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SCHOOL OF LAW

## NORTH CAROLINA LAW REVIEW

Volume 89

Number 5 *Adaptation and Resiliency in Legal Systems*

Article 13

6-1-2011

# Complex Times Don't Call for Complex Crimes

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# COMPLEX TIMES DON'T CALL FOR COMPLEX CRIMES\*

RICHARD E. MYERS II\*\*

*This Essay argues that the rise of the administrative state has led to an overabundance of criminally enforceable regulations, so many in fact that the law has become in many ways unknowable. At the same time, a large portion of criminal lawmaking has moved away from the politically accountable legislature and into the “expert” agencies. The combination of inscrutability and lack of accountability has led to a corresponding loss in the efficacy and legitimacy of the criminal law itself. There are many old, adaptable criminal laws that already cover the conduct that agencies criminalize by regulation. Given the costs, the legislature should not only avoid making new delegations of criminal-lawmaking power to agencies, it should consider contracting their power by repeal, sunset, and jury empowerment.*

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## INTRODUCTION

This symposium is focused on adaptation and resiliency in legal systems, and has been inspired by new interest in the way the law responds to the complexities of the modern world. One significant, longstanding legal adaptation to this complexity has been the rise of the administrative state, with its concomitants, government investment in expertise, and abundance—some would say overabundance—of regulation. Regulation has exploded, in part because Congress has ceded significant portions of the lawmaking field to regulators with massive delegations of rulemaking authority, and the Supreme Court has concurred, with the virtual death of the nondelegation doctrine<sup>1</sup> and the birth of the *Chevron*<sup>2</sup> regime.<sup>3</sup> The Court has also conceded any ability to meaningfully police the civil/criminal distinction,<sup>4</sup> leaving that determination almost entirely to the legislature (or its deputized regulators), and has permitted strict liability criminal regimes to proliferate.<sup>5</sup> These developments have led to strong negative reactions from many quarters.<sup>6</sup> This Essay sketches some of the concerns that arise when the legislature passes

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1. See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328 (2002) (“The Supreme Court has resoundingly rejected every nondelegation challenge that it has considered since 1935.”).

2. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

3. See *infra* Part III.

4. For an excellent discussion of the Court’s brief foray into policing the civil/criminal distinction, followed by its abandonment, see Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 683 (1999) (“In the face of the modern melding of the distinction between crimes and civil wrongs, and the Court’s realization that it cannot always sensibly distinguish a punitive from a non-punitive sanction, it now routinely blesses whatever label a legislature places on a sanction, and appears to have returned to an ‘all-or-nothing’ approach to the imposition of criminal procedural guarantees to a proceeding.”); see also *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 544 (5th Cir. 1987) (noting that a court is permitted to find a forfeiture statute criminal rather than civil in the face of a congressional designation only where “the clearest proof exists that the purpose or effect of the forfeiture is so punitive that it requires [it] to override Congress’ preference for a civil sanction”).

5. See JOHN S. BAKER, JR., *MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIMINAL LEGISLATION 11–12* (2004) (report sponsored by the Federalist Society) (on file with the North Carolina Law Review).

6. See, e.g., *id.*

statutes that will render as yet undefined conduct criminal, on the basis of forthcoming regulations, especially when it gives that power through multiple statutes to multiple agencies in overlapping fields. When, how, and to what extent the ability to define the scope of the social condemnation inherent in the creation of criminal law should be granted to administrative agencies is a complex set of questions. This Essay agrees with those scholars who argue that regulations should principally be used for regulating behavior, as their name suggests, not meting out condemnation and punishment.

Ultimately, this Essay adds to this symposium on adaptation a cautionary note, urging parsimony on the part of the legislature in its delegations of crime-defining power to executive branch agencies, and suggesting adaptation should include an increase in systemic checks and balances and legislative oversight of criminalization. Congress should employ a range of tools such as sunsets, second looks, periodic review, and mandatory reporting back to ensure that the delegations it does make are appropriately carried out.<sup>7</sup> This Essay suggests that where administratively created regulations inform older and deeper moral notions—for example, don't cheat, don't steal, don't knowingly create physical harm, don't knowingly destroy the value of other people's property—there are plenty of old, resilient, well-understood crimes, albeit ones that might be committed in new ways, that will serve as a basis for moral condemnation. The legislature has enough time to create fully articulated new crimes where they are truly warranted. Finally, this Essay argues for expanding the role of the jury to more closely match the original constitutional vision. This adaptation would reinvigorate the jury's law-evaluating power and recommit us to using jurors to help calibrate the law's moral compass. Steering more closely by that compass will help us to ensure that the criminal law retains the legitimacy that has helped the United States to build a resilient and lasting constitutional democracy.

This Essay proceeds in seven parts. Part I lays out the process of creating regulatory crimes. Part II discusses the potential conflict between social condemnation and the utilitarian impulses that may lead to criminalization. Part III discusses *Chevron* deference and the limits it creates for judicial oversight. Part IV discusses the problems that the regulatory-criminal complex creates for democratic

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7. Congress sometimes does attempt to use such tools, for example through the Government Accountability Office ("GAO"), which should be sufficiently funded to engage in the oversight that the Small Business Regulatory Enforcement Fairness Act of 1996 and other legislation mandate. *See* 5 U.S.C.A. §§ 601–612 (West 2007 & Supp. 2010).

governance. Part V argues that crime creation should be a legislative, not regulatory judgment. Part VI discusses forms of oversight. Part VII discusses potential solutions to the problem.

