

## ARTICLES

### FACILITATING CRIMES: AN INQUIRY INTO THE SELECTIVE INVOCATION OF OFFENSES WITHIN THE CONTINUUM OF CRIMINAL PROCEDURES

by  
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*Conventional wisdom holds that all crimes run a gauntlet of procedures that begins with an investigation and arrest, leads to charging and arraignment, and culminates (at least in successful prosecutions) with a conviction and the application of punishment. The reality is more complicated; in fact, there exist “detention crimes,” “charging crimes,” and “pleading crimes,” three types of offenses that, as applied, tend to implicate only portions of this sequence. This Article examines the three categories of “facilitating crimes” and the benefits and drawbacks associated with their use. On the one hand, these offenses may permit more nuanced treatment of specific types of misconduct; on the other, the legitimacy of these offenses may be compromised by their failure to engage the entire “traditional” procedural continuum. This Article concludes that while facilitating crimes and the practices that produce them raise significant concerns, “opt-in” and “opt-out” offenses—two species of crimes that would give defendants a greater role in avoiding portions of the continuum—might be considered as replacements for some conventional crimes.*

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## I. INTRODUCTION

Some crimes provide the basis for many plea bargains, but relatively few arrests. For example, each year in North Carolina thousands of motorists plead guilty to driving with a broken speedometer.<sup>1</sup> Virtually none of these defendants have been charged with this offense, and it is unlikely that many of them have broken speedometers in their vehicles. Instead, almost all of these individuals have been cited for a moving violation, such as speeding.<sup>2</sup> In each case, the original charge is dropped pursuant to an agreement whereby the defendant pleads guilty to the very dubious broken-speedometer offense,<sup>3</sup> which carries a lesser penalty than a conviction on the original charge would.<sup>4</sup> On the other side of the country, California courts and practitioners recognize an offense known as the “wet reckless,” shorthand for “wet reckless driving.”<sup>5</sup> As a matter of

<sup>1</sup> Editorial, *Busted*, NEWS & OBSERVER (Raleigh, N.C.), May 18, 2007, at A12 (relating that in the year ending June 30, 2006, “the state suffered 222,254 cases of broken speedometers”); Pat Stith, David Raynor & Mandy Locke, *Speeders Race Through Loopholes*, NEWS & OBSERVER (Raleigh, N.C.), May 17, 2007, at A1 (discussing the use of the “broken speedometer” offense as a basis for plea bargains in speeding cases). The crime of driving with a broken speedometer is codified at N.C. GEN. STAT. § 20-123.2 (2009) (providing that “[e]very self-propelled motor vehicle when operated on the highway shall be equipped with a speedometer which shall be maintained in good working order”). Violation of this law is punishable by a fine not to exceed \$25, and a conviction does not result in any “points” being added to the defendant’s driving record. *Id.* § 20-123-2(b). For a discussion of this Article’s nuanced definition of “crime,” see *infra* note 46.

<sup>2</sup> See Editorial, *supra* note 1 (expressing skepticism at the number of North Carolina motorists who claim to have defective speedometers in their vehicles).

<sup>3</sup> *Id.* Other jurisdictions likewise recognize crimes that support a large number of factually unfounded plea agreements. Mari Byrne, Note, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961, 2988–89 (2010) (discussing a variety of crimes that undergird factually “baseless” pleas).

<sup>4</sup> Editorial, *supra* note 1.

<sup>5</sup> See CAL. VEH. CODE § 23103.5 (West 2000) (providing that a conviction for reckless driving, reduced from a charge of driving under the influence of drugs or alcohol (DUI), shall count as a “prior” DUI conviction if the prosecutor relates on the record that the reckless driving was accompanied by the consumption of drugs or alcohol by the motorist); *People v. Forrester*, 67 Cal. Rptr. 3d 740, 742 n.2 (Cal. Ct. App. 2007) (referring to a conviction pursuant to the process created by section 23103.5 of the California Vehicle Code as a “wet reckless”); *Walker v. Kiouisis*, 114 Cal. Rptr. 2d 69, 74 (Cal. Ct. App. 2001) (same).

law, a law enforcement officer cannot arrest someone for a wet reckless. The wet reckless cannot be alleged by a prosecutor in an initial charging instrument, and it cannot be tried before a jury. The sole function of the wet reckless offense is to provide a landing point<sup>6</sup> for plea bargains in cases in which a motorist has been charged with driving under the influence of drugs or alcohol.<sup>7</sup>

At the other extreme, some crimes lead to many detentions or initial charges, but relatively few convictions. Not long ago, numerous jurisdictions aggressively leveraged the discretion that broadly worded vagrancy, loitering, and disorderly conduct crimes conferred upon law enforcement. Police used these and similar offenses to detain persons suspected of other crimes, to inflict shaming punishments through public arrests, and to facilitate officers' community caretaking duties, as these responsibilities were understood in that era.<sup>8</sup> Yet many of these same cities and counties systematically declined to prosecute individuals arrested for one of these crimes.<sup>9</sup> The primary function of these offenses was to enable detentions, not to produce convictions and resulting punishment. Another type of crime without convictions implicates modern reliance on plea bargaining for the disposition of criminal cases: certain offenses within the criminal codes seem to exist principally so that prosecutors can charge them and then bargain them away in plea negotiations that permit defendants to plead guilty or no contest to other crimes.

In other words, some crimes do not have to implicate the entire sequence of procedures conventionally associated with criminal offenses—from investigation and arrest to sentencing and appeal—in order to contribute, in some fashion, to the enforcement of a general prohibition scheme. As the foregoing examples suggest, these “facilitating crimes” fall into one of three categories. “Detention crimes” bring about many short-term restraints on liberty, but are rarely charged and even more infrequently prosecuted to conviction. “Charging crimes” are pled down or dismissed—by design—in a significant percentage of the cases in which they are originally alleged. Finally, “pleading crimes”

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<sup>6</sup> This Article borrows the “landing points” phrase, which describes the crime or crimes to which a defendant enters a guilty or no-contest plea as part of a plea bargain with the prosecution, from Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1940 (2006) [*hereinafter* Wright & Engen, *The Effects of Depth and Distance*].

<sup>7</sup> A defendant who pleads guilty to a wet reckless escapes the gamut of penalties associated with a conviction for driving under the influence. *Compare* CAL. VEH. CODE §§ 23103(c), 23103.5(e) (West 2000) (prescribing the penalties associated with a first-time conviction for a “wet reckless”), *with* CAL. VEH. CODE §§ 23536, 23538 (West 2000) (prescribing the penalties associated with a first-time conviction for driving under the influence of drugs or alcohol).

<sup>8</sup> *See infra* text accompanying notes 47–86.

<sup>9</sup> *See infra* text accompanying notes 90–106.

such as the wet reckless rise to the forefront of criminal cases most often pursuant to plea agreements in which the prosecution agrees to dismiss or reduce other charges. Though they represent only small segments of any criminal code, detention, charging, and pleading crimes all serve important purposes. If each criminal case represents a play, these three types of crimes might be likened to actors that appear only in brief scenes, but have crucial roles in driving the plot forward.

Facilitating crimes owe their existence to some very basic characteristics of the lawmaking process and the criminal justice system. There exist strong political pressures to create new crimes,<sup>10</sup> few meaningful constraints on the legislative imagination in fashioning these offenses (and their associated penalties),<sup>11</sup> and little subsequent review of the wisdom and efficacy of the prohibitions that are enacted.<sup>12</sup> These conditions have produced voluminous criminal codes replete with overlapping offenses,<sup>13</sup> which vary along many dimensions, including their susceptibility to proof beyond a reasonable doubt,<sup>14</sup> the penalties that adhere upon conviction,<sup>15</sup> and the costs associated with investigation and trial.<sup>16</sup> Law enforcement officers, meanwhile, are vested with enormous discretion to enforce this jumble of criminal laws,<sup>17</sup> yet remain subject to resource constraints that prevent full prosecution of each and every offense.<sup>18</sup> These circumstances provide police and prosecutors with multiple opportunities (and significant incentives) to select, from the constellation of offenses that often apply to a single course of conduct, the crimes that will most economically and effectively facilitate their

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<sup>10</sup> Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–33 (2001) [hereinafter Stuntz, *The Pathological Politics of Criminal Law*]; William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 9–10 (1996) [hereinafter Stuntz, *Substance, Process, and the Civil-Criminal Line*].

<sup>11</sup> Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 10, at 5.

<sup>12</sup> Luna, *supra* note 10, at 724–25 (“[T]he courts have been hesitant to limit the political branches in their enactment and enforcement of substantive crimes and punishments.”).

<sup>13</sup> Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 10, at 513–19; Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 36–38 (2000) (discussing overlapping crimes in state criminal codes).

<sup>14</sup> See JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 235 (1977) (“While every offense must be proved ‘beyond a reasonable doubt,’ the statutory provisions of the criminal code require varying kinds of evidence that make some crimes easier to prove than others.”).

<sup>15</sup> Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 10, at 552.

<sup>16</sup> Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1495 (2009).

<sup>17</sup> Luna, *supra* note 10, at 725–26.

<sup>18</sup> See Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 10, at 538 (observing that “[l]ocal prosecutors have too many cases and too little time” to try each one).

efforts at different junctures in the investigation and prosecution of a criminal case. In a given matter, one offense may provide the basis for an initial detention; the resulting investigation may lead to the filing of altogether different charges; and these allegations ultimately may be rejected in favor of a distinct bargained-to offense of conviction. When, across cases, an offense is consistently deployed only in certain phases of a criminal matter, with an intent that the crime not implicate other portions of the procedural continuum, it amounts to a facilitating crime.

These crimes, and the practices that produce them, present unique challenges and opportunities. The chronic avoidance of segments of the customary procedural sequence<sup>19</sup> raises significant concerns specific to each type of facilitating crime: detention crimes may evade judicial scrutiny; the frequent dismissal or reduction of charging crimes suggests a lack of sincerity in the underlying criminal sanction; and pleading crimes may lack an adequate foundation in conventional notions of wrongful conduct. On the other hand, a possibility exists that by creating *more* detention, charging, or pleading crimes, legislatures could *decrease* “overcriminalization”—the pervasive seepage of criminal laws and the threat of state-imposed punishment into every aspect of modern life.<sup>20</sup> Before this suggestion is rejected out of hand, one should note the recent revival of interest in diversion programs<sup>21</sup> and similar devices that

<sup>19</sup> It is commonly understood that a basic sequence of procedures adheres to all criminal proceedings. *See, e.g.*, WAYNE R. LAFAYE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE §§ 1.1, 1.3 (4th ed. 2004) (discussing the “typical” phases of a criminal proceeding). The description in the text above intentionally omits appeals and post-conviction proceedings, which also form part of the criminal process but are not immediately pertinent to this Article. The litany of steps discussed by LaFave et al. consists of (1) prearrest investigation; (2) arrest; (3) booking; (4) post-arrest investigation; (5) the decision to charge; (6) filing the complaint; (7) magistrate review of the arrest; (8) the first appearance; (9) preliminary hearing; (10) grand jury review; (11) the filing of the indictment or information; (12) arraignment on the information or indictment; (13) pretrial motions; (14) trial; (15) sentencing; (16) appeals; and (17) post-conviction remedies. *Id.* § 1.3.

<sup>20</sup> *See generally* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008). Erik Luna has described the “overcriminalization” label as encompassing “(1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations.” Luna, *supra* note 10, at 717. Complaints about perceived “overcriminalization” are nothing new. *See, e.g.*, THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 159 (1935) (commenting upon a perceived surfeit of crimes); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967); Justin Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1, 17, 19 (1927) (remarking upon the “great increase in the number of acts which society has chosen to designate as criminal[]” and the “prolific creation of new crimes”).

<sup>21</sup> “Diversion is an intervention that takes place after the criminal process has been initiated, that is, after arrest but before trial and conviction.” John P. Bellasai & Phyllis N. Segal, Note, *Addict Diversion: An Alternative Approach for the Criminal Justice System*, 60 GEO. L.J. 667, 673 (1972) (footnote omitted). *Cf.* Samuel J. Brakel & Galen R. South, *Diversion from the Criminal Process in the Rural Community*, 7 AM. CRIM. L.Q.

follow upon conventional criminal “intake” mechanisms (arrest and charging), but seek to avoid convictions and resulting punishment. These efforts suggest that an offense that is engineered to implicate only portions of the procedural continuum may achieve the social objectives associated with the criminalization of particular conduct more effectively, and with fewer collateral costs, than a “traditional” crime that implicates the gamut of criminal procedures would.

This Article examines detention, charging, and pleading crimes and offers some observations regarding their implications and possible uses. Section II of this Article relates the basic notion of a procedural continuum and its relationship to the essence of a criminal offense. Sections III, IV, and V introduce detention, charging, and pleading crimes, respectively, offering evidence as to their existence and summarizing their distinctive characteristics. With regard to charging and pleading crimes, this discussion incorporates an original analysis of all federal district court cases terminated by plea between October 2002 and September 2007. This study reveals that some crimes are almost never dismissed pursuant to plea deals; others are jettisoned quite often, year after year, in a manner that suggests (though it admittedly does not conclusively establish) their use as charging crimes. A few federal offenses also emerge from this analysis as likely pleading crimes.

Section VI then surveys the problems that facilitating crimes present. These drawbacks may seem overwhelming, such that detention, charging, and pleading crimes should almost always be avoided in the first instance and remedied when detected. The critical view that this Article expresses toward these offenses falls short of outright condemnation, however. Section VII, which concludes the piece, considers the possibility that crimes that parse the procedural continuum may, under certain conditions, result in the more efficient and compassionate administration of the criminal law. Here, this Article suggests that legislatures consider, when enacting new crimes or re-evaluating existing ones, whether these offenses would realize their aims more effectively as either “opt-in” crimes, which would resemble pleading offenses but *categorically* could not form the basis for an arrest or an initial charge, or as “opt-out” crimes, in which defendants could avoid the latter stages of the procedural sequence (trial, conviction, and punishment) through the completion of certain extrajudicial prerequisites. In certain situations, it is submitted, these kinds of departures from the traditional one-size-fits-all procedural continuum may benefit the parties to a criminal case, and society generally.

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122, 124 (1969) (“Diversion, strictly speaking, means moving a person from the criminal process to some non-criminal process, whether it be a medical or social agency or simply sending the person home.”).

## II. CRIMES AND THE PROCEDURAL CONTINUUM

Because detention, charging, and pleading crimes differ from conventional crimes in their respective relationships with the procedural continuum that traditionally applies to criminal offenses, this sequence represents a logical starting point for discussion.

A. *The Procedural Continuum*

The basic array of procedures that adheres to the prosecution of a criminal case has changed only slightly over the past two centuries. In his *Commentaries*, first published in 1765, Blackstone referenced “the regular and ordinary method of proceeding in the courts of criminal jurisdiction . . . .” This sequence was “distributed under twelve general heads, following each other in a progressive order: *viz.* 1. Arrest; 2. Commitment, and bail; 3. Prosecution; 4. Process; 5. Arraignment, and it’s [sic] incidents; 6. Plea, and issue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and it’s [sic] consequences; 10. Reversal of judgment; 11. Reprieve, or pardon; 12. Execution . . . .”<sup>22</sup> Though some of these “heads” no longer exist—a modern defendant would be out of luck if he or she sought the benefit of clergy<sup>23</sup>—the process described by Blackstone remains essentially intact today. Almost exactly two centuries after Blackstone put quill to paper, the report of the President’s Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, outlined the conventional sequence of criminal proceedings in very similar terms. The progression related by the report begins with the commission of a crime, then proceeds to an investigation, arrest, booking, initial appearance, preliminary hearing, information, arraignment, trial or guilty plea, and sentencing.<sup>24</sup>

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<sup>22</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*286.

<sup>23</sup> Through benefit of clergy, a defendant convicted of certain crimes could seek lenient treatment by reading (in the strict form of the procedure) or reciting (in its more lenient application) Psalm 51 from the Bible (“Have mercy upon me, O God, according to thy loving-kindness: according unto the multitude of thy tender mercies blot out my transgressions.”). LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 43–44 (1993); Newman F. Baker, *Benefit of Clergy—A Legal Anomaly*, 15 KY. L.J. 85, 96–97 (1927). The most celebrated case involving benefit of clergy involved the trial of the British soldiers involved in the Boston Massacre. Convicted of manslaughter (potentially a capital offense), the soldiers sought and received the benefit of clergy, and were only branded on their hands as punishment. Jeffrey K. Sawyer, “Benefit of Clergy” in *Maryland and Virginia*, 34 AM. J. LEG. HIST. 49, 49 (1990). The procedure was implicitly recognized by the first United States Congress, which made it unavailable for capital crimes. Act of Apr. 30, 1790, ch. 9, § 31, 1 Stat. 112, 119 (punishment of certain crimes against the United States). The last published decision involving the application of benefit of clergy appeared in 1855, in *South Carolina. State v. Bosse*, 42 S.C.L. (8 Rich.) 276, 282–83 (1855).

<sup>24</sup> PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 8–9 (1967).

As had Blackstone's recitation, this more contemporary description portrays criminal procedure prior to appeal as a sequential process that begins with an investigation and arrest and culminates in the sentencing of a convicted defendant. These and similar overviews of the criminal justice process<sup>25</sup> imply that a "successful" prosecution will proceed through each of the prescribed phases, except to the extent they are rendered unnecessary by a defendant's decision to avoid them (as by a guilty or no-contest plea). The continuum is an ideal, naturally. Crimes go unsolved, police and prosecutors decline to pursue matters, cases are dismissed or thrown out, juries acquit.<sup>26</sup> Yet if the procedural continuum recognizes departures in individual cases, with a few significant exceptions,<sup>27</sup> it normally does not permit the fundamental redesign of its architecture. The rigidity of the basic continuum follows from an understanding that each of the core procedures is integral to a process that advances the state's interest in enforcing the substantive criminal law, but respects and protects the defendant's fundamental rights.<sup>28</sup>

#### B. *The Sequence and Specific Crimes*

Because these procedures are regarded as essential to the criminal process, it is tempting to conclude that they are all fundamental to any crime. In other words, one might conclude that if a prohibition amounts to a crime, then it must be subject to the full range of "criminal"

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<sup>25</sup> See, e.g., *Criminal Justice System Flowchart*, BUREAU OF JUSTICE STATISTICS, U.S. DEPT' OF JUSTICE, <http://bjs.ojp.usdoj.gov/content/largechart.cfm>; LAFAYE, ISRAEL & KING, *supra* note 19, §§ 1.1, 1.3 (relating the conventional steps in a criminal investigation and proceeding); NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE 16-18 (1931) (discussing the stages of a typical criminal proceeding); ARTHUR TRAIN, *THE PRISONER AT THE BAR* 42 (2d ed. 1908) (same).

