should prove more successful than others. Successful jurisdictions would enjoy lower crime rates and better quality of life, which could affect other jurisdictions, especially neighboring jurisdictions, at least two ways. The successful state would attract more residents who seek a lower-crime environment, and criminals would migrate from the state in reaction to successful crime prevention policies (and be deterred from migrating to it in the first place). Sometimes, offenders might set up residence in other states, especially nearby ones; sometimes they may forgo criminal activity altogether. Other states would adopt successful policies initiated by early, innovative states. The pattern of some criminal justice policies sweeping across a large majority of states—recidivist

in analyses of legal federalism and thus the model's argument for the virtues of jurisdictional competition is weak, see *id.* at 222.

⁴ See, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992). For a challenge to the argument about the "race to the bottom" from state competition over environmental policy, see Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001).

sentencing statutes, sex offender registration,⁵ and preventive detention, for three examples—might be seen to fit this model.

At first blush, it seems jurisdictional competition could be a major force in driving state actors, legislators, judges, and prosecutors, toward harsher criminal justice policies. They want to drive criminal activity to neighboring states (assuming some actors cannot be deterred altogether), and prevent neighbors from driving crime into their jurisdictions. They want their voters to enjoy lower crime and better quality of life and to reap the benefits of jurisdictional competition that come from those results. The trend toward much harsher sentencing policies in the last thirty years, which prosecutors are key actors in implementing, can be viewed as a product of this process: states concluded harsh sentencing policies were successful elsewhere, and they feared being a lower-sentence jurisdiction to whom harsh-sentencing states might push their criminals. The competitive dynamic set up a cycle of states competing with each for ever-harsher criminalization, enforcement, and punishment policies, which seems to have leveled off—after exceeding the incarceration rates of all other democracies—only due to the substantial strain that high incarceration rates put on state budgets.⁶

We certainly see some of that competitive dynamic in criminal justice contexts beyond sentencing policy. Overall, states criminalize more than they decriminalize. Doron Teichman recently offered an extended argument to this effect, suggesting local jurisdictions pursue harsh criminal justice policies to displace crime into neighboring jurisdictions.⁷ He suggests the problem is sufficiently significant that federal criminal law may be a useful tool for reforming the dysfunctional competitive market for criminal justice. His examples, however, are relatively few, because the thesis applies mostly to profit-driven crimes and to offenders who are willing to relocate to continue crime or avoid sanctions. So, for example, Teichman offers good evidence that organized car theft rings seem to have clearly been affected to shift jurisdictions by concerted state efforts to prevent and prosecute car thefts. Some larger-scale drug rings, such as those focused on methamphetamine production, may respond similarly. And at least anecdotal evidence suggests sex offenders sometimes respond to onerous registration requirements and residency restrictions intended to encourage them to leave jurisdictions.

Yet much crime, including crimes of opportunity and passion, are unlikely to fit this jurisdictional competition model. The model seems even weaker with respect to law-abiding residents seeking out locales with successful crime-

⁵ *Smith v. Doe*, 538 U.S. 84, 90 (2003) (noting that by 1996, all fifty states and D.C. had enacted sex offender registration laws).

⁶ See Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1721 (2006); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005) [hereinafter *Politics of Sentencing*].

⁷ Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831 (2005).

reduction strategies. To note only one set of problems, jurisdictions produce many sets of public goods or policies, and potential residents must choose the entire set of policies when they choose a given jurisdiction. Put differently, jurisdictions can fashion a range of different sets of policies (criminal justice, environmental, public transportation, health care, tax levels, etc.), and citizens choose among these packages. But as the number of policies multiplies, the number of jurisdictions with different combinations must increase in order for each citizen to have an option to choose an optimal package. In the real world, an optimal mix may not be available to many, so competitive pressure may do more to shape some policies than others. And all this holds aside real-world restrictions on citizens' mobility among jurisdictions, such as limited employment possibilities or family ties.

Regardless of whether the jurisdictional competition model is weak outside a specific set of crimes and offenders, or whether other factors overcome the incentives that the model posits, the interesting developments are the notable exceptions to this trend and to the presumed pressure of jurisdictional competition. I want to highlight one set of variations of states in criminal justice policy and one explanation for them that has gotten little attention. The variations are in sentencing trends, and the explanation arises from differences in state democratic processes, political cultures, and measures of civic engagement.

II.

