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Charles Lindergh, Caryl Chessman, and the Exception Proving the (Potentially Waning) Rule of Broad Prosecutorial Discretion

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Perhaps ever since legislatures started defining crimes, they have given prosecutors a variety of ways to prosecute the same conduct. Courts have, almost without exception, deferred to legislatures' broad definitions of crime. Kidnapping statutes are the exception. The high profile execution of Caryl Chessman in 1960 for kidnapping prompted considerable scholarly criticism and prompted courts nationwide to impose limiting constructions on kidnapping statutes. Recently, scholars have called for a curb in prosecutorial discretion generally, attributing the explosion in the prison population to broad criminal codes, mandatory minimums, and sentencing guidelines that provide prosecutors leverage in plea negotiations. In the last two terms, the United States Supreme Court appears to have taken on this concern, limiting the scope of federal criminal statutes, twice in cases involving criminal doctrines that are part of most state criminal codes, and once in a case expressly recognized by many of the parties as an example of overcriminalization. The Supreme Court has rarely considered "ordinary" criminal law doctrines, typically interpreting complex or jurisdictional aspects of federal criminal statutes. And neither the Supreme Court, nor any appellate court in non-kidnapping cases, has used overcriminalization as a basis for limiting the scope of a criminal statute. Academics have long criticized the growing prison population, often attributing the phenomenon to increasing prosecutorial discretion, a product of overcriminalization. The Supreme Court's recent cases suggest that America's mass incarceration epidemic may be able to

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prompt reforms in a way that Caryl Chessman's execution prompted reforms in kidnapping laws.

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I. INTRODUCTION

Historically, courts have accepted – and indeed been a part of – the transfer of power from judges to prosecutors. They have accepted and created broad definitions of crimes that provide prosecutors in relatively less serious cases the option of obtaining more severe sentences, or using the threat of a broadly defined crime as leverage to obtain a plea. Kidnapping has, however, been an exception to this rule. One high-profile execution for kidnapping in 1960 led courts nationwide to impose limiting constructions on kidnapping statutes to prevent excessive discretion from vesting in the hands of prosecutors. Recent decisions from the United States Supreme Court suggest that courts may be expanding their concern about prosecutorial discretion beyond the anomalous example of kidnapping.

Over the last two decades, academics have raised substantial concern about the effect of the ever-expanding scope of substantive

criminal law.[1] The most frequently offered explanation for the expanding definition of crimes is that the political popularity of tough-on-crime laws has led legislatures to create a host of new crimes – carjacking and RICO, for instance – that carry substantial penalties.[2] The reality is far more complex. Even traditional crimes, such as burglary, robbery, and kidnapping have, through a concert of action between courts and legislatures, been given sufficiently expansive definitions that encompass even nominal or incidental criminal conduct. Additionally, courts have been the primary actors in fashioning and retaining broad theories of liability for group criminal conduct and felony murder. Complicit themselves in the expanding definitions of crime, courts are rarely heard to express concern, frequently heard from academics, that substantive criminal law is shifting power from judges to prosecutors.[3]

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[1] Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539, 1579 (2014); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 81–82, 260 (2011); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 887 (2004) (observing that frequently drafted "broad language in criminal statutes may reflect an effort to delegate the definition of terms to courts and executive officials").

[2] *See, e.g.*, Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 806 (2003) ("Legislators pass myriad new criminal statutes to prove their toughness on crime."); Michael A. Simons, *Prosecutorial Discretion Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 897–98 (2000) (describing Congress as primarily responsible for expansion of scope of federal criminal powers); Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997); Gerard E. Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661, 723 (1987) (observing that RICO "is so much broader than other criminal statutes" that the amount of discretion it confers on prosecutors may be seen as "different in kind" than other statutes that overlap with other offenses); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 518–19 (2001) (describing expansion and contraction of "core" crimes that involve judicial interpretation of doctrines, but observing that legislatures have the primary role in defining new types of crimes, which are defined quite broadly); Jay M. Zitter, *Validity, Construction, and Application of State Carjacking Statutes*, 100 A.L.R.5th 67 (2002) (observing that "the area of behavior criminalized by state carjacking statutes overlaps a number of other state statutes," requiring courts to consider whether crimes implicate double jeopardy issues).

[3] By contrast, judges are quick to complain about procedures, particularly relating to sentencing, which shift powers to prosecutors. *See, e.g.*, Kate Stith & Jose Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1265 (1997); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 924–25 (1991). Judges have also been heard to complain about procedural rules giving procedural advantages to prosecutors in other

There is, however, a glaring exception to the trend toward ever-expanding criminal statutes. Decisions interpreting the definition of state kidnapping laws frequently express the concern that such laws be interpreted narrowly so as not to permit that charge when the victim's detention is merely incidental to another crime.[4] Remarkably, courts interpreting kidnapping statutes frequently express concern that a broad interpretation of these statutes would vest too much power in the hands of prosecutors.[5]

The origins of this concern, about the scope of kidnapping statutes, lie in the once famous case of Caryl Chessman, sentenced to die in California for kidnapping women he briefly detained as he robbed and sexually assaulted them.[6] Neither robbery nor rape carried the death sentence in California at that point, but kidnapping did in California and several other states. Kidnapping laws became considerably more broad and punitive with the outrage over the 1932 kidnapping of the infant son of Charles Lindbergh in 1932, soon after the elder Lindbergh made international headlines when he became the first American to fly solo across the Atlantic Ocean.[7] Commentators were quick to criticize the interpretation of a kidnapping law in a California case that allowed a

contexts. *See* United States v. DiNapoli, 8 F.3d 909, 917 (2d Cir. 1993) (Pratt, J., dissenting) (lamenting that rejecting efforts to admit grand jury testimony against prosecutors "leave[s] the determination of whether grand jury testimony may be presented at trial by a defendant entirely in the prosecutor's control, a result that seems at odds with the main objective of going to trial – permitting the jury, not the prosecutor, to determine what is the truth."). *See also* Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1155 (2005) (observing that "the Supreme Court, even in this conservative political period, continues to require costly procedural safeguards that go beyond what elected legislatures provided by statute," but shows "great deference to the choices these same legislatures make about what conduct may be made criminal and how severely it may be punished").

[4] *See* John L. Diamond, *Kidnapping: A Modern Definition*, 13 AM. J. CRIM. L. 1 (1985) (describing kidnapping statutes and their interpretation in California, Michigan, New York, and Kansas and the efforts taken by those states to prevent kidnapping definitions to include acts merely incidental to other crimes).

[5] *See, e.g.*, State v. Salamon, 949 A.2d 1092, 1118 (Conn. 2008) (objecting that broad interpretation of kidnapping "has afforded prosecutors virtually unbridled discretion to charge the same conduct either as kidnapping or as an unlawful restraint despite the significant differences in the penalties that attach to those offenses").

[6] *See* Comment, *Robbery Becomes Kidnapping*, 3 STAN. L. REV. 156 (1950); Recent Decisions, *Judicial Construction of Kidnapping Statutes*, 15 ALB. L. REV. 65 (1951).

[7] *See* MODEL PENAL CODE § 212.1 Kidnapping, cmt.1, at 11 (Tentative Draft No. 11, 1960).

prosecutor, at his discretion, to decide whether to charge a rape as a kidnapping and obtain the death penalty.[8] The case attracted attention in larger circles when the defendant, Caryl Chessman, published his first book and became America's first condemned celebrity author.[9]

The authors of the Model Penal Code, who released a first draft of their proposed kidnapping statute three weeks after Chessman's execution, defined the crime in such a way as to prevent its use where the detention of a person was merely incidental to another crime.[10] They described the Chessman case as a paradigm example of an abusive prosecution under a kidnapping statute.[11]

The Model Penal Code also sought to limit the definition of other crimes and theories of liability that would have similarly prevented the use of broadly defined crimes as leverage against defendants who were more appropriately charged for less serious offenses.[12] Their reform proposals for burglary and robbery – and their efforts to limit the scope of group culpability – were adopted almost nowhere.[13] The MPC's kidnapping reform, to the contrary, was widely accepted with courts and legislatures very often expressly recognizing that the basis of the reform was to prevent excessive discretion from vesting in the hands of prosecutors with the *Chessman* case being offered as a paradigm example of an "abusive prosecution."[14]

For roughly the past two decades, academics have strenuously

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[8] *See, e.g.*, authorities cited *supra* note 6.

[9] *See* WILLIAM M. KUNSTLER, BEYOND A REASONABLE DOUBT? THE ORIGINAL TRIAL OF CARYL CHESSMAN (1961); WILLIAM MACHLIN & WILLIAM READ WOODFIELD, NINTH LIFE (1962); THEODORE HAMM, REBEL AND A CAUSE: CARYL CHESSMAN AND THE POLITICS OF THE DEATH PENALTY IN POSTWAR CALIFORNIA, 1948–1974 (2001).

[10] MODEL PENAL CODE § 212.1 Kidnapping (Tentative Draft No. 11, 1960).

[11] *Id.* cmt.1, p.12 n.4 (observing not only the "extremely artificial character" of the kidnapping count in the Chessman case, which permitted a death sentence because the slight physical movement was incidental to the crime of robbery, but because there was no proof that the victims had not already been completed at the time of the slight movement).

[12] MODEL PENAL CODE § 222.1 Robbery (requiring serious bodily injury or attempted serious bodily injury as opposed to simple force); MODEL PENAL CODE § 221.1 Burglary (requiring trespass and prohibiting conviction for both burglary and target crime); § 2.06 Complicity, comment 6(a) (rejecting the Pinkerton doctrine).

[13] *See* Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L. J. 286, 289 (2012) (observed that many of the proposals of the Model Penal Code failed because its proposals were being considered as legislatures pursued a strong law and order agenda).

[14] *See, e.g.*, State v. Dix, 193 S.E.2d 897, 903–04 (N.C. 1973); State v. Innis, 433 A.2d 646, 653 (R.I. 1981).

objected to the concentration of power in the hands of prosecutors through broadly defined criminal statutes.[15] No individual case has stood out in twenty-first-century America, however, to exemplify the concerns about excessive prosecutorial discretion the way Caryl Chessman's case did in the 1950s. America is nevertheless experiencing a high-profile explosion of its prison population, which academics frequently blame on the power given to one of the sides in the adversarial criminal system.[16]

The decades-old War on Drugs and the incarceration of large numbers of non-violent drug offenders – though not as central to present incarceration rates as critics frequently allege – has raised the public's concern over justifications for warehousing a substantial portion of the nation's population.[17] Racially discriminatory enforcement patterns have further made our penal policies appear not only unwise but unfair.[18]

As this epidemic of incarceration has grown, the Supreme Court, in a series of highly noticed opinions, shifted power back to judges to determine how defendants should be sentenced.[19] Last term, in two

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[15] *See, e.g.*, William J. Stuntz, Bordenkircher v. Hayes: *The Rise of Plea Bargaining and the Decline of the Rule of Law* (Harvard Law Sch. Pub. Law, Working Paper No. 120), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=854284.

[16] *See* STUNTZ, *supra* note 1, at 260; Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L. J. 47 (2008) (explaining connection between manner in which prosecutors are exercising their discretion and rate of incarceration); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 718–19 (1996) (describing "the prosecutor [as] the preeminent actor in the system" and, as such, primarily capable of reducing prison populations).

[17] David Cole, *Formalism, Realism and the War on Drugs*, 35 SUFFOLK L. REV. 241, 250 (2001) ("The war on drugs has been a critical factor in the explosion in incarceration rate in America over the past twenty-five years.").

[18] *See, e.g., id.* at 248 ("[T]he war on drugs has largely been a war on minorities."); Andrew D. Black, *"The War on People": Reframing "The War on Drugs" by Addressing Racism within American Drug Policy Through Restorative Justice and Community Collaboration*, 46 U. LOUISVILLE L. REV. 177 (2007); Frank Rudy Cooper, *We Are Always Already Imprisoned: Hyper-Incarceration and Black Male Identity Performance*, 93 B.U. L. REV. 1185 (2013) (attributing racially skewed mass incarceration rates to the war on drugs).

[19] *See* United States v. Booker, 543 U.S. 220 (2005) (rendering Federal Sentencing Guidelines advisory rather than mandatory). *See also* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L. J. 1420, 1427 (2008) ("*Booker* and its progeny . . . allow judges to provide a counterweight to prosecutorial leverage over defendants."). Judge James Carr of the Northern District of Ohio objected to the unregulated prosecutorial power in the previously mandatory Federal Sentencing Guidelines and praised the fact that "*Booker* has restored judicial

barely noticed opinions, the Court did something it almost never does – it considered the scope of federal statutes that mirror traditional forms of criminal liability under state law. One involved accomplice liability,[20] the other a particular type of felony murder.[21] In each case, the Court restricted the scope of liability, holding that a defendant is not liable for the merely foreseeable actions of a confederate[22] and prohibiting a felony murder charge where the defendant's action was a joint cause of the victim's death.[23] In the 2014 term, the Court reversed a conviction involving a statute described by various *amici* and academics as an example of overcriminalization.[24] Each of these opinions is inconsistent with the expansive reading courts traditionally give to criminal statutes, but quite consistent with academic criticism of excessive prosecutorial power and widely shared concerns about America's incarceration explosion.

Courts obviously have a limited ability to curtail legislative efforts to expand the scope of prosecutorial discretion,[25] but these recent decisions bring a new perspective. Until these cases, with the exception of kidnapping statutes, courts have largely ignored the increasing transfer of power to prosecutors.

The attention given to America's incarceration rate may be driving the Court's willingness to reconsider long-accepted doctrines of substantive criminal law. In the highly controversial and very high profile context of gay marriage, William Eskridge has counseled that the Supreme Court should avoid moving too far ahead of public opinion.[26]

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discretion." James G. Carr, *Some Thoughts on Sentencing Post*-Booker, 17 FED. SENT'G REP. 295, 295–97 (2005).

[20] Rosemond v. United States, 134 S. Ct. 1240 (2014).

[21] Burrage v. United States, 134 S. Ct. 881 (2014).

[22] *Rosemond*, 134 S. Ct. at 1252.

[23] *Burrage*, 134 S. Ct. at 886.

[24] *See* Stephen F. Smith, Yates v. United States*: A Case Study in Overcriminalization*, 163 U. PA. L. REV. ONLINE 147 (2014); Paul J. Larkin, Jr., *Oversized Frauds, Undersized Fish, and Deconstruction of the Sarbanes-Oxley Act*, 103 GEO. L. J. ONLINE 17 (2013).

[25] *See* Todd Haugh, *SOX on Fish: A New Harm of Overcriminalization*, 109 NW. U. L. REV. ONLINE 152 (2015) (observing that it would take a lot of cases limiting the scope of criminal statutes "to remedy the problem of overcriminalization").

[26] Eskridge was suggesting that the Supreme Court should avoid a ruling as controversial as one protecting gay marriage until public opinion supported the position. *See* Jeffrey Rosen, *What's a Liberal Now?*, N.Y. TIMES, May 26, 2009, at MM50. Michael Dorf has concluded that this is precisely why the Supreme Court has yet to declare gay marriage constitutionally protected. Michael C. Dorf, *Will the Lower Court*

Michael Klarman has demonstrated that in highly controversial areas, the Court has waited for public support before changing the *status quo*.[27] Prosecutorial prerogative, though certainly not as high profile or long-recognized as the prohibition on gay marriage,[28] nevertheless has quite the historical lineage.[29] The criminal justice system has, however, never previously been the subject of such a wholesale critique from so many corners.[30]

This article will suggest that these recent decisions, which reflect a concern about the power broad criminal statutes confer on prosecutors, represent a new way of viewing the judicial role in interpreting criminal statutes. The first section of the article will demonstrate how hard-wired courts are to allow broadly defined criminal statutes, or to expand the scope of criminal statutes themselves. The second section will look at the unique history of kidnapping law. The expansion and contraction of this law has from its earliest days been driven by high-profile events, the most relevant of which were the kidnapping of the Lindbergh baby and the execution of Caryl Chessman. The third section will then suggest that the Supreme Court's recent decisions in three cases involving the interpretation of criminal statutes, *Burrage v. United States*,[31] *Rosemond v. United States*,[32] and *Yates v. United States*,[33] deviate from the deference courts typically give criminal statutes, something that appears to be explained by the same combination of academic criticism and high-profile attention that led to kidnapping laws being more narrowly

Consensus on Same Sex Marriage Influence the Supreme Court, VERDICT (May 28, 2014), https://verdict.justia.com/2014/05/28/will-lower-court-consensus-sex-marriage-influence-supreme-court.

[27] Michael J. Klarman, Brown *and* Lawrence (*and* Goodridge), 104 MICH. L. REV. 431, 446–52 (2005).

[28] The earliest public prosecutors did not exist in the United States until the mid-nineteenth century. *See* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1327 (2002).

[29] *See* Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J. L. & PUB. POL'Y 715, 762 n.203 (2013) ("Prosecutorial discretion has an ancient lineage."); The Confiscation Cases, 74 U.S. 454, 457 (1868) (recognizing right of prosecution to dismiss case at any point); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375 (1973) (recognizing right of prosecutor not to bring charges); United States v. Batchelder, 442 U.S. 114 (1979) (recognizing right of prosecutor to select among identical provisions carrying different penalties).

[30] *See* STUNTZ, *supra* note 1, at 1 (describing "America's criminal justice system unravel[ing]" in the second half of the twentieth century).

[31] 134 S. Ct. 881 (2014).

[32] 134 S. Ct. 1240 (2014).

[33] 135 S. Ct. 1074 (2015).

defined. Whether these opinions represent a sea change in the relationship between courts, legislatures, and prosecutors remains to be seen, but unlike the *Chessman* case that prompted earlier reforms, the concerns that appear to have animated these decisions are not limited to a single doctrine of criminal law.

II. COURTS ALLOW BROAD CRIMINAL CODES TO TRANSFER DISCRETION TO PROSECUTORS

The breadth of the criminal code is frequently identified as the source of the enormous power prosecutors have in the criminal justice system.[34] This power is so complete that approximately 95% of all criminal convictions result from a defendant's agreement that he be punished rather than face the additional punishment the prosecutor is able to threaten.[35] Prosecutors have undeniably been given more power over the past few decades. The percentages of guilty pleas *and* average criminal sentences have increased over this period.[36]

Commentators have attributed the increase in prosecutorial power, at least in part, to ever broadening definitions of crimes – particularly to new forms of liability created by statute – as a major cause of longer sentences and more guilty pleas.[37] While the number of crimes on the books has dramatically increased from the relatively small number of crimes punished at common law (i.e., those crimes defined by often-ancient decisions of courts before only codified crimes could be punished[38]), the tolerance of courts for very broad interpretations of

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[34] STUNTZ, *supra* note 1, at 259; Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1030 (2006) ("[B]roader criminal laws and longer, mandatory sentences . . . make it easier for [prosecutors] to obtain defendants' cooperation in plea bargaining."). *See also* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2136 (1998) (observing that "[m]ost legal academics . . . would probably . . . agree that there are too many criminal statutes on the books, and that those statutes are frequently too broad and too vague").

[35] *See* Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L. J. 2650, 2655 (2013) (recognizing that 95% rate of plea bargaining led Supreme Court to consider effective assistance of counsel in the plea bargaining phase).

[36] STUNTZ, *supra* note 1, at 259.

[37] *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1155 (2008) ("Felony criminal and sentencing law is astonishingly broad because legislatures have every incentive to statutorily overcriminalize behavior, set unduly harsh punishments, and then leave to the executive the job of divining what degree of enforcement best serves deterrence and the public good generally."); Stuntz, *Pathological Politics*, *supra* note 2, at 512–19; Barkow, *supra* note 34, at 1025.

[38] Common law crimes existed in the United States until the early twentieth century.

crimes dating back to the common law cannot be overstated. Overcriminalization has not just been an act of legislative fiat,[39] driven by mandatory minimums,[40] or the consequence of statutes with innovative theories of liability or covering specialty crimes. RICO and carjacking, as examples, have given prosecutors new tools, but courts have also allowed the old tools to be expanded to cover a wide range of conduct. Perhaps as significantly, long-existing doctrines of substantive criminal law, most often developed by judges, have entrusted prosecutors with the same sort of power to which scholars attribute the recent explosion in incarceration.[41]

Very expansive definitions given to ancient crimes, including burglary, robbery, and kidnapping, cause them to overlap with less serious crimes.[42] Further, long-existing doctrines do not require prosecutors to demonstrate a defendant's culpability for aggravating

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John Jeffries has demonstrated that "[e]ven as late as 1900, there seemed to be no shared and settled understanding of judicial incompetence to create new crimes." John Calvin Jeffries, Jr., *Legality Vagueness and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 192–93 (1985). There were three substantial efforts at codification in the late eighteenth to the mid-nineteenth century, Thomas Jefferson's proposed code in Virginia, Edward Livingston's in Louisiana, and David Dudley Field's in New York. Only Field's was adopted, but not until 1881, though it was proposed in 1849. *See* Gail McKnight Beckman, *Three Codes Compared*, 10 AM. J. LEGAL HIST. 148 (1966); Maxwell Bloomfield, *William Sampson and the Codifiers: The Roots of American Legal Reform, 1820 1830*, 11 AM. J. LEGAL HIST. 234 (1967); Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1093 (1978).