<sup>26</sup> PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *supra* note 24, at 8-9.

<sup>27</sup> The gravity of a crime may affect this process somewhat. Speaking generally, the more serious the offense at issue, the more extensive the associated procedures. For example, in the federal courts a felony prosecution must be initiated by a grand jury indictment, whereas a prosecutor can file an information that alleges only misdemeanor offenses. FED. R. CRIM. P. 7(a)-(b).

<sup>28</sup> For example, one influential source described the functional "essentials" of a criminal proceeding as follows: "(1) To bring the accused before or within the power of the tribunal, (2) a preliminary investigation to insure that the cause is one which should be prosecuted, (3) notice to the accused of the offense charged, (4) opportunity to prepare for trial, procure witnesses, and make needed investigations, (5) a speedy trial, (6) a fair trial before an impartial tribunal, and, (7) one review of the case as a whole by a suitable appellate tribunal." NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, *supra* note 25, at 16. This report then addressed the basic procedural incidents of a criminal prosecution, beginning with arrest and ending with an appeal, which mapped quite neatly against these "essentials." *Id.* at 16-18.



procedures.<sup>29</sup> If these procedures are in some measure inapplicable to a legal sanction, then the proscription must be regarded as civil in nature, or its method of administration rejected and the full set of criminal safeguards applied.

This syllogism finds its strongest support in *Kennedy v. Mendoza-Martinez*,<sup>30</sup> decided by the United States Supreme Court in 1963. The Court in *Mendoza-Martinez* determined that if a legal sanction leads to state-imposed “punishment,” then this punishment can adhere only after application of the full array of constitutionally compelled safeguards traditionally associated with criminal proceedings.<sup>31</sup> Provided that one defines a “crime” as a legal rule, the violation of which can provide grounds for “punishment” by the state,<sup>32</sup> and furthermore agrees that each of the traditional criminal procedures is necessary to vindicate a fundamental constitutional safeguard,<sup>33</sup> the *Mendoza-Martinez* decision

<sup>29</sup> See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 12–13 (3d ed. 1982) (“A definition of the term crime cannot practically be separated from the nature of proceedings used to determine criminal conduct.”); Grant Lamond, *What Is a Crime?* 27 OXFORD J. LEGAL STUD. 609, 609–10 (2007) (noting that to some observers, “a legal prohibition is a criminal prohibition when it is subject to criminal proceedings,” including the incidents of charging, conviction, and sentencing). The reverse supposition does not hold true, at least to a point; just because the administration of a particular prohibition entails a subset of the safeguards and procedures associated with criminal proceedings does not, by itself, mean that the prohibition amounts to a crime. See *Kansas v. Hendricks*, 521 U.S. 346, 364–65 (1997) (concluding that the applicability of certain “procedural safeguards traditionally found in criminal trials” did not transform a sexually violent predator commitment proceeding into a criminal proceeding); *Allen v. Illinois*, 478 U.S. 364, 371–72 (1986) (“[A state’s] decision . . . to provide some of the safeguards applicable in criminal trials cannot itself turn [otherwise civil] proceedings into criminal prosecutions requiring the full panoply of rights applicable there.”).

<sup>30</sup> 372 U.S. 144 (1963).

<sup>31</sup> *Id.* at 166–68. Defining what “punishment” means in this context has itself proved to be a difficult task. See generally Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997) (discussing the complexities of this issue). Since *Mendoza-Martinez*, the Court has distinguished between civil consequences and criminal punishments. The civil or criminal character of a particular sanction is often ascertained through application of a series of “guideposts” related by the *Mendoza-Martinez* decision, applied with a healthy dose of deference to the label that has been affixed to the prohibition by the relevant legislature. See *Hudson v. United States*, 522 U.S. 93, 99–100 (1997) (citing *Mendoza-Martinez*, 372 U.S. at 168–69).

<sup>32</sup> See HUSAK, *supra* note 20, at 78 (explaining that laws are “criminal” in nature when those who break the prescribed rules become subject to state-imposed punishment); Kyron Huigens, *Solving the Williams Puzzle*, 105 COLUM. L. REV. 1048, 1061 (2005) (“With rare exceptions, a criminal offense is a pre-legal wrong that has been reduced to discrete elements for purposes of legal decisionmaking pertaining to legal punishment.”).

<sup>33</sup> See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 12 (1997) (“Thus, [criminal] defendants’ rights are really the system’s rules, rules that regulate the conduct of the various actors who take

could be understood as premising the status of an offense as a “legitimate” crime on its susceptibility to the full range of procedures conventionally intertwined with criminal proceedings.

When properly read, however, the *Mendoza-Martinez* decision announces a rule applicable to criminal *proceedings*, not necessarily to specific *crimes*.<sup>34</sup> This distinction is an important one. In concluding that punishment can follow only after application of a full set of procedural safeguards, *Mendoza-Martinez* neither requires nor implies that the full set of protections (and the procedures that supposedly embrace them) invariably must attach to the offense of conviction—only that the safeguards must apply at some point during a prosecution that leads to punishment. In fact, crimes may be substituted in and out of a criminal action in a manner consistent with constitutional directives. For example, uncharged lesser included crimes can be submitted to the jury<sup>35</sup> even over a defendant’s objection.<sup>36</sup> In such a case, the protections guaranteed by *Mendoza-Martinez* still adhere to the proceedings in which these crimes appear,<sup>37</sup> even if the full spectrum of criminal procedures is not directly applied to the specific crimes ultimately associated with conviction and punishment.

There exist two other reasons why a particular crime need not implicate all of the procedures traditionally associated with the enforcement of a criminal rule. First, some of the customary procedures do not represent constitutionally compelled safeguards, nor are they essential to the application of punishment. Arrests offer a case in point. Though it may be useful to permit arrests for criminal offenses, there is no constitutional or doctrinal directive that makes an arrest a necessary part of every criminal case. Indeed, several states prohibit police officers from making custodial arrests of persons suspected of some minor offenses.<sup>38</sup> Second, criminal defendants may waive constitutional

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part in the process by which some criminal defendants are convicted and punished.”).

<sup>34</sup> It is conceded that if one regards the possibility of punishment as an essential characteristic of a crime, “pure” detention and charging crimes—offenses that categorically could not bring about a conviction, or punishment—would lie outside of the recognized boundaries of the criminal sanction. “Pure” pleading crimes, which *could* lead to punishment, stand on a different footing.

<sup>35</sup> *Keeble v. United States*, 412 U.S. 205, 208 (1973).

<sup>36</sup> *See Harbin v. State*, 14 So. 3d 898, 902–03 (Ala. Crim. App. 2008) (listing decisions so holding).

<sup>37</sup> The charging of an offense and the specification therein of the elements that amount to lesser crimes is generally deemed to give a defendant notice of the possibility that lesser included offenses will be submitted to the jury. *See, e.g., People v. Wilder*, 780 N.W.2d 265, 271 (Mich. 2010).

<sup>38</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001); Adam J. Breeden, *Atwater v. City of Lago Vista: How Should States Respond to the Supreme Court’s Latest Expansion of Automobile Search & Seizure Law?*, 70 U. CIN. L. REV. 1395, 1408–09 (2002) (discussing state laws that prohibit custodial arrests for modest crimes); Surell Brady,

protections intended for their benefit.<sup>39</sup> Provided that these waivers are valid, no obvious, categorical constitutional impediment bars recognition of crimes that must be invited into a case by the defendant, and thus will never appear during the investigation and charging phases of a criminal matter.

In any event, regardless of whether a crime must, in theory, implicate each phase of the procedural continuum, it is manifestly evident that, in practice, many crimes tend to be invoked only at particular junctures within this sequence. The next three sections of this Article discuss these detention, charging, and pleading crimes.

### III. DETENTION CRIMES

There exist (and long have existed) crimes that are used principally to facilitate detentions and arrests, with prosecutions, convictions, and subsequent punishment for the proscribed conduct representing mere afterthoughts. These are “detention crimes.”

There exist two types of crimes that produce many detentions, but few charges or convictions. With the first class of offenses, detentions upon suspicion that the crime has been, is being, or will be committed commonly lead to evidentiary dead ends.<sup>40</sup> For these crimes, while

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*Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 20–21 (2000) (surveying state arrest laws).

<sup>39</sup> A competent defendant can waive his or her rights to counsel, *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938); discovery, *United States v. Ruiz*, 536 U.S. 622, 629–33 (2002); trial by jury (at least in non-capital cases), *Patton v. United States*, 281 U.S. 276, 312 (1930); and appeal, *United States v. Hahn*, 359 F.3d 1315, 1326–28 (10th Cir. 2004), just to name a few of the safeguards afforded for his or her benefit. There are some protections that are regarded as unwaivable, though. *See, e.g.*, *Zedner v. United States*, 547 U.S. 489, 500–01 (2006) (concluding that defendants may not preemptively opt-out of the protections afforded by the Speedy Trial Act of 1974); *United States v. Murphy*, 483 F.3d 639, 642 (9th Cir. 2007) (finding the right to a unanimous jury verdict (in federal court) to be incapable of waiver). *Cf.* *United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008) (observing that the issue of whether the court has subject matter jurisdiction over a case cannot be waived by the parties). For a discussion of the waiver doctrine and its limits, see generally Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113 (1999).

<sup>40</sup> One study of detentions made by the New York City Police Department found significant differences across crimes in how often stops upon suspicion led to arrests. Almost one-quarter (24%) of stops for sale or possession of marijuana led to an arrest, whereas only 2.5% of stops upon suspicion of a weapons offense produced this result. CIVIL RIGHTS BUREAU, OFFICE OF THE ATT’Y GEN. OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT’S “STOP & FRISK” PRACTICES 118 (1999) [hereinafter SPITZER REPORT]. In a somewhat similar vein, a study of felony arrests in New York City in the 1970s found that while 72% of arrests for murder, attempted murder, and non-negligent homicide led to some sort of criminal conviction, only 41% of arrests for felony assault resulted in a similar outcome, and only 25% of arrests for rape produced a conviction of some type. Between these extremes lay arrests for grand larceny and possession of stolen property (50% of which led to some sort of

circumstances amounting to reasonable suspicion are commonplace, more facts—which may not be forthcoming—are necessary to create probable cause, to convince a prosecutor to file charges, or to convict a person of the crime.<sup>41</sup> For example, reasonable suspicion of a concealed-weapons offense is fairly easy to glean; under the right conditions, a “suspicious bulge” may suffice.<sup>42</sup> Yet very few of the resulting detentions actually yield evidence of a weapon.<sup>43</sup> In other words, the law applicable to these crimes leads to a large number of “false positive” detentions, in which a dearth of proof means that no charges for the crime ultimately will follow.<sup>44</sup>

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conviction), narcotics felonies (55%), robbery (58%), gambling (60%), burglary (64%), and forgery (65%). VERA INST. OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY’S COURTS 8 fig.4 (1977). Of course, neither rape nor assault is a “detention crime,” as this Article defines the term, for there is no indication that these offenses are systematically used to effect *only* detentions or arrests. See also Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 MD. L. REV. 755, 773 (2005) (“Statistics show that the percentage of state felony cases dismissed after arrest in major urban centers ranges from 10% for driving-related offenses to 40% for assault cases.”).

<sup>41</sup> With other crimes, the same facts that commonly establish the reasonable suspicion that justifies a detention also will prove commission of the crime beyond a reasonable doubt. With speeding charges, for example, a radar reading and an officer’s accompanying observations normally will justify a stop. In the usual case, assuming a credible police officer, these same evidentiary facts will suffice to convict the driver of speeding. If reasonable suspicion exists, so too does proof beyond a reasonable doubt.

<sup>42</sup> See Lawrence Rosenthal, *Second Amendment Plumbing after Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 38 & n.201 (2009) (listing decisions in which courts have found reasonable suspicion to detain someone for a weapons offense); John P. Murrill, *Louisiana and the Justification for a Protective Frisk for Weapons*, 54 LA. L. REV. 1369, 1386 & n.89 (1994) (same). Officers appreciate and act upon this liberal standard for reasonable suspicion; data compiled by the New York City Police Department indicate that more than one-third of all pedestrian detentions initiated by officers between January 1998 and March 1999 were premised on suspicion of a weapons crime. See SPITZER REPORT, *supra* note 40, at 118 tbl.I.B.3, 128 n.39.

<sup>43</sup> See SPITZER REPORT, *supra* note 40, at 117 n.23 (discussing the paucity of stops prompted by a suspected weapons offense that led to arrests for a weapons crime); Rosenthal, *supra* note 42, at 40–41 (relating that New York Police Department “data shows that the error rate for weapons searches was higher than for other types of searches. . . . [T]here is little doubt that evaluating suspicious bulges and the like involve a substantial risk of error . . .”).

<sup>44</sup> Though feedback loops optimally would exist such that these discrepancies would be accounted for in assessments of reasonable suspicion, the fact-specific nature of the reasonable-suspicion inquiry precludes ready resort to statistics or presumptions based solely on the type of crime involved. Cf. Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913 (2009) (arguing that judicial determinations of probable cause should take into consideration the officer-applicant’s “success rates” in finding evidence when executing prior warrants).

For the most part,<sup>45</sup> this Article is concerned with another type of crime, one that produces similar results (many detentions, but usually no further proceedings) but for different reasons. In the usual case, a detention on reasonable suspicion (or arrest on probable cause) is made with the ultimate goal of convicting the offender of the crime for which reasonable suspicion (or probable cause) exists. With detention crimes,<sup>46</sup> whether the detained person is ultimately charged with and convicted of the offense that led to the detention is beside the point; the prosecution of these crimes is typically not worth the effort. The utility of these crimes lies instead in the authority to temporarily detain that the offenses confer upon law enforcement.

From the perspective of law enforcement, a detention, by itself, can serve several useful purposes. The harms that some crimes seek to prevent can be addressed by giving police officers temporary custody of and control over the person committing the proscribed act. Likewise, detention or arrest alone can fulfill the intended deterrence, retribution, incapacitation, and punishment functions of particular criminal sanctions, with much less time and expense than full prosecution would require. Finally, detention crimes often facilitate the investigation of other offenses by providing law enforcement with justifications for nonconsensual contacts with criminal suspects.

As to the first of these uses, some crimes implicate conduct as to which there typically exists an important interest in temporarily controlling the offender's movements for reasons other than the further investigation of a crime. Public intoxication laws, for example, commonly apply to persons who are unable to exercise due care for their safety, or for the safety of others.<sup>47</sup> These crimes provide a basis upon which to detain intoxicated persons—in some cases, literally picking them up from the middle of the street—and place them in safer environments where they can return to sobriety.<sup>48</sup> Though these individuals could be

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<sup>45</sup> At some point, the disconnect between the circumstances recognized as amounting to reasonable suspicion of a crime, and likelihood that an investigation that builds on this suspicion will ultimately produce evidence of that crime, may become so great that any reasonable officer would appreciate that a stop has no appreciable chance of yielding evidence of that offense. These circumstances could produce a detention crime under the definition used in this Article.

<sup>46</sup> As used here, "crime" encompasses even non-jailable infractions, provided that they provide adequate and appropriate grounds for a vehicle stop, or a similar detention.

<sup>47</sup> See, e.g., CAL. PENAL CODE § 647(f) (West 2010) (providing that one is guilty of public intoxication when found in a public place, under the influence of an intoxicant, and either "in a condition that he or she is unable to exercise care for his or her own safety or the safety of others," or "interfer[ing] with or obstruct[ing] or prevent[ing] the free use of any street, sidewalk, or other public way").

<sup>48</sup> E.g., *In re Bolt*, No. V2004-61268, 2005 WL 1526153, at \*1 (Ohio Ct. Cl. May 20, 2005) (relating an incident in which a local fire department removed an alcoholic from the middle of the street). See also Axel Kleiboemer & Frank L. Schneider, *The Law on Skid Row*, 38 CHI.-KENT L. REV. 22, 38, 41 (1961) (remarking upon the "almost

prosecuted for their inebriation, in many jurisdictions these charges are forthcoming only in extreme cases,<sup>49</sup> since the costs associated with further prosecution commonly outweigh the perceived benefits.<sup>50</sup> Detention offenses also can undergird less compassionate restraints. Broad vagrancy and loitering laws, for example, were once used to harass “undesirable” members of a community, often with the eventual goal of driving these unfortunates out of town.<sup>51</sup> Somewhere between these

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universal attitude of benevolent paternalism which police officers display toward alcoholic derelicts” and observing that “on Skid Row the reason for the arrest of a chronic alcoholic is, almost invariably, a desire to prevent him from injuring himself and to protect him from jackrollers . . .”); Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 631–32 (1956) (commenting on the Philadelphia police’s practice of conducting “protective arrests” of persons who do not “belong” in a dangerous area, with the applicable vagrancy law providing the grounds for the arrest).

<sup>49</sup> See Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 360–61 (1936). One study of San Francisco courts in the early 1920s found that more than 99% of public intoxication cases were dismissed in the police court, with no complaint being filed in the vast majority of these matters. Henrietta Heinzen & Rhoda K. Rypins, *Crime in San Francisco: A Study of the Police Court Docket*, 18 J. AM. INST. CRIM. L. & CRIMINOLOGY 75, 83–84 (1928).