Dan Richman and Bill Stuntz's influential explanations for criminal law politics⁸ and prosecutor regulation⁹ suggest that election of local prosecutors, combined with those prosecutors' identifiable responsibilities for local crime, keep those prosecutors focused on crimes that citizens care about most—violent crime, theft and property crime, and drug crime—and constrain them from spending much effort on other sorts of conduct criminalized in expansive codes. Those codes, though, show little prospect of contracting, because legislators can create new crimes cheaply and take little political heat for enforcement actions that prove unpopular. On this picture, codes, like sentencing policy, are likely to expand but not contract; prosecutors are likely to be vigorous enforcers of core crimes—salient crimes that affect quality of life. Yet these accounts paint with a broad brush, with little attention to variations among states. There are substantial variations, however, that suggest the likelihood of variation in other aspects of criminal justice administration, including prosecutors' broad range of discretionary actions on charging, bargaining and sentencing. That variation is most easily documented in sentencing policy, and it suggests that influences other than jurisdictional competition have a dominant effect on prosecutorial discretion and criminal justice policy more generally.

⁸ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

⁹ See Richman & Stuntz, *supra* note 1.

Consider state incarceration rates. In 1998,¹⁰ the overall incarceration rate in state prisons averaged 433 per 100,000 population. That average has steadily and dramatically increased over the last three decades, in accord with well known changes in sentencing policy. But that average masks wide variation among states. Per 100,000 population, individual state's incarceration rates range from 117 to 743. To highlight some comparisons, Connecticut's rate is 537, while neighboring Massachusetts' is 292. North Dakota's is 144 per 100,000, but South Dakota's is more than double that—328. South Carolina's is 573, while Tennessee's is 325 and North Carolina's is 420. Arizona's rate stands at 525; next door, New Mexico's is barely half that at only 286. Delaware is high above the average at 743; Rhode Island is well below it at 348. All states' rates increased in recent decades, but some increased at rates much greater than others. Jurisdictional competition seems to offer little explanatory power here. What accounts for the variation?

Familiar explanations include variations in crime rates and in social factors such as racial demographics and economic marginality or employment conditions. Recently, Bill Stuntz has also stressed a correlation between policing and prison: the more police a jurisdiction has, the lower its incarceration rate tends to be.¹¹ To these explanations, criminologist Vanessa Barker has recently added an innovative account of variations in states' political contexts, democratic processes, and governance strategies that suggests how state officials and citizens can choose to respond very differently to similar trends in crime problems.¹²

In brief, Barker closely studied a small set of states as case studies, selected because they represent different approaches to state governing structures and democratic processes. Building on existing literature, Barker characterizes state governments by both their rates of civic engagement and their degree of governmental centralization or state activism; these parameters yield three broad types of state political structures: populist, pragmatic, and participatory democracy. The centralization parameter focuses on formal government structures, such as legislative organization and use of popular referenda. The civic engagement data comes in part from data on differing voter participation rates and, interestingly,

¹⁰ For convenience initially, I use figures from BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1998, tbl. 5.4. For more recent data showing comparable contrasts, see WILLIAM J. SABOL, TODD D. MINTON AND PAIGE M. HARRISON, BUREAU OF JUST. STAT. BULL., PRISON AND JAIL INMATES AT MIDYEAR 2006 (2007).

¹¹ See William J. Stuntz, *Accountable Policing*, *Harvard Public Law Working Paper No. 130*, SOC. SCI. RES. NETWORK, available at <http://ssrn.com/abstract=886170> (last modified July 5, 2006).

¹² Vanessa Barker, *The Politics of Punishing: Building a State Governance Theory of American Imprisonment Variation*, 8 PUNISHMENT & SOC. 5 (2006) [hereinafter Barker, *Governance Theory*]; Vanessa Barker, *The Politics of Punishing: A Comparative Historical Analysis of American Democracy and Punishment Variation, 1965–Present* (unpublished doctoral dissertation).

Barker's four types of state political structures or types of governance are populist, participatory democracy, pragmatism, and patronage-oriented. See Barker, *Governance Theory*, *supra* at 10 & tbl.1.

levels of civic engagement as measured by sociologist Robert Putnam's social capital index.¹³ In the interest of brevity, I will highlight two of Barker's contrasting examples, selected because both faced similar rising crime rates starting in the 1960s, though their different governing practices seem to account for much of the difference in their responses to those challenges.