[39] Perhaps this country's best-known criminal law scholar, Wayne LaFave, appears to have coined the term "overcriminalization," which he attributed to acts of the legislature. Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533–35 (1970).

[40] The best-known example of mandatory minimums being used to attempt to extract a plea occurred in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), in which the prosecutor threatened to use a three-strikes law to obtain a life sentence against the defendant for his third offense of forging and uttering a check for $88.30 if the defendant did not accept a sentence of five years at hard labor for this third offense.

[41] *See* discussion *infra* notes 42–139 and accompanying text.

[42] Academics have paid little attention to how these often-prosecuted state law crimes can be used to dramatically enhance the power of prosecutors. An exception is Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law*, 45 IND. L. REV. 629 (2012) and a particularly good student article using South Dakota law to demonstrate a larger national problem with the scope of burglary law, Jennifer Lamb Keating, State v. Burdick*: Has the South Dakota Supreme Court's Interpretation of Burglary Gone Too Far?*, 52 S.D. L. REV. 210 (2007).

circumstances, harms, or the acts of others once he has embarked on a criminal enterprise.[43] As penalties increase for crimes unrelated to culpability, prosecutors are able – without additional proof – to increase penalties, or to threaten to increase penalties.[44] If these traditional forms of liability are as broad as new esoteric or complex forms of legislation, then limiting their scope holds the key to reining in prosecutorial discretion. Such crimes, and traditional theories of accomplice liability for these crimes, after all, account for the bulk of all criminal prosecutions in this country.[45]

A. A Choice Among Crimes

Three very well known, and commonly prosecuted, crimes – burglary, robbery, and kidnapping – have been defined in ways that overlap with much less serious crimes. While the coverage of these crimes was often quite expansive from the outset, the definitions and interpretations of such crimes have not remained static. Through a concert of action, legislatures and courts have expanded the scope and reach of these common law crimes – and thus transferred power to – prosecutors.

Under modern interpretations of these laws, shoplifting can also be charged as a burglary;[46] a petty larceny as a robbery;[47] and an assault as a kidnapping.[48] At a minimum, a conviction on these greater charges exposes a defendant to the potential of a considerably longer sentence,

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[43] *See* Matthew A. Pauley, *The* Pinkerton *Doctrine and Murder*, 4 PIERCE L. REV. 1 (2005)(describing felony murder, liability for the natural and probable consequences of crimes aided, and the *Pinkerton* doctrine as being driving by explained by principles of negligence).

[44] *See* Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response,* 6 OHIO ST. J. CRIM. L. 453 (2009) (contending that while "prosecutors take advantage of . . . overlapping or redundant crimes," they also engage in substantial self-regulation that prevents political backlash).

[45] *See* Stuntz, *Pathological Politics*, *supra* note 2, at 518.

[46] *See, e.g.*, Jennifer Lamb Keating, State v. Burdick*: Has the South Dakota Supreme Court's Interpretation of Burglary Gone Too Far?*, 52 S.D. L. REV. 210 (2007); David A. Bailey, *When Did Shoplifting a Can of Tuna Become a Felony? A Critical Examination of Arkansas's Breaking or Entering Statute*, 63 ARK. L. REV. 269 (2010).

[47] Annotation, *Taking Property from the Person by Stealth as Robbery*, 8 A.L.R. 359 (1920).

[48] Frank J. Wozniak, Annotation, *Seizure or Detention for the Purpose of Rape, Robbery or Other Offenses Constituting Separate Crime of Kidnapping*, 39 A.L.R.5th 283, § 71a (1996).

even if the judge elects not to impose such a sentence.[49] Such convictions further taint defendants with the brand of felon where the facts would have also been completely described by a misdemeanor.[50] The pressure to plead, created by the filing of more serious charges, may be as severe as the life sentence the prosecutor was able to threaten under Kentucky's mandatory minimum law in *Bordenkircher v. Hayes*,[51] but these broadly defined laws create substantial exposure for defendants in ways that cannot be accounted for by their culpability.

The drafters of the MPC sought to rein in the scope of each of these crimes, but were successful in only one. As Darryl Brown has described, "The MPC's substantive agenda turned out to be poorly timed; legislatures took up code reform at the same time they sought to dramatically increase criminal law's effectiveness as a tool against violent crime and drug markets, which they did by increasing sentences, the range of offenses, and the scope of individual crime definitions."[52]

The concern about excessive prosecutorial discretion that has recently become an article of faith in the academic literature is not of recent vintage. Academic commentators in the 1950s observed that statutes conferred too much discretion on prosecutors and the drafters of the American Law Institute's Model Penal Code proposed new statutes in light of their express concerns about prosecutorial power.[53] Though aspects of the MPC's burglary and robbery statutes were adopted by state legislatures, the aspects of these statutes that would have reduced the prosecutorial prerogative were generally rejected by states. For reasons that appear to be unique to the power of high-profile cases to drive legal reform, kidnapping laws were modified after the release of the MPC, with courts and legislatures expressly recognizing the need to

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[49] Charges tend to frame judicial sentences even when judges are not locked into minimums or sentence ranges as a result of the charge. Discretionary guidelines, for example, have a substantial effect on sentencing decisions. *See* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1678 (2012) (observing that four years after the Supreme Court made the Federal Sentencing Guidelines advisory, judges handed down sentences below the guideline range in only 17.4% of the cases).

[50] Substantial consequences attach to felony convictions. *See* S. David Mitchell, *Undermining Individual and Collective Citizenship: The Impact of Exclusion Law on the African-American Community*, 34 FORDHAM URB. L. J. 833, 836 (2007) (observing that felons are prevented from possessing firearms, often denied the right to vote, hold public office, or serve on juries).

[51] *See* discussion *infra* notes 166–67.

[52] Brown, *supra* note 13, at 289.

[53] *See* sources cited *supra* note 6, *infra* notes 56–64.

constrain prosecutorial discretion. Without a popular opinion to drive the MPC's burglary and robbery statutes, the broad definitions of these crimes not only remained, but were expanded.

1. Burglary

The modern crime of burglary would hardly be recognizable to Blackstone. The common law version of the crime required a nighttime breaking into the dwelling of another with the intent to commit a felony therein.[54] Well before statutory crimes began to replace common law crimes, a number of caveats to this definition began to develop, enlarging the scope of burglary. For instance, even before the first American statute on burglary, any amount of force would permit a finding of breaking;[55] entry could be satisfied by the most minimal of crossing;[56] and outbuildings within the curtilage were included within the scope of burglary.[57] By the time the drafters of the MPC began their work in the 1950s, most of those requirements had been eliminated by most states, permitting prosecutors, at their option, an opportunity to increase the amount of punishment defendants faced.[58] As a commentator observed, "In ancient times [burglary] was a crime of the most precise definition, under which only certain restricted acts were criminal; today it has become one of the most generalized forms of crime, developed by judicial accretion and legislative revision."[59]

The requirement that the offense be committed at night had been eliminated virtually everywhere, though some states made a nighttime entry an aggravating factor, elevating the level of the offense.[60] Beyond

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[54] 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 223–28 (London, A. Strahan, 14th ed. 1803).

[55] *Id.*

[56] The barrel of a gun crossing the threshold of a doorway, or a finger passing over a window sill was sufficient to meet this definition. Minturn T. Wright, III, *Statutory Burglary. The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411, 412–13 (1951).

[57] *Id.*

[58] *See* Wright, *supra* note 56, at 440 ("Prosecuting authorities may utilize burglary where certain facts necessary to other crimes would be difficult of proof, or when penalties imposed for other crimes are not considered high enough."); *Id.* at 444 ("Of course this is far from saying that our communities swarm with over-zealous prosecutors who consistently use the burglary statutes to seek and get high penalties for a wide range of conduct which other provisions, imposing lesser penalties, were properly designed to cover. But it is a fact that . . . illustrative cases exist, and their type is not uncommon.").

[59] Wright, *supra* note 56, at 411.

[60] Anderson, *supra* note 42, at 635.

any doubt, the common law breaking requirement had forced the consideration of difficult questions – acts that would not appear to be breaking qualified under common-law-era interpretations of the element.[61] There was not even a suggestion that breaking was a meaningful requirement by the mid-twentieth century – where the element was formally retained in law, it could be satisfied quite easily, by, for instance, "raising a partially opened window, or pushing an unlatched door."[62]

Breaking and entering nevertheless remained as formal requirements of burglary statutes into the mid-twentieth century, which implied an important limitation on the crime – trespass.[63] Without such a limitation, every crime committed inside a building owned by another would become an act of burglary if the defendant entered the premises with the intent of committing the crime.

While the dwelling requirement – like the requirement that the crime occur at night – had been abandoned in virtually all jurisdictions although, like nighttime entry, it remained an aggravated form of burglary in most.[64] Businesses, outbuildings, and even automobiles, came within the definition by the time the MPC offered its reforms.[65] The high penalties for burglary created an anomaly that permitted less serious offenses to also be charged as burglary, radically changing the defendant's criminal exposure. The drafters of the MPC observed that under California law, breaking into a car with the intent of stealing the contents of the glove compartment produced a more severe penalty than stealing the car itself.[66]

The drafters of the MPC raised two primary concerns about the crime of burglary – one about the existence of the crime itself, the second about the scope of the crime.[67] The drafters considered eliminating the offenses as the crime merely contained elements of the other offenses, providing a means for prosecutors to obtain greater punishment or leverage in plea negotiations. They observed that "[n]ot

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[61] *Id.*

[62] *Id. See also* Wright, *supra* note 56, at 412.

[63] Anderson, *supra* note 42, at 636.

[64] Evan Lee Tsen, *Cancelling Crime*, 30 CONN. L. REV. 117, 125 n.30 (1997) (noting that even "very few traditional burglary jurisdictions retained the nighttime requirement.").

[65] MODEL PENAL CODE § 221.1 (Commentaries, Part II). Part 2 at 62.

[66] *Id.* at 64.

[67] *Id.*

only was burglary often more serious than its target offense . . . . [but] [t]here was an opportunity for consecutive sentencing as well."[68] They also raised concerns about the use that could be made of a broad burglary statute, observing that a "greatly expanded burglary statute authorizes the prosecutor and the courts to treat as burglary behavior that is indistinguishable from theft or attempted theft only on purely artificial grounds."[69] Deference to history, the drafters asserted, led them to retain the crime though they criticized the expansion of many aspects of the crime.[70]

The drafters of the MPC believed if the crime of burglary continued to exist, it should be more narrowly defined. As the MPC drafters noted in a number of other contexts, they suspected that burglary had been given an expansive definition because of the stringent requirements of attempt law, a major subject of consideration in the drafters' reformulation of a number of statutes.[71] They observed that under traditional attempt principles, one who intended a crime of larceny, rape, or murder would not have come sufficiently close to committing the crime by merely breaking into a dwelling.[72] The MPC drafters reasoned that the modification to the law of attempts was a preferable way to reach these concerns as attempts are not punished more seriously than the completed crimes and a defendant cannot be punished for both the attempted and completed crime.[73] Not surprisingly, states did not embrace the MPC's suggestion that a crime be eliminated when the reformers themselves continued to include the

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[68] *Id.* at 66.

[69] *Id.* at 63.

[70] *Id.* ("Centuries of history and a deeply embedded Anglo-American conception such as burglary, however, are not easily discarded.").

[71] *Id.*; Robert L. Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, 33 STAN. L. REV. 201, 202 (1981) (observing that under the MPC's new attempt law, the seizure in *Terry v. Ohio* could be justified as probable cause for attempted robbery).

[72] MODEL PENAL CODE § 221.1 (Commentaries, Part II). Part 2 at 63.

[73] *Id.* at 65–66. *See also* Notes, *A Rationale of the Law of Burglary,* 51 COLUM. L. REV. 1009, 1023–24 (1951) (criticizing the use of burglary as an effort to punish attempts as the punishment for burglary is greater than the punishment for most crimes attempted by burglars). The crime of possession of burglar's tools, punished less severely than burglary, even more substantially reduces the prosecution's burden in demonstrating a defendant's attempt to commit a crime. Kimberly Kessler Ferzon, *Inchoate Crimes at the Prevention/Punishment Divide*, 48 SAN DIEGO L. REV. 1273, 1282 (2011) (finding that the crime of possession of burglar's tools permits early intervention by police).

crime in their proposed code.[74]

The MPC's final version did impose an important limitation on burglary prosecutions. The drafters of the MPC prohibited a burglary prosecution if the building entered was open to the public at the time he was on the premises with his unlawful intent.[75] Only a small number of states had eliminated the trespass requirement for burglary at the time the MPC was released, though California – an influential jurisdiction of which the drafters were frequently critical – was one of them.[76] Without a requirement of trespass, the drafters observed a number of scenarios, none of which fit the connotation of burglary, fell within its prohibition, including the following:

> A servant enters his employer's house as he is normally privileged to do, intending on the occasion to steal some silver; a shoplifter enters a department store during business hours to steal from the counters; a litigant enters the courthouse with intent to commit perjury; a fireman called on to put out a fire resolves, as he breaks down the door of the burning house, to misappropriate some of the householder's belongings.[77]

The Model Penal Code's burglary statute therefore exempted from the burglary statute entry into a building, irrespective of the evil intent of the entrant, if "the premises are at the time open to the public or the actor is licensed or privileged to enter."[78]

By requiring a trespassory entry, the draft code prevented the conversion of every crime into a burglary by virtue of the fact it occurred indoors.[79] The MPC precluded a conviction for both the burglary and the offense intended once inside the building.[80] A number

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[74] *See* Helen A. Anderson, From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the United States, 45 IND. L. REV. 629, 642 (2012).

[75] The commentary observes that a New York law at one point permitted a burglary conviction whenever a crime was committed "in" a building, regardless of the actor's intent when he entered.

[76] Interestingly, even though the drafters of the Model Penal Code were particularly critical of California's criminal code, California "declined to adopt any part of it" despite the fact that thirty-four states adopted codes influenced to varying degrees by the proposed code. *See* Miguel Angel Mendez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407, 437 (1995).

[77] MODEL PENAL CODE, § 221.1 (Commentaries, Part II). Part 2 at 69.

[78] *Id.* at 66.

[79] The comments to the model code made clear that if one conceals himself in a building open to the public until a time that the building is no longer open, then the defendant is appropriately charged with burglary. *Id.* at 70.

[80] *See* MODEL PENAL CODE, § 221.1(3).

of jurisdictions, however, have not accepted this limitation.[81] While many state legislatures require that an entry be unprivileged for a burglary conviction, some legislatures have expressly allowed any entry to commit a crime to be sufficient for burglary and in another set of jurisdictions, courts have found ambiguous language to permit a burglary conviction for even a privileged entry.[82] Other jurisdictions recognize that even if the initial entry is privileged, the defendant has outstayed his welcome once he begins to commit a crime and therefore becomes a trespasser, permitting a burglary conviction.[83]

The crime of burglary is further problematic not only in that it allows a burglary count to be added to other charges – some states permit multiple counts of burglary itself on the basis of facts that do not seem related to the amount of punishment a defendant ought to suffer.

California (which seemed to provide endless fodder for the criticisms of the MPC drafters), and a few other states, define burglary as the entry into a building or room with the intent to commit a crime therein.[84] Under this type of statute, a defendant who enters several rooms within a building with the intent to commit a crime (most often larceny) is guilty of a separate count for every door or archway crossed.[85] Rejecting the defendants' arguments in such cases that the burglary was committed with the unlawful entry into the building itself allowed prosecutors to dramatically enhance the sentence with each additional room.[86]

2. *Robbery*

The crime of robbery has long punished conduct that bordered on simple larceny.[87] Robbery is often defined as larceny plus assault.[88]

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[81] *See, e.g.*, State v. Briceno, 651 P.2d 1093 (Wash. App. 1982).

[82] LaFave, *supra* note 39, at 1072 § 22.1(b); 18 PA. CONS. STAT. § 3502(d) (a "person may not be convicted both for burglary and offense which it was his intent to commit after the burglarious entry, unless the additional entry constitutes a felony in the first or second degree.").

[83] *See* Anderson, *supra* note 42, at 646.

[84] *See* People v. Sparks, 47 P.3d 289, 29394 (Cal. 2002) (citing a California definition of burglary dating back to 1858).

[85] *See* People v. Elsey, 81 Cal. App. 4th 948, 957 (2000) (breaking into multiple classrooms within a school constituted separate counts of burglary).

[86] The court in *Elsey*, 81 Cal. App.4th at 959, did distinguish entries into multiple locked rooms in a school from multiple rooms in a dwelling.

[87] It is not unusual for the criminal law to define offenses in ways that have substantial overlap with lesser included offenses. Benjamin Cardozo observed almost a century ago

Assault, in criminal law, is nothing more than an unwanted touching,[89] so any taking from a person seemingly qualifies as an assault. Robbery historically has involved a slightly more restrictive definition, requiring an unlawful taking from the person or presence of the victim with force or threatened force. The amount of force required, however, has been minimal since robbery was defined as a crime.[90]

Early treatises described the small amount of force that distinguished a larceny from a robbery. A pickpocket who surreptitiously obtained a watch from his victim's pocket had merely committed larceny. If, however, the victim became aware of the attempted taking and put up any resistance whatsoever – essentially if both of their hands were on the watch at the same time and the thief was successful – then the larceny became robbery.[91]

Unlike the direct criticisms the drafters of the Model Penal Code had for other broad criminal statutes, the drafters of the MPC's robbery provision defended the existence of this crime against potential claims that it was unnecessary as the crime "consist[ed] of a combination of theft and actual or threatened injury, each element constituting . . . a separate crime."[92] The drafters found this objection sufficient to recommend a substantial reformation of kidnapping and enough to contemplate the elimination of the crime of burglary. In the case of robbery, however, the drafters found the whole greater than the sum of the parts – that the type of assault involved in a robbery may be lightly punished and, unlike the petty larcenist, the violent petty thief, or

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that there was no meaningful distinction between first and second degree murder. BENJAMIN CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 99-101 (1931). For as insightful as Cardozo's criticism is of this distinction, the State of Colorado has created a new definition of first-degree murder which makes the distinction he criticized between the traditional forms of first and second degree murder seem like a model of clarity. In *People v. Jefferson*, 748 P.2d 1223 (1988), the Colorado Supreme Court affirmed, over an equal protection challenge, a mens rea term that defined first degree murder as "an attitude of universal malice manifesting extreme indifference to value of human life generally," while second-degree murder in Colorado was defined as "caus[ing] the death of a person knowingly."

[88] *See* David W. Rantaros, *Criminal Law Taking and Force: A Time Dependent Relationship in Establishing Robbery* State v. Holley, *604 A.2d 772 (R.I. 1992)*, 27 SUFFOLK U. L. REV. 499, 501 n.16 (1993).

[89] LaFave, *supra* note 39, at 867 § 16.3.

[90] *Id.* at 1053, § 20.3(d)(1).

[91] *Id.* at 1053–54 § 20.3(d)(1).

[92] *See* MODEL PENAL CODE § 222.1 Robbery, Comment 1, at 69.

mugger, creates great concern for the law abiding citizens in cities.[93]

However, the robbery statute proposed by the Model Penal Code would have created a considerably more substantial distinction between robbery and larceny than existed through the first half of the twentieth century. Their draft statute limited robbery to a theft, or attempted theft, during which the defendant "recklessly inflict[ed] serious bodily injury upon another" or "threaten[ed] another with or purposely put[] him in fear of immediate serious bodily injury."[94] Considerably more than a nominal struggle for personal property therefore was required to convert a larceny, or attempted larceny, into a robbery. With their model robbery statute, the MPC drafters defined the crime, however, consistent with their tendency to reduce the distinction between attempted and completed crimes.[95] The common law definition of robbery used by virtually every state in the union, if not every state, distinguished between attempted and completed robbery, with the two crimes carrying different punishments.[96] In this way, the MPC lessened the burden on the prosecution to prove robbery.

The MPC's efforts to create a more demanding definition of robbery, however, proved one of the least successful attempts of the project's efforts to reform American criminal justice. Only four states adopted the proposed language requiring either serious bodily injury or a threatened serious bodily injury.[97] Three states after the MPC required that the robbery be committed by violence, or threatened violence, to the victim.[98] For the remaining 43 states and 3 American territories, the common law rule that defined robbery as nothing more than a minimal tussle over personal property remains sufficient for the crime of robbery.[99] A shove, a nudge, or a push can transform an act of petty

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[93] *Id.*

[94] MODEL PENAL CODE § 222.1 Robbery.

[95] *See* Evan Tsen Lee, *Cancelling Crime*, 30 CONN. L. REV. 117 (1997) (discussing MPC's new attempt standard).

[96] *See* People v. Williams, 814 N.W.2d 270, 282-83 (Mich. 2012) (Kelly, J., dissenting) (describing common law history of robbery).

