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Carissa Byrne Hessick
University of North Carolina School of Law, chessick@email.unc.edu

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ARTICLES

THE MYTH OF COMMON LAW CRIMES

*Carissa Byrne Hessick**

Conventional wisdom tells us that, after the United States was founded, we replaced our system of common law crimes with criminal statutes and that this shift from common law to codification vindicated important rule-of-law values. But this origin story is false on both counts. The common law continues to play an important role in modern American criminal law, and to the extent that it has been displaced by statutes, our justice system has not improved. Criminal statutes regularly delegate questions about the scope of criminal law to prosecutors, and judges have failed to serve as a check on that power. As a consequence, the current system provides less notice, less accountability, less separation of powers, and more potential for abuse than the common law system. Thus, to the extent the statute has displaced common law, the shift is not a story of the triumph of the rule of law; it is instead a story of legislative excess, prosecutorial

* Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr. Distinguished Professor of Law, University of North Carolina School of Law. This manuscript greatly benefitted from the comments of Jeff Bellin, Will Berry, Josh Bowers, Darryl Brown, Sam Buell, Erin Collins, Anne Coughlin, Paul Crane, Kimberly Ferzan, Kim Forde-Mazuri, Brandon Garrett, Adam Gershowitz, Rachel Harmon, Andy Hessick, Eisha Jain, David Jaros, Joe Kennedy, Lee Kovarsky, Jason Kreag, Alex Kreit, Corinna Lain, Kay Levine, Dave Marcus, Richard Meyers, John Orth, Allison Redlich, David Wolitz, and Ron Wright. It also benefitted from the participants in "The Role of Judicial Review" panel at the 2017 AALS Midyear Meeting of the Criminal Justice Section, the participants at the 2017 Neighborhood Criminal Justice Roundtable, and the participants at faculty workshops at the University of Arizona James E. Rogers College of Law and the University of North Carolina School of Law. Nicole Downing and Caitlin Wilkinson provided excellent research assistance.

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supremacy, and judicial abdication. The conventional wisdom of criminal common law is not only false, but it also conceals the failings of our current criminal justice system.

INTRODUCTION

As every American school child knows, legislatures write laws and courts interpret those laws. Perhaps nowhere else is that division of powers more scrupulously observed than in the criminal law. Legislatures determine what conduct is illegal, and courts interpret criminal laws when they arise in individual prosecutions. The idea that courts could play a role, let alone a primary role, in deciding what conduct should be criminalized is seen as antithetical to the rule of law.[1] Indeed, the prevailing wisdom is, as Supreme Court Justice Neil Gorsuch said during his recent confirmation hearing, that "judges would make pretty rotten legislators."[2]

[1] See, e.g., Rogers v. Tennessee, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting) (stating "the notion of a common-law crime is utterly anathema today"); see also Sanford H. Kadish et al., Criminal Law and Its Processes: Cases and Materials 145 (8th ed. 2007) (associating the power of "courts to create new common law crimes" with "the regimes of Nazi Germany and Soviet Russia").

[2] U.S. Senate Comm. on the Judiciary, Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States (Day 2),

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But this was not always the case. For more than half of our country's history, judges played a central role in determining the substance of criminal law,[3] just as they did for property law, torts, contracts, and essentially every other area of law in early America.[4] They used the common law method to determine what conduct qualified as criminal and to identify facts that could serve as a defense to prosecution. Judges' role in substantive law was not an American invention. The colonists brought the concept of common law with them from England, and English and American judges helped develop the basic legal principles that underlie modern American law—especially criminal law.[5] The distinction between murder and manslaughter,[6] the creation of self-defense and other affirmative defenses,[7] and the idea of criminal intent[8] all derive from the common law. These familiar criminal law concepts were not articulated by legislatures in statutes that judges merely interpreted; instead, judges identified and refined these concepts over time in the course of deciding various criminal cases. The concepts have since been enshrined in statutes, but their origins lie in common law.

Conventional wisdom tells us that our current criminal justice system is a system entirely of statutes, rather than common law, and that the shift from common law crimes to a system of criminal statutes has been a

https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-neil-m-gorsuch-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-2 [https://perma.cc/9-BW8-XKAY] (last visited Mar. 22, 2019) (quote beginning at 00:27:14).

[3] See 1 Wayne R. LaFave, Substantive Criminal Law § 2.1, at 103 (2d ed. 2003) (noting that "the substantive criminal law began as common law for the most part, and only later became primarily statutory").

[4] See Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 341 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (stating that "the American common law . . . historically has been the basic instrument of official regulation in the legal systems of all of the American states except Louisiana"); see generally Oliver Wendell Holmes, Jr., The Common Law (The Lawbook Exchange, Ltd. 2009) (1881).

[5] See Ford W. Hall, The Common Law: An Account of its Reception in the United States, 4 Vand. L. Rev. 791, 791–92, 797–800 (1951).

[6] 4 William Blackstone, Commentaries on the Laws of England in Four Books, 190–204 (Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) (describing the differences between murder and manslaughter at common law).

[7] 1 Paul H. Robinson, Criminal Law Defenses § 11, at 63 n.1 (1984) ("Most of the defenses recognized today, and in some cases their precise formulation, have not changed in more than 300 years.").

[8] Francis Bowes Sayre, Mens Rea, 45 Harv. L. Rev. 974, 974 (1932) ("For hundreds of years the books have repeated with unbroken cadence that *Actus non facit reum nisi mens sit rea*. 'There can be no crime, large or small, without an evil mind.'" (footnote omitted)).

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positive development.[9] Stripping judges of the power to shape substantive criminal law and placing that power exclusively with the legislature, we are told, provides more notice to individual citizens, ensures that decisions about criminal justice matters are subject to democratic accountability, appropriately separates government powers between branches, minimizes discretion that could lead to abuse, and increases uniformity and deterrence. In short, the shift from common law crimes to criminal statutes is ordinarily told as a story about the triumph of the rule of law.

This Article pushes back against this narrative. It argues that, although statutes now play an important role in the criminal law, it is incorrect to characterize our system as purely statutory. The common law continues to play an important role in shaping the substance of criminal law. The Article identifies several instances of judges permitting criminal prosecutions in situations that are not directly authorized by a criminal statute, but rather are the result of judges expanding the law to encompass new types of disfavored behavior. Nor is the continued existence of criminal common law merely a result of overreaching on the part of judges. Legislatures clearly contemplate a continued role for the common law in shaping the substance of criminal law. Several state legislatures allow judges to create new common law crimes; some codes explicitly refer to the common law definition of crimes rather than codifying the scope of prohibited behavior; and legislatures across the country routinely enact criminal legislation with broad or uncertain terms, knowing full well that the precise scope of those laws will be determined through case-by-case adjudication.

Not only has codification failed to fully displace the criminal common law, but codification has also failed to vindicate rule-of-law values. That is because the shift away from common law crimes did not result in clearly worded prohibitions that reflect democratic preferences. Instead, legislatures have written imprecise and overly broad criminal laws with extremely harsh penalties. The harsh penalties ensure that most defendants will plea bargain, rather than risk trial. As a result, the true scope and meaning of criminal laws have been left to prosecutors, rather

[9] See, e.g., Lawrence M. Friedman, Crime and Punishment in American History 63–65 (1993) (presenting the shift from common law crimes to a system in which "all crimes, and their punishments, should be embodied in a single, clear, definitive code" as a necessary feature of "[a] *republican* criminal justice system" as compared to the "autocratic" criminal justice system of England); see also infra note 31 (collecting sources).

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than judges. Prosecutors' decisions about how to enforce criminal laws—what some have called the real criminal law[10]—are shielded from public view, and they do not bind prosecutors in future cases. In contrast, common law crimes were the result of public decisions by judges with precedential value. Abandoning common law crimes in favor of statutes has resulted in less certainty, less transparency, and less accountability—hardly a triumph of the rule of law.

Despite its inaccuracy, the conventional wisdom against common law crimes is pervasive. It is found in many court opinions, it operates as a background assumption in many public discussions about the law, and it is taught in law schools across the country.[11] The pervasiveness has pernicious effects. The myth of common law crimes tells us that statutory criminal law vindicates individual rights and promotes democracy, and thus that judges should not interfere with the political branches' development of that law. This message reinforces the tendency of modern judges to take an extremely passive role in policing the legislature and the executive in criminal cases.[12] But, in reality, substantive criminal law is badly in need of reform, and history tells us judges could play an important role.

The Article proceeds in three Parts. Part I describes the conventional wisdom surrounding common law crimes. It identifies two separate claims. The first claim is descriptive—that, at present, the criminal law is entirely statutory. The legislature has sole and complete control over the

[10] See, e.g., William J. Stuntz, *Bordenkircher v. Hayes*: Plea Bargaining and the Decline of the Rule of Law, *in* Criminal Procedure Stories 351, 378 (Carol S. Steiker ed., 2006) ("The *real* law, the 'rules' that determine who goes to prison and for how long, is not written in code books or case reports. Prosecutors . . . define it by the decisions they make when ordering off the menus their states' legislatures have given them.").

[11] What I am referring to as "conventional wisdom," others have sometimes called a "canon" or a "canonical account"—that is, a way of thinking about an area of law that is widely shared by legal scholars and judges and that is deeply related to how that area of the law is taught. Katie R. Eyer, The Canon of Rational Basis Review, 93 Notre Dame L. Rev. 1317, 1318 & n.1 (2018); Jill Elaine Hasday, The Canon of Family Law, 57 Stan. L. Rev. 825, 825–27 (2004).

[12] See, e.g., Ewing v. California, 538 U.S. 11, 24 (2003) (plurality opinion) (noting that the Supreme Court's "tradition of deferring" to legislatures "in making and implementing [criminal justice] policy decisions is longstanding"); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) (declaring that "the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions"); see also Shima Baradaran Baughman, Subconstitutional Checks, 92 Notre Dame L. Rev. 1071, 1093–101 (2017) (describing how the courts have failed to act as an institutional check on the other branches in criminal cases).

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substance of criminal law, and a defendant may not be convicted or punished unless her conduct falls squarely within the conduct defined as illegal in a criminal statute. The second claim is normative—that the shift from common law to codification has been an overwhelmingly positive development. Codification vindicates rule-of-law values by preserving the appropriate separation of powers, promoting democracy, and protecting individual rights.

Part II challenges the descriptive claim. First, it notes that the abrogation of common law has not been universal. Some states still explicitly reserve for judges the power to create common law crimes. Some common law crimes have not been codified. And some crimes have only a nominal basis in the text of a criminal statute. After noting the ways in which the common law continues to play a formal role in American criminal law, Part II also documents how the shift to codification has not resulted in clearly delineated crimes. Legislatures often fail to define terms in their criminal statutes; and when they do, they routinely define criminal conduct using qualitative terms, such as whether a defendant's conduct or beliefs were "unreasonable." When legislatures draft statutes in this manner, they necessarily embrace the idea of criminal common law. Such standards require that criminal conduct be defined on a case-by-case basis, and, to the extent that more precise legal standards develop over time, they do so as a result of judge-made law.

Part III shifts from the descriptive to the normative. It challenges the normative claim of the virtues of codification. In the abstract, the shift from common law to codification promises a system in which everyone knows what conduct is prohibited and the punishment associated with that conduct, a system in which those choices are made by democratically elected legislatures, and a system in which the prohibitions are enforced uniformly by democratically accountable prosecutors. But as Part III explains, that is not the system that criminal-law codification has created. Legislators routinely pass statutes knowing that prosecutors will determine, on a case-by-case basis, what the statute means and against whom to enforce it. As a result, people are sometimes left to guess whether certain conduct is permitted or prohibited. They rarely know what punishment they will receive if they engage in illegal conduct. And everyone knows that our laws are not uniformly enforced.

The failure of criminal codes to promote rule-of-law values no doubt has many causes. Language is necessarily limited in what it can express

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clearly,[13] and it is costly (if not impossible) for legislatures to foresee all of the innovative ways that would-be criminals can inflict harm and thus prohibit that behavior.[14] This makes clearly worded and narrowly tailored criminal statutes unappealing to legislators. But at least some of the problems associated with codification are political, rather than technical. Legislators have incentives to pass more and more criminal laws to satisfy interest groups, react to the events of the day, and avoid appearing soft on crime.[15] But drafting precise and non-duplicative legislation is time consuming and requires political consensus, which can be difficult to generate.[16] As a result, modern legislatures enact statutes that are overly broad, that fail to clearly explain what conduct is prohibited and what conduct is permitted, and that regularly impose disproportionately harsh penalties.

Our country is unlikely to return to a system of criminal common law, and this Article does not argue that it should. But it is important that we do not oversimplify the story about the shift from common law crimes to codification. The story is not only inaccurate, but it also papers over the serious defects of our current system of judicial passivity, legislative delegation, and prosecutorial supremacy. The rule of law has yet to triumph in the American criminal justice system, and we should not pretend otherwise.

I. COMMON LAW AND CONVENTIONAL WISDOM

The conventional wisdom in criminal law is that the substance of modern criminal law is purely statutory and that legislative control over criminal law is superior to judicial creation of criminal law through common law. This conventional wisdom can be unpacked into two separate claims—a descriptive claim and a normative claim. The descriptive claim is about the source of modern American criminal law: it is created by legislatures and enshrined by statutes, rather than created by judges through the common law process. The normative claim is that the shift from judicial criminal common law to legislative codification

[13] See Muscarello v. United States, 524 U.S. 125, 138 (1998) (noting that "most statutes are ambiguous to some degree").

[14] See Ernst Freund, The Use of Indefinite Terms in Statutes, 30 Yale L.J. 437, 438 (1921).

[15] See Paul H. Robinson & Michael T. Cahill, The Accelerating Degradation of American Criminal Codes, 56 Hastings L.J. 633, 635–45 (2005).

[16] See Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 Sup. Ct. Rev. 345, 351, 353.

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vindicated rule-of-law values. In particular, it is better at providing defendants notice, it is more democratic, it better maintains the separation of powers, it minimizes discretion that has the potential for abuse, and it is more effective at achieving uniformity and deterrence.

The descriptive claim—that modern criminal law is determined by legislatures and enshrined in statutes, rather than created by judges through the common law process—can be found in numerous court opinions.[17] In *United States v. Wiltberger*, for example, the U.S. Supreme Court noted "the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."[18]

The view that criminal law is created by statute, rather than common law, is also widely accepted—and taught—in American law schools. Indeed, several criminal law professors have argued that, because modern criminal law is statutory rather than common law, it is irrational to continue to teach the course using the case method rather than statutes.[19] But even those textbooks that continue to teach criminal law using cases,

[17] See, e.g., Jones v. Thomas, 491 U.S. 376, 381 (1989) (noting that "the substantive power to define crimes and prescribe punishments" lies with "the legislative branch of government"); Liparota v. United States, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."); United States v. Bass, 404 U.S. 336, 348 (1971) ("[L]egislatures and not courts should define criminal activity."); see also Rogers v. Tennessee, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting) (stating "the notion of a common-law crime is utterly anathema today"); Screws v. United States, 325 U.S. 91, 152 (1945) (Roberts, J., dissenting) ("It cannot be too often emphasized that as basic a difference as any between our notions of law and those of legal systems not founded on Anglo-American conceptions of liberty is that crimes must be defined by the legislature.").

[18] 18 U.S. (5 Wheat.) 76, 95 (1820).

[19] See, e.g., Neil P. Cohen, Teaching Criminal Law: Curing the Disconnect, 48 St. Louis U. L.J. 1195, 1197, 1200–01 (2004) ("The modern truth is that criminal law today is statutory law. Anyone who practices criminal law must be able to read, understand, and apply statutes, some of which are complex and poorly written. This fact alone justifies using the Criminal Law course to teach statutory analysis to first-year students." (footnote omitted)); Markus D. Dubber, Criminal Law in Comparative Context, 56 J. Legal Educ. 433, 436, 442 (2006) ("[C]riminal law in the United States can no longer be regarded as a common law subject. The monolith of 'common law' . . . has been thoroughly and irrevocably replaced by a set of fifty-two independent and comprehensive systems of criminal law, with their own criminal codes and corresponding bodies of jurisprudence interpreting these codes."); Kevin C. McMunigal, A Statutory Approach to Criminal Law, 48 St. Louis U. L.J. 1285, 1285, 1289 (2004) (discussing how criminal law "has not been a true common law subject for many years. . . . As a result of the nineteenth century codification movement, every American state has for decades accepted the notion of legislative supremacy in Criminal Law—the idea that legislators rather than judges should create and define criminal offenses." (footnote omitted)).

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rather than statutes, state that "the reach of the criminal law is determined solely by the reach of statutory language."[20]

Many students are introduced to this idea through the so-called principle of legality, which includes the idea "'[*n*]*ullum crimen, nulla poena, sine lege*' ('There is no crime without law, no punishment without law')."[21] Most modern criminal law textbooks include a section on the principle of legality.[22] The principle of legality includes not only a prohibition on common law crimes, but also prohibitions on ex post facto criminal laws and on overly vague criminal statutes.[23] Although there is some disagreement about the precise scope of the legality principle,[24] there is widespread agreement that the principle requires the "advance

[20] See, e.g., Kadish et al., supra note 1, at 138; see also Joshua Dressler & Stephen P. Garvey, Cases and Materials on Criminal Law 92 (6th ed. 2012) ("[A] person may not be convicted and punished unless her conduct was defined as criminal (today, in the United States, by statute rather than by judges).").

[21] Richard G. Singer & John Q. La Fond, Criminal Law 8 (4th ed. 2007); see also Leo Katz et al., Foundations of Criminal Law 215–16 (1999) (equating the notions of legality, "*nulla poena sine lege* (no punishment without law)," and the "doctrine denying courts the power to make conduct criminal by common law decision"); Jerome Hall, Nulla Poena Sine Lege, 47 Yale L.J. 165, 165 (1937) (identifying, as one meaning for the phrase *nulla poena sine lege*, the idea that "no person shall be punished except in pursuance of a statute which fixes a penalty for criminal behavior").