<sup>50</sup> See Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 10, at 13 (“Criminal procedure’s costs come paired with benefits—special restrictions are attached to special powers—and the costs themselves can be vastly reduced in a world that allows police and prosecutors discretion not to arrest and not to charge.”).

<sup>51</sup> *Id.* at 18; Foote, *supra* note 48, at 614 (“Perhaps [a vagrancy crime’s] principal employment is as a clean-up measure in dealing with the problems of congested urban ‘skid row’ districts. Unwanted drunkards, panhandlers, gamblers, peddlers or paupers are committed or banished, a procedure that is alleged to deter other like persons from entering or remaining in a given locality.”), 631 (“Prosecutions [for vagrancy] were carried on in a bewildering variety of other situations which had no relation to the suppression of criminality.”); Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1218 (1953) (“One aspect of the crime-preventive use of vagrancy statutes is simply to harass reputed criminals and drive them out of town.”); Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 YALE L.J. 1351, 1352 n.5 (1950) [hereinafter *Use of Vagrancy-Type Laws*] (“Frequently, the police follow the custom of repeatedly jailing on vagrancy charges known or suspected criminals against whom no serious crime can be proven in order to keep them out of circulation and persuade them to leave town.”); Carl V. Eimbeck, *Some Recent Methods of Harassing the Habitual Criminal*, 16 ST. LOUIS L. REV. 148, 151–58 (1931). Among their uses, vagrancy laws were invoked to “support arrests for activities which the police desire to suppress, such as ‘communistic agitation,’ or labor organization” in the first half of the twentieth century. Foote, *supra* note 48, at 629 (footnote omitted). In one instance, “[t]he San Francisco police once arrested 375 men at one time, mostly in union halls, and charged them with vagrancy.” *Id.* In another, a state vagrancy law was used to break up, and then arrest many participants in, a so-called “homosexual convention” that took place in Texas in 1953. *Waco Cops Arrest 63 Men in Raid on Sex Convention*, MEXIA DAILY NEWS (Mexia, Tex.), April 13, 1953, at 1.

extremes lie juvenile curfew and daytime loitering laws,<sup>52</sup> violations of which are rarely prosecuted in large communities.<sup>53</sup>

Law enforcement also may consider the shame and inconvenience that may be associated with a detention or arrest as satisfactory punishment for certain crimes, and thus lack interest in further prosecution. An arrest is a “public act that may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.”<sup>54</sup> The shaming effect of an arrest carries special weight when “morals” crimes are involved.<sup>55</sup> The obloquy associated with a public arrest for, say, soliciting a prostitute may, on its own, almost entirely effectuate the aims of the underlying criminal prohibition.<sup>56</sup> In this spirit, a survey of the San Francisco police court docket conducted almost a century ago reveals that out of 225 persons arrested for visiting a “disorderly house” (typically a gambling den or a brothel) over the studied period, 221 were discharged without a trial.<sup>57</sup>

The third, and most significant, application of detention crimes involves their use in the investigation of other offenses. Reasonable suspicion of a crime—any crime<sup>58</sup>—will justify a detention that is, in fact,

<sup>52</sup> See generally Note, *Juvenile Curfews and the Major Confusion over Minor Rights*, 118 HARV. L. REV. 2400 (2005) (discussing these laws).

<sup>53</sup> Leslie Joan Harris, *An Empirical Study of Parental Responsibility Laws: Sending Messages, but What Kind and To Whom?*, 2006 UTAH L. REV. 5, 25–27 (2006) (reporting that several large jurisdictions do not prosecute violations of juvenile curfew laws, with some of these localities maintaining a policy of returning first offenders to their parents).

<sup>54</sup> *United States v. Marion*, 404 U.S. 307, 320 (1971). See also HUSAK, *supra* note 20, at 13 (“the experience of arrest is embarrassing, costly and inconvenient”); Reza, *supra* note 40, at 771 (relating that an arrest is “a truth that [the arrestee] will almost always find embarrassing and unflattering, to say the least . . . Personal ties can be strained, family members shunned, current employment lost and future job prospects threatened, social status damaged—and worse.”); Kirk R. Williams & Richard Hawkins, *The Meaning of Arrest for Wife Assault*, 27 CRIMINOLOGY 163, 170–75 (1989) (discussing the various implications of arrest for spousal abuse); Richard A. Williamson, *The Dimensions of Seizure: The Concepts of “Stop” and “Arrest,”* 43 OHIO ST. L.J. 771, 774 (1982) (relating some of the consequences of an arrest).

<sup>55</sup> See James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1064–66 (1998).

<sup>56</sup> See Courtney Guyton Persons, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes’ Patrons*, 49 VAND. L. REV. 1525 (1996) (discussing the public “shaming” of persons arrested for soliciting prostitutes).

<sup>57</sup> Heinzen & Rypins, *supra* note 49, at 84.

<sup>58</sup> *Whren v. United States*, 517 U.S. 806, 812–13 (1996); see also Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 10, at 12–13 (observing that “the probable cause and reasonable suspicion standards treat all crimes alike,” and “[f]or almost all purposes in the law of criminal procedure, one crime is just as good as another. This is hardly a surprise; procedural rules are almost always transsubstantive.”).

subjectively prompted by constitutionally deficient suspicion relating to some other offense.<sup>59</sup> This “objective” standard for determining the propriety of a detention means that police officers may stop and detain someone for a crime they do not care to pursue to the point of arrest, charging, or conviction.<sup>60</sup> Detention crimes thus provide handy tools to officers interested in probing hunches regarding possible criminal conduct as to which “direct” reasonable suspicion is lacking.<sup>61</sup> Although any detention must be reasonably tailored to the crime for which reasonable suspicion exists,<sup>62</sup> these investigations will often turn up evidence relating to the offense that in fact motivated the officer to take action.

Detention offenses have long represented an important species of criminal law. For many years, police leveraged broadly written<sup>63</sup>

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<sup>59</sup> In evaluating the lawfulness of a detention *ab initio*, the law does not inquire into whether reasonable suspicion existed to detain a suspect for the crime(s) that subjectively motivated the officer to act. Instead, a detention is valid if the officer is aware of facts giving rise to reasonable suspicion (or, in the case of arrests, probable cause) that a crime had been, was being, or was about to be committed. *Whren*, 517 U.S. at 813 (affirming that an officer’s subjective intentions “play no role in ordinary, probable-cause Fourth Amendment analysis”).

<sup>60</sup> See Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 10, at 10 (“Procedural rules make broader criminal liability more attractive, since the latter can be used as a device for evading the costs of the former. The government can exploit a jaywalking ban without enforcing it, by using the jaywalking ban as a tool for enforcing other prohibitions without actually punishing jaywalking.”) (emphasis omitted).

<sup>61</sup> See Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 10, at 539 (“[C]rimes that cover low-level street behavior . . . will only rarely be prosecuted, but . . . often serve as a convenient basis for an arrest and, perhaps, a search.”); Foote, *supra* note 48, at 628–29 (observing that a vagrancy charge “may be a mere cloak for an arrest that officers have been ordered to make, an arrest for some other offense, as a means of validating what would otherwise be an illegal search”). Suggestive of such use, these offenses were once sometimes referred to as “dragnet” crimes. *E.g.*, *People v. Tylkoff*, 105 N.E. 835, 836 (N.Y. 1914).

<sup>62</sup> *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (observing that the reasonableness, and thus the constitutionality of an investigatory detention will depend on, *inter alia*, “whether [the detention] was reasonably related in scope to the circumstances which justified the interference in the first place”). Some allowance is made for questioning relating to other matters, provided that the inquiries do not appreciably extend the duration of the stop. See *Arizona v. Johnson*, 129 S. Ct. 781, 788 (2009) (discussing this principle in connection with a vehicle stop).

<sup>63</sup> See Gary V. Dubin & Richard H. Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. REV. 102, 130 (1962) (“[T]he vague definitions of vagrancy confer on an officer discretion so broad that technically he can seldom be held not to have had probable cause for the arrest.”); *Use of Vagrancy-Type Laws*, *supra* note 51, at 1351–53 (asserting that vagrancy and “suspicious persons” statutes are often “so broadly phrased as to permit the police and trier of fact to determine the question of guilt according to their own moral and political standards”).



loitering,<sup>64</sup> vagrancy,<sup>65</sup> disorderly conduct,<sup>66</sup> and public intoxication<sup>67</sup> crimes—collectively, the so-called “garbage pail of the criminal law”<sup>68</sup>—to investigate other offenses,<sup>69</sup> to “clean up the streets,” and to facilitate law enforcement objectives distinct from the goal of generating convictions for these crimes.<sup>70</sup>

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<sup>64</sup> Dubin & Robinson, *supra* note 63, at 109 (discussing loitering offenses, described as a subset of vagrancy crimes).

<sup>65</sup> *Id.* at 109–11 (discussing various types of vagrancy offenses).

<sup>66</sup> Hall, *supra* note 49, at 359.

<sup>67</sup> Dubin & Robinson, *supra* note 63, at 110 (discussing this type of crime, described as a subset of vagrancy). *See generally* William C. Carriger, Comment, *The Law of Public Drunkenness*, 34 TENN. L. REV. 490 (1967) (discussing the variety and breadth of public intoxication crimes).

<sup>68</sup> Foote, *supra* note 48, at 631. This description was applied to “vagrancy-type” laws, but in the pertinent era, this area of the law was sufficiently amorphous as to encompass crimes that might today be regarded as falling within a separate classification.

<sup>69</sup> Lacey, *supra* note 51, at 1218 (“An individual suspected of another crime may be arrested on a charge of vagrancy so that the police will have the opportunity of investigating further or of securing a voluntary or coerced confession.”); Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 10, at 539; *Use of Vagrancy-Type Laws*, *supra* note 51, at 1358 (“Brief arrests under these vague [curfew, vagrancy, and suspicious persons] statutes are often for the purpose of investigations which could otherwise be accomplished only by illegal detention.”).

<sup>70</sup> *See* William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 12 (1960); Dubin & Robinson, *supra* note 63, at 130 (“[T]he vague definitions of vagrancy confer on an officer discretion so broad that technically he can seldom be held not to have had probable cause for the arrest.”); Raymond Nimmer, *Arrests for Public Drunkenness: A Seldom Discussed Reform Strategy*, 54 JUDICATURE 335, 339 (1971); Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 10, at 18 (“States and localities for years had on their statute books vagrancy and loitering laws that could easily be stretched to apply to almost anything one did in public. These laws were widely (and openly) used as discretionary tools for the police to clean undesirables off the streets.”). Furthermore, some jurisdictions adopted “suspicious persons” laws that only very loosely tethered a police officer’s authority to arrest on the possible commission of a crime. One Massachusetts statute, for example, provided that when a police officer encountered someone at night and had “reason to suspect” that person of an “unlawful design,” the officer could “demand of them their business abroad and whither they are going.” If the person did “not give a satisfactory account of themselves,” the officer could arrest them. MASS. GEN. LAWS ch. 41, § 98 (1921).

The plethora of detentions and arrests for these crimes<sup>71</sup> was not followed by a similarly high volume of prosecutions and convictions. While some communities vigorously prosecuted these offenses,<sup>72</sup> others did not.<sup>73</sup> To many law enforcement officers, these crimes fulfilled their

<sup>71</sup> Arrest data compiled from the Federal Bureau of Investigation's Uniform Crime Reports reflect the frequent utilization of these crimes during the mid-1900s:

Reported Arrests: Selected Crimes

Year	Total Reported Arrests	Disorderly Conduct	Drunkenness	Vagrancy	Curfew/Loitering Laws
1943	490,764	35,319	111,031	35,013	Not Reported
1953	1,791,160	199,548	774,096	75,754	
1963	4,437,786	491,043	1,514,680	141,868	
1973	9,027,700	720,400	1,599,000	62,300	151,200
1983	11,700,500	757,400	1,115,200	33,700	75,000
1993	14,036,300	727,000	726,600	28,200	100,200
2003	13,639,479	639,371	548,616	28,948	136,461

This dataset is derived from the following *Uniform Crime Reports*, issued annually by the Federal Bureau of Investigation, U.S. Department of Justice: UNIFORM CRIME REPORTS 2003, at 270 (2004); UNIFORM CRIME REPORTS 1993, at 217 (1994); UNIFORM CRIME REPORTS 1983, at 170 (1984); UNIFORM CRIME REPORTS 1973, at 121 (1974); UNIFORM CRIME REPORTS 1963, at 104–05 (1964); UNIFORM CRIME REPORTS 1953, at 110 (1954); UNIFORM CRIME REPORTS 1943, at 87 (1944).

Other datapoints yield similar results. It was estimated that in 1966, one-third of all arrests nationwide were for public intoxication. John M. Murtagh, *Arrests for Public Intoxication*, 35 FORDHAM L. REV. 1, 1 (1967). One study of arrests made in Detroit between 1913 and 1919 found that disorderly conduct represented by far the most common reason for arrests within the city during that time period, undergirding approximately 38% of all arrests of men in the city in that span. Arthur Evans Wood, *A Study of Arrests in Detroit, 1913 to 1919*, 21 J. AM. INST. CRIM. L. & CRIMINOLOGY 168, 169 (1930). See also Foote, *supra* note 48, at 613 (“More persons are arrested for vagrancy proper than for any of the more serious offenses except possibly larceny and assault, and it is quite likely that more persons are convicted for this offense than for any other.”) (footnote omitted); C. Raymond Judice, *Public Intoxication*, 30 TEX. B.J. 341, 341 (1967) (“Of the 61,985 arrests made by the Houston Police Department in 1966, 26,453 were for public intoxication.”); *Police Business*, L.A. TIMES, Nov. 12, 1882, at 1 (reporting that of the 1,313 arrests made in Los Angeles in the fiscal year ending October 31, 1882, 541 were for vagrancy, drunkenness, disorderly conduct, drunk and disorderly conduct, disturbing the peace, or being “sick on the streets”); *Work of the City Police*, CHESTER TIMES (Chester, Pa.), Jan. 11, 1916, at 1 (reporting that of 1,520 arrests made by the Chester police force in 1915, 1,186 were for vagrancy, suspicion, disorderly conduct, drunk and disorderly conduct, or drunkenness).

<sup>72</sup> For example, one source relates that in Tuscon, Arizona, between 1956 and 1959, 3,975 arrests for vagrancy led to 3,697 convictions for this offense. Douglas, *supra* note 70, at 3–4. See also Foote, *supra* note 48, at 604–09, 643–47 (discussing the prosecution of vagrancy cases).

<sup>73</sup> Cf. Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 910–11 (2001); Hall, *supra* note 49, at

principal purpose at the point of detention or arrest; it was unnecessary, even wasteful, to initiate further proceedings.<sup>74</sup> Illustrating the point, a study of Boston police practices between 1928 and 1933 found that all of the 476 persons arrested for disorderly conduct in the city during that span were discharged without a court appearance.<sup>75</sup>

These “garbage pail” crimes are no longer quite as important as they once were.<sup>76</sup> There are many reasons for the less-frequent utilization of these crimes. First, some statutes codifying these offenses have been found unconstitutional by courts.<sup>77</sup> Some of the most expansive vagrancy and loitering laws succumbed to courtroom assaults as early as the late 1800s.<sup>78</sup> Beginning in the 1960s, federal and state courts began to scrutinize these laws more carefully,<sup>79</sup> striking down several measures as

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359–61; Lacey, *supra* note 51, at 1224 (observing that “[m]any arrests are made [for vagrancy] with no intention of bringing the cases to trial”). *See also Report of the Chief of Police*, THE NORFOLK NEWS (Norfolk, Neb.), May 8, 1903, at 11 (reporting on arrests made by police in Norfolk, Nebraska during the period between May 1, 1902 and May 4, 1903; over that period, there were 32 arrests for vagrancy, two for disorderly conduct, ten for drunkenness, six for disturbing the peace, with 120 “[t]ramps locked up over night and sent out of city, not docketed”).

<sup>74</sup> According to one observer in the early 1900s, “the unwillingness of many police officials or magistrates to prosecute tramps is well known. When the vagrant is told to ‘get out of town or be run in’ he of course decamps, and the town finances are spared, while the neighboring community receives the shifted burden. Yet if the convicted vagrant is sent to jail he becomes a source of contamination to other inmates.” *Problem of the American Tramp*, BEAVER HERALD (Beaver, Okla.) Sept. 10, 1908, at 2.

<sup>75</sup> Hall, *supra* note 49, at 359.

<sup>76</sup> Loitering crimes represent a notable exception; some localities have adopted short-term detentions for these crimes as an anti-gang strategy. *See* Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 147 (2000) (discussing the practice of repeatedly arresting gang members for loitering, as a way to keep them off the streets). *Cf.* Graham Rayman, *The NYPD Tapes, Part 2: Bed-Stuy Street Cops Ordered: Turn this Place into a Ghost Town*, VILLAGE VOICE, May 11, 2010, <http://www.villagevoice.com/content/printVersion/1808402/> (discussing a New York City Police Department practice of arresting persons for disorderly conduct in order to “clear” the streets, but then releasing these individuals after a few hours in custody, with no charges being filed).

<sup>77</sup> *See, e.g.,* Kolender v. Lawson, 461 U.S. 352, 361 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (finding vagrancy statutes unconstitutional). *See generally* Timothy C. Gerking, Comment, *Alternatives to Vagrancy Laws for Arizona*, 1973 LAW & SOC. ORD. 881, 883 & n.16 (1974) (discussing and listing vagrancy statutes that were found unconstitutional).

<sup>78</sup> *See Ex parte Smith*, 36 S.W. 628, 629–30 (Mo. 1896) (striking down a Missouri vagrancy ordinance); *Ex parte Mittelstaedt*, 297 S.W.2d 153, 153–54 (Tex. Crim. App. 1956) (striking down an ordinance making it unlawful to loaf or loiter within 250 feet of any school or other public building); *Ex parte Hudgins*, 103 S.E. 327, 328–30 (W. Va. 1920) (striking down a West Virginia law that criminalized, as vagrancy, the failure of an able-bodied man of working years to engage in regular, lawful employment).