[97] IOWA CODE ANN. § 711.1; MONT. STAT. 45-5-401; N.D. CRIM. CODE 12.1-22-01; TEXAS PENAL CODE § 29.02; WYOMING STAT. ANN. § 6-2-401.

[98] MISS. CODE ANN. § 97-3-93; NEB. REV. STAT. § 28-324; TENN. CODE ANN. § 39-13-401.

[99] ALA. CODE §13A-8-43; ALASKA STAT. ANN. § 11.41.510; ARIZ. REV. STAT. § 13-1902; ARK. CODE ANN. § 5-12-102; CAL. PENAL CODE § 211; COLO. REV. STAT. ANN. § 18-4-301; CONN. GEN. STAT. ANN. § 53A-133; 11 DEL. CODE § 831; D.C. STAT § 22-2801; FLA. STAT. ANN. § 812.13; GA. CODE ANN. § 16-8-40; HAW. REV. STAT. § 708-841; IDAHO CODE § 18-6501; ILL. STAT. CH. 38, ¶ 18-1; IND. CODE § 35-42-5-1; KAN.

larceny into a serious felony.[100]

This is not to say that the Model Penal Code had no effect on the crime of robbery, but its effect was indirect and, contrary to the policy expressly recognized in other provisions and implicitly recognized in the proposed draft of the robbery provision, eased the burden on prosecutors seeking to gratuitously add robbery counts to indictments. Some states embraced the elimination of the distinction between attempted robbery and robbery,[101] but the far more substantial effect was a change in the number of robbery counts that could be charged from a single act. Allowing a robbery charge even though the force was not contemporaneous with the act of taking has allowed such a charge to be added in homicide prosecutions when the taking of property seemed to be an after-thought.[102]

Multiple counts of robbery itself further became possible with the adoption of the theory underlying the Model Penal Code's definition of robbery. It was well established prior to the MPC that a single act of robbery could produce only a single conviction.[103] The Model Penal

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STAT. ANN. § 21-5420; KENT. REV. STAT. § 35.695; LA. REV. STAT. 14:65; 17 MAINE REV. STAT. ANN. § 651; MD CODE, CRIMINAL LAW, § 3-401; MASS. GEN. LAWS ANN. 265 § 19; MICH. COMP. LAWS ANN. 750.530; MINN. STAT. ANN. § 609-24; VERNON'S ANN. MO. STAT. 569.030; NEV. STAT. ANN. 200.380; N.H. REV. STAT. § 636:1; N.J. STAT. ANN. 2C:15-1; N.M. STAT. ANN. § 30-16-2; MCKINNEY'S CONSOL. LAWS N.Y. ANN. § 160.00; N.C. GEN. STAT. ANN. § 14-87.1; N.D. CRIM. CODE 12.1-22-01; OHIO REV. CODE § 2911.02; 21 OKLA. STAT. ANN. § 791; OR. REV. STAT. § 164.395; PA. CONSOL. STAT. ANN. § 3701; R.I. GEN. LAWS § 11-39-1; S.C. CODE § 16-11-312; S.D. CODIFIED LAWS § 22-30-1; UTAH CODE ANN. § 76-6-301; 13 VT. STAT. ANN. § 608; REV. CODE WASH. ANN. 9A.56.190; WISC. STAT. ANN. 943.32; 9 GUAM CODE ANN. § 40.30; 33 LAWS OF PUERTO RICO ANN. § 4826; 14 VIRGIN ISL. CODE §1861.

[100] Perhaps nothing illustrates the scope of the definition of robbery better than a story related by a very tough-on-crime former criminal law student of mine. After law school, he obtained his dream job as a prosecutor in Philadelphia. In one of his first cases, four co-defendants had been charged with robbery. The four college students had ordered a pizza and at some point before they opened the door for the delivery man, they decided they were not paying for this order. One of them opened the door, grabbed the pizza, gave the delivery man a slight shove, and closed the door. I naturally asked him what he did with the case. He said he entered into a deal where they engaged in 200 hours of some sort of really embarrassing community service after which this crime would not appear on their records. As he put it, "this is not what a robbery statute is all about."

[101] People v. Williams, 814 N.W.2d 270 (Mich. 2011) (identifying states on each side of this distinction).

[102] *See* Joshua Gilmore, *Murder Felony Is Felony Murder: How the Nevada Supreme Court's Decision in* Nay v. State *Reflects the Growing Misconception Surrounding "Afterthought" Robbery*, 9 NEV. L. J. 672 (2009).

[103] H. Mitchell Caldwell & Jennifer Allison, *Counting Victims and Multiplying Counts:*

Code, however, changed the focus of the crime from an act of taking property to an act of threatening or harming a victim.[104] With this new focus came legislative change and judicial interpretations permitting the number of convictions to turn on the persons threatened rather than the number of persons from whom property was taken by threat.[105] Even though most states did not adopt the MPC's restricted definition of robbery, most did adopt language that permitted a count of robbery to be added for each victim, rather than making the number of robberies committed contingent on the number of takings.[106] The same criminal act thus has the capability of producing a substantially different sentence depending on the number of persons in the vicinity.

Not all courts have regarded new statutory language inspired by the Model Penal Code to permit counts of robbery for every person in the zone of danger when force is threatened to extract property, but many have certainly crafted rules that expand the number of possible counts beyond the single count permitted under the common law rule. Some courts regard every employee of a robbed business to be a victim, permitting a count for each of them.[107] Others go considerably further, permitting a count of robbery for every person present in the establishment at the time of the robbery.[108] These additional counts do not necessarily amount to additional punishment as most sentences are not required to be served consecutively. Most jurisdictions have a presumption of concurrent sentencing for acts committed as part of the same transaction, though most states also vest trial courts with extraordinary discretion to determine whether sentences will be served concurrently or consecutively.[109] At a minimum, each additional count raises the risk that a sentencing judge will geometrically increase the defendant's sentence on the basis of the number of people present rather than the culpability of the defendant.

Business Robbery, Faux Victims, and Draconian Punishment, 46 IDAHO L. REV. 647, 652 (2010).

[104] *Id.* at 654

[105] *Id.*

[106] *Id.*

[107] *Id.* at 657–59.

[108] *Id.* at 659–61.

[109] *See* Erin E. Goffette, *Sovereignty in Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Sentencing*, 39 VAL. U. L. REV. 1035, 1051 n.67 (2003).

3. Kidnapping

The crime of kidnapping will be discussed in much greater length in the next section as both legislative and judicial modifications to the law of kidnapping stand in stark contrast to the general trend of increasing the discretion given to prosecutors. Both the expansion and contraction of the law of kidnapping was heavily influenced by individual high-profile cases attracting national attention.

At the turn of the twentieth century, legislatures around the country had increased the penalties for seizing and carrying away a person for the purpose of extracting a ransom – a new aggravating factor for this particular crime. With the Lindbergh kidnapping, legislatures expanded the definition of kidnapping to include any seizure of the person, even if the perpetrator did not move his victim. Of course, the kidnapper of the Lindbergh baby transported him away from the home, as anyone seeking a ransom would be required to do.

With the kidnapping of Charles Lindbergh's son, state legislatures expanded the scope of statutory definitions of kidnapping to encompass even brief seizures of victims where the seizures were incidental to other crimes for which the legislature provided substantial, albeit less severe, punishment. Rape and robbery were paradigm examples of such crimes. The trend of the law to expand the scope of crimes, however, suggests that the Lindbergh kidnapping may not have been necessary to produce a kidnapping law that embraced any seizure of a person, however brief. The nation's most infamous kidnapping – and one of its most infamous crimes – prompted state legislatures to modify their criminal laws, but they did so in a way completely unrelated to the concerns raised by the Lindbergh case.

Were it not for the infamous case of Caryl Chessman, who was executed in California's gas chamber for the crime of kidnapping, the scope of this crime would likely resemble the broad scope of burglary and robbery.

B. In for a Penny, in for a Pound

Requiring the prosecution to demonstrate a defendant's culpability for each element of an offense more closely ties the amount of his punishment to moral fault.[110] It also imposes a burden on the prosecution to prove that culpability. Without a culpability requirement, however, the prosecution can seek to punish conduct more seriously

[110] Brown, *supra* note 13, at 287.

without demonstrating that the defendant bears anything close to traditional criminal liability for the aspect of the crime increasing the punishment. Like broadly defined crimes, crimes with strict liability aggravating elements empower prosecutors.

MPC drafters were concerned about correlating culpability to punishment more precisely than both the common law and the variety of state statutes then in place had done.[111] The MPC therefore included a provision that presumed legislatures provided *mens rea* requirements for each element of every crime.[112] Where a crime defined the first element of a crime using a *mens rea* term, an MPC's provision further presumed that this term was meant to be applied to every element of the crime.[113] Twenty-four states adopted this provision, but as Darryl Brown has demonstrated, courts frequently find, despite these presumptions, that the prosecution is not required to demonstrate any mental state with regard to many elements of offenses.[114]

Courts in the jurisdictions Brown studied were following a long accepted, very clear pattern of liability – once a defendant has embarked on a criminal enterprise, he is liable for any consequences or circumstances that accompany his efforts.[115] Once the defendant is in for a penny, he is in for a pound.[116]

Strict liability for acts a defendant commits, or for harms that result once he has crossed the threshold into criminality, is fairly common. In many instances, courts interpret legislative silence to hold a defendant responsible even in the absence of a showing of culpability once he has committed some sort of crime.[117] The scope of conspiracy law, for instance, itself a judicial creation, was greatly expanded when the United States Supreme Court held that conspirators were liable for acts of others conspirators in furtherance of the conspiracy.[118] Felony

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[111] *Id.*

[112] *See* Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769, 771 (2012).

[113] *Id.* at 287–88.

[114] *Id.* at 298–310.

[115] *Id.* at 325.

[116] Brown describes this as the "otherwise innocent" principle. Courts will require the prosecution to prove all the mens rea elements of an offense if, by committing the act in question without culpability for the element, he is otherwise innocent. Brown, *supra* note 13, at 326.

[117] *See, e.g.*, Dean v. United States, 556 U.S. 568, 575-76 (2009) (defendant held strictly liable for accidental discharge of weapon during an armed robbery).

[118] *See* Mark Noferi, *Towards Attenuation: A "New" Due Process Limitation on*

murder, a common law form of homicide, has been codified by most states.[119] Finally, courts have interpreted a number of statutes to have strict liability elements, such as the amount or type of drugs possessed, or the location of a sale within a certain distance of a school zone.[120]

1. Statutory Interpretation

Two U.S. Supreme Court decisions illustrate how courts interpreting statutes view the intention of the legislature differently if the defendant has already crossed the threshold into criminal conduct. In *Staples v. United States*, the Court considered whether the government had to prove whether the defendant was knowingly in possession of an automatic weapon. The statute itself merely prohibited possession of such weapons.[121] In *Dean v. United States*, the Court considered whether Congress intended to require culpability in a criminal statute increasing the penalty for robbery if a weapon was discharged during the crime.[122]

The statute in *Staples* distinguished innocent conduct from criminal conduct. If the defendant possessed a semi-automatic weapon, then he was guilty of no crime.[123] Part of the mechanism of the gun the defendant in *Staples* possessed had been filed down, permitting it to be repeatedly fired by holding down the trigger.[124] If the prosecution was not required to show that the defendant had knowledge that this mechanism had been filed down, then mere possession was sufficient for conviction for a crime that carried a maximum ten-year penalty.[125] Of course, if the defendant was unaware that the mechanism had been filed down, the defendant had no culpability for any sort of crime.

In *Dean*, by contrast, the defendant was undeniably participating in a robbery – and possessed all the requisite culpability for this crime.[126] The defendant's discharge of a weapon, which he claimed was accidental, a fact not contested by the prosecution, increased the

Pinkerton Conspiracy Liability, 33 AM. J. CRIM. L. 91, 94–95 (2006).

[119] Leonard Birdsong, *Felony Murder: A Historical Perspective by Which to Understand Today's Felony Murder Rule Statutes*, 32 T. MARSHALL L. REV. 1, 24 (2006).

[120] Brown, *supra* note 13, at 324.

[121] Staples v. United States, 511 U.S. 600 (1994).

[122] Dean v. United States, 556 U.S. 568 (2009).

[123] *Staples*, 511 U.S. at 602–03.

[124] *Id.*

[125] *Id.* at 616.

[126] *Dean*, 556 U.S. at 570.

minimum sentence.[127]

The Supreme Court ruled in *Staples* that a *mens rea* requirement was presumed in criminal statutes and thus without proof that the defendant was aware the weapon he possessed could be fired automatically, there could be no conviction.[128] In *Dean*, by contrast, the Court held that Congress intended no culpability requirement for the discharge of a weapon.[129] While a mens rea requirement is typically required in criminal statutes, the Court observed that it is very common in criminal law for legislatures to require no mental element of crimes once a defendant has engaged in some sort of criminal activity – the Court offered felony murder as a classic example of a criminal rule that dispenses with liability once the defendant has committed some criminal act.[130]

State statutes have similarly been interpreted using this principle. Remarkably few defendants have made the claim that, in order to be convicted of possessing certain quantities of specific drugs, they must bear some culpability for the amount and type of drugs, perhaps because the "in for a penny, in for a pound" concept is so thoroughly entrenched that defense lawyers thought such claims would be futile.[131]

Where they have made such claims, defendants have been unsuccessful. Drug possession penalties vary widely depending on the type of drugs possessed, whether the drugs were possessed for personal consumption or distribution, and the quantity of drugs possessed. Appellate courts in two states have addressed this issue. In Colorado, despite a statute that presumes the legislature intended any *mens rea* terms to apply to every term in a statute, the Colorado courts have held, despite the existence of any legislative history on the issue, that no mental element was required for the quantity of drugs possessed.[132] As

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[127] *Id.* at 571 (quoting 18 U.S.C. § 924 (c)(1)(A)).

[128] *Staples*, 511 U.S. at 605.

[129] *Dean*, 556 U.S. at 576.

[130] *Id.* at 575–76.

[131] At the federal level, the argument likely has been seldom presented as the Federal Sentencing Guidelines provide that a drug courier, who transports a suitcase knowing it contains a controlled substance, is, for sentencing purposes, accountable for the contents "regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance." U.S.S.G. § 1B1.3 (illustration (a)(1)). *See also* United States v. Flores, 5 F.3d 1070 (7th Cir. 1993); United States v. Gadison, 8 F.3d 186 (5th Cir. 1993); United States v. Lloyd, 10 F.3d 1197 (6th Cir. 1993).

[132] In a bizarre interpretation of a statute, the Colorado Supreme Court in Copeland v. People, 2 P.3d 1283 (Colo. 2000), held that the prosecution was only required to

Darryl Brown has demonstrated, the Colorado approach is quite consistent with the approach taken by state courts in considering elements dealing with the location of drug sales, the victim's status as a police officer, and proximity of a drug sale to a school.[133] The New York Court of Appeals found, in a very similar case, that in order to convict for an offense requiring a specific amount of drugs, the prosecution must demonstrate that the defendant was at least reckless with regard to the amount of drugs possessed; however, the New York Assembly quickly reversed this interpretation.[134]

2. *Complicity and Conspiracy*

The doctrines of conspiracy and complicity have long made defendants responsible for the acts of their confederates.[135] Often the proof demonstrating the existence of a conspiracy also demonstrates that the defendant aided in or abetted another crime.[136] The nature of criminal activity almost necessarily means that proof of a conspiracy will amount to proof of complicity. Criminal organizations are obviously not like publicly traded corporations. There will usually be no contracts or minutes that detail one's willingness to be part of the unlawful enterprise. The existence of a conspiracy, therefore, is most often demonstrated by a concert of action in which the defendant's assistance to the enterprise illustrates his agreement to be a part of the criminal act or acts.[137] Both conspiracy and complicity, however, are

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demonstrate that the defendant intentionally, knowingly, or recklessly started a fire, not that he bore any culpability for the injury to property. Thus, innocently lighting a candle or a campfire that accidentally leads to property destruction yields criminal liability.

[133] Brown, *supra* note 13, at 326.

[134] People v. Ryan, 626 N.E.2d 51 (N.Y. 1993). The New York Assembly quickly responded with the following law:

> Notwithstanding the use of the term "knowing" in any provision of this chapter defining an offense in which the aggregate weight of a controlled substance or marihuana is an element, knowledge by the defendant of the aggregate weight of such controlled substance or marihuana is not an element of such offense and it is not, unless expressly so provided, a defense to the prosecution therefore that the defendant did not know the aggregate weight of the controlled substance or marihuana.

N.Y. PENAL LAW § 15.20.

[135] *See* Sanford H. Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 340 n.24 (1985) (citing Blackstone for explanation of complicity law); George E. Burns, Jr., *The First Conspiracy Trial*, 36 MD. BAR J. 44, 45 (2003) (describing conspiracy case dating back to 1702).

[136] LaFave, *supra* note 39, at 722–25 § 13.3(a).

[137] *See* Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75

powerful tools in giving prosecutors extraordinary power to punish.

Complicity liability, on its own, creates more severe liability because it renders the defendant liable for the crimes themselves, while conspiracy law punishes the defendant only for the lesser charge of agreeing to commit a crime.[138] Both conspiracy and complicity law, however, are modified by judicially created and judicially maintained doctrines that hold conspirators and those complicit in crimes liable for the unplanned acts of others, so long as the crimes were the foreseeable consequence of the criminal enterprise joined or aided.[139]

This type of liability has been roundly criticized by academic commentators. As Wayne LaFave has stated:

> The "natural and probable consequences" rule of accomplice liability . . . is inconsistent with fundamental principles of our system of criminal law. It . . . permit[s] liability to be predicated upon negligence even when the crime itself requires a different state of mind.[140]

This doctrine, which relieves the prosecutor's burden of demonstrating the defendant's role in causing the criminal acts of others, is more the product of a judicial act than a legislative one. While some state legislatures have codified the doctrine of natural and probable consequences, the doctrine was first developed by courts – and continues to survive in some states because of judicial rather than legislative action. Twenty states retain the doctrine, but only six of those do so because of a statute creating this form of liability.[141]

Liability for the acts of one's co-conspirators, acting in furtherance of the conspiracy, was introduced to American law by the landmark case of *Pinkerton v. United States*.[142] *Pinkerton* liability, of course, suffers from the same risk of disproportionate punishment as the

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COLUM. L. REV. 1122, 1133–34 (1975).

[138] LaFave, *supra* note 39, at 697–99 § 12.4(d), 701–08 § 13.1.

[139] *See* Michael Manning, *A Common Law Crime Analysis of* Pinkerton v. United States*: Sixty Years of Impermissibly Judicially-Created Criminal Liability*, 67 MONT. L. REV. 90 (2006).

[140] LaFave, *supra* note 39, at 726 § 13.2(c); *see also* Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense*, 5 Ohio St. J. Crim. L. 427 (2008); Audrey Rogers, *Accomplice Liability for Unintended Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351 (1998) (criticizing accomplice liability for unintended crimes).

[141] For a very comprehensive consideration of the law of complicity in each American jurisdiction, *see* John L. Decker, *The Mental State Requirements for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237, 262–380 (2008).

[142] 328 U.S. 640 (1946).

doctrine of natural and foreseeable consequences in complicity liability. Professor LaFave quite naturally offers a similar criticism of *Pinkerton* liability that he had for accomplice's liability for the conduct of others. LaFave observes that the MPC drafters objected that under the *Pinkerton* doctrine "the law would lose all sense of proportion" as a defendant becomes liable "for thousands of addition offenses for which he was completely unaware and which he did not influence at all."[143] As LaFave observes, under the *Pinkerton* doctrine, "[e]ach retailer in an extensive narcotics ring could be held accountable as an accomplice to every sale of narcotics by every other retailer in that vast conspiracy."[144]

Courts have recognized certain foreseeability limits on the scope of liability for acts of others under these doctrines, but these limits are analogous to those placed on the scope of tort liability and still provide extraordinarily broad liability.[145] A defendant faces exposure for all crimes that are not proximately connected with the crimes agreed to or assisted.[146] Judge Nancy Gertner has questioned whether *Pinkerton* liability is so broad that a person who loans a robber a ski mask could be liable for a murder occurring during the robbery.[147]

3. *Felony Murder*

Felony murder – a long existing common law doctrine that exists in 35 states – began as a judicially created form of murder that continues to survive only by legislative enactment, often over vigorous criticism by the judiciary.[148] The doctrine is frequently criticized as it most often punishes a defendant with the consequences of premeditated murder even though the prosecution is only required to show that the defendant had the mental state associated with the felony he was committing at the

[143] LaFave, *supra* note 39, at 723.

[144] *Id.* at 724.

[145] *See, e.g.*, United States v. Colon, 549 F.3d 565 (7th Cir. 2008); United States v. Caldwell, 589 F.3d 1323 (10th Cir. 2009).

[146] *See* Alex Kreit, *Vicarious Liability and the Constitutional Dimensions of* Pinkerton, 57 AM. U. L. REV. 585, 619–20 (2008) (observing that conspiracy law permits liability for acts in furtherance of the conspiracy if the defendant had a "general awareness" of the potential consequences).

[147] United States v. Hansen, F. Supp. 2d 65, 67–68 n.3 (D. Mass. 2003).