[22] See, e.g., Richard J. Bonnie et al., Criminal Law 80–112 (2d ed. 2004); Dressler & Garvey, supra note 20, at 92–119; Jerome Hall et al., Cases and Readings on Criminal Law and Procedure 3–72 (3d ed. 1976); Phillip E. Johnson, Criminal Law: Cases, Materials and Text 75–97 (3d ed. 1985); Kadish et al., supra note 1, at 134–67; Sanford H. Kadish et al., Criminal Law and Its Processes: Cases and Materials 350–70 (4th ed. 1983); John Kaplan et al., Criminal Law: Cases and Materials 130–43 (5th ed. 2004); Katz et al., supra note 21, at 208–18. Some casebooks describe the principle without necessarily using the term "legality." Arnold H. Loewy, Criminal Law: Cases and Materials 799–832 (3d ed. 2009) (discussing the principle as "fair notice"); Jens David Ohlin, Criminal Law: Doctrine, Application, and Practice 85–111 (2016) (discussing a "written statute requirement"); Singer & La Fond, supra note 21, at 5–11 (discussing limits of criminal law, including legality). Interestingly, older textbooks and treatises tend not to include such a section. See, e.g., Joel Prentiss Bishop, Commentaries on the Law of Statutory Crimes (Boston, Little, Brown, & Co. 1873) (not discussing legality); George E. Dix & M. Michael Sharlot, Criminal Law: Cases and Materials 162–71 (2d ed. 1979) (not including a section on legality, but noting a "requirement of precision"); Rollin M. Perkins & Ronald N. Boyce, Cases and Materials on Criminal Law and Procedure (6th ed. 1984) (not discussing the principle of legality or suggesting that there is any problem with the creation of common law crimes).

[23] See Hall, supra note 22, at 30–65 (discussing ex post facto criminal laws); Kadish et al., supra note 1, at 136 (same).

[24] See, e.g., Michael S. Moore, Act and Crime: The Philosophy of Action and Its Implications for Criminal Law 239–42 (1993) (arguing that the principle of legality is comprised of four separate values and nine different doctrines, and thus that it is a misnomer to refer to as a single principle).

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legislative specification of criminal conduct"[25] and that it prohibits common law crime creation by judges.[26] The principle of legality and the prohibition on common law crimes are sometimes couched in purely descriptive terms—namely that legislatures, rather than judges, determine the scope of criminal law in modern times.[27] But some sources claim that judicial crime creation is prohibited by law.[28] And other sources claim that the prevailing view is the product of shared values.[29]

The very phrase "principle of legality" helps to underscore the normative aspect of the conventional wisdom—after all, principles are not merely rules, but rules that profess to contain some sort of truth.[30] The normative claim is that rule-of-law values require statutes to be the exclusive source of substantive criminal law.[31] Many tie the principle of

[25] Bonnie et al., supra note 22, at 85 (emphasis omitted).

[26] Hall, supra note 21, at 167–68 (stating that it was the influence of Parliament and the rise of legislation that transformed "*nulla poena* into some real approximation to the rule").

[27] See, e.g., Bonnie et al., supra note 22, at 88 (stating that "judicial crime creation is increasingly hard to find," identifying *Commonwealth v. Mochan*, 110 A.2d 788 (Pa. 1955) as the "most nearly modern example" of the practice, and attributing the decline of judicial crime creation, in part, to the accumulation of penal statutes over time); Gabriel J. Chin & Wesley M. Oliver, Experiencing Criminal Law 7 (2015) (including a section titled "Criminal Law Is Statutory"); 1 Charles E. Torcia, Wharton's Criminal Law § 10, at 37–38 (15th ed. 1993) ("It is for the legislative branch of a state or the federal government to determine, within state or federal constitutional limits, the kind of conduct which shall constitute a crime and the nature and extent of punishment which may be imposed therefor.").

[28] See, e.g., Dix & Sharlot, supra note 22, at 172 ("Crimes are generally—and perhaps constitutionally must be—statutory."); Katz et al., supra note 21, at 215–16 (referencing the "doctrine denying courts the power to make conduct criminal by common law decision"); Ohlin, supra note 22, at 86 (including a section entitled "The Written Statute Requirement" and stating that "appellate courts enforce the prohibition against prosecuting an old common law crime that was not carried over and codified in statute"); Singer & La Fond, supra note 21, at 8 ("Today, a defendant cannot be convicted of a crime unless the legislature has enacted in advance a statutory definition of the offense.").

[29] Bonnie et al., supra note 22, at 88 (attributing the decline of criminal common law, in part, "to the consensus that judicial crime creation is in principle unacceptable"); Johnson, supra note 22, at 75 ("[W]e insist that criminal prohibitions and penalties be enacted by a legislature and applied only prospectively.").

[30] Principle, Webster's Third New International Dictionary of the English Language Unabridged (2002) (defining "principle" as, inter alia, "a general or fundamental truth").

[31] See, e.g., Hall et al., supra note 22, at 3 ("The 'rule of law' has been regarded as the greatest political achievement of our culture, and the relevant principle of legality has maximum significance in the criminal law because the most basic values are involved."); Kadish et al., supra note 1, at 145 (characterizing the power of "courts to create new common law crimes" as allowing courts to "create new crimes, not within the ambit of any existing statute, to reach situations that are considered *analogous* to ones already covered. The doctrine of criminal law by analogy is often associated with the regimes of Nazi Germany and Soviet Russia"); Hall, supra note 21, at 183 (suggesting that the legality principle is a feature that

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legality to the European Enlightenment,[32] whose ideas helped spark the American Revolution and formed the basis of our Constitution.[33] And several have stated that the principle is the first or foundational principle of American criminal law.[34]

The criminal-law literature does more than merely state, in general terms, that criminal statutes are necessary to justify convictions and punishment.[35] It also identifies particular values that are better served by criminal statutes than by criminal common law: notice, separation of powers, democratic accountability, prevention of government abuse, and increasing uniformity and deterrence.

The primary objection to common law crimes is an objection about notice.[36] Common law crimes create notice problems because the

distinguishes "liberal states" from "autocracy"); Kathryn Preyer, Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic, 4 L. & Hist. Rev. 223, 263 (1986) ("[C]ommon law jurisdiction to punish was a doctrine to be feared. Its potential reach threatened the liberties of citizens and the polity of each and every state."); Ben Rosenberg, The Growth of Federal Criminal Common Law, 29 Am. J. Crim. L. 193, 194 (2002) ("Common law crimes . . . run afoul of our deepest notions of due process and raise the specter of the judiciary imposing its will and the coercive powers of the state against its citizens.").

[32] See, e.g., Bonnie et al., supra note 22, at 85–86; Stanislaw Pomorski, American Common Law and the Principle of Nullum Crimen Sine Lege 11–12 (1975); Hall, supra note 21, at 165, 168–70; John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 190 (1985). But see Jerome Hall, General Principles of Criminal Law 20–27 (1947) (tracing the origins of the principle of legality not only to the French Revolution, but also to Rome and the Magna Carta).

[33] See, e.g., Akhil Reed Amar, America's Constitution: A Biography 243 (2005) (stating that a "general commitment to Enlightenment values (slavery aside) pulsated through the Constitution"); Bernard Bailyn, The Ideological Origins of the American Revolution 27 (1967) (noting the prevalence of quotations of Enlightenment thought in the colonies leading up to the Revolution); Suzanna Sherry, The Sleep of Reason, 84 Geo. L.J. 453, 465–69 (1996) (explaining that "our Constitution is in fact a thoroughly Enlightenment document").

[34] E.g., Herbert L. Packer, The Limits of the Criminal Sanction 79–80 (1968) ("*The* first principle, we are repeatedly told, is that conduct may not be treated as criminal unless it has been so defined by an authority having the institutional competence to do so before it has taken place."); Hall, supra note 21, at 184 (stating that the principle of legality "represents the most cherished of all the values involved in the administration of the criminal law").

[35] See, e.g., Singer & La Fond, supra note 21, at 7–8 (discussing the principle of *nulla poene* as a means to providing fair notice); Note, Common Law Crimes in the United States, 47 Colum. L. Rev. 1332, 1337 (1947) [hereinafter Note, Common Law Crimes] (same).

[36] See Loewy, supra note 22, at 799 ("One of the most basic notions of criminal law is that before the crime is committed, the defendant have fair notice that her conduct will be deemed criminal."); Ohlin, supra note 22, at 85 (identifying the "central vision of the criminal law" as the principle "that defendants should only be condemned if they had fair warning about the law's requirements but disobeyed it anyway"); Rosenberg, supra note 31, at 197 (identifying "the problem of notice" as a reason to prohibit common law crimes); Note, Common Law

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boundary between legal and illegal behavior is not set forth in a written statute, but rather evolves and changes over time through the course of individual adjudications. Because a new legal rule can be announced and applied to a defendant in the same case, the common law process can result in convictions for conduct that was not clearly forbidden at the time the defendant acted.[37] Without notice, people might either accidentally engage in illegal behavior, or they might forgo legal behavior because they are uncertain whether it is permitted.[38] This notice objection is grounded in due process concerns.[39]

Another objection to common law crimes is that they are anti-democratic. Common law crimes are determined by judges, who are not accountable to voters through elections. The current system of written statutes is democratic, so the objection goes, because the statutes are written by legislators who are elected and thus democratically accountable.[40] This democratic accountability objection is part of a larger argument that public policy should be set by the political branches, not by the judiciary.[41]

Crimes, supra note 35, at 1337 (identifying "fair warning" as a reason to codify criminal law, rather than rely on criminal common law).

[37] See Stewart Jay, Origins of Federal Common Law (pt. 1), 133 U. Pa. L. Rev. 1003, 1061 (1985) [hereinafter Jay, Part One] (noting "the association of judicial lawmaking with *ex post facto* legislation").

[38] See Singer & La Fond, supra note 21, at 7.

[39] See, e.g., Smith v. Goguen, 415 U.S. 566, 572–73 (1974); Rosenberg, supra note 31, at 197; see also Carissa Byrne Hessick & F. Andrew Hessick, Procedural Rights at Sentencing, 90 Notre Dame L. Rev. 187, 209–10 (2014) (tracing this requirement of ex ante notice to the Due Process Clause).

[40] See Bonnie et al., supra note 22, at 86 ("As the branch of government most directly responsive to the popular will, the legislature had the power to define crimes. Judges were to enforce statutes, not to make law."); Moore, supra note 24, at 240 ("The primary value furthered by [the prohibition against common law crimes] is democracy, because the justification for restricting criminal law-making to legislatures is largely due to the more democratic selection of legislatures over judges."); Roscoe Pound, Common Law and Legislation, 21 Harv. L. Rev. 383, 406 (1908) (stating that, as compared to common law, "legislation is the more truly democratic form of law-making").

[41] E.g., United States v. Bass, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."); see also Judith S. Kaye, State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions, 70 N.Y.U. L. Rev. 1, 8 (1995) (stating that the "ubiquitous web of statutes, combined with more political concerns about 'judicial activism,' may have in fact caused state judges to feel that our role as common-law judges, cautiously and creatively developing the law in ways appropriate to a changing society, has been circumscribed" (footnote omitted)); Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U.

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The separation of powers has also been used to justify a prohibition on common law crimes.[42] The Constitution vests "[a]ll legislative Powers" in Congress, and it vests the "judicial Power of the United States" in the Supreme Court and lower federal courts.[43] The power to legislate includes the power to decide which conduct is legal and which conduct is illegal—that is, the power to write criminal laws.[44] The judicial power, on the other hand, is understood to include only the power to interpret criminal laws as they arise in individual cases and to enter judgments in those cases.[45] This division of authority between branches, so the argument goes, is not only commanded by the text of the Constitution, but it also serves to protect individual rights. Dividing governmental powers between different branches helps to check government power and preserve liberty.[46]

Relatedly, statutes are thought to do a better job than common law in limiting the discretion of government officials and preventing abuse.[47] As Professor John Jeffries explains this argument, common law authority creates the risk "that judicial particularization of the broad rubrics of common-law authority will be too 'subjective,' too closely grounded in the facts of the case at hand, insufficiently abstracted from the personal characteristics of the individual defendant."[48] In other words, because they make the decision whether certain conduct is a crime in the context of a particular case, judges may make those decisions on the basis of a defendant's race, religion, or other inappropriate factors. In contrast, statutes are generally applicable. While they may be inspired by a particular crime or set of crimes, the legislature's decision whether to

Chi. L. Rev. 1, 24 (1985) (noting "the principle that public policy should be made by officials who are answerable to the people through periodic elections").

[42] E.g., Michael Manning, Comment, A Common Law Crime Analysis of *Pinkerton v. United States*: Sixty Years of Impermissible Judicially-Created Criminal Liability, 67 Mont. L. Rev. 89, 107–08 (2006); see also Kadish et al., supra note 1, at 135–36 (directing students to consider the dissent in *Commonwealth v. Mochan*, 110 A.2d 788 (Pa. 1955), to consider whether "the legality principle reflect[s] important separation-of-powers values in addition to those protected by requiring prospectivity and clarity").

[43] U.S. Const. art. I, § 1; U.S. Const. art. III, § 1.

[44] See, e.g., McMunigal, supra note 19, at 1287 ("The dominant attitude expressed in American jurisdictions is one of legislative supremacy and exclusivity [in criminal law].").

[45] Bonnie et al., supra note 22, at 86.

[46] Merrill, supra note 41, at 19.

[47] See, e.g., Kadish et al., supra note 1, at 136; Singer & La Fond, supra note 21, at 7; Paul H. Robinson, Fair Notice and Fair Adjudication: Two Kinds of Legality, 154 U. Pa. L. Rev. 335, 341 (2005); Note, Common Law Crimes, supra note 35, at 1337.

[48] Jeffries, supra note 32, at 214.

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classify particular conduct as criminal is always forward-looking and applies to all members of society.

Finally, some have argued that criminal statutes are better at achieving uniformity and deterrence than are common law crimes. Unlike statutes, common law crimes have not been reduced to a specific, defined set of circumstances. Without specificity, judges cannot ensure that they are making decisions consistent with other judges,[49] and individuals cannot know what behavior to avoid.[50] In contrast, statutes clearly articulate which conduct is forbidden and which is not, thus ensuring that judges will convict and acquit for the same conduct and defendants will know which conduct to avoid.

II. COMMON LAW'S ENDURING ROLE IN MODERN CRIMINAL LAW

The descriptive claim underlying the conventional wisdom—that modern criminal law is purely statutory—is not accurate. To be sure, statutes have supplanted common law as the primary source of American criminal law,[51] but that does not mean the common law has been entirely displaced.[52] To the contrary, common law continues to play an explicit and implicit role in the substance of criminal law.

Judicial crime creation is still explicitly permitted in several states. And even in those jurisdictions that have abrogated criminal common law, we can find criminal prosecutions that can only be explained in terms of judicial crime creation. What is more, legislatures appear to have implicitly embraced common law crimes. Legislatures routinely fail to define statutory terms, and they rely on qualitative standards that

[49] See Robinson, supra note 47, at 341 ("[T]he lack of a precise statutory definition leaves rules subject to interpretation. This is likely to reduce the uniformity in application, as different judges use, or decline to use, common law doctrines.").

[50] See Singer & La Fond, supra note 21, at 8 ("Providing prior notice of illegality by statute also supports the reasons for convicting and punishing lawbreakers. Utilitarians would concede that, before deterrence can be effective, an individual must be able to know what conduct is forbidden and the consequences of breaking the law."); Hall, supra note 21, at 170 (citing Feuerbach for the idea that the principle of legality allows for "deterrence by threat"); Robinson, supra note 47, at 340 (arguing that, because common law crimes are "generally unknown to the public," they cannot "deter future offenders through fear of punishment").

[51] See, e.g., Note, Common Law Crimes, supra note 35, at 1334 ("[A]n examination of the cases shows that the great majority of prosecutions under the common law are for petty matters, and that statutory preemption of the major and more common offenses has been fairly complete.").

[52] See, e.g., Kaye, supra note 41, at 18 ("Vital though the common law still may be, I think it inarguable that it has been surpassed as the preeminent source of law it once was.").

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necessarily require decisions about the scope of criminal law to be made on a case-by-case basis.[53] That is to say, legislatures write statutes that delegate their lawmaking authority; the scope of those statutes can only be determined as a matter of criminal common law.

Before critiquing the conventional wisdom about criminal common law, it is first necessary to acknowledge that the terms "common law crimes" and "criminal common law"[54] have both been used to refer to two distinct but related concepts.[55] Sometimes the terms are used to refer to substantive criminal law—usually the body of law that was brought from England to the colonies, where it served as the basis of the law enforced in early American courts.[56] Sometimes the terms are used to refer to the authority of judges to convict in the absence of a written statute. Importantly, these two meanings are not always distinct. When discussing the authority of judges to convict in the absence of a statute, many assume that authority is limited to situations that fall within the body of substantive criminal laws imported from England.

A. The Common Law's Formal Role in Modern Criminal Law

In the early years of the United States, judges regularly convicted in the absence of statutes and exercised their power to recognize new crimes.[57] Although the Supreme Court prohibited *federal* common law crimes in *United States v. Hudson & Goodwin*,[58] common law

[53] See Freund, supra note 14, at 437 ("It is possible to distinguish roughly three grades of certainty in the language of statutes of general operation: precisely measured terms, abstractions of common certainty, and terms involving an appeal to judgment or a question of degree.").

[54] This Article uses the terms "common law crimes" and "criminal common law" interchangeably.

