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THE INSTITUTIONAL LOGIC OF PREVENTIVE CRIME

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Criminal justice plays a major role in regulating undesirable conduct. As part of that role, the system relies on deterrence, incapacitation, and the shaping of social norms and preferences in an effort to prevent conduct considered harmful. But that preventive role is routinely misunderstood. This paper rethinks preventive enforcement by training attention on the relationship between criminal law and the institutional realities affecting risk regulation in environmental, health, and national security regulation. First, while not denying a host of problems with the expansive reach of criminal enforcement, the article describes how the structure of criminal enforcement does not draw particularly stable or convincing lines excluding risk regulation from its domain. Distinctions between administrative regulation and criminal enforcement therefore blur on the issue of whether preventing harm and regulating risks are crucial goals, but remain important with respect to matters such as type of sanction available (a commonly appreciated distinction) and type of agency used for enforcement (a less-commonly appreciated distinction).

Second, the analysis trains attention on preventive enforcement in a world where social regulation faces a variety of institutional constraints and where multiple political dynamics drive expansive criminal liability. In such a world, a coercive and costly darker side of criminal justice coexists with the socially-valuable institutional characteristics of law enforcement organizations. As examples from food and drug regulation, environmental policy, and national security demonstrate, the mix of unique sanctions and procedural constraints associated with criminal enforcement have distinct institutional effects on public agencies. Specifically, the criminal justice system is capable of fostering a measure of autonomy that often eludes conventional regulatory agencies, provides incentives for investigative competence, and creates contextual effects in the choice of sanctioning regime, allowing politicians to signal the national state's competence to a potentially skeptical public.

This perspective does not necessarily legitimize all preventive criminal enforcement. Instead, three major implications follow from the analysis. (1) Policymakers should rethink the unfavorable comparisons of law enforcement to intelligence agencies in the national security context. (2) Society should recognize that circumscribing preventive criminal liability has subtle and underappreciated costs for regulatory policy. (3) Scholars should better appreciate the interdependence between legal mandates and the evolution of organizations. By ignoring or minimizing the importance of criminal enforcement's distinctive institutional structure, however, scholars and policymakers have often misconceived the central role of criminal enforcement agencies in advanced industrialized states, providing policy prescriptions that are at best incomplete and at worse perverse and highly problematic.

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As bureaucracies satisfy, delight, pollute, and satiate us with their output of goods and services, they also shape our ideas, our very way of conceiving of ourselves, control our life chances, and even define our humanity... We grow up in organizations; to stand outside them is to see their effect on what we believe, what we value, and more important, how we think and reason.¹

INTRODUCTION

Most organized societies promise to punish unjustified violence.² An assassin wrapping up her latest job seems as deserving of criminal punishment as the underworld boss who hired her or the intoxicated driver who smashes into them. But crime control drives a hard bargain. As police walk their beats, investigators sift through evidence, and prosecutors charge, the machinery of criminal justice routinely reveals a darker side. Mass incarceration imposes severe fiscal burdens and social costs.³ Police action often seems to reflect glaring inequities, sometimes degenerating into brutal episodes as violent as those used to justify criminal enforcement in the first place.⁴ And the specter of wrongful convictions looms even in systems with elaborate adjudicatory constraints.⁵ In attempting to balance this darker side with the value of punishing past harms, society confronts familiar and difficult trade-off dominating much of criminal law scholarship and policymaking.⁶

¹ CHARLES PERROW, *COMPLEX ORGANIZATIONS: A CRITICAL ESSAY* 5 (3rd ed. 1986).

² See generally LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* (1993); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 5 (2007). Concerns about public safety have also tended to shape – and in some cases contributed substantially to stark expansions in punitiveness of – the criminal justice systems of other advanced industrialized countries. See, e.g., Michael Tonry and Catrien Bijleveld, *Crime, Criminal Justice, and Criminology in the Netherlands*, 35 *CRIME & JUST.* 1 (2007).

³ See MASS INCARCERATION IN THE UNITED STATES : AT WHAT COST? : Hearing Before the Joint Economic Committee, Congress of the United States, One Hundred Tenth Congress, 1ST SESS., October 4, 2007. (discussing fiscal costs); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 *MICH. L. REV.* 291 (1998)(social costs of order-maintenance policing; Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 *AM. CRIM. L. REV.* 191 (1998)(social impact of policing on communities).

⁴ See William J. Stuntz, *Unequal Justice*, 121 *HARV. L. REV.* 1969 (2008) (discussing perceptions and the reality of unequal enforcement) Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts* 47 *BUFF. L. REV.* 1275 (1999)(discussing examples of police brutality).

⁵ See, e.g., Edward Connors et al., U.S. Dep't of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996), avail. at <http://www.ncjrs.org/pdffiles/dnaevid.pdf>.

⁶ For some interesting examples, see Gerard Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 *UCLA L. REV.* 1751 (1999); David Sklansky, *Police and Democracy*, 103 *MICH. L. REV.* 1699 (2005).

Yet the world is far more complicated than even these trade-offs imply. With life constantly at risk from the very world that sustains it, society's well-being depends not only on punishing paradigmatic violent offenses but on managing risks of adulterated food, toxic water supplies, polluted air, vulnerable infrastructure, and military or terrorist attacks. It is the impulse to manage those risks that has fueled the emergence of a modern regulatory state in advanced industrialized countries.⁷ Not surprisingly, the role of criminal enforcement in managing seemingly intangible, hidden risks inspires sharp debate among scholars and policymakers. Given these debates, at least three questions about the intersection of crime and preventive risk-regulation deserve sustained attention: (1) Is preventive criminal enforcement in the regulatory or national security context an aberration, as some participants in recent debates have suggested? (2) Why do lawmakers and executive officials support preventive criminal enforcement in the first place? And (3) in light of the institutional characteristics affecting the organizations implementing the law, what role can (or does) criminal justice play in the modern regulatory state?

My purpose here is to address these puzzles by showing how much organization theory, criminal law, and the study of the regulatory state have to learn from each other. My approach involves closely scrutinizing existing criminal law provisions to elucidate their relationship to risk regulation, rethinking the political economy of criminal enforcement in light of the crime-regulation connection, and applying organization theory to make sense of how criminal justice operates in regulatory and national security domains. In the course of pursuing this approach, the article challenges a number of often-accepted notions about the institutional realities of criminal justice. Scholars and policymakers often suggest that criminal justice is ill-suited to prevention,⁸ that criminal enforcement bureaucracies are poorly-equipped to manage risk-creating behavior in the

⁷ See, e.g., CHARLES TILLY, *COERCION, CAPITAL, AND EUROPEAN STATES* (1992). Tilly's now-classic account links the interactions between coercive power and capital in an environment where cross-border conflict spurred development of national capacity and bureaucratic structures. These structures, in turn, spawned an evolving set of constituency interests gradually involving the emerging national state in risk regulation (at 118):

The history of state intervention in food supplies illustrates...[how] unintended burdens [emerge] for the state. Since urban food supplies remained risky for centuries, municipal officers bore the major responsibility for overseeing markets, seeking extra supplies in times of shortage, and making sure that poor people could get enough to keep them alive.... Where municipal officers did not meet their responsibilities, they face the possibility of rebellions based on coalitions of their own enemies with the urban poor.

⁸ See, e.g., Norman Abrams, *The Material Support Terrorism Offences: Perspectives Derived From the (Early) Model Penal Code*, 1 J. NAT'L SECURITY L. & POL. 5 (2005) ("The criminal law typically defines as a substantive offense conduct that involves the direct commission of a harm."); Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CALIF. L. REV. 335 (2000) (suggesting that harm appears to be a necessary condition for the imposition of a criminal sanction); John C. Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It*, 101 YALE L.J. 1875 (1992) (arguing that the blurring of the civil/criminal distinction, and the concomitant encroachment of criminal law into domains involving regulation is an unwelcome, and unusual, recent development), Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1550 (1984) (positing that "community standards condemn many crimes unambiguously"); Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 131 (1997) (contending that crime is "any social harm defined and made punishable by law"). *But see* Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998).

national security domain,⁹ or that pervasively dysfunctional political dynamics fuel ill-conceived expansive crime definition.¹⁰ I find otherwise.

This conclusion is no prelude for dismissing the deep-seated social burdens associated with criminal justice in its existing incarnation. No reasonable observer can deny some staggering problems lurking in a criminal justice system that routinely disenfranchises people,¹¹ boasts the highest per capita incarceration rate in the world,¹² and is considered unnecessarily coercive even by those from other nations with highly imperfect crime control measures.¹³ While some of these problems are almost certainly connected to the expansive reach of criminal enforcement, it is a thesis of this paper that the relationship between criminal justice and preventive regulatory enforcement is far more complex, and raises considerably more policy trade-offs, than commonly realized. Take a closer look at criminal law's doctrinal structure and institutional realities, and it becomes clear that defining the relationship between crime control and risk regulation depends in subtle ways on the attributes of prosecutorial officers, investigative agencies, and adjudicatory entities capable of playing a unique role in regulating undesirable conduct.

To develop these ideas, the argument questions the inherent conceptual limits of crime as a category of social activity, and reframes the criminal justice system as a tangle of organizations, institutional pressures, and doctrinal conventions capable of regulating social behavior. Part I begins by showing how, contrary to the views of some commentators and policymakers, criminal law is routinely concerned with risk regulation. The pattern is reflected in regulatory crimes as well as national security offenses, and deeply rooted in the history of criminal enforcement through the existence of inchoate offenses. Nothing in the structure of criminal law limits the doctrine from focusing on risk regulation. Criminal and civil regulatory enforcement differ not in their concern with prevention but in the sanctions, procedural constraints, and bureaucratic institutions involved in implementing law.

Part II then shows how the heterogenous political economies of criminal justice give lawmakers and executive branch officials multiple reasons to pursue criminal enforcement. Some are driven by lawmakers' and interest groups' concerns about regulatory outcomes. Although not all of these dynamics are pathological, they introduce greater complexity into social dilemmas about the use of criminal law. Criminal justice

⁹ See, e.g., Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307 (2003); John J. Farmer, *The 2004 Paul Miller Distinguished Lecture: The Rule of Law in an Age of Terror*, 57 RUTGERS L. REV. 747 (2005); Richard H. Pildes, *Conflicts Between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT'L L. 145, 162 (2003); Michael B. Mukasey, *Jose Padilla Makes Bad Law*, WALL STREET J., A15 (Aug. 22, 2007).

¹⁰ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

¹¹ See, e.g., Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004).

¹² See Mariano-Florentino Cuéllar, *The Political Economies of Criminal Justice*, 75 U. CHI. L. REV. 941, 942 n.2 (2008).

¹³ See Nicole Velasco, *Taking the "Sandwich" Off the Menu*, 29 NOVA L. REV. 99, 113 n.123 (2004) (quoting a European critic of the American criminal justice system); See Tonry and Bijleveld, *supra* note 1 (discussing major policy challenges associated with criminal justice systems in advanced industrialized countries outside the United States).

bureaucracies often tend to reflect greater autonomy than conventional regulatory agencies. Law enforcement agencies tend to display a considerable degree of insularity and even occasional independence, in part because the public views them as carrying out a sensitive mission.¹⁴ Once triggered, their involvement becomes difficult to control and likely to result in a new distribution of regulatory punishments.¹⁵ In contrast, regulators responsible for clean water or occupational safety are expected to be politically constrained, and in fact tend to face a more treacherous political environment at the hands of regulated industries.¹⁶ Criminal justice bureaucracies also tend to develop distinctive investigative capacity for uncovering difficult-to-detect information, making liability judgments, and tracking suspects. The CIA's tracking of al-Qaeda operatives in 2000, for example, failed in part because the agency lacked the case-focused structure and investigative capacity of the FBI.¹⁷

And carving out a role for the FBI or its law enforcement brethren does more than facilitate investigation and prosecution. As criminal investigators, regulatory officials, and national security personnel carry out their work, their overlapping missions can facilitate the successful evolution of more resilient enforcement strategies. By turning regulatory problems into crime prevention problems, policymakers can leverage the interaction between criminal and civil enforcement strategies even if criminal prosecutions are relatively rare. The creation of criminal money laundering statutes, for instance, changed the regulatory politics governing financial activity. Advocates for expansion of new financial regulatory mechanisms to detect offenses could more easily argue that additional reporting requirements were essential to the politically-desirable goal of crime prevention because the underlying conduct in question had been turned into a crime under federal law.¹⁸

These institutional realities deserve a place in our society's deliberations about the scope of criminal justice. Although an institutional perspective does not suggest that all preventive criminal enforcement is justified (current patterns of criminal enforcement involving drug and immigration offenses, for example, are difficult to justify without considerable additional argument), it does suggest that preventive criminal enforcement has underappreciated value. The institutional arguments supporting a role for preventive

¹⁴ See Peter K. Manning, *Rules in Organizational Context: Narcotics Law Enforcement in Two Settings*, 18 SOC. Q. 44 (1977). See also Part II.c., *infra*.

¹⁵ See Part II.b, *infra*.

¹⁶ See, e.g., Mark J. Moran and Barry R. Weingast, *Congress as the Source of Regulatory Decisions: The Case of the Federal Trade Commission*, 72 AM. ECON. REV. 109 (1982)(showing how even ostensibly independent multi-member commissions are powerfully affected by congressional preferences). Although regulatory agencies often seek and sometimes achieve a measure of autonomy, see DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* (2002), their political environment and public standing often make this task tremendously difficult. See Peter C. Yeager, *Structural Bias in Regulatory Law Enforcement: The Case of the U.S. Environmental Protection Agency*, 34 SOC. PROBS. 330 (1987). The spectrum of agencies subjected to political control also extends to other contexts. See, e.g., Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094 (1985).

¹⁷ See Amy B. Zegart, "CNN With Secrets": 9/11, the CIA, and the Organizational Roots of Failure, 10 INT'L J. INTEL. & COUNTERINTEL. 18, 24-25 (2007). See *infra* Part II.b.

¹⁸ See *infra* Part II.e.

criminal enforcement in risk regulation also showcase how organizational realities interact with doctrinal features to shape law's implementation.

Despite these rationales, difficult questions remain about the proper scope of the criminal sanction and the efficacy or legitimacy of national states' regulatory goals. But ultimately, the stakes in understanding the institutional logic of preventive crime reach beyond policy dilemmas about FBI counter-terrorism activity, criminal investigators' role in enforcing EPA regulations, or judicial constraints on the blocking of financial assets. At issue is whether (and how much) to approach legal problems involving risk regulation by cabining the subtly interconnected roles of individual moral intuitions and doctrinal standards less clear than principled observers often think. Some of those intuitions and standards may be deeply rooted in the architecture of human cognition about the proper role of punishment.¹⁹ Others may arise from legitimate (though rarely theorized in any sustained way) concerns about the potential for abuse inherent in criminal justice.²⁰ Amidst the legislative votes, bureaucratic judgments, and adjudicatory choices constituting the criminal justice system, calibrating the place that should be assigned to those intuitions and standards is a difficult task. These are best addressed, however, by first casting aside unsupported conceptions about the complex relationship between risk regulation and criminal justice.

I. THE REALITY OF PREVENTIVE CRIMINAL ENFORCEMENT

On a balmy August day in 1996, Scott Dominguez almost died at a fertilizer manufacturing facility in Soda Springs, Idaho.²¹ He was working at Evergreen Resources, a company with a history of violating environmental laws. Allan Elias, its owner, had used a 35,000 gallon tank for cyanide leaching and phosphoric acid storage.²² Together these chemicals react to form hydrogen cyanide gas, which is highly toxic. The tank needed cleaning, however, so Elias ordered Dominguez and his co-workers to dump the toxic sludge from the bottom of the tank despite the workers' pleas for safety equipment and the absence of tests to determine whether it was safe to enter the tank.²³ The workers complained of sore throats. Unmoved, Elias told them to find work elsewhere if they did not finish the job. Within two hours, Dominguez emerged from the tank on a stretcher and permanently brain-damaged.²⁴ When asked by doctors treating Dominguez whether there was cyanide in the tank, Elias lied and said no. He lied again

¹⁹ See, e.g., Mikhail, John, *Moral Grammar and Intuitive Jurisprudence: A Formal Model of Unconscious Moral and Legal Knowledge* (July 20, 2008). THE PSYCHOLOGY OF LEARNING AND MOTIVATION: MORAL COGNITION AND DECISION MAKING, D. Medin, L. Skitka, C. W. Bauman, D. Bartels, eds., Vol. 50, Academic Press, 2009, available at SSRN: <http://ssrn.com/abstract=1163422>.

²⁰ For one thoughtful account of these risks, see David A. Skeel, Jr. and William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PENN. J. CONST. L. 809 (2006)(many open-ended crimes don't sufficiently cabin executive discretion).

²¹ See generally JOSEPH HILLDORFER AND ROBERT DUGONI, *THE CYANIDE CANARY: A STORY OF INJUSTICE* (2004).

²² See Testimony of David M. Hulmann, before the United States Senate Committee on Health, Education, Labor, and Pensions, *The Prosecution of Worker Endangerment Cases and the Need for Stronger Criminal Provisions of the Worker Safety Laws to Protect America's Workers* 3 (April 29, 2008) (Uhlmann testimony).

²³ See *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001).

²⁴ See Uhlmann testimony, at 3 n6.

to medical personnel and regulatory inspectors over the ensuing days.²⁵ Belying any notion that Dominguez might have freely chosen to assume the risks involved, the trial transcript revealed how Dominguez entered the tank without protection because “I really, really, really did, really did trust” Elias.²⁶

It should be clear from this description that Elias’ behavior created risks for his workers, whose relative position in the labor market made leaving Evergreen extremely difficult.²⁷ Elias’ willingness to violate regulations involving exposure to toxic chemicals and forge approval documents serves as a proxy for the social risks he could generate managing the ironically-named Evergreen Resources. Expert trial testimony indicated that the tank in question contained enough cyanide to kill thousands.²⁸ What is also clear, however, is that Elias is not guilty of criminally violating occupational safety laws. Such prosecutions would depend not only on showing the presence of a willful regulatory violation, but also demonstrating that such a violation caused the affected worker to die.²⁹

Ask why the worker safety violations at issue in the *Elias* case are not subject to criminal prosecution, and some knowledgeable observers will respond with an argument that goes something like this. What happened to Dominguez is a tragedy. Nonetheless, regulatory problems generally involve the creation of risk and are thus ill-suited to the application of criminal law.³⁰ Whether the context involves occupational safety or compliance with economic sanctions, the inherently coercive nature of the criminal sanction makes it most appropriate to deploy its machinery in situations where individuals have actually *caused* harm.³¹ This is why, from a principled perspective, it is understandable that occupational safety crimes are restricted to narrow instances involving death rather than a far broader range of circumstances involving the mere knowing or negligent creation of risk.³² Risk-focused criminal statutes, therefore, go against the grain of criminal justice.³³

²⁵ Though critics of occupational safety regulations may instead prefer a system of disclosure and worker choice, the *Elias* case highlights the extent to which disclosure regimes also trigger regulatory dilemmas.

²⁶ *United States v. Allan Elias* (D. Idaho, CR No. 98-00070-E-BLW), Trial Transcript at 3499 (Testimony of Scott Dominguez, May 3, 1999).

²⁷ Dominguez was a recent high school graduate with little work experience. *See id.* Framing the workers’ decision to stay at Evergreen as a voluntary choice to assume the risks involved sidesteps a host of complicated questions about the definition of coercion and the proper extent of information disclosure that could provide a plausible rationale for regulating working conditions. For an interesting discussion of the coercion-related issues in another context, see Mark Kelman, *Thinking About Sexual Consent*, 58 STAN. L. REV. 935 (2005).

²⁸ *See* Uhlmann testimony, at 3.

²⁹ *See* 29 U.S.C. Sec. 666(a)(2000).

³⁰ *See*, e.g., Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1863 (1992)(criminal law’s reach as a regulatory tool is “overextended”).

³¹ *See*, *supra* note 8 (discussing the conventional harm-focused view of criminal law).

³² Indeed, many criminal codes punish certain actions (such as driving while intoxicated) more severely when they actually cause a completed harm. This focus was both identified and eloquently critiqued by Schulhofer. *See* Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974). For a discussion on the potential ambiguities associated with the definition of “harm,” *see infra* Part I.

