2022

Constraining Criminal Laws

F. Andrew Hessick
University of North Carolina School of Law, ahessick@email.unc.edu

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

Publication: *Minnesota Law Review*

Article

Constraining Criminal Laws

F. Andrew Hessick[†] and Carissa Byrne Hessick[††]

INTRODUCTION

Most American criminal law is statutory. Although many crimes have common law origins, most crimes are now codified, and courts

† Judge John J. Parker Distinguished Professor of Law, University of North Carolina School of Law.

†† Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr. Distinguished Professor of Law, University of North Carolina School of Law. We would like to thank Tom Arthur, Martha-Grace Duncan, Max Eichner, Shon Hopwood, Joe Kennedy, Kay Levine, Jonathan Nash, Leigh Osofsky, Sasha Volokh, and the participants in faculty workshops at Emory University School of Law and the University of North Carolina School of Law for their helpful comments on previous drafts. Meg Daly and Shay Potter provided helpful research assistance.

must interpret the relevant statutory language in criminal cases. As a result, how judges interpret individual criminal statutes is exceedingly important.

Because criminal statutes are used to deprive people of their liberty—and sometimes even their lives—one might expect significant attention to be given to the interpretation of criminal statutes.[1] But that is not the case. Discussions about interpretation have focused on the appropriate relationship between the judiciary and the legislature and how courts should interpret *all* statutes, criminal or otherwise. The one exception is the rule of lenity—but even that rule has been hollowed out over the last century and rarely plays a role in interpretations.[2]

Rather than considering whether the judiciary has a special role to play in constraining criminal laws, the dominant modern theories of interpretation—textualism and purposivism—have largely focused on how courts can best implement the will of the legislature.[3] The major disputes have been about which theory better implements the legislature's will[4]—or, to use the jargon, which theory better re-

1. For a lengthy discussion of why criminal laws are different than non-criminal laws, and thus ought to be treated differently as a constitutional matter, see F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 300–05 (2021).

2. Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 931 (2020) ("With the court required to exhaust every other interpretive resource before applying it, lenity plays almost no role in deciding cases of statutory ambiguity.").

3. David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137, 151 (2019) ("Textualist and purposivist theories are largely motivated by faithful-agent concerns that arise due to the inherent tension of common-law judges interpreting statutes enacted by democratically accountable legislatures.").

4. Scholarship advocating for textualism includes John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7 (2001), arguing that textualism produces interpretations that most accurately embodies the legislature's will; Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994), arguing that use of legislative history produces interpretations that convert rules into standards; and Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17–18 (Amy Gutmann ed., 1997), arguing that textualism mitigates the flaws of judicial interpretive discretion. Scholarship arguing that purposivism better achieves the will of the legislature includes HENRY J. FRIENDLY, BENCHMARKS 200–01 (1967), describing interpretation as "the art of proliferating a purpose" (quoting Brooklyn Nat. Corp v. Comm'r, 157 F.2d 450, 451 (1946)); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1375 (1958), stating that the goal of interpretation is to implement the purpose underlying the law; and Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907), noting that

sults in courts being "faithful agents" of the legislature.[5] These discussions about interpretation focus on how courts should interpret all statutes, and they make no mention of distinct considerations for criminal laws.

Treating criminal law interpretation no differently than other statutory interpretation is a major departure from the past. Historically, courts developed a series of statutory construction rules that applied only to criminal laws. Those rules constrained the sweep of criminal statutes. They prevented not only criminal convictions that weren't supported by the text of a statute, but also some convictions that were supported by text. A defendant could be convicted only if he violated both the letter and the spirit of the law.

The interpretive history is complicated because courts and commentators did not always agree on the reason for these limitations. Some claimed that judges could modify statutes because they shared lawmaking power with the legislature. Others claimed that the rules curtailing the reach of criminal statutes implemented the will of the legislature. But unlike with modern invocations of the will of the legislature, those commentators did not see the role of the courts as passive or mechanical in implementing the legislature's will. Instead, they took a more active, independent role in choosing *how* to implement that intent.

As Blackstone explained, there are many different ways of ascertaining legislative intent, ranging from the text of the statute to the spirit underlying the statute.[6] The historical rules curtailing the reach of criminal law comprised a deliberately chosen package of methods for determining legislative intent that limited the law. Judges used text to determine the outer perimeter of criminal statute, and they used purpose—as filtered through their own sense of justice—to further narrow the scope of the law.

"[t]he object of genuine interpretation is to discover the rule which the law-maker intended to establish . . . ." For a general overview of the relative merits and demerits of each method of interpretation at implementing the legislative will, see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

5. *See, e.g.*, John F. Manning, Response, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1651 (2001) (arguing that "the best reading of the constitutional structure supports the . . . faithful agent theory" of interpretation).

6. 1 WILLIAM BLACKSTONE, COMMENTARIES *59–61 (identifying five different "signs" of legislative intent: words, context, subject matter, effects, and spirit); *see also infra* notes 112–14 and accompanying text.

Whatever the historical disagreements about rationale, there was general agreement that courts had an active role to play in limiting criminal law. Notably absent were arguments that courts would infringe on the power of the legislature when judges narrowed a criminal statute through interpretation. Ultimately, courts coalesced around three major rules of constraint—that a criminal law could not be extended beyond the text of a statute, that statutes should be construed more narrowly than the text if the text sweeps beyond the reason for the law, and that broadly written laws should be treated as if ambiguous and construed more narrowly than written.[7]

This history does not fit comfortably with claims by textualists and judicial minimalists that courts have no independent role in fashioning law.[8] But the history can and should inform discussions about how to interpret modern criminal statutes. History tells us that judges have in the past—and could again in the future—play a significant role in counterbalancing the political and institutional pressures that have drastically expanded the scope of criminal law.

Treating criminal law interpretation no differently than other statutory interpretation has exacerbated various problems within the criminal justice system. It has left unchecked the incentives for legislatures to write overly broad or imprecise criminal statutes that allow individual prosecutors to determine the circumstances under which they will actually enforce the laws.[9] Those incentives act in concert with the asymmetric politics of crime—under which dominant political forces favor more and harsher criminal laws and the forces that favor fewer and more lenient laws are unable to compete.[10] By conceptualizing their role as "faithful agents" of the legisla-

7. *See infra* Part II.

8. *See, e.g.*, Lance McMillian, *The Proper Role of Courts: The Mistakes of the Supreme Court in* Leegin, 2008 WIS. L. REV. 405, 443 ("[T]extualism is ultimately a device to restrain judicial lawmaking: courts should interpret the law as written, not make it."); Scalia, *supra* note 4 ("[U]nder the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.").

9. *See* Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1512–26 (2008); Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 360–63 (2019); *see also* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 761 (1999) ("Although the absolute or relative degree of breadth is quite difficult to prove, let alone quantify, anyone with more than a passing familiarity with federal criminal law is struck by the extraordinary extent to which Congress has eschewed legislative specificity in this highly sensitive area.").

10. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 173 (2011)

ture, rather than as any sort of independent check on criminal statutes, modern courts have permitted the "pathological politics" of modern criminal law to persist.[11] Those pathological politics have led to overcriminalization and mass incarceration.[12]

This Article challenges the modern statutory interpretation of criminal laws. In doing so, it makes two distinct, but related contributions. First, it demonstrates that courts historically played a significantly more active role in interpreting criminal laws than they currently play. In particular, courts routinely interpreted statutes to reach no further than the text or the purpose, and they treated broadly written laws as ambiguous and in need of narrowing constructions. Put simply, courts used their interpretive powers to deliberately favor criminal defendants and constrain the criminal law. Second, it explains how a more active judiciary would combat some of the pathologies of the modern criminal justice system and protect important constitutional principles. Specifically, if modern courts were to use the historic rules of constraint, they would better protect important constitutional principles such as the separation of powers and democratic accountability. In making these points, the Article does not claim that courts are *obliged* to take a more active role in interpreting statutes; rather, it claims that courts are *allowed* to take this more active role and that there are good reasons to do so. In other words, while we do not argue that judges must use their interpretive powers to narrowly construe criminal statutes, we argue that they should.

The Article proceeds in three parts. Part I begins by providing an overview of the dominant theories of statutory interpretation,

("Save for law enforcement lobbies, few organized, well-funded interest groups take an interest in criminal statutes . . . ."); Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1980–81 (2006) (noting that groups favoring more lenient criminal statutes lack political power); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1029–31 (2006) (describing the disparity in power between targets and proponents of criminal legislation).

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

12. For a sampling of the modern literature on overcriminalization and mass incarceration, see MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019); JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); and STUNTZ, *supra* note 10.

both of which are premised on the idea that courts should act as faithful agents of the legislature when interpreting statutes. It then explains how, with only small exceptions that have little practical consequence, those theories of interpretation treat criminal laws the same as non-criminal laws. Part II demonstrates how these modern theories depart from historical practice in failing to distinguish between criminal and other statutes and by assuming that judges' main interpretive task is to carry out the will of the legislature. It traces the development of the rules of statutory construction that judges used to constrain the reach of criminal laws, and it describes how these rules were widely accepted by early state and federal courts. Part III explains how, in abandoning their role as an institution that independently constrains the criminal law, modern courts have countenanced a disastrous expansion of the criminal justice system. If courts were to once again embrace their role as an institutional constraint on the scope of criminal law, rather than merely seeking to effectuate legislative will by enforcing the purpose or the text of a criminal statute, they could help curtail some of that expansion and better protect important constitutional values, such as the separation of powers and democratic accountability.

I. MODERN STATUTORY INTERPRETATION AND CRIMINAL LAW

Criminal laws today are mostly codified in statutes. Accordingly, how courts interpret those statutes is critically important. This Part describes the two major theories of statutory interpretation—both of which are premised on the idea of courts as faithful agents—and it explains how neither the theories nor the courts applying those theories distinguish between criminal statutes and other types of statutes.

A. MODERN THEORIES OF STATUTORY INTERPRETATION

A common theme that underpins most discussions today about statutory interpretation is that the role of the court in interpreting statutes is to implement the will of the legislature.[13] Both of the dom-

13. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1303 (2018) (reporting a study that found implementing the will of Congress to be a common goal among judges). To be sure, not all scholarship operates on the assumption that the role of the courts is to act as a faithful agent. A significant scholarly debate asks whether courts should be "faithful agents of the legislature or independent cooperative partners" in interpretation. KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 20–21 (2013). Nevertheless, the "conventional" view that underlies the vast majority of scholarship and judicial opinion is the faithful agent theory.

inant theories of interpretation—purposivism and textualism—operate on this premise. They both claim that, when interpreting statutes, courts should act as faithful agents of the legislature.

Purposivists argue that the best way for a court to carry out the will of the legislature is to interpret a statute in light of the purpose motivating that statute. For purposivists, the goal is to implement the "spirit" of the law,[14] and the text of the statute is just one piece of evidence in identifying that spirit.[15] Under a purposivist approach, when the purpose of a statute diverges from the text of the statute, courts should implement the purpose rather than the text.[16] The justification is the commonsensical notion that statutes are not written in a vacuum; instead, they are written for a particular reason.[17] And the only sensible way to interpret a statute is through the lens of that purpose.[18]

By contrast, textualists maintain that the most faithful way to implement the will of the legislature is to adhere to the text of the statute. In their view, instead of seeking to identify the purpose motivating a statute, courts should interpret a statute according to the ordinary meaning of the statute's text.[19] The goal is to ascertain the

---

See, e.g., Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010).

14. Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 272 (2020) (describing purposivism as an effort to implement the "spirit" of a statute).

15. *See* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 704 (2014) (stating that purposivists "begin by reading statutes carefully"); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1297 (2020) (demonstrating that purposivists consider text). Even the strongest purposivist decisions, such as *Church of the Holy Trinity v. United States*, in which the Court stated that the "letter" of a statute must yield to its "spirit" when the two conflict, consider the text of the statute as a starting point for interpretation. *See* 143 U.S. 457, 458 (1892).

16. *See, e.g.*, United States v. Am. Trucking Ass'n, 310 U.S. 534, 543 (1940) (asserting that when applying a statute's plain meaning would yield a result "'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words" (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922))); Krishnakumar, *supra* note 15, at 1283–84 ("[P]urposivists are willing to reject a statute's seemingly plain meaning when contrary indications of purpose cut strongly against such meaning.").

17. *See* HART & SACKS, *supra* note 4, at 1156 ("Every statute must be conclusively presumed to be a purposive act.").

18. *Id.* ("Any judicial opinion . . . which finds a plain meaning in a statute without consideration of its purpose, condemns itself on its face.").

19. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392–93 (2003) ("[Textualism] ask[s] how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context."); Frank H. Easter-

"objective" meaning of the statute's text and to give effect to that meaning,[20] even when those statutory terms do not match up with the reason for the statute or would lead to socially undesirable results.[21] Accordingly, if a statutory text is unambiguous, courts must give effect to that language. And if a statute is ambiguous, courts should interpret it according to the best reading of the statute in light of the commonly understood meaning of its terms when the statute was written,[22] the statute's context, grammatical rules,[23] and a host of other things that inform how a reasonable person would understand the statute.[24] The point of using these extra-textual considerations, however, is not to figure out what the legislature intended or the goals that the statute seeks to accomplish. It is to figure out the objective meaning of the text of the statute.[25]

---

brook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) ("We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words.").

20. Manning, *supra* note 4, at 16 (explaining that textualism counsels a court to interpret legal writings based on how "a reasonable person would use language under the circumstances").

21. *See* Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 4, at 144 (stating that textualists ask "what the text would reasonably be understood to mean, rather than upon what it was intended to mean"); John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1309–10 (2010) ("[C]ourts must respect the terms of an enacted text when its semantic meaning is clear, even if it seems contrary to the statute's apparent overall purpose." (emphasis omitted)); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 356 (2005); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2128 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("The modern rule, as the Supreme Court has repeated often, is that clear text controls even in the face of contrary legislative history.").

22. *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434 (2005) (stating that "modern textualists" look to the "ordinary meaning" of words and phrases, as well as "the relevant linguistic community's (or sub-community's) shared understandings and practices").

23. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 5 n.16 (2005) ("Language canons address grammar rules and the arrangement of words or phrases within a statute, in an effort to clarify the ordinary or common meaning of legislatively chosen text.").

24. Kavanaugh, *supra* note 21, at 2121 (stating that the goal of textualist interpretation is to achieve the "*best reading* of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons"); Nelson, *supra* note 21, at 355 (identifying a range of potential considerations to determine the meaning of the text of a statute).

25. Nelson, *supra* note 21 ("When pushed to acknowledge the importance of legislative intent, textualists sometimes fall back on another distinction: the intent that matters, they say, concerns the rule that legislators meant to adopt rather than the real-world consequences that legislators expected the rule to have."). Although the two inquiries are different—one asks what the legislature intended, the other what

Textualists have offered theoretical and practical justifications for their theory. The principal theoretical argument is that the law consists only of the text of the statutes that legislatures enact, not the purpose that motivated that statute.[26] For courts to interpret a law to mean something other than its text is to circumvent the method of lawmaking prescribed by the various state and federal constitutions.[27]

The textualists' main practical argument is that there is typically no single purpose underlying legislation.[28] The legislative process requires lawmakers with different values to compromise.[29] The text of the statute embodies that compromise.[30] Accordingly, the text may not align with the goals of the statute's proponents who settled for less to secure the law's passage, nor may it align with the goals of the statute's critics who supported a watered-down version of the statute in exchange for some other concession.[31] The only way to respect that compromise is to interpret the statute according to its text.[32]

---

the text means—the two often are difficult to separate in practice. Scalia, *supra* note 21 (acknowledging that "what the text would reasonably be understood to mean" and "what it was intended to mean" are concepts that "chase one another back and forth to some extent, since the import of language depends upon its context, which includes the occasion for, and hence the evident purpose of, its utterance").

26. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("We are governed by laws, not by the intentions of legislators . . . . 'The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself . . . .'" (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845))); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 27 (2006) ("Textualists observed that it is the language of a statute, and not its underlying purpose, that is enacted into law by both Houses of Congress and the President.").

27. *See* Scalia, *supra* note 4, at 9–14 (discussing "the uncomfortable relationship of common-law lawmaking to democracy"); Easterbrook, *supra* note 4, at 68–69 ("No matter how well we can know the wishes and desires of legislators, the only way the legislature issues binding commands is to embed them in a law." (emphasis omitted)); Manning, *supra* note 19, at 2390 ("[R]espect for the legislative process requires judges to adhere to the precise terms of statutory texts."); Molot, *supra* note 26, at 24 (noting the textualist view that judges "exceed their role in the constitutional structure" by going beyond statutory text).

28. Easterbrook, *supra* note 4, at 68 (arguing that each legislator has multiple goals, and that multiple legislators increase the goals).

29. Manning, *supra* note 4, at 18 ("[M]any statutes result from bargains struck among interest groups competing for advantage in the legislative process."); Easterbrook, *supra* note 4, at 68 ("Legislation is compromise.").

30. Manning, *supra* note 4, at 18 ("Because statutory details may reflect only what competing groups could agree upon, legislation cannot be expected to pursue its purposes to their logical ends . . . .").

31. Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 46 ("If legislation grows out of compromises among special interests . . . a court cannot add enforcement to get more of what Congress wanted. What Con-

Worse, permitting judges to interpret statutes in the name of the legislation's "purpose" creates the risk that judges will substitute their own views for those of the legislature—be it because they innocently confuse their own goals with those of the legislature or because the judges disingenuously invoke "legislative purpose" as cover to implement their own views.[33]

Some scholars have gone so far as to suggest that judges can't be trusted to interpret statutes at all. They argue that judges may allow their own policy preferences to drive their linguistic conclusions about the objective meaning of a text.[34] Based on this fear, they have argued that judges should rely on search results from linguistic databases that can provide information about how frequently words are used particular ways, rather than judges' own linguistic intuitions in deciding the ordinary meaning of a word or a phrase.[35]

---

gress wanted was the compromise, not the objectives of the contending interests.").