<sup>79</sup> *See* Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 10, at 18 (discussing the judicial abrogation of vagrancy and loitering laws).

void for vagueness<sup>80</sup> or, in a few instances, because they were found to impose cruel and unusual punishment.<sup>81</sup> To the extent that jurisdictions have replaced these crimes with narrower prohibitions, the lessened breadth of these new statutes has made them less helpful in generating sweeping grounds for detention.

Other changes in the law also have diminished the utility of these crimes. In *Terry v. Ohio*,<sup>82</sup> decided in 1968, the United States Supreme Court affirmed that officers could detain suspects on reasonable suspicion, a quantum of evidence less than probable cause.<sup>83</sup> Prior to *Terry*, the law was not entirely clear as to whether even a short-term detention could be justified on anything less than a probable cause standard.<sup>84</sup> This uncertainty made the near-ubiquitous probable cause afforded by vagrancy and loitering statutes important to everyday investigatory efforts.<sup>85</sup> In expanding the factual penumbras around other offenses that provide lawful grounds for detention on suspicion, the decision in *Terry* decreased law enforcement's need to invoke vagrancy and other "dragnet" crimes.<sup>86</sup>

Finally, new grounds for detentions have emerged. Modern traffic laws and vehicle-equipment requirements, in particular, provide a smorgasbord of options for police officers intent on stopping an

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<sup>80</sup> See *City of Chicago v. Morales*, 527 U.S. 41, 63 (1999) (finding a Chicago anti-loitering ordinance unconstitutionally vague); *Kolender*, 461 U.S. at 359–61 (rejecting a California law that required loiterers to present "credible and reliable" identification to law enforcement officers upon demand); *Papachristou*, 405 U.S. at 162 (finding a Jacksonville vagrancy ordinance void for vagueness); *In re Newbern*, 350 P.2d 116, 123–24 (Cal. 1960) (rejecting, on vagueness grounds, "common drunkard" language within California's vagrancy statute).

<sup>81</sup> E.g., *Robinson v. California*, 370 U.S. 660, 667 (1962) (finding unconstitutional a state law that made it a misdemeanor to "be addicted to the use of narcotics," on the ground that application of the statute inflicted cruel and unusual punishment barred by the Eighth and Fourteenth Amendments).

<sup>82</sup> 392 U.S. 1 (1968).

<sup>83</sup> *Id.* at 30–31.

<sup>84</sup> See Foote, *supra* note 48, at 614 ("Administratively, vagrancy-type statutes are regarded as essential criminal preventives, providing a residual police power to facilitate the arrest, investigation and incarceration of suspicious persons."); Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 317–20 (1942); Comment, *Police Power to Stop, Frisk, and Question Suspicious Persons*, 65 COLUM. L. REV. 848, 853–56 (1965) (remarking upon the then-existing split of authority about whether an officer could detain a suspect on less than probable cause).

<sup>85</sup> Lacey, *supra* note 51, at 1218; *Use of Vagrancy-Type Laws*, *supra* note 51, at 1358.

<sup>86</sup> In a similar vein, judicial elaboration of the community caretaking exception to the warrant requirement has established the lawfulness of detentions made for purposes other than criminal investigation. Under this exception to the warrant requirement, officers may initiate a detention when they possess, "specific . . . articulable facts to suspect that a citizen is in need of help or is in peril." *State v. Marx*, 215 P.3d 601, 605 (Kan. 2009). See also *People v. Madrid*, 85 Cal. Rptr. 3d 900, 906 (Cal. Ct. App. 2008); Mary Elisabeth Naumann, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 AM. J. CRIM. L. 325 (1999).

automobile.<sup>87</sup> The California Department of Motor Vehicles, for instance, identifies more than 750 distinct “rules of the road” and equipment violations.<sup>88</sup> These infractions and misdemeanors represent a mere subset of the offenses proscribed by the state Vehicle Code that will provide adequate grounds for a traffic stop.<sup>89</sup> In California, an officer may stop a vehicle upon reasonable suspicion of seat belt,<sup>90</sup> signaling,<sup>91</sup> stopping,<sup>92</sup> passing,<sup>93</sup> turning,<sup>94</sup> right-of-way,<sup>95</sup> and lane violations;<sup>96</sup> for driving too fast<sup>97</sup> or too slow;<sup>98</sup> for following another vehicle too closely;<sup>99</sup> for a severely cracked windshield or obstructions inside or outside of the

<sup>87</sup> See Luna, *supra* note 10, at 726 (“[T]he all-encompassing nature of today’s codes appears little different from a single statute declaring that law enforcement may pull over any car or stop any pedestrian at any time for any reason or, for that matter, no reason at all.”). A significant percentage of nonconsensual contacts with the police involve vehicle stops. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005, at 1 (2007), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=432> [hereinafter CONTACTS BETWEEN POLICE AND THE PUBLIC] (relating that traffic stops accounted for 44% of all face-to-face contacts between the police officers and members of the public in 2005). When asked to give the reasons for these stops, officers attributed 53.3% of the stops to speeding, 10.7% to record checks, and 9.6% to equipment defects. *Id.* at 4.

<sup>88</sup> *Vehicle Code Appendix B List of Violations Division 11 Rules of the Road*, CAL. DEP’T OF MOTOR VEH., <http://www.dmv.ca.gov/pubs/vctop/lov/lovd11.htm>; *Vehicle Code Appendix B List of Violations Division 12 Equipment of Vehicles*, CAL. DEP’T OF MOTOR VEH., <http://www.dmv.ca.gov/pubs/vctop/lov/lovd12.htm>.

<sup>89</sup> The California DMV also relates 65 other distinct offenses within the Administration division of the Code, *Vehicle Code Appendix B List of Violations Division 2 Administration*, CAL. DEP’T OF MOTOR VEH., <http://www.dmv.ca.gov/pubs/vctop/lov/lovd2.htm>; 85 offenses within the Registration division of the Code, *Vehicle Code Appendix B List of Violations Division 3 Registration of Vehicles*, CAL. DEP’T OF MOTOR VEH., <http://www.dmv.ca.gov/pubs/vctop/lov/lovd3.htm>; 26 “special antitheft laws,” *Vehicle Code Appendix B List of Violations Division 4 Special Antitheft Laws*, CAL. DEP’T OF MOTOR VEH., <http://www.dmv.ca.gov/pubs/vctop/lov/lovd4.htm>; 101 offenses relating to driver’s licenses and unlicensed driving, *Vehicle Code Appendix B List of Violations Division 6 Driver’s Licenses*, CAL. DEP’T OF MOTOR VEH., <http://www.dmv.ca.gov/pubs/vctop/lov/lovd6.htm>; 14 offenses relating to a lack of insurance, *Vehicle Code Appendix B List of Violations Division 7 Financial Responsibility Laws*, CAL. DEP’T OF MOTOR VEH., <http://www.dmv.ca.gov/pubs/vctop/lov/lovd7.htm>; and 10 crimes relating to accidents and accident reports, *Vehicle Code Appendix B List of Violations Division 10 Accidents and Accident Reports*, CAL. DEP’T OF MOTOR VEH., <http://www.dmv.ca.gov/pubs/vctop/lov/lovd10.htm>.

<sup>90</sup> CAL. VEH. CODE § 27315(d)–(e) (West 2000).

<sup>91</sup> *Id.* § 22107.

<sup>92</sup> *Id.* §§ 22109, 22450.

<sup>93</sup> *Id.* §§ 21750–59.

<sup>94</sup> *Id.* §§ 22100–05, 22107–08.

<sup>95</sup> *Id.* §§ 21800–10.

<sup>96</sup> *Id.* §§ 21650, 21657–58, 21714.

<sup>97</sup> *Id.* §§ 22348(a), 22349–50.

<sup>98</sup> *Id.* § 22400(a).

<sup>99</sup> *Id.* § 21703.

vehicle that might interfere with driver visibility;<sup>100</sup> for windows with too much tint;<sup>101</sup> for an obstructed license plate;<sup>102</sup> and for burned-out headlights,<sup>103</sup> tail lights,<sup>104</sup> brake lights,<sup>105</sup> or license plate lights,<sup>106</sup> just to name a few of the permissible grounds for a temporary detention. Not all of these offenses are detention crimes, as defined by this Article. Drivers who exceed the speed limit or run red lights often receive tickets, and deservedly so.<sup>107</sup> For purposes of conducting a traffic stop, however, the Vehicle Code does not distinguish between these offenses and other, more trivial violations of state law, as to which a warning may represent the most common outcome if the officer's investigation yields proof of no other crime.<sup>108</sup>

#### IV. CHARGING CRIMES

The second category of facilitating crimes—charging crimes—are offenses that prosecutors allege with the expectation that they will be dismissed or reduced to lesser charges pursuant to plea agreements.<sup>109</sup>

Charging crimes are inextricably intertwined with a form of plea negotiations known as charge bargaining. With a charge bargain, the

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<sup>100</sup> *Id.* §§ 26708, 26710.

<sup>101</sup> *Id.* § 26708.5.

<sup>102</sup> *Id.* § 5201.

<sup>103</sup> *Id.* § 24400.

<sup>104</sup> *Id.* § 24600.

<sup>105</sup> *Id.* § 24603(e)–(f).

<sup>106</sup> *Id.* § 24601.

<sup>107</sup> See CONTACTS BETWEEN POLICE AND THE PUBLIC, *supra* note 87, at 5 tbl.7 (relating that in traffic stops initiated in 2005, 71.1% of drivers who were stopped for speeding received tickets, while 57.9% of drivers stopped for a stop sign or red light violation were ticketed).

<sup>108</sup> See Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 415 (2000) (observing that police may “‘stop’ cars on the ground that they are being operated in any way, however minor, in violation of local ordinances or state laws”). It is impossible to ascertain the precise percentage of vehicle stops that are conducted as pretexts for the investigation of other crimes. While many individuals ultimately receive citations for the offenses that provide the initial legal grounds for these detentions, a decision to issue a citation may be motivated by reasons other than a desire to secure a conviction for the offense. An officer may believe that a failure to cite a suspect (charged with other crimes) with the detention offense will provide fodder for a defense argument that the stop was unjustified under any rationale, so that evidence discovered by the officer in the course of the stop should be suppressed. Even if the officer's investigation does not yield evidence of other crimes, an officer may consider it useful to cite the detention offense anyway. Doing so will secure an opportunity to establish the validity of the stop promptly in court, so as to discourage a possible civil lawsuit for an invalid stop at some distant point in the future.

<sup>109</sup> Charging crimes do not necessarily reflect an improper practice of alleging crimes that cannot be proved beyond a reasonable doubt. A crime's status as a charging offense follows from its tactical use to elicit plea bargains, not from its allegation upon insufficient grounds.

defendant pleads guilty (or no contest) to only some of the charges alleged against him or her, with the other charges being dismissed. Alternatively or in addition, the initial charges are reduced to (or replaced with) lesser crimes, to which the defendant enters a guilty or no contest plea.<sup>110</sup> Charge bargaining has existed for almost as long as plea bargaining itself.<sup>111</sup> While not all states collect data regarding the prevalence of charge bargaining, what information exists suggests that it is a fairly common practice,<sup>112</sup> particularly in jurisdictions where the agreed-upon crimes of conviction place significant constraints on judicial discretion at sentencing.

Charging crimes are jettisoned or reduced in an inordinate number of charge bargains. It may sound counterintuitive for a prosecutor to charge a crime that he or she is perfectly willing (or even desires) to plead down or dismiss. By alleging such an offense, however, a prosecutor may encourage a defendant to plead guilty or no contest to a different charge or charges, in exchange for the dismissal of the originally alleged crime. This triangulated outcome may represent a satisfactory (or even optimal) resolution to a case from the prosecutor's perspective, particularly when the initial charged offense or combination of offenses carries an arguably excessive punishment relative to the

<sup>110</sup> See Stephen S. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 278–82 (1989) (discussing “charge bargaining” by federal prosecutors).

<sup>111</sup> See GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 21–24 (2003) (documenting the practice of charge bargaining in liquor cases in 1800s Massachusetts); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 17 (1979) (discussing early charge bargains). See also MO. ASS'N FOR CRIM. JUSTICE, THE MISSOURI CRIME SURVEY 315 (1926) (representing that more than ten percent of all pleas within the sample of surveyed cases were to lesser offenses than originally charged); LESTER BERNHARDT ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 298–99 (1947) (“A practice has grown up that is so common that it forms the chief technique employed; namely, waiver of the major felony charge and acceptance of a plea of guilty of a lesser offense. . . . In Chicago in 1926, 78.81% of all pleas of guilty in felony cases were entered to minor offenses. Reduction was most frequent in property crimes such as robbery, burglary, and larceny, and not so frequent in cases of homicide, rape, and other sex crimes.”) (footnotes omitted); Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 109–11 (1928) (commenting upon the practice of pleading to a lesser offense than that originally charged, describing this custom as “much more common” than “securing pleas of guilty by the express or implied promise of leniency,” and discussing data that indicate the prevalence of the practice).

<sup>112</sup> For example, data on dispositions in the Tennessee state courts reveal that approximately one-eighth of all reported guilty pleas are to lesser charges than originally alleged. ANNUAL REPORT OF THE TENNESSEE JUDICIARY FISCAL YEAR 2007–2008: STATISTICS 20 (2008). See also MO. ASS'N FOR CRIM. JUSTICE, *supra* note 111, at 315; ORFIELD, *supra* note 111, at 298–99; Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1287–88 (1997) (discussing the frequent use of charge bargains in Minnesota).

gravamen of the defendant's alleged misconduct.<sup>113</sup> While the possibility exists that the defendant will demand a trial on the charged crime(s), frustrating any desire the prosecutor may have to see the defendant ultimately convicted of a lesser offense or offenses, the prosecution may take comfort in the fact that the less serious crimes still may be available to the parties at trial, as lesser included offenses.<sup>114</sup> In any event, to a prosecutor, the increased likelihood of a conviction for the charged offense(s), and a resulting sentence that may be somewhat in excess of what the prosecutor considers ideal, may represent a small price to pay for the smaller chance of acquittal (after a trial, which a defendant charged only with a less serious offense may be more eager to face) or dismissal (after pretrial motion practice that might be avoided through plea bargaining) than would be the case had the prosecutor charged only the crime(s) to which a plea is sought.<sup>115</sup>

Commentators have posited that charging crimes exist, but the available data remain somewhat inconclusive.<sup>116</sup> It has long been established that, in a given jurisdiction, prosecutors will dismiss or reduce some crimes pursuant to charge bargains more often than others.<sup>117</sup>

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<sup>113</sup> Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 86 (1968) (observing that in cases of "vertical overcharging," in which a prosecutor charges a crime as an offense carrying greater punishment than the facts would seem to merit, "[t]he allegedly extravagant charge usually encompasses, as a 'lesser included offense,' the crime for which the prosecutor actually seeks conviction"). See also Norman Abrams, *The New Ancillary Offenses*, 1 CRIM. L. F. 1, 25 (1989) (discussing this mindset).

<sup>114</sup> Alschuler, *supra* note 113, at 86.

<sup>115</sup> See HUSAK, *supra* note 20, at 38.

<sup>116</sup> Alschuler, *supra* note 113, at 86; Abrams, *supra* note 113, at 24–25. In this context, commentators often make reference to a "going rate" in plea deals. See, e.g., Malcolm M. Feeley, *Pleading Guilty in Lower Courts*, 13 LAW & SOC'Y. REV. 461, 463 (1979); Arthur Rosett, *The Negotiated Guilty Plea*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 70, 71 (1967) ("In some places a 'going rate' is established, under which a given charge will almost automatically be broken down to a given lesser offense . . .").

<sup>117</sup> Other authors have documented recurring charge bargains in which a particular crime is customarily reduced to another offense in a particular jurisdiction. E.g., LYNN M. MATHER, PLEA BARGAINING OR TRIAL? 84 (1979) (relating that in Los Angeles in the 1970s, "most [grand theft auto] cases were settled by a guilty plea or [slow plea] conviction of the lesser felony offense of joy riding or receiving stolen property"). Several of these studies date back to the Golden Age of empirical research into the administration of the criminal law. Among them, an inquiry into plea bargaining practices in Illinois during the 1920s observed that charge reduction was most common with property crimes such as robbery, burglary, and larceny, John J. Healy, *The Prosecutor (in Chicago) in Felony Cases*, in ILL. ASS'N FOR CRIM. JUSTICE, THE ILLINOIS CRIME SURVEY, 312–14 (1929); an examination of practices in the Connecticut courts during the same era revealed that murder charges were reduced most often, CHARLES E. CLARK & HARRY SHULMAN, A STUDY OF LAW ADMINISTRATION IN CONNECTICUT 188–89 (1937); a similar study of Prohibition-era prosecutions in the federal district courts found that fully 91.9% of all convictions to liquor offenses upon pleas of guilty or no contest in the Northern District of California were entered as "guilty to part," meaning that one or more charged offenses were dismissed as part of



These findings suggest, but do not conclusively establish, the existence of charging crimes; it could be the case, for example, that some crimes are simply more difficult to prove beyond a reasonable doubt than others are, and thus are more likely to be compromised even when the prosecutor doesn't initially intend to bargain.<sup>118</sup>

To better ascertain the existence of charging crimes, at least in federal practice, the author reviewed data collected by the Administrative Office of the United States Courts concerning each criminal case terminated in the U.S. district courts between October 1, 2002 (the first day of Fiscal Year 2003) and September 30, 2007 (the last day of Fiscal Year 2007).<sup>119</sup> This dataset consists of 435,004 unique records.<sup>120</sup> Each record relates, as to a single defendant in a criminal case, the five "most serious" charges (as determined by the base offense level associated with

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a plea bargain, AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS pt. 1, at 53 (1934); and a survey of California state prosecutors indicated that charges alleging violations of liquor or traffic laws, or the crimes of seduction or statutory rape, were among the most commonly compromised, Miller, *supra* note 20, at 13–15 & n.41. A half-century later, a longitudinal review of criminal cases filed in New York City found substantial deterioration of burglary, robbery, and narcotics charges, but far fewer compromises in homicide cases. VERA INSTITUTE OF JUSTICE, *supra* note 40, at 10. Most recently, a thorough study of segments of the North Carolina criminal code found that the most serious assault crimes, which boast several reasonable bargaining options, were pled down to lesser offenses more often than were kidnapping charges, which lack a similar range of comparably attractive alternatives. Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9, 12–17 (2007) [*hereinafter* Wright & Engen, *Charge Movement*] (relating the relevant data, and observing that "[w]here the criminal code offers the attorneys a deeper set of plausible charges as landing spots in the negotiations, more charge movement happens").