³³ *See* Coffee, *supra* note 7. *Cf.* Nancy Frank, *From Criminal to Civil Penalties*, 30 SOC. PROBLEMS 532, 533 (1983)(suggesting that criminal laws focused on risk-regulation and strict liability were hampered by a “broad consensus that strict liability violated a central principle of the criminal law”). These perspectives might not entirely rule out expanding occupational safety laws to punish consequences that could be

This picture is simple, alluring, and wrong. In advanced industrialized countries, the national state's legal machinery tends to legitimize intervention before society experiences adverse consequences.³⁴ An impending scheme to detonate a shrapnel-laden bomb in the glassy atrium of a federal courthouse, the criminal toxic waste disposal provisions ultimately used to prosecute the employer in the *Elias* case,³⁵ a taciturn banker helping aspiring drug traffickers raise capital for a new smuggling run, or a vast industrial operation threatening to yield salmonella-laden spinach – each of these situations can trigger preventive criminal enforcement. As used here, the terms refer to the use of the criminal justice system to regulate risks through sanctions, incapacitation, and the shaping of social attitudes even if the conduct in question has yet to result in directly-observable harms.³⁶ Some of the conduct triggering preventive criminal enforcement may imply that harmful activity is afoot but too difficult to observe,³⁷ but even then preventive enforcement depends in some sense on the relationship between conduct and (unobserved or unrealized) threats.

What most readily forges the scope of those prohibitions is a political process of crime definition and enforcement. That process determines whether contributors to specially-designated terrorist organizations, environmental offenders, or employers violating occupational safety laws are subject to criminal penalties. Evaluating such a process poses difficult questions about the scope of the criminal sanction. There is, however, little basis in simply assuming that preventive criminal enforcement is either a rare or an unambiguously pathological development at odds with some coherent, prevailing conception of criminal law. The overlap between regulation, crime, and national security offenses therefore leaves principled observers and policymakers with difficult practical questions about the political context forging criminal law and how that context interacts with legitimate social goals.

A. Crime, Regulation, and the Regulation of Crime

Although such preventive enforcement strikes some observers as deeply suspect,³⁸ criminal codes have long revealed a concern not only with forbidding harm, but with

reframed as past harms (such as Dominguez' brain damage), but they would be highly skeptical about criminalizing Elias' risk-creating behavior as such.

³⁴ See Joachim J. Savelsberg, *The Making of Criminal Law Norms in Welfare States: Economic Crime in West Germany*, 21 LAW & SOC. REV. 529 (1987) (discussing the growing breadth of liability for economic crime in the former West Germany and other advanced industrialized countries).

³⁵ These provisions only cover worker endangerment situations that also involve violations of toxic waste regulations, however, so occupational safety policy is still affected by the absence of more expansive criminal statutes. See 29 U.S.C. sec. 666(e).

³⁶ Exactly what counts as a "harm" is the subject of no small controversy. Although these debates have some relevance to the present argument, at this juncture one should bear in mind only that: (1) a great many observers eagerly *distinguish* between harm and risks even if they differ on where they situate the line, and (2) one can consider the analysis on the basis of a range of distinct definitions of "harm."

³⁷ Cf. Mariano-Florentino Cuéllar, *The Mismatch Between State Power and State Capacity in Transnational Law Enforcement*, 22 BERKELEY J. INT'L L. 15, 22 (2004)(discussing the existence of "presumption crimes.")

³⁸ See, e.g., Michele Cotton, *Back With a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313 (2000).

preventing it.³⁹ The Model Penal Code, for instance, reflects so pointed a concern with reducing the threat of future harms that its goal could be described as “prevention-squared” – its description of the general purposes of criminal prohibitions provides that “[offenses should] forbid and *prevent* conduct that unjustifiably and inexcusably inflicts or *threatens* substantial harm to individual or public interests.”⁴⁰ The model code goes on to define a panoply of anticipatory offenses, including not only traditional future-oriented common-law crimes such as attempt,⁴¹ but also newer statutory formulations such as criminal reckless endangerment.⁴² When lawmakers, executive branch officials, and political constituencies include risk-reduction goals ranging from disrupting terrorist financing to assuring food safety within the scope of criminal justice, they shift attention from regulation to the regulation of crime. Such a shift suggests, in principle that the distinction between risk and actual harmful consequences – looming so large in the architecture of our own cognition⁴³ – should not entirely define the limits of criminal law.⁴⁴ Consider some examples.

Possession crimes have become staples of American criminal codes since before the modern war on drugs.⁴⁵ Before drug and weapons possession was criminalized, possession of burglar’s tools with intent to commit a burglary, or of intoxicating liquor, made an individual subject to potentially severe criminal penalties. Though criminal law is assumed to require an act (in terms of both normative arguments about the definition of criminal law and cases raising constitutional objections to crimes that do not encompass an act requirement), possession is not precisely an act at all. It is a state giving rise to a legal conclusion that an individual has constructive power over a physical object or substance. Despite this quality, possession crimes have generally been upheld, often by reading in a requirement that possession be conscious or willing (thereby emphasizing an alleged criminal’s failure to terminate possession).

Perhaps the rationale for possession offenses can be simply assumed from the conclusion that the substance that the individual is prohibited from possessing is itself so harmful (e.g., special dyes for counterfeiting, or explosives) that possession enforcement is inherent in any scheme to regulate the substance. But even in light of assumptions about the harmfulness of a particular product, the severity of the punishment associated with possession – and the powers that law enforcement officials obtain over individuals who appear guilty of it – are difficult to justify as a direct response to a specific harm.

³⁹ See, e.g., WAYNE LA FAVE, CRIMINAL LAW 568 – 661 (2003)(discussing inchoate criminal liability in state and federal criminal codes).

⁴⁰ See Model Penal Code Section 1.02, *Purposes; Principles of Construction*.

⁴¹ See *id.*, Section 5.01.

⁴² See *id.*, Section 211.2.

⁴³ See, e.g., George Loewenstein, Deborah Small, and Jeff Strnad, *Statistical, Identifiable, and Iconic Victims and Perpetrators* (Stanford Law and Economics Olin Working Paper No. 301, Mar. 2005)(reviewing studies indicating how identifiable victims garner more public sympathy than statistical victims); George Loewenstein, *Emotions in Economic Theory and Economic Behavior*, 90 AM. ECON. REV. 426 (2000)(discussing the difficulties people face in disentangling powerful emotional reactions driven by responses to individual, salient details from broader judgments about risk and probability).

⁴⁴ Cf. Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

⁴⁵ See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2002).

Instead, one might justify severe possession penalties (leaving aside the question of the distribution of their imposition) on the basis of what a possessing individual was assumed to have done in the past, or (more to the point of our inquiry) what she will do in the future. Sometimes the future-focused version of the presumption underlying possession is formalized through a charge of possession with intent (e.g., to distribute). Thus, although a past-focused rationale for some possession exists, there is also a future-focused version of possession, thereby yielding the criminal justice system with yet another flexible means of intervening before a harm (involving the use of the fertilizer as an explosive, the sale of the drugs to minors, or the illicit discharge of the weapon) is completed.

Something similar happens with money laundering and terrorist financing offenses. Give money to a specially-designated terrorist organization and you are guilty of material support, regardless of whether the organization uses your donation for an illicit purpose.⁴⁶ The hybrid criminal-regulatory arrangement in these statutes may seem unfamiliar to some observers, and raises some questions about the scope of knowledge that makes donors guilty. But at their core, material support laws amount to little more than rule-based versions of complicity. Instead of leaving the scope of “aid or abet” to judges and juries, the statute defies actions (or purportedly does) that would amount to a violation.⁴⁷ These actions include, among others, providing allegedly terrorist groups with: currency, commercial equipment, personnel, and most physical assets (e.g., not including medicine or religious materials). While Section 2339A focuses on providing the aforementioned resources with the *knowledge* that they will be used in preparation for certain federal offenses involving what would be colloquially referred to as terrorism (or intending for the materials to be used in such preparation), 2339B is even *more* open-ended by criminalizing the knowing provision of such aid to organizations designated as “Foreign Terrorist Organizations” (FTOs) by the State Department.⁴⁸

Where money laundering opens the door for the criminal justice system to prevent harms involving the financial support or facilitation of terrorism-related offenses,⁴⁹ material support swings it wide open by multiplying the government’s discretion. The open-ended nature of 2339B in particular comes not only from the government’s power to apply the law in a manner that covers a wide range of specific types of support, but from the fact that the State Department has such considerable power over *who* gets designated as an FTO.⁵⁰ A person convicted under 2339B is therefore potentially twice removed from directly causing harm – by merely assisting an organization and by the fact that the organization in question may be one that is suspected of, but has not been obviously or unambiguously demonstrated to be, planning terrorist actions.

⁴⁶ See Abrams, *supra* note __, at 6.

⁴⁷ See 18 U.S.C. Sec. 2339A and 2339B.

⁴⁸ For an illuminating discussion, see Robert M. Chensney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1 (2005).

⁴⁹ See Cuéllar, *supra* note __, at __.

⁵⁰ See Alison Elizabeth Chase, *Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism*, 45 VA. J. INT’L L. 41 (2004).

Unsurprisingly, cases brought under the material support laws fit snugly within the definition of preventive enforcement as the management of the risk of future harm.⁵¹

The civil-criminal overlap is also present in environmental regulation, a domain where agencies can define rules that – when violated – constitute a crime.⁵² In principle, the distinction between environmental crime and civil offenses is also one grounded in “knowledge” and in whether harm resulted. Taken together these two features should make criminal prosecutions in this area appear to fit with the standard conception of how and where criminal liability is imposed: a person intends to commit an offense and causation of harm epitomize the criminal sanction. Nonetheless, in the context of environmental crimes, intent does not necessarily mean one intended to violate a law.⁵³ It does not even mean one intended to achieve a goal that would involve the emission of certain kinds of pollution, or the improper treatment of certain wastes. Instead, environmental criminal provisions generally require mere “knowledge” (though some provide for negligence) of a pollutant’s discharge. This is the same degree of knowledge that possession violations tend to require, and is a far cry from the individualized intent to cause harm generally associated (or perceived as being associated) with criminal violations.

Nor does the act requirement foreclose prosecution of individuals who have yet to actually cause harm. Environmental crimes involve conduct elements associated with the violation of regulatory standards. They are found in statutes replete with overlapping civil and criminal enforcement provisions.⁵⁴ Crimes under the Clean Air Act, for example, arise from violations of the National Ambient Air Quality Standards or New Source Performance Standards.⁵⁵ Violations of Resource Conservation Recovery Act involve failure to adhere to detailed permitting and notification requirements creating obligations for the handling of certain hazardous wastes.⁵⁶ One could certainly argue about whether such violations directly cause harm to people or the environment, or whether they merely signal that harm may arise (e.g., as a result of a regulatory violation). But if such violations are to be treated as harmful, they do not seem conceptually different in principle from those subject to civil penalties. There is no analogy here for the requirement under occupational safety statutes that a causal link be established between a safety violation and a worker’s death.⁵⁷ Potential offenders can violate the act requirements of environmental criminal statutes by failing to file required reports,⁵⁸ failing to pay required fees,⁵⁹ or operating without a permit.⁶⁰

⁵¹ See, e.g., *U.S. v. Rahmani*, 209 F.Supp. 2d 1045, 1047 (C.D. Cal. 2002)(charge of raising money for alleged terrorist organization); *U.S. v. Goba*, 220 F.Supp. 2d 182, 190 (W.D.N.Y., 2002)(conviction of individuals who traveled to Afghanistan to participate in training).

⁵² *United States v. Grimaud*, 22 U.S. 506 (1911)(Congress may constitutionally delegate to an administrative agency the power to issue regulations the violation of which is punished by statute as a criminal offense).

⁵³ See, e.g., *United States v. Weitzenhoff*, 35 F.3d 1275, 1284-1285 (9th Cir. 1993)(criminal violation of the Clean Water Act does not require a showing that defendant knew conduct would violate criminal statute).

⁵⁴ See Andrew Oliveira et al., *Environmental Crimes*, 42 AM. CRIM. L. REV. 347 (2005)(“Most of these [environmental] statutes contain overlapping civil, criminal, and administrative penalty provisions.”).

⁵⁵ See 42 U.S.C. Sec. 7413(c)(2000).

⁵⁶ See 42 U.S.C. Sec. 6901-6992k (2000).

⁵⁷ Compare 42 U.S.C. Sec. 7413(c)(2000) with 29 U.S.C. Sec. 666(a)(2000).

⁵⁸ 42 U.S.C. Sec. 7413(c)(2000).

On the other hand, perhaps we can find a more direct focus on punishing the creation of serious *ex post* harm and not threatened harm in the actual behavior of regulators and law enforcement authorities. But things still prove somewhat less than clear-cut. In internal guidance documents, the EPA's Office of Criminal Enforcement emphasized that, while criminal cases should be picked in accordance with criteria that included "significant environmental harm," that factor "should be broadly construed to include the presence of actual harm, as well as the threat of significant harm, to the environment or human health."⁶¹ As if to underscore the point, three of the four factors to be used in interpreting the "significant environmental harm" criterion do not involve completed harm at all, but the risk of it.⁶² Earlier documents provide similar guidance.⁶³ Hence, while the document does evince a policy of trying to use civil penalties to target less "wrongful" conduct (as understood in the exercise of bureaucratic discretion), the definition of "wrongful" is not self-explanatory, nor is it apparently defined by presence of actual (as opposed to threatened) harm.

Not surprisingly, actual criminal and civil enforcement activities *both* routinely target the possibility of threatened harm (or, put differently, harm arising from emissions or waste disposal violating regulatory requirements), and activity that did not involve intentional violations of legal requirements. Some criminal penalties recently imposed involve plainly willful violations crating substantial harm or risk. Other criminal penalties imposed in a recent year targeted a supervisor who failed to prevent workers from discharging wastewater containing coal slurry into a creek,⁶⁴ punished lapses in regulatory compliance at a drinking water plant,⁶⁵ sanctioned managers at a company discharging water used to wash chiles into an irrigation drainage ditch,⁶⁶ and punished an attempt (though not a successful one) to dispose of waste in a lake.⁶⁷ These and many other cases all involve legally defensible applications of criminal penalties (mostly found in environmental statutes, but in some cases also involving the use of mail fraud or false statement prohibitions under federal law). What these prosecutions do not demonstrate is a categorical distinction compared to behaviors targeted using civil penalties, such as those involving cases against oil companies and manufacturers forced to pay civil fines and reduce polluting activities.⁶⁸

As with occupational safety violations, it may be harder to say in the context of environmental violations (compared to gun possession, for example) that *no* harm has occurred at all in the criminal cases that are brought. In fact those cases tend to proceed

⁵⁹ See Oliveira et al, *supra* note __, at __.

⁶⁰ See *id.*

⁶¹ See Memo from Earl Devaney, Director, Office of Criminal Enforcement, to EPA Employees Working in or in Support of OCE Programs (Jan. 12, 1994)(on file with author).

⁶² See *id.*

⁶³ See U.S. Dep't of Justice, *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* (July 1, 1991), quoted in Oliveira et al, *supra* note __ at 352 n.19.

⁶⁴ See EPA Criminal Case Summary 2 (1999)(on file with author). I picked the year at random from among the last ten years of criminal law case summaries available from the EPA.

⁶⁵ *Id.* at pp. 12-13.

⁶⁶ *Id.* at 15.

⁶⁷ *Id.* at 29.

⁶⁸ See EPA Civil Case Summary 2001.

because prosecutors and investigators believe past harm actually *has* occurred. But two things are worth noting about the criminal cases that *are* brought by teams of regulators, criminal investigators, and prosecutors. First, they seem routinely to be motivated by a concern to prevent future harms – a priority that is evidenced both in the specific deterrence rationales that prosecutors emphasize and in the settlement agreements actually produced in environmental cases. Second, even if the criminal penalties do seem in some sense conditioned on the existence of past harm, the harms in question are similar to those resulting in civil penalties. Hence, while occupational safety and environmental criminal violations may be different from material support, conspiracy, and possession offenses in critical ways, they further illustrate the conceptual overlap in the work of traditional administrative regulators and criminal justice bureaucracies.

Admittedly, environmental violations resulting in criminal prosecutions are not identical to those violations subject to civil sanctions. The statutory elements associated with criminal prohibitions do preclude out some civil cases from being considered for criminal enforcement. Criminal cases more frequently seem to involve instances of repeat regulatory violations (particularly in the occupational safety context), and sometimes involve perpetrators whose intent evinces greater willfulness (and in some cases, and explicit decision to disregard safety or environmental consequences for an action). Nonetheless, drawing a categorical distinction between the two domains as they actually play out turns out to be less straightforward than it might initially appear. Because intent and conduct requirements are flexible, a massive number of violations can be addressed through criminal enforcement or administrative regulation. The criminal statutes can thus be understood either primarily as risk-creation offenses, or we can expand the concept of harm to engulf both what regulators and law enforcement bureaucracies do. Either way, the distinction between criminal justice and the domain of administrative regulation is, in practice, a blurry one.⁶⁹

C. *How Crime Definition Accommodates Regulatory Goals.*

Some might readily acknowledge the blurry line defining the edges of preventive criminal enforcement while still questioning how much risk regulation fits into the underlying structure of criminal law. After all, the intellectual roots of criminal law seem to define the typical offense as one involving harmful acts undertaken with some degree of volition or at least negligence.⁷⁰ Courts occasionally say as much, even if sometimes

⁶⁹ The blurry distinction between regulatory and criminal justice domains evident in environmental, occupational safety, and material support laws also suggests that it may be misleading to assume that criminal laws merely provide prosecutors with menus of options for charging people. Prosecutors may find it difficult to criminally charge violators of environmental regulations in the absence of environmental crime laws, unless perhaps they proceed with a complex obstruction of justice-type charge unlikely to work in every case where the environmental crime statutes work. In the material support context, surely the law's marginal impact depends on the scope of conspiracy. But it would be a stretch to suggest that in no conceivable case could the existence of material support laws make a difference, as they are likely to make it substantially easier for prosecutors to prevail on conspiracy- or accomplice-type theories without ever having to prove that the defendant shared the objective of a terrorist organization.

⁷⁰ See, e.g., Wayne R. LaFare, *Criminal Law* (4th ed.) sec. 1.2(f) (“The broad aim of the criminal law is, of course, to prevent harm to society...”); sec. 5.1 (“It is commonly stated that a crime consists of both a physical part and a *mental part*” [emphasis added]). For a philosophical account of this perspective, see generally DOUGLAS N. HUSAK, *OVERCRIMINALIZATION* (2008).

they do so to point out narrow exceptions from this maxim.⁷¹ Trends in preventive criminal enforcement might therefore reflect a political, administrative, or jurisprudential failure – the alternative which would have been adherence to an otherwise clear structure limiting the substantive scope of criminal law.

Reality is considerably more complicated. Admittedly, there is something of a tension between the conception of criminal law as primarily a means of punishing people who are known to have *caused* harm and the reality that criminal codes themselves reveal a concern with prevention, or threats – or, as the MPC puts it, with *preventing threats*.⁷² Fully addressing that tension implicates a host of different problems, including (among others) the proper relationship between consequentialist goals and moral principles, the difficulties of preventing open-ended criminal provisions with harsh punishments from being abused, and the conceptual coherence of the nettlesome harm concept that some philosophers of criminal law so frequently deploy. Instead of purporting to resolve these puzzles, the aim of this part is more modest: to show how the doctrinal features of criminal law manage to accommodate preventive enforcement, and to raise questions about the politically feasible and proper relationship between criminal law and risk regulation.

Societies should not lightly dismiss the value of placing some principled limits on the use of police, prosecutors, and courtrooms to meet out coercive punishment. But those limits require considerable justifications, as they are not readily discernible from criminal law's underlying structure. Although difficult questions about the scope of the criminal sanction are unavoidable, the underlying structure of criminal law is compatible

⁷¹ See *Morisette v. United States*, 342 U.S. 246 (1952).