California has above-average incarceration rates and below-average voter-participation rates and indicia of social capital, combined with a populist governance form that tends to encourage conflict among social groups rather than participatory civic involvement. California's series of harsh sentencing policies since the 1960s, enacted by the legislature as well as by popular initiative, represent responses "tied to the insecurities and concerns of 'the people' rather than to the dispassionate treatment models espoused by the state's technocrats and criminological experts"¹⁴ or the more moderate policy options generated in more participatory forms of governance.

By contrast, Washington is a state with a stronger tradition of participatory democracy including wide involvement in town hall-style meetings, hybrid citizen-state councils, and civic associations. In contrast to California, its voter participation rate and social capital rank are well above average. Perhaps as a consequence, its incarceration rate is well below average, even though it faced similar circumstances of rising crime starting in the 1960s. Washington explored a range of criminal justice policy options in a deliberate process of town hall meetings and public hearings that eventually resulted in the state's sentencing guidelines in 1983, combined with a sentencing commission charged with exploring alternatives to incarceration. Other state policies turned to situational crime control techniques (street lighting and the like) rather than additional punitive strategies.¹⁵

Washington's more recent three-strikes legislation is more narrowly drawn than California's and has not dramatically pushed up the prison population.¹⁶ Barker credits the state's participatory governance structures and deliberative process that relies on wide civic engagement for moderate outcomes in punishment policy. More broadly, she concludes, surprisingly, that "American states with widespread citizen participation tend to keep imprisonment relatively low even in the face of high crime."¹⁷ If this is so, it undermines the jurisdictional competition model as an explanation for harsh criminal justice policies. On the other hand, it is

¹³ See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000). Putnam defines social capital as "social networks that tend to bring about increased reciprocity and trust among individuals," Barker, *Governance Theory*, *supra* note 12, at 8, and using a large database he ranks states by rates of civic engagement and social capital.

¹⁴ Barker, *Governance Theory*, *supra* note 12, at 14.

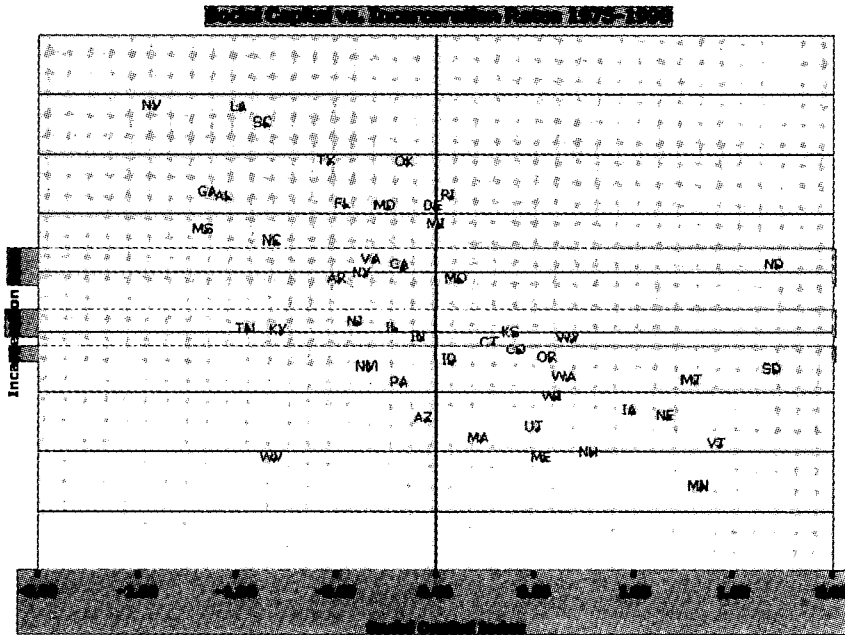
¹⁵ See *id.* at 16–19.

¹⁶ *Id.* at 17–19.

¹⁷ *Id.* at 6.

consistent with the thesis familiar among legal scholars that institutional design affects substantive policy outcomes.