[55] See Pomorski, supra note 32, at 2–3 (noting the different meanings of the term "common law").

[56] But sometimes it refers to the idea that certain acts are forbidden by "natural law." Natural law is the idea that legal principles are derived "from a universalized conception of human nature or divine justice rather than from legislative or judicial action." Natural Law, Black's Law Dictionary (10th ed. 2014). The idea that legal principles derived from natural law was once widely accepted, but has since fallen out of fashion. See generally Stuart Banner, When Christianity Was Part of the Common Law, 16 L. & Hist. Rev. 27, 49–60 (1998) (describing the shift in attitudes towards common law, namely a shift from perceiving common law as the natural law discovered by judges to perceiving that common law is judge-made law).

[57] 1 Life and Letters of Joseph Story 298 (W. Story ed., Boston 1851); see also infra notes 211–216.

[58] 11 U.S. (7 Cranch) 32, 34 (1812) (holding that the "exercise of criminal jurisdiction in common law cases" is "not within the[] implied powers" of the federal courts).

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prosecutions persisted in the states long after.[59] At the same time that state courts exercised common law authority, state legislatures also enacted criminal statutes. But their enactment of statutes was not novel, nor did it supplant common law authority.[60]

It was not until the late nineteenth and early twentieth centuries that statutes became the primary source of substantive criminal law in most states. As their criminal codes grew, several states enacted statutes that explicitly deprived judges of common law authority.[61] And even when the legislature did not explicitly abolish common law crimes, judges in some states held that the code abolished common law crimes by implication.[62]

But the rejection of common law crimes occurred slowly, and it has not been complete. By 1947, only eighteen states had "abolished" common law crimes.[63] By 1976, that number had risen to twenty-seven.[64] To this day, more than a dozen states expressly retain a role for common law

[59] See 1 LaFave, supra note 3, § 2.1(c), at 106–07; Jeffries, supra note 32, at 192–93; Pound, supra note 40, at 403; Rosenberg, supra note 31, at 199.

[60] Into the twentieth century, the common law, in most states, continued to serve "as a reservoir of substantive law to stop up the holes left by the legislatures, 'ready to be called into activity whenever the occasion may require.'" Note, Common Law Crimes, supra note 35, at 1334–35 (quoting State v. E. Coal Co., 70 A. 1, 5 (R.I. 1908)). And some states expressly adopted the common law as a matter of statute or constitutional provision. See Herbert Pope, The English Common Law in the United States, 24 Harv. L. Rev. 6, 25 (1910) ("In some states the common law as it existed down to the time of the Revolution is declared, either by a constitutional or statutory provision, to be in force." (footnote omitted)).

[61] See, e.g., Ariz. Rev. Stat. § 13-103 (LexisNexis 2018) ("All common law offenses and affirmative defenses are abolished."); Colo. Rev. Stat. § 18-1-104(3) (2018) ("Common-law crimes are abolished and no conduct shall constitute an offense unless it is described as an offense in this code or in another statute of this state . . . ."); Ky. Rev. Stat. Ann. § 500.020(1) (LexisNexis 2014) ("Common law offenses are abolished and no act or omission shall constitute a criminal offense unless designated a crime or violation under this code or another statute of this state."); Minn. Stat. § 609.015 (2016) ("Common law crimes are abolished and no act or omission is a crime unless made so by this chapter or by other applicable statute . . . ."); N.J. Stat. Ann. § 2C:1-5(a) (West 2018) ("Common law crimes are abolished and no conduct constitutes an offense unless the offense is defined by this code or another statute of this State."); Utah Code Ann. § 76-1-105 (LexisNexis 2017) ("Common law crimes are abolished and no conduct is a crime unless made so by this code, other applicable statute or ordinance."); see also 1 LaFave, supra note 3, § 2.1(c), at 107 n.19 (collecting sources).

[62] See, e.g., Estes v. Carter, 10 Iowa 400, 401 (1860); see also 1 LaFave, supra note 3, § 2.1(c), at 106.

[63] Note, Common Law Crimes, supra note 35, at 1332; Hart & Sacks, supra note 4, at 513–14.

[64] Hall et al., supra note 22, at 3 n.* ("Today at least 27 states either expressly or by implication have 'abolished' common law crimes.").

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crimes: Alabama,[65] Connecticut,[66] the District of Columbia,[67] Florida,[68] Idaho,[69] Maryland,[70] Michigan,[71] Mississippi,[72] New Mexico,[73] North

[65] Ala. Code § 1-3-1 (LexisNexis 1999) ("The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force . . . ."); see also Tucker v. State, 168 So. 2d 258, 260 (Ala. Ct. App. 1964) ("[C]ommon-law jurisdiction cannot 'be exercised as to purely statutory offenses, nor in cases of common-law offenses for which punishment is prescribed by statute. Hence it can only exist as to common-law offenses, for which common-law punishment only can be inflicted.'" (quoting State v. Gillilan, 41 S.E. 131, 133 (W. Va. 1902) (internal quotation marks omitted))).

[66] Conn. Gen. Stat. § 53a-4 (2017) ("The provisions of this chapter shall not be construed as precluding any court from recognizing other principles of criminal liability or other defenses not inconsistent with such provisions.").

[67] D.C. Code § 45-401(a) (2001) ("The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, shall remain in force except insofar as the same are inconsistent with, or are replaced by, some provision of the 1901 Code.").

[68] Fla. Stat. § 775.01 (2018) ("The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.").

[69] Idaho Code Ann. § 18-303 (West 2016) ("All offenses recognized by the common law as crimes and not herein enumerated are punishable, in case of felony, by imprisonment in the state prison for a term not less than one (1) year nor more than five (5) years; and in case of misdemeanors, by imprisonment in the county jail for a term not exceeding six (6) months or less than one (1) month, or by fine not exceeding $500, or both such fine and imprisonment.").

[70] See 7 M.L.E. Criminal Law § 3 (2019) ("The common law in relation to crimes is in force except insofar as it has been abrogated by statute. Even where a statute has been enacted covering a crime, the common law is still applicable if the statute was not intended to cover the entire field or to repeal the common law." (footnotes omitted)).

[71] Mich. Comp. Laws Serv. § 750.505 (LexisNexis 2017) ("Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.").

[72] Miss. Code. Ann. § 99-1-3 (2015) ("Every offense not provided for by the statutes of this state shall be indictable as heretofore at common law.").

[73] N.M. Stat. Ann. § 30-1-3 (West 2016) ("In criminal cases where no provision of this code is applicable, the common law, as recognized by the United States and the several states of the Union, shall govern.").

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Carolina,[74] North Dakota,[75] Rhode Island,[76] South Carolina,[77] Virginia,[78] and Washington[79] all recognize the common law authority of judges to convict for conduct that is not criminalized by statute.

In those jurisdictions where judges retain common law authority to convict in the absence of a statute, they ordinarily use that authority to convict for the same discrete group of uncodified crimes. For example, judges in Maryland routinely convict defendants for the common law offense of indecent exposure.[80] And judges in North Carolina routinely convict defendants for robbery, despite the fact that there is no statute defining robbery as a criminal offense.[81] It is less common, but not unheard of, for courts to use their common law authority to convict for a crime that had never before been recognized in the jurisdiction.[82] For example, in 1967, a New Mexico appellate court upheld a conviction for the common law misdemeanor of "indecent handling of a dead body," despite the fact that there was no statute prohibiting the conduct and despite the fact that there had never before been a conviction for such

[74] N.C. Gen. Stat. § 14-288.3 (2017) ("All other provisions of the Article are intended to be supplementary and additional to the common law and other statutes of this State and, except as specifically indicated, shall not be construed to abrogate, abolish, or supplant other provisions of law.").

[75] N.D. Cent. Code § 1-01-03(7) (2016) ("The will of the sovereign power is expressed by . . . [t]he decisions of the tribunals enforcing those rules, which, though not enacted, form what is known as customary or common law.").

[76] 11 R.I. Gen. Laws § 11-1-1 (2002) ("Every act and omission which is an offense at common law, and for which no punishment is prescribed by the general laws, may be prosecuted and punished as an offense at common law.").

[77] S.C. Code Ann. § 16-1-110 (2015) ("A felony or misdemeanor provided by statute or in common law which is not assigned a classification pursuant to Section 16-1-90 or 16-1-100 must be punished as provided before enactment of the classification system.").

[78] Va. Code Ann. § 18.2-16 (2014) ("A common-law offense, for which punishment is prescribed by statute, shall be punished only in the mode so prescribed.").

[79] Wash. Rev. Code § 9A.04.060 (2016) ("The provisions of the common law relating to the commission of crime and the punishment thereof, insofar as not inconsistent with the Constitution and statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the courts of this state having jurisdiction of the offense.").

[80] See, e.g., Genies v. State, 43 A.3d 1007, 1010–11, 1013 (Md. 2012); Wisneski v. State, 921 A.2d 273, 279–80 (Md. 2007).

[81] See, e.g., State v. Bates, 330 S.E.2d 200, 201 (N.C. 1985); State v. Black, 209 S.E.2d 458, 460 (N.C. 1974).

[82] See Hart & Sacks, supra note 4, at 514 (noting that "the process of defining new types of conduct as criminal appears to have come to a virtual stop").

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behavior in the state.[83] More recently, the Supreme Court of Mississippi relied on the fact that suicide was unlawful at common law to uphold a conviction for manslaughter.[84] The defendant had argued that he had accidentally shot the victim during the course of an unsuccessful suicide attempt, and he requested that the jury be given an instruction on accident. But the state countered with the argument, which the Mississippi Supreme Court accepted, that Mississippi had, by statute, incorporated common law crimes, and that suicide was unlawful at common law.[85] Notably, in agreeing with the state that "[s]uicide is a common law offense," the court did not cite any Mississippi cases on the matter; it relied only on cases from other jurisdictions.[86]

Even in those jurisdictions that explicitly prohibit judicial crime creation, we nonetheless see convictions that cannot possibly be explained as anything else.[87] Take, for example, the scores of federal convictions for insider trading. The Supreme Court tells us that "Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b-5 prohibit undisclosed trading on inside corporate information by individuals who are under a duty of trust and confidence that prohibits them from secretly using such information for their personal advantage."[88] But neither of these sources actually addresses trading on inside corporate information. Section 10(b) prohibits the use, "in connection with the purchase or sale of any security," of "any manipulative or deceptive device."[89] And Rule 10b-5 forbids the use, "in connection with the purchase or sale of any security," of "any device, scheme, or artifice to defraud."[90] Insider trading does not appear to be manipulative, deceptive, or fraudulent because a person who is engaged in insider trading is not making any affirmatively misleading statements;

[83] State v. Hartzler, 433 P.2d 231, 233–35 (N.M. Ct. App. 1967). The court relied on a handful of cases from other states and several criminal law treatises to conclude that the conduct constituted a common law crime.

[84] Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

[85] Id. at 753.

[86] Id. at 753 & n.2.

[87] "Rulings that, while purporting to be interpretations of statutes, criminalize acts that were never contemplated by Congress are more accurately thought of as rulings that create federal criminal common law than as interpretations of the statutes themselves." Rosenberg, supra note 31, at 211.

[88] Salman v. United States, 137 S. Ct. 420, 423 (2016).

[89] Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10(b), 48 Stat. 881, 891 (codified as amended at 15 U.S.C. § 78j(b)).

[90] 17 C.F.R. § 240.10b–5.

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they are merely buying or selling stock without making any representation about why they are engaging in the transaction.[91]

The Supreme Court has dealt with this problem by concluding that insiders have a fiduciary obligation to the shareholders of a corporation.[92] According to the Court, this fiduciary duty creates a duty for the insider to either disclose their information or abstain from trading; otherwise insiders would be able to take unfair advantage of uninformed stockholders.[93] Alternatively, the Court has theorized that the fiduciary duty means that the insider "misappropriates confidential information for securities trading purposes."[94] Interpreting the statute and regulation as prohibiting insider trading is desirable, the Court tells us, because it protects the securities markets and enhances investor confidence.[95]

These are perfectly good explanations why insiders ought to be forbidden from trading on their insider information. But they are not particularly good explanations as to why insider trading necessarily falls within the generic prohibitions on deceptive practices or fraudulent schemes found in the relevant statute and regulation.[96] And they are very

[91] As Professor Donna Nagy has explained, "the common law generally imposed liability for affirmative misstatements. Fraud by silence was actionable only in limited circumstances, and the default rule was one of caveat emptor." Thus, the "challenge in prosecuting insider trading as a violation of Rule 10b-5 thus turns on characterizing a defendant's silence as a fraud." Donna M. Nagy, Insider Trading and the Gradual Demise of Fiduciary Principles, 94 Iowa L. Rev. 1315, 1323 (2009). In order for an insider's silence to be considered fraudulent, "the insider trader must be under some type of obligation to speak." Id.

[92] Chiarella v. United States, 445 U.S. 222, 228 (1980) (finding "a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation").

[93] Id. at 228–29. This is sometimes referred to as the "traditional" or "classical theory" of insider trading liability. United States v. O'Hagan, 521 U.S. 642, 651–52 (1997).

[94] This is sometimes referred to as the "misappropriation theory":

> The "misappropriation theory" holds that a person commits fraud "in connection with" a securities transaction, and thereby violates § 10(b) and Rule 10b-5, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information. Under this theory, a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information. In lieu of premising liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock, the misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information.

O'Hagan, 521 U.S. at 652 (citation omitted).

[95] See, e.g., id. at 653, 658.

[96] Commentators have long argued that neither the statute nor the regulation reach insider trading. E.g., Stephen M. Bainbridge, Incorporating State Law Fiduciary Duties into the

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poor explanations of how these generic statutory and regulatory prohibitions put the public on notice that insider trading is a crime.

Federal liability for the substantive crimes of co-conspirators provides another example. There is no federal statute that allows for the conviction of individuals for the crimes of their co-conspirators. But in *Pinkerton v. United States*,[97] the Supreme Court held that one conspirator can be convicted for the crimes committed by another. Daniel and Walter Pinkerton were indicted for both conspiracy and several completed crimes. Daniel did not commit the substantive crimes (he had been incarcerated when Walter committed them),[98] but the Supreme Court nonetheless affirmed his convictions. No federal statute created this criminal liability,[99] nor is this type of liability recognized at common law;[100] the *Pinkerton* Court created it out of whole cloth. The Court affirmed Daniel's convictions because it believed punishment in these circumstances made sense. The Court reasoned that conspirators were like

Federal Insider Trading Prohibition, 52 Wash. & Lee L. Rev. 1189, 1192 (1995) ("[T]he insider trading prohibition is a species of federal common law."); Michael P. Dooley, Enforcement of Insider Trading Restrictions, 66 Va. L. Rev. 1, 59 (1980) (stating that insider trading litigation in the courts has exceeded the authority granted by the 1934 Act); Saikrishna Prakash, Our Dysfunctional Insider Trading Regime, 99 Colum. L. Rev. 1491, 1497–98 (1999) ("Rather than endorsing specific legislation that would make the use of material, non-public information illegal in appropriate circumstances, the SEC arguably manipulated a statute and a regulation that bar deceptions in order to curb informational advantages."). And the SEC appears to have thought the same until the 1950s. See Prakash, supra, at 1498 n.18 ("During the 1950s, the SEC openly acknowledged that it lacked the authority to regulate insider trading through rule 10b-5.").

[97] 328 U.S. 640 (1946).

[98] The majority conceded that there was "no evidence to show that Daniel participated directly in the commission of the substantive offenses on which his conviction has been sustained." Id. at 645. The dissent explained why:

> The proof showed that Walter alone committed the substantive crimes. There was none to establish that Daniel participated in them, aided and abetted Walter in committing them, or knew that he had done so. Daniel in fact was in the penitentiary, under sentence for other crimes, when some of Walter's crimes were done.

Id. at 648 (Rutledge, J., dissenting in part).

[99] See Alex Kreit, Vicarious Criminal Liability and the Constitutional Dimensions of *Pinkerton*, 57 Am. U. L. Rev. 585, 596 (2008) ("To this day, the *Pinkerton* 'elements' are nowhere to be found in the federal criminal code . . . ."); Manning, supra note 42, at 110 ("A search of the United States Code will reveal no statute prescribing that a conspirator may be held criminally responsible for the substantive offenses of his or her co-conspirators."); see also *Pinkerton*, 328 U.S. at 649 (Rutledge, J., dissenting in part) ("I think this ruling violates both the letter and the spirit [of the statute] . . . .").

[100] Manning, supra note 42, at 117 (noting that the rule in *Pinkerton* "violates the long-standing principle of conspiracy law that conspiracy is an offense separate and distinct from the substantive offense").

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business partners and that, because the relevant federal conspiracy statute permitted the overt act of one conspirator to satisfy the overt act requirement for all, "the same or other acts in furtherance of the conspiracy are likewise . . . attributable to the others for the purpose of holding them responsible for the substantive offense."[101] Put simply, the Court found criminal liability despite the absence of any supporting statutory language or legislative history.[102]

Judicial recognition of crimes with only tenuous connections to statutes is not only a federal phenomenon. California's felony murder law provides an example from the states. California law specifically states that no person can be convicted or punished for conduct unless it is prohibited by statute.[103] And yet the California Supreme Court has admitted that its second-degree felony murder rule is a judicial, rather than a statutory, creation.[104] The court has defended the crime from separation of powers challenges on the theory that the doctrine is an interpretation of the statutory term "implied malice" that is supported by common law principles.[105] But the argument that "implied malice" necessarily includes an unintentional killing committed during the course of any dangerous felony defies any rational textual analysis,[106] especially in light of the fact

[101] *Pinkerton*, 328 U.S. at 647.