⁷² The allure of the conception of criminal law as “primarily a means of punishing people who are known to have done bad things” is plain in the vast scholarly literature advancing retributive justifications for punishment. See, e.g., Cotton, *supra* note __, David Wood, *Retribution, Crime Reduction, and the Justification of Punishment*, 22 OXFORD J. LEGAL STUD. 301 (2002). See also Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 335 (2004) (noting that “[w]e [presumably meaning the public] tend[s] to focus on the state’s response to individual offenders and the direct harm caused by the offense”); Renée Melancon, *Arizona’s Insane Response to Insanity*, 40 ARIZ. L. REV. 287 (1998) (describing as a core purpose of criminal law “to punish persons who voluntarily exert harm upon others”). Even conceptions of the structure and purposes of criminal law that explicitly contemplate the prevention of future harms do so either by emphasizing the promise of general deterrence that could be achieved through punishment of harmful conduct, see Gerald Leonard, *Towards a Legal history of American Criminal Theory: Culture and Doctrine From Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691 (2003), or by implying that there should be a particularly close link between the criminalized conduct and harm, e.g., Barbara Herman, *Feinberg on Luck and Failed Attempts*, 37 ARIZ. L. REV. 143, 143-44 (1995) (“The framing premise is a view of the purpose of the criminal law: to penalize those behaviors *likely* to cause serious harm.”) (emphasis added). Thus, even observers of the criminal justice with a broadly utilitarian perspective amenable to deterrence arguments might readily have a panoply of reasons – including, among others, a consequentialist concern not equalize prospective punishments for actions producing different degrees of harm (or, more to the point, having different probabilistic relationships to harm) – to be concerned about a system imposing severe criminal liability on the basis of presumptions and risk-creating offenses. *But see* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001) (“American criminal law’s historical development has borne no relation to any plausible normative theory--unless ‘more’ counts as a normative theory.”). Though I agree with Stuntz’s assessment of the overall trend, Part II suggests the possibility that the political economy of preventive criminal enforcement may occasionally lead politicians to create overlapping domains of administrative and criminal enforcement in a manner that may be prescriptively defensible.

with preventive enforcement. Act requirements in criminal statutes often don't involve obvious "harms," but risk creation. Intent requirements only partially circumscribe the scope of preventive criminal sanctions. And courts only intervene lightly in circumscribing the substantive scope of criminal enforcement. Consider each of these in turn.

Begin with the objective offense elements of criminal liability. As we have seen, criminal acts (also known as objective offense elements) often involve the creation of risks rather than some unambiguous harm. Only conduct criminalized were unambiguously harmful, there would be little need for separate intent requirements to begin with, and no room for criminal statutes that explicitly allow punishment for grossly undesirable conduct that nonetheless fails to produce a completed harm of some kind (as Schulhofer documents). Instead, criminal law's concern with risk regulation is plain in the definition of conduct that stops well short of constituting a completed harm. Instead the conduct is criminalized because of the risk it either creates in the world or reveals about the defendant (drunk driving offenses that don't result in property damage or injury are examples of both). There is no independent requirement for prosecutors to demonstrate that some unambiguous, completed harm has occurred (rather than the creation of a risk) when prosecutors punish someone for a Resource Conservation and Recovery Act (RCRA) violation or an offense involving the financing of an organization specially designated as a terrorist entity.⁷³

Perhaps mental state requirements do more work in circumscribing preventive criminal liability. Although requirements associated with preventive offenses do play a limited role in circumscribing criminal liability, however, their impact is relatively meager and should not be overstated. Some strict liability crimes exist, particularly involving food and pharmaceutical regulation formally dispense with intent requirements altogether.⁷⁴ The intent requirements associated with regulatory crimes have limited real-world impact in terms of cabining the risk-regulation focus of criminal justice when objective offense elements can be controlled entirely by legislative or regulatory process. Environmental regulatory statutes are an example, where "willfulness" requirements are yoked to violations of regulatory rules defined through legislative and executive action.⁷⁵

When willfulness requirements actually interfere with prosecutions, law enforcement officials can often find statutory substitutes with less demanding requirements. In *Elias*, for example, an employer's dramatic disregard for his workers'

⁷³ See Resource Conservation and Recovery Act sec. 3008(d), 42 U.S.C. sec. 6928(d)(defining as criminal, among other things, the activity of "[a]ny person who... knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter..."); 18 U.S.C. sec. 2339B(a)(1)(defining as criminal conduct where an individual "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so").

⁷⁴ There is, of course, a "presumption in favor of scienter" relevant to statutory interpretation and useful in vindicating constitutional interests. See *United States v. X-Citement Videos, Inc.*, 513 U.S. 64 (1994). Nonetheless, the Court has repeatedly recognized the legislature's wide latitude to eschew knowledge requirements altogether from criminal offenses. See, e.g., *Lambert v. California*, 355 U.S. 225 (1957).

⁷⁵ See generally David A. Barker, *Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387, 1392-1394 (2002). Federal occupational safety violations require a higher threshold. See Uhlmann testimony, *supra* note ____.

safety was still not enough to demonstrate a “willful” violation as the term is understood for purposes of OSH Act criminal liability. But RCRA allowed him to be convicted under a less demanding intent standard.⁷⁶ Even if one believes that willfulness or purpose requirements are meaningful in some sense despite regulatory state’s control of act requirements, in many cases that intent requirement can be inferred indirectly.⁷⁷ Because “willful violation” is not defined in the Occupational Safety and Health Act, its scope is the province of judicial interpretation.⁷⁸ Courts interpreting the law have generally taken the reference to willfulness as a requirement that prosecutors show some voluntary action done with either intentional disregard or mere indifference to statutory occupational safety requirements. A single violation may be found to be “willful,”⁷⁹ and the requisite intent may similarly be demonstrated even if a workplace is otherwise safe.⁸⁰ To sum up: intent requirements often set a higher threshold for punishment in the criminal context, but the impact is often quite limited and leaves a considerable overlap between criminal and regulatory domains. Intent requirements do not therefore provide a compelling map to distinguish the inherent domains of each sphere.

These developments reflect relatively limited court intrusion into the definition of substantive crimes. At various times, eager lawyers have advanced against risk-regulation offenses arguments rooted in equal protection, substantive due process, or the Eighth Amendment.⁸¹ Yet the definition of act and intent requirements is largely left up to the legislature.⁸² Where courts have asserted greater control, of course, is in how criminal justice is administered once the legislature defines an offense. Supreme Court regulation of the criminal justice system through criminal procedure is far more intricate, intrusive, and pervasive than the relatively limited Supreme Court regulation of substantive criminal law.⁸³

Given such limited review of substantive criminal law, our society is thus one where prosecutors, investigators, and police regulate risk alongside safety inspectors, financial regulators, and intelligence analysis. Still, the claim here is a limited one. Recognizing criminal law’s potential for playing a role in risk regulation does not imply that maximal breadth of crime-definition or criminal enforcement is socially desirable. Neither does it imply that we should dismiss the role of intent or other common features of traditional criminal law. In all likelihood, the framework of common law concepts and categories that has long seemed to drive criminal law has deep historical and perhaps even cognitive roots. Those roots inform common intuitions about the proper scope of criminal law, and it would be instrumentally risky if not normatively problematic to

⁷⁶ See *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001).

⁷⁷ See, e.g., *Williams v. State*, 262 Ga. 677 (1993)(jury may infer intent from conduct before, during, and after offense).

⁷⁸ See, e.g., *United States v. Ladish Malting Co.*, 135 F.3d 484, 490 (7th Cir. 1998)(willfulness in a criminal case can be “proved by showing deliberate indifference to the facts or the law.. or by showing awareness of a significant risk coupled with steps to avoid additional information”).

⁷⁹ See *A.E. Staley Mfg. Co. v. Sec’y of Labor*, 295 F.3d 1341, 1347 (D.C. Cir. 2002).

⁸⁰ See *Vladek Corp. v. Occupational Safety and Health Review Comm’n*, 73 F.3d 1466 (8th Cir. 1996).

⁸¹ See, e.g., *LaFave*, *supra* note ___, section 3.1-3.6.

⁸² See *id.* at 135 (equal protection challenges “rarely successful”); 142 (discussing the “decline in the Court-asserted control over legislative policy” involving crime-definition after *Nebbia v. New York*).

⁸³ See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 67-69 (1997).

entirely disregard them.⁸⁴ How much to continue relying on the basic, common law-suffused architecture of criminal law – including its presumption that more purposive mental states merit more severe punishments – is bound to remain a central question in criminal law. The centrality of that question, moreover, remains whether one trains attention on what’s ultimately desirable from a normative perspective or what’s desirable in a second-best world (more on this below). Nor is exceedingly broad criminal enforcement routinely desirable, as criminal law’s coercive power (particularly in an advanced industrialized power with the bureaucratic capacity to enforce the law) can be staggering.

But the claims here are more subtle. Nothing about the existing structure of criminal law or criminal enforcement rules out or even cuts sharply against the existence of a role for crime-definition and enforcement in risk regulation. Risk regulation can become crime prevention, and vice versa. Moreover, even if people try to use analogies to the common law as a guide to the proper scope of preventive criminal enforcement and occasionally find them useful in line-drawing, it’s not clear that the intuitions underlying those decisions constitute the best way of approaching the inherent policy questions pervading criminal law.⁸⁵ Absent a simple, persuasive doctrinal map of the proper way to draw the civil-criminal distinction, then any analysis of preventive criminal enforcement that explicitly excludes consequentialist discussion will require a lot more elaboration and defining than commonly realized. This state of affairs alone should prompt new attention to the distinct institutional realities affecting criminal justice relative to other enforcement mechanisms.

That comparison should unquestionably consider that criminal law has a brutal legacy as a tool for coercion, particularly at certain points in history.⁸⁶ Societies should define limits on its use to prevent abuse. The problem arises when the project of limiting criminal law’s empire becomes divorced from the principled evaluation of criminal law’s uses as a regulatory tool subject to instrumental considerations.

It is the ineluctable burden of an instrumental perspective, then, to treat criminal justice as deserving a place in the institutional design of mechanisms to regulate risks. It may not be possible to banish the darker side of criminal justice. Crime-definition and enforcement constitute powerful means of social control and regulation, with distinctive costs and benefits rooted in the bureaucratic realities of criminal justice – which are in turn affected by the larger political context. Our minds may struggle to fully grasp the dangers implicit in seemingly abstract risks that, but for fate, would have exerted a painful price on society. Moral intuitions might nonetheless play some role in drawing distinctions between the domain of crime and regulation. It is enough for my purposes to argue that such intuitions should not play the only role, and that institutionally-sensitive

⁸⁴ See Mikhail et al., *supra* note __.

⁸⁵ For a discussion of how those intuitions may complicate instrumental analyses of criminal law in the context of strict liability crimes, see Mark Kelman, *Strict Liability: An Unorthodox View*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1512, 1512-14 (Sanford H. Kadish ed., 1983)

⁸⁶ See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 601 (2nd ed. 1985)(describing prisoners who were “whipped and beaten; or they were tortured with pulleys, iron caps or ‘cages,’...” and noting that “[t]he story was always the same [in the criminal justice system]. Somehow reforms never took hold, or were perverted in practice.”)

analysis should form an important piece of the preventive criminal enforcement puzzle. Precisely what we can learn from taking institutions and organizations seriously is the subject of what follows.

II: COMPARED TO WHAT? THE POLITICAL ECONOMY OF PREVENTIVE CRIMINAL ENFORCEMENT

Thus far we've painted a picture where preventive criminal enforcement is a historical and legislative fact rather than an aberration. That picture raises a host of important and sometimes troubling questions, such as why the coercive machinery of criminal justice is already so deeply enmeshed in the project of risk regulation. Whatever the nature of public intuitions about the proper scope of the criminal sanction, however, the structure of criminal law does not solve the question of how much preventive enforcement should be part of criminal law's expanding empire.

That question defines some of the major policy problems currently facing domains such as national security, environmental regulation, and food safety. To address it, we need to turn our attention to the institutional realities permeating the enforcement process in an imperfect world. Instead of assuming that criminal law's inherent structure provides a reliable map for understanding the nature of preventive enforcement, we can gain perspective from investigating how institutional circumstances governing lawmakers' decisions, political pressures, and organizational realities affect the enforcement process in general – and the criminal justice system in particular.

A. The Heterogenous Politics of Crime

In 1940, the eminent legal scholars Jerome Michael and Herbert Wechsler confidently declared that “[t]he major problems of the criminal law are two: what behavior should be made criminal, and what should be done with persons who commit crimes.”⁸⁷ Strikingly, and despite the two scholars' eagerness to associate themselves with the application of social science to legal doctrine, their account neglected to consider the extent to which political and organizational realities complicate both problems. Budgets, policing priorities, bureaucratic choices, and lawmakers' response to their political environment inevitably take their toll on criminal justice. Regardless of how judges or scholars answer the more abstract normative questions, these factors have the potential to shape how the public understands the scope of criminal law. Political realities can impact how criminal law relates to society's larger regulatory or national security goals, or how much normative considerations about the scope of punishment are reflected in what investigators and prosecutors manage to achieve. By sidestepping these considerations, Michael and Wechsler found it easier to frame problems in criminal justice as primarily ethical or philosophical choices concerning the proper relationship between law, punishment, the individual, and the state.

Yet criminal law operates in an indelibly political context of legislative choices, executive decisions, and group conflict. The millions of arrests, hundreds of thousands of convictions, and overall distribution of punishment and mercy emerging from the criminal justice system therefore partly reflect the choices of players in our system of political institutions. Even observers far more tolerant than Michael and Wechsler would

⁸⁷ See JEROME MICHAEL AND HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 6 (1940).

likely find it easy to criticize the result of those choices, particularly the staggering size of the prison population. As those critiques have gained traction, it has become relatively simple to characterize as dysfunctional the political responses to criminal justice problems in our system, and to condemn the expansive crime definition and enforcement associated with criminal enforcement of risk regulations as similarly problematic.⁸⁸ After all, regardless of one's views about the proper scope of preventive criminal enforcement in the more abstract realm that Michael and Wechsler inhabited, it seems relatively clear that politicians – under pressure from law enforcers – have too much to gain from responding to or even engendering uninformed public concerns about crime.

Or is it? Given the extent to which evaluations of preventive criminal enforcement depend on political realities, this section reconsiders the basic political dynamics affecting crime definition and enforcement. These dynamics are often described in terms that play down or almost eliminate the possibility that preventive enforcement can make useful contributions to regulatory goals.⁸⁹ Those descriptions, however, fail to recognize the extent to which criminal justice is driven by multiple political economies, including pluralistic interest group dynamics focused on the practical consequences of fusing crime-control mechanisms to enforce legal rules.

Admittedly, the resulting enforcement regimes may bear complicated or even tenuous connections to more technocratic justifications for policy. By the same token, the criminal enforcement-regulatory arrangements sometimes emerging from competitive political dynamics involving employers, unions, environmental groups, and civil liberties advocates can have a major impact on the distribution of resources and opportunities generated by the national state, a reality not lost on some of the political players even if it's only faintly visible to the larger public. Taken together, these dynamics make it possible for preventive criminal enforcement to constitute an element of sensible political compromises, and hint at lawmakers' understanding of the institutional distinctions involved in using law enforcement agencies to achieve regulatory or national security goals.

In a democracy, politicians sometimes define crimes and support their enforcement in response to broadly-held concerns among the public. As Lyndon Johnson sought to do in pursuing a major crime initiative while also advancing legislation Medicare, civil rights, and voting rights, policymakers can craft responses to concerns about physical security as a means of helping legitimize broader policy initiatives.⁹⁰ Rising crime rates – particularly involving traditional property and violent offenses likely to engender more immediate public concern -- can trigger legislative responses ranging from more expansive definitions of traditional property offenses⁹¹ to greater resources for local police.⁹² Media coverage of violent crimes can trigger cognitive dynamics making

⁸⁸ See Stuntz, *Pathological Politics*, *supra* note __, at __.

⁸⁹ See, e.g., Simon, *supra* note __, at 277 (presenting an interpretation of recent history wherein crime has reshaped “private” life in America by placing it in spaces and procedures self-consciously aimed at security from crime...”).

⁹⁰ See Cuéllar, *Political Economies*, *supra* note __, at 982-983.

⁹¹ See, e.g., *State v. Victor*, 368 So.2d 711 (La.1979)(statute requires only taking, not asportation, and thus larceny is complete when shoplifter conceals store's goods in a box, while still inside the store).

⁹² See Cuéllar, *Political Economies*, *supra* note __, at 983.

the public more easily remember certain offenses, skewing perceptions of the frequency of those crimes.⁹³

These impressions give lawmakers reason to support statutes addressing specific, high-visibility crimes such as carjacking even when the conduct criminalized is already covered by other statutes.⁹⁴ After the Tylenol poisoning episode in 1982 led to the deaths of seven people, federal lawmakers passed a new law making it easier to prosecute “malicious adulteration” of a consumer product in commercial channels.⁹⁵ Domestic violence mandatory arrest statutes may prove attractive vehicles for lawmakers to convey their concern, even if they end up having little effect on some police departments,⁹⁶ or perhaps perversely affecting the victims whose plight motivated the laws in the first place.⁹⁷ Regardless of whether lawmakers’ responsiveness in criminal justice improves social welfare in a given context, this dynamic only partially explains behavior by policymakers. The mass public is rarely if ever in a position to advocate some of the highly technical criminal law changes that often occupy lawmakers’ time,⁹⁸ and sometimes the public is relatively disengaged or only partially interested in intricate policy choices impacting criminal justice.⁹⁹

A related but conceptually separate mechanism involves principal-agent dynamics, where law enforcers successfully press lawmakers for changes. Law enforcement officials have a major stake in criminal justice policy. Their careers and reputation are affected in part by performance of a mission impacted by crime definition and enforcement resources. Regardless of one’s substantive evaluation of the policies they advocate, law enforcement officials can behave as a powerful interest group advocating changes in the criminal justice system. Federal law enforcement officials, for example, successfully pressed for Congress to fix a “flaw” in a certain money laundering-related statute, leading to a Supreme Court ruling forcing prosecutors to demonstrate

⁹³ See generally Martin S. Greenberg and Scott R. Beach, *Property Crime Victims’ Decision to Notify the Police: Social, Cognitive, and Affective Determinants*, 28 LAW & HUM. BEHAVIOR 177 (2004)(investigating availability heuristic effects on property crime victims’ decisions to notify police about suspected crimes); L.J. Shrum, Robert S. Wyer, Jr., and Thomas C. O’Guinn, *The Effects of Television Consumption on Social Perceptions: The Use of Priming Procedures to Investigate Psychological Processes*, 24 J. CONS. RES. 447 (1998)(availability heuristic implicated in psychological priming effects).

⁹⁴ See Stuntz, *Pathological Politics*, *supra* note __, at 531-532. For a discussion of lawmakers’ incentives to support legislation helping to create favorable impressions among the public even when it has little effects on policy, see Gregory A. Caldeira and Christopher Zorn, *Strategic Timing, Position-Taking, and Impeachment*, 57 POL. RES. Q. 517 (2004).

⁹⁵ See Kessler, *supra* note __, at 14.

⁹⁶ See Carole Kennedy Chaney and Grace Hall Saltztein, *Democratic Control and Bureaucratic Responsiveness: The Police and Domestic Violence*, 42 AM. J. POLI. SCI. 745, 763 (1998)(discussing how some police departments are relatively unaffected by the requirements because of practical or organizational resistance and a lack of effective monitoring associated with statutory requirements).

⁹⁷ See Jeanne Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 8 (2006)(describing criminal justice responses to domestic violence as a “state-imposed de facto divorce” that does not necessarily benefit the victim).

⁹⁸ See, e.g., Elizabeth S. Donald, Note, *Electronic Surveillance and Antitrust Investigations: The Effect of the Reauthorized Patriot Act*, 41 U.C. DAVIS L. REV. 387 (2007) (discussing the impact of technical changes made by the USA Patriot Act on antitrust investigations).