As a modest test and extension of part of Barker’s thesis, I cross-referenced data from Putnam’s social capital index, in which he ranks state populations by their rates of civic engagement, with recent data on state incarceration rates.¹⁸ The results are notable. As the map¹⁹ below illustrates, states with below-median rates of civic engagement (regardless of state governance structure) overwhelmingly have above-median incarceration rates. Conversely, states with high civic-engagement rates predominantly have below-average percentages of their citizens in prison. More specifically, 16 of 24 states that rank below the median on the social capital index also have above-average incarceration rates; three of the remaining 24 states have prison rates right at the mean. On the other hand, 18 of 22 states that have above-mean social capital measurements also have below-average incarceration rates. (One state, Delaware, ranks exactly on the social-capital mean and has an above-average prison rate.)



¹⁸ See PUTNAM, *supra* note 13, at 19 (defining defines “social capital” as social networks that tend to bring about increased reciprocity and trust among individuals).

¹⁹ Putnam did not generate social-capital data for Alaska and Hawaii, so those states are not included here.

Incarceration rates are in large part functions of legislative and gubernatorial policy making. But prosecutors play a role as well, and these variations in social and political culture—and to a lesser degree in governance structure—seem likely candidates for also having some influence on prosecutors' decision making (as well as on legislatures' decisions on criminal justice issues other than sentencing, such as crime creation). To explore the connection further between local political cultures and prosecutor behavior, one would need data on variations in the political structure of prosecutors' political accountability. A large majority of states use similar systems of direct, quadrennial election of head prosecutors by local jurisdictions. But how prosecutors are influenced by other actors and structures, such as local courts, sentencing guidelines, and local political culture, likely varies much more, as does the nature of prosecutors' political interaction with local constituencies. I have not yet gathered that data and am not aware of other work on this topic. Yet, from existing broad-level descriptions of state prosecutors' responsiveness to local political preferences,²⁰ from studies of state-level differences in monitoring effects of sentencing commissions and legislatures,²¹ and from more detailed accounts of wide variation in prosecutors' approaches to a range of important policy choices, including plea bargaining practices, open discovery, drug court participation,²² the role of *variations* in democratic structures and local political practices seems a promising avenue for explanatory accounts of prosecutorial discretion in criminal justice policymaking. Moreover, crime rates can vary significantly from city to city within states, a fact that that both likely affects and is affected by prosecutorial discretion.²³ The design of democratic practices, in conjunction with varying patterns of civic life, hold the prospect for more descriptive power about criminal justice policy than the pressures of jurisdictional competition, or than more familiar explanations such as rising crime rates or a social consensus for harsh retributivism.

²⁰ Richman & Stuntz, *supra* note 1.

²¹ For an analysis of how state judges in Virginia are monitored by the legislature that reappoints them through data gathered by the state sentencing commission, see Nancy King & Roosevelt Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885 (2004). If such monitoring disciplines judges' discretionary sentencing choices, it seems likely to at least indirectly affect as well the prosecutors who work within the sentencing constraints that judges abide by.

²² For a major study of a ground-level courthouse relations among prosecutors and other local actors in criminal justice systems, documenting informal practices among these players, see generally ROY B. FLEMMING ET AL., *THE CRAFT OF JUSTICE* (1992); PETER F. NARDULLI ET AL., *THE TENOR OF JUSTICE* (1988).

²³ For data on variations in city-level crime rates, see the compilation of FBI and U.S. Census Bureau data at CityMayors.com, which ranks cities by rates of reported violent crimes. See *Virginia Beach Named the Safest Big US City*, CITY MAYORS, June 9, 2004, available at http://www.citymayors.com/society/uscities_safest.html (using 2004 data and reporting, for example, Fort Worth's violent crime rate per 100,000 citizens at 712 compared to Dallas' rate of 1438; lowest reported violent crime rate in Virginia Beach, Va., at 224/100,000, while the highest reported rate was Atlanta at 2,065/100,000).

III.

If democratic practices hold much potential for explaining criminal justice policymaking by prosecutors and other players, they nonetheless seem a challenging site from which to generate prescriptive ideas for improving criminal justice. Political structures and patterns of civic life are not easily amenable to change, and any movement for change in those arenas is unlikely to be driven primarily by a goal of improving criminal justice administration. While some jurisdictions may have the good fortune to have well-functioning political cultures that, among other things, allow moderate, thoughtful prosecution practices to thrive, others do not. With that latter group particularly in mind, I now turn from systemic or macro-level context explanations to other possibilities for mediating some of the undesirable incentives and practices that arise from the interaction of expansive criminal codes and expansive prosecutorial discretion. As nearly all scholars have concluded, prospects for effective regulation here are slim.²⁴ Below I provide a brief account of those prospects and suggest a possibility for a doctrinal change that could play a modest role in checking prosecutorial abuse of one aspect of overcriminalization.