### I. THE PROCESS OF CREATING REGULATORY CRIME

To understand the shoals that the administrative state is building, it is important to understand where these criminally enforceable regulations come from. Congress regularly passes statutes that delegate to an agency the power to promulgate regulations, while providing that violations of the yet to be written regulations will be crimes subject to statutory penalties. Examples from the environmental arena alone can be found within the Clean Water Act,<sup>8</sup> the Clean Air Act,<sup>9</sup> the Resource Conservation and Recovery Act,<sup>10</sup> the Endangered Species Act of 1973,<sup>11</sup> and the Wildlife Disaster Recovery Act of 1989.<sup>12</sup> Similar rules could be found in many other substantive areas, such as banking, securities, or health care.<sup>13</sup>

After Congress passes these statutes, the agency, under its rulemaking authority, engages in notice and comment rulemaking, which is governed by the Administrative Procedure Act.<sup>14</sup> While Congress has set broad goals, regulators decide what conduct will ultimately be punishable. Many pollution-control statutes, for example, criminalize the release of pollutants under certain conditions.<sup>15</sup> What constitutes a pollutant, what kind of permitting is

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8. 33 U.S.C. § 1319 (2006).

9. 42 U.S.C. § 7413 (2006).

10. 42 U.S.C. § 6928 (2006).

11. 16 U.S.C. § 1540 (2006).

12. 16 U.S.C. § 551 (2006).

13. See BAKER, *supra* note 5, at 17–31 (collecting crimes).

14. 5 U.S.C. §§ 500, 553, 557 (2006). Agencies also engage in other important but less visible forms of rulemaking, for example through interpretive letters, enforcement standards, or other informal mechanisms. See, e.g., *SEC Interpretive Releases*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/rules/interp.shtml> (last visited Apr. 29, 2011) (“The Commission occasionally provides guidance on topics of general interest to the business and investment communities by issuing ‘interpretive’ releases, in which we publish our views and interpret the federal securities laws and SEC regulations.”).

15. See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1361(b) (2006); Toxic Substances Control Act, 15 U.S.C. § 2615(b) (2006); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1268(e), (g) (2006); Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 411 (2006); Clean Water Act, 33 U.S.C. § 1319(c) (2006); Ocean Dumping Act, 33 U.S.C. § 1415(b) (2006); Act to Prevent Pollution From Ships, 33 U.S.C. § 1908(a) (2006 & Supp. II 2008); Safe Drinking Water Act, 42 U.S.C. §§ 300h-2(b), 300h-3(c), 300i-1 (2006); Noise Control Act of 1972, 42 U.S.C. §§ 4910(a)(1), 4912(c) (2006); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6928(d), (e), (f) (2006); Clean Air Act, 42 U.S.C. § 7413(c) (2006); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b) (2006); Emergency Planning and

required to handle that pollutant, how the pollutant may be stored, and who within an organization may be subject to criminal punishment are all within the regulatory agency's control.<sup>16</sup> A second set of regulators, the members of the U.S. Sentencing Commission ("USCC"), decides how much punishment will attach to violations of the regulations. Congress created the USCC as another administrative agency, this one ostensibly housed in the judicial branch, and charged it with normalizing sentences to ensure that punishment reflects offense conduct.<sup>17</sup> The USCC enacts the federal sentencing guidelines, which are supposed to reflect the commission's expert judgment on appropriate sentences.<sup>18</sup>

What does it look like in practice? Insider trading is a textbook example of the process of creating crimes through delegation to an agency.<sup>19</sup> In the Securities Exchange Act of 1934, Congress delegated the authority to regulate the stock market to the Securities and Exchange Commission ("SEC").<sup>20</sup> In the enacting legislation, it included section 78j(b), which states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.<sup>21</sup>

In response to this delegation of authority, regulators within the SEC issued an implementing regulation, Rule 10b-5, "Employment of Manipulative and Deceptive Devices,"<sup>22</sup> which contains the following substantive provision:

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Community Right-To-Know Act of 1986, 42 U.S.C. § 11045(b)(4) (2006); Hazardous Materials Transportation Authorization Act, 49 U.S.C. § 5124 (2006).

16. See *supra* note 15 and accompanying text.

17. See Sentencing Reform Act of 1984, 28 U.S.C. § 991(a) (2006 & Supp. II 2008).

18. See *An Overview of the United States Sentencing Commission*, U.S. SENTENCING COMM'N, [http://www.uscc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/USSC\\_Overview.pdf](http://www.uscc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf) (last visited Apr. 29, 2011).

19. See JULIE R. O'SULLIVAN, *FEDERAL WHITE COLLAR CRIME* 77–81 (3d ed. 2007); ELLEN S. PODGOR & JEROLD H. ISRAEL, *WHITE COLLAR CRIME IN A NUTSHELL* 71–84 (2004).

20. See Securities Exchange Act of 1934, ch. 404, § 4(a), 48 Stat. 881, 885 (codified as amended at 15 U.S.C. § 78d (2006)).

21. *Id.*

22. 17 C.F.R. § 240.10b-5 (2010).

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.<sup>23</sup>

Willful violations of these regulations are punishable by up to twenty years in prison and fines of up to \$5 million per violation.<sup>24</sup>

While the statute creates a legislatively enacted range of available punishment, in practice, that cap is only the first step in determining how much punishment a defendant will actually face. For the purposes of the insider trading example, the U.S. Sentencing Guidelines section 2b1.1 creates a table that calculates one component of the harm to society caused by a financial crime based on the amount of actual or intended loss associated with the defendant's conduct.<sup>25</sup> The defendant's criminal history, the actual or intended loss amount, and any enhancements based on the way the crime was committed or the nature of the victims combine to create a presumptive sentence under which the defendant's guidelines range is calculated.<sup>26</sup> This produces a range of months.<sup>27</sup> As the loss amount increases, so does the number of months that appear within the sentencing range. A judge then chooses within that range, unless there are extraordinary reasons to sentence outside the calculated guidelines range.<sup>28</sup>

In practice, then, there are two layers of regulators between the people's elected representatives and the ultimate sentence: the agencies defining criminal conduct and the sentencing commission deciding how much punishment should attach. Other doctrines

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23. *Id.*

24. *See* Securities Exchange Act of 1934, 15 U.S.C. § 78ff (2006).

25. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b) (2010).

26. *Id.*

27. *Id.*

28. *See id.* § 1B1.1.

prevent the people's other direct representative in the criminal justice system, a jury, from passing on the moral content of the regulations.<sup>29</sup>

## II. A CONFLICT OF VALUES

For some, criminalization is simply an additional way to put teeth into behavior modification under the rule of law, and there is no meaningful distinction between civil and criminal law. But for others, there are significant tensions between the utilitarian impulses underlying much of administrative law and the moral commitments that apply to criminal law. Under the traditional view, criminal law is supposed to reflect and channel society's moral impulses, and criminal law necessarily contains an element of social condemnation. As Richard Lazarus has said, "Criminal sanctions are not simply another enforcement tool in the regulator's arsenal to promote public policy objectives. A criminal sanction is fundamentally different in character."<sup>30</sup> On the other hand, the strictly utilitarian view is counter to the American constitutional tradition, but may be more reflective of the current state of the law than the view that the tradition supposedly represents. Of course, any critique of the use of the criminal law external to its reflection of democratic processes requires a prior sense of the purpose of the criminal law, or perhaps a belief in a constitutional commitment to other limiting principles, such as separation of powers.

Christopher Slobogin has noted that the margin between the civil and criminal law is eroding in part because of the concentration of power within agencies.<sup>31</sup> And agencies are not likely to seek to limit themselves. There are institutional reasons that drive regulators to

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29. See generally Richard E. Myers II, *Requiring a Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137 (2009) (noting the limited role that juries play in criminal trials and arguing for a change in the law that would require juries "to make a specific finding of censure in addition to any factual finding required under the law before a defendant could be convicted, as opposed to the current system of a general verdict finding the defendant guilty or not guilty").

30. Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 883 (1994).

31. Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 121–22 (2005). This is a development Slobogin would embrace, and like the utilitarians who are happy to add criminal teeth to civil sanctions, he would add civil incapacitation to traditionally criminal conduct. In his view it is high time to require the criminal law to take dangerousness seriously. See *id.*; see also Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025 *passim* (explaining the rise of "hybrid" regulatory statutes that regulators can enforce through either criminal prosecutions or civil suits).

ask Congress to give them the authority to add criminal sanctions to their regulatory regime, and for them to use that authority expansively. An agency that has a criminal statute to enforce must be taken seriously. By creating criminal offenses, agencies enhance their status, they can seek additional enforcement resources, and their enforcers get leverage over regulated parties. In addition, they can retain power over investigations, have independent access to the U.S. Attorney's offices and the Department of Justice ("DoJ"), and can force capitulation in civil enforcement cases where they can plausibly threaten to bring criminal charges. Once they are granted even ambiguous authority, we should expect agencies to seek to expand that authority to the fullest extent possible.

### III. *CHEVRON* DEFERENCE

Once the agency begins interpreting and enforcing its statute, the courts are extraordinarily deferential. The *Chevron* doctrine established a rule of construction that requires courts to defer to reasonable agency interpretations of the statutes the agency administers when Congress has not spoken specifically to the issue in question.<sup>32</sup>

While the *Chevron* opinion itself was undertheorized, the resulting literature has focused on several rationales that support the decision.<sup>33</sup> One rationale is agency expertise, a second is the nimbleness and flexibility of agency rulemaking compared to the often cumbersome legislative process, and a third is the relative political accountability of agencies compared to the courts.<sup>34</sup> I will consider the tradeoffs inherent in each justification in turn.

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32. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

33. See, e.g., Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron* U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1289–98 (using justiciability as an interpretive analogue); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 618–19 (1992) (arguing that *Chevron* is based on policy preferences); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 357–62 (2000) (invoking the justiciability analogue); Daniel Lovejoy, Note, *The Ambiguous Basis for Chevron Deference: Multiple-Agency Statutes*, 88 VA. L. REV. 879, 885–99 (2002) (exploring the prudential doctrine, presumed congressional intent rationale, and constitutional rationale).

34. See sources cited *supra* note 33.

### A. Agency Expertise

Perhaps the most important consideration in favor of deference for purposes of this symposium is agency expertise within a particular field.<sup>35</sup> As the individuals most conversant with the tradeoffs at issue within their sphere of expertise, regulators know better than Congress what should be done, and through notice and comment rulemaking, the affected parties and the agency overseeing them can hammer out a set of rules that adequately address the underlying problem that Congress was attempting to solve. Of course, this makes some seemingly questionable assumptions about the severability of spheres of life and the availability of time for the regulated parties. A business owner may simultaneously be trying to run a business while staying abreast of regulation issued by a virtual alphabet soup of agencies: the EPA, OSHA, the SEC, the DEA, the IRS, the SBA, and on and on. At the same time that the citizen is responding to multiple, overlapping, and sometimes conflicting regulatory schemes, the regulators from each of these agencies are convinced that their concerns should be very important to the regulated party. As rulemakers, the agencies may be aware of all of the regulations within their respective domains, but that domain expertise does not put them in a position to adequately weigh the potentially conflicting demands that overlapping schemes may make on the regulated. In fact, each agency may be committed to a heartfelt belief in the centrality of the regulated field (it is after all what they spend all of their time and energy thinking about) and operate under a certainty that the sky will in fact fall if there are any violations within the agency's sphere of expertise.