[148] *See* Joseph C. Mauro, *Intentional Killing Without Intending to Kill: Knobe's Theory as a Rational Limit on Felony Murder*, 73 LA. L. REV. 1011 (2013) ("Felony murder authorizes maximum criminal punishment, the kind reserved for the most ruthless and calculating killers.").

time of the victim's death.[149] Felony murder charges can thus flow – with identical punishments – for killings ranging from the premeditated to the accidental.

Studies of mock jurors reveal that they do not share the law's comfort with punishing premeditated killers the same as those who play only minimal roles in crimes that lead to a victim's death.[150] As Norman Finkel has described, the fact that "a sidekick, a lookout, and a getaway driver" can be held as liable as a triggerman in a robbery is problematic for many of those asked to sit in judgment in jurisdictions with felony murder.[151] Studies of mock jurors reveal that they would punish minor participants in felonies gone wrong less than they would punish triggermen if they were given the option.[152] Much like mandatory minimums that prosecutors have the option to seek, felony murder – easily proved with little or no opportunity for mitigation in sentencing[153] – fundamentally changes the actual or potential sentence of a defendant whose fault for a death may vary widely.

While courts often express reservation about the felony murder rule, they have little ability to eliminate it.[154] Courts traditionally recognize that legislatures have broad powers to define crime and the rare constitutional challenges to the felony murder rule have been rejected,[155] though courts have placed some constraints on the crime within their limited sphere of interpreting statutes. Because felony murder is essentially a special category of the doctrine of natural and probable consequences, but one for which fact patterns often repeat themselves, courts have arrived at certain generic limits on the rule.[156]

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[149] Nelson E. Roth & Scott E. Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446, 453 (1985) (observing that "[f]ew legal doctrines have been as maligned and yet shown as great a resiliency as the felony-murder rule").

[150] *See* Norman J. Finkel, *Commonsense Justice and Jury Instructions*, 6 PSYCH. PUB. POL'Y & L. 591, 610 (2000).

[151] *Id.*

[152] *Id.*

[153] *See* Mariko K. Shitama, *Bringing Our Children Back from the Land of Nod: Why the Eighth Amendment Forbids Condemning Juveniles to Die in Prison for Accessorial Felony Murder*, 65 FLA. L. REV. 813, 820 n.43 (2013) (describing mandatory life in many states for felony murder).

[154] Clayton T. Tanaka & Larry M. Lawrence, II, *Due Process Felony Murder Doctrine*, 36 LOY. L.A. L. REV. 1479, 1494 (2003).

[155] *See* State v. Armstrong, 178 P.3d 1048 (Wash. App. 2008).

[156] Fact patterns that repeat themselves often give rise to rules of law in ways that issues presenting widely varying fact patterns cannot. Probable cause and reasonable

The limits on the rule generally depend on which version of the felony murder rule a court adopts, or interprets its legislature to have adopted, the proximate cause version or the agency version. The proximate cause version essentially operates with the same lack of predictability that exists in *Pinkerton* and complicity liability cases.[157] Under the agency theory of felony murder, however, defendants are not liable for the actions of others who cause deaths – a defendant would not be liable, for instance, for the death of a victim killed by a responding police officer under the agency theory.[158]

III. THE SPECIAL HISTORICAL EXCEPTION OF KIDNAPPING

Professor Kimberly Bailey is not alone in describing a modern trend in criminal justice. She recently observed:

> This practice of overcharging to induce guilty pleas is aided by the fact that, as part of the political war on crime over the last few decades, state and federal legislatures have both increased the number of crimes on the books and broadened the liability of criminal defendants under various crimes that already existed. First, they have increased the number of overlapping crimes, which enable a prosecutor to charge a defendant with multiple crimes for the same conduct. In addition, they have redefined criminal offenses in a way that less serious conduct is criminalized more severely than it was in the past. As a result the guilty plea rate is now 96%.[159]

As illustrated above, courts have done little or nothing to slow this trend and have often been a part of it.

The present generation of American academics raising this concern are following in the little-known footsteps of others who were largely unsuccessful in their efforts to rein in prosecutorial power, with the exception of the regulation of one area of law: kidnapping.

Unlike in burglary, robbery, or felony murder cases, courts have used their decisions in kidnapping cases to express a concern that broad

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suspicion determinations are quite similar. It is difficult to use judicial considerations of most probable cause issues to predict outcomes in subsequent cases. However, for fact patterns that frequently present themselves, these determinations are quite predictive. Most states, for instance, have very clearly established whether weaving within a lane, or touching a line separating a lane from the shoulder constitutes reasonable suspicion of drunk driving. *See, e.g.*, State v. Otto, 718 S.E.2d 181 (N.C. App. 2011) (weaving within lane is insufficient suspicion for a DUI stop).

[157] *See* WAYNE R. LAFAVE, CRIMINAL LAW, § 13.3(c), p. 727 (2010).

[158] *See* State v. Pierce, 23, S.W.3d 289 (Tenn. 2000).

[159] Bailey, *supra* note 1.

interpretations of statutes will permit too much punishment and confer too much discretion on prosecutors to use a charge as leverage to obtain a plea.[160] Beginning in the 1960s, appellate courts began to require that the detention involved in the act of kidnapping be more than incidental to another crime, such as robbery or rape.[161] The Connecticut Supreme Court was a latecomer when it changed its interpretation of its kidnapping law in 2008, observing in *State v. Salamon*:

> Unfortunately, [our previous interpretation] has afforded prosecutors virtually unbridled discretion to charge the same conduct either as a kidnapping or as an unlawful restraint despite the significant differences in the penalties that attach to those offenses. Similarly, our prior construction of the kidnapping statutes has permitted prosecutors – indeed it has encouraged them – to include a kidnapping charge in any case involving sexual assault or robbery.[162]

In no other context, other than in interpreting kidnapping statutes, have courts expressly recognized that they have a role in limiting the discretion of prosecutors. In fact, the Supreme Court of the United States has repeatedly recognized that the nature of plea bargaining involves granting a defendant leniency in exchange for his plea.[163] The Court has recognized charges that place pressure on defendants to plead are only illegitimate if they are unsupported by probable cause or based on a constitutionally prohibited basis, such as race or ethnicity.[164] The Court finds no issue with prosecutors bringing any charge supported by probable cause. Using crimes carrying very severe sentences to obtain a plea on a less serious crime, or, failing that, to impose a severe sanction, has been accepted by the Supreme Court as just a part of the give-and-take of plea bargaining.[165] In *Bordenkircher v. Hayes*, the Court found no constitutional issue with a prosecutor threatening a life sentence, using a three-strikes law, unless a defendant

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[160] *See* cases cited *infra* note 274.

[161] *See, e.g.*, People v. Levy, 204 N.E.2d 842 (N.Y. 1965); People v. Daniels, 459 P.2d 225 (Cal. 1969).

[162] State v. Salamon, 949 A.2d 1092, 1118 (Conn. 2008).

[163] *See* Joseph L. Hoffman et al., *Plea Bargaining in the Shadow of Death*, 69 FORDHAM L. REV. 2313, 2321–30 (2000).

[164] *See* United States v. Batchelder, 442 U.S. 114, 123–25 (1979).

[165] Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 719 (2006) ("[I]t is permissible for a prosecutor to induce a plea by threatening to otherwise bring charges that carry more serious penalties and to follow through on that threat if the defendant insists on proceeding to trial.").

accepted a five-year sentence for uttering a bad check for $88.30.[166] Such pressure, the Court reasoned, is simply in the nature of a system that permits defendants to barter with prosecutors for leniency.[167]

That state courts would consider how their interpretation of a statute would confer too much discretion on prosecutors seems at least inconsistent with the Supreme Court's laissez-faire description of plea bargaining. For those familiar with state court interpretations of criminal statutes, the *Salamon* decision – and other decisions involving limits on kidnapping statutes – also stand out as unusual restrictions on the prerogative of the legislature to define crimes and the prerogative of prosecutors to decide how they should be enforced.

Kidnapping, though, has a unique history. The definition of this crime has experienced remarkable volatility as high-profile crime stories, and the public's response to those stories, prompted legislatures and courts to first radically expand the crime's definition and then contract it. In the Founding Era, kidnapping was a common law crime that was effectively never prosecuted because a successful prosecution required transportation outside the country.[168] By the second half of the nineteenth century, initially motivated by concerns about the kidnapping of free blacks, statutes began to appear forbidding the seizing and moving of any person.[169] In the early twentieth century, as concerns mounted about the threats of kidnapping, the crime became much easier to prove as legislatures removed the requirement that the victim be moved any distance.[170] At the same time, the penalties for kidnapping were dramatically increased – most states came to prescribe the death penalty for a kidnapping involving any type of bodily harm.[171] The crime became so easy to prove that a count could be added to virtually any assaultive crime.[172] Then, in the latter half of the twentieth century, as the world negatively reacted to the execution of Caryl Chessman for two acts of kidnapping that were merely incidental to robbery, legislatures and courts responded to the power given to prosecutors to radically increase penalties by alleging kidnapping in addition to other

[166] Bordenkircher v. Hayes, 434 U.S. 357 (1978).
[167] *Id.* at 365.
[168] Diamond, *supra* note 4, at 2.
[169] Rollin M. Perkins, *Non-Homicidal Offenses Against the Person*, 26 B.U. L. REV. 119, 191–92 (1946).
[170] Diamond, *supra* note 4.
[171] *See, e.g.*, MODEL PENAL CODE § 212.1, Comment 1.
[172] *Id.*

crimes.[173] To understand the courts' unique concern about the exercise of prosecutorial discretion in kidnapping cases, one therefore has to look at the history of American kidnapping statutes.

At the time the country was founded, there was a great distinction between kidnapping and false imprisonment. False imprisonment was a misdemeanor and involved any degree of detention, whether unlawfully placing a person in a jail or momentarily seizing a person on the street and was punishable as a misdemeanor.[174] Kidnapping, by contrast, required the victim to be transported out of his country and was punishable by fine, imprisonment, and pillory.[175] As one founding-era writer observed, though kidnapping was not a capital crime, "[i]n every view it is an offence of primary magnitude, and might well have been substituted on the roll of capital crimes in the place of many others which are there to be found."[176] English courts began to define the crime to address the abduction of British subjects who were transported to the colonies for forced labor.[177]

States retained common law crimes into the nineteenth century, meaning that kidnapping could be prosecuted, but the common law elements of the crime practically ensured there would be no prosecution.[178] The size of the United States and limits on transportation in the late eighteenth century made involuntary transportation out of the country difficult, but more importantly, there was no longer the same market for indentured servant; such a class of persons dramatically declined in the late eighteenth century and was non-existent by 1830.[179] In most jurisdictions, there was no generic kidnapping statute until late into the nineteenth century, meaning that unless the intent was to enslave the kidnapped person, one could be convicted of this crime only if the

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[173] *See* discussion *infra* notes 218–50 and accompanying text.

[174] *See* HARRY TOULMIN & JAMES BLAIR, A REVIEW OF THE CRIMINAL LAW OF KENTUCKY 114 (W. Hunter, Frankfurter, Ky, 1804). Toulmin and Blair's treatise has been described as "America's first homegrown treatise on criminal law." Gerald Leonard, *Toward a Legal History of American Criminal Law Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 721 (2003).

[175] *See* TOULMIN & BLAIR, *supra* note 174, at 127.

[176] SIR EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 430 (P. Byrne, Philadephia 1806).

[177] *See* Diamond, *supra* note 4, at 2–3.

[178] *See* discussion *supra* note 175.

[179] *See* ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY 30 (2001).

common law elements were satisfied.[180] In other jurisdictions, the statutes specifically addressing slave catchers were enacted simultaneously with generic statutes criminalizing the seizing and transportation of any individual.

The Federal Fugitive Slave Act of 1793 created a new profession – slave catchers, a class of person described by historian Daniel Wait Howe as "detested in the North and despised by all respectable people in the South."[181] Kidnapping was a real threat for free blacks, who could be sold into slavery or offered for a reward when they met the description of runaway slaves.[182] Much like the development of kidnapping law in England, the first American kidnapping statutes addressed the concern that the seized individuals would be forced into involuntary servitude.[183] "Far more dreaded than the professional slave-catchers," Howe further observed, "were the kidnappers,"[184] those who captured free persons and sold them into bondage. Efforts by northern states to use kidnapping laws to prohibit slave-catchers from recovering the property of owners was ruled unconstitutional by the United States Supreme Court in *Prigg v. Pennsylvania*, but prohibitions on kidnapping free blacks remained throughout the war.[185]

Many statutes during this era specifically prohibited the taking of a free black person for the purpose of placing him or her in slavery – generic prohibitions on kidnappings that did not require international or even interstate transportation either accompanied or followed these laws.[186] In a number of states, statutes specifically forbid only the seizure of free blacks with the intent to enslave them, leaving the

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[180] *See* Click v. State, 3 Tex. 282, 286–87 (1848) (finding that an indictment charging kidnapping is facially defective because it does not allege the common law requirement of transportation outside the country).

[181] DANIEL WAIT HOWE, POLITICAL HISTORY OF SECESSION TO THE BEGINNING OF THE AMERICAN CIVIL WAR 227 (1914).

[182] *See* J. Lawrence Angel et al., *Life Stresses of the Black Community as Represented by the First African Baptist Church, Philadelphia, 1823 1841*, 74 AM. J. PHYSICAL ANTHROPOLOGY 213 (Oct. 1987).

[183] *See* Perkins, *supra* note 169 ("Prior to the Civil War one of the special uses of [kidnapping statutes] was to provide special punishment for false imprisonment where the intent was to cause the victim 'to be sold as a slave, or in any way held to service' and this clause is still found in some statutes.").

[184] *Id.*

[185] *See, e.g.*, H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 LAW & HIST. REV. 1133 (2012).

[186] THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861, 23–41 (1974).

common law requirement of international transportation in place for any other sort of kidnapping. An 1839 Pennsylvania manual for justices of the peace listed only one entry for kidnapping, which prohibited only the taking of free men into slavery. The law prohibited the taking, or attempted taking of "any negro or mulatto, from any part or parts of this commonwealth, to any place or places whatsoever out of this commonwealth" with the intent of placing such person in a condition of "a slave or servant for life, or any term whatsoever."[187] A similar Massachusetts manual for justices of the peace referenced kidnapping only in two criminal forms, each of which alleged that the person taken out of state was a "free citizen of said commonwealth [of Massachusetts]," with one of the forms providing for situations in which person was kidnapped to be sold as a slave.[188]

Such statutes were not limited to northern states. A Virginia justice of the peace manual offered a definition of kidnapping that purported to be the common law prohibition even though the international transportation element was left out.[189] In the same paragraph, the manual observed that taking a free person for the purpose of enslaving him or her was prohibited:

> The stealing and carrying away, or secreting of any person, (sometimes called kidnapping) is an offense at Common Law, punishable by fine and imprisonment. When it is done with the intent to use or sell him as a slave, it is made a felony by statute.[190]

Other states, by contrast, adopted a generic prohibition on kidnapping as they moved to prevent slave-catchers from taking free blacks. In 1815, New York, for instance, prohibited only kidnapping as it was forbidden by the common law, which required transportation out

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[187] R. E. WRIGHT, THE PENNSYLVANIA JUSTICE: A PRACTICAL DIGEST OF THE STATUTE AND COMMON LAW OF PENNSYLVANIA, ON THE RIGHTS, DUTIES, AUTHORITY OF THE ALDERMAN AND JUSTICE OF THE PEACE 160 (R. H. Small, Philadelphia 1839) (quoting Act of 25th March, 1826). The evolution of Pennsylvania's kidnapping laws is described in MORRIS, *supra* note 186, at 42–52.

[188] J.C. BANCROFT DAVIS, THE MASSACHUSETTS JUSTICE: A TREATISE UPON THE POWERS AND DUTIES OF JUSTICES OF THE PEACE: WITH COPIOUS FORMS 462 (W. Lazell, Worcester, Mass. 1847).

[189] JOSEPH MAYO, A GUIDE TO MAGISTRATES: WITH PRACTICAL FORMS FOR THE DISCHARGE OF THEIR DUTIES OUT OF COURT: TO WHICH ARE ADDED PRECEDENTS FOR THE USE OF PROSECUTORS, SHERIFFS, CORONERS, CONSTABLES, ESCHEATORS, CLERKS, &C., ADAPTED TO THE NEW CODE OF VIRGINIA 384 (Nash & Woodhouse, Richmond 1853).

[190] *Id.*

of the country.[191] By 1853, however, a justice of the peace manual in New York printed a much broader kidnapping statute that punished in a single provision:

> forcibly seiz[ing] and confin[ing] any other . . . with the intent to cause such other person to be secretly confined or imprisoned in this state against his will: "or to cause such other person to be sent out of this state against his will; or . . . caus[ing] such person to be sold as a slave, or any way held to service against his will . . ."[192]

Interestingly, Mississippi had a statute identical to New York's.[193] California similarly drafted a statute prohibiting all types of kidnapping in the mid-nineteenth century, though its aim at those who would enslave free blacks was clear.[194] The state's first kidnapping statute in 1850 defined the act as forcibly taking "any man, woman or child, whether white, black or colored . . . and convey[ing] him or her into another county . . . or [taking such person] with a design to take him or her out of state . . . ."[195]

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[191] JOHN A. DUNLAP, THE NEW-YORK JUSTICE, OR, A DIGEST OF THE LAW RELATIVE TO JUSTICES OF THE PEACE IN THE STATE OF NEW-YORK 281 (Isaac Riley, New York 1815). New York appellate courts, however, never had occasion to interpret the requirement that the taking be for the purpose of enslaving the victim, suggesting that there were few prosecutions under this provision. *See* Milton G. Gershenson, *Kidnapping and Abduction*, 21 BROOK. L. REV. 20, 26 (1954).

[192] JOHN FREDERICH ARCHBOLD, A COMPLETE PRACTICAL TREATISE ON CRIMINAL PROCEDURE, PLEADING AND EVIDENCE IN INDICTABLE CASES (6th ed., Banks, Gould, New York 1853); *see also* 2 THOMAS W. WATERMAN, A COMPLETE PRACTICAL TREATISE ON CRIMINAL PROCEDURE, PLEADING, AND EVIDENCE, IN INDICTABLE CASES 185 (Banks & Bros., New York 1860) (quoting 2 N.Y. REV. STAT. (4th ed.) 850–51).

[193] *See* WATERMAN, *supra* note 192, at 185 (quoting HUTCHINSON'S MISS. CODE 960, §§ 27-31).

[194] California's concern about kidnappers should not be confused for any sympathy for free blacks during this era. *See In re* Perkins, 2 Cal. 424, 438 (1852) (describing the purposes of the act relating to fugitive slaves "to purge the State of this class of inhabitants who in the language of a distinguished jurist, are 'festering sores upon the body politic").

[195] *See* State v. Chu Quong, 15 Cal. 332, 333 (1860) (quoting the fifty-fourth section of the Act relating to Crimes and Punishments). Well after the Civil War, many states retained their statutory prohibition on taking a person for the purpose of placing him in a condition of slavery. *See* WM. WIRT VIRGIN, MAINE CIVIL OFFICER: A GUIDE FOR JUSTICES OF THE PEACE, TRIAL JUSTICES, SHERIFFS AND THEIR DEPUTIES, CORONERS AND CONSTABLES 381 (Portland 1871) (describing in separate sections the prohibition on abduction of a white person and carrying him or her out of state and the kidnapping of a free citizen to place him in slavery). With the reorganization of the New York statutes in 1882, the legislature retained a definition of kidnapping that, in a single provision, prohibited a seizure of a person with the intent to secretly confine, unlawfully

By the end of the late nineteenth century, states typically forbade the unlawful seizure and transportation of any person and provided for punishment by a typical maximum punishment of ten years.[196] As the public became aware of a new motive for kidnapping – ransom – legislatures dramatically increased the penalties associated with the crime.[197]

Two high-profile kidnappings attracted national attention and raised the country's awareness to the concern about ransom-driven snatchings. The first, in Philadelphia, involved the taking of a prominent shop-keeper's son.[198] His disappearance was announced in a Philadelphia newspaper with a reward that prompted a series of ransom notes.[199] In an odd twist, later that year the two men identified as the kidnappers were shot and killed as they attempted to burglarize a member of the Supreme Court of New York.[200] As one of the men lay dying, he confessed to the Philadelphia crime. When asked why he had committed the crime, he responded, "for the money."[201]

The second case during this era to attract national attention, which appears to have been the immediate catalyst for legislative reform, occurred in Omaha, Nebraska. The young son of Patrick Cudahy, one of the founders of the Armour-Cudahy Meat Packing Company, was abducted in front of Cudahy's Omaha home and a ransom note threatened that if the kidnappers $25,000 demand was not met, the child would be blinded with acid.[202] The child was returned safely within a day, even though the ransom was not paid.[203] As an interesting footnote to the story, both of the men tried for the crime – one who was immediately captured, the other who was captured five

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imprison, transport out of state, or place the taken person in a condition of slavery. N.Y. PENAL LAW § 211.1 (Banks & Bros. 1882). *See also* People v. Camp, 34 N.E. 755 (N.Y. Ct. App. 1893) (observing that the Penal Code incorporates the provisions of 2 N.Y. REV. STAT. 664 § 28 that preceded the 1882 reorganization of New York's statutes). Congress even passed a statute *after* the Civil War providing that the "kidnapping or inveigling of person in order to sell them into slavery is made penal." Federal Act of May 21, 1866.