<sup>118</sup> Plea-bargaining practices also are shaped by a number of idiosyncratic factors, including the customs of the local prosecutor's office, corresponding groups of defense attorneys (such as a public defender's office), and courtroom "workgroups" consisting of particular prosecutors, defense attorneys, and judges. See Schulhofer & Nagel, *supra* note 112, at 1294–98.

<sup>119</sup> The data are available through the Federal Justice Statistics Program's website. *Federal Justice Statistics Program Resource Guide*, NAT'L ARCHIVE OF CRIM. JUSTICE DATA, <http://www.icpsr.umich.edu/NACJD/fjsp/>. The relevant databases (Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2003 [ICPSR 24153]; Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2004 [ICPSR 24170]; Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2005 [ICPSR 24187]; Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2006 [ICPSR 24205]; and Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2007 [ICPSR 24222]) were downloaded in ASCII Tab-Delimited file format, and then converted into Microsoft Excel files. The author then sorted the records by manner of disposition, and removed all cases that were not resolved, in whole or in part, through a plea of guilty or no contest. Copies of the downloaded datasets and the datasets as modified are in the author's custody.

<sup>120</sup> Kyle Graham, Shortened Plea Bargain AOUSC Spreadsheets (2011) (unpublished spreadsheet data analysis) (on file with author).

the charge<sup>121</sup>), the “most serious” offense of conviction, if any, and the sentence ultimately imposed by the court.

The idiosyncrasies of the federal criminal laws, and the United States Sentencing Guidelines applicable thereto, counsel caution when drawing conclusions from this dataset.<sup>122</sup> Even taken with a grain of salt, however, the data reveal significant differences in how often specific federal crimes disappear from cases pursuant to plea bargains. Over the studied time period, 373,461 defendants had their cases resolved, at least in part,<sup>123</sup> through a guilty or no-contest plea. In 82.3% of these dispositions (totaling 307,518 defendants), the “most serious” offense at charging remained the “most serious” offense at conviction.<sup>124</sup>

Many crimes claimed a substantially higher “integrity rate” than 82.3%, while other offenses were compromised much more often. Within the former class, hundreds of crimes never lost their status as the “most serious” offense in any case that ultimately led to a plea of guilty or no contest.<sup>125</sup> Most of these crimes were alleged in only a handful of cases.<sup>126</sup> But as Table I illustrates, some crimes that frequently represented the “most serious” initial charge were never, or only rarely, discarded as part of a plea agreement:

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<sup>121</sup> The “base offense level” represents the starting point for sentencing calculations under the United States Sentencing Guidelines. Higher base offense levels translate into lengthier Guidelines-prescribed advisory terms. ROGER W. HAINES, JR., FRANK O. BOWMAN, III & JENNIFER C. WOLL, *FEDERAL SENTENCING GUIDELINES HANDBOOK* 1305 (2010).

<sup>122</sup> The dataset contains certain inherent shortcomings that limit its usefulness. Among them, by premising the “most serious” designation on the assigned base offense level, the data may inadequately account for the fact that enhancements and other penalty adjustments may apply to a different charge, such that the other charge ultimately carries a greater penalty than the nominal “most serious” charging offense does. Furthermore, the Guidelines were not mandatory for part of the studied time period, such that a nominal “most serious” offense was not necessarily required to be regarded as such by a sentencing judge. *See* *United States v. Booker*, 543 U.S. 220, 245 (2005). Also, since the dataset includes only the five “most serious” charges and five “most serious” terminating offenses, it does not fully capture the use of criminal laws within the federal courts. For these and other reasons, this Article treats the data principally as a useful starting point for analysis, as opposed to a definitive resource.

<sup>123</sup> Graham, *supra* note 120. Some cases involved a guilty plea as to a charge or charges, but a trial as to another charge or charges.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Among the crimes with a “perfect” record in this respect were violations of 18 U.S.C. § 656 (2006) (theft, embezzlement, or misapplication by bank officer or employee) (which, when alleged as a misdemeanor, represented the most serious terminating offense in all 212 plea-resolved cases where it was originally the most serious charging offense) and 18 U.S.C. § 3615 (criminal default) (which, when alleged as a misdemeanor, went 180 for 180 in this respect). Graham, *supra* note 120.

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## FACILITATING CRIMES

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Table I

Substitution of "Most Serious" Charges Pursuant to Plea: High Integrity Rates

United States Code Section	Description of Offense	Cases Where Most Serious Charging Offense	Cases Also Most Serious Conviction Offense	Integrity Rate
26 U.S.C. § 7203 <sup>127</sup>	Willful failure to file a tax return (misdemeanor)	269	269	100%
18 U.S.C. § 1028(a) <sup>128</sup>	Fraud with identification documents (misdemeanor)	2,302	2,289	99.4%
8 U.S.C. § 1326 <sup>129</sup>	Re-entry of an excluded alien <sup>130</sup>	53,347	51,896	97.3%
18 U.S.C. § 2113(a) <sup>131</sup>	Bank robbery/burglary	5,397	5,212	96.6%
18 U.S.C. § 922(g) <sup>132</sup>	Unlawful transport of firearms	21,560	20,157	93.5%

<sup>127</sup> Under this section of the Internal Revenue Code, "[a]ny person required . . . to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor." 26 U.S.C. § 7203 (2006).

<sup>128</sup> This provision proscribes a range of crimes relating to the production or possession of false "identification documents," such as social security cards. 18 U.S.C. § 1028. Both 26 U.S.C. § 7203 and 18 U.S.C. § 1028 displayed much higher integrity rates when alleged as misdemeanors than when they were charged as felonies.

<sup>129</sup> This section provides, in pertinent part, that anyone who "has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter . . . enters, attempts to enter, or is at any time found in, the United States" has committed a felony, unless an exception applies. 8 U.S.C. § 1326(a) (2006).

<sup>130</sup> The AOUSC dataset identifies three separate § 1326 offenses: 8 U.S.C. §§ 1326, 1326(a), and 1326(b). The figures above combine these offenses, which are substantially similar in their integrity rates.

<sup>131</sup> Section 2113, subdivision (a) of Title 18 relates two somewhat distinct crimes. The first is essentially bank robbery, as that crime is generally understood; this crime applies to one who "by force and violence, or by intimidation," or by extortion, takes or attempts to take property, money, or anything else of value from a bank or similar financial institution. The second of these offenses amounts to bank burglary; it creates the felony crime of entering or attempting to enter a bank or like establishment with the intent to commit therein any felony affecting the institution, or larceny. 18 U.S.C. § 2113(a).

<sup>132</sup> Subdivision (g) of § 922 of Title 18 makes it a felony for a felon, or a person belonging to any of several other identified classes (such as fugitives from justice and citizens who have renounced their citizenship), to possess a firearm. 18 U.S.C. § 922(g). The offenses described by 18 U.S.C. § 922 displayed wildly disparate integrity rates. The integrity rate for 18 U.S.C. § 922(k) (interstate transportation, shipment, or receipt of a firearm with a removed, altered or obliterated serial number), for example, was just 43.7%. Graham, *supra* note 120.

These crimes bear indicia of offenses that are unlikely to be bargained down particularly often<sup>133</sup>: they tend to be easy to prove,<sup>134</sup> their commission infrequently implicates other offenses (such that they typically form the “core” of any case in which they appear),<sup>135</sup> and they boast few attractive plea alternatives from the shared perspectives of prosecutors and defense attorneys.<sup>136</sup> The infrequent dismissal of these crimes therefore comes across as unsurprising.

At the other extreme, some crimes were pled down or dismissed much more often when alleged as the most serious charging offense in a case. Again, most of these crimes appeared in only a few cases, or in a single matter. But this segment of commonly rejected offenses included a number of crimes charged with some frequency, as set forth in Table II<sup>137</sup>:

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<sup>133</sup> See Wright & Engen, *Charge Movement*, *supra* note 117, at 16–17 (discussing some of the factors that affect how frequently a crime will be charge-bargained down to a lesser offense).

<sup>134</sup> See EISENSTEIN & JACOB, *supra* note 14, at 235.

<sup>135</sup> For instance, within the AOUSC dataset, all three of the identified 8 U.S.C. 1326 offenses (coded as 8 U.S.C. § 1326, 8 U.S.C. § 1326(a) and 8 U.S.C. § 1326(b)) represented the most serious charging offense in more than 90% of the cases in which they appeared.

<sup>136</sup> The most common alternative resolution to a case involving an initial “most serious” charge under 8 U.S.C. § 1326 involved a plea to a charge under 8 U.S.C. § 1325, but this was the outcome in less than two percent of all cases in which a count under 8 U.S.C. § 1326 represented the most serious charging offense.

<sup>137</sup> This table is not intended to be exhaustive. Another crime with a high dismissal rate is 18 U.S.C. § 474 (possession of a counterfeiting plate, or a counterfeit electronic image of a United States security), which was identified as the most serious charging offense in 82 cases resolved by plea, but the most serious offense of conviction in only 30 of these cases. The frequent dismissal of this crime likely owes to its peripheral nature as compared to the crimes set forth at 18 U.S.C. § 471 (production of a counterfeit security) and 18 U.S.C. § 472 (uttering or passing a counterfeit security), both of which were frequently charged alongside a § 474 count. It also should be noted that while dismissals accounted for the vast majority of instances in which crimes lost their status as the most serious charging offense in a matter, in a few cases, these substitutions occurred for other reasons. Graham, *supra* note 120.

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## FACILITATING CRIMES

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Table II

Substitution of "Most Serious" Charges Pursuant to Plea: Low Integrity Rates

United States Code Section	Name of Offense	Cases Where Most Serious Charging Offense	Cases Also Most Serious Conviction Offense	Integrity Rate
8 U.S.C. § 1327 <sup>138</sup>	Aiding or assisting certain aliens in entering the U.S.	42	7	16.7%
18 U.S.C. § 1512(a) <sup>139</sup>	Witness tampering through force/murder	142	49	34.5%
18 U.S.C. § 1203 <sup>140</sup>	Hostage taking	236	90	38.1%
18 U.S.C. § 844(h) <sup>141</sup>	Use of fire/explosives in commission of a felony	262	105	40.1%
21 U.S.C. § 848(a), (b) <sup>142</sup>	Participation in a continuing criminal enterprise	282	114	40.4%
18 U.S.C. § 514 <sup>143</sup>	Uttering a fictitious obligation, with intent to defraud	180	77	42.8%

<sup>138</sup> "Any person who knowingly aids or assists any alien inadmissible" due to a conviction for an aggravated felony, or terrorist, or national security crime "to enter the United States, or who connives or conspires with any person or persons to allow, procure, or permit any such alien to enter the United States, shall be fined . . . or imprisoned not more than 10 years, or both." 8 U.S.C. § 1327.

<sup>139</sup> Section 1512(a) of Title 18 prohibits actual and attempted witness tampering by means of force or threats of force. *United States v. Lester*, 749 F.2d 1288, 1293 (9th Cir. 1984).

<sup>140</sup> "[W]hoever . . . seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished . . ." 18 U.S.C. § 1203(a).

<sup>141</sup> Under 18 U.S.C. § 844(h), whoever "uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or . . . carries an explosive during the commission of any felony which may be prosecuted in a court of the United States . . ." shall be sentenced to 10 years imprisonment. 18 U.S.C. § 844(h).

<sup>142</sup> To prove a violation of 21 U.S.C. § 848 (2006), the government must establish that "(1) the defendant committed a felony violation of the federal narcotics laws, (2) the violation was part of a continuing series of violations, (3) the series of offenses occurred in concert with five or more persons, (4) the defendant was an organizer, supervisor, or manager, and (5) the defendant obtained substantial income or resources from the series of violations." *United States v. Soto-Beníquez*, 356 F.3d 1, 25 (1st Cir. 2003).

<sup>143</sup> Section 514 of Title 18 of the United States Code prohibits the actual or attempted passing, uttering, presenting, offering, brokering, or sale, of "any false or fictitious instrument, document, or other item appearing, representing, purporting, or contriving through scheme or artifice, to be an actual security or other financial instrument issued under the authority of the United States, a foreign government, a State or other political subdivision of the United States, or an organization . . ." 18 U.S.C. § 514(a).

The fact that these crimes were dismissed quite often does not, by itself, establish that they represent charging crimes. On the other hand, certain characteristics of these crimes suggest a susceptibility to strategic charging. These offenses tend to (1) carry stiff penalties, as compared to related offenses;<sup>144</sup> (2) have a close connection to another crime or crimes;<sup>145</sup> and (3) be in some sense peripheral to the “core” of a defendant’s misconduct. These qualities make these crimes particularly suitable for charging with the understanding that their ultimate disposition is open to negotiation,<sup>146</sup> and that the prosecutor might be satisfied with a plea to other offenses.<sup>147</sup>

<sup>144</sup> For example, during the studied period the base offense level for a conviction under 8 U.S.C. § 1327 was 23 or 25; cases in which this crime represented the most serious charging offense most frequently (in 34 out of 42 plea-resolved cases) led to plea bargains involving a lead charge under 8 U.S.C. § 1324, which carried a base offense level of 12. UNITED STATES SENTENCING GUIDELINES MANUAL § 2L1.1 (2007); UNITED STATES SENTENCING GUIDELINES MANUAL § 2L1.1 (2003); Graham, *supra* note 120.

<sup>145</sup> For example, the crime related at 18 U.S.C. § 514 was intended to close a small “loophole” in federal law relating to counterfeit securities lacking any “real” analogue security actually issued by a government. *Financial Instruments Anti-fraud Act: Hearing on S. 1009 Before the Comm. on Banking, Hous., and Urban Affairs*, 104th Cong. 1–3 (1996) (statement of Sen. Alfonse M. D’Amato, Chairman, S. Comm. on Banking, Hous., and Urban Affairs). See also *United States v. Pullman*, 187 F.3d 816, 822–23 (8th Cir. 1999) (discussing the legislative history of 18 U.S.C. § 514); *United States v. Summa*, No. 02 CR. 101(GEL), 2003 WL 21488093, at \*2 (S.D.N.Y. June 25, 2003) (same). The frequent dismissal of this charge suggests that the loophole was not quite as glaring as Congress thought it was.

<sup>146</sup> Factors that may affect the frequency with which a crime will be pled down or dismissed as part of a plea include, without limitation: (1) whether the offense is relatively difficult to prove, or tends to create slam-dunk cases for prosecutors (if a crime is easy to prove, little incentive normally exists for the prosecutor to enter into a bargain that will lead to the reduction of the charge), see Wright & Engen, *The Effects of Depth and Distance*, *supra* note 6, at 1967; (2) whether there exist other, closely related offenses that will provide plausible alternatives for the parties to agree upon as settlement options, *id.* at 1955; (3) whether the plausible alternative charges carry slightly or moderately less punishment than the crime to be dismissed or reduced (as opposed to significant differences in sentence length, stigma, or other aspects of punishment, which make a reduction less likely), *id.* at 1940; Wright & Engen, *Charge Movement*, *supra* note 117, at 16 (“Where the criminal code offers the attorneys a deeper set of plausible charges as landing spots in the negotiations, more charge movement happens.”); Alschuler, *supra* note 113, at 104 (“[A]ccidents of ‘spacing’ in the criminal code can greatly affect the pressures brought to bear on a defendant to plead guilty.”); and (4) whether the charged crime carries mandatory punishment terms that are more severe than those desired by the prosecutor in the typical case that implicates the offense.

<sup>147</sup> Most of the crimes referenced in Table II represented the most serious charging offense in the great majority of the cases in which they were alleged. A charge under 8 U.S.C. § 1327 represented the most serious charging offense in all 42 of the cases terminating with a plea in which it appeared among the five most serious charges (100%). The statistics for the other offenses, with the number of cases in which the crime represented the most serious charging offense followed by the count of cases terminating with a plea in which the crime appeared are as follows: 18 U.S.C.

Of course, other reasons may lie behind the frequent rejection of these charges. Some of these explanations may be almost as provocative as the use of these crimes to induce pleas to other offenses. It may be the case that these crimes are essentially cumulative of other federal offenses. Alternatively or in addition, prosecutors might chronically misgauge the difficulty of proving these offenses, such that indictments are readily obtained but the charges must be jettisoned later. There also may be other, more benign explanations for the frequent dismissal of these charges. On the whole, however, it seems safe to say that even in the rarified air of federal prosecutions, there likely exist at least a handful of charging crimes.

### V. PLEADING CRIMES

The third type of facilitating offense, “pleading crimes,” consists of criminal offenses that rarely (or never) provide the basis for an initial arrest, and do not often represent the most serious charge when a criminal case is filed (or even appear in the initial charging instrument). Instead, these crimes rise to prominence in plea negotiations. In this setting, these crimes frequently form the basis for plea agreements in which other, more serious charges are dropped.<sup>148</sup>

Pleading crimes might be understood as the flip side of charging crimes; if a lead charge is pled down or dismissed, another crime must take its place.<sup>149</sup> Pleading crimes therefore tend to be positioned close “below” other crimes within a criminal code, both in terms of their gravamen and their sentencing consequences. Oftentimes a tight relationship exists between specific charging crimes and pleading offenses,<sup>150</sup> but this is not always the case.