Clearly prosecutors in many jurisdictions retain the leeway—and sometimes the incentive—to charge and bargain harshly in ways that exploit overexpansive criminal codes and sentencing laws. The overcriminalization that prosecutors sometimes exploit takes three forms. The least significant is probably criminalization of conduct that few people think is morally wrong, or for which there is no persuasive argument of blameworthiness. Such statutes exist; adult consensual sex crimes probably fit this category,²⁵ as do the notorious federal misdemeanors of misusing Smokey Bear’s image or disturbing mud in a federal cave.²⁶ But these crimes are largely or completely unenforced, and the political incentives on prosecutors will keep them that way. The American political system is fairly good at prompting legislative repeal of crimes that no longer have wide popular support but significantly interfere with people’s personal, social and commercial lives. Look at our history of repealing everything from nineteenth century commercial crimes against wholesalers to formerly widespread prohibitions on gambling, alcohol sales, contraceptive distribution, and

²⁴ See, e.g., Richman & Stuntz, *supra* note 1. For a partial dissenting view based on recent developments in two states, see Ronald Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005).

²⁵ For historical accounts of how outdated and sparsely enforced sodomy laws can nonetheless be employed by local officials to arrest, prosecute or harass gays and lesbians, see WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS* (2008).

²⁶ 16 U.S.C. §§ 4302(1), 4302(5), 4306(a)(1), 4306(b) (2006) (offense to disturb a cave); 18 U.S.C. § 711 (2006) (criminalizing unauthorized use of the “Smokey Bear” name).

midwifery.²⁷ The political process is hardly perfect at managing overcriminalization; problematic statutes and enforcement policies remain. Scholars have offered proposals for addressing remaining strands of overcriminalization. Doug Husak and Bill Stuntz have both suggested that courts develop—for the first time in our history—a constitutional law of substantive criminal law, a doctrine that could overturn criminal statutes not grounded in a workable application of the harm principle or a theory of moral blameworthiness.²⁸ I have doubts about the feasibility of such doctrines,²⁹ but no alternative to such judicial review or the political process for the problem of excessive criminalization seems on the horizon.³⁰

The second, much more problematic aspect of overcriminalization is excessive punishment attached to uncontroversial (or at least plausible) criminal statutes. Here the political constraints on prosecutors' (and judges') implementation are much weaker. Some mandatory sentencing regimes leave those actors little way to avoid overly harsh sentencing consequences for legitimate prosecutions; in other cases, prosecutors have the power to invoke or forgo sentence enhancements (say, under recidivist sentencing statutes) but little political incentive to do so.³¹ On the whole, public monitoring and democratic process seem to work less well at moderating harsh sentencing than at eventually winning repeal or non-enforcement of outdated statutes. But in addition to Barker's evidence for the salutary effect of some democratic processes and civic participation rates, there are nonetheless some countervailing pressures. Some state sentencing guideline systems, such as Virginia's, work well at monitoring regimes on trial judges and prosecutors to keep their discretionary sentencing choices in line with voluntary guideline standards.³² (Virginia's incarceration rate is only slightly above the national average.)³³ In Virginia and in other states, budget pressures can be a significant force in moderating incarceration rates and

²⁷ For a brief account of this history of legislative decriminalization, see Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223 (2007).

²⁸ See DOUGLAS N. HUSAK, OVERCRIMINALIZATION (2008); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

²⁹ See DARRYL K. BROWN, HISTORY'S CHALLENGE TO CRIMINAL LAW THEORY, CRIMINAL LAW AND PHILOSOPHY (forthcoming 2009).

³⁰ *But see id.* (suggesting administrative bodies play a greater role in drafting substantive criminal law).

³¹ For an example of state law granting prosecutors power to forgo sentence enhancements (and an unusual state rule requiring such decisions to be made based on written policy), see *State v. Brimage*, 706 A.2d 1096 (N.J. 1998). For an example of a state statute giving prosecutors power to invoke mandatory sentences for repeat offenders, see Fla. Stat. § 775.084 (2008).

³² See King & Noble, *supra* note 21.