Moreover, expertise in a particular domain does not mean expertise in moral judgment, which helps determine which conduct has become egregious enough to be a crime, nor in the relative moral judgment inherent in deciding how much to punish this defendant compared to other defendants.

### B. Enhanced Flexibility

A second justification for the *Chevron* regime is the enhanced flexibility that occurs when Congress spots a problem, creates a cadre of experts to address it, and gives them the authority to create appropriate rules to solve the problem going forward. As Professor

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35. See Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 739–41 (2002) (discussing expertise rationale).

Ruhl has suggested, many of the most intractable problems in the real world can only be solved through the input of the many participants in “complex adaptive systems.”<sup>36</sup> In some ways, the law is struggling to figure out a difficult core question: How do we regulate things we don’t understand? One way is to create mechanisms that have sufficient inherent flexibility to permit new information to be processed quickly. This flexibility rationale runs contrary to the principle of legality, and its interpretive counterpart, the rule of lenity, which are especially critical in the criminal sphere.

The courts have consistently held that prosecutors’ interpretations of criminal statutes are not entitled to *Chevron* deference, even though the DoJ is charged with administering criminal statutes.<sup>37</sup> This resistance has been justified in part because the nature of the expertise deployed in applying a rule is considered different than that deployed in creating one.<sup>38</sup> One way that the courts have explained away the conflict between lenity and deference is the notion of intended delegation.<sup>39</sup> Where Congress has expressly delegated the authority to regulate, and where the agency has issued regulations compliant with the Administrative Procedures Act (“APA”), the courts have held that the ambiguities in the statute that might support an underlying claim of lenity no longer exist.<sup>40</sup> The

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36. J.B. Ruhl, *General Design Principles for Resilience and Adaptive Capacity in Legal Systems — with Applications to Climate Change Adaptation*, 89 N.C. L. REV. 1373, 1374–75 (2011). See generally J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996) (explaining how law and society interact under complexity theory).

37. See *Crandon v. United States*, 494 U.S. 152, 177 (1990) (“[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.”); see also, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 264 (2006) (recognizing that it is the duty of the attorney general to “evaluate *compliance* with federal law in deciding whether to prosecute; but this does not entitle him to *Chevron* deference”) (emphasis added); *Stenberg v. Carhart*, 530 U.S. 914, 941 (2000) (citing *Crandon* and stating that a state attorney general’s interpretation of a law was not binding); Note, *Justifying the Chevron Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2048–49 (2010) (noting the Supreme Court’s refusal to bow to DoJ interpretation).

38. See *Gonzales*, 546 U.S. at 264.

39. See generally Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values With Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1710–11 (2001) (suggesting that the Supreme Court engages in democracy-forcing interventions in cases where it needs to “make sure that the then-sitting legislature was being ‘responsive to the people,’ rather than to the clamoring of a narrow interest group well positioned to block legislative reform”) (citation omitted).

40. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 n.18 (1995) (refusing to apply the lenity exception where regulations issued under the Endangered Species Act provided notice of the behavior that would be considered a crime).

clarifying regulation has created sufficient certainty to satisfy the requirements of legality. The principle of legality that underlies these concerns about when and how to apply *Chevron* is still strong. As Professor Griffin explains in detail in her article in this issue, the Supreme Court has ruled that the broadest interpretation of 18 U.S.C. § 1346, which encompassed deprivation of a right of honest services in cases where there was no direct benefit to the accused, was overbroad, and permitting the statute to be enforced in that way rendered the statute unconstitutionally vague.<sup>41</sup>

The scope of permissible agency action in criminal cases is governed by additional commitments—the constitutional bar on ex post facto legislation and the rule of lenity. The ex post facto limitation, which is driven by legality concerns, makes it unconstitutional for the state to convict someone of an act that was not a crime at the time the act was performed. This limitation would make the adaptation and flexibility in cases such as *Chenery II*,<sup>42</sup> discussed by Professor Hornstein elsewhere in this symposium,<sup>43</sup> unconstitutional in the criminal context.

The rule of lenity, which has deep roots in the common law of England and in U.S. law,<sup>44</sup> requires that ambiguous criminal statutes be read in the way that most favors the defendant, limiting the application of criminal sanctions to those cases where the legislature clearly intended them to attach.<sup>45</sup> *Chevron* requires that agency interpretations be given deference by the courts, and would permit interpretations broadening as well as narrowing criminal liability. These rules potentially conflict, as scholars and the courts have recognized.<sup>46</sup> A court might have to choose between a narrowing interpretation of liability, as dictated by the rule of lenity, and a

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41. Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815, 1825 (2011).

42. *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 201–03 (1947) (explaining that agencies must be able to act by general rule or by individual order to respond to varying and unforeseeable challenges).

43. Donald T. Hornstein, *Resiliency, Adaptation, and the Upsides of Ex Post Lawmaking*, 89 N.C. L. REV. 1549 *passim* (2011).

44. See Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 748–51 (1935); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 86–97 (1998).

45. See Hall, *supra* note 44, at 748–52.

46. See, e.g., Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 38–47 (2006); Solan, *supra* note 44, at 128–34; Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2115–16 (1990). *But see* Dan Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 507–11 (1996) (attempting to reconcile lenity and deference).

broader definition advanced by an agency. The conflict should result at the very least in deep skepticism regarding the wisdom of attaching criminal penalties to regulatory schemes. The tension between the two almost guarantees litigation over the way agencies interpret criminal regulations. Any reasonably sophisticated criminal defense attorney should be able to offer plausibly narrower readings of a criminal statute in many cases. By permitting more and more criminal regulation, Congress is ultimately inviting such litigation, squandering resources, and increasing red tape.