32. *Id.* (stating that "[i]f legislation grows out of compromises among special interests," then a court cannot push one purpose motivating the statute "farther along the journey without undoing the structure of the deal").

33. Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 278 (2019) ("[T]extualists protest that purposivist interpretation risks the substitution of judicial for legislative judgment . . . ."); Scalia, *supra* note 4 ("The practical threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires . . . ." (emphasis omitted)).

34. *See* Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 286 (2021) (stating that a judge may "bring latent biases or prejudices about preferred outcomes in cases that come before her" and that allowing judges to "resort to [linguistic] intuition risks motivated reasoning and confirmation bias"); *id.* at 297–98 (arguing that "the black box of judicial intuition" permits "motivated reasoning"); *id.* at 309 ("We just think that intuition about linguistic facts, unchecked by evidence, runs the risks (if not the guarantee) of confirmation bias and motivated reasoning.").

35. *See id.* at 285 (stating that "there are ample grounds for questioning the wisdom of relying exclusively on the intuition of an individual judge as the end point" for determining the meaning of a statutory phrase); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 806–07 (2017) (implicitly criticizing judges who treat "ordinary meaning" as a "gut level" assessment of "linguistic intuition" rather than as an empirical question); Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L. REV. 156, 160, 176 (2011) (stating that a "judge's confidence in her linguistic intuition may be misplaced" and arguing that, even though judges may be sophisticated users of language, "this sophistication does not correlate with the ability to intuit ordinary usage"). In their more recent work, these scholars have insisted that they are not "endors[ing] the view that blindly attributes to each word its most frequent sense." Lee & Mouritsen, *supra* note 34, at 344. Nonetheless, they appear to acknowledge that they are proposing a change to the theory of interpretation. *Id.* ("[W]e think the frequency assessment should play a role in the interpretation of legal texts."). But their proposed theory and chosen methodology do not actually

The differences between purposivism and textualism can significantly affect the interpretation of a statute.[36] Suppose Congress enacts a statute criminalizing the sale of stolen goods with the single goal of stopping criminal operations designed to dispose of stolen goods. But the statute is so broadly phrased that it criminalizes the sale of all stolen goods, regardless whether the person selling those goods knows that the goods were stolen. The textualist would enforce the statute against people who naively sell stolen goods, even though targeting them was not the goal of Congress. Because the statute includes a general prohibition on selling stolen goods and does not limit liability to people who know that they are selling stolen goods, the statute applies generally to all sellers of stolen goods, even if preventing oblivious sellers was not the point of the statute. The purposivist, by contrast, would interpret the statute not to reach people who naively sell stolen goods. Although those naïve sellers fall within the text of the statute, outlawing those sales was not the goal of the statute.[37]

Despite their differences, textualists and purposivists agree that the role of a court in interpreting statutes is to be a faithful agent of the legislature.[38] In this regard, textualists and purposivists distinguish themselves from those who preach pragmatism and dynamic

---

solve the problems that they identify with "judicial intuition." That is because judges must often infer how a word is being used when analyzing the results of their corpus search. Corpus searches thus multiply the need for judges to rely on their "linguistic intuition," shifting the exercise of that intuition from the statute itself to the corpus results, and in so doing, making the exercise of that intuition less visible. *See* Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 BYU L. REV. 1503, 1523–25.

36. One famous example comes from *Church of the Holy Trinity v. United States*. 143 U.S. 457 (1892). There, the Court held that a church that had brought a priest from England to the United States had not violated a statute making it a crime to "assist or encourage the importation or migration of any alien . . . to perform labor or service of any kind in the United States." *Id.* at 458, 465. According to the Court, despite the breadth of its language, the statute was meant to apply only to manual laborers. *Id.* at 465. Although the act of the church was "within the letter" of the statute, the Court held the church had not violated the statute because it was "not within its spirit nor within the intention of its makers." *Id.* at 459. According to textualists, *Trinity* was wrong because, if the church's act was within the letter of the act, it violated the statute. *E.g.*, Scalia, *supra* note 4, at 20 ("Well of course I think the act was within the letter of the statute, and was therefore within the statute: end of case.").

37. Purposivists would likely address the issue by reading a mental state into the statute. *See infra* text accompanying notes 72–76.

38. *See* Barrett, *supra* note 13, at 113 ("[T]his disagreement between textualists and purposivists is about the role of congressional intent in statutory interpretation, not about the principle that federal courts must function as Congress's faithful agents.").

statutory interpretation. According to pragmatists and dynamic interpreters, the role of the courts is not simply to be a faithful agent in interpreting statutes. Instead, courts should take a more active role in interpretation.[39] Although the text and purpose of a statute should guide their interpretation, a court should not aim simply to implement the legislature's will. According to pragmatists, courts should select the reading that achieves the greatest social benefit.[40] Dynamic interpreters argue that courts should interpret statutes in a way that aligns with contemporary social values, and they should do so even when that interpretation expands or contracts the statutory text.[41]

For most of the twentieth century, purposivism was the dominant form of interpretation in the courts[42]—although judges regularly relied on other methodologies.[43] Since the 1980s, there has been a

39. *See, e.g.*, William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 992 (2001) ("In my view, Article III judges interpreting statutes are both agents carrying out directives laid down by the legislature and partners in the enterprise of law elaboration."); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 585 (1988) (supporting a model under which "judges exercise their common law power by incorporating political values into the interpretive process").

40. *See* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 57–96 (2003) (arguing for legal interpretations that produce the best outcomes); RONALD DWORKIN, LAW'S EMPIRE 94–95 (1986) (explaining that pragmatism counsels courts to "make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake"); Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 992 (2016) ("[Pragmatism] posits only that judges should construe statutes by focusing on the practical consequences that will result from an interpretation and seeking the best result.").

41. *See, e.g.*, Popkin, *supra* note 39, at 623.

42. Manning, *supra* note 4, at 6 (stating that strong purposivism prevailed "for most of the last century").

43. *See* FRIENDLY, *supra* note 4, at 199–200 ("Many judges [over time] have stopped with the words . . . . Others have hurdled the words and proceeded directly to the purpose . . . ."). Although judges were predominantly purposivist, they were not self-consciously so. The particular theories of statutory construction—such as purposivism and textualism—had not yet been developed. As Justice Kagan has said, statutory interpretation "was not really taught as a subject . . . as a discipline" before the 1980s. Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015) [hereinafter Scalia Lecture], https://www.youtube.com/watch?v=dpEtszFT0Tg (last visited March 27, 2022); *see also* Philip P. Frickey, Lecture, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 242 (1992) ("[T]he general curricular mood was one of benign neglect . . . ."). Consistent with this lack of theory, Justice Frankfurter described statutory interpretation as an "art," as opposed to a science. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 530 (1947).

shift.[44] Textualism has become increasingly prominent.[45]

The modern shift toward textualism has been more in the attitude with which judges approach statutes as opposed to a wholehearted embrace of the textualist methodology.[46] Because the primary justification for textualism is that it avoids purposivism's shortcomings, textualism and purposivism should be mutually exclusive theories. But that has not been the case in the courts. Few, if any, judges are consistently textualist or purposivist across cases.[47] Even in a single case, courts regularly apply both textualism and purposivism in interpreting the same statutory provision. Courts often say, for example, that the plain text of a statute demands a particular interpretation and that the legislative history supports that interpretation too.[48] They also temper their interpretations with pragmatic considerations, such as the consequences that would result in adopting one interpretation or another.[49]

Although the shift towards textualism has affected how courts have interpreted statutes, it has not resulted in a fundamental rethinking of the role of the courts in interpreting statutes. Most judges continue to perceive their primary directive in interpreting statutes to act as a faithful agent of the legislature. Courts repeat with mind-numbing regularity some variant of the idea that their goal in statutory interpretation is to effectuate the intent of the legislature.[50]

---

44. Grove, *supra* note 14, at 271 ("Modern textualism arose in the 1980s.").

45. Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 304 (2017) (describing the "sea change" in interpretation from purposivism to textualism). Justice Kagan has suggested that "we're all textualists now." Scalia Lecture, *supra* note 43, at 08:25.

46. *See* Gluck & Posner, *supra* note 13, at 1310 (reporting a study of forty-two circuit judges in which none claimed to be a pure textualist). Rather, the point is that judges today put significantly more weight on the text than the judges of yesterday.

47. Jonathan H. Choi, *The Substantive Canons of Tax Law*, 72 STAN. L. REV. 195, 207 (2020) ("While few Justices or judges today are entirely purposivist or entirely textualist, we have reached an equilibrium that incorporates various indicia of statutory meaning but focuses on statutory text.").

48. *See, e.g.*, Garnett v. State, 632 A.2d 797, 804–05 (Md. 1993).

49. *See* Gluck & Posner, *supra* note 13, at 1310 (reporting that many judges who ascribe to textualism also weighed pragmatic considerations).

50. *See, e.g.*, United States v. Jackson, 964 F.3d 197, 208 (3d Cir. 2020) ("A court's primary purpose in statutory interpretation is to discern legislative intent." (quoting Morgan v. Gay, 466 F.3d 276, 277 (3d Cir. 2006))); Pruitt v. Oliver, No. 1190297, 2021 WL 298727, at *9 (Ala. Jan. 29, 2021) ("The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature . . . ." (quoting *Ex parte* State Dep't of Revenue, 683 So. 2d 980, 983 (Ala. 1996))); Coal. of Concerned Cmtys., Inc. v. City of Los Angeles, 101 P.3d 563, 565 (Cal. 2004) ("Our fundamental task in interpreting a statute is to determine the Legislature's in-

But here's the rub: purposivists and textualists do not always act solely as faithful agents. Start with purposivists. Textualists are correct that one typically cannot identify the purpose of a statute. Legislators often draft statutes with a specific incident, and not a broader purpose, in mind. Purposivists accordingly do not seek to implement the actual purpose underlying the statute.[51] Instead, they base their interpretation on the "reasonable purposes" that judge ascribe to legislators.[52] But as prominent purposivists have acknowledged, this reasonable purpose is a "legal fiction."[53]

Purposivists thus provide their own vision of the purpose of the statute. They identify what they *perceive* to be the reason motivating the statute or the spirit of the statute, and interpret the statute in that light. In these situations, purposivists do not carry out the legislature's will; instead, they temper the statute with their own understanding of what the reasonable purpose of the statute should be.

Textualists also take a more active role in interpretation than simply acting as a faithful agent. For example, many textualists consider substantive canons of construction—the presumption against retroactive legislation, the presumption against federal preemption, the clear statement rule against interpreting a statute in derogation of the common law, and the clear statement rule against federal abrogation of state sovereign immunity—in interpreting statutes.[54] These substantive canons do not reflect conventions about how ordinary people understand communications.[55] Instead, they embody substantive preferences for particular legal positions.[56] Thus the

---

tent . . ."); Pick v. Commonwealth, 852 S.E.2d 479, 484 (Va. App. 2021) ("The primary object of interpreting a statute is to ascertain and give effect to legislative intent." (quoting Leftwich v. Commonwealth, 737 S.E.2d 42, 45 (Va. App. 2013))).

51. Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1370 (2015) ("The purpose the court should impute to the legislature is not an actual, historical intent or purpose . . . .").

52. HART & SACKS, *supra* note 4, at 1327.

53. STEPHEN G. BREYER, ACTIVE LIBERTY 87–88 (2005); *see also* John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1928–29 (2015) (discussing the fiction).

54. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 382 (2005) (invoking the canon of avoidance). Some textualists have argued that judges should not consider substantive canons of construction. *See* Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405–06, 1409 (2002) (attacking the canon of avoidance as "noxious," "wholly illegitimate," and "a misuse of judicial power"); *see also* Manning, *supra* note 19, at 2420 (attacking the absurdity doctrine).

55. *See* Barrett, *supra* note 13, at 124 ("A judge applying a substantive canon often exchanges the best interpretation of a statutory provision for a merely bearable one.").

56. *See id.* at 110 ("[C]ourts and commentators sometimes seek to rationalize

purpose of these canons is not to implement the ordinary understanding of the text; instead, it is to *limit* the effect of the text of statutes.

Textualists have sought to justify using canons of construction by arguing that legislators draft legislation against the existing legal backdrop, and an informed reader would understand legislators to have implicitly incorporated those canons into their laws unless the law says otherwise.[57] As several prominent textualists have acknowledged, this theory rests on a fiction.[58] It is extremely doubtful that legislators are aware of all the canons—much less that they necessarily meant to incorporate them[59]—when drafting legislation. More fundamentally, this theory rests on the assumption that courts *actually possessed* the power to create these substantive canons in the first place—a theory directly at odds with the notion that courts should operate only as faithful agents.[60]

These departures from the faithful agent theory of statutory interpretation highlight a disconnect in textualism and purposivism: both theories claim that the courts are subservient to the legislature in the interpretation of statutes, but neither consistently practices what it preaches. The theories recognize, at least implicitly, that courts do play a larger role. As Part II discusses, this larger role is the traditional role of the judiciary. That is particularly so for criminal statutes.

---

these and other substantive canons as proxies for congressional intent, it is generally recognized that substantive canons advance policies independent of those expressed in the statute.").

57. Nelson, *supra* note 21, at 386 ("[S]ome textualists seem attracted to the idea that a canon can form part of the backdrop for legislation even if there is little reason to think that members of the enacting Congress acted in accordance with it."); *Clark*, 543 U.S. at 382 (calling the canon of avoidance "a means of giving effect to congressional intent" and "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"); Scalia, *supra* note 4, at 25–27.

58. *See, e.g.*, Barrett, *supra* note 13, at 110 (discussing the historical use of substantive canons and the tension with textualist beliefs).

59. *See, e.g.*, FRIENDLY, *supra* note 4, at 210 ("It does not seem in any way obvious that . . . the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them.").

60. Some textualists have argued that courts should apply these canons because they are so ancient that they are now simply settled doctrine. Scalia, *supra* note 4, at 29 (noting that the rule of lenity "is validated by sheer antiquity"). But the idea that doctrine trumps text is, of course, directly antithetical to the basic principles of textualism.

B. MODERN INTERPRETATION OF CRIMINAL STATUTES

Because the goal of the major theories of statutory interpretation is to ascertain the will of the legislature, those theories typically do not distinguish between criminal statutes and non-criminal statutes. Regardless of the type of statute, the basic question is the same: what did the legislature want? Accordingly, those theories call for the same interpretive approach for all types of statutes, criminal or otherwise.

Consistent with these theories, courts have also not categorically approached the interpretation of criminal statutes differently from the interpretation of other statutes. They have used the same mix of interpretative approaches that they use for non-criminal statutes.

Sometimes, courts use purposivism to interpret criminal laws. Take, for example, the D.C. Circuit's opinion in *United States v. Chin*.[61] In that case, Andrew Chin coerced Donnell Melvin, who was seventeen years old, to carry drugs for him. Chin was charged with violating the Juvenile Drug Trafficking Act, which makes it a crime to "knowingly and intentionally . . . employ, hire, use, [or] persuade . . . a person under eighteen years of age to assist in avoiding detection or apprehension for" a drug offense "by any . . . law enforcement official."[62] Chin argued that he had not violated the statute because he did not know that Melvin was a minor when he asked Melvin to carry the drugs. Writing for the court, then-judge Ruth Bader Ginsburg rejected the argument. According to Ginsburg, the purpose of the law was to protect minors, and construing the law to require knowledge of the minor's age would thwart that goal.[63]

On other occasions, courts have employed textualism to interpret criminal statutes. One example comes from *Brogan v. United States*.[64] The question in that case was whether a federal law which outlaw "mak[ing] any false . . . statements" to federal officials[65] also criminalizes false statements that simply deny guilt. Several circuits had interpreted the statute to exclude these "exculpatory no" statements, even though such statements fell within the literal text of the statute.[66] Those courts reasoned that the statute was not meant to

61. 981 F.2d 1275 (D.C. Cir. 1992).

62. 21 U.S.C. § 861(a)(2).

63. *Chin*, 981 F.2d at 1280 (stating that the purpose of the act was "to protect a vulnerable class defined by age").

64. 522 U.S. 398 (1998).

65. 18 U.S.C. § 1001.

66. *Brogan*, 522 U.S. at 401 (collecting cases).

criminalize mere denials of guilt.[67] The Supreme Court rejected this approach. It refused to interpret the statute more narrowly than it was written. In doing so, the Court stated "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself."[68]

In addition to using the same interpretive theories for criminal statutes, courts also employ the same canons of construction to determine the meaning of a criminal statute. They regularly employ linguistic canons, such as the rule of the last antecedent,[69] as well as substantive canons, such as requiring a clear statement before concluding that Congress meant to alter the balance of power between the federal government and the states.[70]

Perhaps more important, although textualists and purposivists sometimes do not act as faithful agents, the instances in which they do not act as faithful agents does not depend on whether the statute they are interpreting is criminal or civil. Purposivists use the same approach they use for other statutes in trying to glean the purpose motivating a criminal law, and textualists use the same analysis they apply to other statutes in determining whether substantive canons apply to criminal statutes.

There are only two ways in which courts have treated the interpretation of criminal statutes differently—cases involving common law principles and the rule of lenity. One generally applicable canon of construction is that statutes should not be read to conflict with the common law unless there is a clear statutory purpose to do so.[71] This canon has led some courts to treat criminal statutes differently because some common law rules applied only to criminal statutes.

---

67. *See, e.g.*, Moser v. United States, 18 F.3d 469, 473 (7th Cir. 1994) (stating that the exception was rooted in "the legislative history of 18 U.S.C. § 1001 [and] the 'concern for Fifth Amendment values implicated by the application of § 1001 to a mere false denial of criminal wrongdoing'").