[102] See United States v. Long, 301 F.3d 1095, 1103 (9th Cir. 2002) ("The *Pinkerton* doctrine is a judicially-created rule that makes a conspirator criminally liable for the substantive offenses committed by a co-conspirator when they are reasonably foreseeable and committed in furtherance of the conspiracy."); Kreit, supra note 99, at 596 ("[T]he *Pinkerton* majority appears to have created an entirely new basis for criminal liability out of statutory thin air, arguably in violation of the prohibition against creation of federal common law crimes."); Manning, supra note 42, at 110 ("The *Pinkerton* theory is clearly a common law doctrine and not statutory in nature.").

[103] Cal. Penal Code § 6 (West 2019) ("No act or omission, commenced after twelve o'clock noon of the day on which this Code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this Code, or by some of the statutes which it specifies as continuing in force . . . .").

[104] People v. Robertson, 95 P.3d 872, 878 (Cal. 2004) ("The first degree felony-murder rule is a creation of statute. (§ 189.) The second degree felony-murder rule is a common law doctrine.").

[105] See People v. Sarun Chun, 203 P.3d 425, 431–34 (Cal. 2009).

[106] See id. at 452–53 (Moreno, J., concurring in part and dissenting in part) ("We . . . possess the authority to abrogate the second degree felony-murder doctrine because 'the second degree felony-murder rule remains, as it has been since 1872, a judge-made doctrine without any express basis in the Penal Code.'" (quoting *Robertson*, 95 P.3d at 884 (Moreno, J., concurring))).

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that a separate statute criminalizes unintentional killings that occur during the course of specific, enumerated felonies.[107]

B. Legislatures' Tacit Embrace of Criminal Common Law

Criminal common law is often presented as an issue of judicial versus legislative control over the scope of criminal law. But legislatures sometimes write statutes that explicitly embrace the common law. And legislatures routinely implicitly embrace the common law when they fail to clearly delineate the scope of criminal law. Those statutes delegate crime definition to judges,[108] and thus necessarily incorporate common law both as a substantive source of criminal law and as a process for determining the scope of that law.[109]

Several states have enacted statutes that incorporate common law definitions. Sometimes this incorporation is crime-specific, such as the North Carolina burglary and arson statutes, which do not articulate elements for the crimes, but rather prohibit conduct "as defined at the common law."[110] But sometimes the incorporation is wholesale. For example, a number of states that prohibit common law crimes nonetheless include a catch-all statutory provision explicitly permitting the use of common law to interpret statutes.[111] Kansas and Nevada go even further, requiring courts to use the common law to interpret statutory terms that are not defined.[112]

Legislatures also implicitly incorporate the common law into their criminal codes whenever they fail to define statutory terms. Because

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[107] Cal. Penal Code § 189 (West 2019).

[108] See Kahan, supra note 16, at 353.

[109] See generally Rosenberg, supra note 31 (discussing federal criminal common law as both a body of law and a process).

[110] N.C. Gen. Stat. § 14-51 (2017) (burglary); id. § 14-58 (arson).

[111] E.g., Colo. Rev. Stat. § 18-1-104(3) (2018) (permitting "the use of case law as an interpretive aid in the construction of the provisions of this code"); Minn. Stat. Ann. § 609.015 (2016) (permitting "the use of common law rules in the construction or interpretation" of criminal statutes).

[112] Kan. Stat. Ann. § 21-5103(a) (2017) ("[W]here a crime is denounced by any statute of this state, but not defined, the definition of such crime at common law shall be applied."); Nev. Rev. Stat. Ann. § 193.050(3) (LexisNexis 2012) ("The provisions of the common law relating to the definition of public offenses apply to any public offense which is so prohibited but is not defined, or which is so prohibited but is incompletely defined."). Both of these states make criminal statutes, as opposed to the common law, the sole source of criminal prohibitions. Kan. Stat. Ann. § 21-5103(a) (2017); Nev. Rev. Stat. Ann. § 193.050(1) (LexisNexis 2012).

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courts will ordinarily assume that the legislature is writing its statutes against the backdrop of the common law,[113] a decision not to define a term—especially a term around which a body of common law has developed, is essentially a decision to incorporate that body of common law.[114]

Sometimes, however, there is no clearly established common law definition of a term. When legislatures fail to define statutory terms that do not have an established common law meaning, then they are not simply incorporating the historical common law meaning; instead they are delegating the meaning of that term to the judiciary.[115] Put differently, the legislature is, to some extent, delegating to judges the task of deciding what conduct should be legal and what conduct should be illegal. And it is inevitable that, in making that decision, the judges' decision will result in a type of common law.[116]

[113] E.g., Neder v. United States, 527 U.S. 1, 21 (1999) ("It is a well-established rule of construction that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" (alterations in original) (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992))); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (stating that "where a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply" (citations omitted)); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense"); People v. Hall, 388 P.3d 794, 798 (Cal. 2017) ("[C]ourts construe criminal statutes against the backdrop of the common law presumption that scienter is required and imply the requisite mental state, even where the statute is silent."); People v. Reeves, 528 N.W.2d 160, 164 (Mich. 1995) ("'[W]ords and phrases that have acquired a unique meaning at common law are interpreted as having the same meaning when used in statutes dealing with the same subject' matter as that with which they were associated at the common law." (alteration in the original) (quoting Pulver v. Dundee Cement Co., 515 N.W.2d 728, 732 (Mich. 1994))); see also Henry M. Hart, Jr. & Herbert Wechsler, The Federal Courts and the Federal System 435 (1953) (stating that "a state legislature acts against the background of the common law, assumed to govern unless changed by legislation"); Jay, Part One, supra note 37, at 1006 (identifying the previous statement from Hart and Wechsler as the "standard account of state law").

[114] See Pomorski, supra note 32, at 75–78.

[115] See Kahan, supra note 16, at 353–54; Kaye, supra note 41, at 25, 28.

[116] See Rosenberg, supra note 31, at 202–07 (identifying several examples of federal criminal common law); see also Gary D. Rowe, The Sound of Silence: *United States v. Hudson & Goodwin*, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes, 101 Yale L.J. 919, 925 n.29 (1992) ("The current version of federal common law ('new' federal common law . . .) involves filling gaps in otherwise comprehensive congressional statutory schemes." (citing Henry J. Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N.Y.U. L. Rev. 383 (1964))).

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One example of such a wholesale delegation occurred in a federal statute aimed at corruption. In the mid-twentieth century, prosecutors began using the federal mail fraud statute to obtain convictions for government corruption.[117] That statute prohibits "any scheme or artifice to defraud, or for obtaining money or property" that uses the mails or causes them to be used.[118] Because the statute could be read to prohibit not only fraudulent schemes to obtain money or property, but also *other* fraudulent schemes, prosecutors argued—and lower courts agreed—that corrupt government officials fraudulently deprived their constituents of their "intangible right" to "honest services" and thus could be convicted under this statute.[119] After declining to address the issue for decades,[120] the Supreme Court rejected this interpretation of the mail fraud statute in *McNally v. United States*.[121] The *McNally* Court acknowledged that the statute could be read to include frauds that obtained more than simply money or property,[122] but it relied on legislative history and the rule of lenity to read the statute more narrowly.[123] In rejecting the idea that the mail fraud statute reached government corruption, the *McNally* Court stated that "[i]f Congress desires to go further, it must speak more clearly than it has."[124]

Congress responded quickly, enacting 18 U.S.C. § 1346, which states that, for purposes of mail and wire fraud "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[125] The statute did not define the term "intangible right of honest services," and the only legislative history for the statute

[117] Lisa Kern Griffin, The Federal Common Law Crime of Corruption, 89 N.C. L. Rev. 1815, 1820 (2011) (noting that these prosecutions began in the 1940s and increased in frequency in the 1970s).

[118] 18 U.S.C. § 1341 (2012).

[119] See, e.g., United States v. Clapps, 732 F.2d 1148, 1153 (3d Cir. 1984); United States v. Von Barta, 635 F.2d 999, 1005–07 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); United States v. Mandel, 591 F.2d 1347, 1362 (4th Cir. 1979), aff'd in relevant part, 602 F.2d 653, 654 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); United States v. Keane, 522 F.2d 534, 549 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976); United States v. States, 488 F.2d 761, 766–67 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974); Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941), cert. denied, 313 U.S. 574 (1941).

[120] See supra note 119 (collecting cases).

[121] 483 U.S. 350, 361 (1987).

[122] Id. at 358.

[123] Id. at 357–60, 357 n.7.

[124] Id. at 360.

[125] Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988) (codified as amended at 18 U.S.C. § 1346).

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indicated that it was enacted "to overturn *McNally* and restore the broad definition of fraud that had evolved prior to that decision."[126] Although the Supreme Court ultimately opted to construe the statute narrowly in order to avoid constitutional concerns,[127] Section 1346 represents a significant delegation and ratification of common law powers. Not only did Congress fail to define what was meant by the phrase "intangible right of honest services,"[128] but the circumstances surrounding the passage of Section 1346 obviously also conveyed Congress's approval of the lower courts' decision to use their common law authority to decide which actions ought to be illegal.[129]

The Sherman Act's prohibition on restraints of trade provides another example of wholesale delegation. The statute prohibits any "contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce."[130] During the congressional debates surrounding the Sherman Act, the bill's proponents insisted that they were creating a way for federal officials to enforce common law prohibitions of conspiracies in restraints of trade. But the common law doctrine in that area was quite obviously unsettled.[131] The cases decided since the passage of the statute have confirmed that Congress essentially delegated to the federal courts the task of creating a criminal common law of antitrust.[132] Indeed, soon after the statute's passage, Professor Roscoe Pound used it as proof that "lawyers in the legislature often conceive it more expedient

[126] Griffin, supra note 117, at 1821 & n.29 (collecting sources).

[127] Skilling v. United States, 561 U.S. 358, 408–12 (2010).

[128] See Griffin, supra note 117, at 1822 ("Codifying the expansion of fraud liability to cases of 'intangible' rights violations thus did nothing at all to clarify how far the statute ultimately extends.").

[129] See Rosenberg, supra note 31, at 203–05 (identifying honest services fraud as proof that federal common law crimes exist).

[130] 15 U.S.C. § 1 (2012).

[131] Arthur M. Allen, Criminal Conspiracies in Restraint of Trade at Common Law, 23 Harv. L. Rev. 531, 534–43 (1910); Donald Dewey, The Common-Law Background of Antitrust Policy, 41 Va. L. Rev. 759, 759, 762–85 (1955); Freund, supra note 14, at 441.

[132] See, e.g., Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933) (characterizing the Sherman Act as having "a generality and adaptability comparable to that found to be desirable in constitutional provisions," stating that because the statute "does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape," and noting that the Act's "general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness"); see also Freund, supra note 14, at 440–41 (noting that the statutory language has given rise to differing interpretations, which "made the criminality of acts dependent upon matter of degree and of opinion").

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to make of a statute the barest outline, leaving details of the most vital importance to be filled in by judicial law-making."[133]

Failing to define statutory terms is not the only way in which legislatures delegate the scope of criminal law to the courts. Sometimes legislatures write criminal statutes that are designed to distinguish between legal and illegal conduct on a case-by-case basis.[134] Legislatures do this whenever they write statutes that include a qualitative standard, such as whether the defendant's conduct was "unreasonable."[135] Every jurisdiction in this country has at least one criminal statute that employs such a standard.[136] Those standards essentially fail to give any guidance about how they will be applied, leaving people uncertain whether their conduct will be deemed unreasonable by judges or juries.[137]

Criminal statutes that employ flexible standards rather than clear prohibitions are routinely tolerated by the courts. As Justice Holmes once said:

> [T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death.[138]

As recently as 2015, the Supreme Court reaffirmed "the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct."[139] Not only do these flexible standards require case-by-case determinations, but, as explained more fully in the next Part, because of other features of the modern criminal

[133] Pound, supra note 40, at 383.

[134] See Freund, supra note 14, at 437 (noting that legislatures sometimes write statutes using "terms involving an appeal to judgment or a question of degree").

[135] The rules-versus-standards debate is a mainstay in both legal education and legal scholarship. When using the terms "rules" and "standards," I do so against the backdrop of Professor Louis Kaplow's observation that "the only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act." Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 560 (1992) (emphasis omitted).

[136] See Appendix to Supplemental Brief of United States at 1a–99a, Johnson v. United States, 135 S. Ct. 2551 (2015) (No. 13-7120) (collecting federal criminal statutes and state criminal statutes that employ qualitative standards).

[137] See, e.g., Carissa Byrne Hessick, Vagueness Principles, 48 Ariz. St. L.J. 1137, 1146 (2016) (explaining how the qualitative standards in child neglect statutes fail to give parents and caregivers sufficient notice about what conduct is criminal).

[138] Nash v. United States, 229 U.S. 373, 377 (1913).

[139] Johnson v. United States, 135 S. Ct. 2551, 2561 (2015).

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justice system, those determinations are often no longer made by judges. Instead they are made by prosecutors and, as a result, they pose even greater rule-of-law problems than do common law crimes.

III. THE NORMATIVE FAILURE OF CODIFICATION

Conventional wisdom tells us that the shift from common law to codification vindicated the rule of law.[140] This normative claim is premised on the assumption that codification ensures clearly worded criminal prohibitions that are fairly enforced. As the previous Section explains, however, legislatures often fail to clearly define crimes when they enact statutes. Because the power to interpret laws is given to courts, one would expect that a failure to define crimes is essentially a delegation of lawmaking power to judges.[141] But in practice that power is usually exercised by prosecutors rather than judges. Because prosecutors have overwhelming leverage to induce guilty pleas and unfettered enforcement discretion, they largely determine the scope of modern criminal law. Prosecutors' decisions about the scope of criminal law do not bind them in future cases, and they are often shielded from the general public.

This delegation of criminal law power to prosecutors reintroduces the very flaws that the shift from common law crimes to codification was supposed to cure. In a very real sense, the current criminal justice system gives less notice, ensures less stringent separation of powers, provides fewer limitations on government discretion and abuse, and is less effective at ensuring uniformity and deterrence than a system of common law crimes. And while the delegation of criminal law substance to prosecutors may, in some jurisdictions, provide more democratic accountability than a system of common law crimes, that accountability is more apparent than real. In short, the rule of law has not been vindicated by the shift from common law crimes to codification—those values are routinely subverted by our current system.

A. Codification and the Rise of Prosecutors

When we speak of criminal statutes, we often assume that the statute is written in specific rather than general terms, and we also assume that the

[140] See supra note 31.

[141] See Kahan, supra note 16, at 353–54. Indeed, the previous Section referred to legislative failure to define statutory terms as a tacit embrace of criminal common law. See supra text accompanying notes 113–116.

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statutes are written to target only particular harmful behavior. But statutes frequently do not live up to this ideal. Language is imprecise, and so legislators may not be able to clearly communicate what activity should be prohibited and which permitted. Carefully crafted laws require significant time and effort, and both are often in short supply when legislatures are in session. In addition to the time and effort required, legislatures have several additional disincentives to enact precise laws. Precise laws create a risk that would-be wrongdoers will circumvent them.[142] Precise laws are more likely to be rendered obsolete by technology or other changed circumstances, and updating laws can be both time-consuming and expensive.

Political concerns may also encourage legislators to vote for broad, imprecise statutes. Legislators may find it more difficult to agree on the content of a precise law, than on a more general principle. In addition, there are few incentives for legislators to write narrow, precise laws. For non-criminal laws, legislatures must balance the preferences of competing interest groups. But for criminal laws, with the exception of white-collar offenses, all of the powerful interest groups favor broader criminal laws and harsher punishments.[143] Even without the prompting of interest groups, legislators will sometimes propose legislation to expand the scope of criminal laws in order to respond to a news story.[144] Those legislators who vote against increasing the scope of criminal laws risk being labeled "soft on crime."[145] Indeed, the "soft on crime" label is so

[142] See generally Samuel W. Buell, The Upside of Overbreadth, 83 N.Y.U. L. Rev. 1491 (2008) (arguing that overly broad laws may, in some circumstances, be beneficial because they allow the state to punish those who adapt their behavior to legal regimes).

[143] See, e.g., Rachel E. Barkow & Kathleen M. O'Neill, Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation, 84 Tex. L. Rev. 1973, 1982–83 (2006) ("Legislators can reap political rewards by increasing penalties without worrying about angering any powerful interest group or alienating the public.").

[144] Robinson & Cahill, supra note 15, at 644; see also Jessica A. Roth, Alternative Elements, 59 UCLA L. Rev. 170, 178 (2011).

[145] As Paul Robinson and Michael Cahill explain:

> Criminal law proposals, however useless or even ridiculous they may be, typically pass because legislators share a common reluctance to appear "soft on crime." When a new and unnecessary specific offense, such as "library theft," is proposed, the issue becomes a referendum on whether legislators care about public libraries, not on whether the proposed legislation will actually do anything to combat the problem of theft or will instead have pernicious ramifications for the application of the criminal code's general theft provision. As a result, the rational legislator is likely to vote in favor of the library-theft bill because there is a clear constituency—library users, and taxpayers generally—

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toxic that interest groups seeking to advance non-criminal law interests have targeted state judges who are opposed to those interests in their reelection campaigns by running ads about their defense-friendly rulings.[146]

But these surface politics are not the only forces that drive broad statutes and harsh punishments. The institutional relationship between legislatures and law enforcement does as well. As Professor Bill Stuntz explained in some detail, legislatures and prosecutors have cooperated to increase the substance and penalties of criminal law. They have done so in order to ensure that prosecutors are more likely to obtain convictions and that they can do so relatively inexpensively—i.e., through plea bargains rather than through trials.[147] This dynamic has led legislatures to pass laws that are both more broad than they think is appropriate and more harsh than they think is just.[148] Such laws allow prosecutors to pressure defendants to plea bargain.[149] And, to the extent that voters worry that certain conduct ought not be illegal or that certain penalties are too high, legislators will reassure them that the laws are meant to make convictions of the truly culpable more certain and less expensive—in other words, they will tell their constituents that they do not expect prosecutors to enforce the law as written.[150]

> that will benefit from its enactment, and no constituency to complain about the new provision's more subtle and diffuse drawbacks.