⁹⁹ See Cuéllar, *Political Economies*, *supra* note __, at 955-956.

defendants' knowledge of illegality.¹⁰⁰ Money laundering laws swelled in the wake of the September 11 attacks at the request of prosecutors and investigators.¹⁰¹ The Enron debacle fueled the fortunes of law enforcement officials' efforts to pass financial investigation provisions associated with the Sarbanes-Oxley law.¹⁰² FBI officials routinely leverage their favorable relationships with congressional appropriators, often facilitated by the presence of agency detailees working for relevant lawmakers, to expand its resources.¹⁰³ And between the 1930s and 1950s, federal law enforcement agents played a major role in expanding state and local drug laws.¹⁰⁴ Local prosecutors continue to successfully lobby state legislatures for expanding the scope of drug laws in recent years.¹⁰⁵ In all of these cases, the power of law enforcement agents tends to be bolstered by their ability to facilitate the creation of public support for their mission. In short: by lending support to lawmakers and other elected officials, police and prosecutors let politicians associate themselves with popular crime-fighting goals.

Important as this dynamic is in explaining the trajectory of criminal justice, it fails to account for situations where law enforcers have little if any plausible interests at stake, such as when new classes of activities are criminalized. Occasionally, officials even resist policymakers' initiatives, as when the FBI sought to minimize its involvement in drug enforcement in the 1970s.¹⁰⁶ Hence, the last piece of the puzzle in understanding the politics of crime concerns organized interests, public constituencies, and therefore lawmakers who care about policy outcomes and use the criminal justice system to affect them. Union members organize to press Congress for occupational safety laws, including criminal provisions.¹⁰⁷ Environmental groups and their allies fight with industry over the scope of environmental crimes.¹⁰⁸ Food and pharmaceutical manufacturers eagerly seek

¹⁰⁰ See *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994). Congress soon responded by amending the statute to effectively overrule the Supreme Court in response to protestations from law enforcement officials. See Stuntz, *Pathological Politics*, *supra* note ___, at 563.

¹⁰¹ See Michael Shapiro, *The USA Patriot Act and Money Laundering*, 123 BANKING L.J. 629 (2006).

¹⁰² See Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1552 (2005)(discussing the political economy of Sarbanes-Oxley, underscoring the role organized pressures leading congressional proponents to speak more about "increased criminal penalties" than any other provision of the package).

¹⁰³ See Lori E. Shaw, *The USA Patriot Act of 2001, The Intelligence Reform and Terrorism Prevention Act of 2004, and the False Dichotomy Between Protecting National Security and Preserving Grand Jury Secrecy*, 35 SETON HALL L. REV. 495, 555 (2005)(quoting a National Security Council staff concluding that "independence" is what the FBI "views as its birthright.").

¹⁰⁴ See Kenneth J. Meier, *The Politics of Drug Abuse: Laws, Implementation, and Consequences*, 45 WEST. POL. Q. 41, 44 (1992).

¹⁰⁵ See *id.* at 45 ("Federal law enforcement officials also lobbied for state laws that restricted marijuana in the 1930s and laws that increased penalties in the 1950s").

¹⁰⁶ See JAMES Q. WILSON, BUREAUCRACY 189 (1990)("The FBI's opposition of any involvement in narcotics investigation was based not only on a fear of corruption but also on a desire to avoid taking on a task already performed by other organizations that would then become its rivals."). See also JAMES Q. WILSON, THE INVESTIGATORS 165 (1978)("[I]t is the desire for autonomy, and not for large budgets, new powers, or additional employees, that is the dominant motive for public executives.").

¹⁰⁷ See Patrick G. Donnelly, *The Origins of the Occupational Safety and Health Act of 1970*, 30 SOC. PROBS. 13, 18 (1982).

¹⁰⁸ See Evan J. Ringquist, *Political Control and Policy Impact in EPA's Office of Water Quality*, 39 AM. J. POLI. SCI. 336 (1995)(discussing the political evolution of water regulatory acts and the different regulatory strategies deployed to enforce the resulting regulatory provisions).

legislation trying to restrict criminal penalties by eviscerating strict liability.¹⁰⁹ And employers sometimes endeavor to weaken the scope of otherwise popular employer sanctions affecting businesses' risks of hiring undocumented workers.¹¹⁰

It should not be entirely surprising to uncover a role for organized interests and pluralistic competition in the criminal aspects of environmental regulation or occupational safety. But even conventional drug enforcement, now the very heartland of ordinary criminal justice, bears the hallmarks of interest group competition. As one observer put it:

Just because traditional producer and consumer groups are not found in drug control politics does not mean that organized interests have no stake in these policies. First, substance abuse is a policy area with a wide variety of voluntary self-help organizations... A Second group with potential interests in drug abuse policy is the alcohol industry.¹¹¹

Hence, for example, the Marijuana Tax Act of 1937 was adopted in part as distillers and brewers urged legislative action. They were apparently interested in eliminating marijuana as a competitive intoxicant. A report by the U.S. Public Health Service even attributed an apparent rise in drug addiction during the 1920s to prohibition. Of course, criminalization of drug use and possession did change the political context in a number of important ways. In particular, law enforcement agencies became important constituencies pressing for the expansion of state and federal drug laws between the 1930s and 1950s. And it almost certainly became comparatively more difficult for advocates of liberalized drug policy to promote their goals (as they were advocating behavior that became increasingly fixed as criminal in the public mindset). Nonetheless, even the context of drug enforcement – now so iconically associated with the conventional politics of crime involving law enforcement and broad public perceptions – can produce evidence of pluralistic, organized interests competing to shape enforcement policy.¹¹²

Not all domains of criminal justice initially subject to interest group competition reflect the staggering expansion of drug enforcement. By its nature and its interaction with public perceptions, such competition also implies compromises that work to limit criminal enforcement. When the major twentieth century occupational safety law emerged from the legislative process, it included criminal penalties. The scope of the relevant crime was extraordinarily limited, however, to willful offenses causing a worker's death and subject to punishment by misdemeanor.¹¹³ A company's overweening pressure to force a worker to clean cyanide sludge from a containment tank in Idaho proved nearly fatal for the worker, therefore, but not subject to prosecution under federal occupational safety laws.¹¹⁴

¹⁰⁹ See Frank, *supra* note __, at 537-538.

¹¹⁰ See Daniel J. Tichenor, *The Politics of Immigration Reform in the United States, 1981-1990*, 26 POLITY 333, 340-344 (1994)(discussing the complex coalition that emerged to support major immigration reform in the late 1980s and the difficulties associated with strict enforcement of employer sanctions).

¹¹¹ See Meier, *supra* note __, at 44.

¹¹² See *id.*

¹¹³ See Uhlmann Testimony, *supra* note __, at __.

¹¹⁴ See *supra* note __ (discussing RCRA criminal liability provisions; Elias case).

Political competition has also checked the scope of employer sanctions for immigration violations. When the Immigration Reform and Control Act (IRCA) was forged as a major compromise during the Reagan Administration, employers were subject to criminal penalties if they hired undocumented workers.¹¹⁵ Yet employers severely resisted giving prosecutors both the expansive authority over white collar immigration violations along with powerful offense detection systems capable of ferreting out noncompliance. Unable to stop a political compromise resulting in the creation of new immigration-related criminal penalties governing employers, business interests made a concerted effort to block the detection mechanisms that would have empowered prosecutors to aggressively enforce the new laws.¹¹⁶ A similar story plays out in the context of money laundering violations, where banks ultimately tolerated the creation of criminal penalties against money laundering but sought to block expansion in regulatory mechanisms to detect offenses.¹¹⁷

These scenarios involving intense competition and powerful organized interests opposing the expansion of criminal law force lawmakers to compromise in a manner that still allows them to please at least some public constituencies favoring enforcement. Hence, the presence of employer sanctions in the immigration context allowed lawmakers to claim in their public dealings that the new immigration policy they had supported would force employers to comply and limit the growth of a future undocumented population.¹¹⁸ Yet the absence of employer verification, the presence of weak penalties, and correspondingly low incentives for enforcement made the new laws less problematic to employers – many of whom increased their reliance on undocumented labor following passage of IRCA.¹¹⁹ These dynamics are largely ignored or played down by scholars focusing exclusively on the dysfunctional expansion of the criminal justice system.

From its police cruisers to its (frequently absent) prisoner reentry programs system, in the United States that system harbors unmistakable elements of dysfunction.

¹¹⁵ See 8 U.S.C. § 1324a(b), (e)(4)-(5), (f) (2000).

¹¹⁶ See Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime* 24 LAW & SOC. REV. 1041 (1990).

¹¹⁷ See Cuéllar, *Tenuous Relationship*, *supra* note __, at 364-365. The potential separation between prosecutorial mechanisms rooted in the criminal justice system and detection mechanisms rooted in the conventional regulatory realm helps explain a phenomenon that might at first seem paradoxical. Crime definition and enforcement may be subject to intense (and often underappreciated) interest group pressure. In contrast, criminal justice bureaucracies themselves may display greater bureaucratic autonomy on balance compared to their regulatory counterparts. See Part II.b, below. The power of law enforcement bureaucracies (when endowed with the power to both detect and punish regulatory violations more harshly) provides an especially compelling rationale for organized interests to contest agencies' initial endowment of legal authority to engage in regulations facilitating the detection of crimes. Stuntz's *Pathological Politics*, though undoubtedly describing one aspect of the politics of law enforcement, many ultimately over-emphasize law enforcement agencies' power when it comes to crime-definition and the legislative process overall (because interest groups can become powerfully and successfully involved in trying to limit the scope of laws that will be used against them in the regulatory context, or as an alternative, in limiting detection mechanisms that will be used to punish their violations). In contrast, criminal justice agencies power to resist some measure of external political control at the enforcement stage is considerable.

¹¹⁸ See Calavita, *supra* note __, at 1042 (discussing the U.S.' public "reversal of the long-standing laissez-faire policy" of not regulating the hiring of undocumented workers).

¹¹⁹ See generally Marc R. Rosenblum, *Moving Beyond the Policy of No Policy: Emigration From Mexico and Central America*, 46 LAT. AM. POL. & SOC. 91 (2004).

Yet the existence of pluralistic competition over crime definition and enforcement sets the stage for a more complicated relationship than commonly acknowledged between policy outcomes and sensible prescriptive goals for the national state and its laws. Food and drug policy, immigration rules, terrorist financing, and occupational safety priorities help define states. The players involved in setting those priorities act as though consequences follow from involving the criminal justice system in these domains.

The story of the Clean Water Act demonstrates how the evolution of criminal penalties can reflect lawmakers' concerns about achieving stricter enforcement. The original environmental crime penalties included in the CWA led to relatively little criminal enforcement.¹²⁰ Civil enforcement was initially more robust. But during the early 1980s, Reagan appointees severely cut back overall regulatory enforcement. The Administration's appointees and explicit policies produced public and congressional controversy, leading to the firing of some of the Reagan White House's appointees most committed to an anti-regulatory stance (such as Anne Burford Gorsuch). Eventually, the controversies also facilitated legislative victories by a coalition favoring stricter enforcement. Criminal prosecutions surged, as did budgets for environmental crimes.¹²¹

There is no denying that criminal penalties introduce a new variable into the enforcement equation. As some courts and scholars have readily explained, higher penalties for regulatory violations facilitate some measure of general and individual deterrence.¹²² Higher penalties can also impact prosecutorial incentives, thereby affecting their interest in triggering investigations and cases.¹²³ There is room to question deterrence rationales, particularly as they apply to doctrinal changes governing prosecution of individuals allegedly involved in conventional drug, violent, or property offenses.¹²⁴ Nonetheless, regulatory and national security goals incorporated into the criminal justice system focus on the behavior of individuals who are often sociologically different from typical drug, violent, or property crime offenders. Company executives accused of negligently dumping toxic wastes or bankers accused of facilitating illicit financial transactions often have more to lose.¹²⁵

But the implications of criminal justice may run deeper still. When lawmakers pass laws and fund payrolls permitting criminal enforcement and prosecution, they alter the mix of bureaucracies involved. State lawmakers trying to expand administrative enforcement but bereft of functioning regulatory agencies in the nineteenth century

¹²⁰ See Peter Cleary Yeager, *Beyond the Law: Crime in Complex Organizations – Industrial Water Pollution*, 18 CRIME & JUST. 97 (1993).

¹²¹ See *id.*

¹²² See, e.g., Kirk R. Williams and Jack P. Gibbs, *Deterrence and Knowledge of Statutory Penalties*, 22 SOC. Q. 591 (1981); W. Kip Viscusi, *The Risks and Rewards of Criminal Activity: A Comprehensive Test of Criminal Deterrence*, 4 J. LAB. ECON. 317 (1986).

¹²³ Cf. Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641 (2002).

¹²⁴ See Paul H. Robinson and John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003).

¹²⁵ See Joseph F. Dimento, *Criminal Enforcement of Environmental Law*, 525 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 134, 138 (1993)(discussing the impact of criminal sanctions or even investigations on targets whose social and material statutes gives them more to lose).

“invoked criminal law more and more... as a low-level, low-paid administrative aid.”¹²⁶ FDA inspectors can potentially collaborate with FBI agents. Trigger the criminal justice system, and certain distinct bureaucracies become players in the enforcement process.¹²⁷

This choice of organizational players is hardly a minor detail before the regulatory game begins. It is the game. Although police departments, federal investigative agencies, and prosecutors’ offices are different from each other, they are also likely to have several distinct characteristics setting them apart from conventional regulatory agencies. Because of selection effects, legal constraints, and distinct bureaucratic missions, they are likely to have a culture associated with gathering complex information relevant to statutory determinations of liability. Perhaps that culture – interacting with legal constraints – can create unique investigative capacity. And though all bureaucracies are in a position to advance strategies furthering their own political autonomy, law enforcement officials probably play that game from an institutional position of distinct advantage. Unlike other agencies, the bureaucracies charged with crime prevention are likely to enjoy a greater degree of political insulation and influence owing to the perceived sensitivity of their law enforcement mission and their ability to strategically leverage responsibilities widely perceived as involving high social value. In effect, even when leaving aside raw distinctions in the nature of penalties involved, deploying criminal justice means deploying a different set of institutional actors capable of shaping the relationship between legal mandates, national governments, and the public.

B. Legal Constraints and Organizational Capacity

Criminal law is supposed to regulate private conduct. But its scope also determines what organizations engage in risk regulation, and how they undertake that mission. Specifically, the creation of preventive criminal liability allows bureaucracies with distinctive investigative and analytical capacities to take part in regulating social conduct. Capacity is what allows a bureaucratic organization to perform its ostensible function. Even if one dispenses with frequently unrealistic assumptions about bureaucratic “slack”,¹²⁸ attaining capacity tends to be costly. It requires individuals and organizational investments of time, energy, and resources. Since individuals in public organizations often aim for a suboptimal aspirational standard instead of maximally effective performance (what Cyert and March describe as “satisficing”), organizations may miss opportunities to enhance their performance.¹²⁹ In some cases they may be deliberately engineered to fail.¹³⁰ All of these factors make it unlikely that bureaucracies charged with preventive enforcement functions will naturally build all the capacity they can to perform in accordance with public expectations.

¹²⁶ See Friedman, *History of American Law*, *supra* note ___, at 584.

¹²⁷ All bureaucracies have some common characteristics, but the extent to which the similarities or distinctions matter depends on the context of the comparison. As discussed below, when compared to conventional regulatory bureaucracies or national security agencies, however, these institutions may reflect different capacities to investigate and to make judgments of liability borne from meeting legal constraints.

¹²⁸ See WILLIAM NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

¹²⁹ See RICHARD CYERT AND JAMES MARCH, *A BEHAVIORAL THEORY OF THE FIRM* (1992).

¹³⁰ Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267, 268 (John E. Chubb & Paul E. Peterson eds., 1989).

Yet not all organizational actors operate the same way. Organizations routinely differ in how they define their missions, what trade-offs their leaders consider acceptable, and how internal norms interact with external pressures to affect the allocation of rewards for organizational performance. For example, capacity investments are more likely in organizations whose performance is judged in large measure on the basis of their ability to meet external constraints by a politically-relevant audience.¹³¹ Drawing implications from this observation is difficult in a world where even law enforcement agencies are quite heterogeneous. While local beat cops, IRS criminal investigators, and federal prosecutors reflect such distinctions, however, they are similar in the fact that their career incentives and organizational environments force them (at least in advanced industrialized countries assigning importance to judicial structures) to take into account legal constraints. Those constraints matter to law enforcement agencies whose behavior is readily observable by political constituencies concerned about (especially violent) crime rates.¹³² Yet they also apply – in underappreciated ways – to federal law enforcement authorities given the career interests of agents and prosecutors whose advancement depends to a non-trivial extent on producing investigative results and convictions.¹³³

There is little question that the conditions fomenting growth in agencies' capacity are context-dependent and worth further empirical scrutiny. Law enforcement capacity is contingent on the intersection between organizational incentives and culture, legal constraints, and public expectations. Not surprisingly, the extent of police and prosecutorial capacity is not the same at different points in history, or in different countries. Urban police departments in turn-of-the-century Chicago, for instance, had little regard for the law, and built correspondingly meager capacity to navigate its constraints.¹³⁴

Nonetheless, even in a world where criminal enforcement agencies are heterogeneous and the scope of criminal liability is broad (and growing), criminal justice bureaucracies are likely to be different from regulatory bureaucracies in critical ways likely to foment capacity. In particular, societies with more elaborate legal constraints governing police and prosecutorial behavior are more likely to generate capacity, and thereby more likely to end up with law enforcement bureaucracies that can add value to regulatory tasks. Law enforcement organizations must be capable of supporting their factual assertions sufficiently to convince an institutionally distinct, external (judicial)

¹³¹ Cf. Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L.ECON. & ORG. 469 (2007)(modeling the circumstances under which imposing decision costs on regulatory bureaucracies – akin to those involved in prosecuting criminal offenders – can cause them to develop endogenous expertise).

¹³² See Stuntz, *Pathological Politics*, *supra* note __, at __.

¹³³ The cases may be different – and in particular, the willingness of prosecutors to push the envelope in making more novel and complex legal arguments, *see id.* at __-- but prosecutors and investigators who fail to produce results are unlikely to have the same range of career and professional advancement options as those who do produce results. *See generally* Wilson, *The Investigations*, *supra* note __, at __; Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1444-45 (2004).

¹³⁴ See Mark H. Haller, *Historical Roots of Police Behavior: Chicago, 1890-1925* 10 LAW & SOC. REV. 303 (1976)(discussing police, class conflict, and legal constraints in turn-of-the-century Chicago).

observer.¹³⁵ They are more readily identified with popular missions that are relatively salient to the public than most regulatory agencies. Even in the case of federal prosecutors, high-profile drug, fraud or public corruption cases are likely to carry considerable prospects of career rewards that can be reaped both within and beyond the law enforcement system. The prospect of such rewards can provide a degree of motivation to law enforcement officials less likely to be present for regulatory staff. Finally, as noted in the next section, law enforcement entities tend to reflect characteristics making it easier for them to build and maintain organizational autonomy – allowing them greater latitude to shield their efforts to build and retain capacity from being eroded by pressure from organized interests.

These dynamics have had an effect on law enforcement bureaucracies. Despite their enormous power, many investigators and prosecutors work in an environment where they are expected to meet constraints imposed by legislators,¹³⁶ the mass public,¹³⁷ and judicial scrutiny of cases (or the possibility of it).¹³⁸ Observers of federal prosecutors have often (and rightly) emphasized their striking degree of discretion in deciding what to charge and whom to charge.¹³⁹ But the limits and subtleties of such discretion – like the more general autonomy that tends to be associated with many law enforcement agencies – must be understood in context. Even U.S. Attorneys’ Offices are under pressure to perform in particular ways. Federal prosecutors are free to pursue more complex cases, but not to lose them all. Congress and the executive branch pressures prosecutors to do more of one kind of case or less of another.¹⁴⁰ And individual federal prosecutors may often care not only about bureaucratic and political audiences but the demands of future employers. Moreover, despite the staggering breadth of federal criminal liability, if it is true that federal prosecutors have incentives to bring “knife-edge” cases involving

¹³⁵ See Part III.b.2 for a discussion of how indiscriminate expansions in the scope of liability – particularly involving the elimination of intent elements from criminal statutes – may ultimately erode the conditions allowing criminal justice bureaucracies to develop distinctive capacities.

¹³⁶ See Luis Garicano and Richard A. Posner, *Intelligence Failures: An Organizational Economics Perspective*, 19 J. ECON. PERSP. 151 (2005) (suggesting that prosecutors and investigators are under pressure to achieve convictions, even in the federal system). See also Wilson, *The Investigators*, *supra* note __, at 197.