68. *Brogan*, 522 U.S. at 403.

69. *E.g.*, Lockhart v. United States, 136 S. Ct. 958, 962–63 (2016) (applying the rule of the last antecedent).

70. *E.g.*, Bond v. United States, 572 U.S. 844, 857–60 (2014) (refusing to interpret a statute in a way that would upset the usual balance of federal and state powers absent a clear statement that Congress intended to do so).

71. Pasquantino v. United States, 544 U.S. 349, 359–70 (2005) (applying the canon of construction that statutes should not be read to conflict with the common law unless there is a clear statutory purpose to do so).

Perhaps the most well-known common law doctrine that courts will use to interpret criminal statutes is the rule favoring *mens rea*.[72] When a criminal statute omits a mental state requirement, courts will often (though not always[73]) read a mental state requirement into the statute.[74] Judges justify this decision not on the grounds that the statute's text or purpose support the inclusion of a mental state, but rather based on the same fiction used to justify other substantive canons of interpretation—that legislators were aware of and meant to incorporate this background presumption into the statute.[75] Some state courts have suggested that the presumption is derived from an old rule about the strict construction of penal statutes.[76] But, as described below, the rule of strict construction has largely been abandoned by purposivists and textualists.[77]

The second way in which courts have treated the interpretation of criminal statutes differently from the interpretation of other statutes is the rule of lenity.[78] That rule directs judges to construe ambiguous criminal statutes in favor of defendants.[79] Although seem-

---

72. Staples v. United States, 511 U.S. 600, 619 (1994) (applying "the background rule of the common law favoring *mens rea*").

73. *E.g.*, United States v. Freed, 401 U.S. 601 (1971); United States v. Balint, 258 U.S. 250 (1922). For more on the exceptions to the rule favoring *mens rea*, including criticism that it is not consistently followed, see Hessick & Kennedy, *supra* note 9, at 401–07; and Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 937 (2004).

74. *E.g.*, Morissette v. United States, 342 U.S. 246 (1952); United States v. U.S. Gypsum Co., 438 U.S. 422 (1978); *see also* Hessick & Kennedy, *supra* note 9, at 401–07 (describing the case law surrounding this canon).

75. *See* Brogan v. United States, 522 U.S. 398, 406 (1998) (describing the presumption as a "generally applicable, background principle[] of assumed legislative intent"); *see also supra* text accompanying notes 54–56.

76. Price, *supra* note 73, at 936 ("State courts have . . . occasionally invoke[ed] strict construction to support the inference of a mens rea term.").

77. *See infra* text accompanying notes 190–202.

78. In addition to the rule of lenity, there is a constitutional doctrine—the void-for-vagueness doctrine—that can affect criminal law interpretation. The vagueness doctrine requires that a criminal statute "clearly define the conduct it prescribes." Skilling v. United States, 561 U.S. 358, 415 (2010) (Scalia, J., concurring). Although not a doctrine of interpretation, the vagueness doctrine relates to interpretation insofar as it means that courts will not cure hopelessly vague criminal statutes through interpretation, but instead will strike them down as unconstitutional. Although not limited to criminal laws—see, for example, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which struck down an immigration removal statute as unconstitutionally vague—the doctrine is at its strongest when applied to statutes that either criminalize conduct or prescribe punishment. *See* Johnson v. United States, 576 U.S. 591, 595–96 (2015).

79. *See Rule of Lenity*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets

ingly powerful on its face, the rule rarely affects the interpretation of criminal laws.[80] Modern judges typically rely on it only as a tool of last resort.[81] Only if they have exhausted all other interpretive tools—including legislative history, linguistic conventions, structure, motivating policies, and canons of construction—without resolving "grievous ambiguity" in a statute will modern judges use the rule of lenity to "break the tie" between competing interpretations.[82] Because those other tools almost always resolve statutory ambiguities, lenity rarely affects the interpretation of a statute.[83]

In sum, with the exception of how the presumption against the derogation of the common law is applied and a very anemic rule of lenity, courts interpret criminal statutes no differently than other statutes. And while the academic debate surrounding statutory interpretation often includes discussions of criminal statutes, that debate rarely includes any suggestion that criminal law interpretation ought to be treated differently.[84]

---

out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment.").

80. Hopwood, *supra* note 2 ("[L]enity plays almost no role in deciding cases of statutory ambiguity."); Price, *supra* note 73, at 891 ("Lenity comes into play only in the unlikely event that other conventions yield an interpretive 'tie.'").

81. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 385–86.

82. *See* Chapman v. United States, 500 U.S. 453, 463 (1991) ("The rule of lenity, however, is not applicable unless there is a 'grievous ambiguity or uncertainty in the language and structure of the Act,' such that even after a court has 'seize[d] everything from which aid can be derived,' it is still 'left with an ambiguous statute.'" (quoting Huddleston v. United States, 415 U.S. 814, 831 (1974); and then quoting United States v. Bass, 404 U.S. 336, 347 (1971))); Moskal v. United States, 498 U.S. 103, 108 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980))); *see also* Hopwood, *supra* note 2 (noting that modern lenity doctrine requires courts "to exhaust every other interpretive resource" before applying lenity); Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 106–20 (2016) (tracing the decreasing force of lenity in court opinions); Price, *supra* note 73, at 891 (noting that prevailing doctrine "ranks lenity dead last in the interpretive hierarchy").

83. Hopwood, *supra* note 2 ("[L]enity plays almost no role in deciding cases of statutory ambiguity."); Kahan, *supra* note 81, at 386 ("[I]f lenity invariably comes in 'last,' it should essentially come in never.").

84. For example, three cases commonly discussed in the statutory interpretation literature—*Smith v. United States*, 508 U.S. 223 (1993), *Muscarello v. United States*, 524 U.S. 125 (1998), and *United States v. Costello*, 666 F.3d 1040 (7th Cir. 2012)—interpret criminal statutes. Those discussions frequently analyze the cases no differently than other non-criminal cases. *See, e.g.*, Lee & Mouritsen, *supra* note 35, at 805–06, 812–13, 825–26 (analyzing *Muscarello* and *Costello*); Lee & Mouritsen, *supra* note

II. HISTORICAL PERSPECTIVE ON THE INTERPRETATION OF CRIMINAL LAWS

Because the prevalent theories of interpretation do not distinguish between criminal statutes and non-criminal statutes, the common view is that courts typically should not take on a more proactive role in interpreting criminal laws; they should not, for example, deliberately try to construe criminal statutes in a way that favor defendants. Instead, they should simply interpret criminal statutes according to the will of the legislature. Indeed, if anything, the conventional wisdom that courts have no role in making criminal common law[85] suggests that courts should be especially careful in interpreting criminal statutes not to thwart the will of the legislature. This position, however, departs from the traditional role that courts played in interpreting criminal laws. Historically, courts both independently created common law crimes and defenses, and they played a much more active role in interpreting criminal statutes. When interpreting criminal statutes, courts were at times quite aggressive, deliberately developing doctrines designed to interpret criminal laws in a way that favored criminal defendants.

A. THE JUDICIARY'S TRADITIONAL ROLE IN FASHIONING CRIMINAL LAW

To understand how courts approached interpretation of criminal law, it is useful to begin with a discussion about the role courts historically had in setting criminal policy. Judges historically had broad common law power in criminal cases.[86]

In 18th century England, the judicial power was not limited simply to implementing the law as written. It included making the law. The most obvious example of this lawmaking power was in the

34, at 282–84 (analyzing *Muscarello*); Jennifer L. Mascott, *The Dictionary as a Specialized Corpus*, 2017 BYU L. REV. 1557, 1583–86 (analyzing *Costello*); Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435, 444 (2018) (discussing *Muscarello*); Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 115 (2020) (discussing *Smith*); James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 987 (2019) (discussing *Costello*); Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1311, 1314–15, 1352–53 (analyzing *Smith*).

85. Rogers v. Tennessee, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting) ("[T]he notion of a common-law crime is utterly anathema today."); *see also* SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, 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").

86. In most states, courts enjoyed that power for well into the twentieth century, and some continue to enjoy common law power even to this day. *See* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 979–83 (2019).

fashioning of common law. In the 1700s, English courts had the power to create common law crimes and to convict individuals for violating those prohibitions.[87]

Early American courts continued the English practice in criminal cases. Like their English counterparts, American judges had lawmaking power. In the early years of the Republic, state courts routinely tried individuals for violations of common law crimes.[88]

Early federal courts followed the same approach as the state courts. Like state courts, federal courts had the power to create common law crimes. It was widely accepted that the Article III "judicial power" conferred on federal courts included the power to enforce common law crimes.[89] Federal prosecutors commonly brought prosecutions for violations of federal common law crimes including bribery, counterfeiting, and piracy.[90] In 1793, Attorney General Edmund Randolph issued an official opinion supporting the prosecution of individuals who violated the neutrality of the United States in a war between France and England, despite the absence of a statute outlawing the conduct. According to Randolph, the conduct was "indictable at the common law, because [their] conduct comes within the description of disturbing the peace of the United States."[91] Thomas Jefferson, Alexander Hamilton, and John Jay all approved of this common-law prosecution.[92]

---

87. *See* 4 BLACKSTONE, *supra* note 6, at *176–219; *see, e.g.*, Bruce P. Smith, Review Essay, *English Criminal Justice Administration, 1650–1850: A Historiographic Essay*, 25 L. & HIST. REV. 593, 616–17 (2007) (discussing common law and statutory crimes).

88. 1 LIFE AND LETTERS OF JOSEPH STORY 298 (William W. Story ed., 1851) ("[The common law] is the law of every State . . . . The smallest County Court . . . acts upon it and enforces it, even as to crimes."). It was not until the nineteenth century that statutes became the primary source of criminal law. Even today, common law crimes persist in more than a dozen states, Hessick, *supra* note 86, at 978–79, though the absence of new crimes suggests that courts have become increasingly hesitant to use their power to innovate as legislation has become more prevalent. *See* Note, *Common Law Crimes in the United States*, 47 COLUM. L. REV. 1332, 1334 (1947) ("[W]ith the rise of the legislature, the judiciary has shown marked reluctance to innovate or to apply ancient and obscure precedent in fields which it concedes to be the proper province of legislative action.").

89. *See generally* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951).

90. *See infra* note 94 and accompanying text.

91. Opinion of the Attorney General Edmund Randolph Submitted to the Secretary of State (May 30, 1793), *in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 152 (Walter Lowrie & Matthew Clarke eds., 1833).

92. *See* Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1053 (1985).

Federal judges also approved of federal criminal common law. According to Justice Story, "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 common law jurisdiction" over crimes that violate the sovereignty of the United States.[93] And at least eight circuit court decisions in the first decades of the judiciary expressly upheld federal criminal common law.[94]

It was not until 1812—after the founding generation of Justices had left the Court—that the Supreme Court declared that federal courts had no criminal common law authority in *United States v. Hudson & Goodwin*. *Hudson & Goodwin* was a significant break from judicial practice at the Founding.[95] The opinion did not claim that the federal courts historically lacked the criminal common law power. Instead, it argued only that the prevailing "public opinion" in 1812 was that the federal courts did not have the power.[96] But for the first

93. 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 88, at 299.

94. 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, 920 (1992) (citing United States v. Smith, 27 F. Cas. 1147 (C.C.D. Mass. 1792) (No. 16,323) (denying motion in arrest of judgment following counterfeit conviction—a common-law, non-statutory offense); Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360) (charging jury, in prosecution for breach of neutrality, that federal government possessed jurisdiction over all crimes at common law); United States v. Ravara, 2 U.S. (1 Dall.) 287 (1793) (sustaining indictment at common law for writing threatening letters to British minister); United States v. Worrall, 2 U.S. (1 Dall.) 384 (1798) (denying motion in arrest of judgment for bribing a federal revenue commissioner); FRANCIS WHARTON, PRECEDENTS OF INDICTMENTS AND PLEAS 562 n.(d) (1849) (describing United States v. Meyer, 26 F. Cas. 1242 (C.C.D. Pa. 1799) (No. 15,761) (detailing a common law prosecution for libel and observing that "ably defended" defendants did not challenge the existence of a federal common law criminal jurisdiction)); Williams' Case, 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708) (describing a common law rule against expatriation which was used to convict an American expatriate who engaged in foreign hostilities); United States v. Anonymous, 1 F. Cas. 1032 (C.C.D. Pa. 1804) (No. 475) (explaining a jury charge stating that indictments could be sustained under both statute and common law); United States v. McGill, 4 U.S. (1 Cranch) 426 (1806) (stating that federal courts have jurisdiction over common law crimes)).

95. Rowe, *supra* note 94 ("[P]recisely because we take the *Hudson* doctrine as such a tired truth today—'Federal crimes, of course,' the Supreme Court recently yawned, citing *Hudson*, 'are solely creatures of statute'—we often fail to see just what a considerable revision of the early republic's practice it represents.").

96. United States v. Hudson, 11 U.S. 32, 32 (1 Cranch) (1812) ("[W]e consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted, and the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition."). Public opinion, it should be noted, had shifted because many common law prosecutions were

twenty-five years, the federal judicial power in criminal cases was not limited simply to implementing criminal statutes.

To be sure, many during this period understood common law decisionmaking not to involve making law but instead to entail the process of discovering law that existed in nature.[97] But this view was hardly universal; many saw common law decisions as policymaking.[98] More important, even under the theory that courts were only identifying law, that process did not involve the same endeavor as interpreting statutes. No book laid out the rules of the common law.[99] Instead, courts had to choose among competing principles in announcing common law rules. Although precedent and the process of legal reasoning aided the courts in this endeavor, policy choices were inevitable. And when courts and commentators subsequently acknowledged that common law is the process of law-making, rather than law-discovery, judges did not retool the way that they approached common law decisionmaking. Courts continued to employ the same legal reasoning and consult precedent.

---

based on political disputes between the two political parties that played out as, for example, libel prosecutions. *See* Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 L. & HIST. REV. 223, 242 (1986) (emphasizing that when it came to the question of federal criminal common law, "political combat merged with the legal issue"); Rowe, *supra* note 94, at 936 ("The Jeffersonian understanding of the Constitution, which Justice Johnson summarily articulated in *Hudson*, was forged in the furnace of the Sedition Act.").

97. REGINALD W.M. DIAS, JURISPRUDENCE 151 (Butterworths 5th ed. 1985) ("The orthodox Blackstonian view, however, is that judges do not make law, but only declare what has always been law."); Willis & Co. v. Baddeley [1892] 2 QB 324 (CA) 326 (Lord Esher MR) (Eng.) ("There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable."); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 573 (2019) ("[T]he early American states inherited a tradition in which courts were charged to find law rather than make it.").

98. *See* JEREMY BENTHAM, OF LAWS IN GENERAL 166–68, 184–95 (H.L.A. Hart ed., Athlone Press 1970); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 8 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) ("Common law . . . that fictitious composition which has no other person for its author . . . which in default of sensible matter fills up the measure of the universe.").

99. An exchange during a nineteenth century argument before the King's Bench illustrates the point well.

> Counsel: "In the book of nature, my Lords, it is written—"
>
> Lord Chief Justice Ellenborough: "Will you have the goodness to mention the *page,* Sir, if you please?"

3 JOHN LORD CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 239 (1857).

That process continues today. More than a dozen states expressly retain a role for common law crimes in their courts.[100] Although federal courts no longer recognize a common law power to create crimes, they continue to exercise common law power to curtail crimes. Like state courts, federal courts routinely recognize nonstatutory criminal defenses.[101] This practice is not limited to applying ancient defenses. Federal courts continue to recognize new common law defenses. In *Brogan v. United States*,[102] for example, the Court acknowledged an affirmative defense to federal criminal statutes for law enforcement officers, even though such a defense could not be found in the U.S. Code or previous Supreme Court opinions.

While affirmative defenses obviously differ from criminal offenses, they both involve defining the scope of criminal offenses. Defenses are exceptions to criminal liability, and those exceptions limit the reach of criminal law. Indeed, it would be unnecessary to have separate provisions defining defenses if we had language precise enough to define criminal offenses in a way that excluded conduct falling within a defense.[103]

B. HISTORICAL APPROACH TO INTERPRETING CRIMINAL STATUTES

Consistent with their power to create criminal common law, courts traditionally played a significant role in setting criminal policy through interpretation of criminal statutes.

1. English Approach to Statutory Interpretation

English courts historically took a capacious view of their power to interpret statutes. As Professor Bill Eskridge has documented, English and early American courts typically viewed their interpretive role as significantly broader than merely mechanically implementing the text of a statute.[104] Although some sources put significant weight on the text,[105] the more common view was that courts could depart

100. *See* Hessick, *supra* note 86, at 980–82.

101. Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1434–36 (2017).

102. 522 U.S. 398 (1998).

103. *See* Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 874–75 (1991) (developing this concept).

104. *See* Eskridge, *supra* note 39, at 998–99.

105. *See* DAINES BARRINGTON, OBSERVATIONS ON THE MORE ANCIENT STATUTES 116 (3d ed. 1769) ("[L]et the inconveniences of a statute be what they may, no judge . . . can constitutionally dispense with them; their office is *jus dicere* and not *jus dare*."). Plowden, a legal expert of the Tudor period, had an inconsistent view. On the one hand, some parts of his report supported textualism. *See, e.g.*, Partridge v. Strange &

from the text of a statute when they thought doing so gave better life to the spirit of the statute.[106] Courts both expanded the reach of statutes beyond their text and contracted statutes to less than their text when they thought doing so was necessary to implement the spirit of the law.[107]

The precise ground on which the courts departed from the text varied. Some courts took the position that they could depart from the text of a statute in the name of equity.[108] Under their view, courts were not simply faithful agents, but instead had an independent role to play in interpreting statutes.[109] Others took the view that they were obliged to implement the will of the legislature.[110] But instead of implementing the legislature's *actual* intent, these courts ascribed to the legislature the courts' own view of what the legislature intended by enacting the statute.[111]

Blackstone adhered to this latter approach. Blackstone said that the goal of statutory interpretation was to ascertain the "will of the

---

Croker (1553) 75 Eng. Rep. 123, 138 (KB) ("[T]hings which don't come within the words, shall not be taken by equity."). While other parts suggested a broader interpretive role for the courts. *See* Eyston v. Studd (1574) 75 Eng. Rep. 688, 695, 698 (KB) (stating that through equity, courts could "correct[]" the law to cure any deficiency by "enlarg[ing] or diminish[ing] the letter"); *see also* Frank Edward Horack, *Statutory Interpretation—Light from Plowden's Reports*, 19 KY. L.J. 211, 220–21 (1931) (noting that Plowden sometimes endorsed broad equity, and sometimes limited interpretation to the text).