Robinson & Cahill, supra note 15, at 644–45; see also William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 509 (2001) ("[B]oth major parties have participated in a kind of bidding war to see who can appropriate the label 'tough on crime.'").

[146] See Jed Handelsman Shugerman, The People's Courts: Pursuing Judicial Independence in America 1–3 (2012) (collecting recent incidents); Kaye, supra note 41, at 14 n.74 (collecting incidents from the 1980s and 1990s).

[147] See Stuntz, supra note 145, at 529–33; see also Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869, 880 (2009) (noting that Congress "now legislates with precisely this framework of prosecutorial power over pleas in mind").

[148] Russell M. Gold et al., Civilizing Criminal Settlements, 97 B.U. L. Rev. 1607, 1617 (2017).

[149] Stuntz, supra note 145, at 531.

[150] See Barkow, supra note 147, at 875 ("In theory, federal prosecutors stand as the gatekeepers to ensure that these laws are properly applied and are used judiciously. That is, prosecutors working in United States Attorneys' Offices should ensure that no matter how broadly a criminal statute is worded, it is not applied except in those instances where a defendant is actually blameworthy. These prosecutors should also make sure that a law is not applied to a given case if the punishment dictated by the law would be excessive."); Josh Bowers, Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute, 110 Colum. L. Rev. 1655, 1664 (2010) ("It is necessary and desirable for prosecutors to exercise

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These practical, political, and institutional considerations have resulted in imprecise, overly broad, and overly harsh criminal laws.[151] Ordinarily, broad or imprecise laws delegate power to judges to determine the scope of the law. But when it comes to criminal law, that power is delegated almost exclusively to prosecutors. Plea bargaining is one reason that prosecutors largely determine the scope of criminal law.[152] Because most criminal cases are resolved by plea bargaining, rather than by trial, ambiguous statutory terms are far more often interpreted by prosecutors than by judges. Legislatures have purposely given prosecutors great leverage in plea negotiations by enacting statutes with harsh sentences. The only way for defendants to avoid disproportionately harsh sentences is to forgo legal challenges to prosecutorial charging and to plead guilty even when they have a plausible argument that their behavior did not fall within a proper interpretation of the statute. As a result, defendants are often convicted without a judge deciding whether their actions fell within the imprecisely worded statute.[153]

Leverage during plea bargaining is not the only way that legislatures have delegated power over the scope of criminal law to prosecutors. When legislatures enact overly broad laws—that is, laws that reach beyond the conduct that the legislature meant to prohibit and include less blameworthy (or even innocuous) behavior[154]—they know that

a measure of discretion because codes are too expansive to do otherwise."); Gold et al., supra note 148, at 1618 & n.32 (providing an example of a U.S. senator opposing legislation to reduce drug sentences on the theory that new legislation was not needed "because prosecutors were not seeking those penalties in all cases" and because prosecutors could use the disproportionately harsh sentences "as leverage to obtain guilty pleas").

[151] See Rosenberg, supra note 31, at 213 (noting "the almost exponential growth in the number and breadth of federal criminal statutes."); Roth, supra note 144, at 172 ("Federal criminal law . . . has been derided for being disorganized, vague, incomprehensible, and seemingly boundless."); Stuntz, supra note 145, at 512–23 (documenting criminal law's breadth and depth).

[152] See Baughman, supra note 12, at 1095.

[153] See infra text accompanying notes 254–256; see also Gold et al., supra note 148, at 1626–28 (discussing how plea bargaining dynamics lead to "legally innocent" defendants pleading guilty).

[154] See Buell, supra note 142, at 1493 (noting that most critiques of overly broad laws focus on statutes that "extend[] criminal sanctions beyond culpable actors who pose a genuine risk to others"); Sanford H. Kadish, Legal Norm and Discretion in the Police and Sentencing Process, 75 Harv. L. Rev. 904, 909–10 (1962) (identifying the phenomenon of "overcriminalization," namely, the proliferation of "criminal statutes which seem deliberately to overcriminalize, in the sense of encompassing conduct not the target of legislative concern"); see also Bowers, supra note 150, at 1678 ("A criminal is normatively innocent where his conduct is undeserving of communal condemnation, even if it is contrary to law.").

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prosecutors are unlikely to enforce the statute as broadly as written. But it is entirely up to prosecutors to decide how broadly or narrowly to enforce those laws. In other words, prosecutors are free to decide which conduct to treat as illegal and which to treat as permissible. [155]

Importantly, the decisions that prosecutors make about the scope of criminal law are largely shielded from public view.[156] Only if a case goes to trial will a prosecutor have to argue why she believes that the defendant's behavior fell within the relevant statutory language. If the defendant pleads guilty, then the judge is never asked to rule upon the meaning of the statute, and the prosecutor need not disclose her interpretation of the statute. But the charges that a prosecutor chooses to bring are only one piece of evidence about how the prosecutor interprets and enforces the law. The charges that a prosecutor chooses *not* to bring give significant information about how a prosecutor interprets an ambiguous statute,[157] and they also tell us how a prosecutor has decided to enforce an overly broad statute. But the public rarely learns about the cases a prosecutor does not litigate. Thus, although prosecutors largely determine the scope of modern criminal law, those determinations are not visible to the public.

B. Rule-of-Law Values Revisited

The conventional wisdom assumes that criminal statutes are better than criminal common law at vindicating rule-of-law values. But, as the previous Section explains, our current system is not a system of precisely written statutes that target only particular harmful behavior. Our system

[155] Barkow, supra note 147, at 871 (noting that prosecutors "are the final adjudicators in the vast majority of cases").

[156] See Russell M. Gold, Promoting Democracy in Prosecution, 86 Wash. L. Rev. 69, 78 (2011).

[157] A prosecutor's decisions about when not to charge are as important as their decisions about when to bring charges for determining the scope for the criminal law as enforced by the prosecutor.

> Even where there is strong evidence that a particular defendant's conduct falls within the letter of a criminal prohibition, a prosecutor might nonetheless decline to bring charges for any number of reasons. A prosecutor will sometimes fail to charge where a defendant is particularly sympathetic, or when a prosecutor thinks a defendant's conduct is not sufficiently blameworthy even if technically criminal. Prosecutors occasionally decline to charge due to fundamental disagreement with substantive law or discomfort with the severity of the likely penalty.

Daniel Epps, Adversarial Asymmetry in the Criminal Process, 91 N.Y.U. L. Rev. 762, 778 (2016) (footnotes omitted).

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of imprecisely defined crimes, broadly written statutes, and overly harsh punishments empowers prosecutors to make ad hoc and low-visibility decisions about the scope of criminal law. This current system fails to vindicate rule-of-law values and, in some instances, is less compatible with those values than the criminal common law.

1. Notice

The notice objection to common law crimes is that, because the boundary between legal and illegal behavior is not set forth in a written statute, the scope of the criminal law evolves and changes over time through the course of individual adjudications.[158] Because a change to a common law crime can be announced and applied to a defendant in the same case, a defendant can be convicted for conduct that was not clearly forbidden at the time the defendant acted.[159]

The modern criminal justice system can also result in convictions for conduct that was not clearly forbidden at the time the defendant acted.[160] Take, for example, a statute that forbids "unreasonable" conduct. The statute does not specify what conduct is reasonable and what conduct is unreasonable. The reasonableness—and thus the criminality—of conduct is decided only after a defendant has acted. Because individuals cannot know how prosecutors will judge the reasonableness of their actions, they lack notice about whether their conduct will be considered criminal.[161] Of course, when charges involving statutes with such qualitative standards are brought to trial, the jury serves as a check on prosecutors' legal judgment about what conduct should be criminalized. But juror judgments about qualitative standards are even less predictable and less easily discovered than prosecutors' judgments.[162]

Statutes with undefined terms also fail to give notice. Take, for example, the Racketeer Influenced and Corrupt Organizations ("RICO")

[158] See supra notes 36–39.

[159] See Jay, Part One, supra note 37, at 1061 (noting "the association of judicial lawmaking with *ex post facto* legislation").

[160] See Freund, supra note 14, at 444 (hinting at the irony that so many "indefinite terms" are included in statutes given that "the strong demand for codification of the criminal law . . . was largely inspired by the general abhorrence of undefined offenses").

[161] As Ernst Freund noted, statutes that use qualitative terms "fail to differentiate adequately either the province of morals or of social restraint from the province of law, or the province of the unlawful from that of the legitimate and even valuable." Id. at 438.

[162] What is more, because the vast majority of criminal cases result in plea bargains rather than trials, the jury does not provide this check in most cases.

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statute—a law adopted to help combat organized crime. Congress made it a federal crime for individuals to invest money obtained through a "pattern" of criminal activity in an "enterprise," to acquire an interest in an "enterprise" through a "pattern" of criminal activity, or to conduct the affairs of an "enterprise" through a "pattern" of criminal activity.[163] There is no common law understanding of the terms "enterprise" or "pattern," and Congress did not provide a particularly helpful definition of the terms.[164] As a result, the federal reporters are full of cases that attempt to give some coherent meaning to these terms.[165] And because statutory interpretation decisions are generally thought to apply to defendants who acted *before* a decision was announced,[166] leaving it to courts to define statutory terms means that defendants may act without having notice whether their conduct is legal or illegal.

Overly broad statutes fail to provide notice too. When legislators pass laws that sweep in more conduct than is necessary to prevent a particular harm, they do not expect the law to be enforced in all circumstances that fall within the text of the statute. But rather than identifying when enforcement would be appropriate and when it would be inappropriate, they leave it to prosecutors to decide what circumstances will trigger prosecution. In other words, they leave it to prosecutors to decide what conduct is, as a matter of practice, illegal.

[163] 18 U.S.C. § 1962(a) (2012).

[164] Congress defined "enterprise" to "include[] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (2012). While it may be obvious whether an entity is a corporation or a partnership, it is entirely unclear what it means for a group of individuals to be "associated in fact."

Congress defined "pattern" of criminal activity to mean "at least two acts . . . one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act." 18 U.S.C. § 1961(5) (2012). If two acts were all that was required to form a pattern, one imagines that Congress would have said "two or more." By using the phrase "at least two," Congress ostensibly meant that while two acts are necessary, they may not be sufficient to qualify as a "pattern." See H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 237–38 (1989).

[165] See Norman Abrams et al., Federal Criminal Law and Its Enforcement 598–619, 651–65 (5th ed. 2010) (collecting cases).

[166] See Rivers v. Roadway Express, Inc., 511 U.S. 298, 312–13 (1994); see also Hall, supra note 21, at 171 (noting that "all case law—and that includes jurisprudence interpretative of statutes or codes—operates retroactively"); Leah M. Litman & Shakeer Rahman, What Lurks Below Beckles, 111 Nw. U. L. Rev. 555, 579 (2017) (noting that "decisions of statutory interpretation reflect what a statute meant when it was enacted").

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Importantly, the public often knows—or at least suspects—that broad statutes will not be enforced as written. This is communicated to the public every time a challenge to an overly broad statute is met with the justification that broad language is needed in order to provide "flexibility" to prosecutors.[167] But the public does not know how prosecutors will choose to enforce these overly broad laws, and thus they do not have notice about the scope of criminal law.[168] Needless to say, prosecutors rarely explain under what circumstances they will enforce criminal law and under what circumstances they will decline to enforce.[169] And even when such circumstances are made public, defendants whose conduct falls outside of that interpretation often have no recourse if a prosecutor decides to abandon that interpretation in her particular case.[170]

The notice problems created by qualitative standards, undefined terms, and overly broad laws are more significant than the notice problems

[167] See, e.g., Abram Olchyk, A Spoof of Justice: Double Jeopardy Implications for Convictions of Both Spoofing and Commodities Fraud for the Same Transaction, 65 Am. U. L. Rev. 239, 270 (2015) (recounting that a federal statute addressing commodities fraud was written to include "catch-all" language of "all 'schemes and artifices'" in order "to allow prosecutors more freedom and 'flexibility' in pursuing fraudsters" (emphasis omitted)); Editorial, Prosecutors, Police Need Flexibility in Dealing with Synthetics, Idaho Press-Trib. (Dec. 20, 2013), https://www.idahopress.com/members/prosecutors-police-need-flexibility-in-dealing-with-synthetics/article_f092f130-6916-11e3-a233-0019bb2963f4.html [https://perma.cc/3M7J-UVPK] (arguing that, rather than waiting for legislatures to designate particular drugs as controlled substances, statutes should instead be written more broadly because "law enforcement needs the flexibility").

[168] Hessick, supra note 137, at 1152–56.

[169] See Epps, supra note 157, at 778 ("It is difficult to know exactly how often such prosecutorial discretion not to charge occurs—both because of the opacity of prosecutorial decisionmaking in general and because decisions *not* to act are particularly hard to measure."). The prosecutor's decision to proceed is often framed as a question of normative desirability, Bowers, supra note 150, at 1665–66, or "seek[ing] justice," Epps, supra note 157, at 782. But what, precisely, it means to do justice, either in a particular case or in more general terms, is rarely elaborated upon. Id. at 782–83.

[170] For example, when the Department of Justice ("DOJ") was repeatedly asked to clarify whether it would pursue federal charges against individuals who used or sold marijuana in states that had repealed their marijuana laws, DOJ made public a memorandum providing guidance to U.S. Attorneys. That memorandum set forth enforcement priorities in states that had repealed their marijuana prohibitions, and those priorities suggested that federal prosecutors would not target sellers or buyers that complied with relevant state regulations. But the memorandum also made clear that, whatever enforcement priorities the government set, federal prosecutors retained the power to fully enforce federal marijuana law and individuals could not rely on the memorandum as a legal defense. See Memorandum from James M. Cole, Deputy Attorney General to All United States Attorneys (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf [https://perma.cc/-5MK8-YS94].

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associated with common law authority. That is because common law crimes are subject to significant restraints. When judges exercise their common law power to convict for a crime that is not enshrined in statute, they are not simply deciding whether they think a particular defendant deserves punishment. Conviction is only warranted if a defendant's conduct is prohibited by previous cases or by broader principles that have been articulated in the past.[171] Those cases and principles are known in advance.[172]

Also, although the common law sometimes relies on qualitative standards,[173] those standards have been given content through adjudication. As a matter of practice, when judges have been charged with developing and enforcing qualitative standards, they have done so in a more transparent fashion. Case law articulates principles that provide more content to the qualitative standard, and courts often fashion rules that make the application of standards to particular facts more predictable.[174] These principles and predictability provide more notice to individuals than entrusting enforcement of qualitative standards to the personal judgment of prosecutors.

The process of common law decision-making also provides notice to the public about the scope of common law crimes. Any defendant who is convicted of a common law crime can appeal that decision. The appellate court will then have to decide whether the conviction was a legitimate exercise of common law authority, and the appellate court will explain its decision in a written opinion. That opinion will contain legal analysis that provides further information to individuals about the legality or illegality

[171] See Hall, supra note 32, at 46 (noting that "case-law embodies the principle of legality" because "there is a vast body of case-law which limits official action" and thus it "is at least arguable that this renders the principle of legality much more effective than does the generality of codes").

[172] See Pomorski, supra note 32, at 8 ("The possibility of a conviction on the basis of a precedent for a common law offense . . . is not a serious violation of the principle of legality because the criminal character of the punished act was known earlier.").

[173] Cf. Freund, supra note 14, at 438 (noting that some qualitative standards have "the sanction of common-law recognition"). For example, a common law self-defense claim requires a defendant to prove that she reasonably believed that force was necessary to prevent imminent unlawful force by another. Joshua Dressler, Understanding Criminal Law 221 (6th ed. 2012).

[174] For example, at common law, an intentional killing performed in "sudden heat of passion" as the result of "adequate provocation" would result in a conviction for manslaughter, rather than murder. Although "adequate provocation" seems to be a relatively open-ended concept, common law courts developed a list of situations that qualified as "adequate provocation" and situations that did not. Dressler, supra note 173, at 524–25.

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of certain conduct. The analysis will bind that court and the relevant lower courts in future cases. Put differently, when judges decide cases, they are making law. That law helps provide clarity and predictability for future cases—or, in other words, it provides notice.

In contrast to the constraints imposed by common law, prosecutorial decision-making in the current criminal justice system is essentially unconstrained. Prosecutors have no substantive constraints on their discretion; they are not limited by either existing cases or historical principles. Prosecutors are free to develop novel legal theories when prosecuting defendants, and they are free to pursue personal policy agendas in deciding the optimal scope of the criminal law.[175] So long as prosecutors are not pursuing cases based on a defendant's race or religion,[176] they are free to use whatever criteria they want in setting the scope of criminal law. Nor does the process of enforcement create constraints on prosecutors. Prosecutors regularly make decisions on an ad hoc basis. Prosecutors are not only not required to justify their decisions, but current doctrine protects them from having to provide such justifications. There is no formal legal requirement that prosecutors act consistently in different cases,[177] nor are there any effective practical mechanisms to make consistency a political requirement.[178]

In sum, lack of notice is a bigger problem in the current criminal justice system than it is in a system of common law crimes.

2. Democratic Accountability

Another objection to common law authority is that it is anti-democratic because judges are not accountable to voters through elections.[179] Unlike judges, legislators and prosecutors are elected, so the argument goes, and thus they are democratically accountable for their decisions about the scope of criminal law.[180]

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[175] See Baughman, supra note 12, at 1092.