¹³⁷ As Wilson puts it (describing the FBI):

When crime was on the increase, the FBI went after criminals; when public concern over threats to domestic security was at its peak, the FBI investigated subversives, broadly defined. The Bureau’s gradual involvement in civil rights cases paralleled rather closely the gradual shift in public sentiment on the issue of black rights – from a concern over violence perpetrated by the Ku Klux Klan, it steadily moved toward an interest in voting rights and then on to a wider range of citizenship issues.

Wilson, *The Investigators*, *supra* note __, at 214.

¹³⁸ For an intriguing argument suggesting that factual accuracy in the allocation of criminal penalties can be enhanced by leveraging the capacity of law enforcement organizations (rather than expecting improvements from defense attorneys), see Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585.

¹³⁹ See, e.g., Stuntz, *Pathological Politics*, *supra* note __, at __.

¹⁴⁰ See Wilson, *The Investigators*, *supra* note __, at __.

conduct that is not obviously criminal,¹⁴¹ the constraints associated with judicial evaluation of cases are likely to loom especially large.

Over time, the combination of pressures to investigate and achieve convictions in particular domains and legal constraints leads law enforcement to develop distinctive structural features and concentrations of skills. Drug and money laundering enforcement agencies have built up elaborate, measurable capacities to make arrests and achieve convictions relying on undercover investigations, informants, and police patrol methods where there are likely to be high concentrations of offenses (such as airports or inner-city neighborhoods).¹⁴² By contrast, in the drug and money laundering context, the regulatory agency with primary responsibility for imposing civil penalties to encourage compliance with anti-laundering regulations (the Financial Crimes Enforcement Network, or FinCEN), struggled for many years to develop a capacity to effectively impose such penalties.¹⁴³ Detectives investigate and solve homicides because these offenses attract widespread attention and the absence of leads resulting in prosecutions can generate political pressures. Federal prosecutors adapt their routines to achieve convictions in complex cases, for which they tend to be individually accountable and to receive career rewards.¹⁴⁴ Investigative agencies also tend to develop distinct organizational routines, focused on following individuals and cases rather than focusing on (for example) geographic regions,¹⁴⁵ and local cops amass tacit knowledge relevant to identifying individuals committing chargeable offenses.¹⁴⁶ Though far from perfect, it is a striking contrast to the investigative capacities of many regulatory bureaucracies,¹⁴⁷ and even intelligence agencies.¹⁴⁸

As an example of organizational contrasts in capacity, consider the story of the CIA's failure in tracking Khalid al-Mihdhar and al-Hazmi, two al-Qaeda suspects, in the months before the September 11 attacks. As the suspects traveled to Malaysia and then Thailand, CIA analysts tracking their progress faced considerable difficulties ultimately resulting in the loss of the suspects.¹⁴⁹ Analysts failed to communicate effectively across bureaucratic lines of geographic jurisdiction within the CIA as the suspects traversed lines of international jurisdiction.¹⁵⁰ The CIA bureaucracy did not make a single person

¹⁴¹ See Stuntz, *Pathological Politics*, *supra* note __, at __.

¹⁴² See Cuéllar, *Tenuous Relationship* *supra* note __, at __; William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998).

¹⁴³ See Cuéllar, *Tenuous Relationship*, *supra* note __, at __.

¹⁴⁴ See Stuntz, *Pathological Politics*, *supra* note __, at 533, 543.

¹⁴⁵ See Wilson, *The Investigators*, *supra* note __, at __ (discussing FBI case management).

¹⁴⁶ See Manning, *supra* note __, at 48 (discussing law enforcement officers' development of tacit knowledge).

¹⁴⁷ See David Barstow, *California Leads Prosecution of Employers in Job Deaths*, N.Y. TIMES (December 23, 2003). Regarding the performance and capacities of intelligence agencies, see Richard A. Best, *Intelligence Issues for Congress*, CRS ISSUE BRIEF FOR CONGRESS (Feb. 1, 2005)(discussing analytical limitations of existing intelligence bureaucracies).

¹⁴⁸ See generally *Final Report of the Joint Inquiry into the Terrorist Attacks on September 11, 2001*, U.S. House of Representatives Permanent Select Committee on Intelligence and U.S. Senate Select Committee on Intelligence, December 2002, 107th Congr. 2nd sess., House Report, 107-792 and Senate Report 107-351, 149-155 (July 24, 2003)(describing CIA Director Tenet's limited knowledge of the details involving strategic situation facing the United States).

¹⁴⁹ See Zegart, "CNN With Secrets," *supra* note __, at 18-19

¹⁵⁰ See *id.* at 19-20.

(or small team) accountable for following the whereabouts of these individuals,¹⁵¹ nor did it attempt to gather systematic information about their associates or immediate future plans.¹⁵² Despite information suggesting that the suspects might try to enter the United States to plan or commit criminal offenses, the intelligence agency failed to notify the FBI and immigration authorities.¹⁵³ By comparison, the FBI had investigative protocols in place to prevent the failures experienced by the intelligence agency.¹⁵⁴

The contrast between the FBI's and the CIA's approach in the al-Mihdhar episode is not an accident. Because criminal justice bureaucracies tend to be subject to pressures that can be partially managed by building skills in investigation, interviewing, and analysis of evidence, their capacities are in demand in some regulatory and national security settings. The bombing of the U.S.S. Cole was not only investigated by the FBI, but the question of who actually carried out the bombing (an attribution question on which crucial national security and foreign policy decisions depended) was repeatedly punted to the FBI.¹⁵⁵ This move is not irrational; despite the agency's considerable shortcomings, the agents' culture and career path constantly forced them to work in environments likely to develop different (and distinctly valuable) investigative skills compared to those that might otherwise be available among national security bureaucracies. In a radically different context, California's Department of Occupational Safety and Health developed a team of criminal investigators for similar reasons –

¹⁵¹ See *id.* at 23 (“Above all, surveillance of the three terrorists faltered because the CIA’s internal structure left no single person or office in charge of the case... [T]he CIA’s field office structure focused on where, not who; it was designed to cover broad territory rather than track specific terrorists.”).

¹⁵² See REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 268 (2004)(*9/11 Commission Report*).

¹⁵³ In retrospect, these performance failures proved costly to the intelligence agency and to some of its personnel. Such costs, however, are almost entirely an *ex post* consequence of the September 11 attacks themselves and the subsequent investigation. The more relevant distinction between intelligence and law enforcement agencies concerns their routine tasks, organizational structures, and capacities. In the case of the CIA and other intelligence agencies, these characteristics seem to have been affected by the relative lack of rewards analysts and managers received for ensuring that individuals’ whereabouts, actions, and plans could be known and that such information could be validated through presentation to a relatively neutral observer such as a court.

¹⁵⁴ As one agent put it:

We had the predicate for a [deleted] investigation if we had that information... [W]e would immediately go out and canvas the sources and try to find out where these people were... [T]hey were very close – they were nearby – [and]... We would have used all available investigative techniques. We would have given them the full court press.

Zegart, *supra* note __, at 25 (citation omitted). These observations __ must, of course, be taken with a grain of salt. Nonetheless, they are consistent with deeper structural characteristics of the FBI involving the priority assigned to tracking suspects and gathering information that reflect its role as a criminal enforcement agency.

¹⁵⁵ President Clinton was reluctant to launch a reprisal attack without officials being “willing to stand up in public and say, we believe that he [Bin Laden] did [the attack on the U.S.S. Cole].” See *9/11 Commission Report, supra* note __, at 193. The FBI played a critical role in the investigation. *Id.*, at 192-193. The CIA had “no definitive answer on [the] crucial question of outside direction of the attack...” *Id.* at 195. Meanwhile, CIA Director Tenet was “surprised to hear that the White House was awaiting a conclusion from him on responsibility for the *Cole* attack...” *Id.* at 196.

because they were likely to possess some of the distinctive skill sets that would elude ordinary regulatory analysts.¹⁵⁶

In an account of the FDA's efforts to regulate tobacco under the Food, Drug, and Cosmetics Act, former Commissioner David Kessler also acknowledges the unique contributions of criminal investigators.¹⁵⁷ When the FDA discovered cyanide-laced Sudafed capsules in March of 1991, Kessler found the skills of experienced investigators particularly useful in pinpointing the extent of the tampering. Finding that the FBI had taken too long to respond, however, he rushed to "build an Office of Criminal Investigations to fill the huge gap in the agency's capabilities that Sudafed had revealed."¹⁵⁸ The value of filling those gaps was soon evident the FDA received reports of syringes in Diet Pepsi cans. Unlike conventional regulatory inspectors, the FDA's newly-enlarged team of criminal investigators proved to be keen interrogators, who ended up flying "from city to city to investigate tampering reports and soon.. were eliciting confessions from people who had fabricated claims and were making arrests."¹⁵⁹

Experienced criminal investigators also played a pivotal role in handling informants, such as the R.J. Reynolds employee that Kessler colorfully names "Deep Cough," whose leads helped the FDA strengthen its legal case for asserting regulatory jurisdiction over tobacco.¹⁶⁰ The thorny nature of the agency's relationship with "Deep Cough" led Kessler to reflect again on the value of individuals whose' instincts were forged outside the realm of conventional regulatory policymaking. Here is what happened when Kessler learned about the potential source:

[I] knew we had to handle the informant delicately. I could not use the FDA scientists and lawyers who had taken the first tentative steps into the world of tobacco. *Instead, I needed professionals with law enforcement experience – bluff-proof investigators with the skills to test the credibility of a confidential informant.*¹⁶¹

The point of Kessler's account is not that regulatory goals depended exclusively on the availability of criminal *prosecution* as an option against the tobacco companies – though at one point he does suggest that overlapping criminal enforcement and regulatory mandates may have shaped the tobacco companies' willingness to disclose information to

¹⁵⁶ See Barstow, *California Leads*, *supra* note __, at __.

¹⁵⁷ The Food, Drug, and Cosmetic Act (FDCA or Act), 21 U.S.C. § 301 *et seq.*, grants the FDA the authority to regulate, among other items, "drugs" and "devices," §§ 321(g)-(h), 393, defined as such in relevant part on the basis of whether their manufacturers intend them to affect "the structure or any function of the body." 21 U.S.C. § 321(g)(1)(C). In order to determine whether regulation under the FDCA would be possible, the FDA was forced to gather extensive information regarding the pharmacological effects of cigarettes and nicotine, as well as the knowledge of and extent of efforts to manipulate such effects by tobacco companies. See DAVID KESSLER, *A QUESTION OF INTENT* (2001).

¹⁵⁸ See *id.*, at 26. Recognizing that the goal of such an office was not necessarily criminal prosecution (even though it would plainly leverage the capacities and cultures that individuals had forged working in an environment favoring prosecution), Kessler identified the objectives of the 100 criminal investigators he was hiring as "meet[ing] the needs not only of law enforcement but of public safety."

¹⁵⁹ See *id.*, at 79.

¹⁶⁰ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (discussing the FDA's rationales for asserting jurisdiction over tobacco).

¹⁶¹ Kessler, *supra* note __, at 80.

the FDA.¹⁶² Instead, the centrality of criminal investigators to the FDA's fact-gathering efforts further demonstrates the demand among public bureaucracies for the abilities that investigators hone specifically in the context of the criminal justice system. Working with a mixture of discretion and constraints, criminal investigators tend to nurture skills crucial to the regulatory state. They are capable of helping regulators coax individuals to reveal false reports of syringes in soda cans, handle nervous tobacco company whistleblowers, and discern the full extent of a tampering scandal. Unique skill-sets and organizational cultures associated with law enforcement personnel also caused tensions within the FDA.¹⁶³ As he assigned greater responsibilities to his growing cadre of criminal investigators (in many cases tasks unrelated to prosecution), Kessler the price of these tensions in exchange for the capacities his organization acquired.

The distinctive capacity of law enforcement also emerges in a different context, involving nation-building and occupation. In trying to diagnose some of the daunting problems facing the Iraq occupation, a former military official emphasized the difference between law enforcement and the quintessential national security bureaucracy, the military. His underlying premise concerns the nature of counterinsurgency, which is arguably "about gaining control of the population, not killing or detaining enemy fighters."¹⁶⁴ Yet the military's distinctive competence, he noted, is fundamentally distinct from that of law enforcement.¹⁶⁵ He notes:

Counterinsurgency is work better suited to a police force than a military one. Military forces – by tradition, organization, equipment, and training – are best at killing people and breaking things. Police organizations, on the other hand, cooperate with minimum force. They know their job can't be done from miles away by technology. They are accustomed to face-to-face contact with their adversaries, and they know how to draw street-level information and support from the populace....The police are used to functioning within legal restraints. Our armed forces, however, are used to obeying only the laws of war and the United States Uniform Code of Military Justice. Soldiers and marines are trained to respond to force with massive force. To expect them to switch overnight to using force only as permitted by a foreign legal code, enforced and reviewed by foreign magistrates and judges, is quite unrealistic. It could also threaten their survival the next time they have to fight a conventional enemy.¹⁶⁶

¹⁶² See *id.*, at 377-78. Kessler also notes the value of criminal penalties in discussing his eventual response to the Pepsi syringe scare. After his criminal investigators confirmed the incidents involved hoaxes, Kessler "went on national television to underscore that such actions were criminal and to warn that we would prosecute every case. Almost immediately, the torrent of claims slowed to a trickle." Note that threatening prosecution in such cases made it easier to address behavior from disaggregated groups of individuals not acting through private firms generally more sensitive to economic sanctions.

¹⁶³ See *id.*, at 100. Such distinctions contribute to law enforcement organizations' prospects for autonomy, discussed in Part II.c., *infra*.

¹⁶⁴ See Terence J. Daley, *Killing Won't Win This War*, N.Y. TIMES (August 21, 2006). He continues: "A properly planned counterinsurgency campaign moves the population, by stages, from reluctant acceptance of the counterinsurgent force to, ideally, full support." *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

Apart from acknowledging the role law enforcement plays in forging workable social arrangements where these have broken down, this observation further illustrates how policing is bureaucratically different from alternative modes of enforcement.¹⁶⁷ Cops, it seems, are different from army captains or compliance inspectors.

Distinctions in how law enforcement bureaucracies build capacity are unlikely to be lost on politicians who spend so much of their time designing, overseeing, restructuring, and reacting to public bureaucracies. By conferring preventive responsibilities on law enforcement agencies, politicians change the range of capacities that government authorities can deploy to regulate risks.¹⁶⁸ The capacities honed in the criminal investigation and prosecution context, moreover, may continue to shape the bureaucracies' actions even when their staffs are deployed in non-criminal prosecution roles, as organizations build environments and cultures that are shaped by their primary tasks.¹⁶⁹ When regulatory or national security penalties overlap substantially with criminal ones but the latter require a higher threshold of proof, the imposition of criminal penalties – can also serve as a means of sending a signal of government competence to politically-relevant (domestic or international) constituencies.

The signaling function of criminal justice reflects the fact that criminal statutes (even ones that expansively define criminal liability, though to a lesser extent) can only be imposed if authorities have the capacity to prove a case in court. Occupational safety civil penalties, for instance, are often used in cases that could be eligible for prosecution. But even in a world where courts have interpreted the causation requirement of the relevant criminal statutes loosely and the willfulness requirement means willful blindness to regulatory violations, the deployment of the criminal sanction in an occupational safety case implies the government can prove something beyond a reasonable doubt that it wouldn't need to prove in order to use mere administrative penalties. Similarly, material support offenses in a world where prosecutors could deploy the open-ended provisions of 2339B are far easier to prove than offenses involving conspiracy to commit a terrorist act (which was, after all, the point of the statute in the first place). But doing so is more demanding than freezing assets or designating someone as an enemy combatant.¹⁷⁰

By considering the political implications of signaling, we can explain something of a puzzle in the Bush Administration's use of legal authority to advance counter-terrorism efforts: why press for such expansive powers and still rely so heavily on the

¹⁶⁷ Cf. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

¹⁶⁸ In the drug context, for example, the involvement of law enforcement in enforcing drug prohibition has generated the capacity for undercover and informant-driven investigations. See Wilson, *The Investigators*, *supra* note __, at __.

¹⁶⁹ See Wilson, *Bureaucracy*, *supra* note __, at 90-97; . Mariano-Florentino Cuéllar, *Refugee Security and the Organizational Logic of Legal Mandates*, 37 GEO. J. INT'L L. 583, 718 (2006).

¹⁷⁰ Thus, criminal justice can be as preventive as regulation but still offer government a means of signaling competence as long as a material difference exists (or is perceived to exist) in what must be proved to impose sanctions. Target audiences may naively believe such differences exist (an impression that may persist even as criminal liability is broadened to the point of eroding the distinctive capacities of criminal justice).

criminal justice system?¹⁷¹ In a world where audience responses matter, there is some value in communicating the government's capacity – or at least fostering the impression of its existence. Over time, of course, trends in the dramatic expansion of criminal liability may not only cause damage to the prescriptive legitimacy of criminal justice but also to its role as a signaling mechanism. Eventually the breadth of criminal liability can erode capacity distinctions and therefore the value of criminal justice enforcement as a signal. As I explain below, I suspect that scenario has yet to fully materialize even in the national security context.¹⁷² Regardless of the context, the expanding breadth of criminal liability may – when fully grasped by the public – gradually neutralize value of the criminal justice system as a means of facilitating the process of discerning whether government has accumulated (and is deploying) bureaucratic capacity.

In the meantime, if pivotal legislators and executive branch officials expect to face skeptical audiences, it may seek to encourage deployment of criminal sanctions.¹⁷³ Perhaps it is not entirely surprising, upon reflection, that following the September 11 attacks, a federal government that has consistently insisted it does not need to deploy criminal prosecutions to manage national security threats has nonetheless continued to do so in selected cases. British authorities, too, used criminal prosecution to mollify critics who were increasingly skeptical of an alleged terror plot to bomb aircraft using liquids thwarted by law enforcement.¹⁷⁴ Confronting a doubting public, British law enforcement officials chose a strategy of information dissemination and prosecution:

The decision to press formal charges came after days of growing public skepticism about the extent of the plot that the authorities announced on Aug. 10. At the time, the police warned that the purported conspirators had planned to commit mass murder on what on what one officer called an “*unimaginable scale*.”¹⁷⁵

The more skeptical the relevant audiences monitoring government policy, the less likely they are to accept that regulatory and national security actions that can be imposed on a

¹⁷¹ For a discussion of the Bush Administration's substantial (though by no means exclusive) reliance on criminal justice approaches to addressing terrorism, see Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, HUMAN RIGHTS FIRST (May 2008).

¹⁷² The erosion of any signaling value for successful criminal prosecutions is driven, of course, both by changes in substantive criminal laws, changes in the (actual or perceived) costs of unsuccessful prosecutions, and the process through (and speed at) which public perceptions adjust to any changes in the criminal laws (e.g., whether the public realizes that certain criminal penalties have been watered down to the point that they could apply to almost anyone).

¹⁷³ Obviously, executive officials (and some legislators) may also be concerned about the risk of embarrassment (e.g., resulting from acquittal).

¹⁷⁴ See See, e.g., Alan Cowell, *Britain Files Charges for 11 Tied to Plot*, N.Y. TIMES (August 21, 2006).

¹⁷⁵ See *id.* The corresponding costs of prosecution arise in part from the government's inability to control precisely the extent of defendants' liability. Hence, “[t]he nature of the charges raised new speculation about the scope of the plot, possibly suggesting that it was more limited than indicated by the sweep of the first arrests.” *Id.* The police then responded by providing additional details, previewing the nature of judicial proceedings: “[The police's] aim in offering such detail was two-fold: to give the impression that the police were offering the public a glimpse into the kind of evidence that was being amassed and to offset charges that the police had overreacted to a threat.”

near-discretionary basis provide any indication of the government's capacity to detect and respond to legitimate threats.