106. *See* Eskridge, *supra* note 39, at 998–1005 (demonstrating the accepted view was to interpret statutes in light of their spirit); *see also, e.g.*, 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 649 (3d ed. 1768) ("In some Cases the Letter of an Act of Parliament is restrained by an equitable Construction; in others it is enlarged; and in others the Construction is contrary to the Letter.").

107. Eskridge, *supra* note 39, at 999 ("English judges freely went beyond the letter or words of statutes . . . [though] most invoked the common law, general equity, and statutory spirits to narrow rather than expand statutory words.").

108. A DISCOURSE UPON THE EXPOSICION & UNDERSTANDINGE OF STATUTES 140–41 (Samuel E. Thorne ed., 1942) [hereinafter DISCOURSE] ("Yt is therfore to be knowen that sommetymes statutes are taken by equytye more then the wordes, sommetyme contrary to the wordes, sommetyme it is taken strayctelye accordinge to the words.").

109. Eskridge, *supra* note 39, at 999.

110. *Partridge*, 75 Eng. Rep. at 130 ("[W]ords [of a statute] are no other than the verberation of the air, do not constitute the statute, but are only the image of it, and the life of the statute rests in the minds of the expositors of the words, that is, the makers of the statutes.").

111. *See, e.g.*, THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 8 (1724) ("Statutes must be interpreted by a reasonable Construction, according to the Meaning of the Legislators. . . . They may be construed according to Equity . . . for Law Makers cannot comprehend all Cases.").

legislat[ure]."[112] But Blackstone did not describe the "will" of the legislature as some historical fact that reflected what the legislature actually intended. He acknowledged that "all cases cannot be foreseen or . . . expressed" by the legislature.[113] Instead, his view was that the will was something that courts could infer from the assumption that the legislature was rational in writing its laws. As Blackstone put it, "*positive* law is construed, and *rational* law is made by it."[114]

Blackstone laid out a series of rules for interpreting statutes to implement the will of the legislature in a rational way. The best evidence of the legislature's will, Blackstone said, was the text of the statute; accordingly, courts should interpret statutes according to their text when the text of a statute was unambiguous.[115]

But Blackstone stressed the rarity of unambiguous statutes. In his view, the text of a statute rarely captured the legislature's will because of the inability to foresee all cases or include them in the text.[116] Thus, statutory text could be too narrow by excluding harms that the legislature would have covered, and it could be overbroad by including matters that the legislature would have excluded.[117] To correct these instances where the "law . . . is deficient," Blackstone identified other signs of legislative intent.[118] The most important consideration, Blackstone said, was the "equity"—that is, the "spirit and reason"—of the law.[119] In his view, this equity is the "soul and spirit of all law,"[120] and leads to the "true sense and sound interpre-

112. 1 BLACKSTONE, *supra* note 6, at *59 ("The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made.").

113. 3 BLACKSTONE, *supra* note 6, at *430–31 ("In general law all cases cannot be foreseen, or, if foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly expected.").

114. *Id.* at *429.

115. 1 BLACKSTONE, *supra* note 6, at *61; *see also* Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court's Approach to Statutory Interpretation*, 51 GA. L. REV. 121, 136 (2016) (discussing the importance of text to Blackstone).

116. 1 BLACKSTONE, *supra* note 6, at *59–60 ("Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use.").

117. 3 BLACKSTONE, *supra* note 6, at *430–31 ("In general law all cases cannot be foreseen; or, if foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly expected.").

118. 1 BLACKSTONE, *supra* note 6, at *62.

119. *Id.* at *59–61.

120. 3 BLACKSTONE, *supra* note 6, at *429.

tation" of the law.[121] Thus, Blackstone said, courts should determine statutes "according to the spirit of the rule, and not according to the strictness of the letter."[122]

Consistent with this view, Blackstone took a highly expansive view of what constituted a statutory ambiguity permitting courts to consider equity in interpreting a statute.[123] For example, he suggested that an ambiguity occurred when a statute used generalized language that could cover conduct that was not meant to be outlawed.[124] Thus, instead of establishing sweeping mandates that courts had no discretion in applying, broad statutes called for courts to consider the reason for the statute in determining its scope. He recognized similar ambiguities when statutes used language that was too specialized or otherwise not well suited to accomplish the statute's apparent purpose.[125]

Moreover, consistent with his view that the court should ascribe a fictitious rationality to the legislature, Blackstone explained that, even when the text appeared to be clear, a court could deviate from the text if enforcing the statute in particular circumstances would lead to "unreasonable" results.[126] The theory was that unreasonable consequences were "not foreseen by the parliament."[127]

---

121. *Id.*; *see also id.* at *430 (noting that "court[s] of law" should determine statutes "according to the spirit of the rule, and not according to the strictness of the letter").

122. *Id.* at *430.

123. WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 46 (1999) (noting that in the eighteenth century, courts "changed the meaning of statutes, refused to give them the effect intended, or to apply a rule . . . until the [legislature issued] an unmistakable mandate, which the courts reluctantly at times conceded it was their duty to obey" (quoting CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 36 (1959))).

124. 3 BLACKSTONE, *supra* note 6, at *431 ("Here by *equity* we mean nothing but the sound interpretation of the law; though the words of the law itself may be too general, too special, or otherwise inaccurate or defective."); *see also id.* ("[S]ome will arise that will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted.").

125. *Id.*

126. 1 BLACKSTONE, *supra* note 6, at *91 ("But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament; and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it."). Blackstone confirmed this view by pointing to the example that a statute imposing punishment on "whoever drew blood in the streets" did not extend to a surgeon who operated on an ill person in the street, because a legislature could not have reasonably meant to prohibit surgeons from saving lives. *Id.* at *61.

127. *Id.* at *91.

Up until the early 1600s, these principles of interpretation applied to all statutes, including criminal ones.[128] Just as they did with other types of statutes, courts both expanded and contracted criminal statutes based on the spirit and reason underlying those statutes.[129] This approach underlay the development of doctrines such as necessity and insanity as defenses to criminal statutes that were written in general language.[130] Likewise, it resulted in the courts occasionally extending criminal statutes beyond their text to encompass activities that raised the same sort of mischief that the statute targeted.[131]

But in the mid-1600s judges began to disclaim the power to extend criminal statutes beyond the text.[132] This change was in response to legislation expanding the death penalty for criminal violations. Parliament had enacted legislation extending the death penalty to various offenses that had previously carried lesser punishments. At the same time, Parliament limited the availability of benefit of clergy[133]—the ability to transfer jurisdiction to the ecclesiastic

128. Eyston v. Studd (1574) 75 Eng. Rep. 688, 699 (KB) ("And if it be said that the law is penal in this case, to this it may be answered that so it is also in the other case, but equity knows no difference between penal laws and others, for the intent . . . ought to be followed and taken for law, as well in penal laws as in others."); *see* POPKIN, *supra* note 123, at 13 ("Plowden was not adopting any special rule to limit the reach of *criminal* statutes . . . .").

129. DISCOURSE, *supra* note 108, at 156–57 (stating that "penall statutes are not onlie taken straightelie, but also sommetymes they are taken more straightelie then the wordes are," but noting that the rule was not absolute).

130. POPKIN, *supra* note 123, at 13.

131. Powlter's Case, 11 Coke Rep. 29a, 34a (1603) (stating that criminal statutes could be extended beyond the text because "it is frequent in our books, that penall statutes, have been taken by intendment"). The extent of the practice is unclear. *See* POPKIN, *supra* note 123, at 13–14. Some commentators suggested that equity could not extend criminal statute. *See* DISCOURSE, *supra* note 108. Or, that at best the power to extend criminal statutes was limited. *See* CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES OR ACTS OF PARLIAMENT AND THE EXPOSITION THEREOF 29–30 (1677).

132. *See* PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 239–41 (1875).

133. Commentators often claim that restrictions on the benefit of the clergy were the reason for adoption of the rule of strict construction, pointing to Peter Benson Maxwell's 1875 book on interpretation. *See, e.g.*, Scalia, *supra* note 4, at 29 (citing Maxwell for the proposition); Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 514–15 (2002) (stating that Maxwell originated the theory of the rule of lenity, or "benefit of clergy"). Benefit of clergy allowed a literate person to avoid the death penalty for an offense by demanding that he be tried in the ecclesiastic courts, which imposed lighter sentences. But Maxwell did not ascribe the rise of strict construction only to the restrictions on benefit of clergy. He also noted the increase in the number of statutes prescribing capital punishment. *See* MAXWELL, *supra* note 132, at 462.

courts, which imposed lighter sentences than death.[134] The expansion of the death penalty and the restriction of benefit of clergy led courts to adopt a rule of strict construction of criminal statutes.[135] Thus, by 1648, Justice Roll stated in *King v. Page & Harwood* that "the statute of stabbing being a penal law, it shall be taken strictly and not extended to equity."[136]

Blackstone recognized this same principle. Although stating that courts should generally consider equity in interpreting statutes, he noted an exception for criminal law. He stated that "[p]enal statutes must be construed strictly" and not extended beyond their text through interpretation.[137] Invoking that principle, Blackstone recounted a decision stating that a statute making it a capital offense to steal "horses" should not extend to a person who steals a single horse.[138]

This rule of strict construction prevented judges from using equity to *extend* criminal prohibitions beyond the text of the statute.[139] But it did not restrict their ability to rely on equity to *narrow* the scope of criminal statutes. As Lord Chief Justice Mansfield[140] stated in

---

134. Benefit of clergy was a demand to transfer jurisdiction to the ecclesiastic courts, which imposed lighter sentences. LEONA C. GABEL, BENEFIT OF CLERGY IN ENGLAND IN THE LATER MIDDLE AGES 111, 126 (Octagon Books 1969) (1928–1929). Although the benefit was initially limited to clergy, courts later extended it to anyone who was literate. *See* William W. Berry III, *Procedural Proportionality*, 22 GEO. MASON L. REV. 259, 263 (2015).

135. 1 BLACKSTONE, *supra* note 6, at *88 ("Penal statutes must be construed strictly.").

136. (1648) 82 Eng. Rep. 550, 550 (KB). For that reason, Justice Roll refused to read an ambiguous statute ousting the benefit of clergy to apply to the defendants.

137. 1 BLACKSTONE, *supra* note 6, at *88.

138. *Id.*; *see also* R. v. Seas (1784) 168 Eng. Rep. 255, 255 (KB) (holding capital punishment for stealing "any goods, wares, or merchandises" from a stable not applicable to theft of a coachman's coat from a stable); R. v. Kemp (1780) 168 Eng. Rep. 213, 214 (KB) (holding that stealing a tree at around 9 PM. not to be theft at "night time" because it was still light outside); 1 BLACKSTONE, *supra* note 6, at *88 (noting that capital punishment for stealing "sheep, or other cattle" was held inapplicable to theft of cattle).

139. 1 BLACKSTONE, *supra* note 6, at *88; *see also, e.g.*, WM. HENRY MALONE, CRIMINAL BRIEFS 155 (1886) ("Penal statutes are to be construed strictly. By this is meant only that they are not to be so extended by implication, and beyond the legitimate import of the words used, as to embrace cases or acts not clearly described by such words.").

140. Although not as well-known as Blackstone today, Lord Chief Justice Mansfield influenced many of the Framers. James Wilson called Mansfield "[t]he great luminary." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 103 (Max Farrand ed., 1911). Chief Justice Marshall invoked Mansfield in some of his most significant opinions. *See, e.g.*, Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 89 (1809); Marbury v.

1782, there is a "great difference between bringing a case within the equity of an act where it was not within the words, and taking a case out of the meaning of an act by an equitable construction, where it was within the words." Accordingly, a court could use equity to limit criminal statutes to exclude conduct that fell within the text of the law but not the reason for the statute—or as Lord Mansfield put it, if the conduct did not create "equal mischief" as the conduct prompting the statute.[141]

Thus, by the eighteenth century, two separate but related doctrines of interpretation applied to criminal statutes. First, the rule of strict construction prohibited judges from *extending* a criminal statute beyond its text.[142] Second, judges could rely on equity to *narrow* statutes. William Hawkins recognized these two rules in his 1712 Treatise on the Pleas of the Crown, stating that "[p]enal statutes are construed strictly against the subject, and favorably and equitably for him."[143] Together, these two doctrines established a one-way ratchet in favor of the defendant. To commit a crime under statute, a person had to violate both the letter and the spirit of an act.

Of course, if the text of a statute unambiguously criminalized particular conduct, courts had no discretion but to enforce the statute according to its terms. The text established the spirit and purpose of the law. But as noted earlier, judges readily found ambiguity in statutes. Whenever the letter of those statutes reached conduct that was less blameworthy, judges could interpret the statute more narrowly.[144]

Madison, 5 U.S. (1 Cranch) 137, 168 (1803); *see also* 11 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 20 (3d ed. 1938) (calling Mansfield "the greatest legal genius of the eighteenth century").

141. 1 EDWARD HYDE EAST, TREATISE OF THE PLEAS OF THE CROWN 592 (1806).

142. This differs from the rule of strict construction which preceded the modern rule of lenity. That rule applied only when statutes were deemed ambiguous, and it directed judges to choose interpretations that were more favorable to defendants. *See infra* notes 191–96 and accompanying text.

143. 1 WILLIAM A. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 30 § 8, at 77 (3d ed. 1712); *see also* WOOD, *supra* note 111, at 541 ("Penal statutes shall not be extended by Equity; The Words may be construed beneficially according to the Intent of the Legislators; but Things out of the Words shall not be taken by Equity.").

144. English judges sometimes disagreed on when statutes were unambiguous. *See, e.g.*, R. v. Hodnett (1786) 99 Eng. Rep. 993 (KB). There, the Court unanimously ruled that the Marriage Act, which prohibited clandestine marriages, extended to illegitimate children. But the justices diverged in their reasoning. Justice Buller concluded that the statute's plain language extended to illegitimate children and "where they are plain, we are to decide on them." *Id.* at 996. By contrast, Chief Justice Mansfield concluded that the statute extended to illegitimate children because there was "no reason to except illegitimate children, for they are within the mischief intended to be

An illustration of these rules of strict and liberal construction working together comes from Lord Mansfield's opinion in *Raynard v. Chase*.[145] There, a statute prohibited a person from being a brewer without an apprenticeship.[146] John Chase was charged under the statute because he became a brewer after being a paid partner in a brewery instead of an apprentice. Although Chase had not been an apprentice and accordingly fell within the letter of the law, Lord Mansfield concluded that Chase should not be convicted.[147] Mansfield noted both the rule of strict construction of statutes against a defendant and the liberal rule of construction in favor of the defendant. He explained that the judges had "confined the penalty and prohibition to cases precisely within the express letter."[148] But at the same time, he explained, judges had "by a liberal interpretation, extended the qualifications for exercising the trade, much beyond the letter of the Act."[149] Applying that latter liberal rule, Mansfield concluded that Chase should not be punished even though he had violated the text of the statute.[150]

2. Early American State Courts

Many early American state courts followed the English approach in interpreting criminal statutes.[151] They adopted both the rule that

remedied by the Act." *Id.* at 995.

145. (1756) 97 Eng. Rep. 155, 158 (KB).

146. *Id.* at 155.

147. *Id.* at 158.

148. *Id.*

149. *Id.*

150. *Id.*

151. As for interpretation generally of statutes, opinions were as divided in the past as they are today. For example, Theodore Sedgewick's treatise argues that the rule should be that courts must follow the text, even if doing so runs counter to what the judge believed the legislature intended. *See* THEODORE SEDGWICK, TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 294–310 (1857). But he also acknowledged that courts in practice often departed from the text under the pretext of legislative intent when they believed justice called for an exception. *See id.* at 295; *see also id.* at 311–15 (describing several nineteenth-century cases in which the equity of the statute doctrine was applied). Others argued that courts generally were not confined to the text. *See* Frederick J. de Sloovère, *The Equity and Reason of a Statute*, 21 CORNELL L.Q. 591, 597 (1936) ("In many early American cases the doctrine of equitable interpretation was adopted."); James McCauley Landis, *Statutes and the Sources of Law*, *in* HARVARD LEGAL ESSAYS 213, 218 (Roscoe Pound ed., 1934) ("[F]or a time, the doctrine of the equity of the statute held considerable sway in American courts."); *see also* Woodbridge v. Amboy, 1 N.J.L. 213, 214 (1794) ("We do not consider ourselves as bound by the strictly grammatical construction of the words of the act. The intention of the legislature

statutes could not be expanded beyond their literal terms, and the rule that the criminal statute could be narrowed to less than its literal terms.[152] A typical example is the Connecticut Supreme Court's statement in 1816 that in "expounding penal statutes, it is an established rule, that the construction must be strict, as *against* the defendant, but liberal, in his *favour*."[153] State courts in South Carolina,[154] New York,[155] Massachusetts,[156] New Jersey,[157] and New

---

should be our guide.").