### C. *Relative Political Accountability*

A third justification that has been advanced for the *Chevron* regime is the relative political accountability of agencies versus the judiciary.<sup>47</sup> According to this theory, agencies must report to the president, who is a nationally elected figure held responsible by voters at the polls.<sup>48</sup> In contrast, the federal judiciary is composed of life-tenured, politically insulated actors, who need not, and will not, consider the concerns of the electorate. But this begs the question. Recognizing the fact that agencies may be somewhat more accountable politically than the courts misses the core commitments of the Constitution to separation of powers and bicameralism which require that multiple politically-accountable parties have to sign off on rules governing conduct before they take effect as law. It is these considerations that inform the next Part.

## IV. DEMOCRATIC GOVERNANCE CONCERNS

The rise of the regulatory-criminal complex also leads to concerns about democratic governance. As we shall see, it tests our constitutional commitment to separation of powers and checks and balances, it leads to concerns about the ability of even a highly engaged citizenry to engage in political oversight, and it permits governmental actors to duck political accountability. At some point, flexibility and adaptability begin to look like absence of accountability and lawlessness.

### A. *Structural Commitment*

The simplest argument against having regulators engage in criminal lawmaking is that it violates the constitutional notions of

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47. Note, *supra* note 37, at 2044.

48. *Id.* at 2043.

bicameralism and presentment.<sup>49</sup> While this argument has much persuasive power, the courts have dismissed it. This constitutional argument played itself out through the rise and fall of the nondelegation doctrine.<sup>50</sup> The doctrine holds that in a system of separated powers, one unit may not delegate the powers constitutionally entrusted to it to another unit.<sup>51</sup> For our purposes, that would mean that the legislature is not permitted to delegate lawmaking power to the executive.<sup>52</sup> The courts have avoided the implications of the nondelegation doctrine in the regulatory-criminal context by holding there to be no delegation and that the implementing regulations merely carry out the orders that the legislature put in place, so long as it has given the regulating agency “intelligible principles” to follow.<sup>53</sup> The nondelegation doctrine, if not entirely dead, has no pulse, but the concerns underlying it still exist.<sup>54</sup>

For those concerned with perceptions of liberty as a goal of government, the limits included in separation of powers, including capacity limitations, have collateral benefits. A shortage of time limits the raw amount of legislation that Congress can pass, thereby protecting the citizenry from government overreaching. Checks and balances in our system mean that there has to be a social consensus before we make behavior a crime. However, the compromises and tough choices inherent in legislation are often avoided by passing

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49. Cf. Boris Bershteyn, Note, *An Article I, Section 7 Perspective on Administrative Law Remedies*, 114 YALE L.J. 359, 369 (2004) (noting that the rise of the administrative state has altered the traditional allocation of powers in federal policymaking established by the bicameralism and presentment requirements in favor of the executive).

50. DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 14 (1993) (critiquing the delegation of lawmaking power to agencies that lack political accountability); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1740 (2002). *But see* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1328 (2003); Thomas O. Sargentich, *The Delegation of Lawmaking Power to the Executive Branch*, in *SEPARATION OF POWERS: DOCUMENTS AND COMMENTARY* 116, 127 (Katy J. Harriger ed., 2003) (examining the pros and cons of “reviving the principle against broad delegation”).

51. *See* sources cited *supra* note 50.

52. *See* *Field v. Clark*, 143 U.S. 649, 694 (1892).

53. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 372 (1989) (upholding delegation as constitutional so long as Congress provides the agency with an “intelligible principle” to interpret the law).

54. *See, e.g., Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) (“In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests [a]ll legislative Powers herein granted . . . in a Congress of the United States.’ This text permits no delegation of those powers.” (citing *Loving v. United States*, 517 U.S. 748, 771 (1996))) (alterations in original).

generic statutes that proclaim lofty goals, such as a clean environment or protection of endangered species. By the time the hard choices are made, the legislators are politically insulated.

### *B. Notice*

The complex regulations that result from delegation also create notice problems for the regulated, and for the polity writ large. Notice and comment rulemaking provides a very different kind of notice to the public than is provided when matters are on the congressional agenda. As noted earlier, the idea that notice and comment rulemaking adequately permits the regulated entities to participate in self-government requires some important fictions. One must pretend that the regulated entities have sufficient time, money, and capacity to engage in any rulemaking that will affect them, and that the constructive notice at issue really constitutes notice. Even regulations that are beautifully detailed and contain the product of perfectly drawn balances between our values are hard to follow if it is impossible to keep up with them as they are issued. The hoary maxim that ignorance of the law is no excuse is defensible when the law is based on widely held knowledge and deep societal commitments, but it becomes much more problematic when the criminal code contains hundreds of crimes and the code of federal regulations contains hundreds of thousands of regulations that may serve as the bases for criminal prosecution.

Additionally, in a world of rational ignorance, notice and comment rulemaking is more likely to lead to interest group capture of the agency than it is to a broad consensus about particular behavior.<sup>55</sup> While it is possible that the system will result in regulations that are the result of careful consideration of all of the possible consequences, we are just as likely to have regulations that were designed for the benefit of particular individuals who for purposes of their own have devoted the time and energy necessary to capturing the system.