[196] Hugh A. Fisher & Matthew F. McGuire, *Kidnapping and the So-Called Lindbergh Law*, 12 N.Y.U. L. Q. REV. 646, 649–50 (1934–1945).

[197] Comment, *Robbery*, *supra* note 6, at 157.

[198] Fisher & McGuire, *supra* note 196, at 649.

[199] *Id.*

[200] *Id.*

[201] *Id.* at 649–50.

[202] *Id.* at 650.

[203] *Id.*

years later – were both acquitted.[204] The particularly graphic nature of the threat to the child – and Cudahy's national profile (in 1900, Armour-Cudahy was one of the country's largest meat packing companies) – raised the concern that America was experiencing a new type of crime.[205]

In response to these new fears, legislatures enacted laws that provided for substantially greater penalties when the kidnapping was perpetrated for the purpose of extracting a ransom.[206] A common statute provided enhanced penalties if the crime was committed for the purposes of ransom, extortion, or robbery.[207] A commentator describing the California statute observed that robbery was included in the litany of new motives because, in 1901, extortion involved the taking of money with consent and the drafters of the new kidnapping statutes wanted to ensure that defendants were not able to escape punishment because money was involuntarily handed over as a result of the abduction.[208]

High-profile kidnapping cases continued into the early twentieth century as Prohibition prompted the creation of large, highly sophisticated criminal organizations capable of complex criminal activity and as the proliferation of automobiles provided a ready mechanism for whisking away victims.[209] Additionally, during this

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[204] *Id.*

[205] *Id.* at 651.

[206] *See, e.g.*, Recent Decisions, *Judicial Construction*, *supra* note 6, at 67 (observing that California's 1901 modification increased the penalty for aggravated kidnapping to ten years to life).

[207] *See, e.g.*, R. WAITE JOSLYN, CRIMINAL LAW AND STATUTORY PENALTIES OF ILLINOIS: A COMPILATION OF THE STATUTES AND DECISIONS AS THE CRIMES AND OFFENSES, IN THE STATE OF ILLINOIS 97 (2d ed.1920) (quoting statute of 1901 providing for penalty of five years to life for abduction of a person with intent to obtain ransom).

[208] *See* Comment, *Robbery*, *supra* note 6, at 157.

[209] Fisher & McGuire, *supra* note 196, at 652 ("Prohibition, which had forced the bootleggers to organize in order to facilitate the moving, inspection, sale, and distribution of illegal liquor, brought upon the scene the gunman, the highjacker, and racketeer, for outside the law itself the dealer in illicit liquor had to protect themselves against the aggressive activities of their rivals."). It seems that the *end* of Prohibition may have sparked even more kidnappings as the business that created criminal organizations had disappeared. *See War on Predatory Crime*, WALL ST. J., Aug. 24, 1933, at 6.

> Release of John J. O'Connell, Jr., upon payment of $40,000 ransom, brings again to public attention the extent to which this and other forms of predatory crime have grown in recent years. With the passing of prohibition it is possible that all forms of preying upon the public that are included in the term "racketeering" will increase unless met by greater efficiency in the detection

period there were headline-grabbing kidnappings that were unrelated to the emergence of organized crime. Among them was the abduction and murder of Robert Franks in Chicago by Nathan Leopold and Richard Loeb, both highly intelligent students, one a student at the University of Chicago Law School, another about to enter the Law School, whose motivation was merely to demonstrate their superior intelligence by committing the perfect, or unsolvable, crime.[210] After Franks went missing, a ransom note was found demanding $10,000 for his return. Clarence Darrow, then America's most famous lawyer, represented the pair and successfully prevented the judge from imposing the death penalty.[211] Among many popular adaptations of the events, the bizarre and compelling nature of the crime led to the production of a major motion picture, *Compulsion*, which starred Orson Wells as Darrow.[212]

The attention the Leopold and Loeb case attracted would be dwarfed in 1932 when the son of Col. Charles Lindbergh was kidnapped near Hopewell, New Jersey. Lindbergh became the most famous man in America overnight when he became the first person to cross the Atlantic Ocean in an airplane, flying solo from New York to Paris in 33 hours.[213] On March 1, 1932, his son was kidnapped. A ransom note in the baby's nursery instructed Lindbergh to have $50,000 ready, but provided no further information.[214] Ransom notes followed as did phone calls with those claiming to be the kidnappers, with money delivered to the alleged kidnappers through an intermediary.[215] The story tragically ended when

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and punishment of crimes than the country has ever known.

Id.

[210] To describe Leopold and Loeb as highly intelligent is something of an understatement. Nathan Leopold reportedly had an I.Q. of 210, spoke twenty-seven languages fluently, and had apparently spoken his first words at the age of four months. Richard Loeb continues to be the youngest graduate in the University of Michigan's history. Leopold had a strong interest in the philosophy of Friedrich Nietzsche, particularly Nietzsche's notion of the superman, who "is, on account of certain superior qualities inherent in him, exempted from the ordinary laws which govern men. He is not liable for anything he may do." SIMON BAATZ, FOR THE THRILL OF IT: LEOPOLD, LOEB, AND THE MURDER THAT SHOCKED JAZZ AGE CHICAGO (2008).

[211] *See* DEAN A. STRANG, WORSE THAN THE DEVIL: ANARCHISTS, CLARENCE DARROW, AND JUSTICE IN A TIME OF TERROR 142 (2013) (observing that Darrow remains America's most famous lawyer).

[212] *See* PATRICK HAMILTON, ROPE (1929).

[213] *See* LLOYD C. GARDNER, THE CASE THAT NEVER DIES: THE LINDBERGH KIDNAPPING 5–7 (2012).

[214] *Id.* at 27.

[215] *Id.*

the body of the baby was found in woods about four miles from the Lindbergh's house.[216]

The Lindbergh kidnapping set in motion reform of criminal statutes throughout the country. An editorial in the Washington *Post* asserted that the "kidnapping of the Lindbergh baby has thrown the country into a paroxysm of horror and outrage, it is a crime that outrages humanity!" Lloyd Gardner, author of one the definitive books on the Lindbergh kidnapping, wrote that "[t]he kidnapping shocked Americans because it could happen to a national hero, whose fate foretold their worst fears, and because it suggested something had gone very wrong with American society."[217]

Congress quickly enacted a law that had been pending at the time of the Lindbergh kidnapping.[218] Prior kidnappings from the 1920s – and especially ones in the St. Louis area – had prompted Congressman Joseph Cochran and Senator Roscoe Patterson, both from Missouri, to introduce a bill forbidding transportation of a person in interstate commerce who had been "kidnapped or otherwise unlawfully detained."[219] Hearings were underway on their bill when Charles Lindbergh's son went missing. The law was quickly approved, but final passage was delayed until the child's body was found, Congress fearing that enactment of the law might have some role in the baby not being returned alive. The only real debate on the bill, following the news that grabbed international headlines, was the penalty. The version that passed in 1932 did not include the death penalty, but gave the trial judge extraordinary discretion to sentence the defendant to any term of years.[220] Two years later, the bill was amended to provide for the death penalty "if the verdict of the jury shall so recommend," unless the victim of the kidnapping was "liberated unharmed," in which case the judge had discretion to sentence the defendant to any term of years, just as if the jury did not recommend death.[221] Under the new federal law, the

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[216] *Id.* at 84.

[217] *Id.* at 3.

[218] Robert C. Finley, *The Lindbergh Law*, 28 GEO. L. J. 908–12 (1940).

[219] *See* Barry Cushman, *Headline Kidnappings and the Origins of the Lindbergh Law*, 55 ST. LOUIS U. L.J. 1293, 1294 n.10 (2011) (describing high-profile kidnappings in the St. Louis area that prompted the federal kidnapping bill before the Lindbergh kidnapping); Finley, *supra* note 218, at 909–10 (describing a wave of kidnapping in St. Louis in 1932).

[220] Finley, *supra* note 218, at 911.

[221] *Id.* This provision of the kidnapping law was declared unconstitutional in *United States v. Jackson*, 390 U.S. 570 (1968), as the peculiar drafting of the law required a

victim had to be transported across state lines, but there was a rebuttable presumption that if the victim was held for at least seven days, there had been interstate transportation.[222]

Practically, the federal kidnapping law eased jurisdictional issues when victims were taken across state lines. The Lindbergh kidnapping, however, created a far greater impact on substantive law at the state level. In this era of "horror and outrage" over kidnapping, state legislatures moved quickly to amend their kidnapping laws, which for the most part already covered all the acts described in the federal law that came to be known as the Lindbergh Law.[223] To toughen their laws, states increased penalties and removed the asportation requirement from their kidnapping statutes.[224] Many states adopted the death penalty for certain forms of kidnapping during this period. *The Nation*, critical of the death penalty on principle, was also critical of the popular movement that had produced this change in the law.

> The increase in kidnapping has led the press to put extraordinary emphasis on such crimes . . . A public demand to 'do something about it' has been fanned by the newspapers, and as usual in such situations a good deal of hysteria and unwisdom has

jury recommendation of death a pre-requisite to a death sentence, allowing a defendant to avoid a death sentence by simply pleading guilty, or even agreeing to a bench trial. Trial judges were, however, certainly aware of the consequences of the latter trick. In *Brady v. United States*, 397 U.S. 742 (1970), the case in which the Supreme Court first recognized that guilty pleas were voluntary, the defendant, charged with kidnapping under this statute, had entered a guilty plea that he claimed was involuntary as he had done so to avoid the death penalty. In its description of the facts, the Court observed that the trial judge made clear that he was unwilling to agree to a bench trial in the case, which left the defendant the option of risking a death sentence as a result of a jury trial, or pleading guilty and avoiding the death penalty. Somewhat remarkably, the Supreme Court held that the defendant's guilty plea was voluntary even though the scheme that ensured his protection from a death sentence if he entered a guilty plea was itself unconstitutional in *Jackson*. *See also* Hoffman et al., *supra* note 163, at 2321–30 (critiquing *Jackson* and *Brady*).

[222] Finley, *supra* note 218 at 911.

[223] *See, e.g.*, *Death Penalty for Kidnapping*, LITERARY DIG. (1933) ("With the sentence of Walter McGee to the death penalty for the kidnapping of Miss Mary McElroy, daughter of H.F. McElroy, City Manager of Kansas City, the nationwide crusade against crimes of this kind assumed greater interest and importance.").

[224] *See* Lawrence M. Friedman, *Front Page: Notes on the Nature and Significance of Headline Trials*, 55 ST. LOUIS L.J. 1242, 1282 (2011) (observing that states expanded their kidnapping statutes and their penalties, these new laws being known as "Little Lindbergh" Laws.); Recent Cases, *Kidnapping Movement Incidental to the Commission of a Crime Held Insufficient for Simple Kidnapping in California*, 110 U. PA. L. REV. 293, 293 (1961–1962).

> resulted. The counsel easiest to give, and therefore most generally given, has been to stiffen the penalties for kidnapping. A thoughtless and uninformed campaign has been untaken to make kidnapping an offense punishable by death.[225]

It was not, however, the penalty alone that was modified. The substantive requirements for the offense were considerably relaxed. The federal law, of course, required *moving* the victim across a state line.[226] State laws prior to the Lindbergh kidnapping required some type of transportation of the victim – states toughened their laws to eliminate this requirement, removing any distinction between the lesser crimes of unlawful arrest, or unlawful restraint, and kidnapping.[227] Any detention of the victim became sufficient for the crime of kidnapping, a crime that now could be satisfied with facts no more severe than those sufficient for an unlawful arrest.

Appellate courts did not have occasion to address the expanded definitions of kidnapping until the 1950s,[228] suggesting that prosecutors initially were not routinely charging defendants in new ways following the amendments to state laws.[229]

In 1950, however, in a case that received a considerable amount of attention, the California Supreme Court reviewed a kidnapping

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[225] *The Death Penalty for Kidnapping*, 137 NATION 172 (1933). The history of these state kidnapping statutes is quite consistent with Stuntz's theory that legislatures create very broad crimes that they do not expect prosecutors to enforce. Only two people were executed in California for kidnapping and only one in Florida—the inmate in Florida had also killed his victim, but had only been prosecuted as a kidnapper. *See* Ken Diggs, *A Current of Electricity Sufficient in Intensity to Cause Immediate Death: A Pre-*Furman *History of Florida's Electric Chair*, 22 STETSON L. REV. 1169, 1198 (1993).

[226] Note, *A Rationale of the Law of Kidnapping*, 53 COLUM. L. REV. 540, 544 (1953); United States v. Powell, 24 F. Supp. 160 (E.D. Tenn. 1938).

[227] *See supra* note 224.

[228] *See* Comment, *Robbery*, *supra* note 6, at 160 (observing that all the reported cases in California involving kidnapping had involved some degree of asportation prior to 1950); State v. Salamon, 949 A.2d, 1092, 1115 (Conn. 2008) ("Beginning in the 1950s . . . questions surfaced about the propriety of such expansively worded kidnapping statutes."). All of the prosecutors who responded to a survey conducted by the *Stanford Law Review* of district attorneys in California stated that they would not have pursued a kidnapping charge under the facts in the *Knowles* case. *Id.*

[229] There is an important counter-example. Florida provides an illustration of the rarity of death sentences for kidnapping, despite the widespread existence of laws providing for this penalty in cases of kidnapping. Only one person was executed in Florida for kidnapping, in 1939, under Florida's version of the "Little Lindbergh" Law and, as the defendant had suffocated his victim, he could have been charged with murder. *See* Diggs, *supra* note 225, at 1198–99.

conviction that grew out of an armed robbery. David Knowles claimed that as the detention of the victims was merely incidental to the armed robbery, a crime for which the California Legislature had already prescribed substantial penalties, an additional (and substantially greater) penalty for kidnapping was contrary to the intent of the legislature.[230] Knowles and his confederates entered a men's clothing store, displayed weapons, made them move to a stockroom, and took the wallets of the owner and his clerk, and merchandise from the store.[231] The robbers then forced the clerk to open the cash register and took the money. One of the robbers then struck the owner in the head with the barrel of his gun before the two fled with their loot. As there was bodily injury – assault from the striking from the pistol – the defendants faced either life without the possibility of parole or death under the California statute and received the former sentence.[232] The punishment for robbery at that time was potentially as little as one year imprisonment.[233]

Justice Traynor wrote the opinion for the majority, reasoning that the California statute permitted a kidnapping conviction whenever the prosecution could demonstrate that a victim had been seized by a defendant who intended to rob the victim. Prior to the Lindbergh kidnapping, California's kidnapping statute punished, by a minimum term of ten years and maximum of life:

> Every person who maliciously, forcibly, or fraudulently takes or entices away any person with intent to restrain such person and thereby to commit extortion or robbery, or exact from the relatives or friend of such person any money or valuable thing . . . .[234]

In 1933, the Legislature provided that, where the victim suffers bodily harm, the punishment shall be death or life without the possibility of parole for:

> Every person who seizes, confines, inveigles, entices, decoys, abducts, kidnaps or carries away any individual by any means whatsoever with the intent to hold or detain, or who holds or detains, such individual for ransom, reward, or to commit extortion or robbery . . . .[235]

Traynor observed that "seize" was defined as: (1) "to take

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[230] People v. Knowles, 217 P.2d 1, 4 (Cal. 1950).

[231] *Id.* at 4

[232] *Id.* at 2–3.

[233] *See id.* at 18 (Carter, J., dissenting).

[234] *Id.* at 4.

[235] *Id.*

possession of by force"; (2) "confine"; (3) "to restrain within limits; to limit"; (4) "to shut up; imprison; to put or keep in restraint . . . to keep from going out" and that the conduct in this case was a seizure of the store owner and his clerk:

> Clearly a person is taken possession of by force when he is compelled to enter a room at the point of a gun, as in this case. He is also restrained within limits, shut up, and kept from going out when he is forced to remain in that room for fifteen or twenty minutes.[236]

The Court, through Justice Traynor, recognized that the *Knowles* case involved "no seizure or confinement that could be separated from the actual robbery as a separate and distinct act."[237] Nevertheless, Traynor dismissed, as contrary to the clear meaning of the statute, the defendant's policy arguments about the severity of this interpretation and the intent of the legislature, which acted swiftly after the Lindbergh kidnapping to address ransom-based takings only.[238]

Three justices dissented in two separate opinions. Justice Edmond concluded that the historical context informed the law's purpose – kidnapping law was expanded in California because of a series of ransom-driven snatchings – and the seizure in this case did not fit that paradigm.[239]

Justice Carter's dissent raised an issue that would become an oft-repeated policy basis against a broad interpretation of kidnapping laws.

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[236] *Id.*

[237] *Id.*

[238] In doing so, Traynor interestingly cited fellow legal realists in recognizing the court's inability to give a statute anything but its plain meaning. *Id.* at 5 ("The judgment of the court if I interpret it aright does not rest upon a ruling that Congress would have gone beyond its purpose if the purpose that it professed was the purpose truly cherished. The judgment of the court rests upon the ruling that another purpose not professed, may be read beneath the surface, and by the purpose so imputed the statute is destroyed. Thus the process of psychoanalysis has spread to unaccustomed fields. There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body.") (quoting United States v. Constantine, 296 U.S. 287, 298–99 (1935) (Cardozo, J., dissenting)); *id.* ("While courts are no longer confined to the language (of the statute), they are still confined by it. Violence must not be done to the words chosen by the legislature.") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947)). The majority did not consider an affidavit from a member of the California Legislature in 1933 that stated that the legislature did not consider the amount of detention involved in a robbery when enacting its modification of the kidnapping law. *See* Comment, Robbery, *supra* note 6, at 159, 159 n.19.

[239] *Knowles*, 217 P.2d at 12–13 (Edmond, J., dissenting).

The legislature, he contended, could not have intended to confer on prosecutors the power to determine whether an ordinary robbery should be treated as a capital crime.[240] If convicted of robbery, a judge had discretion to sentence a defendant between five years and life.[241] If the prosecutor chose to prosecute the robbery as a kidnapping – and there was some form of bodily injury – the judge was required to sentence the defendant to either life without parole or death.[242]

> The prosecuting attorney is given the sole and arbitrary power to determine whether a person shall suffer life imprisonment without possibility of parole or even death on the one hand, or, in the case of robbery in the second degree, as little as one year's imprisonment. It all depends on the charge he chooses, at his whim or caprice, to make against the accused. . . . It is not to be supposed that the Legislature intended to place any such drastic and arbitrary power in the hands of the district attorney.[243]

The *Knowles* decision attracted a great deal of attention. Often because of the profile of a particular judge, or judges, the decisions of some courts are more noticed than others.[244] The California Supreme Court was at that point regarded as one of the most erudite courts in the country, with Justice Traynor being its best-known intellect.[245] Traynor was one of the most prominent disciples of the legal realist movement. His decisions are credited with creating the modern doctrine of products liability.[246] The United States Supreme Court relied heavily on Justice Traynor's decision in *People v. Cahan* to conclude that the Fourth

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[240] *Id.* at 18 (Carter, J., dissenting).

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] This was certainly true of the New York Court of Appeals when Benjamin Cardozo served on that court. In the present day, the Seventh Circuit receives more attention than it otherwise would because of the intellectual reputations of Judges Posner and Easterbrook.

[245] *See, e.g.*, Walter V. Schaefer, *Chief Justice Traynor and the Judicial Process*, 53 CALIF. L. REV. 11, 12 (1965) (Chief Justice of the Illinois Supreme Court observed that he does not "know of any judge whose work has been so significant in so many areas of the law."); John W. Poulos, *The Judicial Process and Criminal Law: The Legacy of Roger Traynor*, 29 LOYOLA L.A. L. REV. 429, 429 (1996) ("By nearly universal acclamation, Roger Traynor was one of the great masters of the judicial process of the twentieth century.").

[246] James R. Hackney, Jr., *The Intellectual Origins of American Strict Products Liability: A Case Study in American Pragmatism*, 39 AM. J. LEGAL HIST. 443, 498 (1995). Traynor's opinions recognized as "germinal in the development of strict products liability." *Id.*

Amendment forbid the introduction of illegally obtained evidence in state as well as federal criminal cases.[247] Interestingly, though, it was not Traynor, the great legal innovator, who prompted national reform of America's kidnapping laws, it was those he caused to dissent from his view.