152. Earlier decisions espoused the rule of strict construction but did not mention the rule of favorable interpretation. *See, e.g.*, Church v. Thomson, 1 Kirby 98, 99 (Conn. Super. Ct. 1786) (stating that a penal statute "could not be extended beyond the letter . . . it being a penal statute, ought to be construed strictly"); Yarborough v. Giles, 2 N.C. (1 Hayw.) 453, 453 (N.C. Super. Ct. L. & Eq. 1797) ("[T]he law which says this, is a harsh one, and should be construed with all possible strictness according to the letter."); Higgins v. Allen, 3 H. & McH. 504, 505 (Md. Gen. Ct. 1796) ("The act . . . is in the highest degree penal, and requires, therefore, the strictest construction."); Elliot v. Richards, 1 Del. Cas. 87, 88 (Ct. Com. Pl. 1796) ("The rule that a penal statute ought to be construed strictly, and the letter must be attended to, and that it cannot extend to crimes not mentioned in it, is a good rule and cited in many books.").

153. Myers v. State, 1 Conn. 502, 505 (1816) (emphasis in original); *see id.* ("Recourse may, therefore be had to the spirit, or reason, of the law, for the purpose of exempting from its operation, one, who is within the letter of it; but this, generally speaking, cannot be done in order to bring within the penalty, one, who is not within the letter. Hence it results, as a general proposition, to which there have been but very few exceptions, that no man can be subjected to the penalty of a statute, unless he is within both the letter and spirit of it."); *see also* Daggett v. State, 4 Conn. 60, 63 (1821) ("More correctly it may be said, that such laws are to be expounded strictly against an offender, and liberally in his favour. This can only be accomplished, by giving to them a literal construction, so far as they operate penally; or at most, by deducing the intention of the legislature from the words of the act.").

154. In *Mongin v. Baker*, a widow sued to preserve her rights in her deceased husband's lands that had been seized as a punishment for treason. 1 S.C.L. (1 Bay) 73 (S.C. Ct. Com. Pl. & Gen. Sess. P. 1789). Despite the absence of such an exception in the statute, the Court ruled in the widow's favor, stating that "[t]he maxim, that penal laws are to be construed strictly, is a wise one. The Court is not bound to give, nor will they ever give such a harsh construction to the act, as to deprive [a widow] of a common law right, when the act itself is silent upon the subject." *Id.* at 77. Although espousing only the strict construction rule, the Court actually applied the rule of interpreting in favor of a defendant by reading an exception into the text of the statute. *See id.* Later cases continued to follow this view. *See, e.g.*, State v. Barefoot, 31 S.C.L. (2 Rich.) 209, 211 (S.C. Ct. App. 1845) ("The statute, being penal, shall be construed favorably.").

155. Fish v. Fisher, 2 Johns. Cas. 89, 90 (N.Y. Sup. Ct. 1800) (Radcliff, J.) ("The act, it is true, is highly penal, and ought, therefore, when it operates upon the offender, to be construed strictly; but it is also in favour of personal liberty, and to this end, when it operates upon the offence only, ought to be liberally expounded.").

156. Commonwealth v. Derby, 13 Mass. 433, 435 (1816) ("Taking into view the general principle, that, in the construction of penal statutes, if any obscurity occurs, the most lenient opinion is to prevail, we are satisfied, that the justice erred in con-

Hampshire[158] adhered to a similar rule. Throughout the nineteenth century, courts in other states pronounced the same two-prong approach to interpreting criminal statutes.[159]

Like their English counterparts, state judges offered different justifications for these doctrines. Some stated that these favorable interpretations implemented the intent of the legislature.[160] Others relied on broader judicial power, suggesting that courts had the power to limit the reach of a statute even when doing so was against the intent of the legislature.[161] But many judges did not offer a reason for the rules. They simply recited the doctrines in discussing how to interpret criminal statutes.

To be sure, state courts did not always apply these doctrines. Some courts placed limits on the doctrine of strict construction, refusing to interpret language so strictly as to undermine the obvious goal of criminal statutes. In 1797, the Delaware Court of Common Pleas said: "The observation that a penal statute is to be construed strictly is true. But those laws enacted for the public good are to be construed so as to prevent the mischief which they were intended to remedy."[162]

---

sidering the respondent guilty."); Reed v. Davis, 25 Mass. 514, 533 (1829) ("The statute is highly penal, and should therefore be limited in its application, to the object the legislature had in view.").

157. Hinchman v. Clark, 1 N.J.L. 340, 353 (1795) ("Acts . . . are to be so construed as no man that is innocent or free from injury or wrong, be, by a literal construction, punished or endamaged." (quoting *Co. Litt.* 360, a, § 685)).

158. *See* Fairbanks v. Antrim, 2 N.H. 105, 107 (1819) (observing that, although courts cannot expand criminal statutes beyond its text, they could construe the words of a statute "beneficially").

159. *See, e.g.*, State v. Upchurch, 31 N.C. (9 Ired.) 454, 456–57 (1849) ("The interpretation of [penal] statutes is to be benignant to the accused; and, therefore, words in his favor cannot be rejected."); *see also* G. A. ENDLICH, COMMENTARIES ON THE INTERPRETATION OF STATUTES § 329, at 454 (1888) (listing cases).

160. *Fairbanks*, 2 N.H. at 108 (observing that they could construe the words of a statute "beneficially, according to the intent of the makers thereof"); *see also* SEDGEWICK, *supra* note 151, at 298 (stating this view).

161. State v. Boon, 1 N.C. (Tay) 191, 199 (1801) (Johnston, J.) ("[T]here remains no doubt in my mind respecting the intention of the Legislature; but the Judges in this country, as well as in England, have laid down, and invariably adhered to, very strict rules in the construction of penal statutes in favor of life.").

162. Harrison v. Hunter, 2 Del. Cas. 76, 77 (Ct. Com. Pl. 1797). For another, later, example, see *Commonwealth v. Baird*. 4 Serg. & Rawle 141 (Pa. 1818). At issue was whether a criminal statute requiring a license to sell liquor "in the city and county of Philadelphia" prohibited unlicensed sales outside the city of Philadelphia but still in the county. *Id.* at 144. Although a strict reading of the conjunctive in the statute suggested that the statute required a license only for sale in both the city and county of Philadelphia, the court refused to adopt that construction. *Id.* at 145. The Court ex-

Moreover, by the middle of the nineteenth century, some courts occasionally departed from the rule of interpreting criminal statutes in favor of defendants. In 1837, for example, the Massachusetts Supreme Court refused to recognize an exception to a criminal statute prohibiting the sale of alcohol for sales of alcohol for medicinal purposes. In response to the argument that the legislature did not mean to limit medicinal sale of alcohol, the Court said that "if the law is more restrictive in its present form than the legislature intended, it must be regulated by legislative action."[163]

These departures, however, were not the norm. A significant enough number of courts followed the rules of strict construction and of interpreting in favor of defendants that, by the end of the nineteenth century, one leading treatise summarized the law by reiterating the English rule that criminal statutes "are not to be regarded as including anything which is not within their letter as well as their spirit."[164]

3. Early Federal Courts

The experience in the early federal courts was largely the same as in the early state courts. Federal judges followed the two rules favoring defendants in interpreting criminal statutes. And the evidence suggests that early federal judges saw themselves as having an active role to play in limiting the scope of criminal law.

Although discussions at the Constitutional Convention did not focus on how federal courts should interpret statutes,[165] the ratifica-

plained that it was clear that the legislature meant to prohibit unlicensed sales in the whole county of Philadelphia, and it would depart from "the strict meaning of the expressions . . . in order to comply with the manifest spirit and intention of the law." *Id.*

163. Commonwealth v. Kimball, 41 Mass. (24 Pick.) 366, 370 (1837).

164. ENDLICH, *supra* note 159. Another significant commentator, Theodore Sedgewick, argued that courts *should not* narrow criminal laws, but he acknowledged that his view did not prevail in the courts. *See* SEDGEWICK, *supra* note 151, at 294–95.

165. During discussions on the proposed Council of Revision that could veto federal legislation, James Wilson expressed the view that "[l]aws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not so unconstitutional as to justify the Judges in refusing to give them effect." 5 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787 WITH A DIARY OF THE DEBATES OF THE CONGRESS OF THE CONFEDERATION AS REPORTED BY JAMES MADISON 344 (Burt Franklin ed., 1888) (statement of James Wilson, Delegate, Pennsylvania). George Mason said that, if judges did not have an opportunity to veto the legislation through the Council, "with regard to every law however unjust oppressive or pernicious . . . they would be under the necessity, as judges, to give it a free course." *Id.* at 347–48. These statements suggest only that Mason and Wilson believed that courts could not refuse to enforce laws that were unjust. They did not express a position on whether courts should follow a textualist, purposivist, or other

tion debates touched more on the topic. As a general matter, the view expressed was that courts could interpret statutes in a way that departed from the text.[166] Although those discussions referred to judicial interpretation generally, instead of focusing on criminal laws specifically, the Federalist Papers suggested that the judicial power to depart from the text was particularly important for punitive laws.[167] In Federalist 78, Hamilton stated that "ill humors" could lead to "unjust and partial laws" that inflicted "injury of the private rights of particular classes of citizens."[168] He suggested that courts could

approach in determining the content of the law. Several years later in his lectures on law, James Wilson stated that courts generally should interpret statutes to implement "the spirit of the law, or the motive which prevailed on the legislature to make it." JAMES WILSON, 2 THE WORKS OF JAMES WILSON 123 (James DeWitt Andrews ed., 1896). Considering spirit and intent, Wilson said, was essential to "true and sound construction." *Id.*

166. For example, Timothy Pickering, an advocate for the Constitution, wrote that federal courts would interpret laws "according to the spirit of the rule, and not according to the strictness of the letter." Refutation of the "Federal Farmer": Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 289 (Bernard Bailyn ed., 1993) [hereinafter THE DEBATE ON THE CONSTITUTION]; *see also id.* at 297 (noting that courts of law, like courts of equity, determine meaning "according to the spirit of the rule, and not according to the strictness of the letter," and arguing that "our ideas of a court of equity are derived from the English Jurisprudence"). Opponents to the Constitution held a similar view. One of the objections of the anti-federalists to the creation of a federal judiciary was that federal courts would expand federal power by exercising their power to interpret the Constitution according to its spirit instead of its letter. *See* BRUTUS NO. XI, N.Y. J., Jan. 31, 1788, *reprinted in* 2 THE DEBATE ON THE CONSTITUTION, *supra*, at 135 (noting that the Supreme Court could "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter," thereby enabling the judges to "mould the government, into almost any shape they please"); Letter from the Federal Farmer to The Republican III (Oct. 10, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra*, at 273 (emphasizing that "if the law restrain [the federal judge], he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate"); Letter from Samuel Osgood to Samuel Adams (Jan. 5, 1788), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra*, at 705–06 (arguing that through powers of equitable interpretation the Supreme Court could "make what Constitution they Please for the united States").

167. In Federalist 83, Alexander Hamilton more ambiguously said that courts should use "*common sense*" in interpretation, THE FEDERALIST NO. 83, at 496 (Alexander Hamilton) (Clint Rossiter ed., 1961)—a term that may suggest ordinary readings of statutes, but also may suggest that courts should use their sense of what makes sense in interpreting statutes. *See* POPKIN, *supra* note 123, at 40–41 (arguing that commonsense interpretation carried the idea of judicial discretion).

168. THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clint Rossiter ed., 1961).

deviate from the text to "guard" against these effects by "mitigating the severity and confining the operation of" those laws.[169]

Consistent with these views, federal courts followed the same two-prong approach as state courts in interpreting criminal statutes.[170] In 1794, the district court in South Carolina adopted the rule of strict construction of criminal statutes.[171] The Supreme Court first applied the rule the next year,[172] and reiterated the rule in many cases.[173] Like its English ancestor, this rule of strict construction prohibited courts from expanding criminal statutes through equity "so as to extend it to cases not within it."[174]

Federal courts also adopted the doctrine that courts could narrow the scope of criminal statutes to less than its text suggested. Alt-

169. *Id.* Also in Federalist 78, Hamilton said that courts should not substitute "their pleasure to that of the legislative body" by exercising "WILL instead of JUDGMENT" when rendering interpretations. *Id.* at 469. Hamilton did not seek to reconcile the tension between these statements—that on the one hand that courts should "mitigate[e] the severity and confin[e] the operation of" statutes, and on the other that courts should enforce legislative intent instead of their own pleasure—though one can do so. *See generally* POPKIN, *supra* note 123, at 40–41 (discussing the ambiguities in the Federalist papers regarding interpretation).

170. Some justices suggested that courts could diverge from the best reading of a statute's text if necessary to avoid injustice. *See, e.g.*, Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 328–29 (1796) (Elsworth, C.J.) ("[I]t is of more importance, for a judicial determination, to ascertain what the law is, than to speculate upon what it ought to be. If, however, the construction, that a statement of facts by the Circuit Court is conclusive, would amount to a denial of justice, would be oppressively injurious to individuals, or would be productive of any general mischief, I should then be disposed to resort to any other rational exposition of the law, which would not be attended with these deprecated consequences.").

171. *See, e.g.*, Bray v. Atalanta, 4 F. Cas. 37, 38 (D.S.C. 1794) (No. 1,819) ("[I]t is a penal law and must be construed strictly.").

172. United States v. Lawrence, 3 U.S. (3 Dall.) 42, 45 (1795) ("[W]henever a new remedy is so introduced, (more especially in a case so highly penal) it must be strictly pursued.").

173. United States v. Gooding, 25 U.S. (12 Wheat.) 460, 477 (1827) ("This is a penal act, and is to be construed strictly, that is, with no intendment or extension beyond the import of the words used."); United States v. Eighty-Four Boxes of Sugar, 32 U.S. 453, 462–63 (1833) ("The statute under which these sugars were seized and condemned is a highly penal law, and should, in conformity with the rule on the subject, be construed strictly."); *see also* United States v. Winn, 28 F. Cas. 733, 734 (C.C.D. Mass. 1838) (No. 16,740) ("[P]enal statutes are to be construed strictly."); United States v. Hare, 26 F. Cas. 148, 156 (C.C.D. Md. 1818) (No. 15,304) ("It is admitted that penal statutes should be construed strictly.").

174. United States v. Sheldon, 15 U.S. (2 Wheat.) 119, 121 (1817). This precursor to the rule of lenity went broader than criminal laws. *See* Sixty Pipes of Brandy, 23 U.S. (10 Wheat.) 421, 423 (1825) (applying rule of strict construction to forfeiture statute); CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 161–62 (1996) (noting that the rule applied to civil penalties).

hough no early opinion of the Supreme Court adopted the doctrine, several justices explicitly advocated narrowing criminal statutes in favor of defendants.[175] For example, Justice Story wrote while riding circuit that it "is a principle grown hoary in age and wisdom, that penal statutes are to be construed strictly, and criminal statutes to be examined with a favorable regard to the accused."[176] Justice Johnson espoused a similar view.[177]

The only Justice to speak against construing criminal statutes favorably towards defendants was Justice Chase—the same Justice who stood alone in his rejection of federal criminal common law.[178] Sitting as a circuit justice, Chase said in *Priestman v. United States*:

> Of those rules of construction, none can be more dangerous, than that, which distinguishing between the intent, and the words, of the legislature, declares, that a case not within the meaning of a statute, according to the opinion of the Judges, shall not be embraced in the operation of the statute, although it is clearly within the words: or, *vice versa*, that a case within the meaning, though not within the words, shall be embraced.[179]

But for the other Justices, their statements about statutory interpretation, as well as their view that federal judges could create common law crimes, strongly suggest that the early federal courts perceived themselves as having a broader policy role in fashioning criminal law.[180] Even if they conceived of their ultimate goal as implementing Congress's intent, they clearly made independent policy choices by cherry-picking methodologies that most favored defend-

---

175. The willingness to favor defendants was not limited to *substantive* criminal law. In *United States v. Steward*, the Circuit Court interpreted a procedural statute favorably to a defendant in a way that departed from the text. 27 F. Cas. 1338, 1339 (C.C.D. Pa. 1795) (No. 16,401). The statute required the government to provide only three days' notice of witnesses to prisoners being tried on criminal charges. *Id.* at 1338. The court refused to enforce that three-day limitation. Stating that "the intention of the Legislature [was] to afford an opportunity to canvass the characters of the witnesses," the court stated that a "reasonable time shall be allowed after a list of the names of the witnesses is furnished" for the prisoner to assess the witnesses. *Id.* at 1338–39.

176. United States v. Mann, 26 F. Cas. 1153, 1157 (C.C.D.N.H. 1812) (No. 15,718).

177. United States v. Palmer, 16 U.S. 610, 637 (1818) (Johnson, J.) ("This, however, is more than I need contend for, since a doubt relative to that construction or intent ought to be as effectual in their favour, as the most thorough conviction.").

178. Jay, *supra* note 92, at 1016–17 (stating that "[o]nly the notorious Justice Samuel Chase is known" to have rejected federal common law); 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 88, at 299 (stating 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 common law jurisdiction").

179. 4 U.S. (4 Dall.) 28, 30–31 n.1 (1800).

180. *Id.* at 31–32.

ants. Notably absent from these discussions were any mention of judicial subordination to Congress.

John Manning has argued that one should not place too much stock in the practices of the federal courts at the founding, because the precise contours of the judicial power were still in flux at that time.[181] He argues that subsequent developments in the nineteenth century established that federal courts had no discretion to fashion policy in interpreting statutes; instead, their function was to act only as faithful agents in interpreting statutes.[182] Although his argument focuses on interpretation of statutes generally, it implicitly extends to criminal statutes because they are a subset of statutes.