No doubt my rendition of some of the distinctive capacities of criminal justice bureaucracies seems difficult to reconcile with a spate of problems revealed in particular cases or investigations. The Moussaoui trial produced a striking array of missteps.¹⁷⁶ The Chandra Levi investigation in Washington, DC – burdened by bureaucratic failures and glaring media attention – seems destined to disappoint even the most ardent defenders of police conduct.¹⁷⁷ Yet part of the argument is precisely that such shortcomings (at the margin) are more likely to become apparent among criminal justice bureaucracies than regulatory or national security bureaucracies. And when the problems do emerge, prosecutors, investigators, and their senior managers operate in an environment that makes it more difficult to neglect the shortcomings than does the environment in which regulators or national security officials work.

The key point is not that criminal justice bureaucracies will always have more capacity in absolute terms than traditional regulatory bureaucracies.¹⁷⁸ Instead it is that investigative and prosecutorial techniques, honed in an environment where the discretionary culture at least occasionally focuses on meeting external legal constraints, can play a constructive role. In light of those constraints and their organizational cultures, law enforcement entities tend to develop distinctive investigative, operational, and analytical capacity relevant to the central task of investigation, persuasively adjudicating liability, and developing responses to threats. Because of such characteristics associated with law enforcement entities, executive authorities' decision to deploy criminal enforcement to manage risks (including those involving national security) can allow government to signal its competence to the public.

C. Criminal Justice and Bureaucratic Autonomy

If organizational realities in institutional culture, incentives, and resources distinguish criminal justice from ordinary regulatory agencies, then surely one specific dimension along with these bureaus differ involves how these relate to their larger political environment. Criminal justice agencies tend to be characterized by people with relatively similar goals and professional backgrounds. Although they are politically responsive in a number of underappreciated ways – especially the state and local ones – the reigning conventional wisdom about these agencies among policy elites and members of the mass public is that they should be relatively independent from the interference of representative politicians.¹⁷⁹ Though regulatory agencies vary in their missions, priorities, organizational cultures, and institutional structures, they are not ordinarily

¹⁷⁶ See Frank W. Dunham, *Where Moussaoui Meets Hamdi*, 183 MIL. L. REV. 151 (2005).

¹⁷⁷ See Sari Horwitz, Scott Higham and Sylvia Moreno, *Why Killed Chandra Levy*, WASH. POST (July 27, 2008)(discussing the organizational failures associated with the Washington, DC Metropolitan Police's investigation of the Chandra Levy murder).

¹⁷⁸ It is not even obvious that organizational capacity can be coherently defined in absolute terms rather than relative to specific goals. See, e.g., Mariano-Florentino Cuéllar, *"Securing" the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939-1953*, Stanford Public Law & Legal Theory Working Paper (2008).

¹⁷⁹ See Friedman, *supra* note __, at 360 (describing how police organizations "cut the cords that tied the police to local politicians").

identified with a relatively popular mission the way law enforcement agencies are, nor do they boast the professional cohesion and identity that law enforcement agencies possess.¹⁸⁰

These differing characteristics can lead some legislators and executive branch officials to expect that many law enforcement agencies will be characterized by greater autonomy – that quality of bureaucracies that allow them to better resist interference from external sources such as organized interests.¹⁸¹ Criminal justice bureaucracies may be better insulated from the pressures of organized interests, who may have multiple ways of dissuading regulators from severe enforcement activity and whose own members and staffs may end up running traditional regulatory agencies.¹⁸² Local cops, for example, work in notoriously insular organizations whose hierarchical and social arrangements set individuals apart from conventional external pressures.¹⁸³ Combined with external pressures, the internal “formally codified internal or procedural rules routinely allows investigators and prosecutors “to reduce the vulnerability of the organization to pressures on behaviors derived from non-organizational sources.”¹⁸⁴ In part as a result, cops’ experience on the street... and isolation from the public at large ” results in a sense that they are separated from the rest of society.”¹⁸⁵

Such separation is not the monopoly of local cops. By design, federal prosecutors enjoy a distinct measure of political independence, with the recent investigations involving U.S. Attorney firings in the Bush Administration poignantly demonstrating the political risks of interference in this domain.¹⁸⁶ In California, prison officials leveraging the alleged centrality of their public safety mission managed to successfully cut back on nettlesome quantitative and qualitative reviews focused on more ambitious rehabilitation objectives.¹⁸⁷ In short, despite interest group dynamics affecting crime definition and even enforcement, criminal justice agencies seem to achieve a different degree of independence compared to the typical regulatory agency.

¹⁸⁰ See Patrick Roberts, *How Bureaucracies Control Change: Autonomy in the FBI and CIA*, CISAC SOCIAL SCIENCE SEMINAR PAPER 11 (April 6, 2006)(on file with author)(“Politicians and the public demand an effective federal police force, and national policing demands control over information, dispatch, and broad authority across state lines.”). See also JAMES Q. WILSON, *BUREAUCRACY* (1990).

¹⁸¹ See Carpenter, *supra* note __, at __

¹⁸² See generally JOHN P. HEINZ, *THE HOLLOW CORE: PRIVATE INTERESTS AND NATIONAL GOVERNMENT* (1993).

¹⁸³ See Kennedy Chaney and Saltztein, *supra* note __, at 749 (discussing the institutional bases for heightened police autonomy from political control).

¹⁸⁴ See Manning, *supra* note __, at 47.

¹⁸⁵ See *id.*

¹⁸⁶ See Dan Eggen, *Gonzalez Ready to Leave the Stage*, WASH. POST A11 (Sept. 14, 2007) (discussing the Bush Administration’s considerable costs from the firings of U.S. Attorneys). See also *infra* note __ (discussing sources recognizing the extent of autonomy among law enforcing officials).

¹⁸⁷ See, e.g., Karen O’Neill, *Organizational Change, Politics, and the Official Statistics of Punishment*, 18 SOC. FORUM 245 (2003). In contrast, conventional administrative agencies routinely face requirements for additional data collection and evaluation advanced by organized interest. The recent Data Quality Act governing federal administrative agencies, for example, was slipped in by a lobbyist and has subjected regulatory agencies to costly information-evaluation requirements. See, e.g., Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 ENVTL. L. 1083, 1092 (2007)(discussing the impact of the Data Quality Act).

Law enforcement agencies differ in their precise extent of autonomy. The U.S. Attorney’s Office for the Southern District of New York is not a typical, but perhaps a prototypical, example of how criminal justice bureaucracies can forge autonomy. What Manhattan federal prosecutors have created over several decades is a more exaggerated version of the political environment that a host of other law enforcement agencies can promote – a high-visibility, publicly popular overall mandate, officials with considerable prestige and a strong (and strongly shared) professional identity, along with “coalitions of esteem” outside the agency from former officials in other important positions, elites supportive of the agency’s mission, and staff who perceive career rewards from expending major efforts to undertake the agency’s particular function.¹⁸⁸ Together these factors place the Southern District, and to a lesser extent, law enforcement agencies generally – at the center of a web of expectations supportive of the Office’s relative independence from the relative interference that would be more familiar to an ordinary administrative agency.¹⁸⁹ Even for the Southern District, autonomy is not the same thing as absolute freedom from external constraints, which play an important role in shaping agency capacity. Instead, within the context of the constraints described in the previous section, the contention is that law enforcement agencies are likely to have greater autonomy in deciding what targets to pursue, and how to do it.

While many law enforcement agencies will fail to achieve the Southern District’s unusual degree of independence, they are likely to fare better at forging autonomy in comparison to ordinary regulatory entities. In California, the Circuit Prosecutor Project – promoted independently by the California District Attorneys’ association – was explicitly designed to take up occupational safety and environmental cases that were too technically complex or taxing for other prosecutors’ offices.¹⁹⁰ By creating the project, prosecutors apparently hoped to supplement the activities of California’s occupational safety regulatory agency and to bolster its capacity to deploy (in conjunction with prosecutors) criminal sanctions that might otherwise be routinely and effectively opposed through pressure from organized interests. In a larger sense, it is telling that historically, one of the signature scholarly and policy preoccupations regarding regulatory agencies such as California’s occupational safety enforcement or its federal equivalent was subjecting them to political controls,¹⁹¹ while the corresponding concern involving criminal enforcement bureaucracies has been (broadly speaking) to foment their relative independence from ordinary political interference.¹⁹²

¹⁸⁸ On the independence Southern District, see Daniel C. Richman, *Prosecutors and their Agents, Agents and their Prosecutors*, 103 COLUM. L. REV. 749 (2003). For a discussion of the organizational factors promoting agency autonomy, see Carpenter, *supra* note __, at __. For how such autonomy can be leveraged and enhanced the context of sentencing, see Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005).

¹⁸⁹ Cf. Roberts, *supra* note __, at 27 (concluding that “the CIA” was “unable to develop full autonomy stemming from an independent perspective when a similar agency, the FBI, had much more success”).

¹⁹⁰ See Barstow, *California Leads*, *supra* note __, at __.

¹⁹¹ See generally Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

¹⁹² The perceived importance of the criminal justice system’s independence might encompass two conceptually-distinct dimensions: one involving the protection of the integrity of criminal investigations, see, e.g., Thomas Newcomb, *In From the Cold: The Intelligence Community Whistleblower Protection Act of 1998*, 53 ADMIN. L. REV. 1235, 1254 (2001), and another emphasizing the importance of ensuring that law enforcement-related policies and activities in general are not diluted or manipulated for unrelated

The costs of such political interference vary not only in terms of the specific agency but its broader legal context. French investigative magistrates, for example, historically faced powerful executive controls. These were particularly strong, ironically, in the domain of public corruption investigations.¹⁹³ As a result, at least under the Fifth Republic's heavily presidential system, magistrates (who roughly combining the function of prosecutors and investigators) historically faced unique difficulties in achieving autonomy. When a spate of political scandals came to light during the late 1980s and 1990s, the magistrates seized on the opportunity to appear to public concerns about corruption. The magistrates began to leverage their criminal investigation mission and the presence of the scandals to argue for greater independence and increase politicians' costs of direct interference with the investigations.¹⁹⁴ As politicians faced increasing difficulties and even risks of criminal sanctions when seeking to engage in traditional patterns of interference with investigations, the magistrates began to increase the rate of investigations, thereby bringing additional scandals to light and affecting public perceptions of the frequency of illicit financing of political activities. The magistrates pursued this agenda while build on a reputation for impartiality by investigating figures across the political spectrum. Between 1990 and 1995, the number of French politicians in important positions placed under investigations went from about 5 to 50, and thereafter the number remained between 30 and 50.¹⁹⁵ Ultimately, their actions began to change norms among French politicians and contributed to passage of new campaign financing legislation establishing more realistic (but nonetheless constrained) mechanisms through which parties and candidates could fund their activities.¹⁹⁶

In contrast, American law enforcement agencies tend to begin from a higher level of autonomy, particularly federal prosecutors in a post-Watergate environment.¹⁹⁷ The

political purposes, *see, e.g.,* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2139 (2002) (“[T]he Department of Justice proudly takes great pains to insulate itself from political interference, especially with respect to criminal prosecutions”); David A. Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1819 (2005) (“[T]he push for police professionalism in the 1950s and 1960s succeeded so well at insulating police departments from political interference that even today, after nearly two decades of ‘community policing’ reforms, police departments often seem to operate outside the normal processes of local government, accountable to no one.”). *But see* WILLIAM J. VIZZARD, IN THE CROSS FIRE: A POLITICAL HISTORY OF THE BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS (1997) (describing the intense, and relatively unique, political pressures arising as a result of the Bureau’s jurisdiction over the regulation and investigation of firearms that limit its autonomy”). Two points are worth noting regarding Vizzard’s insightful account. (1) Unlike most law enforcement agencies, ATF explicitly combines law enforcement functions with regulatory responsibilities in a domain generating unusual political interest, making it less like traditional law enforcement agencies and somewhat more like traditional regulatory agencies. (2) Despite the unusual constraints on ATF, Vizzard still notes that the agency appeared to be “rather skillfully capitalizing on every opportunity to build and enhance the agency’s image.” *Id.* at 217.

¹⁹³ *See* Ari Adut, *Scandal as Norm Entrepreneurship Strategy: Corruption and the French Investigating Magistrates*, 33 THEORY & SOC. 529, 530-532 (2004).

¹⁹⁴ *See id.* at 555 (increasing cost of political interference).

¹⁹⁵ *See id.* at 553.

¹⁹⁶ *See id.* at 564-565 (new anti-corruption norms and laws). *See also* Violaine Roussel, *Changing Definitions of Risk and Responsibility in French Political Scandals*, 29 J. LAW & SOC. 461 (2002)

¹⁹⁷ *See generally* Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309 (1999) (discussing how federal law enforcement agencies have enhanced their independence in a post-Watergate period). It is telling, moreover, how FBI Deputy Director Mark Felt so

relative political independence of law enforcement agencies has facilitated state-level occupational safety prosecutions over interest group objections.¹⁹⁸ Criminal enforcement agencies' deep connection to a mission considered both crucially important and in need of protection from political interference has facilitated local prosecutors' own political influence over policymaking, electoral contests and judicial selection.¹⁹⁹ State and federal law enforcement officials routinely impact the legislative process.²⁰⁰ State, local, and federal law enforcement agencies generate some of their revenues through forfeiture actions, arguably insulating them from some of the constraints associated with the politics of legislative budgeting.²⁰¹ Federal criminal agencies, though not uniformly invested with the degree of autonomy associated with the U.S. Attorney's Office for the Southern District of New York, display even more flexibility and discretion.²⁰² In particular, the FBI has a long tradition of effectively advocating for its interests in Congress.²⁰³

Even in a system assigning such importance to law enforcement, American criminal justice enjoys nothing like complete political autonomy. State and local law enforcement authorities certainly face political constraints because these agencies are held responsible for local crime control, especially violent crime.²⁰⁴ But as long as these agencies comply with the basic political imperative of satisfying the implicit threshold for effectiveness that politically-responsive constituencies impose on state and local law enforcement agencies, these organizations retain considerable autonomy to choose the strategies they will deploy, including (for instance) "broken windows" type policing strategies.²⁰⁵

The situation tends to be different for traditional regulatory agencies. Only rarely (if ever) do regulators at the EPA, OSHA, or Customs and Border Protection enjoy the full complement of advantages helping criminal justice organizations foster bureaucratic autonomy. Despite the different missions of the Bureau of Citizenship and Immigration Services, the Federal Communications Commission, or the California Coastal Commission, their missions are often explicitly recognized as involving critical policy trade-offs that merit political oversight, if not control.²⁰⁶ The OSHA, EPA, NLRB, and

deftly used the media to heighten the risks that the Nixon Administration faced. Felt was reportedly especially angry because of the Nixon White House's efforts to engage in political interference within the FBI. See Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1040-1041 (2007) (discussing Felt's use of leaks to respond to threats to the FBI's autonomy).

¹⁹⁸ See Barstow, *supra* note __.

¹⁹⁹ See Simon, *supra* note __, at 37-39 (discussing the prosecutor's political power).

²⁰⁰ See Stuntz, *Pathological Politics*, *supra* note __, at __.

²⁰¹ See Karis Ann-Yu Chi, *Follow the Money: Getting to the Root of the Problem With Civil Asset Forfeiture in California*, 90 CAL. L. REV. 1635, 1647-48 (2002).

²⁰² See Athan Theoharis, *FBI Wiretapping: A Case Study of Bureaucratic Autonomy*, 107 POLI. SCI. Q. 101 (1992).

²⁰³ See generally Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999).

²⁰⁴ See Stuntz, *Pathological Politics*, *supra* note __, at __.

²⁰⁵ See Bernard C. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998).

²⁰⁶ It is a heightened version of this notion that seems so profoundly entrenched in some classic administrative law cases favorably disposed toward political control of regulatory agencies. See, e.g.,

other regulators charged with quasi-legislative missions that are routinely described as meriting political oversight, remain more readily subject to political control.²⁰⁷

Criminal justice agencies enjoy greater prospects for autonomy because of the perceived importance of their crime-fighting mission. Accordingly, some observers question whether the expanding scope of criminal sanctions would eventually erode the relevance of criminal law as a distinct category of social regulation, and therefore the distinctive features of criminal enforcement agencies in the regulatory process.²⁰⁸ In fact, the process through which the public modifies its overall impressions of the criminal justice system is likely to evolve gradually and in response to a host of countervailing pressures. Even if some members of the public are constantly updating their perceptions of what precise law enforcement missions criminal enforcement agencies are carrying out, large fractions of the mass public are likely to harbor impressions that remain “sticky.” Experimental evidence suggests people resist disconfirming evidence when evaluating the nature of criminal justice and related matters.²⁰⁹ Many members of the public, moreover, possess quite limited information about prosecutors’ and investigators’ work.²¹⁰ In the short term, fixing the “crime” label onto a regulatory mandate is likely to leave public perceptions of law enforcement bureaucracies relatively unchanged – particularly when enforcement is initially relatively restrained.²¹¹ Over time, the expanding scope of criminal liability may tend to expand the range of conduct many members of the public consider problematic because it is criminal.²¹² In short, whatever

Chevron v. NRDC, 467 U.S. 837, 865 (1984)(“While agencies are not directly accountable to the people, the Chief Executive is...); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

²⁰⁷ See, e.g., See Terry M. Moe, *Integrating Politics and Organizations: Positive Theory and Public Administration*, 4 J. PUB. ADMIN. RES. & THEORY 17 (1994)(discussing how OSHA has been impacted by interest group pressures); Yeager, *supra* note __ (discussing the extent of political control experienced by regulatory agencies). Note that such control may affect the distribution of criminal prosecutions because of regulatory agencies’ role in detecting offenses. Still, criminal investigation can sometimes have their own detection strategies (including, for instance, whistleblowers, citizen suit provisions, and referrals raising concern among law enforcement officials). Indeed, it is perhaps the prospect of impacting the distribution of punishment probably leads some actors to focus on shaping detection by targeting weaker regulatory agencies instead of risking apparent manipulation of criminal justice agencies.

²⁰⁸ See, e.g., *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993)(“If we use prison to achieve social goals regardless of the moral innocence of those we incarcerate, then imprisonment loses its moral opprobrium and our criminal law becomes morally arbitrary.”).

²⁰⁹ See Charles S. Taber and Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM.J. POLI. SCI. 755 (2006); Matthew Rabin and Joel L. Schrag, *First Impressions Matter: A Model of Confirmatory Bias*, 114 Q. J. ECON. 37, 38-39 (1999).

²¹⁰ See, e.g., Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99 (1992); Katherine Beckett, *Setting the Public Agenda: “Street Crime” and Drug Use in American Politics*, 41 SOC. PROBS. 425 (1994). Whether low information is a barrier to sensible political decision-making is a complicated question. Compare ARTHUR LUPA and MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW* (1998)(even when citizens lack information about laws or policies, institutional structures and organized interests facilitate sensible political choices) with Michael Bailey, *The Two Sides of Money in Politics: A Synthesis and Framework*, 3 ELECTION L.J. 653(2004)(voter ignorance can distort the political process under certain conditions).

²¹¹ Cf. Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786 (1967)(discussing the gradual impact of legal rules on social attitudes).

²¹² See, e.g., Cuéllar, *Tenuous Relationship*, *supra* note __, at 351-363.

its ultimate consequences, the expanding scope of regulatory crimes is unlikely to entirely dilute criminal enforcement agencies' autonomy advantages in the short run.

D. The Interaction of Criminal and Non-Criminal Enforcement

Still other institutional rationales can support politicians' decision to invest criminal justice authorities with power to engage in preventive enforcement. These rationales may hold valid even if it turns out criminal justice authorities have little power to proceed on their own because they depend (as is the case in domains such as occupational safety) on the investigative work of regulatory agencies facing constraints from organized interests. Greater enforcement may result from competition between traditional regulatory agencies with authority to investigate preventive criminal violations (such as the EPA) and law enforcement agencies sharing investigative authority (the FBI).²¹³

As institutional designers weigh these implications, some will recognize how the presence of overlapping criminal and civil jurisdiction can facilitate the imposition of more severe civil penalties. Regulatory agency staff may be affected by what psychologists describe as a "moderation bias."²¹⁴ Decisions about penalty severity might be affected by the existence of an even more severe layer of (criminal) penalties and a formal review structure for analyzing whether an agency should impose (or recommend) maximally severe (criminal) penalties. Adding a layer of maximally severe criminal penalties may lead agency staff to view its most severe civil penalties as more appropriate than it would in the absence of the availability of criminal sanctions.²¹⁵ This effect may play a role even if the criminal penalties are not routinely used.²¹⁶ In addition, the bureaucratic entities representing the national state gain additional negotiating leverage from the presence of criminal sanctions. Regulators can advance environmental compliance goals by leveraging criminal penalties to negotiate occupational disqualification provisions for company executives.²¹⁷ The presence and use of criminal penalties can help generate considerable publicity about regulatory violations, raising private actors' costs of noncompliance. Together, these factors almost certainly impacted the behavior of chronic occupational safety violators McWane, Inc. The company that faced repeated civil sanctions as stray machinery injured its workers and placed their

²¹³ Cf. Wilson, *Bureaucracy*, *supra* note __, at __ (discussing how bureaucratic competition can encourage aggressive enforcement – e.g., in the context of drug enforcement or antitrust).