### *C. Political Accountability*

Another democratic governance concern is political accountability. A system of administrative regulation and sentencing

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55. The rationally ignorant voter has little time to devote to policing political actors. Notice and comment rulemaking will be watched by stakeholders, but not by the public at large. It is possible, of course, that advocacy groups will arise to advance the public interest, but it is by no means necessary.

commission determination of appropriate punishment creates two full layers of political insulation between the legislature and the punishment associated with a particular crime—a conduct layer and a punishment layer—permitting the legislature to pass the buck on accountability to the unelected regulators. Legislators can simply pass a relatively vague, hortatory statute and then run against the regulators when it becomes clear whose ox is being gored. They can argue that the implementing regulations are more complex than they intended, more punitive than they intended, cover conduct that they did not intend to criminalize, or create costs that they did not intend.<sup>56</sup> We have created a situation where a congressman can routinely pass delegating law and then campaign against the resulting regulation.<sup>57</sup> These concerns multiply when the decision about which behavior will be newly criminalized is not made and weighed by elected legislators but by faceless technocrats who are focused on their domain, rather than the big picture, and will never have to stand for election. Instead, they are protected civil servants who may long outlast whatever president or governor is nominally in charge.<sup>58</sup> Rulemaking, even notice and comment rulemaking, cannot substitute for the broad social consensus represented by a legislature. Expert regulators and a tiny subset of the regulated are an insufficient substitute for bicameralism and presentment. In many instances, an executive branch agency makes the rule, interprets the rule, enforces the rule, and may even render initial adjudication on the rule it has created.<sup>59</sup> This concentration of power in the name of efficiency is the direct antithesis of the liberty-protecting ideas behind the separation of powers. Our current system places ever greater pressure on the

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56. See William A. Niskanen, *Legislative Implications of Reasserting Congressional Authority Over Regulations*, 20 *CARDOZO L. REV.* 939, 941–42 (1999).

Congress often approves very general regulatory legislation—leaving the regulatory agencies with broad discretion to define the law by the rules they promulgate. This permits members of Congress to play both sides of the street—to take credit for the presumed benefits of the regulation and to blame the agencies for the costs of meeting specific rules. The President accepts the role of regulatory cop in exchange for much more executive discretion on regulations than on fiscal issues.

*Id.*

57. *Id.*

58. See STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS* 139 (2008).

59. For example, immigration laws follow this pattern, with enforcement taking place under the auspices of the Department of Homeland Security and adjudication taking place under the Executive Office of Immigration Review, both of which are components of the DoJ. See EXEC. OFFICE FOR IMMIGRATION REVIEW, *DEPT OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL* 1–3 (2006).

already endangered civil/criminal distinction. Once the regulation is deemed civil—and punitive fines can be civil, as can incarceration—the procedural protections that criminal enforcement mandates disappear.

#### V. NEWLY DETERMINED WRONGS—A LEGISLATIVE, NOT REGULATORY CALL

At the center of my critique is a commitment to the principle that crime is not the subject of expertise, or of elite views, but instead should be evidence of broadly and deeply held moral commitments.<sup>60</sup> Agencies may be experts in their spheres, but they are not the appropriate arbiters of society's moral center. The criminal law should reflect society's moral judgments, not the judgments of experts.<sup>61</sup>

According to Dan Kahan, delegation is a good thing if we want a successful regulatory state. “Delegation—whether express or implied, whether to agencies or courts—is a strategy for maximizing Congress’ policymaking influence in the face of constraints on its power to make

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60. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 5–7 (1995) (discussing the role of community values in the formulation of criminal justice policy); Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1861–63 (2000) (same). Sources discussing the expressive function of the law include: Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 221–22 (1965) (discussing the emergence of incarceration for economic crimes); Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 949, 953, 979 (1997); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 22, 24, 37; Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 407 (1958); Sanford H. Kadish, *Some Observations on the Use of Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 435–40 (1963); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 351, 362, 365 (1997); Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2445–48 (1997); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1863 (1992); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 397–400 (1997); Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 521 (1996) (focusing on the employment consequences of the stigma associated with being convicted of a crime).

61. Other scholars agree. See Kristen E. Hickman, *Of Lenity, Chevron, and KPMG*, 26 VA. TAX REV. 905, 923 (2007) (“[D]eciding that particular actions should be criminally punishable is an act of collective moral judgment and condemnation. As designated representatives of the people, members of Congress are both more in touch with communal perceptions of ‘right’ and ‘wrong’ and more accountable to the public for the moral judgments they make than agencies are.”).

law.”<sup>62</sup> Shortages of political capital and of time lead Congress to delegate to courts the power to fill in the gaps.

In such circumstances, members of Congress are likely to avail themselves of the “virtue[s] of vagueness,” drafting statutes in terms sufficiently general that legislators on both sides of a disputed issue can “tell [their] constituents that [they] obtained language to protect them” while leaving it to courts to devise an interpretation of what “congressional intent” was.<sup>63</sup>

But this expansive use of criminal sanctions clearly comes with costs. As another scholar has noted, “Estimates suggest that over three hundred thousand federal regulations are punishable by criminal penalties enforceable through the combined efforts of as many as two hundred different federal agencies.”<sup>64</sup>

According to Paul Robinson, legislators have increasingly used the criminal law where civil regulations were once the norm, hoping to increase deterrence by calling undesirable behavior a crime, and enlisting the moral power of the name. This change is counterproductive, he argues, because overuse of the label “crime” in areas that were historically merely civil weakens the moral force of that label everywhere.<sup>65</sup>

The weight of the commentary suggests that overcriminalization undermines the law.<sup>66</sup> These scholars suggest that the moral authority

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62. Kahan, *supra* note 46, at 474.

63. *Id.* (alterations in original) (quoting CHARLES R. WISE, *THE DYNAMICS OF LEGISLATION* 178 (1991)).

64. Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting “Apparent Innocence” in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 32 (1995). According to Pilcher, “In contemporary America, virtually every regulatory scheme, particularly in federal law, includes felony criminal enforcement provisions to add ‘teeth’ to the costs of noncompliance, covering such diverse areas as environmental safety, securities markets, employment practices, consumer protection, public benefits, and international trade.” *Id.*

65. Paul H. Robinson, *Moral Credibility and Crime*, ATLANTIC MONTHLY, Mar. 1995, at 72, 77.

66. BAKER, *supra* note 5, at 3; GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING *passim* (Gene Healy ed., 2004); DAVID A.J. RICHARDS, SEX, DRUGS, DEATH AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION 1–28 (1982); Stuart P. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1535–41 (1997); Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 769 (2004); Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261, 267–68 (2003); V.F. Nourse, *Rethinking Crime Legislation: History and Harshness*, 39 TULSA L. REV. 925, 935–38 (2004) (arguing that overcriminalization is a consequence of the federal system); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 638 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 *passim* (2001); Symposium, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV.

of the law is deeply damaged when good people know that they cannot possibly fully comply with the law, no matter how hard they try.<sup>67</sup> Erik Luna has put it quite succinctly: “When the criminal sanction is used for conduct that is widely viewed as harmless or undeserving of the severest condemnation, the moral force of the penal code is diminished, possibly to the point of near irrelevance among some individuals and groups.”<sup>68</sup>

At the same time that it undercuts the moral authority of the criminal law, overcriminalization also reduces the efficacy of the law more generally. It makes the law incomprehensible, so that it actually reduces compliance because of despair. James DeLong has noted that there is a point of diminishing returns when the impossibility of full compliance leads to reduced efforts to comply.

Overuse of punitive sanctions damages the moral fabric of the culture . . . . [W]hen people who regard themselves as responsible moral actors learn that they have committed criminal offenses they have never even heard of, their first reaction is disbelief. Their second is contempt for the law. The developing perception is that one cannot possibly keep up with all the rules and cannot afford to try. The rational person must shrug and accept the possibility of criminal conviction as one of the risks of life . . .<sup>69</sup>

As Benjamin Cardozo said, “Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable.”<sup>70</sup>

Other commentators have made this point directly to Congress during oversight hearings. Roger Marzulla, a former assistant attorney general charged with representing numerous agencies, put it this way: “Citizens remain subject to tens of thousands of unclear and

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541, 541 (2005); Task Force on the Federalization of Criminal Law, Am. Bar Ass’n, *The Federalization of Criminal Law*, 11 FED. SENT’G REP. 194, 194–95 (1999); Paul Rosenzweig, *The Overcriminalization of Social and Economic Conduct*, THE HERITAGE FOUND. *passim* (Apr. 17, 2003), [http://s3.amazonaws.com/thf\\_media/2003/pdf/lm7.pdf](http://s3.amazonaws.com/thf_media/2003/pdf/lm7.pdf).

67. For a version of this argument based on general concerns regarding regulatory overcriminalization, see James V. DeLong, *The New Criminal Classes: Legal Sanctions and Business Managers*, in GO DIRECTLY TO JAIL, *supra* note 66, at 9, 36–37. Other scholars have suggested that the moral authority of the law is a more important component than the risk of punishment in ensuring compliance. See ROBINSON & DARLEY, *supra* note 60, at 5–7, 201–15; TOM R. TYLER, WHY PEOPLE OBEY THE LAW 19–68 (1990).

68. Erik Luna, *Overextending the Criminal Law*, in GO DIRECTLY TO JAIL, *supra* note 66, at 1, 7.

69. DeLong, *supra* note 67, at 9, 36–37.

70. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 3 (1924).

inconsistently implemented and enforced regulations, with potential exposure to millions of dollars in penalties and hundreds of years in federal prison for unwitting violations.”<sup>71</sup>

And the distinction between civil regulations and criminal charges is supposed to be important. Critical constitutional rights turn on whether an action is considered civil or criminal. Moral condemnation attaches to someone convicted of a crime in a different way and to a different degree than it does to a tortfeasor. As Professor Aaron Fellmeth has said, “To the discredit of the juristic and legislative professions, the centrality of the distinction between the civil and criminal law to our jurisprudential paradigm has done nothing to enhance its clarity or its cogency.”<sup>72</sup>

These concerns with overcriminalization are particularly troubling in light of recent research that helps explain why people obey the law. Traditional explanations of compliance with the law modeled citizens as rational agents responding to incentives and penalties associated with abiding by and breaking the law.<sup>73</sup> However, this “deterrence” model has been subject to substantial critique in recent years,<sup>74</sup> in part reflecting empirical work indicating that deterrence claims are “speculative” at best.<sup>75</sup> Rather than focusing on an individual’s perception of the costs and benefits of complying with the law, Professor Tom Tyler has demonstrated that normative factors such as an individual’s personal perception of the justice or injustice of a particular law play a significant role in determining whether she complies with the law.<sup>76</sup> Tyler also identified a spillover effect, finding that individuals who generally believe the criminal

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71. *Administrative Crimes and Quasi-Crimes: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. 85 (1998) (statement of Roger J. Marzulla). Marzulla is particularly well-situated to make these observations. He served as assistant attorney general in charge of the DoJ’s Environment and Natural Resources Division, and brought cases on behalf of his client agencies: EPA, Interior Department, Bureau of Reclamation, Fish and Wildlife Service, National Marine Fisheries Service, Department of Transportation, and Department of Commerce. See *Roger J. Marzulla*, MARZULLA LAW, <http://www.marzulla.com/attorneys.php?action=view&id=1> (last visited Apr. 29, 2011).

72. Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 3 (2005).

73. See, e.g., Richard A. Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193 *passim* (1985).

74. See, e.g., TYLER, *supra* note 67, at 56–57; see also Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 416 (1999) (“Deterrence arguments also draw incessant fire from academic theorists.”); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 458–68 (1997).

75. Kahan, *supra* note 74, at 416.

76. TYLER, *supra* note 67, at 57.

justice system is just and legitimate are more likely to be law-abiding.<sup>77</sup> Therefore, to the extent that overcriminalization makes good people feel that they cannot comply with the law and undermines the underlying “moral credibility” of the law, obedience to the law declines.<sup>78</sup>

## VI. ATTEMPTS AT OVERSIGHT

There has been a range of attempts at oversight by all three branches, none of which has met with particular success. This Part sketches judicial, congressional, and executive forays into the field.