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§ 1512(a) (142/151, or 94.0%); 18 U.S.C. § 1203 (236/252, or 93.7%); 18 U.S.C. § 844(h) (262/293, or 89.4%); 21 U.S.C. § 848 (282/329, or 85.7%); 18 U.S.C. § 514 (180/180, or 100%). By comparison, the firearm enhancement prescribed by 18 U.S.C. § 924(c), which had an integrity rate of 65.4% over the studied time period, represented the most serious charging offense in only 58.6% of the cases in which it appeared. Graham, *supra* note 120.

<sup>148</sup> There is a close relationship between pleading crimes and so-called “backup” offenses—relatively minor crimes that are alleged along with more serious charges as “backups” in the event that the lead charges fail. See Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 759 (2005) (discussing the use of the “backup” crime of fornication in rape cases).

<sup>149</sup> For example, William Stuntz has described the possible utility of retaining a sodomy crime on the books, even if it is never charged: “First, when the government initially charges some species of sexual assault, sodomy might serve as the basis for a plea bargain, and its existence as a potential charge might give the government a much greater chance of inducing a plea.” Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 10, at 27.

<sup>150</sup> Decades ago, pleas to joyriding (where the offense exists) commonly resulted from the reduction of charges alleging grand theft auto. See Alschuler, *supra* note 113, at 89 & n.92 (discussing the relationship between these offenses). Likewise, in 1920s

Some pleading offenses are banal; others, very serious. At one extreme, broken-speedometer<sup>151</sup> and “coasting”<sup>152</sup> charges provide convenient grounds for plea agreements in speeding cases.<sup>153</sup> These offenses are extremely difficult to detect in the field, but the lesser penalties that they carry (relative to speeding),<sup>154</sup> along with the frayed but not completely fictional factual tethers that connect them with the speeding offense, make them useful surrogates in excessive-speed matters.<sup>155</sup> One study of speeding cases in North Carolina found that approximately 30% of all such matters statewide resulted in broken-speedometer compromises;<sup>156</sup> in two counties, these dispositions resolved more than half of all speeding cases in which the driver was clocked at 90 miles per hour or faster.<sup>157</sup>

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New York, a defendant charged with pick-pocketing, a felony, often would have that charge reduced to “jostling,” an otherwise picayune misdemeanor, as part of a plea bargain. Moley, *supra* note 111, at 109.

<sup>151</sup> Other states (such as Georgia, Mississippi, Oklahoma, and Virginia) also have broken-speedometer laws similar to that in effect in North Carolina. *Supra*, note 1; GA. CODE ANN. § 40-8-8 (2007); MISS. CODE ANN. § 63-7-75 (West 2009); VA. CODE ANN. § 46.2-1080 (2010).

<sup>152</sup> “Coasting” occurs when a motorist sets his or her automobile’s gears in neutral while driving downhill. *E.g.*, ALA. CODE § 32-5A-57 (LexisNexis 2010); ARIZ. REV. STAT. ANN. § 28-895 (West 2004); CAL. VEH. CODE § 21710 (West 2000); COLO. REV. STAT. § 42-4-1009 (2010); IDAHO CODE ANN. § 49-606 (2008); 625 ILL. COMP. STAT. ANN. 5/11-1410 (West 2008).

<sup>153</sup> Other states claim, or claimed, similar pleading crimes for use in traffic cases. *See* Byrne, *supra* note 3, at 2968 (discussing “defective equipment” pleas in Missouri) and 2989 (discussing “215” pleas in New Jersey and “cow-lamp” pleas in Iowa).

<sup>154</sup> In North Carolina, conviction on a broken-speedometer charge leads to penalties that are less severe than those attached to a speeding conviction. *See* Editorial, *supra* note 1. In California, while a conviction for speeding will result in the addition of “points” to one’s driver’s license, a coasting conviction does not have this effect. *See Vehicle Code Violations Used in Negligent Operator Counts*, CAL. DEP’T OF MOTOR VEH., <http://www.dmv.ca.gov/dl/vioptct.htm>.

<sup>155</sup> One California attorney, “Stan The Radar Man,” has posted on his website: “Because the judges know truckers are cheated out of traffic school, many of them are willing to give truckers a no point, non moving violation conviction called coasting (21710 of the Vehicle Code). I use law defenses to win the case and I ask for a coasting conviction as an alternative sentence. I do this to avoid any points against your record.” Stanley Alari, CDL TRUCKER TICKET LAWYER, <http://www.trucker-ticket-lawyer.com>. *See also* Byrne, *supra* note 3, at 2968 (discussing the similar invocation of defective-equipment charges by Missouri defense attorneys).

<sup>156</sup> Stith, Raynor & Locke, *supra* note 1. The vast number of broken-speedometer pleas attracted the notice of the local media, *see* Editorial, *supra* note 1, leading to modest legislative reform. Now, at least in theory, a broken-speedometer plea is unavailable when the defendant is charged with speeding “in excess of 25 miles per hour or more over the posted speed limit.” N.C. GEN. STAT. § 20-141(o) (2009).

<sup>157</sup> Pat Stith, David Raynor & Mandy Locke, *Cops Write Tickets, Speeders Get Deals*, NEWS & OBSERVER (Raleigh, N.C.), May 15, 2007, at A1. One recidivist scofflaw had his speeding citations reduced to broken-speedometer charges in 17 out of 19 cases—even though his speedometer was not, in fact, broken. Stith, Raynor & Locke, *supra* note 1.



Likewise, if voluntary manslaughter is not a pleading crime, it comes very close to being one. It is well known that this crime is rarely charged by prosecutors in the first instance, but often becomes a crime of conviction through plea negotiations.<sup>158</sup> The federal sample of cases resolved through pleas reveals, among the five “most serious” charges filed in these cases during the surveyed time period, 425 murder charges, 246 involuntary manslaughter charges, and only 78 voluntary manslaughter charges.<sup>159</sup> And whereas voluntary manslaughter represented the most serious charging offense in only 25 cases, it was the most serious terminating offense in 67 matters.<sup>160</sup> Voluntary manslaughter likely accounts for few charges, but many dispositions, because of its relationship to the crimes of first- and second-degree murder. A prosecutor might reason that (proof permitting) it is better to allege these greater offenses in the first instance, a decision that will permit a conviction to the charged crime but also accommodate a voluntary manslaughter resolution to the case, if additional facts or arguments make this charge reduction appropriate.<sup>161</sup>

While voluntary manslaughter seems to be a “universal” pleading crime, the connections that must exist between a pleading offense and other portions of a criminal code mean that most of these crimes are specific to a particular jurisdiction.<sup>162</sup> Review of the federal dataset, for instance, yields a few pleading crimes within the United States Code. Misprision of a felony (18 U.S.C. § 4)<sup>163</sup> was the most serious original charging offense in only 602 cases disposed of by plea over the surveyed time period. Yet this crime was the most serious terminating offense for

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<sup>158</sup> Alschuler, *supra* note 113, at 90.

<sup>159</sup> Graham, *supra* note 120.

<sup>160</sup> *Id.*

<sup>161</sup> *E.g.*, State v. Graham, 69 P.3d 563, 568 (Kan. 2003).

<sup>162</sup> For example, in Texas a driving while intoxicated charge is sometimes pled down to the lesser offense of “obstruction of a highway.” See Karisa King, *DWI Suspects Have Way to Thwart Prosecutors*, SAN ANTONIO EXPRESS-NEWS, April 6, 2008, at A1; Karisa King & Elizabeth Allen, *D.A. Seeks to Expedite DWIs*, SAN ANTONIO EXPRESS-NEWS, April 1, 2008, at A1. Petty larceny also may represent a pleading crime at certain times and places in which the offense is deemed too minor a basis to launch a prosecution, but an adequate ground upon which to terminate one. And so, of 1,855 felony charges in cases initiated in Chicago in 1926 that were reduced to a lesser offense, 973 were ultimately resolved as petty larceny. Moley, *supra* note 111, at 118.

<sup>163</sup> “Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.” 18 U.S.C. § 4 (2006). The essential elements of misprision of a felony “are 1) the principal committed and completed the alleged felony; 2) defendant had full knowledge of that fact; 3) defendant failed to notify the authorities; and 4) defendant took steps to conceal the crime.” United States v. Cefalu, 85 F.3d 964, 969 (2d Cir. 1996).

2,359 defendants who pled guilty or no contest over this span.<sup>164</sup> Likewise, use of a communications facility in furtherance of the distribution of narcotics, marijuana, or a controlled substance (21 U.S.C. § 843(b))<sup>165</sup> was the most serious charging offense in just 552 cases resolved by plea, but the most serious termination offense in 1,884 such matters.<sup>166</sup>

Each of these crimes bears indicia suggestive of a pleading crime<sup>167</sup>: a plausible connection to another offense or offenses, lesser penalties than that crime or crimes,<sup>168</sup> and significant reasons why it would not typically represent the most serious original charge in a case.<sup>169</sup> On this last point, the crime of misprision of a felony is sufficiently banal as to call into question the need for pervasive prosecution. As for the 21 U.S.C. § 843(b) offense, its commission usually implicates other, much more substantial drug trafficking crimes, which normally will occupy the full attention of the initial charging instrument. If and when significant

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<sup>164</sup> This crime also had an extremely high integrity rate (99.5%) within the dataset, suggesting that in many cases an agreement was reached early on with the defense whereby the defendant agreed in advance to plead to the misprision offense, instead of other possible charges. Graham, *supra* note 120.

<sup>165</sup> “It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony” under subchapters I and II of chapter 13 of Title 21 of the United States Code. 21 U.S.C. § 843(b) (2006). The identified subchapters encompass sections 801–971 of Title 21, which relate most of the significant federal drug crimes.

<sup>166</sup> Graham, *supra* note 120.

<sup>167</sup> See Wright & Engen, *Charge Movement*, *supra* note 117, at 16–17 (discussing the circumstances in which an offense is likely to be bargained down to a lesser charge, including the characteristics of the ultimate charge of conviction).

<sup>168</sup> The base offense level for misprision of a felony is set at nine levels below that for the concealed or non-reported offense, but in no case less than four, or higher than 19. U.S. SENTENCING GUIDELINES MANUAL § 2X4.1 (2010). The maximum sentence for a conviction under 21 U.S.C. § 843(b) is four years. 21 U.S.C. § 843(d). This 48-month maximum commonly results in sentences that are lower than the Guidelines range for comparable drug-distribution crimes, particularly when large quantities of drugs are involved. See, e.g., *United States v. Thornton*, 188 F. App’x 733, 737 (10th Cir. 2006) (discussing the application of the Guidelines to a conviction under 21 U.S.C. § 843).

<sup>169</sup> Other federal crimes also represented the most serious offense of conviction in far more cases than they represented the most serious charging offense, but have not been identified here as pleading crimes. To understand why, assume that Crime A and Crime B carry the same penalties, but that a coding decision has been made by the creators of the AOUSC dataset, such that Crime A is consistently identified as the more serious charging offense. If Crimes A and B are often alleged together in an initial indictment (as, for example, drug crimes often are), in each case in which Crime A is dismissed after being identified as the most serious charging offense, Crime B will become the most serious offense of conviction (assuming no other counts are involved). If Crime A is dismissed often enough, a significant imbalance may result between how often Crime B is alleged as the most serious charging offense and how often it represents the most serious terminating offense, even though Crime B has played an important part in each case since the time of charging.

cracks appear in that case—whether due to witness availability or credibility issues, a viable defense motion to dismiss or suppress, or otherwise—the § 843(b) offense may provide a face-saving escape route for the prosecutor.

All of the pleading crimes that have been discussed to this point are susceptible to all phases of the procedural continuum; they just tend to implicate the latter portions of this process. The wet reckless offense recognized in California is a different animal, for it *categorically* cannot form the basis for an arrest or an initial charge. It is, in short, a “pure” pleading crime. The unique character of the wet reckless warrants close review, as it suggests an altogether different, procedurally selective model for criminal offenses.

As background, under California law a conviction for driving under the influence of drugs or alcohol (DUI) carries a substantial fine and serious consequences for one’s driving privileges.<sup>170</sup> A DUI conviction will also ratchet up the penalties attendant to a subsequent conviction for the same offense.<sup>171</sup> In the 1970s, many DUI charges were plea-bargained down to reckless driving,<sup>172</sup> which involved (and still entails) a smaller fine and less severe licensing consequences,<sup>173</sup> and did not (and still does not) count as a “prior” in the event of a later DUI prosecution.<sup>174</sup> Frustrated by these plea bargains,<sup>175</sup> in 1981 the California legislature

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<sup>170</sup> See CAL. VEH. CODE §§ 23536, 23538 (West 2000) (prescribing the penalties associated with a conviction for driving under the influence).

<sup>171</sup> See *id.* § 23540 (relating the penalties for a conviction for driving under the influence, with a prior conviction for driving under the influence or a “wet reckless”); *id.* at § 23546 (relating the penalties for a conviction for driving under the influence, with two prior convictions for driving under the influence or “wet reckless” driving); *id.* at § 23550 (relating the penalties for a conviction for driving under the influence, with three prior convictions for driving under the influence or a “wet reckless” driving).

<sup>172</sup> See DEP’T OF ALCOHOL AND DRUG PROGRAMS, ENROLLED BILL REPORT, Assemb. 1981–82–348, at 1 (Cal. 1981) (discussing the “wholesale or indiscriminate practice of reducing driving-under-the-influence offenses to reckless driving violations which have negligible penalties”); GOVERNOR’S TASK FORCE ON ALCOHOL, DRUGS & TRAFFIC SAFETY, TASK FORCE REPORT: ALCOHOL, DRUGS AND TRAFFIC SAFETY, at IV–4 (1981) (“Reduction of a charge to reckless driving is one of the more frequent results of plea bargaining. The ranges of the penalties for reckless driving (23103 V.C.), including assessments, brings the penalty into the lower ranges of those for driving under the influence. However, a conviction of reckless driving does not carry the potential for license suspension or heavier sanctions for future offenses that a driving under the influence conviction does, and is, therefore, a more desirable outcome for the defendant.”). The practice of pleading DUI charges down to reckless driving was not unique to California. See Alschuler, *supra* note 113, at 94 (discussing similar plea bargains in Illinois).

<sup>173</sup> Compare CAL. VEH. CODE § 23103(c) (relating the penalties for a “dry” reckless conviction), with *id.* §§ 23536, 23538 (same, for a DUI conviction).

<sup>174</sup> See *id.* § 23103.5.

<sup>175</sup> See S. COMM. ON JUDICIARY, BACKGROUND INFORMATION, Assemb. 1981–82–348, at 2 (Cal. 1981) (“The main purpose of the bill is to address abuses associated with the current practices of reducing drunk driving charges to reckless driving through

passed Assembly Bill (AB) 348, providing that in any DUI case pled down to reckless driving, the prosecutor must relate on the record whether the offense involved the consumption of drugs or alcohol.<sup>176</sup> When the prosecutor declares that drugs or alcohol were implicated, the defendant will be subject to somewhat greater punishment than is otherwise associated with a conviction for reckless driving, and the conviction will count as a prior DUI conviction for purposes of assigning punishment for future DUI convictions.<sup>177</sup>

The legislative history surrounding AB 348 yields no indication that the California legislature believed that this measure somehow created a novel crime, as opposed to a new plea procedure with customized consequences. Nevertheless, courts,<sup>178</sup> practitioners,<sup>179</sup> commentators,<sup>180</sup> and the California Department of Motor Vehicles<sup>181</sup> all came to recognize a conviction that results from a guilty or no-contest plea to reckless driving, when pled down from a DUI charge and accompanied by a declaration of drug or alcohol use in the commission of the offense, as reflective of a new, distinct crime: a “wet reckless”<sup>182</sup> (whereas a

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plea bargainin[g].”). Another report on AB 348 observed that “[w]ith the current plea bargaining policies, a large number of persons arrested for drunk driving are allowed to plead guilty to reckless driving rather than go to trial. Then if there is a subsequent conviction for drunk driving, the record does not show a previous DUI conviction. Therefore, no mandatory jail time is imposed. This bill will close this loophole and will remove that enticement to plead guilty to a lesser offense.” CAL. HIGHWAY PATROL, ENROLLED BILL REPORT, Assemb. 1981–82–348, at 2 (Cal. 1981).

<sup>176</sup> CAL. VEH. CODE § 23103.5(a).

<sup>177</sup> *Id.* at § 23103.5(c).

<sup>178</sup> *See, e.g.,* *People v. Forrester*, 67 Cal. Rptr. 3d 740, 742 n.2 (Cal. Ct. App. 2007) (referring to a “wet reckless” conviction); *Walker v. Kiouisis*, 114 Cal. Rptr. 2d 69, 74 (Cal. Ct. App. 2001) (same); *People v. Claire*, 280 Cal. Rptr. 269, 271 & n.2 (Cal. Ct. App. 1991) (discussing the common use of the term “wet reckless” in describing a plea under section 23103.5 of the California Vehicle Code).

<sup>179</sup> *See, e.g.,* Charge Reductions, S. CAL. DUI DEFENSE, [http://www.southern-california-dui-defense.com/charge\\_reductions.html](http://www.southern-california-dui-defense.com/charge_reductions.html) (describing the wet reckless offense).

<sup>180</sup> *E.g.,* LAWRENCE TAYLOR & ROBERT TAYAC, CALIFORNIA DRUNK DRIVING DEFENSE § 3.2 (4th ed. 2008).

<sup>181</sup> *See* HELEN N. TASHIMA & SLADJANA OULAD DAOUD, CAL. DEP’T OF MOTOR VEH., 2008 ANNUAL REPORT OF THE CALIFORNIA DUI MANAGEMENT INFORMATION SYSTEM 71 (2008) (describing the “wet reckless” offense in California).