³³ See BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1998, tbl 5.4, *supra* note 10.

prompting policy movement toward alternatives to prison.³⁴ And Ron Wright has identified nascent examples in a couple of states that hold potential as models for state sentencing commissions prompting development of *prosecutorial* guidelines that could have a significant moderating effect.³⁵ Judicial intervention as an alternative to these political mechanisms seems at least as unlikely as it is with respect to expansive substantive rules. The Supreme Court has been active in recent years in revising sentencing practices, but it has largely shut down the prospect of any meaningful proportionality review that could put an outer limit on incarceration sentences.

The final form of overcriminalization takes the form of redundant criminalization—statutes that prohibit conduct that is already criminalized, or largely so, by other statutes. Redundant and overlapping criminalization poses a considerable risk for prosecutorial misuse in a relatively low-visibility manner that is hard to monitor. Prosecutors can stack charges that drive defendants into hard bargains; even when charges are ultimately dropped, they have done their work as bargaining chips. Some prosecutorial charging guidelines formally discourage this tactic, though none are enforceable by actors outside the prosecutor's office.³⁶ Even if courts were to surprise us and develop constitutional supervision of criminal law's content, much of this form of overcriminalization would not be affected because most such statutes criminalize conduct that is uncontroversial in its wrongfulness.

The common law has long had a weak doctrine for dealing with a small portion of prosecutorial overreaching through overlapping statutes. The merger doctrine, with some variation among jurisdictions, generally holds that lesser included offenses merge into greater offenses for purposes of punishment. Some jurisdictions more broadly apply the doctrine than others, especially in felony murder contexts to prohibit punishment on a greater range of underlying felonies. But many states have followed Virginia's pattern of narrowly construing the doctrine to do very little work. The same is true for the somewhat related doctrine in some states (such as Virginia)³⁷ that have statutory or constitutional rules for a "same episode" approach to double jeopardy doctrine. The Model Penal Code's

³⁴ See Barker, *supra* note 12; Christopher Swope, *Revising Sentences*, in GOVERNING ISSUES AND APPLICATIONS FROM THE FRONT LINES OF GOVERNMENT 93 (Alan Ehrenhalt, ed. 2005); ROBIN CAMPBELL, VERA INST., DOLLARS AND SENTENCES: LEGISLATORS' VIEWS ON PRISONS, PUNISHMENT AND THE BUDGET CRISIS (2003).

³⁵ Ronald Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005).

³⁶ See *id.* at 1024, nn.57 & 58 (Washington state's statutory prosecutorial guidelines codify a no-overcharging rule but forbid judicial enforcement).

³⁷ A Virginia statute provides that "[i]f the same act be a violation of two or more statutes, . . . conviction under one of such statutes . . . shall be a bar to a prosecution or proceeding under the other or others." VA. CODE ANN. § 19.2-294 (2008). Virginia courts have repeatedly construed this provision as narrowly as possible, so that bars only successive prosecutions initiated after a conviction and thus works as only as a narrow joinder rule.

relevant provision, section 1.07,³⁸ is similarly limited and—relying on the “included offense” concept—states only that a defendant may not be convicted of more than one offense arising from “the same conduct” if “one offense is included in the other.” All of these approaches have had limited effectiveness and have “not proven useful or clear as a guide to determining when multiple liability is appropriate.”³⁹

Despite courts’ traditional approach to narrow construction of these doctrines and statutory formulations, the expansion of both the merger and same-conduct double jeopardy doctrines could be a plausible avenue for judicial supervision of charging practices that exploit closely overlapping statutes. To be sure, this form of review would be more intrusive than most courts have engaged in through these doctrines. It would require courts not merely to examine whether two charges share elements, or whether the prosecution is using the same facts to prove each statute’s elements (familiar analyses in double jeopardy doctrine), but whether the statutes serve the same functional purpose or protect against the same harm and public interest, such that punishment under both for a single act constitutes double punishment. Under merger doctrine, courts engage in this sort of interest or statutory purpose scrutiny, but generally very differentially. And under same-conduct double jeopardy doctrine, several state courts are experienced in close factual inquiry into the facts prosecutors use to prove charges under different statutes.⁴⁰

A statutory provision requiring courts to engage in this sort of analysis was proposed in code revision projects in Illinois and Kentucky. (Paul Robinson and Michael Cahill were key players in drafting those reform proposals.) That provision would bar conviction for offenses “based on the same conduct” if “the harm or wrong of one offense is . . . [inter alia] entirely accounted for by the other offense.”⁴¹ Rather than limiting courts to a comparison of specific elements between charged offenses, this approach focuses courts’ attention on the gravamen of each offense.