Immediately, the *Knowles* case drew substantial academic criticism in California and beyond. Academic commentators began to echo the concerns raised by Justice Carter, who, despite apparently being the first to articulate this concern about the scope of prosecutorial power, would never be cited in the numerous judicial decisions, legislative debates, and scholarly articles that took up his cause. A comment in the *Stanford Law Review* concluded that the legislature would not have enacted a law that gave "the district attorney [such] great latitude in prosecution."[248] A note in the *Albany Law Review* criticized the decision observing that the "prosecuting attorney is given sole and arbitrary power to charge either kidnapping or robbery, and thus it is within his power, in a proper case, to determine whether a defendant shall suffer death or as little as one year's imprisonment."[249] Three years later, an article appeared in the *Columbia Law Review* critical of the scope of kidnapping laws throughout the country, observing that most states do not require any asportation, and recommending the elimination of kidnapping as an offense when it is merely incidental to another crime such as extortion, homicide, assault rape, or robbery.[250]

The *Knowles* decision, however, would attract considerable attention for another reason – one of Knowles' co-defendants would

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[247] Mapp v. Ohio, 367 U.S. 643 (1961) (citing People v. Cahan, 282 P.2d 905 (Cal. 1955)).

[248] Comment, *Robbery*, *supra* note 6, at 160. "Echo" is actually a kind way of characterizing the way this Comment made use of the dissent in *Knowles*. Without even acknowledging that there was a dissent, the Comment in the *Stanford Law Review* observed that the prosecutor could charge the same defendant with a crime carrying a minimum penalty of one year, or one carrying a maximum of life without parole or death, and then observed, without citation, "It can hardly be contended that the legislature contemplated granting such broad discretion to the district attorney." *Id.* It is nevertheless noteworthy that Justice Carter's dissent so quickly gained traction – a concern he appears to have been the first to raise but was never attributed to him over six decades that courts, legislatures, and academic commentators have expressed concern about the broad grant of prosecutorial discretion in the kidnapping statutes. It is also worth noting that the editorial standards of the *Stanford Law Review* have substantially improved since 1950.

[249] Recent Decisions, *Judicial Construction*, *supra* note 6, at 73–74.

[250] Note, *Rationale*, *supra* note 73, at 556.

become one of America's early celebrity criminals. Caryl Chessman's name-recognition has not lingered in the history of crime, but during his time in the San Quentin prison, his case attracted worldwide attention.[251] Known as the "Red Light Bandit," Chessman followed his victims in their cars to secluded areas in the Los Angeles area where he would flash a red light, tricking them into thinking he was a police officer.[252] When they stopped, he robbed or sexually assaulted them. The robbery in the *Knowles* case was merely one of several crimes for which he was charged.[253] Knowles and Chessman received life sentences for the kidnapping involved in the robbery of the clothing store, but Chessman was given a death sentence for the kidnapping of two of the victims he stopped on remote roads, both of whom he ordered to perform oral sex on him.[254] In each case, the jury found that the 20 feet he required his victims to move when he ordered them to go behind a car constituted kidnapping.[255] The trial judge instructed the jury that being forced to perform oral sex could constitute the bodily harm required for a death sentence, which the jury chose to impose.[256] Citing the *Knowles* case, the California Supreme Court rejected Chessman's argument that the facts of his case were insufficient to demonstrate that he had committed robbery.[257] A simple detention of the victim, the court held, was sufficient for kidnapping under the California statute and Chessman had detained and even ordered his victims to move a small distance.[258]

Despite the facts of his case, which one would not expect to generate considerable sympathy,[259] his case attracted worldwide

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[251] HAMM, *supra* note 9, at 2.

[252] *Id.* at 3-4.

[253] Chessman was convicted of 17 counts, four of them grew out of the events described in the *Knowles* opinion – the robbery and kidnapping of the two victims in the clothing store. *See* People v. Chessman, 238 P.2d 1001, 1005 (Cal. 1951).

[254] HAMM, *supra* note 9, at 50-52.

[255] The jury found that he required them to move this short distance with the intent of robbing them, with the rape in each case constituting the bodily harm required for a death sentence under California's kidnapping law. *See Chessman*, 238 P.2d at 1005. Chessman had actually taken the victims' money prior to requiring that his victims move. *See* MODEL PENAL CODE § 212.1 Kidnapping, comment 1 n.6 ("Upon no other evidence than the fact that Chessman had taken the couple's wallet before he forced the girl out of her car, the jury was permitted to infer that Chessman had carried the girl away to rob her.").

[256] HAMM, *supra* note 9, at 52.

[257] *Chessman*, 238 P.2d at 1016.

[258] *Id.*

[259] As an editorial in the *Dallas Morning News* observed, "Opponents of the death

attention and international calls for his reprieve. Though he came across as arrogant when he represented himself at the trial, he humanized himself with the publication of his first of four books from death row, *Cell 2455 Death Row,* in which he denied his involvement in the crimes that landed him on death row, but admitted to having been involved in a life of crime from which he had reformed while incarcerated.[260] His book, the first published by an American death row inmate, was celebrated by literary critics and criminal justice reformers alike.[261] For those who believed in rehabilitation as a goal of the penal system, Chessman's description of his own reform made him worthy of sparing.[262] For criminologists, his ability to articulate – and his perceived sincerity – provided for an opportunity to study the criminal mind.[263]

During his time on death row, Columbia Pictures made a movie of the first of his books, *Cell 2455, Death Row*.[264] Two months before his execution, singer Ronnie Hawkins released as a single, "The Ballad of Caryl Chessman," calling for him to receive a reprieve. Caryl Chessman had become a figure in American culture in the 1950s and 1960s because of the California Supreme Court's interpretation of that state's kidnapping statute.[265] Efforts to stop his execution came from a

penalty, resting their case on Chessman, picked a precarious basis. This man stands convicted of particularly revolting crimes." HAMM, *supra* note 9, at 36 (quoting DALLAS MORNING NEWS, March 14, 1960).

[260] HAMM, supra note 9, at 4.

[261] *Id.* at 79.

[262] *Id.* at 79-80.

[263] *Id.* at 79–83.

[264] *See* THOMAS DOHERTY, TEENAGERS AND TEENPICS: THE JUVENILIZATION OF AMERICAN MOVIES IN THE 1950S 8 (2001) (referencing CELL 2455, DEATH ROW (Columbia Pictures 1955)).

[265] The best-known example of Caryl Chessman's influence on American popular culture is Merle Haggard's "Sing Me Back Home," though one must know the back story to understand Chessman's role in the song. Merle Haggard, prior to his success as a musician, was incarcerated in San Quentin while Chessman was an inmate. For a week, Haggard was placed in a punishment cell that adjoined California's death row for making alcohol. While there, he communicated with Chessman and the experience changed his life. Haggard reports that he realized that if he did not rehabilitate himself, he would end up where Chessman was, but would die without the recognition Chessman received. *See* Howard Husock, *Why Hollywood Loves Johnny Cash and not Merle Haggard*, CITY J. (Jan. 13, 2006). "Sing Me Back Home," is based on the execution of Chessman and "Rabbit" Hendrix, who ended up on death row because of a failed escape attempt that originally was going to include Haggard. DAVID CANTWELL, MERLE HAGGARD: THE RUNNING KIND 120 (2013). The lyrics are as haunting as they

number of unlikely corners, including former First Lady Eleanor Roosevelt, actors Marlon Brando and Shirley MacLaine, *Tonight Show* host Steve Allen, writer Norman Mailor, and evangelist Billy Graham.[266] The Governor of California granted one stay of execution because the Chessman case had created substantial anti-American sentiment abroad, and it was feared that Chessman's execution could endanger the life of President Eisenhower who would have been in South America on the scheduled date.[267]

The facts of Chessman's case, like the facts of *Knowles*, were legally compelling because prosecutors were able to use a kidnapping statute to obtain a penalty that was otherwise unavailable, which academic commentators immediately criticized.[268] The public interest in his case naturally reached its apex just before his execution, which occurred as the American Law Institute was working on its proposal for a criminal code to reform perceived shortcomings in the nation's criminal statutes. Caryl Chessman was executed on May 3, 1960, and the drafters of the Model Penal Code released a draft condemning American kidnapping statutes as permitting "abusive prosecutions" at their conference held two weeks later.[269] A question of legal doctrine has perhaps never had such a human face, and it is hard to remember a major act of legal reform coinciding with such a high-profile example of

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are mournful:

The warden led a pris'ner
Down the hallway to his doom
And I stood up to say goodbye
Like all the rest
And I heard him tell the warden,
Just before he reached my cell
Let my guitar playing friend do my request

MERLE HAGGARD: POET OF THE COMMON MAN: THE LYRICS 29 (Don Cusic ed. 2002).

[266] HAMM, *supra* note 9, at 136.

[267] This event was the subject of some controversy. Gov. Brown, a death penalty opponent, who vacillated on the Chessman case, apparently asked the United States Department of State to make this request. *Id.* at 129.

[268] Additional sympathy for Chessman's cause was attributable to another legal problem with the appellate process. Midway through his trial, the court reporter died, and the task of transcribing the proceedings was taken over by a relative of the prosecutor, a chronic alcoholic who was shown to have changed certain facts in the transcript and who was unable to read his own handwriting when asked to do so in a post-trial proceeding ordered after the United States Supreme Court required the California courts to conduct a hearing on the reliability of the transcripts. Hamm, *supra* note 9, at 4.

[269] *See* MODEL PENAL CODE § 212.1 (Tentative Draft No. 11, 1960).

the practice to be reformed.[270]

At the height of the public's excitement over Chessman's case, the drafters of the Model Penal Code took up the issue, advocating a clear distinction "between simple false imprisonment and the more terrifying and dangerous abductions for ransom or other felonious purpose."[271] They observed that "[e]xamples of abusive prosecution for kidnapping [were] common" and proposed a kidnapping statute that would "minimize opportunities for such injustice by clearly and rationally restricting [prosecutorial] discretion to punish."[272] The *Chessman* and *Knowles* cases played prominently in the concerns raised by the MPC drafters.[273] The MPC drafters focused on statutes in California and New York as illustrative of the potential for abusive prosecutions in kidnapping cases.[274] The drafters listed Chessman's case as one of several examples of "abusive prosecutions," singling out *Chessman* as illustrative of the "extremely artificial character given by the California courts" to the definition of kidnapping.[275] *Knowles* was, of course, California's clearest authorization of a prosecution for a kidnapping that was merely incidental to another crime. *Chessman* added only a small but dramatic insult to this injury the drafters identified. By the time the American Law Institute considered its kidnapping statute, it was less clear that the facts of the Chessman case would permit a death sentence in a similar subsequent case. The

[270] *See* HAMM, *supra* note 9, at 2 ("Rather than strictly legal considerations . . . it was Chessman's status as a prolific death row author that generated widespread notoriety.").

[271] MODEL PENAL CODE § 212.1, comment 1, at 11 (Tentative Draft No. 11, 1960).

[272] *Id.* at 15.

[273] Interestingly, the *Chessman* case became more of a focal point of criticism when the issues with kidnapping statutes were raised in the states. The Oregon Legislature created a commission in 1967 to revise its criminal laws. The commission observed, using very similar language to the commentary to the Model Penal Code, that cases "are sometimes prosecuted as kidnapping in order to secure the death penalty or life imprisonment for behavior that amounts in substance to rape or robbery in jurisdictions where these offenses are not subject to such penalties." *See* State v. Garcia, 605 P.2d 671, 674 (Or. 1980).

[274] The drafters did, however, offer examples from other jurisdictions of improper charging decisions including Garton v. Tinsley, 171 F. Supp. 387 (D. Colo. 1959); State v. Coursey, 225 P.2d 713 (Ariz. 1950); Crum v. State, 101 S.W.2d 270 (Tex. Crim. App. 1937). One of the more outrageous examples offered by the drafters involved an Oklahoma murder prosecution. The defendant pled guilty in exchange for a life sentence. Prosecutors then charged the defendant with kidnapping, a capital crime in Oklahoma at the time, and the defendant received the death penalty. Williams v. Oklahoma, 358 U.S. 576 (1959).

[275] MODEL PENAL CODE§ 212.1, comment 1, at 12 n.4 (Tentative Draft No. 11, 1960).

California Legislature in 1951 had amended the statute to require a "carrying away" of the person detained under the section of the kidnapping statute that led to Chessman's death sentence.[276]

The drafters of the Model Penal Code focused their ire on the seemingly excessive punishment that stemmed from improper kidnapping charges. "Among the worst [examples of abusive prosecution] is the use of [kidnapping charges] to secure a death sentence or life sentence for behavior that amounts in substance to robbery or rape, in a jurisdiction where these offenses are not subject to such penalties."[277] The drafters concerned themselves with prosecutors who actually intended to go to trial and obtain the greater sentence for kidnapping. Following the release of the Model Penal Code, state courts would speak in more broad terms about how prosecutors could make improper use of redundant kidnapping charges in the plea bargaining phase.

The MPC's proposed kidnapping statute required that a victim be moved a "substantial distance" for a conviction to prevent a prosecution for kidnapping when the seizure of a person was merely incidental to another crime.[278] The fact that kidnapping was a capital crime in many states in 1960 clearly animated the drafters of the MPC. Their commentary observed, "[t]he criminologically non-significant circumstance that the victim was detained or moved incident to [another] crime determines whether the offender lives or dies."[279]

Courts began to respond to ALI criticism and forbade prosecutions for kidnapping when the victim's detention was merely

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[276] *See* Lonnie E. Woolverton, Jr., *Kidnapping and the Element of Asportation*, 35 S. CAL. L. REV. 212, 214 (1961-1962); *see also* People v. Thompson, 284 P.2d 39, 42 (1955) (observing modification in California law to require asportation of the victim when aggravated form of kidnapping involving intent to rob is charged).

[277] MODEL PENAL CODE, § 212.1, comment 1, at 13-14 (Tentative Draft No. 11, 1960).

[278] *Id.*

[279] *Id.* at 14 (cited in State v. Masino, 466 A.2d 955, 959 (N.J. 1983)). Prior to New Jersey's adoption of the MPC, its courts embraced the very broad interpretation of kidnapping statutes that constituted the majority rule prior to the reforms of the 1960s. However, the Supreme Court of New Jersey observed that the "mandatory minimum of 30 years for kidnapping places upon the prosecution the moral obligation not to indict under this statute unless the crime warrants such severe punishment." State v. Johnson, 170 A.2d 830, 835 (N.J. 1961). *See also* State v. Morris, 160 N.W.2d 715, 718 (Minn. 1968) ("If under some circumstances the statutory penalty is unduly harsh, it is the duty of the prosecutor, the court, and the correctional authorities to modify the charge, the sentence, or the period of confinement so that it will be commensurate with the gravity of the crime and the harm or potential harm which is inflicted by the defendant.").

incidental to another crime, even where the legislature had not modified the underlying statute. In 1965, five years after the MPC's proposed draft and three years after the release of the completed Model Penal Code, the New York Court of Appeals reversed its interpretation of that state's kidnapping law. The court observed that kidnapping "is, by contemporary standards, one of the most serious crimes," specifically observing that the crime can be punished by death.[280] The court reasoned that allowing a detention incidental to another crime to permit a kidnapping "could literally overrun several other crimes, notably robbery and rape, and in some circumstances assault."[281] The court further observed its new limitation on the crime was "consistent with the general trend of professional comment and analysis of kidnapping statutes."[282]

In 1969, the California Supreme Court reversed its holding in *Knowles* and *Chessman*, embracing the result, and policy argument, of Justice Carter's 1950 dissent. The court observed that since the time of *Knowles* and *Chessman*

> [t]here have been . . . fresh judicial approaches, far-reaching legislative innovations, and considerable analysis of the problem by legal commentators and scholars. Out of this ferment has arisen a current of common sense in the construction and application of statutes defining the crime of kidnapping.[283]

Justice Mosk, for a unanimous court observed that "[i]t is doubtful that the legislature intended that [a] standard robbery situation should lead to a prosecution for kidnapping, or that the prosecutor should have an unlimited option to charge either robbery or kidnapping-for-robbery, or both, or mere false imprisonment."[284] While the court did not expressly address the severity of kidnapping under California law in 1969, the defendant in *Daniels* had been sentenced to death for robberies and sexual assaults, much like Chessman.[285] The statute in *Daniels*, just as in *Chessman*, gave prosecutors the power to seek a penalty substantially more severe than would be allowed for robbery or rape – and this charging ability of course added to their power in the plea bargaining phase.

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[280] People v. Levy, 204 N.E.2d 842, 843 (N.Y. 1965).
[281] *Id.* at 844.
[282] *Id.* at 845.
[283] People v. Daniels, 459 P.2d 225, 229 (Cal. 1969).
[284] *Id.* at 234 n.8.
[285] *Id.* at 226–27.

In other states, legislatures, not courts, determined that a kidnapping charge was inappropriate when the victim's detention was merely incidental to another crime.[286] When Oregon, for instance, amended its kidnapping statutes to prevent their use when the victim's detention was merely incidental to another crime, the legislature expressed the oft-cited concern about abuse of prosecutorial discretion. The comments to the legislation created by the Oregon Law Revision Commission observed:

> Current kidnapping statutes apply to abductions which are incidental to or an integral part of the commission of an independent crime such as robbery or rape where the victim is removed and confined for a given period to effectuate the criminal purpose. Where the detention period is brief there is no genuine kidnapping. However, cases of this nature are sometimes prosecuted as kidnapping in order to secure the death penalty or life imprisonment for behavior that amounts in substance to rape or robbery in jurisdictions where these offenses are not subject to such penalties.[287]

Courts limiting the reach of kidnapping laws recognized, as Justice Carter in *Knowles* had, as academic commentators following *Knowles* had, and as the drafters of the Model Penal Code had, that such an interpretation was necessary to constrain prosecutorial discretion. Courts in these jurisdictions were required to weigh in on the policy requiring limits on kidnapping statutes as they still had to interpret the requirement that the victim be moved a "substantial distance."[288] The Pennsylvania Supreme Court observed that kidnapping "is one of the most serious crimes carrying with it extremely severe criminal sanctions."[289] The court observed that in "other jurisdictions [with] broader definition[s] of kidnapping than Pennsylvania, the prosecutors would charge a defendant with kidnapping in order to obtain a higher permissible sentence whenever there was any forcible movement of the victim."[290] The New Jersey Supreme Court observed that prior to the

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[286] A majority of state legislatures have adopted the MPC's kidnapping provision. *See* Melanie A. Prince, *Two Crimes for the Price of One: The Problem with Kidnapping Statutes in Tennessee and Beyond*, 76 TENN. L. REV. 789, 806, 806 n.146 (2009).

[287] *See* State v. Garcia, 605 P.2d 671, 673 (Or. 1980) (quoting commentary to OR. REV. STAT. 163.215).

[288] *See* Note, *Movement Incident to the Commision of a Crime Held to Insufficient to Support Indictment for Simple Kidnapping in California*, 110 U. PA. L. REV. 293 (1961).

[289] Commonwealth v. Hughes, 399 A.2d 694, 696-97 (Pa. 1979).

[290] *Id.*

legislative change in New Jersey, "kidnapping's harsh sentence, even when the movement was simply incidental to the underlying crime of rape or robbery, was available to state public outcry or prosecutorial zeal. The potential for abusive prosecution became evident."[291]

While the *Chessman* case appears to have focused the attention of reformers on the discretion of prosecutors to *obtain* severe sentences, a broad kidnapping law also gave prosecutors the power to *threaten* severe sentences. In requiring more than a detention incidental to another crime, the North Carolina Supreme Court specifically addressed the advantages this broad discretion conferred in the plea bargaining phase. The court agreed with a defendant's contention that charges for kidnapping that were merely incidental to another crime "add[ed] leverage in the plea bargaining process, so as to bring about a plea of guilty to the charge of the felony to facilitate which the alleged kidnapping was committed."[292]

Courts have continued from the time of Caryl Chessman's execution to the present day to interpret kidnapping statutes expressly in light of their concern about the scope of prosecutorial power.[293] Even

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[291] State v. Masino, 466 A.2d 955, 958 (N.J. 1983).

[292] State v. Fulcher, 243 S.E.2d 338, 349 (N.C. 1978).