<sup>182</sup> It is tempting to assimilate the wet reckless into standard practice by treating it as an offense (reckless driving) with an integrated sentencing enhancement (the consumption of drugs and alcohol). While only a fine line distinguishes crimes from crime-enhancement combinations, the wet reckless is probably best classified as a distinct crime, or at least, a distinct plea that is commonly regarded as connoting both a separate offense and unique consequences. As discussed in the text above, prosecutors cannot allege a wet reckless, a fact that distinguishes this crime from crime-enhancement combinations recognized under California law. Also unlike an enhancement, the “wet” aspect of the offense cannot be submitted to a jury; it springs into existence only in a plea bargain. Furthermore, the parties have almost plenary authority to decide the quantum of drugs or alcohol in the driver’s system that will

conviction for “conventional” reckless driving is now described as a “dry” reckless).<sup>183</sup> This “wet reckless” label most closely describes a defendant’s plea, but it also connotes, in a rough sense, the criminal conduct for which he or she has been convicted. In short, as a matter of both parlance and practice, “wet reckless” describes not only an outcome, but also an offense.

The wet reckless is not only a distinct crime; it is also a distinctive one. Because the crime is summoned by courtroom actors, it cannot be invoked at any stage of a criminal proceeding prior to plea bargaining. A police officer cannot arrest or cite someone for a wet reckless (though they can, of course, arrest a suspect for DUI, or for regular reckless driving), and a prosecutor cannot allege a wet reckless in an initial charging instrument. Nor is the wet reckless available to the parties as a lesser included offense at trial; indeed, the offense can never be proved through trial. The crime only comes into play in the course of plea negotiations, in which both the defendant and the state must consent to its application.<sup>184</sup>

Notwithstanding its idiosyncrasies, the wet reckless has proven extremely effective in generating plea bargains in DUI cases. Though the legislative intent behind AB 348 may have been to deter plea bargaining, the wet reckless has had the opposite effect by giving the parties in DUI cases an additional compromise settlement option that carries penalties greater than those affixed to a conviction for “dry” reckless driving, but less than those associated with a DUI conviction. Illustrating the point, California arrests for DUI in 2005 led to 136,591 convictions for driving under the influence, 14,452 wet reckless convictions, and only 2,890 dry reckless convictions.<sup>185</sup> Data from earlier years reveal a comparable proportion of wet reckless convictions in DUI cases.<sup>186</sup>

The frequent invocation of the wet reckless in California courtrooms suggests, if nothing else, that a distinctive sanction, tethered to a particular brand of misconduct or sequence of events, can be seen and accepted as a crime even if the sanction is categorically divorced from

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implicate the wet reckless charge; no amount categorically implicates the offense, or (above zero) precludes its use.

<sup>183</sup> See *California DUI—Wet and Reckless Reduced Charge*, DUI.COM (Feb. 3, 2008), <http://www.dui.com/dui-library/california/penalties-fines/wet-reckless>.

<sup>184</sup> The “wet reckless” cannot be inserted into a case as a lesser included offense to driving under the influence of alcohol, since under California law, reckless driving is not a lesser included offense of DUI. *People v. McGrath*, 271 P. 549, 550–51 (Cal. Dist. Ct. App. 1928).

<sup>185</sup> TASHIMA & DAOUD, *supra* note 181, at 19.

<sup>186</sup> Similar data for the period spanning the years 1990 to 2000 show that DUI arrests led to approximately twice as many wet reckless convictions than convictions for dry reckless driving, with the number of wet reckless convictions consistently hovering between 10% to 13% of the number of DUI convictions. HELEN N. TASHIMA & CLIFFORD J. HELANDER, CAL. DEP’T OF MOTOR VEH., 2002 ANNUAL REPORT OF THE CALIFORNIA DUI MANAGEMENT INFORMATION SYSTEM, at i (2002).

significant portions of the continuum of conventional criminal procedures. Indeed, individual defendants charged with driving under the influence likely welcome the existence of the wet reckless and the plea agreements it inspires. But the wet reckless and other facilitating crimes may harm defendants generally, even if they seem to benefit the parties in particular cases. The next section of this Article discusses the possible hidden costs of the wet reckless, other pleading crimes, and detention and charging offenses.

## VI. THE PERILS OF FACILITATING CRIMES

The preceding discussion assumes that detention, charging, and pleading crimes are of more than merely academic interest. This assumption might be unwarranted if these crimes had no substantial positive or negative effect on the administration of criminal justice. As related below, however, facilitating crimes and the practices that produce those offenses may present problems that are different in both degree and kind from those associated with other crimes. Detention crimes are so inexpensive to administer that powerful incentives exist to create them; meanwhile, the manner in which these crimes are used tends to shield them from scrutiny. Charging crimes suggest a fundamental insincerity in the substantive criminal law. And, since they are insulated from challenge by the bargains they facilitate, pleading crimes may be almost entirely untethered from reality, lacking factual predicates that correspond to conventional understandings of unlawful, or at least undesirable, conduct.

### A. *Detention Crimes and Overcriminalization*

Many commentators believe that modern American criminal law criminalizes too much, and punishes too harshly.<sup>187</sup> This situation, it is argued, is counterproductive to the rule of law because at some point the elasticity and overexpansion of criminal laws compromises their integrity.<sup>188</sup> Critics of “overcriminalization” also decry an alleged absence of adequate notice,<sup>189</sup> the high costs of enforcement,<sup>190</sup> the vast authority

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<sup>187</sup> E.g., HUSAK, *supra* note 20, at 3 (“[T]he most pressing problem with the criminal law today is that we have too much of it.”). As one commentator has observed, “The academic consensus is that federal criminal law . . . includes too many offenses . . . and covers too many people within the scope of its sanctions. The criminal law of the states has also been charged with being bloated and rapacious, although there the consensus may be weaker.” Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1497–98 (2008) (footnote omitted).

<sup>188</sup> HUSAK, *supra* note 20, at 12 (observing that “[a]s the scope of criminal liability expands, stigma is depleted and deterrence most likely is eroded,” due to a lack of respect for seemingly inappropriate criminal prohibitions).

<sup>189</sup> E.g., *id.* at 11 (“Because of the number and complexity of criminal statutes . . . potential lawbreakers may not receive adequate notice of their legal obligations.”).

<sup>190</sup> E.g., *id.* at 12.

that the perceived surfeit of criminal laws confers upon police and prosecutors,<sup>191</sup> and the possible “chilling effect” that broad criminal laws may have on law-abiding conduct, even when they are rarely enforced.<sup>192</sup>

The persistent use of a crime to generate only detentions, without subsequent prosecution, may exacerbate these problems. More specifically, while detention crimes may effectuate the basic goals associated with a prohibition more inexpensively than would either a civil detention scheme or a “traditional” criminal offense that is prosecuted to conviction or acquittal in the normal course of events,<sup>193</sup> this comparative advantage may lead to ever-broader criminal sanctions that implicate many of the aforementioned perils of “overcriminalization.”

As compared to civil detention schemes, detention crimes carry the advantage of a built-in set of rules that govern the permissibility of detentions and arrests. These rules are already well understood by police officers, the persons typically tasked with enforcing these prohibitions. Civil detention schemes, by comparison, must be developed on an *ad hoc*, case-by-case basis.<sup>194</sup> Given the above, when forced to choose between criminalizing a particular form of conduct and making this behavior subject to a civil detention scheme, legislatures have strong incentives to pursue the former course. Meanwhile, as compared to “traditional” criminal offenses, detention crimes rarely lead to expensive judicial proceedings, or the even more pricey application of punishment.<sup>195</sup> In a perverse twist, this lack of prosecutions likely leads to a broader universe of criminal laws than would otherwise be the case, since the restrained application of detention crimes encourages legislatures to criminalize

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<sup>191</sup> *E.g., id.* at 13.

<sup>192</sup> John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1881 (1992) (commenting upon the “additional costs” of overcriminalization, “including the fear and anxiety imposed on risk-averse individuals forced to live under the constant threat of draconian penalties”).

<sup>193</sup> See Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 10, at 7–9 (discussing how civil liability schemes can lead to unpredictable results).

<sup>194</sup> On the subject of noncriminal detentions generally, and the range of detention schemes specifically, see GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 25 (1998) (discussing a variety of detention schemes that are regarded as civil, not criminal, in nature). See also D. A. Cox, *Right, Without Judicial Proceeding, To Arrest and Detain One Who Is, Or Is Suspected of Being, Mentally Deranged*, 92 A.L.R.2d 570, 571–72 (1963); Carrie Lacey, *Abuse of Quarantine Authority: The Case for a Federal Approach to Infectious Disease Containment*, 24 J. LEGAL MED. 199, 203–11 (2003).

<sup>195</sup> Detention crimes also are “cheap” in a political sense. Detentions tend to take place only when an officer observes reasonable suspicion of a crime and decides to investigate. Accordingly, detentions tend to be concentrated either on the highways, or in high-crime neighborhoods where police officers tend to be stationed. With traffic stops, a detention can always be justified on public-safety grounds, which represent a relatively noncontroversial basis for an encounter. The residents of high-crime neighborhoods, meanwhile, may not possess the political capital necessary to challenge the policies that encourage such stops, even assuming that they have the desire to do so.

conduct that might be too expensive to prohibit if offenses were routinely prosecuted to conviction.<sup>196</sup>

The manner in which detention crimes are utilized also tends to limit the ability of the judiciary to test their validity and monitor their use. Many detention crimes escape meaningful review by the courts because they rarely form the basis for a prosecution of a criminal defendant, in which case they would be subject to headlong attack. Instead, a criminal defendant typically has an incentive to attack the validity of an uncharged detention offense only when it enables an investigation that leads to other charges. In this context, however, the “good-faith” exception to the exclusionary rule may insulate the detention crime from scrutiny.<sup>197</sup> Under the good-faith exception, when an officer reasonably relies on a statute or ordinance in conducting a search or seizure, the seized evidence will not be subject to the exclusionary rule even if the statute or ordinance would be found unconstitutional if subjected to direct review.<sup>198</sup> At least in circumstances where the constitutionality of the detention crime is unclear, the exception allows a court to avoid any ruling on the validity *vel non* of the uncharged offense. The good-faith exception thus provides detention crimes with a layer of protection that other, more frequently charged offenses lack.

The recent decision by the United States Court of Appeals for the Tenth Circuit in *United States v. Cardenas-Alatorre*<sup>199</sup> illustrates the effect that the good-faith exception has on judicial review of detention crimes. The defendant in *Cardenas-Alatorre*, a motorist driving along Highway 40 outside of Albuquerque, was pulled over by a sheriff’s deputy.<sup>200</sup> The deputy had perceived that the license plate frame on Cardenas-Alatorre’s vehicle obscured a trivial part of the registration sticker on the license plate underneath.<sup>201</sup> The deputy believed that the stop was valid under a New Mexico state law providing that a vehicle license plate must be “clearly visible[ ] and . . . free from foreign material and in a condition to

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<sup>196</sup> See Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 10, at 10 (discussing the incentives that exist for legislatures to create broad detention crimes).

<sup>197</sup> See *Illinois v. Krull*, 480 U.S. 340, 349–50 (1987).

<sup>198</sup> *Id.* See also *United States v. Leon*, 468 U.S. 897, 921–22 (1984) (applying the good-faith exception in connection with a defective warrant). The exception does not apply when “in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws” or if the provisions of the statute or ordinance “are such that a reasonable officer should have known that the statute was unconstitutional.” *Krull*, 480 U.S. at 355.

<sup>199</sup> 485 F.3d 1111 (10th Cir. 2007).

<sup>200</sup> *Id.* at 1112.

<sup>201</sup> *Id.*



be clearly legible”<sup>202</sup>—arguably, a detention crime. A subsequent investigation conducted by the officer yielded methamphetamine.<sup>203</sup>

When federal drug charges were filed against Cardenas-Alatorre, he responded with a motion to suppress.<sup>204</sup> In his motion, Cardenas-Alatorre argued that the New Mexico law was unconstitutionally vague, at least as applied to him.<sup>205</sup> The district court disagreed, and the court of appeals affirmed.<sup>206</sup> The appellate court recognized that in the usual case, evidence that is seized pursuant to a search conducted under the authority of an unconstitutional statute must be suppressed.<sup>207</sup> The court of appeals went on to recognize and apply the good-faith exception to this general rule, however.<sup>208</sup> Parsing the New Mexico statute, the panel found that one reasonable interpretation of the law plainly forbade even minimal obstructions, such as the license plate holder.<sup>209</sup> The existence of this plausible interpretation of the law that comported with constitutional standards meant that Cardenas-Alatorre’s motion to suppress failed.<sup>210</sup> At the same time, the appellate court cautioned that “nothing in our analysis on this score is meant to prejudge whether a vagueness challenge to the New Mexico law shouldn’t or wouldn’t ultimately succeed.”<sup>211</sup> But since Cardenas-Alatorre wasn’t charged with the equipment violation, the court had no occasion to decide whether the law was, in fact, unduly vague. The detention crime remained on the books, whereas a conventional, charged offense might not have survived.

#### *B. The Insincerity of Charging Crimes*

Charging crimes, meanwhile, provide cause for concern insofar as they imply a lack of sincerity in the criminal sanction. The chronic use of a crime to facilitate a plea, without a concomitant interest in securing a conviction for the offense, connotes a disinterest in enforcing the underlying proscription that calls the validity of the prohibition itself into question.<sup>212</sup>

While this sincerity issue looms over the practice of plea bargaining generally, it casts an especially dark shadow upon charging crimes. A

<sup>202</sup> *Id.* (alteration in original) (quoting N.M. STAT. ANN § 66-3-18(A) (1978) (1998 N.M. Laws, Ch. 48, § 4 (effective July 1, 1998) (amended 2005, 2007))).

<sup>203</sup> *Id.* at 1113.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 1113, 1120.

<sup>207</sup> *Id.* at 1114.

<sup>208</sup> *Id.* at 1114–15.

<sup>209</sup> *Id.* at 1115.

<sup>210</sup> *Id.* at 1115–16.

<sup>211</sup> *Id.* at 1116.

<sup>212</sup> The non-enforcement of detention crimes may raise similar issues, but the serious nature of many charging offenses, as evidenced by the punishments attached to these crimes, makes the tactical use of these charges particularly troubling.

prosecutor who initially insists on a five-year sentence for a crime, with the ultimate goal of procuring a three-year term through plea negotiations, might be described as having proffered an “insincere” initial settlement offer. Yet when it becomes common knowledge that an offense represents a bargaining chip, the whole criminal sanction itself becomes intertwined with the subterfuge.<sup>213</sup> Put another way, the dismissal of a crime for tactical reasons in a large percentage of cases in which it is invoked raises the question of whether the crime amounts only to a vehicle for inducing convictions for other crimes as to which proof beyond a reasonable doubt may be lacking, and calls into doubt whether the government truly values the interests protected by the charging offense.

These problems are, on balance,<sup>214</sup> worsened by the fact that charging crimes often carry severe penalties. In this respect, charging crimes belie the rational assumption that offenses that are assigned the most serious punishments also merit the most sincere prosecution—not only because these penalties connote that the misconduct in question produces substantial social harms, but also because the stiff consequences of conviction dictate an honest, consistent commitment to pursue and punish true offenders. For example, the continuing criminal enterprise crime proscribed by 21 U.S.C. § 848(a), with its mandatory minimum term of 20 years in prison,<sup>215</sup> has been described as a powerful weapon in the federal government’s campaign against drug trafficking.<sup>216</sup> While several drug kingpins have been convicted of this offense,<sup>217</sup> the data discussed in Section IV, *supra*, also indicate that this crime is frequently dismissed pursuant to plea bargains. This pattern prompts the question of whether § 848(a) represents a powerful tool principally because it

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<sup>213</sup> At least insofar as the crimes carry mandatory or customary sentences, charging crimes also concentrate power with the prosecution. Use of these offenses limits the ability of a defendant to obtain a more lenient sentence than that desired by the prosecutor by pleading guilty to the crimes charged, and then relying on the judge to issue a forgiving sentence. Furthermore, to the extent that charging crimes implicate a “going rate” in which certain crimes are customarily pled down to lesser offenses, these charges also aggravate the already existing chasm between courtroom “insiders” such as prosecutors and defense attorneys, who are presumably aware of the going rate, and “outsiders” such as defendants and the lay public, who may not possess similar knowledge. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912–913 (2006).

<sup>214</sup> The “on balance” caveat reflects the fact that these crimes often implicate types of misconduct that clearly represent proper subjects of the criminal laws. This relationship to other, viable crimes tends to suggest a basic sincerity behind the general prohibition effectuated, if not directly realized, by the charging offense.

<sup>215</sup> 21 U.S.C. § 848(a) (2006).

<sup>216</sup> Mark J. Kadish, Rosalyn Suna Kadish & Alan J. Berman, *The Continuing Criminal Enterprise Statute: A Powerful Weapon for Federal Prosecutors*, 19 TRIAL 66, 66 (1983).

<sup>217</sup> See, e.g., *United States v. Edmond*, 52 F.3d 1080, 1113 (D.C. Cir. 1995) (affirming notorious Washington, D.C. drug kingpin Rayful Edmond’s conviction under 21 U.S.C. § 848(b) for leading a continuing criminal enterprise).

produces convictions on its own terms, or because it coerces defendants into accepting plea bargains to other charges (and, possibly, into promising to testify against one's former co-conspirators).<sup>218</sup> If the latter, the crime raises concerns regarding the extent to which the substantive criminal law may be used for instrumental purposes.

*C. Pleading Crimes and the Limits of the Criminal Sanction*

Like charging crimes, pleading offenses raise nettlesome issues regarding the permissible purposes and limits of the criminal sanction. To frame this point as it relates to pleading crimes, consider the following hypothetical state crime:

Section ∞. Offense X.

Upon stipulation of the parties and approval by the court, any individual charged with a crime carrying a minimum punishment of no less than three years in prison may enter a plea of guilty or no contest to this offense. A conviction for this offense shall be described solely as a conviction for "Offense X." Any person convicted of Offense X shall serve no less than two, and no more than three, years in prison.