[176] See Oyler v. Boles, 368 U.S. 448, 456 (1962) (noting that criminal laws may not be enforced "based upon an unjustifiable standard such as race, religion, or other arbitrary classification"); see also Steven Alan Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. Pa. L. Rev. 1365, 1372 & n.22 (1987) (collecting cases).

[177] Hessick, supra note 137, at 1150.

[178] See infra text accompanying notes 193–199.

[179] See supra note 40.

[180] One could legitimately question whether democratic accountability is necessarily a rule-of-law value. The "rule of law" is often described as having eight different elements:

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Before engaging with the democratic accountability objection on its own terms, it is important to note that the objection does not apply to most criminal prosecutions in this country. Although federal judges are appointed and enjoy life tenure, that is simply not the case for most state judges. The vast majority of state judges owe their seats to either direct elections or retention elections. As Professor Jed Shugerman has documented, "Almost 90 percent of state judges face some kind of popular election."[181]

In states where judges are subject to either direct or retention elections, they are *more* democratically accountable than federal prosecutors. U.S. Attorneys are nominated by the President and confirmed by the Senate, but they are never required to stand for elections themselves.[182] That is not to say that federal prosecutors are completely insulated from political pressure. The initial selection of federal prosecutors is indirectly democratic. Incoming presidents ordinarily replace U.S. Attorneys with

1. Generality. Roughly, there must be rules, cognizable separately from (and broader than) specific cases, such that the rules can be applied to specific cases, or specific cases can be seen to fall under or lie within them.

2. Notice or publicity. Those who are expected to obey the rules must be able to find out what the rules are.

3. Prospectivity. The rules must exist prior in time to the actions being judged by them.

4. Clarity. The rules must be understandable by those who are expected to obey them.

5. Non-contradictoriness. Those who are expected to obey the rules must not simultaneously be commanded to do both A and not-A.

6. Conformability. The addressees must be able to conform their behavior to the rules.

7. Stability. The rules must not change so fast that they cannot be learned and followed.

8. Congruence. The explicitly promulgated rules must correspond with the rules inferable from patterns of enforcement by functionaries (e.g., courts and police).

Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U. L. Rev. 781, 785 (1989); see also Lon L. Fuller, The Morality of Law 209–10 (rev. ed. 1969). Democratic accountability is not one of those elements. And direct elections historically have not been viewed as a bulwark against government encroachment on liberty. E.g., The Federalist No. 10 (James Madison); see also Jay, Part One, supra note 37, at 1020 (noting that "it would be wrong to assume that 'democracy' in our modern sense of popular control of the state was uniformly seen as the antidote for excessive government" during the early years of the Republic).

[181] Shugerman, supra note 146, at 3. "Nine states that select judges by gubernatorial appointment are Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont. New York's lower-court judges are elected, but not its judges on its highest court, the court of appeals. South Carolina and Virginia use legislative appointment." Id. at 296 n.22.

[182] 28 U.S.C. § 541(a) (2012).

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their own nominees,[183] and presidents are likely to nominate prosecutors who share their views. Additionally, federal prosecutors do not have life tenure, and so a president may fire any U.S. Attorney whose decisions prove to be politically unpopular.[184] But despite these political checks on federal prosecutors, they are more insulated from direct democracy than judges who stand for elections. Thus, the criminal common law decisions of elected judges have more democratic accountability than the decisions of federal prosecutors.

In addition, it is important to note that discussions about the democratic accountability of prosecutors ordinarily focus on the elected district attorney or the appointed U.S. Attorney. But these politically accountable actors make very few of the prosecutorial decisions discussed in this Article. Prosecutor offices—especially offices in large cities—are largely made up of line or career prosecutors.[185] These are the individuals who make most decisions about how to enforce certain statutes and which individuals to prosecute—that is to say, these are the individuals who largely set prosecutorial policy[186]—and yet they are relatively insulated from political pressure.[187] Line prosecutors usually do not turn over with the election or appointment of a new district attorney or U.S. Attorney, and they often enjoy civil service protection that shields them from firing for purely political reasons.[188] The elected or appointed prosecutor can try to control some of the decisions that line prosecutors make: they can issue office policies or appoint supervisors on the basis of loyalty. But the success of these initiatives can depend on a number of factors—including

[183] See Dave Boyer, White House Says Firing of U.S. Attorneys Is Standard Practice, Wash. Times (Mar. 13, 2017), https://www.washingtontimes.com/news/2017/mar/13/white-house-firing-us-attorneys-standard-practice/ [https://perma.cc/FZ66-2HDH] (documenting U.S. Attorney turnover in recent administration changes).

[184] 28 U.S.C. § 541(c) (2012) ("Each United States attorney is subject to removal by the President.").

[185] Cf. Kay L. Levine & Ronald F. Wright, Prosecution in 3-D, 102 J. Crim. L. & Criminology 1119, 1136 (2012) (noting that different offices have dramatically different numbers of prosecutors).

[186] Cf. Michael Lipsky, Street-Level Bureaucracy: Dilemmas of the Individual in Public Services 13–25 (1980) (explaining how "[s]treet-level bureaucrats make policy").

[187] See Baughman, supra note 12, at 1091 (noting that "individual prosecutors retain a wide degree of discretion and little accountability to fulfill broader executive directives or guidance").

[188] See, e.g., Nat'l Dist. Attorneys Assoc., National Prosecution Standards, No. 1-4.6, at 9 (3d ed.) (identifying "[p]artisan activities that are legal and ethical unless those activities interfere with the efficient administration of the office" and "refusal to participate in partisan activities" as impermissible reasons to remove a line prosecutor).

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office culture—over which the elected or appointed prosecutor has limited control.[189] Consequently, we should not pretend as though, as a group, prosecutors are democratically accountable.

Even in systems where legislators and lead prosecutors are directly elected but judges are not subject to elections, the democratic accountability objection is not quite as strong as it first seems. That is because the current criminal justice system does a poor job ensuring that legislators and prosecutors are held accountable for their policy decisions about substantive criminal law. Legislators are not held accountable for their policy decisions because they pass laws that are so broad or not specific enough to qualify as real policy decisions. They pass these laws knowing that the new laws are not really determining the scope of substantive criminal law; instead they are simply giving more options to prosecutors.[190] And how prosecutors actually employ those options is rarely (if ever) blamed on the legislators who pass the laws.[191] The current system allows legislators to pass the buck to prosecutors; that buck-passing has become so routine that legislators will sometimes reference prosecutorial discretion as a reason not to repeal old statutes or enact new statutes that actually conform to voters' policy preferences.[192] That is to

[189] See Levine & Wright, supra note 185, at 1170–78 (documenting differences in case handling and case outputs based on office structure and culture).

[190] Julie R. O'Sullivan, The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study, 96 J. Crim. L. & Criminology 643, 646–47 (2006); William J. Stuntz, Plea Bargaining and Criminal Law's Disappearing Shadow, 117 Harv. L. Rev. 2548, 2549, 2560–62 (2004).

[191] Stuntz, supra note 145, at 548.

[192] For example, Senator Chuck Grassley opposed legislation that would have reduced mandatory minimum sentences, not because he disagreed with the argument that those sentences were disproportionately harsh, but instead because prosecutorial discretion meant that those penalties were not actually being imposed in all cases. He noted that:

> [J]ust under half of all drug courier offenders were subject to mandatory minimum sentences, but under 10 percent were subject to mandatory minimum sentences at the time of their sentencing.
>
> There are two main reasons so few of these offenders are actually sentenced to a mandatory minimum. The first is they may fall within the safety valve Congress has enacted to prevent mandatory minimum sentences from applying to low-level, first-time drug offenders or, second, they may have provided substantial assistance to prosecutors in fingering high-level offenders in a drug conspiracy.
>
> That is an intended goal of current Federal sentencing policy, to put pressure on defendants to cooperate in exchange for a lower sentence so evidence against more responsible criminals can be attained. As a result, even for drug couriers the average sentence is 39 months. That seems to be an appropriate level.

161 Cong. Rec. S963 (daily ed. Feb. 12, 2015) (statement of Sen. Grassley).

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say, prosecutorial discretion is used as a reason for the *legislature* to avoid electoral accountability for failing to act according to democratic preferences.

While legislators pass the buck to prosecutors, prosecutors simply avoid democratic accountability for their substantive law decisions. They avoid accountability because their decisions are made out of the spotlight and are not easily discovered by voters.[193] Prosecutors rarely explain the general policies or criteria that they use to exercise their discretion.[194] And the democratic process does not create pressure for them to do so. Most prosecutors are reelected without an opponent; and even if a prosecutor finds herself in a contested election, that election almost never includes any reference to a prosecutor's policies.[195] Prosecutors also may not actually possess particularly robust policies that dictate how line prosecutors are supposed to act.[196] To the extent that line prosecutors make their own policy decisions, there is then no democratic accountability for those decisions, because line prosecutors are largely shielded from political pressure.[197]

This is not to say that there is no democratic accountability for elected prosecutors. Prosecutors will occasionally find themselves voted out of office if they mishandle a high-profile case.[198] But those high-profile cases are unlikely to provide much information about the general practices and enforcement policies of a prosecutor—and it is those practices and policies that are the de facto substantive criminal law in our current system. Indeed, prosecutors sometimes deliberately make

[193] See Baughman, supra note 12, at 1103–04; see also supra text accompanying notes 156–157.

[194] See supra notes 168–170, 176–178 and accompanying text; see also Baughman, supra note 12, at 1086–87 (discussing how federal prosecutors were able to successfully avoid disclosing a manual that instructed line prosecutors on general policy).

[195] See Ronald F. Wright, How Prosecutor Elections Fail Us, 6 Ohio St. J. Crim. L. 581, 591–606 (2009).

[196] See Baughman, supra note 12, at 1091–92 (reporting that state prosecutors' offices often "lack any handbook of instructions at all" and that, when surveyed, line prosecutors in the same prosecutor's office disagreed about whether the office had general policies for individual prosecutors to follow as well as what charges to bring when given the same factual scenario).

[197] See supra notes 187–189 and accompanying text.

[198] See Wright, supra note 195, at 602 ("Sometimes the challenger criticizes the incumbent for an overly aggressive investigation in a newsworthy case, such as a political corruption investigation; or perhaps the point of contention involves the failure to bring charges in a big case, or the poor conduct of a trial, or a plea bargain or acquittal that disposed of the charges.").

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different decisions in high profile cases than in other cases which create incorrect public perceptions about how the law is enforced.[199]

In states where judges are subject to retention or direct elections, common law authority in those states may actually result in *more* democratic accountability than in the current system. Unlike prosecutors, judges have to justify their decisions.[200] The opinions in which they justify their decisions give voters far more information about judicial policy decisions than voters have about prosecutorial policies. Nor are judges able to avoid responsibility as legislators do, by passing the buck to prosecutors. Unlike legislators, judges must make decisions in individual cases. So, voters are able to decide which judges to vote for based not only on the common law crimes that judges recognize, but also on how they interpret and apply those crimes in individual cases. Indeed, there is substantial evidence that judges are responsive to electoral pressure and that voters hold judges responsible for their decisions in criminal cases.[201]

In sum, the democratic accountability objection is not very strong. The vast majority of judges are elected, and because their decisions are transparent, voters have significantly more ability to act as a democratic check on judges than on prosecutors. And even in those jurisdictions where judges are not subject to periodic elections, the criminal justice policy decisions of legislators and prosecutors are rarely democratically accountable. Legislators pass their responsibility off onto prosecutors, and prosecutors are able to make low-visibility decisions that voters cannot check at the ballot box.

3. Separation of Powers

Some have stated that the prohibition of common law crimes is necessary in order to maintain the separation of powers.[202] The phrase

[199] See Jared Chamberlain et al., Celebrities in the Courtroom: Legal Responses, Psychological Theory and Empirical Research, 8 Vand. J. Ent. & Tech. L. 551, 554–58 (2006) (collecting evidence that high profile litigants are treated differently than ordinary litigants).

[200] As others have noted, the need to explain their decisions makes judges accountable. See, e.g., Louis Michael Seidman, Ambivalence and Accountability, 61 S. Cal. L. Rev. 1571, 1574 (1988).

[201] See, e.g., Carlos Berdejó & Noam Yuchtman, Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing, 95 Rev. Econ. & Stat. 741 (2013); Gregory A. Huber & Sanford C. Gordon, Accountability and Coercion: Is Justice Blind When It Runs for Office?, 48 Am. J. Pol. Sci. 247 (2004).

[202] See supra notes 42–46.

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"separation of powers" is often used to refer to two related but distinct ideas about the allocation of power in American government. The phrase sometimes refers to the fact that the text of the Constitution assigns different powers to different branches of government. The phrase "separation of powers" is also sometimes used to refer to the idea that the different branches of government serve to check and balance one another.[203] When it comes to common law crimes, we see both of these ideas represented in the separation of powers critique. The separation of powers objection is sometimes framed as a textual argument about which powers the Constitution assigns to different branches. And sometimes the objection is framed as an argument about the optimal division of powers between branches in order to provide checks and balances.

Before responding to the separation of powers objection, it is first worth noting that not all states have adopted the same separation of powers arrangements that were laid out in the federal Constitution. Some states have established a larger role for courts than the role specified by Article III.[204] Thus, any argument that criminal common law authority violates *federal* separation of powers principles may not apply equally to *state* separation of powers principles.

There is no disputing that the U.S. Constitution vests "[a]ll legislative Powers" in Congress and it vests the "judicial Power of the United States" in the Supreme Court and lower federal courts.[205] The power to legislate includes the power to decide which conduct is legal and which conduct is illegal—that is, the power to write criminal laws.[206] The judicial power, on the other hand, is widely understood to include only the power to interpret criminal laws as they arise in individual cases and to enter

[203] Some have argued that checks and balances are distinct from separation of powers theory because they are an "invasion" of separated powers. See Garry Wills, Explaining America: The Federalist 119 (1981). But more often the term "separation of powers" is thought to encompass both ideas—a formalist idea that different branches enjoy different powers, and a functionalist idea that the branches check and balance one another. See Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1522–31 (1991) (noting these formalist and functionalist conceptions of separation of powers).

[204] See F. Andrew Hessick, Cases, Controversies, and Diversity, 109 Nw. U. L. Rev. 57, 65 (2015); see also infra note 208.

[205] U.S. Const. art. I, § 1; U.S. Const. art. III, § 1.

[206] See, e.g., McMunigal, supra note 19, at 1287 ("The dominant attitude expressed in American jurisdictions is one of legislative supremacy and exclusivity [in criminal law].").

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judgments in those cases.[207] Thus, the text of the Constitution seems to support codification rather than common law crimes.[208]

But the textual argument is based on our *current* understanding of the terms "legislative powers" and "judicial power," not the original understanding. The meaning of the term "judicial power" has changed significantly in the two centuries since the Constitution was first ratified, as has our understanding of the concept of separation of powers.[209] When the Constitution was written, the meaning of the term "judicial power" was relatively unsettled.[210] But the strong weight of the evidence indicates

[207] More generally, the judicial power is thought to include the power to provide remedies for legal wrongs, to render dispositive judgments, and to make factual and legal findings. See F. Andrew Hessick, Consenting to Adjudication Outside the Article III Courts, 71 Vand. L. Rev. 715, 719–22 (2018).

[208] Interestingly, the division of powers in the U.S. Constitution is not as strict as the division of powers observed in some states. See, e.g., Mass. Const. pt. 1, art. XXX ("In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men."); Tex. Const. art. II, § 1 ("The powers of the government of the State of Texas shall be divided into three distinct departments, each of which shall be confined to a separate body of magistracy, to wit: Those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."); see also Louis L. Jaffe, Judicial Control of Administrative Action 30 (1965) (noting that the U.S. Constitution, unlike some state constitutions, "has no clauses excluding the exercise of the power of one organ by another").

[209] See William N. Eskridge Jr., All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806, 101 Colum. L. Rev. 990, 993–94 (2001) (explaining that, at the time the Constitution was ratified, the term "separation of powers" had a different meaning that "emphasiz[ed] checks and balances more than stringent separation of functions").

[210] See Edward C. Eliot, The Common Law of the Federal Courts, 36 Am. L. Rev. 498, 503 (1902) ("At the time of the adoption of the Constitution, no clear view was held by the members of the convention as to what its effect would be, in respect of the judicial power."); Jay, Part One, supra note 37, at 1035 (noting the "highly generalized language concerning the role of federal courts" in Article III, the fact that "Article III came about through a process of known compromises" and that "few aspects of the debate (if any) on federal jurisdiction are documented"). Years after the Constitution was adopted, Gouverneur Morris, one of the delegates to the Constitutional Convention, sent a letter to Timothy Pickering about how to interpret the Constitution. He stated his belief that the provisions of the Constitution are "as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary." Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), *reprinted in* 3 The Records of the Federal Convention of 1787, 419, 420 (M. Farrand ed., 1911). He suggested that the ambiguity of the provisions regarding the judiciary had been phrased in general terms because of the "conflicting opinions [that] had been maintained" on the subject. Id.

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that those who drafted and ratified the Constitution understood that term to encompass criminal common law authority.[211]

There is significant evidence that, in the early years of the Republic, the "judicial power" was understood to include criminal common law authority.[212] It is widely accepted that the Constitution was drafted and

[211] See, e.g., Randall Bridwell & Ralph U. Whitten, The Constitution and the Common Law: The Decline of the Doctrines of Separation of Powers and Federalism 35–51 (1977); 1 Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 623–33 (Paul A. Freund, ed., 1971); Charles Grove Haines, The Role of the Supreme Court in American Government and Politics 1789–1835, at 125–28 (1944); Morton J. Horwitz, The Transformation of American Law 1780–1860, at 9–12 (1977); 1 Charles Warren, The Supreme Court in United States History 433–37 (1922); Jay, Part One, supra note 37; Stewart Jay, Origins of Federal Common Law (pt. 2), 133 U. Pa. L. Rev. 1231 (1985) [hereinafter Jay, Part Two]; Stephen B. Presser, A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence, 73 Nw. U. L. Rev. 26 (1978); Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 73 (1923). But see Robert C. Palmer, The Federal Common Law of Crime, 4 Law & Hist. Rev. 267 (1986); Preyer, supra note 31; Rowe, supra note 116.