It is true that some decisions in the mid-1800s suggest a shift toward stronger adherence to the will of Congress represented through the text and less discretion for the courts in interpreting criminal statutes.[183] This shift occurred around the same time that the Court disclaimed the federal power to create common law, after the founding generation of Justices had left the Court.[184] For example, in *United States v. Wiltberger*,[185] the Supreme Court said that, although penal statutes should be strictly construed:

> The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would com-

181. Manning, *supra* note 5 (arguing that the history is "inconclusive").

182. Manning, *supra* note 4, at 86 ("Although the federal courts at times invoked the equity of the statute until well into the nineteenth century, the law as early as the Marshall Court began to shift to the faithful agent theory as the dominant constitutional foundation of statutory interpretation.").

183. This move toward subordination to Congress and textualism was not unique to criminal law but was part of a broader trend toward textualism. *See* Schooner Paulina's Cargo v. United States, 11 U.S. (1 Cranch) 52, 60 (1812) ("In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it."). Even so, some Justices still thought that courts could depart from the text in interpreting statutes. Joseph Story likewise recognized the power of equitable interpretation. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 6 (Isaac F. Redfield ed., Little, Brown & Co. 10th ed. 1870) (1836) ("[A] more general way in which this sense of equity . . . is applied, is, to the interpretation and limitation of the words of positive or written laws: by construing them, not according to the letter, but according to the reason and spirit of them.").

184. While riding circuit, Marshall stated that the rule of strict construction meant that, "where the intention is not distinctly perceived, where, without violence to the words or apparent meaning of the act, it may be construed to embrace or exclude a particular case, where the mind balances and hesitates between the two constructions, the more restricted construction ought to prevail." The Adventure, 1 F. Cas. 202, 204 (C.C.D. Va. 1812) (No. 93).

185. 18 U.S. (5 Wheat.) 76 (1820).

> prehend. The intention of the legislature is to be collected from the words they employ.[186]

But *Wiltberger* did not abandon the rules of interpreting criminal laws in a way favorable to the defendant. To the contrary, the Court applied them. The ultimate decision by the Court was to *refuse* to extend a statute punishing "manslaughter committed on the high seas" beyond its text to include a killing committed on a river.[187]

Nor did the federal court abandon these doctrines in the decades following *Wiltberger*. To the contrary, throughout the nineteenth century the federal courts reiterated the rule that criminal statutes should be interpreted in the defendant's favor.[188] Eventually,

---

186. *Id.* at 95.

187. *Id.* at 78. The other major case involving the interpretation of criminal statute, *United States v. Palmer*, similarly did not disclaim the rules of interpreting criminal statutes favorably to defendants. 16 U.S. (3 Wheat.) 610 (1818). There, the Court wrote that "when the legislature manifests [its] clear understanding of its own intention, which intention consists with its words, courts are bound by it." *Id.* at 630. But the Court wrote those words in rejecting the argument that the Court should *ignore* the text of a statute that listed robbery as an act of piracy because Congress was mistaken in listing robbery as piracy. The Court said that it could not conclude that Congress made a mistake because the text clearly revealed the intent of the legislature to include robbery. The Court did not say that the text of the statute trumps the intent of the legislature; it said only that because the statute explicitly listed robbery, the text clearly revealed Congress's intent to include robbery as piracy.

Another decision from the Marshall Court frequently cited as support for textualism is *Evans v. Jordan*, 8 F. Cas. 872 (C.C.D. Va. 1813) (No. 4,564), *aff'd*, 13 U.S. (9 Cranch) 199 (1815). There, the Court wrote that:

> An act ought so to be construed as to avoid gross injustice, if such construction be compatible with the words of the law, will not be controverted; but this principle is never to be carried so far as to thwart that scheme of policy which the legislature has the power to adopt . . . . Wherever, then, their language admits of no doubt, their plain and obvious intent must prevail.

Id. at 873. This statement follows the approach advocated by Blackstone. It says the ultimate question is the intent of the legislature, and that an unambiguous text demonstrates the legislature's intent. But it does not resolve when an ambiguity occurs. And other decisions of the Court from this era suggest that the Court was willing to depart from the text even in the face of seemingly unambiguous text. *See, e.g.*, Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 203 (1819) (arguing that an interpretation would depart from the text when "the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application").

188. *See, e.g.*, United States v. Stowell, 133 U.S. 1, 12 (1890) (stating that courts should construe "penal laws . . . strictly in favor of the defendant"); *In re* Cliquot's Champagne, 70 U.S. (1 Wall.) 114, 145 (1865) (noting that "penal laws" are "to be construed with great strictness in favor of the defendant"); Harrison v. Vose, 50 U.S. (1 How.) 372, 378 (1850) ("In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent."); United States v. Alexis Club, 98 F. 725, 726 (E.D. Pa. 1899) ("[T]he

these rules morphed into much weaker rules about construing ambiguity in favor of defendants, culminating with the modern, very weak, rule of lenity.[189]

***

In summary, courts historically adopted several doctrines in interpreting criminal statutes that represented deliberate efforts to favor defendants and constrain the criminal law. In particular, the courts adopted three rules of constraint:

- The rule of strict construction—A criminal statute should not be extended beyond its text.
- The rule of favorable construction—If the text of a statute is broad so that it criminalizes conduct beyond the mischief that motivated the statute, then the statute should be construed narrowly in line with its spirit.
- The rule of ambiguity—Although courts must enforce unambiguous statutes as written, a broad, generally applicable statute is presumptively ambiguous and accordingly should be narrowly interpreted in light of its spirit.

The justifications for these rules of constraint varied. Some judges transparently acknowledged that they were refashioning the law. Others said that these rules were an effort to implement the intent of the legislature. But none actually saw themselves as simply a tool to implement the will of the legislature. They picked from among a set of methods for determining legislative intent, choosing methods that maximally limited the reach of the criminal law.

III. MODERN CRIMINAL LAW'S PATHOLOGIES AND PRINCIPLES

Although courts used to apply a different rubric when interpreting criminal laws, modern courts no longer do so. Instead, they treat criminal law interpretation largely the same as all other statutory interpretation.[190] The one exception is the rule of lenity, which results in a more lenient interpretation of ambiguous criminal statutes.

---

fact that such a statute is generally—perhaps always—a penal statute . . . [it] is, therefore, to be construed strictly in favor of the accused."); Forty-Three Gallons of Cognac Brandy, 11 F. 47, 50 (C.C.D. Minn. 1882) ("The rule which requires that the words in a penal statute shall be construed strongly in favor of the accused.").

189. *See infra* notes 191–98 and accompanying text.

190. *See supra* Part I.B.

The rule of lenity is descended from the rules of constraint that courts historically employed.[191] But the rule is a hollow shell of its historic ancestors, and it rarely affects the interpretation of criminal statutes.[192] Unlike the historical rules of constraint, the rule of lenity does not provide a framework for interpreting criminal statutes. Instead, it is a tool of last resort, to be used only when no other tools of construction resolve the ambiguity in the statute.[193] Moreover, not all statutory ambiguities trigger the rule of lenity; only a "grievous ambiguity or uncertainty"[194] that would require courts to "make 'no more than a guess'"[195] of what the legislature intended will lead them to invoke the rule of lenity. Consequently, the rule minimally constrains the criminal law.

The principal culprit for the dilution of the rule is the purposivist Justice Frankfurter. As Professor Shon Hopwood has documented, Frankfurter's decision "that the rule of lenity should only come 'into operation at the end of the'" interpretive process was tied to Frankfurter's broader commitments to legislative supremacy.[196] Like other mid-twentieth century purposivists, Frankfurter argued that the role of the Court in interpreting statutes is simply to implement the will of the legislature, not to serve as an independent institution that is supposed to inject leniency into the interpretive process.[197] Rather than applying a set of rules that favor criminal defendants, Frankfurter maintained that courts should instead aim simply to implement the will of the legislature in interpreting statutes. Only in the very rare instance, where no other rule of construction could resolve the meaning of a statute, should lenity apply.[198]

---

191. *See* Hopwood, *supra* note 2, at 924–28.

192. *See supra* notes 80–83 and accompanying text.

193. Callanan v. United States, 364 U.S. 587, 596 (1961).

194. Muscarello v. United States, 524 U.S. 125, 139 (1998) (Ginsburg, J., dissenting) (quoting Staples v. United States, 511 U.S. 600, 619 n.17 (1994) (quoting Chapman v. United States, 500 U.S. 453, 463 (1991))).

195. *Id.* at 138 (majority opinion) (quoting United States v. Wells, 519 U.S. 482, 499 (1997)).

196. Hopwood, *supra* note 2, at 928–29. Mila Sohoni has tied Justice Frankfurter's hostility to the rule of strict construction and his adoption of the weaker modern rule to a general shift on the Court around the time of the New Deal—one in which a commitment to broader congressional power led the Supreme Court to seriously curtail several doctrines associated with Due Process. *See* Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1206–07 (2013).

197. *E.g.*, *Callanan*, 364 U.S. at 596 (stating that it "is not the function of the judiciary" to interpret statutes with "an overriding consideration of being lenient to wrongdoers").

198. *Id.* ("The rule [of lenity] comes into operation at the end of the process of

Although purposivists initially hamstrung lenity, textualists also bear some blame. Textualists have not sought to restore the stronger rules that the purposivists abandoned, presumably because those rules conflict with textualist methodology. Instead, textualists recognize the weaker rule of lenity,[199] though only grudgingly,[200] reasoning that they must accept the rule because of its ancient pedigree.[201] But in doing so, they have conflated the history of the modern rule of lenity with that of its more robust ancestor.[202] Textualists have also been quick to criticize those who have declared overly broad criminal statutes ambiguous so that they could construe those statutes more narrowly.[203] In other words, they have ignored the historical rule of ambiguity, which instructs courts to assume that broadly written, general statutes are ambiguous and thus should be interpreted more narrowly.[204]

In short, modern statutory interpretation no longer openly accepts judges' deliberate efforts to favor defendants and constrain the criminal law. To be sure, judges will sometimes narrowly construe a criminal law when doing so conforms to their chosen interpretive methodology. But neither of the dominant methodologies affirmatively embraces judicial interpretation as an opportunity for the judiciary to constrain criminal law.

---

construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.").

199. *See* United States v. Hansen, 772 F.2d 940, 948 (D.C. Cir. 1985) (noting that the rule of lenity "provides little more than atmospherics").

200. *See* Barrett, *supra* note 13, at 128–34; *see also* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582 (1989) ("I should think that the effort, with respect to *any* statute, should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right. Now that may often be difficult, but I see no reason, *a priori*, to compound the difficulty, and render it even more unlikely that the precise meaning will be discerned, by laying a judicial thumb on one or the other side of the scales. And that is particularly so when the thumb is of indeterminate weight. How 'liberal' is liberal, and how 'strict' is strict?").

201. Scalia, *supra* note 4, at 29 (noting that the rule of lenity "is validated by sheer antiquity"); Manning, *supra* note 22, at 436 (justifying textualist use of the rule of lenity on the ground that it is "sufficiently well-settled").

202. *See* John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1561 n.62 (2008) (arguing that the rule of lenity "stretches to the earliest days of the Republic"). Some appear to have even bolstered the pedigree of the modern rule of lenity, claiming it has more historical support than it does. *See* Barrett, *supra* note 13, at 132 (pointing to dicta in *Wiltberger* to suggest adoption of the weaker rule of lenity).

203. *See* Yates v. United States, 574 U.S. 528, 566 (2015) (Kagan, J., dissenting); Bond v. United States, 572 U.S. 844, 867–72 (2014) (Scalia, J., concurring).

204. *See supra* text accompanying notes 116–25.

That's unfortunate because modern criminal law is in desperate need of constraint. Recent decades have seen a disastrous expansion of the criminal justice system. Legislatures have drafted incredibly broad and imprecise laws[205] that delegate enormous discretion to police and prosecutors.[206] And prosecutors have used those laws to incarcerate a staggering number of people.[207]

The results have been breathtaking. Not only does the United States incarcerate a larger percentage of its inhabitants than any other country,[208] but we have also built a criminal justice system that betrays fundamental principles of our constitutional structure.[209] Our system, in which judges routinely fail to act as a meaningful check on the scope of criminal law, rests on a stilted view of the separation of powers and weakens democratic accountability. It also results in less notice and predictability.

Ironically, these are the very principles that modern theories of statutory interpretation invoke to justify their theory of judges as the "faithful agents" of the legislature. Perhaps counterintuitively, a system in which judges make more deliberate efforts to favor defendants and constrain the criminal law would actually better realize the benefits of the separation of powers, increase democratic accountability, and ensure greater notice and predictability.

---

205. Hessick & Kennedy, *supra* note 9, at 360–61 (describing the legislative incentives to write broad and imprecise laws); Kiel Brennan-Marquez, Essay, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641, 658–59 (2019) (same).

206. Hessick, *supra* note 86, at 992 ("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. But in practice that power is usually exercised by prosecutors rather than judges."); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 639 (2005) (observing that the "degradation" of modern criminal codes "reflects a shift of practical authority away from the legislature to prosecutors and police, who now have broad discretion over who gets punished and the level of punishment" so that "[a]rrest, punishment, and the level of punishment are now determined as much by the ad hoc decision-making of individual law enforcement officials as they are by the legal rules").

207. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 69–74, 127–59 (2017).

208. *Countries with the Largest Number of Prisoners per 100,000 of the National Population, as of May 2021*, STATISTA (June 2, 2021), https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants [https://perma.cc/5CMY-57YG].

209. *See generally* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021) (discussing how the modern criminal justice system is designed to circumvent the Constitution's protections for criminal defendants).

A. MODERN CRIMINAL LAW PATHOLOGIES

It is tempting to describe criminal statutes in idealized terms. Indeed, most criminal law textbooks describe the modern criminal justice system, in which crimes are created through the enactment of statutes rather than the common law process, in quite positive terms.[210] In those accounts, our system of criminal statutes consists of clearly worded laws that are tailored to prohibit only the wrongful conduct; this system provides notice, accountability, uniformity, and generally serves important rule of law values.[211]

Missing from these accounts is the fact that legislatures routinely enact broad criminal statutes that sweep in far more conduct than the perceived problem that motivated the law.[212] Lawmakers will deliberately adopt overly broad laws, with the view that prosecutors should have the role of choosing the criteria that will trigger enforcement.[213] To be sure, arguments about overly broad legislation and overly aggressive enforcement could likely be made about various areas of law. But there are political differences that make these problems especially acute for criminal law.

The politics of criminal law make overly broad statutes all but inevitable. Crime legislation is often introduced in the wake of a high-profile crime.[214] Lawmakers feel pressure to do *something* in re-

---

210. This description is often couched in terms of the "principle of legality." Most modern textbooks include a section on the principle. *See, e.g.*, RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN C. JEFFRIES, JR. & PETER W. LOW, CRIMINAL LAW 85–99 (2d ed. 2004); JOSHUA DRESSLER & STEPHEN P. GARVEY, CASES AND MATERIALS ON CRIMINAL LAW 92–119 (6th ed. 2012); JEROME HALL, B.J. GEORGE, JR. & ROBERT FORCE, CASES AND READINGS ON CRIMINAL LAW AND PROCEDURE 3–72 (3d ed. 1976); PHILLIP E. JOHNSON, CRIMINAL LAW: CASES, MATERIALS AND TEXT 76–97 (3d ed. 1985); SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 134–67 (8th ed. 2007); JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 130–43 (5th ed. 2004).

211. *See* Hessick, *supra* note 86, at 971–78 (collecting and describing sources).

212. Marc A. Levin, *At the State Level, So-Called Crimes Are Here, There, Everywhere*, 28 CRIM. JUST. 4, 6 (2013) (highlighting "the deluge of overly broad and vague criminal laws").

213. Brennan-Marquez, *supra* note 205, at 658 ("[O]urs is *not* a world where lawmakers tend to draft well-tailored, proportional statutes. Particularly in the realm of criminal law, the tendency is just the opposite."); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1664–65 (2010) ("[Legislators] seek to leave determinations of optimal enforcement to the executive [and] purposefully avoid the particulars [when drafting criminal statutes], anticipating case-specific, back-end equitable intervention."); Hessick, *supra* note 86, at 996 (observing that, when it comes to broad laws, "it is entirely up to prosecutors to decide how broadly or narrowly to enforce those laws").

214. Jessica A. Roth, *Alternative Elements*, 59 UCLA L. REV. 170, 178 (2011);

sponse, and so they will introduce legislation.[215] The legislation is often broadly or imprecisely phrased, either because it was hastily drafted or because lawmakers deliberately did not want to leave open the possibility that strategic behavior by bad actors could circumvent a more narrowly drafted law.[216]

In other areas of the law, affected interest groups would be able to counter the legislative impulse to pass an imprecise or overly broad law. But that is not the case for criminal laws. The politics of crime are asymmetrical.[217] Crime does not invite compromise and horse-trading because the issue is framed in terms of good and evil,[218] and nobody wants to be seen as negotiating for evil.[219] More generally, the interests of would-be criminal defendants are routinely neglected in legislative politics because no interest group represents them.[220]

Because laws are written so broadly, prosecutors have broad discretion about how to enforce them. It is an open secret that legislators do not intend prosecutors to enforce laws as written. Instead, they expect prosecutors to pick and choose between those people who violate the terms of criminal statutes, and they allow prosecutors to develop their own enforcement criteria to do so.[221] The

---

Stuntz, *supra* note 11, at 531–32.

215. Robinson & Cahill, *supra* note 206, at 644; Stuntz, *supra* note 11, at 531–32.

216. *See* Hessick & Kennedy, *supra* note 9, at 360–61 (describing the dynamics and incentives that lead to these laws); Stuntz, *supra* note 11, at 547–48 (same). *See generally* Buell, *supra* note 9 (explaining why overly broad laws may, in some circumstances, be beneficial because they allow the state to punish those who adapt their behavior to legal regimes).