The great expansion of criminal codes in the last several decades along with the now-established ubiquity of plea bargaining practice that is largely unregulated by sources other than prosecutors themselves, suggests a justification for expanding courts’ longstanding role in limiting multiple liability and punishment

³⁸ See MODEL PENAL CODE § 1.07 (1985).

³⁹ Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for a Model Penal Code Second*, 1 OHIO ST. J. CRIM. L. 599, 605 (2004) (criticizing M.P.C. § 1.07).

⁴⁰ The U.S. Supreme Court rejected the same-conduct test under the Fifth Amendment Double Jeopardy Clause, after a three-year experiment, in *United States v. Dixon*, 509 U.S. 688 (1993), but several states continue to use the doctrine as a matter of constitutional or statutory law.

⁴¹ PROPOSED ILLINOIS CRIMINAL CODE REWRITE & REFORM COMMISSION, FINAL REPORT OF THE ILLINOIS CRIMINAL CODE REWRITE & REFORM COMMISSION § 254(1)(a) (2003); see also CRIM. JUST. COUNCIL, FINAL REPORT OF THE KENTUCKY PENAL CODE REVISION PROJECT OF THE CRIMINAL JUSTICE COUNCIL § 502.254(1)(a) (2003), available at <http://www.law.upenn.edu/fac/phrobins/kentucky/>.

beyond the traditional confines of included-offense analysis. Merger doctrine arose in the common law at a time when codes were small and contained few overlapping or redundant statutes. Merger doctrine, in effect, governed most cases of overlapping crimes, and thereby prevented most cases of double punishment brought on by charge stacking. Judicial supervision of prosecutorial charging, on this picture, was fairly thorough. Judges were an effective check on prosecutor's attempts at overreaching. As codes expanded and overlap increased, however, merger doctrine did not. The doctrine's reinvigoration for the present state of criminal law could provide an effective mechanism for such supervision, with a doctrinal pedigree more familiar historically than the one scholars hope for in the form of constitutional supervision of criminal law's substantive content. Note that such a doctrine would regulate prosecutors even before the stage of formal charging, because both parties should be able to recognize the emptiness of threats to charge overlapping crimes that would be blocked by a broad merger rule.

Such a strategy would be a partial solution, to be sure. A doctrine would have to be rigorous enough to check familiar sorts of overlapping charges not covered by current merger doctrine—say, armed robbery, use of a gun in a felony, and possession of a gun by a convicted felon.⁴² And, as noted above, this strategy gets at only one piece of the puzzle—it doesn't address the substantial power prosecutors derive in bargaining from excessive sentencing provisions—what we can call the *Bordenkircher* problem.⁴³ But such a doctrinal development could be more piece in the evolution of criminal justice systems to help restore some balance.

IV. CONCLUSION

Prosecutors, like legislators, are somewhat susceptible to an arms race dynamic of jurisdictional competition that can increase punishment severity, the scope of substantive law, and enforcement priorities. But those competitive incentives seem to explain only a limited set of crimes and practices in criminal justice, especially those targeted to mobile repeat offenders. Interestingly, vibrant participatory democracy, with citizens involved in civic as well as political life, seems a likely candidate for being a stronger influence—and moderating influence—on criminal justice practice and policy. Citizens and policymakers have many options, inside and outside criminal justice, for addressing crime and public safety, and strong democratic institutions may play a bigger role shaping those choices than competitive pressures to maximize criminal law's mechanisms of deterrence and incapacitation. But many American jurisdictions lack such institutionalized democratic practices, and it is unclear in any case how much those

⁴² See *Morris v. Commonwealth*, 609 S.E.2d 92 (Va. Ct. App. 2005).

⁴³ See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); see also William J. Stuntz, *Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law*, in *CRIMINAL PROCEDURE STORIES* 351 (Carol S. Steiker ed., 2006).

practices shape prosecutorial policies in particular, especially plea bargaining. We have seen the gradual growth of modest regulation of prosecutorial practices, mostly by prosecutors themselves, although sometimes in response to public scrutiny or courts' prompting. Nonetheless, a larger role for the judiciary in this supervisory project would be welcome, and some regulation of overlapping crimes and charge stacking through an expanded merger doctrine is one additional option courts could develop in that new role.