[212] There is a rich and nuanced discussion surrounding the original public meaning of the term "judicial power." For example, Professors Bill Eskridge and John Manning have thoughtfully debated whether the term "judicial power" was understood to require judges to act only as faithful agents of the legislature when interpreting statutes or whether it was understood to permit judges to expand or narrow statutes based on considerations other than statutory text and legislative intent. See Eskridge, supra note 209; John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1 (2001). The question of equitable interpretation is related to, but separate from, criminal common law authority. Common law authority involves the ability of judges to act *in the absence* of a statute, rather than their ability to act within the confines of a statute. While, as Manning points out, the evidence surrounding the question of equitable interpretation may not be conclusive, the evidence surrounding criminal common law authority is far more one-sided. See supra note 211.

It may seem odd that citizens would be more accepting of the judiciary's ability to act in the absence of any statutory authority than their ability to exercise broad personal judgment within the confines of a statute. That is because the modern discussion about judicial power is one about constraint of judges' personal policy preferences. But, at the time of the Founding, citizens would not have necessarily thought that common law authority—that is, the ability of judges to convict in the absence of a statute—entailed less constraint than equitable interpretation. For one thing, common law authority was viewed as constrained by historical common law or natural common law. See supra notes 55–56, 171–173 and accompanying text. For another, there was broad agreement that Parliament had the ability to displace common law through statutes. See 1 William Blackstone, Commentaries on the Laws of England 160 (Oxford, Clarendon Press, 3d ed. 1768). Indeed, the idea that the courts have more authority to act in the absence of legislation has endured. See Eliot, supra note 210, at 500 (observing that in a "class of cases which fall beyond State control, and which have not been touched by Congressional action, the Federal courts enforce a 'common law'"). Modern examples of this principle can be found in the areas of maritime law, punitive damages, *Bivens* actions, and equitable injunctions.

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ratified against a backdrop of English common law principles.[213] And historical practice appears to confirm that the judicial power included the power to recognize and convict for common law crimes. In the years immediately following ratification of the Constitution, there were a number of federal prosecutions brought in the absence of federal criminal statutes. Statutes were considered unnecessary because certain actions were understood to be illegal as a matter of substantive common law. Common law prosecutions were brought for bribery, counterfeiting, and piracy.[214] And despite the fact that these actions had not been explicitly forbidden by Congress, those prosecutions appear to have been accepted as a matter of course.[215] Judges routinely instructed grand juries and petit juries on common law crimes. Justice Story wrote in 1816 that "excepting Judge Chase, every Judge that ever sat on the Supreme Court Bench, from the adoption of the Constitution until 1804" held the opinion that "the Courts of the United States have from their very organization a general

[213] See, e.g., Jay, Part One, supra note 37, at 1033 n.138 (noting that "[m]any provisions of the Constitution employed common-law terms, and common-law principles were expected to provide guidance, as is indicated by various statements made during the ratification process," and collecting sources); Ann Woolhandler, Public Rights, Private Rights, and Statutory Retroactivity, 94 Geo. L.J. 1015, 1062 (2006) (noting that "[t]he Constitution . . . was written against a backdrop of . . . traditional common law interests"); see also Stephen E. Sachs, Constitutional Backdrops, 80 Geo. Wash. L. Rev. 1813, 1836–37 (2012) (suggesting that the Constitution is best understood as having been ratified against a "backdrop" of unwritten common law rules).

To be sure, in establishing a republic, the Founders and the public were necessarily rejecting some aspects of the English system. But criminal common law authority is not obviously tied to those aspects of the English system that the colonies rejected, such as the infallibility of the Crown. But see Jay, Part One, supra note 37, at 1087 (noting that, during the partisan fighting over federal criminal common law, some common law opponents argued that common law authority was "making Americans once again subjects of Great Britain by applying its common law.").

[214] See Jay, Part One, supra note 37, at 1039–42, 1063–64 (providing accounts of federal common law prosecutions in 1790–1794); id. at 1064 n.306 (describing a 1797 common law counterfeiting prosecution "that seems to have provoked little public outcry"); id. at 1073 (identifying several common law prosecutions for neutrality violations and for treason in the mid- to late 1790s); Preyer, supra note 31, at 229–31 (describing early American common law prosecutions).

[215] As Professor Stewart Jay notes, only Justice Iredell appears to have originally rejected federal common law authority; but he subsequently endorsed federal non-statutory prosecutions. Jay, Part One, supra note 37, at 1041, 1053–54. But see Preyer, supra note 31, at 231 (arguing that the evidence "is hardly conclusive for the position that there was a widely shared view among the early federal judges supportive of a federal common law of crimes").

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common law jurisdiction" over crimes that violate the sovereignty of the United States.[216]

Judges were not the only early federal officials to endorse federal common law prosecutions. As Professor Stewart Jay documents in his exhaustive history of the origins of federal common law, the prosecution of Gideon Henfield and John Singleton prompted the majority of the men who we now refer to as "Founding Fathers" to take the position—some more publicly than others—that criminal common law prosecutions were permitted. Henfield and Singleton were indicted for violating the neutrality of the United States in the war between England and France, a crime for which there was no congressional statute, but ample common law authority. A 1793 formal opinion of Attorney General Edmund Randolph for then-Secretary of State Thomas Jefferson made clear the Washington administration's position that Henfield "is indictable at the common law, because his conduct comes within the description of disturbing the peace of the United States."[217] As Professor Jay recounts, Randolph, Jefferson, Alexander Hamilton, and John Jay all approved of the prosecution, which was grounded in the common law rather than in statute.[218]

This apparent consensus that federal prosecutions could be brought in the absence of a federal statute was, however, short-lived. The consensus was undermined by the fact that common law prosecutions became a weapon in the partisan battles between the Federalists and the Republicans. Federalist judges used their common law authority to convict Republicans in federal (and some state) courts, and Republican state judges used their common law authority to convict Federalists in the

[216] 1 Life and Letters of Joseph Story, supra note 57, at 299. Three of the Justices who endorsed criminal common law authority served as delegates to the Constitutional Convention. Jay, Part One, supra note 37, at 1016 (identifying Justices Wilson, Ellsworth, and Patterson).

[217] Jay, Part One, supra note 37, at 1048.

[218] Id. at 1053. As Jay notes, John Marshall:

> avoided reaching the question of the precise scope of federal common-law jurisdiction. . . . Marshall, and other Federalists, never had the ambition to claim that federal courts had the full jurisdiction of the central courts of England. At the same time, for any case within federal jurisdiction, Marshall would draw extensively upon common-law principles. He evidently thought that section 11 of the 1789 Judiciary Act authorized a common-law jurisdiction for criminal cases.

Jay, Part Two, supra note 211, at 1333.

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state courts.[219] As a consequence, federal criminal common law authority became inextricably bound up with those partisan positions.[220] Limiting the common law authority of federal judges became a Republican cause. Jefferson and Randolph, who had supported criminal common law authority in the Henfield prosecution, turned against it.[221] Republicans eventually gained control of federal offices, including the Supreme Court. And as a result of that political victory,[222] in 1812 the Supreme Court declared that federal courts had no criminal common law authority in *United States v. Hudson & Goodwin*.[223]

The fact that federal common law authority was short-lived does not change the fact that criminal common law authority was initially

[219] As Stewart Jay has documented, the controversy over federal common law authority was prompted by "the use of these prosecutions for political purposes during . . . the close of the [1790s]." Jay, Part One, supra note 37, at 1112; see also id. at 1031 (noting that "Federalists . . . [took] such measures as bringing treason charges, prosecuting for the common-law offenses of sedition and violating neutrality, and enacting the despised Alien and Sedition Acts"); id. at 1066 (describing the common law criminal libel prosecution of a Federalist by Republicans in Pennsylvania state court); id. at 1075 (noting that, prior to the passage of the Alien and Sedition Acts, "Federalists had been bringing sedition prosecutions at common law for several years, both in federal and state courts, against well-known Republican editors, causing the demise of a number of publications"); id. at 1076 (noting that, "when he became President, Jefferson suggested the use of *state* criminal libel prosecutions against Federalist editors for personal attacks on him").

[220] See Preyer, supra note 31, at 242 (emphasizing that, when it came to the question of federal criminal common law "political combat merged with the legal issue"); Rowe, supra note 116, at 936 ("The Jeffersonian understanding of the Constitution, which Justice Johnson summarily articulated in *Hudson*, was forged in the furnace of the Sedition Act."). This is not to say that the issue of criminal common law authority for the federal courts "was *purely* a creature of partisan politics." Jay, Part One, supra note 37, at 1033 (emphasis added). But the partisan fight over the matter is crucial to understanding how the consensus over the matter appears to have collapsed less than two decades into the Republic, and that the authority was disavowed by the Supreme Court in 1812.

[221] See Jay, Part One, supra note 37, at 1091–93; see also 2 William Winslow Crosskey, Politics and the Constitution in the History of the United States 763 n.* (1953) (noting Jefferson's initial support and subsequent rejection of federal common law power and stating that his subsequent change of heart was "new and unjustified").

[222] See 2 Crosskey, supra note 221, at 766 (claiming that "the evidence indicates that Jefferson and certain of his henchmen had carefully contrived this case to present this issue, and carefully held it back till they controlled the Court"); Jay, Part One, supra note 37, at 1014 n.38 (noting the "series of unusual postponements in the case" as offering "some evidence that the proceedings were delayed until the Republicans had a safe majority on the Supreme Court"); Preyer, supra note 31, at 247 (noting that, when *Hudson & Goodwin* "was finally decided in March 1812," the "Supreme Court . . . had, for the first time, a Republican majority").

[223] 11 U.S. (7 Cranch) 32, 34 (1812) (holding that the "exercise of criminal jurisdiction in common law cases" is "not within the[] implied powers" of the federal courts).

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understood to have been assigned to the judicial branch by the Constitution.[224] The idea that criminal common law authority fell outside of the judicial power developed over the course of a struggle between Federalists and Republicans. And it was not until after ratification, when those parties were firmly entrenched, that criminal common law authority began to be viewed as an impermissible intrusion by the judiciary on the legislative power.[225]

That criminal common law authority was rejected within thirty years after the Constitution was ratified may, however, indicate that authority over the content of criminal law should not be assigned to the judiciary. That is to say, the fact that criminal common law authority was so quickly rejected may be evidence that common law authority is incompatible with our system of divided government. This is the second separation of powers argument—an argument that the power to write the criminal laws should be separated from the power to interpret those laws and that those powers should be assigned to different branches.

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[224] When discussing equitable interpretation, rather than common law crimes, John Manning appears to have suggested that the original understanding of the term "judicial power" may actually be better understood using later rather than earlier cases. In particular, he suggests that cases from the Marshall Court, rather than earlier cases, give us greater insight into the original understanding of "judicial power."

> In a new system of government with a largely uncharted legal tradition, judges would naturally seek interpretive principles in the most familiar sources of authority, namely English treatises and case law. Hence, largely unelaborated invocations of the equity of the statute in the earliest days of the republic may reflect a predictable reliance on English sources in a new legal system, rather than an affirmative judgment that the federal judges, in our distinctive constitutional system, inherited the same broad lawmaking powers that their English forebears had enjoyed.

Manning, supra note 212, at 89.

It is uncontroversial that later cases may reflect a *better* understanding of the meaning of the Constitution. After all, the common law process allows judges and litigants to refine principles and arguments over time. And that refinement likely includes more nuanced interpretation of constitutional terms that fit more logically within the broader structure of the Constitution. But whether a later case includes a *better* understanding of a constitutional term does not tell us whether that was the *original* understanding. To the contrary, there is ample reason to believe that those who wrote and ratified the Constitution would have also relied on those same "familiar sources of authority" for their understanding of the meaning of constitutional terms. What is more, given that the scope of judicial power became part of a partisan controversy in the decades after the Founding, see supra notes 219–220, it seems quite likely that the understanding of the term changed after ratification.

[225] As Professor Stewart Jay documents, it was during the debates over the Judiciary Act of 1801 that "Republicans began to raise with increasing clarity separation of powers concerns. . . . [T]he Republicans warned that 'this adopting the common law is only another name for legislation.'" Jay, Part One, supra note 37, at 1104 (quoting 11 Annals of Cong. 713 (1802) (statement of Rep. Macon)).

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The separation of powers between different branches is assumed to promote individual liberty because government abuse is less likely when all three branches must agree.[226] In the context of criminal law, the branches must agree that conduct is deserving of punishment in order for a defendant to be convicted. If the legislature does not believe certain conduct should be punished, then it will exclude the conduct from its definition of crimes. If the prosecutor does not believe that the particular circumstances of a case warrant punishment, then she will decline to bring charges in a particular case. And the judiciary will dismiss charges brought by prosecutors unless a defendant's conduct is clearly prohibited by the criminal statute.[227] The jury also serves as a check on government power, not only because it will acquit if the prosecutor fails to carry her burden of proof, but also because it has the power to nullify—that is, acquit against the weight of the evidence—in cases where a prosecution appears unjust or unwarranted.[228]

Those who believe that common law crimes fail to strike an optimal balance of power between the branches appear to object to the courts' encroachment on the legislature's power to write the law.[229] After all, when employing their common law authority, judges are both deciding that conduct is criminal and interpreting whether a particular defendant's conduct meets the threshold in a particular case. But these concerns about encroachment are likely overstated. For one thing, both prosecutors and juries continue to act as a check on judges. Judges cannot convict unless prosecutors bring charges, and juries have been known to acquit because they did not agree with a judge's instructions about the scope of the

[226] See, e.g., Bond v. United States, 564 U.S. 211, 222 (2011); Jaffe, supra note 208, at 32; Barkow, supra note 147, at 871.

[227] See Baughman, supra note 12, at 1083–84 (articulating these constitutional checks and noting that they have, at times, been underenforced).

[228] See Laura I. Appleman, The Lost Meaning of the Jury Trial Right, 84 Ind. L.J. 397, 409–17 (2009) (describing the historical view of the jury right as ensuring "the local community was able to both create and control the content of . . . substantive law" and that the jury functioned as "a popular bulwark against government and sovereign oppression"); Anne Bowen Poulin, The Jury: The Criminal Justice System's Different Voice, 62 U. Cin. L. Rev. 1377, 1400 (1994) ("The jury's power to nullify provides an accommodation between the rigidity of the law and the need to hear and respond to positions that do not fit legal pigeonholes, such as claims of spousal abuse before the battered-spouse syndrome received acceptance."); see also Blakely v. Washington, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.").

[229] See supra note 42.

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criminal law.[230] For another, judges' common law authority is not unlimited; it is constrained by existing common law—i.e., previously decided cases and principles.[231] Legislatures do not have similar constraints on their ability to criminalize behavior, so long as the criminal laws do not prohibit otherwise constitutionally protected behavior.[232]

But even though common law crimes allow judges to perform more than one function, that does not mean they provide fewer checks and balances than codification. The current codification system does a poor job involving all three branches in a case and thus in protecting individual liberty.[233] Instead, the prosecutor is extraordinarily powerful—possessing the power not only to enforce the laws, but also the power to largely determine the scope of the substantive law and the power to obtain convictions while avoiding adjudication in the courts.[234]

As discussed above, the legislature has written laws that delegate the scope of the criminal law to prosecutors.[235] Not only have the legislature and the executive failed to check each other, their actions have also served to weaken—and in some cases, eliminate—the ability of the judiciary to act as a check.[236] The rise in guilty pleas and the decline of trials is directly attributable to the collaboration of legislatures and prosecutors.

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[230] See Harry Kalven, Jr. & Hans Zeisel, The American Jury 58, 116 (1966) (reporting on jury nullification).

[231] See supra text accompanying notes 171–174.

[232] As Professor Darryl Brown has explained:

> [I]n the modern era, legislatures create crimes, and legislatures do not abide by a consistent set of principles regarding what matters are appropriate for criminalization. They employ criminal law purely instrumentally, as a tool for achieving whatever end majorities choose to pursue. More interestingly, courts have never developed significant constitutional doctrines for checking legislatures' crime-creation choices, even as they developed a range of doctrines to review legislative action in any number of other topics, and in the process of regulating other topics—speech, privacy rights, property and contract rights, rights to fair notice, weapons possession—they have overturned hundreds of criminal laws.

Darryl K. Brown, Can Criminal Law Be Controlled? 108 Mich. L. Rev. 971, 972 (2010).

[233] See Barkow, supra note 147, at 871–73 (stating that the prosecutors' combination of powers "can lead to gross abuses," that "the combination of law enforcement and adjudicative power in a single prosecutor is the most significant design flaw in the federal criminal system," and that "judicial and legislative oversight has failed to correct this power grab by prosecutors").

[234] Id. at 876–77 ("[A] prosecutor's decision about what charges to bring and what plea to accept amounts to a final adjudication in most criminal cases.").

[235] See supra text accompanying notes 151–155.

[236] See Stuntz, supra note 145, at 528 ("[P]rosecutorial and legislative power reinforce each other, and together both these powers push courts to the periphery.").

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Legislatures pass overlapping statutes and statutes with harsh penalties. These statutes, in connection with the lack of judicial oversight over prosecutorial discretion and plea bargaining, ensure that defendants plead guilty rather than insisting on trial.