217. *See* Barkow & O'Neill, *supra* note 10 (explaining that, with the exception of those who care about white collar crime, "the groups that seek shorter sentences and more flexible sentencing authority do not wield much political power"); Barkow, *supra* note 10 (contrasting the powerful lobbies for expansive and punitive criminal laws with the weak groups that would oppose them). *But cf.* Richman, *supra* note 9, at 774–76 (noting that some criminal laws, such as mail and wire fraud, target politically powerful white-collar individuals, and yet "one rarely sees high-profile efforts by interest groups to limit purely criminal statutes" such as those).

218. *See generally* Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829 (2000) (discussing the role crime plays in our conception of societal values).

219. *See* JOEL BEST, RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS 24–26 (1999); PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 15–19 (1998).

220. STUNTZ, *supra* note 10; Kennedy, *supra* note 218, at 829–33.

221. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 875 (2009) ("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'

broadly written laws also often remove the need for prosecutors to prove, beyond a reasonable doubt, facts such as the overt act requirement for conspiracy that distinguish the culpable violators of the law from the non-culpable violators[222]—a situation that Bill Stuntz famously described as "pathological."[223]

One might expect that the prosecution of individuals for innocuous behavior under broadly written laws would provoke a response by voters, but legislators can easily frame such a prosecution as a failure of prosecutorial discretion.[224] They can claim that this sort of prosecution is not what they intended when they passed the imprecise or overbroad statute, and instead reflects poor judgment on the part of the prosecutor filing the charge.[225] For their part, voters seem content with a system in which lawmakers explicitly pass laws that are broadly written specifically so that prosecutors need not meet

---

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."); Bowers, *supra* note 213, at 1664 ("It is necessary and desirable for prosecutors to exercise a measure of discretion because codes are too expansive to do otherwise."); Hessick, *supra* note 86, at 996 ("[P]rosecutors are free to decide which conduct to treat as illegal and which to treat as permissible.").

222. Bill Stuntz described this phenomenon in the following terms:

> Suppose a given criminal statute contains elements *ABC*; suppose further that *C* is hard to prove, but prosecutors believe they know when it exists. Legislatures can make it easier to convict offenders by adding new crime *AB*, leaving it to prosecutors to decide when *C* is present and when it is not. Or, legislatures can create new crime *DEF*, where those elements correlate with *ABC* but are substantially easier to prove. Prosecutors can continue to enforce the original crime, but more cheaply, by enforcing the substitutes. When they do this, prosecutors are engaging in informal adjudication: they are not so much redefining criminal law (the real crime remains *ABC*) as deciding whether its requirements are met, case by case.

Stuntz, *supra* note 11, at 519.

223. *Id.* at 528 (noting that "discretionary enforcement frees legislators from having to worry about criminalizing too much, since not everything that is criminalized will be prosecuted; likewise, legislative power liberates prosecutors, widening their range of charging opportunities" and observing that, as a result "prosecutorial and legislative power reinforce each other" and thus "criminal law will always be broader than ordinary majoritarian politics would suggest").

224. *Id.* at 548.

225. *See* Hessick & Kennedy, *supra* note 9, at 354 n.7 (collecting sources); *see also* Brennan-Marquez, *supra* note 205, at 658 ("When laws are enforced to the public's liking, legislatures typically receive credit, but when laws are enforced overzealously (or otherwise unreasonably), blame can easily be deflected to prosecutors.").

the burden of proof for difficult-to-prove elements,[226] such as mental states.[227]

In a system of legislative excess and vast prosecutorial power, one might expect judges to act as a check on the other branches. And sometimes judges do push back against overly broad laws. In *Bond v. United States*, for example, the Supreme Court narrowly construed a very broad law, the Chemical Weapons Convention Implementation Act.[228] The statute defined a chemical weapon so broadly that a lower court said "it turns each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache."[229] In an opinion harkening back to the historic rules of constraint, the Court held that the statute was so broad as to be ambiguous,[230] and it relied on federalism to adopt a narrow interpretation, stating that states have the primary role in regulating the possession and use of chemicals.[231]

But *Bond* is more the exception than the rule. Judges do not always construe narrowly broadly written statutes. To the contrary,

---

226. This is, in some respects, reminiscent of the arguments about lack of accountability that appear in the nondelegation doctrine literature. *See, e.g.*, William D. Araiza, *Reciprocal Concealed Carry: The Constitutional Issues*, 46 HASTINGS CONST. L.Q. 571, 615 (2019) ("This principle of accountability underlies the non-delegation doctrine."); Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593, 1650 (2019) ("[B]road delegations to agencies may reduce political accountability . . . ."); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 AM U. L. REV. 295, 296–98 (1987) (arguing that delegation to administrative agencies undermines political accountability). Critics of a strong nondelegation doctrine argue that delegation does not reduce accountability, and that Congress remains "accountable for the performance of agencies generally, and people properly evaluate the agencies' accomplishments as well as failures when deciding whether to hold members responsible for authorizing the agency, or for failing to curtail its power, fix its mistakes, or eliminate it altogether." Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1749 (2002). Whether voters do, in fact, continue to hold lawmakers accountable when they have delegated large amounts of power is an empirical question that we do not believe has been answered with empirical evidence. But we have explained elsewhere why we think it unlikely that delegations do not decrease accountability. *See* Hessick & Hessick, *supra* note 1, at 311–16.

227. *See generally* Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491 (2019) (explaining how those groups who might ordinarily champion criminal justice reform are content to allow the proliferation of strict liability crimes).

228. Bond v. United States, 572 U.S. 844 (2014).

229. United States v. Bond, 681 F.3d 149, 154 n.7 (3d Cir. 2012), *rev'd*, 572 U.S. 844 (2014).

230. *Bond*, 572 U.S. at 859–60 ("[T]he ambiguity derives from the improbably broad reach of the key statutory definition.").

231. *Id.* at 859 ("[I]t is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute.").

because they do not treat criminal laws differently than noncriminal laws, we routinely see courts adopt more expansive and punitive readings of statutes even when narrower interpretations are available.[232]

Lockhart v. United States[233] provides an example. Under 18 U.S.C. § 2252(a)(4), defendants convicted of possessing child pornography face a ten-year mandatory minimum if they have "a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward."[234] The issue in *Lockhart* was whether that mandatory minimum applies to a defendant with a prior conviction for sexually abusing an adult.[235] The Supreme Court ruled that the minimum did apply to those defendants. Relying on the rule of the last antecedent, the Court concluded that the "involving a minor or ward" language modified only "abusive sexual conduct."[236] In doing so, the Court rejected the argument that a different canon of construction—the series qualifier rule—called for the "involving a minor or ward" language to modify other qualifying predicate convictions.[237] The modern, weak rule of lenity gave the majority little pause. Although noting that reading favoring defendants was entirely possible, the Court stated that "the arguable availability of multiple, divergent principles of statutory construction cannot automatically trigger the rule of lenity."[238]

Employing the historical rules of constraint would have led to the opposite conclusion. The reason for the statute was to protect minors by punishing those who possess child pornography; it was not to protect against all sexual assaults by punishing anyone who engages in sexual abuse.[239] Given that the reason for the criminal

232. *See* Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 926 (2005) ("The operative presumption in criminal cases today is that whenever the conduct in question is morally blameworthy, statutes should be broadly construed, in favor of the prosecution, unless the defendant's interpretation is compelled by the statute.").

233. 136 S. Ct. 958 (2016).

234. *Id.* at 961.

235. *Id.* at 962 ("[Lockhart] therefore contended that his prior conviction for sexual abuse involving an *adult* fell outside the enhancement's ambit.").

236. *Id.* at 962–63.

237. *Id.* at 965 (explaining the Court's rejection of the series qualifier rule in this context).

238. *Id.* at 968.

239. *See generally id.* at 973–75 (Kagan J., dissenting) (describing the legislative history and purpose of 18 U.S.C. § 2252(a)(4)).

statute was to protect minors, and at least one of the predicate offenses was limited to sexual abuse of minors, the historic rules of constraint would have directed a narrower construction, limiting the statute to defendants whose prior convictions involved minors.

B. PROTECTING CORE PRINCIPLES THROUGH CONSTRAINT

In failing to act as a constraint on criminal law, judges have not only permitted imprecise and overly broad laws to proliferate. They have also failed to preserve important principles—namely, protecting against excessive deprivations of liberty and ensuring democratic accountability. Reinstituting the rules of constraint in criminal cases would better protect these principles. It would also serve other important interests, such as notice and predictability.

1. Liberty

A key concern with the criminal law is the risk of unjustifiable deprivations of liberty. Criminal law restricts liberty in two important ways: it restricts liberty by restricting the ability of people to engage in certain conduct, and it uses restrictions on liberty (incarceration, probation, etc.) as the punishment for violating those prohibitions.[240]

One way that our legal system mitigates the risk of unjustified deprivations of liberty is through protections that limit the ability of the government to impose criminal punishment. Examples include the prohibitions on ex post facto laws and bills of attainder, the jury requirements, the right to the assistance of counsel, the prohibition on double jeopardy, and the heightened burdens of proof imposed through the Due Process Clauses.[241] The rules of constraint create limitations of this sort. They direct courts to use a combination of tools of construction that favor defendants in criminal cases. These favorable interpretations thus protect against excessive deprivations of liberty by limiting the reach of the criminal law.

These substantive limitations are not the only way in which the rules of constraint protect against unwarranted deprivations of liberty. Another way that the rules do so is through bolstering the separation of powers.

One of the major reasons for the separation of powers—the practice of assigning the legislative, the executive, and judicial pow-

240. *See* Hessick & Hessick, *supra* note 1, at 307.

241. *See id.* at 301.

ers to different actors[242]—is to limit the power of the government to impose criminal punishment. Dividing powers between different institutions ensures that no one actor or institution has the power to strip people of liberty unjustifiably.[243] Instead, separation of powers ensures that multiple and diverse institutional actors must agree that a person should be punished before that person can be convicted of a crime.[244]

Although the precise way in which power is divided differs in the various states and in the federal government,[245] they all share the same basic feature of separating the legislative, executive, and judicial powers in a way that limit the power to impose criminal punishment.[246] First, the legislature has to decide to criminalize particular conduct. Second, the executive must decide to prosecute a particular individual. Third, the judge must decide whether the defendant's conduct falls within the scope of the criminal statute and the jury must decide factual guilt. Finally, the executive has the power of clemency—the power to wipe out convictions with a pardon or reduce punishment with commutation. If any of these actors believes that a particular act or a particular person should not be punished, then the person will not be punished. In other words, each of these

242. F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 65 (2015).

243. *See* THE FEDERALIST NO. 47 (James Madison).

244. *See, e.g.*, Bond v. United States, 564 U.S. 211, 222–23 (2011); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 32 (1965); Barkow, *supra* note 221, at 871; Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 181–82 (2019); Hessick, *supra* note 86, at 1014; *see also* Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 3 n.2 (2021) (collecting additional sources).

245. Hessick, *supra* note 242.

246. The terms "legislative power," "executive power," and "judicial power" are not self-defining. As a result, arguments about the proper separation of powers are often disputes about which powers are supposed to be given to which branches. Sometimes the argument is a historical one. *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–24 (2012) (discussing the role of history in defining separation of powers). For example, what was the term "judicial power" thought to include when the Constitution was first written. *See, e.g.*, Eskridge, *supra* note 39, at 1009–29 (using history to define the scope of judicial interpretive power). But sometimes the argument is a normative one about the optimal division of powers between branches. *See* Manning, *supra* note 4, at 56–78 (making normative and textualist arguments about separation of powers). Any historical separation of powers claim is refuted by Part II, which definitely shows that the judicial power was thought to include the power to constrict criminal laws. *See supra* Parts II.B, II.D. This section addresses the latter type of separation of powers claim.

institutional actors functions as a "veto gate," making it more difficult to punish and thus preserving liberty.[247]

The rules of constraint implicitly endorse a judiciary that plays an active role constraining the criminal law. Each of the rules of construction standing alone are reasonable ways of implementing the will of the legislature. But taken together the rules of constraint create a toolkit that lets the courts play a robust role in constraining criminal law. Defendants whose conduct fall outside of the text of the statute cannot be convicted, nor can defendants whose conduct falls outside the spirit of the law. And if legislatures were to write statutes with overly broad terms, the courts would say those laws are ambiguous and then narrow the sweep of that statutory language. In this way, judges would serve as a check on prosecutors who bring charges that aren't supported by both statutory text and spirit, and they would also serve as a check on the legislature's delegation of power to prosecutors through overly broad statutory language.

The faithful agent theories reject this view of separation of powers. Instead, they adopt a view of legislative supremacy.[248] Because legislatures are entrusted with the power to make the law, so the argument goes, judges should aim only to implement the will of the legislature when interpreting those laws; otherwise judges risk usurping the legislative power as their own.[249] The faithful agent position argues that the optimal division of power heavily favors the legislature over the courts: the legislature should have the uncontested power to set policy and craft laws, while the judicial power should consist merely of rendering interpretations of those laws that assist lawmakers in realizing their vision.[250]

This division of power—a mighty legislature and a subservient judiciary—isn't well suited to guard against tyranny or protect liberty. It instructs judges to help further the will of the legislature—even when the legislature intends to write an imprecise or overly broad law, thereby delegating power to prosecutors. When they are merely faithful agents, judges no longer operate as an independent veto gate,

---

247. Epps, *supra* note 244, at 3 n.2, 37–38 (describing the "veto gate" theory of separation of powers as the conventional argument that separation of powers protects negative liberty).

248. *E.g.*, Manning *supra* note 4, at 77 (arguing that courts must be textualist because of legislative supremacy).

249. *Id.*

250. *See, e.g.*, Molot, *supra* note 26, at 31 ("[C]ourts should be faithful to legislative instructions and follow laws enacted through bicameralism and presentment rather than make new laws themselves.").

but rather simply reinforce the legislature's choices after the executive has acted.

To be sure, the faithful agent theories will sometimes protect liberty. For example, sometimes a legislature may have written a broader law than its purpose would suggest, in which case a purposivist would protect liberty more by construing the statute more narrowly than the textualist. This is what happened in *Yates v. United States*.[251] The issue there was whether a commercial fisherman violated 18 U.S.C. § 1519, which prohibits destroying a "tangible object" with the intent of impeding or obstructing a government investigation. The fisherman had thrown undersized fish he caught back into the water in order to evade consequences for violating fishing regulations.[252] Although the *Yates* Court acknowledged that a fish is a tangible object, it refused to construe the statute to reach fish. Because § 1519 had been enacted "to protect investors and restore trust in financial markets" in the wake of a major corporate and accounting scandal, the Court decided that "tangible object," as used in the statute should be limited to objects "used to record or preserve information."[253] Had the *Yates* Court followed the text of the statute, it would have concluded that the destruction of the fish was sufficient to commit the crime. It is only because the Court decided to limit the term "tangible object," in light of the reasons that the law was passed, that the defendant's conviction was vacated.

Textualism can also protect liberty when a legislature has written a statute with language that did not fully capture all of the bad behavior it was trying to prevent. In that case the purposivist would give the statute a broader reading than the textualist and in so doing protect liberty less. This is illustrated by *Nichols v. United States*.[254] The defendant in that case was convicted for failing to notify the sex offender registry officials in Kansas when he moved to the Philippines.[255] The Supreme Court reversed the conviction. The Court recognized that Congress has passed sex offender registry laws—including requirements that offenders must notify registry officials when they move from one state to another—in order to ensure that sex offenders could be easily identified and found after they were re-

251. 574 U.S. 528 (2015).

252. *Id.* at 531–34 (describing the events that gave rise to Yates' conviction under 18 U.S.C. § 1519).

253. *Id.* at 532.

254. 136 S. Ct. 1113 (2016).

255. *Id.* at 1115.

leased from prison.[256] Obviously requiring Nichols to notify officials about his move to the Philippines would allow officials to more easily identify and find Nichols if he ever returned to the United States. But because a move to a foreign jurisdiction wasn't covered by the text of the statute, the Court refused to uphold the conviction in the face of clear statutory text to the contrary.[257]

As these examples show, purposivism and textualism sometimes protect liberty, but they also sometimes fail. Textualists fail when the text is broader than the purpose, and purposivists fail when the purpose is broader than the text. More fundamentally, both theories fail to cast the courts as an independent constraint on the criminal law; instead, they instruct judges to sometimes read laws narrowly and sometimes broadly. But neither suggests that courts should have a substantive bias in favor of narrow statutory constructions of criminal laws.

In short, the faithful agent theory does not treat the courts as a fully coequal branch that can operate as a veto on legislative and executive decisions to punish. Instead, purposivism and textualism are both based on the premise that the courts should be subordinate to the legislature. And while purposivism and textualism may, incidentally, protect liberty, the courts should instead constrain criminal statutes using interpretive rules that favor defendants.

2. Democratic Accountability

One strong norm in our legal system is that public officials should be accountable for their decisions.[258] A traditional mechanism for that accountability is elections. Officials who make important policy decisions should be accountable to voters through periodic elections, either directly or indirectly.[259] One reason given in favor of the "faithful agent" theory is that judges, unlike legislatures, are not accountable to voters through elections.[260] Because people cannot vote

256. *Id.* at 1119.

257. *Id.* at 1118.

258. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005) ("The idea of accountability is very much in fashion in legal and political thought these days. . . . [T]he term is used in a variety of different ways.").

259. *See, e.g.*, F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 723 (2018) (describing the election mechanisms for accountability). For a criticism of this view, see Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1254 (2009).