[293] *See, e.g.*, State v. Phuong, 299 P.3d 37, 42 (Wash. App. 2013) ("The incidental restraint concern derives from the potential for prosecutorial abuse when the offense of kidnapping is broadly defined."); People v. Adams, 205 N.W.2d 415, 420 (Mich. App. 1973) (observing that "a literal reading of the kidnapping statute would permit a prosecutor to aggravate the charges against any assailant, robber, or rapist by charging the literal violation of the kidnapping charge which must inevitably accompany each of those offenses."); People v. Wesley, 365 N.W.2d 692, 695 (Mich. 1983) ("[T]his section of the kidnapping statute could be used by prosecutors as a vehicle for overcharging a defendant."); State v. Garcia, 605 P.2d 671, 674 (Or. 1980) (describing the goal of the Oregon Legislature in drafting its kidnapping statute as "provid[ing] the flexibility to cover diverse kidnapping fact situations, yet rationally restrict prosecutorial discretion"); Mobley v. State, 409 So. 2d 1031, 1035 (Fla. 1982) (recognizing that "narrow construction of the statute is necessary to prevent the abuse of prosecutorial discretion"); People v. Bridges, 612 P.2d 1110 (Colo. 1980); State v. Mead, 318 N.W.2d 440, 445 (Iowa 1982) (observing that some courts have "reasoned that a narrow construction of [kidnapping] statutes was necessary to prevent the abuse of prosecutorial discretion."); State v. Warner, 626 A.2d 205, 208 (R.I. 1993) (observing that the "primary thrust" of the prohibition on "incidental kidnapping" prosecutions is "to avoid an excess of prosecutorial zeal that may cause a person to be charged with the offense of kidnapping in circumstances wherein the kidnapping is merely incidental to another offense, such as robbery, sexual assault, or the like"); *see also* State v. Smith, 669 N.W. 19, 35 (Minn. 2003) (objecting that the majority's interpretation denies prosecutors the prerogative to charge any offense for which there is probable cause); State v. Dix, 193 S.E.2d 897, at (N.C. 1973) ("A caloused [sic]

when courts did not limit the scope of their kidnapping laws, the concerns roused by the Chessman case led them to urge restraint by prosecutors. The highest courts in New Jersey and Wisconsin were initially reluctant to limit the scope of kidnapping statutes, but they nonetheless cautioned prosecutors to use the broad powers conferred by the statutes in an appropriate fashion.[294] Each would subsequently interpreted its kidnapping statutes to forbid a charge that was merely incidental to another case.[295]

In some ways, the unique concern courts have shown for broad prosecutorial discretion in kidnapping cases is understandable. American courts have long treated cases involving the death penalty differently than even cases involving the potential of life without

concept of kidnapping creates the potential for abusive prosecutions since virtually every false imprisonment, assault, battery, rape, robbery, escape or jail delivery will involve some movement or intentional confinement. When kidnapping, [sic] by definition overruns other crimes for which the prescribed punishment is less severe, a prosecutor has the naked and arbitrary power to choose the crime for which he will prosecute."); State v. Anthony, 817 S.W.2d 299, 304 (Tenn. 1991) (observing that "courts often rule that, despite the wording of kidnapping statutes, they were not intended to apply to acts of detention incidental to other crimes "or that to so apply them would allow abuse of prosecutorial discretion"); State v. Griffin, 564 N.W.2d 370, 373 (Iowa 1997) ("[T]he legislature did not intend to afford prosecutors the option of bootstrapping convictions for kidnapping, carrying life sentences, onto charges for which the legislature provides much less severe penalties.") (quoting State v. McGrew, 515 N.W.2d 36, 39 (Iowa 1994)).

[294] State v. Hampton, 294 A.2d 23, 36–37 (N.J. 1972) ("[T]he severe penalty commanded by the [kidnapping] statute imposes on prosecutors a moral obligation not to seek an indictment therefor unless the crime fairly appears and warrants the heavy punishment."). The Wisconsin Supreme Court had cautioned prosecutors to wisely exercise their judgment when bringing charges under the broad kidnapping statute, but seemed to retract that caution in *Harris v. State*, 254 N.W.2d 357, 368 (Wis. 1977), rejecting a challenge to the statute's breadth, noting that "the district attorney has great discretion whether or not to prosecute, it follows that he may exercise this discretion in determining whether or not to prosecute; it follows that he may exercise this discretion in determining which of several related crimes he wishes to charge defendant committed." The Illinois Supreme Court in 1990 forbid giving prosecutors the power to choose between the crimes of aggravated kidnapping and armed violence, each of which could be satisfied by the same elements, but armed violence carried a greater penalty. People v. Christy, 564 N.E.2d 770, 774 (Ill. 1990) ("[P]rosecutorial discretion is a valuable aspect of the criminal justice system . . . however, prosecutorial discretion will effectively nullify the aggravated kidnapping statute, as skilled State's Attorneys will usually seek the more severe sentence and, therefore, charge defendants with armed violence rather than aggravated kidnapping.").

[295] *See* State v. Wooten, 342 A.2d 549 (N.J. Super. 1975); State v. Simpson, 347 N.W.2d 920 (Wisc. 1984).

parole.[296] Caryl Chessman, whose case became the primary catalyst for limitations on the kidnapping statute, was sentenced to death for kidnapping. The death penalty was still a potential sentence for kidnapping when the American Law Institute released the Model Penal Code.[297]

However, courts continued to express a concern about the breadth of prosecutorial discretion in kidnapping even after the penalties for kidnapping became comparable to the penalties for rape and robbery. As of 1973, the death penalty may have remained on the books for kidnapping, but practically it would never again be a possibility. *Furman v. Georgia* declared that the death penalty violated the Eighth Amendment as it was arbitrarily applied.[298] When state legislatures enacted new death penalty statutes to address the concerns in *Furman*, none of them included the death penalty for kidnapping.[299] Only three states following *Furman* provided for capital punishment in cases not involving homicide.[300] Georgia, North Carolina, and Louisiana continued to permit the death penalty for rape, but with the Supreme Court's decision in *Coker v. Georgia* in 1977, this possibility was eliminated.[301] Yet the unique concern courts and legislatures expressed about excessive prosecutorial discretion in kidnapping chases has lingered to this day.

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[296] *See* Woodson v. North Carolina, 428 U.S. 280, 303–04 (1976) (recognizing that "[i]n *Furman*, members of the Court acknowledged what cannot fairly be denied that death is a punishment different from all other sanctions in kind rather than degree"); Lockett v. Ohio, 438 U.S. 586 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.").

[297] Until *Furman v. Georgia*, 408 U.S. 238 (1972) imposed a moratorium on the death penalty, there were no limits on the crimes which could be punished by death. *See, e.g.*, John J. Donahue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 796 (2005).

[298] 408 U.S. 238 (1972).

[299] *See* John W. Poulas, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 143 n.1 (1986) (describing assessment by Tennessee Legislature that capital punishment for kidnapping violated Eighth Amendment).

[300] Megan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 89 n.28 (2010).

[301] Coker v. Georgia, 433 U.S. 584 (1977). The Supreme Court recently reaffirmed that the death penalty may not be imposed for even the rape of a minor. Kennedy v. Louisiana, 554 U.S. 407 (2008).

IV. RECENT LIMITS ON THE SCOPE OF SUBSTANTIVE CRIMINAL LAW

Unlike individual cases that sparked the nation's interest in kidnapping law, no single case, or even series of cases, has caused the country's interest to recently focus on doctrines of substantive criminal law. Nevertheless, there has been a growing general consciousness and concern about America's criminal justice system.[302] Per capita, we incarcerate more of our citizens than any country on the planet.[303] Academics, public intellectuals, politicians, and even television producers have raised the public's awareness to this emerging development. This incarceration explosion has been linked to broad powers prosecutors have to seek a variety of penalties for any given criminal act.[304] Recently the Supreme Court has taken an interest in the scope of criminal statutes, perhaps in response to these recent criticisms. Just as Caryl Chessman's case caused courts to reconsider long-existing broad kidnapping statutes in many jurisdictions, the frequently documented and often-criticized increase in America's prison population may usher in new judicial scrutiny of criminal statutes.

America's incarceration explosion, three decades in the making,[305] has attracted national attention, energized groups with powerful lobbies, and strained cash-strapped state budgets. In 2011, this country incarcerated 748 persons for every 100,000 residents, giving the United States the highest rate of incarceration of any nation on the planet.[306] Russia ranked second with an incarceration rate of 581 persons per 100,000 residents.[307]

The impact of this epidemic has not been felt evenly throughout the country. In many urban areas, the majority of African American men have criminal records.[308] The war on drugs, the popularity of tough-on-crime politics, and the fall of rehabilitation as a goal of our penal system have led to widespread warehousing that states are not able

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[302] *See* Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU. L. REV. 189, 190–91 (2013) ("In the face of dropping crime rates, budget constraints, bipartisan calls for reforms, and judicial encouragement through recent Supreme Court decisions, many states are now forced to reconsider the punitive policies that have expanded the carceral states of America and created the phenomenon on mass incarceration.").

[303] *Notes from the Field: Challenges of Indigent Criminal Defense*, 12 N.Y. CITY L. REV. 203, 226 (2008).

[304] *See supra* note 1.

[305] *See* Brown, *supra* note 13, at 289.

[306] Robin Walker Sterling, *Raising Race*, 35 CHAMPION 24, 24 n.1 (2011).

[307] *Id.*

[308] Michelle Alexander, *The New Jim Crow*, 9 OHIO ST J. CRIM. L. 7, 9 (2012).

to afford and have left entire communities populated with felons whose status permanently impairs their hope of meaningful employment.[309]

One does not have to look far to find evidence of racial inequality in this system. The Obama Administration reduced the ratio for sentences for crack cocaine compared to powder cocaine from 100:1 to a positively egalitarian present ratio of 18:1.[310] Enforcement patterns in drug cases exacerbate this inequality and perceived inequality. Low-level drug busts rarely occur on college campuses despite the frequency of drug use by students – they tend to occur on streets and sidewalks in inner-city neighborhoods.[311] A dramatic increase in the prison population that has demonstrably affected minority populations in uneven proportions does not seem to many to be random, or merely a response to the incidents of criminal activity.

A variety of unlikely bedfellows have combined to draw attention to criminal justice policies that have led to prison sentences for non-violent offenders, especially drug offenders. Easily demonstrated claims of discriminatory enforcement and incarceration have drawn the criticism of minority groups and left-leaning organizations.[312] One noted scholar has described the pattern of incarceration as a modern Jim Crow system:

> What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than the language we use to justify it. In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to

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[309] Mary Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. 165, 171–72 (2013).

[310] *See* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995) (describing inequalities in punishment for crack and powder cocaine when the punishment ratio was 100:1); Kyle Graham, *Sorry Seems to be the Hardest Word: The Fair Sentencing Act of 2010, Crack and Methamphetamine*, 45 U. RICH. L. REV. 765 (2011) (describing modification of ratio of crack to powder cocaine to 18:1).

[311] Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order Maintenance Policing*, 89 J. Crim. L. & Criminology 775, 809 (1999) (observing "conscious decision of police departments to target drug enforcement efforts on urban and inner-city neighborhoods where people of color live"); Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES MAG., June 20, 1999, at 87 (contending that "[c]ommon sense . . . dictates that if the police conducted pretext stops on the campus of U.C.L.A. with the same frequency as they do in South Central, a lot of whites would be arrested for drug possession.").

[312] *See, e.g.*, NAACP, MISPLACED PRIORITIES: OVER INCARCERATE, UNDER EDUCATE 7, 14 (2011), *available at* http://naacp.3cdn.net/01d6f368edbe13534_bq0m68x5h.pdf.

> label people of color "criminals" and then engage in all the practices we supposedly left behind. Today it is perfectly legal to discriminate against criminals in nearly all the ways it was once legal to discriminate against African Americans. Once you're labeled a felon, the old forms of discrimination – employment discrimination, housing discrimination, denial of the right to vote, and exclusion from jury service – are suddenly legal. As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it.[313]

At the same time, our incarceration rates threaten to bankrupt state budgets, typically the concern of fiscal conservatives.[314] In an op-ed in the *Washington Post*, Newt Gingrich called for conservatives to "address the astronomical growth in the prison population, with its huge cost in dollars and lost human potential."[315] State governments not noted for their relative soft-on-crime policies are trying to figure out ways to reduce their prison populations.[316]

While the incarceration of non-violent drug offenders is attracting considerable attention in public discussions about this country's incarceration rates, no single type of crime accounts for the bulk of the enlarged inmate population. There has been an increase in the prison population across all types of crimes, something commentators attribute to prosecutors obtaining new powers and strenuously putting to use old and new powers to leverage deals and enhance sentences.[317]

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[313] Alexander, *supra* note 308. Michael Klarman has argued that the Supreme Court's revolution in criminal procedure was driven by concerns of racial disparities in the way criminal defendants were treated. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000). It would hardly be surprising if the racial disparities played a role in the Supreme Court's decision to increase its regulation of substantive criminal law.

[314] *See* Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581 (2012).

[315] Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER RACE & JUST. 315, 320 (2012).

[316] *See* PEW CHARITABLE TRUST, MISSISSIPPI'S 2014 CORRECTIONS AND CRIMINAL JUSTICE REFORM: LEGISLATION TO IMPROVE PUBLIC SAFETY, ENSURE CERTAINTY IN SENTENCING, AND CONTROL CORRECTIONS COSTS (2014), http://www.pewtrusts.org/~/media/Assets/2014/09/PSPP_Mississippi_2014_Corrections_Justice_Reform.pdf; Gary Cohen, *Punishment and Rehabilitation: A Brief History of the Texas Prison System*, 75 TEX. B.J. 604 (2012).

[317] *See* Schoenfeld, *supra* note 315.

At the federal level, it is certainly true that the majority of offenders are incarcerated on drug charges, but this is not true at the state level.[318] A very insightful article by Heather Schoenfeld demonstrates that while the dramatic increase in prison population is related to drug laws and their enforcement, this does not tell the entire story.[319] The population of Florida prison doubled in the 1980s as a result of the War on Drugs. During this period, she describes, "prosecutors . . . responded to heightened rhetoric and public hysteria by using laws already on the books to increase the likelihood that drug offenders would serve time in prison."[320] Into the 1990s, Florida's prison population continued to dramatically rise but not because of an increase in drug sentences or offenders, each of which remained relatively constant during this decade.[321] During this decade, she attributes the growing prison population to "hundreds of new crime bills that lengthened prison sentences, increased time served and shifted power from judges to prosecutors."[322] Then between 2000 and 2009, she describes prosecutors "harness[ing] their new power [to] secure more convictions, even for less serious offenses."

The Supreme Court appears to have begun responding to frequently raised concerns that legislatures have conferred too much power on prosecutors through broad criminal statutes. Of course the Supreme Court has long been in the business of interpreting federal criminal statutes, but the recent decisions of the Supreme Court have a unique quality. Two decisions from last term limited federal criminal statutes that have very commonly adopted state analogs.[323] The country's highest court obviously occupies a position of great influence and state courts may be expected to adopt the reasoning of the Supreme Court limiting state criminal statutes, which are used far more often than federal criminal statutes.

In 2015, the Court, in *Yates v. United States*, imposed a limiting construction on a criminal statute designed to prevent the destruction of corporate documents, which federal prosecutors used to indict a

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[318] *See* Kathleen Miles, *Just How Much the War on Drugs Impacts Our Overcrowded Prisons, in One Chart*, HUFFINGTON POST, March 10, 2014.

[319] *Id.* at 320.

[320] *Id.* at 322–24.

[321] *Id.* at 324–25.

[322] *Id.* at 325–26.

[323] Rosemond v. United States, 134 S. Ct. 1240 (2014); Burrage v. United States, 134 S. Ct. 881 (2014).

fisherman who threw an undersized catch overboard, after it was discovered by officials, in an effort to thwart his prosecution.[324] While the Supreme Court has, with some frequency, interpreted the terms of federal statutes, the parties in the *Yates* case expressly described the concern in this case as one of overcriminalization, a concern the Supreme Court and many lower courts have previously left to the legislature.

One thing is clear. The United States Supreme Court seems to be taking a more aggressive role in reviewing the scope of criminal statutes.

A. *Rosemond* and the Doctrine of Natural and Probable Consequences

The majority of jurisdictions recognizes that one who aids another in committing a crime, with the intent that that crime occur, is liable not just for the intended crime but for other crimes related to the intended crime.[325] As the California Supreme Court stated, "[A] person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime), but also for any other offense (nontarget crime) committed by the confederate as a 'natural and probable consequence of the crime originally aided and abetted.'"[326] As the District of Columbia Court of Appeals described foreseeability in a group criminality context, a "natural and probable consequence in the ordinary course of things presupposes an outcome within a reasonably predictable range."[327] State and federal courts have frequently held that a confederate's possession of a weapon in a drug deal is a natural and probable consequence of the venture.[328]

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[324] 135 S. Ct. 1074 (2015).

[325] *See* State v. Carson, 950 S.W.2d 951, 955 (Tenn. 1997) (noting that the rule is "applied by the majority of courts under a variety of statutes governing criminal responsibility").

[326] People v. Prettyman, 14 Cal. 4th 248, 254 (1996).

[327] Roy v. United States, 652 A.2d 1098, 1105 (D.C. App. 1995).

[328] *See* People v. Morceli, No. E044803, 2008 WL 4946645, at *5 (Cal. App. 4th Dist. 2008) (possession of gun by co-conspirator in drug deal is foreseeable); United States v. Powell, 929 F.2d 724 (D.C. Cir. 1991) (using doctrine of natural and foreseeable consequences to hold defendant liable under very similar circumstances as the *Rosemond* case); United States v. Sandoval-Curiel, 50 F.3d 1389, 1393 (7th Cir. 1995) ("This Court has noted that it is reasonable for a jury to conclude that the presence of firearms in transactions involving a sizeable amount of money or drugs is reasonably foreseeable."); United States v. Christian, 942 F.2d 363, 368 (6th Cir. 1991) (finding that possession of a firearm was foreseeable in light of the well-recognized nexus between drugs and firearms).

The majority opinion in *Rosemond* nevertheless held that accomplices were liable only for acts they are aware would come to pass when they began to assist the criminal venture.[329] The facts of Justus Rosemond's case were not very complicated and frequently occur in drug trafficking cases. An acquaintance of Rosemond's, Vashti Perez, arranged to sell a pound of marijuana and took along Rosemond and another man, Ronald Joseph, to the transaction.[330] Rather than pay for the drugs at the encounter, the purchaser punched one of the sellers in the face, grabbed the drugs and ran.[331] Either Rosemond or Joseph fired several shots from a semiautomatic weapon at the fleeing drug thief, though it was not clear which man did so.[332] Rosemond, for his part, claimed that he did not possess or use a firearm during any part of this drug transaction gone wrong.[333]

Rosemond was charged with using a gun in connection with a drug trafficking crime, but because there was no proof regarding whether Rosemond or Joseph fired the shots, he was charged with aiding and abetting the use of a gun during a drug crime.[334] Of course, if he aided this crime, he would be liable to same extent as the person actually possessing the weapon.[335] The jury found him guilty of the crime but did not indicate whether it concluded Rosemond possessed the weapon or if it found him guilty on the basis of his aiding and abetting the offense of Joseph's possession of a gun during a drug crime.[336] As the jury could have found him guilty of the crime under the complicity theory (and as there appears to have been adequate evidence showing Rosemond had a gun), the issue on appeal was whether the jury was adequately instructed on aiding and abetting.[337] A jury thus could have concluded that he either engaged in the drug crime with the gun, or he gave aid, encouragement, and assistance to Joseph to do so.[338]

The Court observed that Rosemond had been charged with

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[329] Rosemond v. United States, 134 S. Ct. 1240, 1243 (2014).
[330] *Id.*
[331] *Id.*
[332] *Id.*
[333] *Id.* at 1246.
[334] *Id.* at 1243.
[335] *See* Dressler, *supra* note 140 (recognizing that accomplices are punished as principals, but arguing for lesser liability for minor accomplices).
[336] *Rosemond*, 134 S. Ct. at 1243.
[337] *Id.* at 1244.
[338] *Id.*

aiding and abetting a "combination crime."[339] To prove this crime, the government was required to prove both drug trafficking and possession of a gun during the trafficking. Justice Kagan concluded, however, that Rosemond did not have to assist in the commission of both aspects of this combination crime to be guilty of aiding and abetting the crime,[340] but he did have to intend that the principal commit both aspects of the crime.[341] And to prove he intended to aid a drug offense with the use of a weapon, Justice Kagan concluded that Rosemond had to be aware that Joseph possessed a gun *before* he lent his assistance to the drug transaction.[342]

The Court rejected Rosemond's argument that he had to intend that his confederate carry a weapon, as well as commit the drug crime, in order to be guilty of assisting this crime – knowledge that a gun would be involved in the crime he was aiding, and hoping to come to fruition, was sufficient.[343] As Justice Kagan wrote, "What matters for the purposes of gauging intent . . . is that the defendant has chosen, with full knowledge, to participate in the illegal scheme – not that, if all had been left to him, he would have planned the identical crime."[344] The trial court erred, according to the majority, as it instructed the jury that, to find Rosemond guilty under the complicity theory, it must find that he knew Joseph had the weapon, but it did not indicate *when* it must be found that he was aware that Joseph had the weapon.[345] Advanced knowledge of whether one's confederates will be armed, according to Court, "enables [the defendant] to make the relevant legal (and indeed, moral) choice" of whether he should lend his aid to their activities.[346] As Justice Kagan further explained, "When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding to go ahead with his role in the venture that show his intent to aid an *armed* offense."[347]

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[339] *Id.* at 1250.
[340] *Id.* at 1246-51.
[341] *Id.* at 1251.
[342] *Id.* at 1251-52.
[343] *Id.* at 1250.
[344] *Id.* at 1249.
[345] *Id.* at 1251-52.
[346] *Id.*
[347] *Id.* at 1249. The dissent did not directly address the limits on natural and probable consequences that this opinion implicitly created. Justice Alito's dissent, joined by Justice Thomas, addressed only a point made by the majority in responding to a concern

Though the majority in *Rosemond* asserted that it did nothing to disturb the doctrine of natural and probable consequences in complicity cases, as it claimed that issue was not before the Court, the majority's reasoning is completely at odds with this much criticized doctrine.[348] Knowledge is a much more exacting standard for the prosecution to meet than "natural and probable." Though it is defined using slightly different terms in other contexts, the Model Penal Code's widely accepted definition of "knowledge" requires a "practical certainty" that the facts in question are true,[349] while a natural and probable fact is one within a "predictable range" of outcomes.[350] *Rosemond* thus permits liability only for those means or consequences of the criminal venture of which the defendant is practically certain when he gives his aid, encouragement or assistance. *Rosemond* has a wide persuasive swath as many state accomplice statutes resemble the federal statute at issue in the case. Justice Kagan's majority opinion observed that the doctrine of natural and probable consequences had been subject to academic

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the government raised at oral argument that the defendant who observed a bulge in his confederate's jacket during a drug transaction, but who completes the transaction nonetheless, should be held liable for aiding and abetting a drug crime while possessing a weapon. *Id.* at 1254-55 (Alito, J., concurring and dissenting). Justice Kagan's opinion for the majority concluded that walking away from the transaction at that point, as opposed to walking away from the enterprise when a gun was revealed to be part of the plan ahead of time, might increase the risk of violence. *Id.* at 1251. Justice Alito contended that this portion of the opinion confuses necessity with *mens rea* requirements. *Id.* at 1254-55 (Alito, J., concurring and dissenting).