The elimination of trials has also removed juries as a check on substantive criminal law in individual cases. When a criminal case proceeds to trial, the jury serves not only as a fact-finder; it also serves as a democratic check on government actors' decisions to prosecute.[237] If, for example, a prosecutor brings a case under a statute involving a qualitative standard, the jury will acquit unless it agrees with the prosecutor's judgment that the defendant acted unreasonably. Eliminating juries removes them as a check on the scope of criminal statutes, and it also removes them as a check through nullification.[238]

To be clear, the judges are at least partially responsible for their greatly diminished role in criminal prosecutions. They have refused to place limits on the plea-bargaining process, and they routinely "rubber stamp cooperation, charging, and plea decisions."[239] In addition to their failures to check plea bargaining, judges have also been less active in interpreting criminal laws than other statutes. Judges could, for example, choose to interpret statutes at the beginning of a criminal case, before most defendants decide whether to plead guilty. This is the current practice in the civil system, in which judges routinely construe statutes when deciding a motion to dismiss.[240]

In embracing their role as mere interpreters of statutes, and in taking up that task largely after conviction, modern judges largely eschew their ability to narrow the scope of the criminal law. Historically, judges construed criminal statutes narrowly, thus helping to preserve individual liberty.[241] Current trends in judicial methodology and ideology have made the judiciary less able to check the expansion of criminal power.[242]

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[237] See supra note 228.

[238] See generally Appleman, supra note 228.

[239] Barkow, supra note 147, at 872.

[240] Gold et al., supra note 148, at 1632–33, 1640–44.

[241] Eskridge, supra note 209, at 1005; Zachary Price, The Rule of Lenity as a Rule of Structure, 72 Fordham L. Rev. 885, 896–99 (2004).

[242] See, e.g., Carissa Byrne Hessick, Corpus Linguistics and the Criminal Law, 2017 BYU L. Rev. 1503, 1506, 1514, 1526 (2017) (noting how textualists will often rely on conclusions about "ordinary meaning" in interpreting statutes rather than canons of statutory construction that promote notice and accountability); Price, supra note 241, at 886, 899, 912–21 (arguing that modern decisions that deemphasize the rule of lenity have decreased democratic accountability and separation of powers).

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Textualism in particular—which asks only whether government action is supported by the text of a statute—is particularly ill-suited to ensuring that legislators and prosecutors are held responsible for their decisions to increase the scope of criminal law.[243]

Common law authority provides more checks and balances than the current codification system because it involves all three branches. Judges are not able to initiate prosecutions on their own; they still need prosecutors to bring charges against specific individuals. Nor do judges have exclusive authority over the scope of criminal law. The legislature has the ability to overrule any common law decision.[244] If a judge deems certain conduct criminal as a matter of common law, that judgment can be overturned by the legislature—even retroactively. And if a judge decides certain behavior is permitted, the legislature could criminalize it prospectively.

In sum, the separation of powers objection does not suggest that our current system of codification is superior to the criminal common law. The text of the Constitution does not forbid common law crimes, and common law crimes are better suited to ensuring the participation of all three branches, thus protecting individual liberty.

4. Discretion and the Potential for Abuse

Some have argued that common law authority affords judges greater discretion than they have under a system of statutes and with that discretion comes the potential for abuse.[245] Because judges make the decision whether certain conduct is a crime in the context of an individual case, so the argument goes, they may make those decisions on the basis of a particular defendant's race, religion, or other irrelevant individual characteristics. In contrast, statutes are generally applicable. While they may be inspired by a particular crime or set of crimes, the legislature's decision whether to classify particular conduct as criminal is always forward-looking.

[243] See Price, supra note 241, at 911–13 (arguing that a more robust rule of lenity would provide greater accountability for legislators and executive officials than does our current system).

[244] See 1 William Blackstone, Commentaries on the Laws of England 160 (Oxford, Clarendon Press, 3d ed. 1768); see also Philip Hamburger, The Inversion of Rights and Power, 63 Buff. L. Rev. 731, 745 (2015) (discussing Parliament's absolute power).

[245] See supra notes 47–48.

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The discretion argument does not stand up to serious scrutiny. While the text of a statute may leave no room for the consideration of personal characteristics, its enforcement certainly does. Qualitative standards, undefined terms, and overly broad statutes delegate significant discretion to prosecutors—more discretion than what is given to judges by common law crimes.[246] Prosecutors are just as likely to be influenced by a defendant's personal characteristics as are judges. Indeed, because prosecutors, unlike judges, are not bound by their past decisions, prosecutors may be more likely to allow race, religion, or other unacceptable factors to drive their decisions.[247] There is a robust literature demonstrating that police and prosecutors are more likely to arrest, prosecute, and seek harsh sentences for defendants who are poor or who are members of racial minorities.[248]

As the Supreme Court acknowledged in *Bordenkircher v. Hayes*, "[t]here is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse."[249] As then-Attorney General Robert Jackson explained, sprawling criminal codes allow prosecutors to pursue charges against anyone they choose:

> With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and

[246] Hessick, supra note 137, at 1156–59.

[247] See Baughman, supra note 12, at 1092.

[248] E.g., David A. Harris, Profiles in Injustice: Why Racial Profiling Cannot Work 10–12 (2002); Charles Crawford et al., Race, Racial Threat, and Sentencing of Habitual Offenders, 36 Criminology 481, 481–82, 503 (1998); Jill Farrell, Mandatory Minimum Firearm Penalties: A Source of Sentencing Disparity?, Just. Res. & Pol'y, June 2003, at 95, 98–99, 103–04, 110–12; Cassia Spohn et al., The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges, 25 Criminology 175, 175–76, 186 (1987); Sonja B. Starr & M. Marit Rehavi, Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of *Booker*, 123 Yale L.J. 2, 28–29 (2013); Jeffrey T. Ulmer et al., Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences, 44 J. Res. Crime & Delinq. 427, 450–52 (2007).

[249] 434 U.S. 357, 365 (1978).

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> then searching the law books, or putting investigators to work, to pin some offense on him.[250]

Professor John Jeffries has argued that statutes may be better at preventing abuse than the common law because of the limits they place on the executive. Jeffries acknowledges that the greater threat of abuse comes from law enforcement, rather than from judges.[251] The courts' need to justify their decisions and the creation of precedent impose "important constraints on abuse of discretion in the judicial process."[252] But Jeffries nonetheless sees common law authority as creating an unacceptable risk of abuse because it invites abuse *by law enforcement*. Jeffries explains:

> The law remains entirely open-ended. No doubt some applications are predictable, but others are open to speculation. And the incentive to speculate rests, first and most important, with the agencies of law enforcement. Viewed from their perspective, [common law authority] is a continuing invitation to vindicate their own notions of appropriate social control by criminal arrest and prosecution.[253]

In other words, common law authority exacerbates abuse by police and prosecutors.

It is unclear whether common law authority invites more abuse by police and prosecutors than does our current system of qualitative standards, undefined terms, and overly broad statutes. That is an empirical question that may be impossible to test. But there is little doubt that qualitative standards, undefined terms, and overly broad statutes *also* invite abuse.

What is more, current institutional dynamics allow prosecutors to obtain guilty pleas from defendants even when the criminal statutes are clearly worded and the defendants' behavior falls outside of the statutory language. Take, for example, the case of Evan Emory.[254] Emory filmed himself singing innocuous songs to students at a local school. He then altered the video to make it appear as though he was singing songs with

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[250] Robert H. Jackson, The Federal Prosecutor, 31 Am. Inst. Crim. L. & Criminology 3, 5 (1940).

[251] Jeffries, supra note 32, at 215 ("[T]he chief locus of concern is not the courts, but the police and prosecutors.").

[252] Id. at 214.

[253] Id. at 226.

[254] Erica Goode, Michigan Town Split on Child Pornography Charges, N.Y. Times (Mar. 7, 2011), https://www.nytimes.com/2011/03/08/us/08muskegon.html? [https://perma.cc/MJA2-H8T9].

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graphic sexual lyrics and that the children were laughing and enjoying the songs. After Emory posted the altered video on YouTube, the county prosecutor charged Emory with manufacturing and distributing child pornography, crimes that carry a maximum punishment of 20 years' imprisonment. Emory's conduct fell well outside of the child pornography statutory language,[255] but he negotiated a plea to lesser charges in order to avoid the risk of conviction at trial.[256]

So even assuming that Jeffries is correct, and that common law authority encourages abuse by law enforcement, it is unlikely that such abuse would be worse than the current codification system. In a system where penalties are so harsh that defendants cannot risk trial, prosecutors can unilaterally decide what conduct should be punished. Plea bargaining deprives judges of the ability to check those decisions. At least the common law system requires *both* prosecutors and judges to agree that punishment was warranted. The current system requires only prosecutors to reach that judgement because the system's high penalties ensure that defendants will not seek a trial. And the leverage that the current system has given prosecutors in order to secure plea bargains is sometimes so high that it allows prosecutors, as in the case of Evan Emory, to expand the scope of the criminal law to reach conduct that plainly falls *outside* of the scope of a clearly written statute.

5. Uniformity and Deterrence

Some argue that, because common law crimes have not been reduced to a specific, defined set of circumstances, the outcomes of criminal cases are less likely to be uniform and illegal conduct is less likely to be deterred.[257] Neither of these arguments stands up to scrutiny.

The uniformity argument rests on the assumption that statutes necessarily reduce crime definitions to a specific, defined set of circumstances. But that is simply not true.[258] Statutes that contain qualitative standards or undefined terms also fail to articulate the specific,

[255] The statute requires either filming a child in a sexual activity or making it appear that a child is engaging in that activity. Mich. Comp. Laws § 750.145c (2019). Emory did neither. Laughing—even laughing at a sexually explicit song—is not, in any sense of the term, sexual activity.

[256] See Erica Goode, Crime & Punishment in YouTube Generation, Hous. Chron., Mar. 13, 2011, at A23.

[257] See supra notes 49–50.

[258] See Pomorski, supra note 32, at 9 (observing that "in a great [many]" jurisdictions "the wording of the criminal statutes is as vague as the common law doctrines").

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defined set of circumstances that are illegal. And just as the constraints of the common law methodology give more notice to defendants than does the current system,[259] so too is the application of criminal law likely to be more uniform than in the current system.[260] Judges must articulate the reasons for using or declining to use a particular common law doctrine, those decisions are subject to appeal, and those appeals give rise to binding precedent.[261] In contrast, prosecutors need not articulate the reasons for their decisions, those decisions are not reviewable, and the decisions made in one case do not constrain their decisions in subsequent cases.

The argument that common law crimes undermine deterrence is also not particularly strong. Because common law crimes are "generally unknown to the public,"[262] so the argument goes, they cannot "deter future offenders through fear of punishment."[263] This deterrence argument, though often repeated by criminal-law scholars,[264] ought not be taken at face value. The argument appears to rely on the assumption that individuals will not know the content of common law crimes unless they read all of the judicial decisions from criminal cases, whereas they could learn the content of statutory crimes by merely consulting the criminal code.[265] But the idea that individuals could read and understand every crime in a jurisdiction's criminal code is laughable.[266] In fact, if you factor in scope and stability, people are probably more likely to know the content of criminal common law than criminal statutes. There are only a small number of common law crimes, which have remained relatively stable over time; in contrast, there are a vast number of criminal statutes, which can be enacted or repealed at any time based on legislative whim.[267] What is more, accessibility of crime definitions depends on circumstances other than existence of the common law authority. For example, the availability

[259] See supra Subsection III.B.1.

[260] See Rosenberg, supra note 31, at 194 (arguing that common law crimes "may bring uniformity and clarity in some instances where statutes fail to do so").

[261] See Jeffries, supra note 32, at 214.

[262] Robinson, supra note 47, at 340.

[263] 1 LaFave, supra note 3, § 2.1(f), at 118.

[264] See supra note 50.

[265] See Paul H. Robinson & Jane A. Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 Stan. L. Rev. 681, 682 (1983) ("Only a precise, principled code that sufficiently defines forbidden conduct can achieve its goals of condemnation and deterrence.").

[266] Jeffries, supra note 32, at 210–11; Roth, supra note 144, at 176.

[267] See supra text accompanying notes 231–232.

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of high-quality treatises can make the common law more accessible than criminal codes,[268] whereas the failure to compile and formally codify legislatively enacted crimes can make statutory crimes inaccessible.[269]

Notably, the deterrence argument ignores the fact that, in our current system, the meaning of a criminal statute incorporates relevant case law.[270] Take, for example, the federal statute that prohibits fraud in the sale of securities.[271] Any person reading that statute would not know that it also prohibits insider trading unless they also had read the relevant court opinions.[272] So, to the extent that knowledge of case law undermines deterrence, deterrence is also a problem for many statutory crimes.

In sum, common law crimes do not appear to be any less effective at ensuring uniformity or deterrence than our current codification system, and in some instances common law crimes may be better.

CONCLUSION

The conventional wisdom surrounding common law crimes is untrue. Criminal statutes have not fully displaced common law crimes, and to the extent that codification has supplanted common law crimes, it has often

[268] Indeed, the publication of newer common law treatises appears to have quieted calls for codification earlier in American history. See Charles M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform 206 (1981).

[269] See Roth, supra note 144, at 176 ("Although most federal crimes are set forth in Title 18 of the U.S. Code, a significant number of federal crimes are also scattered throughout other titles. No one has been able to come up with a reliable count of the number of federal crimes that are on the books, which is a strong indication that something is seriously amiss."); see also Cook, supra note 268, at 6–8 (recounting that, in early America, statutes were rarely compiled, instead they were published annually in pamphlet form, which were not widely available, and thus, according to one contemporary "a complete set was rarely to be found: Hence it became difficult to know what the law was" (quoting Acts of the General Assembly of the Province of New Jersey, at iii (Burlington, Samuel Allinson 1776)) (internal quotation marks omitted)).

[270] Pomorski, supra note 32, at 3 ("The judicial construction of a statute incorporated in a precedential decision becomes an integral part of the statute and is binding on equal footing with the statute itself.").

[271] 15 U.S.C. § 78j(b) (1934) (prohibiting the use, "in connection with the purchase or sale of any security," of "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission] may prescribe"); 17 C.F.R. § 240.10b-5 (2018) (forbidding the use, "in connection with the sale or purchase of any security," of "any device, scheme, or artifice to defraud," or any "act, practice, or course of business which operates . . . as a fraud or deceit").

[272] See, e.g., United States v. O'Hagan, 521 U.S. 642, 651–52 (1997) (explaining why trading on inside information "qualifies as a 'deceptive device' under § 10(b)"); see also supra text accompanying notes 88–96.

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failed to vindicate rule-of-law values. Despite its falsity, the conventional wisdom is routinely taught to students,[273] repeated in court opinions,[274] and embraced in the academic literature.[275]

The conventional wisdom is not only wrong, it is also pernicious. The descriptive claim validates the idea that judges ought to have no role in shaping the content of the law. In this respect, the descriptive claim reinforces the tendency of modern judges to defer unconditionally to legislatures' and prosecutors' decisions about the scope of criminal law.[276] The normative claim helps to cement that unconditional deference. It tells judges that, if they take too active of a role in shaping the content of criminal law, then they risk undermining important rule-of-law values. But, in reality, judges' deference to prosecutors and refusal to check legislative excess is a far greater threat to the rule of law.

Any reasonably informed observer of the modern American criminal justice system will tell you that it is in desperate need of reform. Our laws are too harsh, defendants are routinely convicted and sentenced without important procedural protections, law enforcement and prosecutors unfairly target poor and minority communities, and we incarcerate a larger percentage of our population than does any other country in the world.[277] Given these realities, I do not think that it is a coincidence that

[273] E.g., Dix & Sharlot, supra note 22, at 172; Johnson, supra note 22, at 75; Kadish et al., supra note 1, at 145.

[274] E.g., Jones v. Thomas, 491 U.S. 376, 381 (1989); United States v. Bass, 404 U.S. 336, 348 (1971); Screws v. United States, 325 U.S. 91, 152 (1945) (Roberts, J., dissenting).

[275] E.g., Friedman, supra note 9, at 63–65; Jeffries, supra note 32, at 214; Robinson, supra note 47, at 341.

[276] See supra note 12. That this tendency is a modern phenomenon can be seen in the contrast between modern discussions of the role of judges in interpreting statutes and older discussions. Compare Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2118–19 (2016) (reviewing Robert A. Katzmann, Judging Statutes (2014)) (stating that "[s]tatutory interpretation has improved dramatically over the last generation" because "[s]tatutory text matters much more than it once did," but arguing that whenever judges "selectively pick[] from among a wealth of canons of construction" the public is left to question whether "courts are really acting as neutral, impartial umpires"), with Bishop, supra note 22, §§ 155–56, at 97–98 (discussing how to interpret overlapping statutes and statutes "in derogation of the common law"), and Pound, supra note 40, at 385 (discussing how judges "might deal with a legislative innovation"). See also Harlan F. Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 11 (1936) (stating that Coke and Blackstone "found in the common-law system the perfection of reason, and in such intrusive matters as statutes and equity but evil devices to mar its symmetry" and noting that, although the influence of this idea is waning, "it plays no small part in much of our legal thinking today").

[277] See, e.g., Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (rev. ed. 2012); Stephanos Bibas, The Machinery of Criminal Justice (2012);

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the story we tell ourselves about how our criminal law developed and the values that it embodies is false. Perhaps if we can recognize that this story is false—if we can recognize that the "bad old days," when common law crimes were the norm and criminal statutes were the exception, were actually *more* protective of individual rights and better able to check government abuse than our current system—then perhaps we can finally begin the hard work that will be needed to change the system.

James Forman, Jr., Locking Up Our Own: Crime and Punishment in Black America (2017); William J. Stuntz, The Collapse of American Criminal Justice (2011).