If enacted, Offense X very well might survive or evade judicial scrutiny; several courts have rejected motions by defendants to set aside pleas to fictitious crimes that were not originally charged by the prosecution (for obvious reasons), but invoked as lesser offenses by the parties for plea-bargaining purposes.<sup>219</sup> Given the arguable viability of the statute, at least in light of the posture in which its constitutionality is likely to be presented to the courts, the question becomes whether it is desirable to have this pleading crime—and others like it—within the criminal code.

The answer to this question might be "yes" if one were to ask a defendant charged with a crime carrying a penalty in excess of three years in prison. To this person, a plea to Offense X, with its maximum custodial term of three years, might seem like an attractive alternative to a trial involving, and conviction for, the greater offense. This defendant

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<sup>218</sup> Kadish, Kadish & Baverman, *supra* note 216, at 68 (Section 848 "is not necessarily being used to net the 'big fish'; yet, because of the statute's broad language, harsh penalties, and liberal construction, the drug task forces can use it for leverage against mid-range defendants in a typical drug conspiracy, in hopes of getting these defendants to 'flip' against others in the 'organization.'").

<sup>219</sup> In *Spencer v. State*, 942 P.2d 646, 647–649 (Kan. Ct. App. 1997), the court upheld a plea-bargained conviction to attempted aggravated battery, a crime that did not exist under Kansas law. The court reasoned that the defendant had originally been charged with a legitimate offense, and could not complain on appeal about the terms of his freely entered-into bargain. For a discussion of *Spencer* and the handful of other decisions that have confronted similar issues (often involving pleas to "attempted voluntary manslaughter," and usually coming to the same conclusion as the *Spencer* court), see Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 740–41 (2001).

also might prefer to be convicted of Offense X to the extent that its indistinct nature obscures the character of his or her alleged criminal conduct, in much the same way that a conviction for a wet reckless likely carries less stigma than that attached to a conviction for driving under the influence of drugs or alcohol.<sup>220</sup>

But these benefits may come at a very high price—if not to the defendant described above, then to others like him in as-yet-unfiled cases. One reason is that the existence of pleading crimes may encourage overreaching by prosecutors. If a criminal code contains not only Offense X, but also other pleading crimes (e.g., Offense A, B, C, D, etc.), each with its own punishment terms, prosecutors might file charges they would otherwise reject. Imagine a case in which there exists an 11% chance of conviction on the sole charge, which carries a sentence of ten years. Assuming that the prosecutor can foresee the unlikelihood of success, normally this case would and should be rejected. The prosecutor might find this case more attractive, however, if there also exists a generic pleading option that carries a maximum penalty of one year in jail. In this situation, a rational defendant whose only concern relates to time served might plead guilty to the lesser charge rather than go to trial on the greater offense.<sup>221</sup> An ethically suspect prosecutor might anticipate this thought process and file the case.<sup>222</sup>

Perhaps more significantly, a crime such as Offense X would tug at the very fabric of the criminal sanction. Offense X lacks any factual

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<sup>220</sup> This “blurring” of the defendant’s misconduct is itself troubling. As one commentator has observed: “[I]f the plea to an unreal reduced charge (or to a hypothetical offense) is accepted by the judge—as it is in most cases—the crime of which the defendant stands convicted has little or no relation to what he actually did and has a distorting effect on the criminal justice system. The criminal conviction becomes a suspect unit of analysis for counting crimes, for making restitution awards, for parole, and for sentencing guidelines. In the absence of an accurate plea, officials find themselves searching for the ‘real’ offense concealed behind the fictional plea in an attempt to restore the proper fit between the sanction and the charge, between the sentence and the purpose of sentencing—whether it is ‘just deserts,’ restitution, rehabilitation, or vengeance. As a result, the public comes to assume that convictions for lesser offenses invariably mask greater ones.” Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. REV. 567, 575 (1996). See also King, *supra* note 39, at 166–70 (discussing how the parties to criminal cases may reach plea bargains that may satisfy their interests, but compromise broadly held values).

<sup>221</sup> Of course, defendants aren’t always, or even usually, perfectly rational in this regard. See generally Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

<sup>222</sup> In theory, the judge stands in the way of pleas to crimes that are unsupported by the facts of a case. In reality, some judges do not take this obligation to heart. See generally Byrne, *supra* note 3 (discussing the practice of accepting “baseless pleas”). Furthermore, many courts permit pleas without a factual basis for the crime of conviction, provided that a factual basis exists for a conviction of the more substantial crime that was originally charged. *Id.* at 2987–88.

predicates that correspond to conventional understandings of harmful,<sup>223</sup> blameworthy, or even merely undesirable conduct. The purported crime involves no prohibition, no rule; only a consequence.

While Offense X represents a flight of fancy, the problems it poses also appear with the wet reckless and other pleading crimes.<sup>224</sup> Indeed, a common characteristic of a pleading crime is a disconnect between the proscribed conduct and conventional notions of criminal behavior that needs to be punished and deterred—otherwise, the offense presumably would be charged more often in the first instance. Some of these crimes differ from Offense X only in that they have been varnished with some conceivable connection to another crime or a category of crimes (as with the wet reckless and DUI offenses, or 21 U.S.C. § 843(b) and drug trafficking crimes), a linkage that limits their ability to wreak mischief by cabining the range of cases in which the parties can plausibly invoke the offense. Even so, these crimes raise troubling questions regarding the acceptable boundaries of the criminal laws.

#### D. *Facilitating Crimes, Procedure, and Legitimacy*

Finally, a perception of illegitimacy surrounds all three categories of facilitating crimes.<sup>225</sup> This perception owes to the pervasive influence of the procedural continuum in shaping beliefs regarding the “proper” administration of criminal offenses.

Detention and charging crimes appear flawed, relative to other offenses, because they do not lead to convictions and punishment, which are relied upon in the normal course of events as final expressions of community disapproval toward a defendant and his or her alleged misbehavior. The absence of these expected consequences of a “successful” prosecution connotes, rightly or wrongly, that these offenses are being used for improper purposes, or at least that they are being applied in an unsatisfactory way. A sense prevails that if a criminal offense permits the intrusions associated with detention and charging, it should also bring about convictions.

Pleading crimes implicate similar thinking, only in reverse. If a crime implicates a social harm that is sufficiently serious that a criminal

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<sup>223</sup> See Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 766 (2004) (describing the “harm requirement” as “perhaps the most familiar attempt to narrow the boundaries of the criminal law”).

<sup>224</sup> Cf. Byrne, *supra* note 3, at 2991–95 (discussing ethical and other issues associated with factually “baseless pleas,” many of which involve pleas to pleading crimes).

<sup>225</sup> It is understood that “legitimacy” is a term packed with multiple meanings. See generally Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (discussing three different conceptions of legitimacy). As used here, “legitimacy” combines aspects of at least two of the three strands of legitimacy identified by Fallon—“legal” legitimacy (essentially, lawfulness), *id.* at 1794, and “moral” legitimacy (or “respect-worthiness”), *id.* at 1796.

conviction may adhere to its commission, the intuition exists that it also should encompass the lesser intrusions associated with arrest and charging. When a crime leads to relatively few or no arrests, this lacuna suggests that the offense falls out of step with the functions properly assigned to the substantive criminal law.

As the bulk of this Article has described, these impressions are at war with the realities surrounding the administration of the criminal laws, circumstances that encourage the production and use of facilitating crimes. Instead of attacking these conditions head-on, the next, and final, section of this Article considers instead whether political energies might be redirected toward the recognition and application of facilitating crimes that might decrease, instead of abet, overcriminalization.

## VII. CONCLUSION: THE PROMISE OF FACILITATING CRIMES

The discussion above establishes that facilitating crimes present significant challenges, and cause for some concern. At a minimum, it makes sense to keep track of how particular crimes are used by police and prosecutors so as to ascertain their status as detention, charging, or pleading offenses. This data could then be used during periodic reviews of the criminal code, audits of police practices, or other inquiries into the administration of the criminal laws. For example, if data reveal that a particular crime is almost invariably dismissed pursuant to plea negotiations, this would suggest that the offense is either superfluous, defective, or being used as a charging crime.

At the same time, the pivotal insight that follows from an awareness of facilitating crimes—that it is not always necessary for a particular crime to intersect with all portions of the continuum of criminal procedures in order for the offense to serve the purpose(s) assigned to it—might carry some useful implications, as well. To this point, this Article has focused on reasons why police and prosecutors might want to avoid certain segments of the procedural continuum. Perhaps other perspectives also should be taken into account. Just as some procedures are deemed too costly to law enforcement insofar as they relate to certain crimes, so too might unnecessary burdens on criminal defendants, suspects, and others outside of law enforcement be avoided by tailoring some crimes to avoid portions of the procedural continuum.

For example, jurisdictions might recognize more “opt-out” crimes. An “opt-out” crime would represent a minor offense as to which a defendant could obtain a dismissal of the charge against him or her prior to trial and conviction, as a matter of law, upon satisfaction of certain prerequisites.<sup>226</sup> The basic concept behind an “opt-out” offense informs

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<sup>226</sup> Brady, *supra* note 38, at 25 n.117 (“Jurisdictions often resort to conditional dismissals of criminal cases. . . . These dispositions enable defendants to avoid entry of a conviction and . . . potential punishment if the defendants meet certain conditions for a specified time.”).

existing “diversion” programs. With diversion, a case against a defendant charged with a crime—usually a minor offense, such as small-scale drug possession—may be “diverted” short of trial and conviction on the condition that the defendant complete certain extrajudicial requirements such as drug treatment or alcohol counseling.<sup>227</sup> If the defendant fails to meet these obligations, the case against him or her may be reinstated.<sup>228</sup> In general, however, diversion remains a matter of prosecutorial grace;<sup>229</sup> this alternative is not categorically available to all defendants charged with a particular offense.<sup>230</sup>

The modern trend is toward the broadened availability of diversion and similar programs,<sup>231</sup> and the day may be approaching when diversion becomes a matter of right for defendants charged with a variety of minor crimes.<sup>232</sup> If so, this sort of “opt-out” crime would draw from the basic facilitating-crime model by categorically avoiding portions of the procedural continuum—at least if the defendant so chooses. A few examples of “opt-out” infractions already exist; in California, a motorist charged with failing to provide his or her driver’s license upon the lawful demand of a peace officer will get any resulting charge dismissed simply by bringing the license to court and showing it to the judge.<sup>233</sup> A similar rule applies to the offense of failing to provide proof of automobile insurance.<sup>234</sup>

Diversion and “opt-out” crimes represent viable alternatives to existing offenses only with regard to modest crimes as to which there exists a minimal interest in punishing the offender.<sup>235</sup> Another, more

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<sup>227</sup> NAT’L ASSOC. OF PRETRIAL SERVS. AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL DIVERSION/INTERVENTION 17 (2008) (discussing various requirements commonly imposed on defendants as conditions of diversion).

<sup>228</sup> See, e.g., John P. Bellasai, *A Short History of the Pretrial Diversion of Adult Defendants from Traditional Criminal Justice Processing, Part One: The Early Years*, 2, <http://www.napsa.org/publications/diversionhistory.pdf>.

<sup>229</sup> JOHN CLARK, PRETRIAL JUSTICE INST., PRETRIAL DIVERSION AND THE LAW: A SAMPLING OF FOUR DECADES OF APPELLATE COURT RULINGS, at II–2 to II–9 (2006).

<sup>230</sup> Bellasai, *supra* note 228, at 1; Brakel & South, *supra* note 21, at 124–25.

<sup>231</sup> NAT’L ASSOC. OF PRETRIAL SERVS. AGENCIES, PROMISING PRACTICES IN PRETRIAL DIVERSION 33 (2010) (commenting on the growth of pretrial diversion as an alternative to prosecution).

<sup>232</sup> California’s Proposition 36, for example, creates a route to expungement for many non-violent drug offenders. However, this program requires a nominal conviction as a prerequisite for participation in the treatment regimen that must be completed as a condition of expungement. See CAL. PENAL CODE § 1210.1 (West Supp. 2011).

<sup>233</sup> CAL. VEH. CODE § 12951(a) (West 2010).

<sup>234</sup> CAL. VEH. CODE § 16028(e) (West 2000). See also CAL. HEALTH & SAFETY CODE § 41970 (West 2006) (providing for dismissal of charges that concern an unlawful gasoline cargo tank upon the presentation in court of proof of correction of the violations).

<sup>235</sup> This is not to say that diversion and similar alternatives to conventional prosecution represent cure-alls for the problems associated with the traditional manner of prosecuting minor offenses. Drug courts, in particular, have been both

ambitious design would involve the replacement of some existing offenses with “pure” pleading crimes on an “opt-in” basis. With this approach, an offense incapable of providing grounds for an arrest or an initial charge could be invoked by the defense either in connection with a plea agreement (with the prosecutor’s concurrence) or, possibly, as a lesser included offense for the fact-finder’s consideration at trial.

“Opt-in” crimes might represent preferable alternatives to some existing offenses. In particular, “opt-in” crimes might provide useful substitutes for certain types of crimes that have come under fire for allegedly placing too much power in the hands of police and prosecutors at the investigatory and charging phases of a criminal matter. “Ancillary” crimes represent one class of offenses that might function better on an “opt-in” basis. Ancillary crimes “function as surrogates for the prosecution of primary or core crimes . . . . They are created mostly for situations in which a defendant is believed to have committed a primary or core offense, but prosecution is unlikely to be successful or is otherwise thought to be undesirable.”<sup>236</sup> Money-laundering crimes offer an example of an ancillary offense under this definition.<sup>237</sup> Prosecutorial reliance on ancillary crimes has been attacked on the ground that this emphasis “is likely to divert attention from, and downgrade the importance of, [more] substantive crimes,” and downplays “what should be the main focus of the criminal law—the perpetration of harms.”<sup>238</sup>

The commentator who affixed the “ancillary crimes” label to certain offenses noted that “[t]he problems created by the expanded use of the new ancillary offenses exist, in the first instance, because these crimes are available to be used as a basis for criminal charges.”<sup>239</sup> Recognition of facilitating crimes, especially pleading offenses, allows us to ask: what if these crimes *weren’t* available to be used as criminal charges, at least in the first instance? What if existing ancillary crimes were retooled so that, like the wet reckless, they could only form the basis for a negotiated plea, or perhaps a lesser-included-offense instruction at trial? Might this outcome be politically palatable, even if outright abolition of these crimes is not?

The candid answer to the last question: probably not. “Opt-in” crimes are too exotic to replace existing offenses, at least for the time

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hailed as beneficial and decried as counterproductive. *E.g.*, Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 786 (2008); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004); Morris B. Hoffman, Commentary, *The Drug Court Scandal*, 78 N.C. L. REV. 1437 (2000); Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2000); John Feinblatt, Greg Berman & Aubrey Fox, *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277, 291–92 (2000).

<sup>236</sup> HUSAK, *supra* note 20, at 40.

<sup>237</sup> See Abrams, *supra* note 113, at 17–18.

<sup>238</sup> *Id.* at 34.

<sup>239</sup> *Id.* at 36.



being. Yet these offenses still might serve a valuable purpose if legislatures, when enacting *new* ancillary crimes, considered whether to follow the facilitating-crime model instead of simply enacting conventional crimes. The tight relationships between ancillary crimes and “core” or primary offenses make the former natural candidates for pleading-crime status. By definition, ancillary crimes bear a close connection to at least one other offense, and commonly carry a penalty that is somewhat less than that attached to the “core” crime. Limiting ancillary crimes to “opt-in” status would maintain law enforcement’s initial investigatory focus on more substantive offenses, much as cases that produce a wet reckless conviction remain, at their core, DUI prosecutions. At the same time, the availability of ancillary offenses for pleading purposes would trump any claim that legislatures or law enforcement have entirely abandoned the interests purportedly protected by these crimes.

True, this redesign of ancillary offenses might encourage overzealous prosecutors to bring marginal cases that allege only core charges, with the hope of ultimately eliciting a plea to an ancillary crime. For this gambit to have any chance of success, however, there must be some proof that the defendant committed the core offense. Otherwise, depending on the mechanism by which cases are reviewed for probable cause, either a grand jury will not return an indictment, or these charges will not survive review by a magistrate. Moreover, a defendant can always put the prosecution to its proofs as to the charged crimes, instead of invoking the “opt-in” offense. And in any event, even assuming that there exists some risk of improper conduct involving these “opt-in” ancillary crimes, this outcome must be compared with the status quo. In a worst-case scenario in which prosecutors routinely overcharge core offenses in order to obtain a plea to an ancillary crime, there still must be a significant quantum of proof that the defendant committed the core offense for the defendant to find him- or herself in a position where he or she might rationally admit to or otherwise invoke the “opt-in” crime. Today, no such limitation exists on the invocation of ancillary offenses; they may stand on their own, leading to more convictions and more punishments for what are arguably ill-considered criminal charges.

To understand how this substitution might work, consider how it would apply to the crime of possession of burglar’s tools.<sup>240</sup> Though it may be politically impossible to eliminate the crime altogether, it might be palatable to retain the offense, but only as a pleading option (or a lesser included offense) in burglary cases. Limiting the crime of possession of burglar’s tools in this manner would eliminate the prospect of wrongful detentions and prosecutions for this offense, in which

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<sup>240</sup> This offense was chosen solely because it has been identified as an ancillary offense, see Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 10, at 516; the author expresses no opinion as to whether the offense represents an ideal candidate for conversion to a facilitating crime.

individuals who are detained, arrested or even prosecuted for this crime in fact possessed the purported burglar's tools for entirely lawful reasons. Meanwhile, retaining the crime as a pleading offense would preserve the general condemnation of possession of burglar's tools with felonious intent, and retain the possibility of punishment for those persons likely also to have committed the more serious crime of burglary.

Even this limited acceptance of facilitating crimes may seem heretical, given the prevailing sense that the basic architecture of criminal procedure represents a perfect machine, with each cog and gear of the continuum representing an essential part of the device. But if some crimes are going to implicate only portions of the procedural spectrum—and, like it or not, they are—it makes sense to consider how to benefit from this fact. The forces that have created facilitating crimes show no sign of abating. Perhaps it is time to exert more control over their progeny, whether through abolition or embrace.