260. *See* Scalia, *supra* note 4, at 9–25 (arguing for textualism from a principle of democratic accountability).

judges out of office when they disagree with their policy choices, so the argument goes, judges should not privilege their own policy preferences when interpreting statutes; instead they should seek to implement the preferences of elected lawmakers.[261]

This argument does not hold, of course, for most criminal law interpretations in this country. The vast majority of criminal prosecutions occur in the states, rather than in the federal system. Although federal judges are appointed and enjoy life tenure, most state judges do not. An overwhelming number of state judges owe their seats to either direct elections or retention elections.[262] In addition, although state lawmakers are elected, recent work from Miriam Seifter demonstrates that state legislatures are far more countermajoritarian than state courts.[263] The accountability of judges in these systems suggests that they need not take only a passive role in implementing the will of the legislature.

But even assuming that all judges are unelected, the rules of constraint are better suited than either purposivism or textualism to achieve democratic accountability. Having unelected judges act as a constraint on the criminal law could, counterintuitively, actually ensure more accountability.

To understand the democratic accountability argument, it is important to emphasize that imprecise and overly broad criminal laws stand in the way of democratic accountability. As explained in the previous section, purposivism and textualism sometimes result in narrower constructions of those imprecise and overly broad laws, but they do so incidentally and only in some circumstances.[264] Having judges serve as an independent constraint on criminal laws will result in a body of criminal laws that sweeps more narrowly than either textualism or purposivism would, standing alone. And the narrowness of the criminal law ensures greater democratic accountability: only when a legislature has enacted specific and narrowly

261. *Id.* at 14 (stating that, in a democracy, interpreting statutes to achieve what the judge thinks is best is a "recipe for incompetence and usurpation").

262. As Jed Shugerman has documented, "[a]lmost 90 percent of state judges face some kind of popular election." JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 3 (2012). "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.

263. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021).

264. *See supra* notes 251–56 and accompanying text.

written criminal laws will defendants be convicted, and those specific and narrow laws allow voters to better understand what their elected representatives have done and to vote them out if they disapprove.

Take, for example, the interplay between overly broad laws and textualism. As we previously explained, legislatures often pass overly broad laws.[265] If courts use textualism to interpret those laws, there is less accountability. Legislators are not really making policy decisions when they pass broad, general criminal laws. They pass these laws knowing that the new laws are not actually determining the scope of substantive criminal law; instead they are simply giving more options to prosecutors.[266] Remarkably, when complaints are raised about the content of criminal statutes, lawmakers sometimes explicitly state that those complaints are best dealt with through prosecutorial charging decisions, rather than through new legislation. For example, 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.[267] In a similar vein, when prosecutors make unpopular charging decisions that fall within the text of these general criminal laws, lawmakers often complain that the legislature enforced the law in a way that they hadn't

---

265. *See supra* notes 212–20 and accompanying text.

266. Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 646 (2006); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549, 2560–62 (2004); *see also supra* note 221 (collecting additional sources).

267. 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. 2224, 2240 (2015) (statement of Sen. Grassley).

intended, rather than take any action to actually narrow the law.[268] In other words, prosecutorial discretion is used as a reason for the legislature to avoid electoral accountability for failing to act according to democratic preferences.

Purposivism also creates democratic deficits. It allows lawmakers to articulate an unobjectionable purpose, and then it relieves them of some of the responsibility associated with deciding how to achieve that particular purpose. That may prove especially important when it comes to criminal justice issues. Voters are likely to agree that crime should be reduced, but they are more likely to disagree about how that reduction should be achieved. When legislatures can rely on the courts to implement their purpose, then they need not come to agreements about the precise scope of criminal statutes.[269] Avoiding precision about how to achieve the purpose allows them to avoid offending voters who might disagree about the best way to achieve that purpose.

What about the democratic accountability of prosecutors? At first glance, the democratic accountability of prosecutors looks relatively robust. Federal prosecutors are appointed by the president subject to confirmation by the Senate,[270] and prosecutors can be re-

268. *See, e.g.*, Matt Bokor, *Prosecutors Have Little Sympathy for Senior Gamblers*, ASSOCIATED PRESS, Feb. 4, 1982, LEXIS. Upon learning that prosecutors filed illegal gambling charges against eight seniors who were playing a "nickel-and-dime card game," House Criminal Justice Chairman Larry Smith, "while not advocating a change in the statute, said he would hope prosecutors would use better judgment." *Id.*; *cf.* Brendan Sasso & Jennifer Martinez, *Lawmakers Slam DOJ Prosecution of Swartz as 'Ridiculous, Absurd*,' HILL (Jan. 15, 2013), https://thehill.com/policy/technology/277353-lawmakers-blast-trumped-up-doj-prosecution-of-internet-activist [https://perma.cc/QN4Q-2UGH] (reporting that, when charges filed by prosecutors under the notoriously imprecise Computer Fraud and Abuse Act led to a defendant committing suicide, federal legislators criticized prosecutors' decision to bring charges).

269. One prominent example comes from the Sherman Act. That statute prohibits any "contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce." 15 U.S.C. § 1. Deciding what, precisely, constituted a restraint of trade would doubtlessly have been controversial. And so Congress simply didn't decide the question. Instead, Congress essentially delegated to the federal courts the task of creating a criminal common law of antitrust. *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").

270. 28 U.S.C. § 541(a).

moved by the president without cause.[271] State prosecutors are even more accountable. Local prosecutors are directly elected in forty-five states, and the other five states have some form of indirect accountability that resembles the federal system.[272]

But on closer inspection, the democratic accountability for prosecutorial decisionmaking is not particularly robust. Prosecutors avoid accountability because their decisions about how to interpret and enforce criminal laws are made out of the spotlight and are not easily discovered by voters.[273] Prosecutors rarely explain the general policies or criteria that they use to exercise their discretion.[274] Decisions in individual cases are also generally shielded from view. Specifically, decisions not to prosecute are generally made out of public view and not explained, and even decisions to bring charges are often obscured by plea bargaining decisions.[275] This lack of transparency is compounded by the fact that, as a practical matter, prosecutors are often fairly insulated from political pressure—appointed prosecutors are rarely fired for their decisions,[276] and elected prosecutors rarely face challengers in their elections.[277]

---

271. *Id.* § 541(c) ("Each United States Attorney is subject to removal by the President.").

272. *See* Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1550 tbl.1 (2020) (identifying the selection method for local prosecutors in each state).

273. *See* Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1103–04 (2017); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 78–87 (2011); Lauren M. Ouziel, *Prosecution in Public, Prosecution in Private*, 97 NOTRE DAME L. REV. (forthcoming 2022) (manuscript at 10–30) (on file with authors).

274. *See* Hessick, *supra* note 86, at 1005; *see also* Baughman, *supra* note 273, at 1086–87 (discussing how federal prosecutors were able to successfully avoid disclosing a manual that instructed line prosecutors on general policy).

275. *See* Ouziel, *supra* note 273.

276. United States Attorneys are often chosen because of support from powerful figures within their home states. Perhaps as a result of this support or perhaps just because of political norms, with the exception of holdovers from the previous administration, presidents rarely fire U.S. Attorneys and they have faced significant criticism when they have done so. *See, e.g.*, Marcia Coyle, *Scandal Over U.S. Attorneys' Firing Could Cloud Other Cases*, BLOOMBERG L. (Apr. 27, 2007), https://www.bloomberglaw.com/document/X8KLIJHC000000?jcsearch=900005554868#jcite [https://perma.cc/AVH3-SMT2].

277. *See* Hessick & Morse, *supra* note 272, at 1563 tbl.5 (documenting that only thirty percent of elected prosecutors faced an opponent in either their primary or their general election). Even if a prosecutor finds herself in a contested election, that election rarely includes any reference to a prosecutor's policies. *See* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 591–606 (2009). As a result, the specific enforcement criteria that prosecutors use are unknown and not sub-

Having courts serve as an independent constraint to narrow criminal laws helps correct some of these problems. Rather than simply allowing legislatures to write broad laws and then leave it to prosecutors to develop their own enforcement criteria, judges would instead narrow the statutory text and ensure that the law extends only to that conduct the legislature professed to have been addressing.[278] So, for example, if an elected representative told her voters that she was passing a new law to address the destruction of documents in business fraud cases, prosecutors can't subsequently use the law against a fisherman who destroyed a fish.[279]

Having courts serve as an independent constraint doesn't just benefit individual defendants—like the fisherman who might have his charges dismissed. It also improves democratic accountability more broadly. For one thing, it keeps important decisions about the scope of the criminal law from being decided by prosecutors in nontransparent ways.[280] For another, it creates incentives for lawmakers to be clearer about the criminal statutes that they are writing. If they know that judges will deem overly broad laws ambiguous, then lawmakers have fewer incentives to write those laws and more incentives to take the time to craft more specific and narrowly tailored laws.[281] In addition, if lawmakers know that legislatures will construe statutes only to reach what is the "spirit" of the law, then legislatures know that they must make clear statements about why they are enacting statutes. Either way, it gives voters more information that they can use to hold their legislators accountable for the content of criminal law, and it reduces the discretion of prosecutors to adopt their own interpretations of criminal laws and employ those interpretations in nontransparent ways.

3. Notice and Predictability

Ensuring that individuals have notice of what is illegal is another core principle of criminal law. It underlies many criminal law doctrines, most obviously the restriction on ex post facto laws and the void for vagueness doctrine.[282] The idea is that it is unfair to convict

---

ject to voter scrutiny and accountability.

278. *Cf.* Price, *supra* note 73, at 916–17 (making a similar argument—that lawmakers would be compelled "to own up to the precise nature of the conduct they plan to criminalize"—in support of a stronger rule of lenity).

279. *Cf. supra* text accompanying notes 251–53.

280. *See supra* notes 273–75 and accompanying text.

281. *See supra* text accompanying notes 216–20.

282. *See* Hessick & Hessick, *supra* note 1, at 35–36.

and punish a person who was not adequately informed of his legal obligations.[283]

The most significant notice problems in criminal law arise in statutory interpretation. Language is inherently imprecise.[284] Moreover, because legislatures cannot anticipate how the laws they write will be enforced or how conditions might change in the future,[285] situations often arise in which it is unclear whether a criminal statute applies.

The rules of constraint provide superior notice to textualism and purposivism by giving more information to judges about how they should interpret criminal laws. By telling judges that they should consistently and systematically favor narrower interpretations, it is more likely that different judges will interpret the same law in the same way. That predictability gives more notice to people.

Consider first purposivism. The major notice deficiency with purposivism is that a person does not know whether the court will expand or contract a criminal law. The rule of favorable construction ameliorates this notice problem by cutting off the court's ability to expand the criminal law beyond its text. The text creates an outer limit on the reach of the criminal law.

The rules of constraint also result in at least as much notice as textualism. From the defendant's point of view, the reason for notice is to inform people of conduct that might get them prosecuted. The rules of constraint provide notice comparable to textualism because the text of the statute provides the outer perimeter of illegal conduct under the rule of strict construction. Just as with textualism, a person knows that they might be subject to conviction if they violate that text.

Textualists might object that their theory will provide more notice and predictability because the text of the law will dictate not just what is forbidden, but also what is allowed. By contrast, although the rules of constraint might equally provide notice of what is forbidden, they provide less notice of what is allowed, because judges may re-

283. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972); United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 36 (1963).

284. *E.g.*, Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235 (critiquing textualism on the ground that language often depends on context and assumptions because words themselves are ambiguous).

285. Hessick & Kennedy, *supra* note 9, at 380 ("Legislatures are unable to anticipate the multitude of factual situations that will arise in the future, and thus they cannot always clearly indicate how their statute ought to be applied in all of those future situations.").

duce the reach of the criminal law to less than its text under the rule of favorable construction or the rule of ambiguity.[286]

It is true that textualism potentially provides better notice of what is permitted (though not of what is forbidden). But the argument should not be overstated. To start, textualists do not always read text the same way.[287] They sometime disagree on what constitutes the best objective meaning of a statute.

A good illustration comes from *Smith v. United States*.[288] In that case, the Court had to decide whether exchanging a gun for narcotics fell within 18 U.S.C. § 924(c)(1), which imposes a mandatory minimum penalty for the "use" of a firearm "during and in relation to . . . [a] drug trafficking crime."[289] The majority opinion, written by Justice O'Connor, concluded that exchanging a gun for drugs fell within the "ordinary or natural meaning" of the word "use," and it provided several dictionary definitions to support that construction.[290] The dissenting opinion, written by Justice Scalia, agreed that "use" must be given its "ordinary meaning" and conceded that "use" can be used in the broad way that the majority indicated, but insisted that this broad definition of "use" is not the "ordinary meaning" of the word.[291] Textualism didn't provide predictability because it didn't tell the Justices which definition of "use" to prefer.

Things might have been different if judges saw their interpretive power as a power to deliberately favor defendants. If the Justices in *Smith* believed that the rules of statutory interpretation were designed to push them towards narrower readings of statutes—as the historical rules of constraint did—then Justice Scalia's argument would have been stronger. He could have pointed to not only the logic of his linguistic conclusions, but also the substantive bias of the

286. Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 557 (2009) ("[T]extualism by its very definition seeks to satisfy this dictate of fair notice . . . .").

287. *See e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1743 (2020) ("[T]hese cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms . . . ."); *id.* at 1755 (Alito, J., dissenting) ("The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'"); *see also* Grove, *supra* note 14, at 266–67.

288. 508 U.S. 223 (1993).

289. *Id.* at 225.

290. *Id.* at 228–30.

291. *Id.* at 241–44 (Scalia, J., dissenting).

rules of constraint in favor of a narrower interpretation. That may have resulted in more Justices coalescing around his interpretation.

That judges so often fail to agree on the "ordinary meaning" of statutory terms is a major issue in statutory interpretation.[292] The faithful agent theory seems to assume that it is inappropriate for judges to rely on their own linguistic intuitions or their own policy preferences in choosing between competing interpretations—after all, judges are just supposed to be implementing the will of the legislature.[293]

This problem is solved, to a certain extent, by interpreting criminal statutes in a way that deliberately favors defendants and constrains the criminal law. Judges are no longer relying on their own intuitions or preferences. They are instead relying on interpretive rules that prefer a particular substantive outcome—and that substantive preference leads to more predictability and notice.[294] That may not be the outcome that the legislature would have preferred. But that objection would carry little weight, because the courts' actions would no longer be viewed merely in terms of implementing the legislature's will.

Much more important, as a more practical matter, having courts serve as an independent constraint will lead to more notice and predictability because they will move important decisions about interpretation from prosecutors to judges. As described above, broad general statutes leave prosecutors to decide what should be illegal and what should be permitted.[295] Prosecutors have no substantive constraints on their discretion; they are not limited by either existing cases or historical principles.[296] 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

---

292. *See* Krishnakumar, *supra* note 40, at 929–30 tbl.1 (finding that dissents in Supreme Court cases relying on ordinary meaning are often responding to majority opinions which also employ ordinary meaning to come to a different conclusion); Lee & Mouritsen, *supra* note 35, at 798 (arguing that interpretive problems arise from "the law's conception of ordinary meaning [and] our judges' attempts to measure it"); Lawrence M. Solan, *Why Laws Work Pretty Well, but Not Great: Words and Rules in Legal Interpretation*, 26 L. & SOC. INQUIRY 243, 258 (2001) (reviewing STEVEN PINKER, WORDS AND RULES: THE INGREDIENTS OF LANGUAGE (1999)) (arguing that disagreements stem from using different methods to determine ordinary meaning).

293. *See supra* notes 33–34.

294. *See* Hessick, *supra* note 35, at 1528–29 (arguing that interpretive rules that push judges to interpret criminal statutes more narrowly help to ensure consistency and predictability).

295. *See supra* text accompanying note 221.

296. *See* Hessick, *supra* note 86, at 997–1001.

criminal law.[297] So long as prosecutors are not pursuing cases based on a defendant's race or religion,[298] 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 that they are not required to justify. There is no formal legal requirement that prosecutors act consistently across cases,[299] nor are there any effective practical mechanisms to make consistency a political requirement.[300]

In contrast, judicial decision making is more constrained. Judicial interpretations are more consistent over time. Opinions written by judges interpreting statutes provides information to individuals about the legality or illegality of certain conduct.[301] When the opinion is by an appellate court, that analysis is binding on that court and any relevant lower courts in future cases,[302] and even opinions by trial courts create pressure for future courts to follow in their path.[303] Put differently, when judges decide cases, they are making law.[304] That law helps provide clarity and predictability for future cases—in other words, it provides notice.

CONCLUSION

Courts should not interpret criminal laws the same way that they interpret other statutes. History teaches us that courts did not simply try to implement the will of the legislature in interpreting criminal statutes; instead, they played a more active role, adopting a package of rules that favored criminal defendants.

---

297. *See* Baughman, *supra* note 273, at 1092.

298. *See* Oyler v. Boles, 368 U.S. 448, 456 (1962) (noting that criminal laws may not be enforced "based on race, religion, or other arbitrary classifications"); *see also* Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1372 (1987) (collecting cases).

299. Hessick, *supra* note 86, at 1001.

300. *See supra* text accompanying notes 273–77.

301. Easterbrook, *supra* note 31, at 5 ("The court had to decide the case, and in order to show that its decision was not capricious it often had to announce a rule to govern future cases.").

302. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 573 (1987) ("A system of precedent therefore involves the special responsibility accompanying the power to commit the future before we get there.").

303. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982).

304. *Cf.* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 46 (1947) (noting that case law represents the "principle of legality" because a vast body of case law limits official action).

The abandonment of those rules of constraint in the name of courts serving as faithful agents is not only ahistoric; it has also helped create a broken criminal justice system. The pathologies of criminal law have resulted in an ever increasing body of broad criminal laws that confer vast discretion on prosecutors to decide when to bring criminal charges. Although they sometimes exercise that discretion in a way that narrows the law, prosecutors often have their own incentives not to interpret those statutes narrowly. Returning to the rules of constraint would reintroduce the judiciary as an important check on these overly broad criminal laws. It would also promote democratic accountability and foster important principles of notice and predictability.

Put simply, criminal laws are different, and statutory interpretation should once again reflect that.