²¹⁴ See Mark Kelman, Yuval Rottenstreich, and Amos Tversky, *Context-Dependence in Legal Decisionmaking*, 25 J. LEG. STUD. 287 (1996).

²¹⁵ Cf. Sunstein et al., *supra* note __, at __ (reporting the results of experiments demonstrating how individuals' "firmly retributive" intuitions about the appropriate sanction for a given transgression were affected by context). Although Sunstein et al. take the contingent nature of sanctioning determinations in their experiments as evidence of the "incoherence" of such judgments, their results do not necessarily support such an unambiguous prescriptive implication. See Mark Kelman, *Problematic Perhaps, But Not Irrational*, 54 STAN. L. REV. 1273 (2002). Regardless of the results' contestable prescriptive implications, what matters here is their positive implications – which at least some legislators may readily and implicitly understand: regulators' penalty-imposing behaviors can be shaped by changing the range of available penalties.

²¹⁶ Cf. Mukesh Bhargava, John Kim, and Rajendra K. Srivastava, *Explaining Context Effects on Choice Using a Model of Comparative Judgment*, 9 J. CONSUMER PSYCH. 167 (2000).

²¹⁷ See Dimento, *supra* note __, at __ (discussing occupational disqualifications).

lives at risk, but did not materially change its practices until it faced severe criminal prosecution.²¹⁸

Over time, the occasions where criminal penalties *are* used may shape public perceptions regarding the underlying harmfulness of particular conduct – an outcome that could in turn favorably influence the political context of legislators who can then reap political rewards for supporting regulation in domains that initially would not have garnered substantial public attention.²¹⁹ As Friedman observed:

Many acts become regulatory crimes... for administrative reasons, rather than because they involve “real” criminality – that is, what we define as evil, guilt, blameworthiness. But the line is hard to draw. And getting harder. People in our times feel themselves dancing on the deck of a doomed ship. They hear that the air is poisoned, the water full of muck, resources shrinking, forests shriveling, the planet collapsing from consumer debauchery and wanton material waste. In this climate, some regulatory crimes – polluting water and air – get redefined as real crimes, as crimes against the human race. What started out as *malum prohibitum* ends up as *malum in se*.²²⁰

With a steady progression from *malum prohibitum* to *malum in se* underway, groups and individuals protesting against the existence of criminal penalties may become stigmatized. This feature of criminalization warps conventional pluralist politics, a detail that may not be lost on politicians trying to change the traditional interest group bargaining constraining legislative and bureaucratic action.²²¹

As this evolution plays out, criminal enforcement itself may also justify limited but material expansions in regulatory policy.²²² Because of the distinctive constraints associated with criminal prosecution (described earlier as being instrumental to the

²¹⁸ See Uhlmann testimony, *supra* note __, at 6.

²¹⁹ After all, preventive criminal enforcement allows bureaucracies to make an implicit case to the public regarding how harmful, dangerous, or wrong a particular type of conduct is. This rationale is premised on the view that the potential “dissonance” between the mass public’s perception of what’s harmful and the criminal law’s reach may not only be resolved by questioning the legitimacy of the criminal law, but by accepting that the conduct in question merits punishment through criminal laws. Over time, such reassessments can affect broader judgments of what’s harmful and why. *Cf.* Sheldon Ungar, *Attitude Inferences from Behavior Performed Under Public and Private Conditions*, 43 SOC. PSYCH. Q. 81 (1980). This dynamic may help explain public attitudes with respect to drug regulation. For an example of how prosecutors can use criminal cases to make expressive appeals regarding the underlying harm associated with risky conduct, see Barstow, *Guilty Verdicts in New Jersey*, *supra* note __, at __ (describing how federal law enforcement authorities used a criminal prosecution to publicly characterize a company as “one of the worst and most persistent violators of our nation’s environmental and worker safety laws”).

²²⁰ See Friedman, *supra* note __, at 289-90.

²²¹ *Cf.* Stuntz, *Pathological Politics*, *supra* note __, at __. Whether or not such stigmatization is normatively troubling is likely to depend a great deal on the context: the argument over the growing stigma attaching to drunk driving is unlikely to parallel precisely the argument over the stigma attaching to drug legalization. In any case, the main point here is not that stigmatization is a normatively desirable consequence of criminalization, but that it may be a reason for politicians to broaden the scope of criminalization as a means of achieving a range of policy goals that may vary in terms of how easy or difficult they are to defend prescriptively.

²²² But whatever development in capacity may result from this dynamic is likely to leave the agency with less autonomy than it might have had if legislatures had directly supported its prospects for autonomy, as this would have generally heightened the agency’s ability to dampen political constraints.

development of capacity in criminal justice bureaucracies), criminal prosecutions motivated by preventive objectives may require special resources (even when stats are relatively open-ended). Given these needs and the perception among relevant constituencies that preventive criminal prosecution is indispensable to target the most severe offenders, then the perceived needs of criminal enforcement agencies can become a rationale for regulatory bureaucracies to expand the scope of their own detection capacity. For example, the gradual moves made to regulate criminal financial activity were largely driven by the goal of creating the capacity for preventive criminal enforcement (first, specialized conspiracy cases, and eventually, money laundering cases).²²³ The California occupational safety regulator's unit of criminal investigators, whose creation was primarily justified as a means of facilitating criminal prosecutions, also refers facto-patterns for special attention from civil authorities.²²⁴

A version of the preceding dynamic – where the criminal law label becomes capable of changing the policy environment over time – is present when criminal justice organizations press for expansions in regulatory policies designed to disrupt criminal offenses. In many cases, as with money laundering, the criminal offenses themselves constitute a prophylactic measure with some ambiguous (though rarely if ever entirely implausible) connection to some activity considered harmful (e.g., terrorism, or supplying domestic illegal drug markets).²²⁵ In the early 1970s, when the bureaucratized system for disrupting criminal finance was just getting underway, the new Currency Transaction Reporting requirements governing banks had proven difficult to pass and were vigorously opposed by the banking industry.²²⁶ By the late 1980s, the situation had changed. Although interest in disrupting organized and drug crime remained high throughout the 1970s and 1980s, lawmakers and executive branch officials in the 1980s had the benefit of newly enacted statutes explicitly criminalizing money laundering. Rather than explaining the potentially problematic consequences of financial activities, advocates for greatly expanded regulations could simply emphasize the existing difficulty of fighting the crime of money laundering.²²⁷ The existence of new, highly salient criminal offenses facilitated the substantial expansion of the regulatory system to include suspicious activity reporting and money services businesses.²²⁸

Take these factors together, and we can begin to see why coalitions of politicians could have subtle organizational incentives to support preventive criminal enforcement even without the prospect of position-taking benefits, and even if, in an ideal world, enacting majorities preferred to spur strict civil enforcement rather than a mixture of civil and criminal enforcement. Legislators cannot entirely prevent or assure that particular bureaucracies develop sufficient autonomy to protect their ability to enforce sanctions against unwilling and potentially threatening organized interests. What power legislators and executive branch officials *do* have to enhance autonomy, moreover, come with the cost that such independence may lead to what some politicians consider to be unwelcome

²²³ See Cuéllar, *Tenuous Relationship*, *supra* note __, at 348.

²²⁴ See Barstow, *California Leads*, *supra* note __, at __.

²²⁵ See Cuéllar, *Tenuous Relationship*, *supra* note __, at 393-395 (discussing official justifications and how they evolved).

²²⁶ *Id.* at 444-447 (discussing the banking industry role).

²²⁷ See *id.* at 393-396.

²²⁸ See *id.* at 328-329.

expansions in regulatory power. Creating preventive criminal provisions and encouraging their enforcement can allow legislators to spur preventive enforcement overall, leveraging the autonomy and capacity of criminal enforcement bureaucracies.

III. IMPLICATIONS

We have painted a more complex picture of criminal enforcement's role in risk regulation than commonly perceived. Expansive criminal liability has subtle policy implications, and political origins more intricate than commonly accepted. Prescriptive rationales can support some forms of preventive criminal liability, weakening the argument that the "natural" state of criminal law is to eschew preventive or regulatory functions. Conventional policy problems involving the proper role of criminal law in national security and social regulation begin to look different in light of this picture.

A. Comparing Intelligence and Law Enforcement Organizations

Just as the context can create circumstances where politicians may better realize normatively defensible regulatory goals by supporting a role for preventive criminal enforcement, there is also a plausible prescriptive case to be made for the role of preventive enforcement in the national security context. The possibility of such a role emerges more clearly if we first scrutinize contentions that law enforcement authorities are unlikely to play constructive roles in meeting the challenge of managing national security risks through activities such as intelligence. Garicano and Posner recently took up the question of what (if anything) was wrong with the American intelligence and national security apparatus before the September 11 attacks.²²⁹ Their account makes a number of trenchant observations. They note, for example, that intelligence and law enforcement organizations have different structures, and are likely to have different institutional cultures. Unlike law enforcement organizations, which are in principle geared towards developing cases for prosecution, intelligence organizations can presumably work more flexibly and quickly.²³⁰ Their analysis is also right to question the benefits of centralization.²³¹ These observations led them to conclude that law enforcement bureaucracies were likely to be in a relatively poor position to play a constructive role in the management of national security risks and the gathering and analysis of intelligence.

Though Garicano and Posner are surely right to identify the importance of organizational culture and structure, their analysis unduly assumes that the implications of those distinctions cut in the direction of supporting their conclusions. Perhaps it is true that "intelligence tries to detect plots and threats before they reach the level at which they are prosecutable crimes."²³² But given the staggering scope of preventive criminal jurisdiction described in Part II, it is worth explaining (instead of assuming) just what sorts of threatening plots may be detected (and how threatening they are) if they do not "reach the level of a prosecutable crime."²³³ Nor are the distinctions necessarily as

²²⁹ See Garicano and Posner, *supra* note __, at __.

²³⁰ See *id.*

²³¹ See *id.*

²³² See *id.* at 165.

²³³ And it is plainly misleading to suggest that law enforcement authorities are powerless to intervene in the event that threatening plots *do not* rise to a level where they could be subject to criminal prosecution, given

pronounced as the authors assume them to be: they describe intelligence agencies as being distinctive because of their aims at “long-term penetration of suspect groups,”²³⁴ while Wilson’s landmark analysis of the Drug Enforcement Administration suggests that agency could be aptly described in precisely the same fashion.²³⁵

Perhaps most crucially, in an environment where discretion and poor monitoring are the hallmarks of national security bureaucracies, the skills more commonly associated with law enforcement agencies may turn out to play an essential role in attribution decisions.²³⁶ Even assuming these skills were not directly valuable, optimal national security policies could involve competitive interactions, and overlapping jurisdictions, between the law enforcement bureaucracies and national security agencies. The point is not that law enforcement approaches are certain to be the right methods for managing national security risks. It is instead that assuming the effectiveness of discretionary national security bureaucracies is difficult to defend,²³⁷ and even a somewhat ironic position for Garicano and Posner to take given how much their analysis emphasizes organizational complexities and problems with centralization.

In fact, their depiction of the world does little to grapple with law’s impact on organizations. Under-theorized depictions may point in a different direction. The investigative capacities of agencies whose primary mission is traditional law enforcement may suffer by comparison to the strategic analyses of an idealized intelligence agency. But such an agency does not exist – a point that seems similarly lost on a host of observers criticizing the role of criminal justice’s role in national security.²³⁸ Deep beneath the surface of government are markets for information, services, and influence that are affected by the involvement of prosecutors and investigators with distinctive skill-sets and organizational agendas. If public officials with responsibility for preventing harm are to play a preeminent role in those markets, then law enforcement organizations almost certainly should have their place in the dynamic as well. The burden that must be carried to assign preeminence in the national security field to organizations that can generally avoid meeting external constraints seems a considerably higher one than what Garicano and Posner manage to carry.

that the (permissive) structure of modern criminal procedure is designed to allow intervention in instances where potential perpetrators are merely vaguely suspected of engaging in prohibited conduct. Finally, there is not nearly as much support as the authors seem to assume regarding the contention that law enforcement authorities uniformly behave with a degree of risk aversion that dampens their interest in suspects who may be possible to convict but are not sure bets. Compare Stuntz, *Pathological Politics*, *supra* note __, at __ (describing how federal law enforcement authorities have incentives to bring “knife-edge” cases).

²³⁴ See Garicano and Posner, *supra* note __, at 165.

²³⁵ See Wilson, *The Investigators*, *supra* note __, at __.

²³⁶ Cf. *9/11 Commission Report*, *supra* note __, at __ (analyzing the U.S.S. Cole Incident and efforts to get the FBI to make an attribution decision).

²³⁷ See, e.g., AMY ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, THE JCS, AND THE NSC* (1999); Roberts, *supra* note __, at 26. As Roberts puts it:

Perpetually faced with pressing tactical concerns... the CIA rarely has time to reconfigure its strategic priorities. When analysis does speak to larger threats – and inevitably shapes policymakers’ impressions and the policy environment – the style of the intelligence estimates makes them difficult to refute. Often they are written as summaries using scientific language but without making falsifiable claims.

²³⁸ See Sievert, *supra* note __, at __.

Admittedly, the preceding comparison falls far short of a declaration that prosecutors, investigators, and courtrooms are the best means to manage national security risks. Intricate questions remain about the precise relationship between criminal enforcement bureaucracies and intelligence agencies.²³⁹ Institutional design questions also loom large in deciding on the proper flow of information and resources between criminal justice agencies mixing prevention with investigation, particularly given that their conventional criminal investigation mission is subject to heightened constitutional criminal procedure standards.²⁴⁰ In some cases, moreover, certain law enforcement agencies or regional offices occasionally embody cultures inimical to risk-regulation, where potentially higher-value but complex investigations are played down in favor of smaller but more certain payoffs.²⁴¹

Nonetheless, the comparison does help establish some misunderstood realities affecting the management of national security risks. First, intelligence and other national security bureaucracies involved in risk regulation are likely to face limitations inherent in their institutional context. That context includes secrecy, fewer legal constraints, an internal allocation of responsibilities by region or analytical category rather than by individual or case assigned explicitly to civil servants, and less emphasis on making explicit judgments of responsibility. The context is often described as providing advantages to intelligence agencies carrying out sensitive national security missions.²⁴² Although some of these characteristics occasionally help, it is closer to the truth to see them as the product of an intensely political process that often fails to maximize the nation's overall national security capacity.²⁴³ Moreover, whatever advantages arise from the organizational characteristics of intelligence bureaucracies are tempered by costs that are unlikely to be eliminated as long as the basic architecture of the national security bureaucracy remains unchanged.

Second, while criminal justice agencies have also have their drawbacks in managing national security risks, taking them to task for a culture of "investigation and prosecution" constitutes a gross oversimplification. Though successful prosecution tends to be perhaps these agencies' defining goal, criminal justice agencies have long pursued multiple agendas. These include the maintenance of public order,²⁴⁴ emergency response,²⁴⁵ and broad regulation of risks.²⁴⁶ Nor is a focus on investigation and prosecution irrelevant to national security policymaking, given the extent to which

²³⁹ Some of these involve the consequences of incorporating organizational features from intelligence bureaucracies, such as regional structures, into organizations whose predominant culture and distribution of career incentives favors the development of case-related information and the tracking of suspects. For a description of recent organizational changes in the FBI along these lines, see John Solomon, *FBI Reorganizes Effort to Uncover Terror Groups' Global Ties*, WASH. POST (Sept. 26, 2007), A5.

²⁴⁰ See, e.g., George P. Varghese, Comment, *A Sense of Purpose: The Role of Law Enforcement in Foreign Intelligence*, 152 U. PENN. L. REV. 385, 395-396 (2003).

²⁴¹ See Wilson, *The Investigators*, *supra* note __, at __ (comparing the organizational cultures and typical case significance of the FBI versus the DEA).

²⁴² See, e.g., Garicano and Posner, *supra* note __.

²⁴³ See, e.g., AMY ZEGART, *FLAWED BY DESIGN* (1999).

²⁴⁴ See Livingston, *supra* note __, at __.

²⁴⁵ See generally John Kinkaid and Richard L. Cole, *Issues of Federalism in Response to Terrorism*, 2 PUB. ADMIN. REV. 181 (2002)(discussing the law enforcement role in emergency response).

²⁴⁶ See *supra* Part I.b.

quintessential liability judgments involving the provenance of attacks or the degree of responsibility of offenders become lodged at the heart of national security policy problems such as the military response to the U.S.S. Cole attack.²⁴⁷ Policing and investigation are also likely to be particularly helpful in counterinsurgency and post-conflict reconstruction settings, where long-term relationships with the public and investigative skill are critical ingredients of success.²⁴⁸ And when governments seek to persuade skeptical constituencies about their competence, criminal justice bureaucracies let authorities convey something about their genuine ability to glean information about genuine threats.²⁴⁹

Finally, even without unrealistically assuming stark improvements in cooperation between law enforcement agencies and intelligence bureaucracies, shared jurisdiction by multiple agencies with distinct organizational cultures can sometimes enhance the capacity of public institutions to manage national security risks.²⁵⁰ A measure of competition can sometimes encourage socially-valuable innovation. At the same time, the fragmentation of power over national security achieved by limiting the domestic role of the CIA can also help cabin the potential for problematic concentrations of legal and bureaucratic power. Such fragmentation allows the domestic intelligence portfolio to be lodged in a n agency tempered at least in part by a culture of taking legal constraints seriously, and enhances the difficulty in controlling every component of the national security state. President Nixon discovered as much when he desperately sought to control the CIA and the FBI con concoct a cover story for Watergate.²⁵¹

It is true enough that questions of organizational competence are always relative, which is why modern military organizations are better at taking territory than managing civil authority. But even if one believed intelligence agencies in their current form to reflect the optimal mix of characteristics for learning about some national security threats, it is highly unlikely that geostrategic and terrorism-related threats will create situations that call for precisely the same type of organizational competence. This

²⁴⁷ On the increasing (though by no means complete) convergence of criminal and military liability for terrorism-related offenses, see Robert Chesney and Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008).

²⁴⁸ See Daly, *supra* note ____.

²⁴⁹ See James D. Fearon, *Signaling Foreign Policy Interests: Tying Hands versus Sinking Costs*, 41 J. CONFL. RES. 68 (1997)(discussing the political value of signaling); Cowell, *supra* note ____ (discussing the example of the British airline bombing plot as an instance of signaling). There is, of course, a risk associated with the fact that criminal prosecutions more readily signal competence than relatively less constrained national security detention: prosecutions are more difficult to control. In a world where high public demand for visible progress on counter-terrorism, moreover, law enforcement officials will have somewhat less latitude to affect the probability of court victories simply by varying the pool of cases and screening out marginal ones. Combine the need to signal competence through some criminal prosecution and the demand for cases, and it's hardly surprising that U.S. counter-terrorism prosecutions since the September 11 attacks have produced a mixed record. See Carrie Johnson and Walter Pincus, *Few Clear Wins in U.S. Anti-Terror Cases*, WASH. POST, A1 (APRIL 21, 2008).

²⁵⁰ This is one point on which Richard Posner has insightfully written. See, e.g. RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 (2005)(criticizing the 9/11 Commission's focus on the value of centralization without considering the benefits of decentralization).

²⁵¹ See generally RICHARD REEVES, PRESIDENT NIXON: ALONE IN THE WHITE HOUSE (2001) (discussing Nixon's experiences trying to control the FBI and the CIA during Watergate, and note the role of a culture of law enforcement in limiting abuses).

analysis therefore cuts sharply against the idea that the proper allocation of authority among national security agencies can best be made by considering a binary choice between war and crime.