[348] Tellingly, Justice Scalia concurred in the entirety of the opinion of the Court with only the exception of footnotes 7 and 8. *Id.* at 1240 Supreme Court justices often refuse to join portions of opinions, but it is very rare for them to take exception to individual footnotes. In footnote 7, Justice Kagan concludes that this case has nothing to say about the doctrine of natural and probable consequences. *Id.* at 1248 n.7.

[349] *See* Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1372–73 (1992).

[350] *See* Roy v. United States, 652 A.2d 1098, 1105 (1995). Federal law does use the term "knowledge" slightly differently than the Model Penal Code. Judge Kozinski's description of "willful blindness" as an appropriate basis for finding a defendant knowingly possessed drugs describes "willful blindness" much as the Model Penal Code describes knowledge. *See* United States v. Heredia, 483 F.913, 926 (9th Cir. 2007) (observing that "willful blindness is tantamount to knowledge."). Judge Graber's dissent reveals why a category of "willful blindness" was different than ordinary knowledge under federal law. Graber objected to permitting a conviction on the basis of willful blindness as a matter of statutory interpretation. Graber contended that the "plain text of the statute does not make it a crime to have a high probability of awareness of possession – knowledge or intention is required." *Id.* at 931 (Graber, J., dissenting).

criticism[351] and any subsequent effort to use it will be unlikely to overcome the logical force of her *Rosemond* opinion.

B. *Burrage* and the Felony Murder Rule

The felony murder rule has probably been more criticized than the doctrine of natural and probable consequences, but this is doubtless due to the fact that the felony murder rule is more easily grasped and is taught to thousands of law students annually.[352] The objection to the felony murder rule, at its core, is the same as the objection to the doctrine of natural and probable consequences or to the *Pinkerton* doctrine. In each case, the objection is to an increase in the defendant's punishment for the results the defendant caused without considering the defendant's culpability for those harmful results.

The Supreme Court did not consider a traditional felony murder case this term, but it did consider a federal statute with the same features as a felony murder case. Under the federal Controlled Substances Act, a defendant must be sentenced to a minimum twenty-year prison term if he distributes a Schedule I or II substance and "death or serious bodily injury results from the use of such substance."[353] In *Burrage v. United States*, the defendant challenged his conviction, claiming that the statute did not permit a conviction under this provision if the drugs he provided acted in combination with other factors to increase the odds of death.[354] In agreeing with the defendant, the Court established a new limitation on the scope of results for which one category of felons (namely drug dealers) could be held liable.

The victim in *Burrage*, Joshua Banka, began his last morning on earth smoking marijuana and injecting himself with oxycodone pills that he had crushed, cooked and placed in a syringe.[355] Later that day, Marcus Burrage, the petitioner in this case, came to the apartment of Joshua and Tammy Banka and sold them one gram of heroin.[356] Joshua Banka immediately cooked and ingested the heroin, left the apartment,

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[351] *Rosemond*, 134 S. Ct. at 1248 n.7.

[352] The criticisms of the felony murder rule appear to be far more numerous than the criticism of the doctrine of natural and probable consequences, though this would be difficult to quantify. *See generally* Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L. J. 763 (1999) (describing history of felony murder rule and its criticisms).

[353] 21 U.S.C. § 841(a)(1), (b)(1)(A)-(C) (2013).

[354] Burrage v. United States, 134 S. Ct. 881 (2014).

[355] *Id.* at 885.

[356] *Id.*

and returned sometime between midnight and 1:00 a.m. when he ingested more heroin.[357] Joshua Banka was found dead in his bathroom the following morning.[358]

A search of Banka's apartment revealed 0.59 grams of heroin and a variety of other drugs, including alprazolam, clonazepam, oxycodone, and hydrocodone.[359] Many of these drugs were found to be in Banka's system at the time of his death, including heroin, codeine, alprazolam, clonazepam, and oxycodone.[360] Other than the heroin, none of the other drugs were present in Banka's system at levels higher than are normally prescribed for medical purposes.[361]

Two medical experts agreed that a combination of drugs caused Banka's death.[362] One of the experts testified that heroin was a "contributing factor" and, in combination with the other drugs in Banka's system, caused "respiratory and/or central nervous system depression."[363] The other medical expert contended a "mixed drug intoxication" caused the death. Neither could testify that Banka would have died without the heroin, though one expert testified that his death would have been "[v]ery less likely." Each expert testified, however, that the heroin was a "contributing factor" to Banka's death.[364] The district court instructed the jury that Burrage was responsible for the death if "the heroin distributed by the Defendant was a contributing cause of Joshua Banka's death."[365] The jury found Burrage responsible for the death, resulting in the twenty-year mandatory minimum sentence.[366]

Justice Scalia's majority opinion minted a more exacting causation requirement than has typically been applied in civil, or even criminal, cases. The Court held that the prosecution had been unable to demonstrate that the heroin Burrage sold Banka was the but-for cause of the death, because the other drugs in Banka's system *could* have killed him without the heroin.[367]

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[357] *Id.*
[358] *Id.*
[359] *Id.*
[360] *Id.*
[361] *Id.*
[362] *Id.*
[363] *Id.*
[364] *Id.* at 885-86.
[365] *Id.* at 886.
[366] *Id.*
[367] *Id.* at 887-89.

In an ordinary criminal case, if a defendant intentionally sets in motion one mechanism sufficient to kill a victim, while another person sets in motion a different mechanism sufficient to kill that same victim, if these mechanisms act simultaneously to bring about the death, both persons are guilty of the homicide. As Wayne LaFave has explained it:

> In the criminal law . . . the situation sometimes arises where two causes, each alone sufficient to bring about the harmful result, operate together to cause it. Thus A stabs B, inflicting a fatal wound; while at the same moment X, acting independently, shoots B in the head with a gun, also inflicting such a wound; and B dies from the combined effect of the two wounds. It is held that A has caused B's death. . . . (X, of course, being exactly in the same position as A, has equally caused B's death.)[368]

As Professor LaFave describes, the best way to describe the question of causation in this instance is not whether the defendant's actions were a "but-for cause" of the harm, but rather, "Was the defendant's conduct a substantial factor in bringing about the forbidden result?"[369]

The majority in *Burrage* explicitly rejected the "substantial factor" test courts use in ordinary criminal cases to determine whether a defendant's actions caused a particular harmful result.[370] The provisions of the Controlled Substances Act considered in *Burrage* are much like the provisions of the felony murder rule. The Controlled Substances Act does not require that defendants deal in especially deadly drugs, or that they sell to youth users likely to exceed normal dosages, in order to be held liable for the deaths that result from their sales.[371] The drug dealer's sentencing enhancement that follows as a result of a drug customer's death is a matter of chance, as the statute is indifferent to varying degrees of risk the drug seller took when he provided the drug.[372] While Professor LaFave has observed that the requirement of causation "has sometimes been used to limit the harshness of the felony murder rule," courts have also used the same principles of causation in

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[368] LaFave, *supra* note 39, at 353–54 § 6.4(b).

[369] *Id.* at 354.

[370] The district court's test, that the Supreme Court rejected, would have allowed a finding that the defendant caused the death if his actions were a "contributing cause" of the death. *Burrage*, 134 S. Ct. at 883.

[371] *See* 21 U.S.C. § 841(b)(1)(C).

[372] *Id.*

felony murder cases as they use in ordinary homicide cases.[373]

Justice Scalia's majority opinion in *Burrage* requires that the prosecution show a greater causal link between the sale of drugs and a drug customer's death than ordinary causation principles require. The Court has thus limited the randomness of the additional punishment under the Act and read something like a *mens rea* term into the enhanced punishment that follows from a customer's death. If the drug customer's death is attributable solely to the drugs sold, especially if consumed in customary dosages, then the seller was placing his customer's life in considerable risk merely by providing the drugs. If, however, the drug user was consuming a very risky combination, even without the additional drugs the defendant provided, then it is harder to say it was the defendant who took an unreasonable risk with his customer's life that led to his death.

Burrage thus has obvious implications for statutes involving deaths from drug sales.[374] But *Burrage* could potentially have a greater persuasive impact. Felony murder statutes use the same principle as the enhancement under the Controlled Substances Act did. Lower courts could well use *Burrage* to limit the scope of these highly criticized statutes so that some form of culpability is required for death occurring during the commission of a felony.

C. *Yates* and Overcriminalization

While academics have long objected to the existence of broad criminal statutes that confer extraordinary discretion on prosecutors – and the Supreme Court has long interpreted the language of federal criminal statutes – the Supreme Court has never previously taken up a case that expressly raise the issue of overcriminalization until this term.

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[373] LaFave, *supra* note 39, at 791 § 14.5.

[374] For example, CNN's Ashley Banfield and Alan Dershowitz sparred on the television program "Legal View" over whether Phillip Seymour Hoffman's drug provider should be charged and/or convicted of felony murder. Catherine Taibi, *Ashleigh Banfield: Philip Seymour Hoffman's Dealer 'Deserves to Go Away for Life'*, HUFFINGTON POST (Feb. 3, 2014), http://www.huffingtonpost.com/2014/02/03/ashleigh-banfield-philip-seymour-hoffman-dead-drug-dealer-heroin_n_4718137.html. While the *Burrage* opinion pre-dated Hoffman's by six days, the *Burrage* case was not part of the Banfield/Dershowitz debate. As the ABA Journal observed, *Burrage* received little attention when it was decided. *See* Debra Cassens Weiss, *SCOTUS Ruling Will Make It Difficult to Get Enhanced Sentences for Drug Sales that Result in Deaths*, ABA JOURNAL (Mar. 4, 2014), http://www.abajournal.com/news/article/scotus_ruling_will_make_drug_cases_involving_deaths_harder_to_prove.

In *Yates v. United States*,[375] however, the amicus parties – as did academics writing about the pending case – asked the Court to impose a limiting construction on the statute before the Court to avoid this example of overcriminalization,[376] despite the fact that this is not the sort of argument that typically finds favor with appellate courts.[377]

John Yates was a commercial fisherman who, contrary to federal law, caught but did not release red grouper shorter than twenty inches.[378] An officer from the Florida Fish and Wildlife Commission boarded his vessel, discovered seventy-two undersized fish, wrote Yates a citation for the offense, and told him to keep the fish in a separate crate until he returned to port.[379] Four days later, when Yates had docked, the same officer returned to discover that the fish in this particular crate were longer than the ones he had measured at sea.[380] A crew member confessed that he had followed Yates's instructions to throw the short fish in the identified crate back into the sea and replace them with fish from the rest of the catch.[381]

Yates was indicted for violating a broadly written provision of the Sarbanes-Oxley Act, written after Arthur Anderson's destruction of documents relating to the collapse of the Enron Corporation, designed to prevent the destruction of corporate records.[382] The provision punished anyone who "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" a federal

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[375] *See, e.g.*, Stephen F. Smith, Yates v. United States*: A Case Study in Overcriminalization*, 163 U. PA. L. REV. 147 (2014); Haugh, *supra* note 25.

[376] Yates v. United States, 135 S. Ct. 1074 (2015).

[377] *See* United States v. Batchelder, 442 U.S. 114 (1979) (concluding that Congress did not implicitly repeal a felon-in-possession law carrying a five-year penalty when it adopted another felon-in-possession law carrying a maximum two-year penalty); People v. Williams, 814 N.W.2d 270 (Mich. 2002) (Kelly, J., dissenting) (arguing unsuccessfully that eliminating the distinction between robbery and attempted robbery is inconsistent with existence of crime of assault with the intent to rob, which would be subsumed into robbery if the distinction between attempted and completed robbery is eliminated); People v. Archie, 943 P.2d 537 (N.M. 1997) (rejecting defendant's argument that crime that specifically describes defendant's conduct precludes indictment under another statute that describes the conduct in more general terms).

[378] *Yates*, 135 S. Ct. at 1078.

[379] *Id.* at 1079.

[380] *Id.* at 1080.

[381] *Id.*

[382] *Id.* at 1080-81.

investigation.[383] The prosecution alleged that the fish thrown overboard was a tangible object for the purpose of this statute while the defense argued that "tangible object," in the context of the statute, meant something that could be used to retain information.

Of course this type of federal statutory interpretation is not new to the Supreme Court.[384] The way the case was presented to the Court was, however, quite different. Five different amici described the prosecution in this case as part of a much larger problem of overcriminalization. Cause of Action, a group that calls for greater accountability in government, described in its brief that the organization's mission was safeguarding taxpayer interests and observed that this case was a manifestation of "overcriminalization and government overreach – i.e., the proliferation of statutes and regulations that impose harsh penalties for unremarkable conduct, and the propensity of prosecutors to push (and even exceed) any limits that those laws contain."[385] The Washington Legal Foundation observed that it was interested in this case because it "frequently publishes and sponsors media briefing on the problem of overcriminalization and the growing trend at the federal level to criminalize normal business activities."[386]

The National Association of Criminal Defense Lawyers, and their unusual co-authors the American Fuel and Petrochemical Manufacturers, described an "overcriminalization epidemic" that had prompted the creation of a bi-partisan Congressional commission to study the issue.[387] Quite consistently with other amici, these advocates contended that overcriminalization was the "use of the criminal law to punish conduct that traditionally would not be deemed blameworthy."[388]

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[383] *Id.* at 1078 (quoting 18 U.S.C. § 1519).

[384] Federal courts are necessarily required to interpret federal criminal statutes, which they have been accused of doing too broadly, *see* Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193, 211-13 (2002) and too leniently. See Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 396-425 (advocating abandoning the rule of lenity).

[385] *See* Brief of Cause of Action, Southeastern Legal Foundation, and Texas Public Policy Foundation as *Amici Curiae* Supporting Petitioner, at 1, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451), 2014 WL 3101374.

[386] *See* Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioner, at 2, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451), 2014 WL 3101370.

[387] *See* Brief of Nat'l Ass'n of Crim. Def. Lawyers and the Am. Fuel & Petrochemical Manufacturers as *Amici Curiae* in Support of Petitioner John Yates, at 4–12, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451), 2014 WL 3342498.

[388] *Id.* at 7 (quoting Larkin, *supra* note 29, at 719).

Eighteen law professors told the Court that the prosecution of John Yates was "the latest chapter in a long history of the Government's use of vaguely drawn statutes to criminalize behavior beyond what any ordinary person would understand to be prohibited."[389]

The choice of this argument by so many of the amici in this case is quite interesting. As the law professors' brief recognized, "overcriminalization" has been a term primarily limited to academic discussions.[390] With very rare exceptions, courts have not used the term at all.[391] Courts, including the United States Supreme Court, have recognized that legislatures have the power to provide prosecutors with an array of possible crimes defining a single criminal act.[392]

Neither the plurality opinion written by Justice Ginsberg, nor the concurring opinion of Justice Alito specifically addressed the problem of overcriminalization generally. Each used traditional canons of statutory interpretation to conclude that Congress did not intend "tangible objects" to include fish tossed overboard to prevent prosecution for a game and wildlife regulation in a statute scheme designed to prevent and punish corporate fraud.[393]

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[389] *See* Brief of Eighteen Criminal Law Professors as Amici Curiae in Support of Petitioner, at 2, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451), 2014 WL 3101373.

[390] *Id.* at 2.

[391] A Westlaw search of every permutation of overcriminalization yields sixteen cases, in only two of which did the court limit the interpretation of the statute in light of an overcriminalization concern. *See* United States v. Fernandez, 722 F.3d 1, 24 (1st Cir. 2013) (recognizing that concern about overcriminlization may explain congressional limit on public corruption law to actual bribery); United States v. Brown, 579 F.3d 672, 683 (6th Cir. 2009). Far more cases that address the issue of overcriminalization conclude that our constitutional scheme requires prosecutors to act reasonably. *See* United States v. C.R., 792 F. Supp.2d 343, 365 (E.D.N.Y. 2011) (concluding in a child pornography case that to avoid a "Comstockian crisis of over-prosecution, good sense of prosecutors (however dangerous such reliance is in a democracy) must be assumed").

[392] *See* United States v. Batchelder, 442 U.S. 114 (1979) (concluding that Congress did not implicitly repeal a felon-in-possession statute when it adopted an essentially identical new statute for felon-in-possession with a lower penalty); People v. Williams, 491 N.W.2d 164 (2012) (Kelly, J., dissenting) (contending, unsuccessfully, that the majority's conclusion that there was no distinction between attempted robbery and robbery thwarted the legislature's intent in creating the crime of assault with the intent to rob); State v. Archie, 943 P.2d 537 (N.M. 1997) (rejecting defendant's argument that crime that very specifically described the defendant's actions precluded an indictment for a more generally worded and more serious crime that could be construed to encompass the defendant's activities).

[393] *Yates*, 135 S. Ct. at 1083-88 (plurality opinion); *Id.* at 1089-91 (Alito, J., concurring).

Remarkably, though, Justice Kagan's dissent did address overcriminalization, even though she concluded that the meaning of "tangible objects" was clear – and that the term included fish.[394] She concluded that the majority's opinion was driven by a concern about overcriminalization, something that courts were not often in a position to fix. She observed:

> I tend to think, for the reasons the plurality gives, that [the provision under which Yates was charged] is a bad law – too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion. And I'd go further: [the provision] is unfortunately not an outlier, but an emblem of a deeper pathology in the criminal code.[395]

For Kagan, the statute used to prosecute John Yates is problematic, and a symptom of a much bigger problem, but not one the Court can do anything about. The plurality, however, took a very different approach. Without acknowledging the scope of the problem of overcriminalization, it addressed this particular statute and found that the legislature did not intend the broad meaning the statute had been given by the lower courts.

The plurality opinion, combined with Justice Kagan's dissent, works a strong one-two punch, sending a message to lower courts. There are a lot of very broad statutes on the books that confer extraordinary discretion on prosecutors and courts should not be shy about limiting those statutes when there is an indication that the legislature did not intend the broad construction.

V. CONCLUSION

Courts have been reluctant to limit the scope of criminal statutes – historically, in fact, they have been prone to expand them. For years, judicial consideration of kidnapping statutes was an aberration. Courts deliberating on kidnapping statutes considered the problem of multiple criminal statutes covering a single criminal act – the existence of these overlapping statutes conferred extraordinary power on prosecutors to arbitrarily choose a more severe sentence, or to threaten a severe sentence in order to prompt a plea. In light of that concern in kidnapping cases, courts limited the construction of kidnapping statutes to prevent either excessive punishment or excessive pressure to plea.

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[394] *Id.* at 1091 (Kagan, J., concurring).

[395] *Id.* at 1101 (Kagan, J., dissenting).

For years, though, this concern was limited to kidnapping statutes. The reason courts started to be concern about kidnapping statutes is not surprising. The high-profile execution of Caryl Chessman for kidnapping had grabbed international headlines. The surprising part is that the logic behind limits on broad criminal statutes, like the kidnapping statute that sent Caryl Chessmen to California's gas chamber, did not extend to a host of other broad criminal statutes that allowed for very severe punishment, and prosecutorial leverage, in a range of other types of cases.

Fifty years after Chessman's execution, courts may be signaling an interest in extending the logic of their kidnapping concerns to a number of other criminal statutes plagued with the same breadth as mid-century kidnapping statutes. No single high-profile case seems to have provoked this new concern, but the public's attention to a criminal justice issue does seem to be related to the new attention to doctrines of substantive criminal law. America's mass incarceration epidemic has become a concern of academics, public intellectuals, prison reformers, television producers, and the public generally. For years legal academics have attributed the increase in the prison population to broad statutes that confer extraordinary discretion on prosecutors.

The Supreme Court's last two terms have demonstrated a new sensitivity to the power legislatures have conferred on prosecutors through both long-existing and relatively new theories of criminal liability. Lower courts, taking their cues from the United States Supreme Court, would seemingly be more skeptical of broad readings of criminal statutes.