B. Reinterpreting Preventive Enforcement Dilemmas as Institutional Design Problems

Instead of beginning from abstract principles rooted in the apparent jurisprudential nature of criminal law, our approach counsels attention to the nature and legitimacy of national regulatory goals, and the capacity of organizational actors to implement these legal mandates. With such an overall perspective in mind, the conventional wisdom about criminal law's role in regulatory and national security domains takes on a different hue. This section extends the analysis to consider how society might approach the difficult question of how much to criminalize, and what larger lessons for law and organization theory can be drawn from the study of preventive crime.

If the criminal justice system is in part a means for achieving legitimate regulatory goals, then we must consider its potentially distinctive contributions to achieving those goals against its considerable costs. An institutional approach appears to favor preventive criminal enforcement in the regulatory realm. But this is true only up to a point, since several considerations can still cut against expansive crime-definition and enforcement. These include wasted use of scarce resources, the possibility of diluting conditions fostering organizational capacity, the impact on actual or potential defendants relative to some principled evaluation of the dangers they pose, and the (often meager but still potentially meaningful) impact of public perceptions or attitudes about crime.²⁵² Crime-control narratives may sometimes risk painting too simple a picture of a complex policy problem to an unsophisticated public.²⁵³ Much also depends on rates of imprisonment (which are substantially higher for drug offenses than in conventional regulatory contexts), and the consequences of facing such a sanction for individuals and communities.²⁵⁴ In general, rates of criminal punishment – driven especially by drug offenses – are probably too high given the mix of costs relative to what society gains from the status quo what it could aspire to gain from achieving lower rates of

²⁵² See, e.g., Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005) (finding preliminary experimental support for the thesis that audiences perceiving particular legal outcomes as “unjust” are more likely to “flout” other legal mandates). Although these results are quite interesting, their applied implications depend crucially on – among other things – the extent to which the “unjust” hypothetical scenarios correspond to public perceptions of injustice arising from perceived excessive breadth of actual criminal laws, and the extent to which those judgments are malleable depending on the context. On the latter point, see Sunstein et al.

²⁵³ See generally Simon, *supra* note ___. It is not, however, obvious that this concern outweighs the instrumental value of layering criminal justice responses onto conventional regulatory or national security remedies, nor is it necessarily the case that crime-focused policies spread across domains over time. See, e.g., Cuéllar, *Political Economies of Criminal Justice*, at 966 (discussing the limits of the notion that criminal justice policies spread across domains through a process of “contagious framing”).

²⁵⁴ See Meares, *supra* note __.

incarceration.²⁵⁵ Dysfunctional correction policies can dampen otherwise constructive roles for criminal enforcement in shaping risk regulation.²⁵⁶

Any defensible evaluation of these costs also implicates questions about the distribution of offenses likely to be prosecuted. Despite the relatively greater autonomy of law enforcement bureaucracies relative to their regulatory counterparts, detection systems and regulatory arrangements can powerfully affect the distribution of offenses detected. While criminal investigators sometimes act as sophisticated generators of regulatory information at the FDA and its regulatory brethren,²⁵⁷ it is not uncommon for criminal enforcement bureaucracies working on regulatory or national security cases to rely heavily on referrals from other agencies. These referrals, in turn, are often generated by highly bureaucratized administrative mechanisms that impact the flow of cases in contexts such as anti-money laundering enforcement,²⁵⁸ or Clean Water Act violations.²⁵⁹ In short: organizational rationales for criminal enforcement require attention to whether the likely distribution of prosecutorial attention will serve legitimate social goals. Actual or apparent biases in enforcement tend to erode the favorable public perceptions contributing to criminal enforcement bureaucracies' unique organizational capacities.²⁶⁰ Even if law enforcement agencies are more capable of navigating political pressures cutting against enforcement compared to conventional agencies, their occasional dependence on the latter for detecting offenses in some contexts constitutes yet another potential burden for unqualified defenses of the role of criminal prosecution in risk regulation.

These considerations ensure that an institutional perspective on preventive criminal enforcement does not legitimize all expansive criminal liability or enforcement. Some expansions in the scope of criminal liability result in such meager constraints for law enforcement officials and prosecutors – particularly when coupled with such intense public demands for enforcement – that capacity can erode over time.²⁶¹

²⁵⁵ See Friedman, *Crime and Punishment in American History*, *supra* note __, at __ (discussing the social value of reducing mass incarceration); Simon, *supra* note __, at __ (emphasizing the social impact of fear generated by a political focus on crime control and incarceration).

²⁵⁶ Much of my argument underscores how criminal justice encompasses an organizational dimension distinct from (though in some ways affected by) the availability of imprisonment as a sanction. Kessler's criminal investigators were most valuable to his agency's regulatory goals not by facilitating prosecutions but by deploying their distinctive investigative skills. Nonetheless, recourse to the criminal justice system does imply the availability of imprisonment as a sanction. On challenges associated with imprisonment, see Michael Tonry and Joan Petersilia, *American Prisons at the Beginning of the Twenty-First Century*, 26 CRIME & JUST. 1, 5 (1999)(discussing evidence that "imprisonment often leads to breakup of families and social relationships and to lessening of parental involvement with their children"). For an insightful discussion on the extent of such dysfunction in the probation system, see Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 150 (1997)(despite a 300% increase in the proportion of the U.S. adult population under parole supervision between 1987 and 1997, probation is beset by problems including inadequate funding and supervision). These institutional shortcomings should, however, be evaluated against the potential impact of using criminal sanctions on legitimate regulatory priorities.

²⁵⁷ See Kessler, *supra* note __, at __.

²⁵⁸ See Cuéllar, *Tenuous Relationship*, *supra* note __, at 363-366.

²⁵⁹ See Yeager, *supra* note __.

²⁶⁰ Cf. Stuntz, *Unequal Justice* (high costs for actual or perceived biases in the distribution of enforcement)].

²⁶¹ See *supra* Part II.c.

The national security context provides an apt example. Criminal law's relevance to national security arises in part from the fact that statutes and enforcement strategies adapt over time. But as conspiracy and complicity laws become money laundering offenses and then ever-broader material support laws, the trend associated with broadening liability under criminal statutes would almost certainly reach a point that would begin to erode the distinctive capacities of the criminal justice system. Although the law currently permits the conviction of someone who has not agreed to support an FTO in the sense that would be required for a conspiracy offense,²⁶² in its current form it still requires prosecutors and investigators to demonstrate that an individual knows of the State Department's designation or that the organization engages or has engaged in terrorist activity.²⁶³ The statute's perimeter would have obviously been rendered more elastic had federal law enforcement authorities succeeded in eviscerating the law's intent requirement, but such efforts have not met with success.²⁶⁴ Though it may be easier to convict someone of material support than conspiracy to commit terrorism, it remains more demanding than it is to designate someone as an enemy combatant or to freeze the assets of a charitable organization allegedly supporting terrorist activity. Over time, however, law enforcement agencies' capacity may face similar degrees of erosion as a result of further expansion in statutory terms and loosened constraints on investigative practices.²⁶⁵

Ultimately, precisely how much change would lead to a near-complete dilution of the unique qualities of criminal justice bureaucracies is a matter of degree. Some may think we've already reached that point, though I suspect that conclusion would be premature given both the distinctive organizational culture of law enforcement and the fact that statutes such as 2339B still require more stringent proof than analogous regulatory decisions involving (for example) enemy combatant designations or the freezing of allegedly terrorist assets. Substantial further evisceration in what precisely agents and prosecutors have to prove, and changes in how they must compete for resources with national security bureaucracies with potentially overlapping mandates,

²⁶² See Abrams, *supra* note __, at __.

²⁶³ See 18 U.S.C. Sec. 2339B(1):

To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d) (2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

Assuming an individual does not know of the State Department's designation, the knowledge requirement explicitly requires law enforcement authorities to demonstrate *two* things that are not necessary to show in the regulatory context: (a) that an organization actually engages in or has engaged in terrorist activity, and (b) that the individual in question knew about this. Admittedly, the laws cited in the statute define terrorist activity as more than the actual and direct conduct of terrorist operations, but the State Department has more flexibility in designating FTOs than what is found in the statutory definitions of terrorism cited in 2339B.

²⁶⁴ For a cogent summary of the litigation positions the Justice Department has taken in interpreting 2339B's intent requirements, see generally Chesney, *supra* note __, at __.

²⁶⁵ See, e.g., John O'Neil, *Senators Question F.B.I. Director*, N.Y. TIMES (May 2, 2006)(discussing "a Justice Department report... that showed that the F.B.I. last year issued more than 9,200 "national security letters," which allow agents to collect data on individuals from businesses without a court warrant.").

may ultimately lead to a situation where even longstanding organizational cultures and institutional structures fade like antiquated notions about what constitutes war and peace.

Finally, some enforcement regimes involving high-volume offenses with an ultimately preventive logic – such as those involving low-level immigration violations – are not obviously justified from a consequentialist perspective in terms of the regulatory goals achieved relative to the social and individual costs. Federal immigration enforcement, for example, constitutes the lion’s share of all federal prosecution. Many of these offenses, in turn, are simple violations of offenses involving unlawful reentry after deportation that probably serve as a poor proxy for the degree of threat posed by the individuals targeted.²⁶⁶ Some enforcement in this domain is unquestionably valuable to any reliable and politically-viable immigration policy. But the current status quo is again difficult to defend, particularly from an institutional perspective. Many of the relevant cases engage little distinctive law enforcement investigative ability, yet they consume enormous resources. The deterrent impact is contingent on a host of factors affecting the target population. From a prescriptive perspective, the existing arrangement needs to be defended far more successfully than it has currently been.

The examples from immigration and drug policy also show how the preceding considerations are likely to point in different directions depending on the specific enforcement challenge facing societies. To the extent courts become more explicit about taking into consideration these factors, one can imagine a doctrinal arrangement whereby the (limited) constitutional evaluation of criminal penalties becomes somewhat more comparable to meaningful judicial review of administrative action – with the focus on reasons for using the intervention of criminal law, the considerable cost of threatening coercive punishment, empirical or analytical support for such an activity, and mechanisms for participation in decisionmaking or for policing the possibility of abuse. Such review, though close in spirit to what the Supreme Court contemplated in *Morissette*,²⁶⁷ should recognize the institutional contribution of preventive criminal enforcement to legitimate regulatory goals. Yet it would become somewhat more demanding than relatively limited forms of review currently governing crime definition.²⁶⁸

Regardless of whether these gradual changes emerge, policymakers and scholars should glean some larger implications from preventive criminal enforcement. *First*, criminal law is partly an underappreciated mechanism for shaping institutions through the imposition of constraints and the nurturing of autonomy. This organizationally-focused perspective yields a neglected rationale for the distinctive features of criminal justice.

²⁶⁶ See, e.g., Mary de Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL’Y REV. 1, 36-40 (2007)(by 2004 immigration prosecutions eclipsed all other categories of federal prosecution; as immigration prosecutions increased 552% between 1994 and 2003 and the likelihood of imprisonment for conviction of immigration offenses rose from 57% to 91%, the “the surges in prosecutions and increases in likelihood of imprisonment have apparently not dampened migration volume”). Moreover, “many immigration cases are in-and-out affairs, quickly dispatched in a day or less in magistrate court...” *Id.*, at 36.

²⁶⁷ See *Morissette*, 342 U.S. at ___.

²⁶⁸ For an interesting discussion of the existing doctrinal approaches to regulating substantive criminal law (and the questions they raise), see Adil Ahmad Haque, *Lawrence v. Texas and the Limits of the Criminal Law*, 42 HARV. CIV. RTS.-CIV.LIB. L. REV. 1 (2007).

Second, criminal enforcement can serve a valuable signaling function enhancing the fortunes of political actors who want to demonstrate their government’s competence. In governance, trust – however fleeting – is valuable. *Third*, the analysis also makes a contribution to our understanding of the relationship between organization theory, legal doctrines, and politics. Prevailing approaches often focus on the limitations of public organizations deliberately built into the law by political actors’ compromises.²⁶⁹ While there is something to be learned from this perspective, it misses different dynamics that also involve the relationship between law, politics, and organization. A closer look at the legacy of modern criminal justice suggests a more nuanced perspective, where doctrinal features co-evolve with institutional structures and help sustain socially-valuable organizational characteristics. However imperfect the process is, it showcases how some of law’s enduring impact may flow not through its direct impact on individual behavior, but through its partial capacity to forge organizational characteristics which in turn shape how the national state operates and how its citizens live.²⁷⁰

CONCLUSION

This paper explored the implications of two intersecting characteristics of the criminal justice system. First, the lawmakers, prosecutors, investigators, and police who represent the criminal justice system apply a body of laws focusing at least as much on risk regulation as on anything else. No other description conveys the full measure of a system replete with conspiracies lacking overt acts, drug offenses ultimately designed to influence the risks of psychological and physiological changes among inner-city and suburban youths, air-quality rules subject to criminal sanction, terrorist financing prohibitions, and strict liability crimes involving pharmaceutical and food safety. Far from reflecting only recent encroachment into regulatory territory,²⁷¹ criminal law has long had a “regulatory edge” encompassing social and economic risks and making criminal justice “both more and less than the moral steward of society.”²⁷² And this regulatory edge arises from multiple political dynamics reflecting the influence of organized interests and social movements rather than through a single, plainly dysfunctional political dynamic.

Societies should nonetheless carefully weigh decisions to criminalize risk-creating behavior. A preventive, risk-regulating logic may be the only way of defending expansive criminal prohibitions punishing the financing of charities potentially involved in terrorist activity, unlawful reentry into the United States after being deported, food safety crimes subject to strict liability, or environmental offenses that unduly punish small offenders. Despite such defenses, some of these existing criminal enforcement programs are overbroad and worth reforming under almost any sensible analysis concerned with institutional consequences. What makes less sense is to assume that our underlying doctrinal structure or historical legacy unambiguously settles the matter of

²⁶⁹ See Moe, *supra* note __; McNollgast, *supra* note __.

²⁷⁰ See *supra* Part II.b., II.c.

²⁷¹ Cf. Simon, *supra* note __, at 5 (suggesting that broad-based governance through crime control is a relatively modern and problematic development, not “proximate and proportionate” to the genuine “crime threat experienced”).

²⁷² See Friedman, *History of American Law*, *supra* note __, at 592.

how criminal law should be used to regulate risks in a democratic, advanced industrialized state.

Second, as we consider how to settle that matter, we should recognize the institutional realities exerting an impact on the intricate domain of crime control. To wit: the criminal justice system implies not only a distinction in the severity of sanctions available or procedural constraints relative to other enforcement regimes, such as those administered under the rubric of conventional regulatory policy or national security authority governing detention or targeting. Instead, criminal justice organizations also share distinctive institutional characteristics making them different from agencies in other enforcement regimes. They have different capacities and cultures borne in part from responding to legal constraints. They possess an abiding identification with a publicly-prominent, widely-supported mission that helps them forge autonomy from conventional political controls. And as criminal and civil enforcement regimes interact, national governments obtain greater leverage to manage risks through context effects created by the presence of severe sanctions, bargaining leverage, and the consolidation of public support for new regulatory strategies to control risk-creating crimes.

Taken together, these two realities paint a complex picture of the intersection between preventive criminal enforcement and risk regulation. Unlike simpler depictions rooted in ultimately unsatisfying doctrinal accounts of the civil-criminal line, the more complex picture forces society to grapple with difficult questions about the scope of the criminal sanction in an advanced industrialized national state. The political independence that criminal justice agencies can forge, though never absolute, bears a complicated relationship to social welfare. Even in law-bound societies, government agencies can be coercive or brutal. But they also represent the vehicle through which the democratic national state can deliver on the restrained yet responsible risk regulation that helps justify its existence in the first place.

Some observers will inveigle against this picture of preventive crime. They might argue that the realm of prisons, prosecutors, and police is already far too vast, encroaching on less coercive forms of social organization. The coercive legacy of imprisonment and policy brutality focused on propagating social, racial or economic stratification may loom too closely in history, or too seem too frequently reflected for some observers even in present times. Concern may also arise from the perceived tension between preventive criminal enforcement and deep-seated judicial or public intuitions about the *ex post* nature of traditional criminal punishment. No doubt these tensions are sometimes powerful, though I have argued above that they may be overstated in part because of the capacity of the “crime” label to shape social perceptions about what constitutes harm. Even in light of (or perhaps because of) the capacity of criminal law to nudge public views, some may have more jaundiced ideas about the basic competence of a criminal justice system that remains capable of generating wrongful convictions, losing evidence, and (conversely) rejecting vital public priorities involving civil rights, official corruption, or violent crime.

My argument is not meant to dismiss entirely such disquiet about regulating risk by regulating crime. Conventional narratives of crime-definition are deeply embedded in

the public mindset,²⁷³ making prosecutors and criminal investigators seem like blunt instruments for the regulation of toxic water pollution, financial support for insurgencies, and how workers should clean cyanide sludge from storage tanks. My hope is nonetheless to place analysis of preventive criminal enforcement on a sounder footing, grounded in the institutional realities affecting lawmakers, prosecutors, and investigators and how these compare to those affecting other enforcement regimes. Criminal justice forces on society a heavy burden, including that of defining the system's role in risk regulation without the simple assumption that the structure of criminal law will solve the problem for us. There is room to argue that the potential burdens society will reap from tolerating preventive criminal enforcement are too great to shoulder. But we should better appreciate such rejection as a costly strategy full of trade-offs, replete with tensions relative to broad chunks of existing social regulation, and far from required by the inherent nature of criminal law's structure.

Put simply: the organization of justice drives, to a considerable degree, the justice that organizations deliver. Clean water, the dangers grouped under the broad rubric of national security, and migration policy (to name just a few domains) depend not only on the technocratic quality of the goals involved but on the institutional dynamics of an enforcement system that often places conventional agencies at a disadvantage in trying to achieve their goals. Eschewing preventive criminal enforcement may also force societies to shoulder the burden of greater reliance on alternative, more coercive methods of enforcement, such as targeting or enemy combatant designations in the national security context. The success of an otherwise prescriptively sound and democratically enacted risk regulation priority may depend enough on the nature of available sanctions and the possibility shaping social attitudes enough to warrant recourse to the criminal justice system. And even beyond the realm of criminal law, observers should recognize how much law's ultimate legacy is mediated through its institutional logic – its impact on the evolution and behavior of organizations imbued with legal responsibility.²⁷⁴

In the end, it is not only the extent of concerns about toxic risks or terrorism, but rather our complicated relationship to the national state, that should inform evaluations of preventive criminal enforcement. The national state, imperfect and unquestionably evolving in response to global migration and capital flows, is as mixed a blessing as the machinery of criminal justice it has spawned. As Charles Tilly put it: “Destroy the state, and create Lebanon. Fortify it, and create Korea.”²⁷⁵ Such is the burden of living with what the state and its criminal justice machinery have become – a complex layering of institutional rules and bureaucracies, existing in a tangled relationship with organized

²⁷³ Indeed, it is the very strength of that mindset – and its slow pace of change – that imbues crime-definition with some of its institutional consequences. Defining a crime of money laundering has the potential to turn, at the margin, paperwork-laden technical violations of banking rules bearing a convoluted relationship to anti-drug or counter-terrorism policies into apparently harmful actions directly undermining society. Cf. Steven Klepper and Daniel Nagin, *Tax Compliance and Perceptions of the Risks of Detection and Criminal Prosecution*, 23 LAW & SOC. REV. 209 (1989) (discussing how crime-definition can shape public perceptions of particular conduct).

²⁷⁴ Cf. Cuéllar, *Refugee Security*, *supra* note __, at 583; Stephenson, *supra* note __.

²⁷⁵ Tilly, *supra* note __, at 227. Tilly was writing at a time (1990) when generic references to “Korea” not only evoked the costly problems associated with the political partition reified at the end of the Korean War and the systematic brutality of the North Korean regime, but also the (then more recent) coercive heritage of the South Korean state.

interests and the larger public. We can better manage those entanglements by recognizing that the scope of criminal law serves not only to restrain official coercion but to shape a world where privately-sponsored brutality and complex unseen risks exert a major impact on our lives.