### A. *Judicial Oversight*

As discussed above, the judiciary has failed to enforce nondelegation principles, and has also refused to police the civil/criminal distinction.<sup>79</sup> But while the courts have been loath to enter the fray in those areas, they have used their interpretive powers to address concerns over complexity in other minor but symbolic ways. Over the course of the last half century, courts have used their interpretive powers to reintroduce ignorance of the law as a defense to criminal prosecution in a few select cases.<sup>80</sup> This new use of ignorance of the law as a defense has accompanied, and perhaps responded to, a dramatic increase in the number of statutory and administrative crimes.<sup>81</sup> Courts have identified two particular areas—crimes involving ostensibly innocent activity and crimes involving the violation of highly complex regulations—where the expanding number of crimes warrants acceptance of ignorance of the law as a defense.<sup>82</sup> The courts have increased access to this defense by interpreting the statutory mens rea term “willful” in various statutes or regulations to require that the government prove that the defendant knew the particular statute or regulation she was alleged to have violated.<sup>83</sup>

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77. *Id.* at 4.

78. See Robinson & Darley, *supra* note 74, at 498.

79. See *supra* Part IV.

80. See generally Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 343–46 (1998) (discussing the expanded availability of ignorance of the law as a defense). For a recent example involving securities laws, see Alexander P. Robbins, Comment, *After Howard and Monetta: Is Ignorance of the Law a Defense to Administrative Liability for Aiding and Abetting Violations of the Federal Securities Laws?*, 74 U. CHI. L. REV. 299, 307–10 (2007).

81. See *supra* note 64 and accompanying text.

82. See Davies, *supra* note 80, at 363–87.

83. *Id.* at 362–63.

The innocent activity exception stems from the desire to ensure that only those individuals who are morally culpable and have had fair notice of the illegality of their conduct are punished. *Lambert v. California*,<sup>84</sup> which struck down a defendant's conviction for failing to register as a felon as required by a Los Angeles municipal ordinance, dealt with the fair notice concern.<sup>85</sup> The *Lambert* Court said that a party should not be held criminally liable due to lack of knowledge of a statute if he is "wholly passive and unaware of any wrongdoing."<sup>86</sup> In *Staples v. United States*<sup>87</sup> the Supreme Court said that in order to hold a person criminally liable for illegal possession of a "firearm," the government must demonstrate that the defendant knew his weapon was a firearm under the statute.<sup>88</sup> The rationale for this holding was in part that fifty percent of American homes contain guns and "owning a gun is usually licit and blameless conduct."<sup>89</sup> However, the lower courts have had difficulty determining what constitutes "innocent" activity, with some courts equating innocence with "technical legal[ity]" and other courts equating innocence with "total innocuousness."<sup>90</sup>

The second exception applies in cases that involve "highly technical statutes that threaten . . . to ensnare individuals engaged in apparently innocent conduct."<sup>91</sup> The exception was originally limited to tax evasion cases such as *Cheek v. United States*,<sup>92</sup> but was expanded to include other statutory and regulatory crimes following the Supreme Court's decision in *Ratzlaf v. United States*.<sup>93</sup> In *Ratzlaf*, the Court held that the government must prove that a defendant accused of violating federal antistructuring rules acted with knowledge that his structuring was unlawful, rather than merely with the purpose of circumventing bank reporting obligations.<sup>94</sup> However,

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84. 355 U.S. 225 (1957).

85. *Id.* at 226, 229.

86. *Id.* at 228.

87. 511 U.S. 600 (1994).

88. *Id.* at 619.

89. *Id.* at 613–14.

90. See Pilcher, *supra* note 64, at 24.

91. *Bryan v. United States*, 524 U.S. 184, 185 (1998).

92. 498 U.S. 192 (1991). In *Cheek*, the defendant refused to pay his taxes, believing that the income tax was unconstitutional. *Id.* at 194–95. The Court recognized that the tax code is extremely complex, and found that in such cases, defendants must be aware of the law and choose to violate it if they are to be found "willful" under the criminal tax statutes. *Id.* at 199–200.

93. 510 U.S. 135 (1994).

94. *Id.* at 136.

the lower courts have had difficulty determining whether a statutory or regulatory scheme is “complex” or not.<sup>95</sup>

Commentators are split on whether this expansion of ignorance of the law as a defense is warranted.<sup>96</sup> Those in favor argue that the expansion is warranted because the increasing number and complexity of crimes increases the risk of punishing morally blameless individuals.<sup>97</sup> This “intrusion of the criminal law into socially unexpected realms of conduct diminishes the power of criminal law as a social institution” because the governed will begin to question the moral authority of the law.<sup>98</sup> In opposing the erosion of the rule, Professor Davies opines that the legislature, not the courts, should define criminal conduct.<sup>99</sup> In addition, she argues that the lack of consistency regarding what activity is “innocent” and what regulations are complex will generate “wide[r] uncertainty about the law’s commands.”<sup>100</sup> Taken together, these developments suggest that the courts are aware of the complexities of the regulatory state, but have serious—and well-founded—doubts about the legitimacy or efficacy of judicial attempts to intervene in the agency definition of criminal conduct.

### B. Congressional Oversight

Congress has attempted to reassert its control over the federal agencies, ironically by adding red tape to the agencies’ attempts to pass regulations. The Paperwork Reduction Act<sup>101</sup> requires agencies to do more paperwork to ensure that the regulated do less paperwork, or at least to justify the additional paperwork that the agencies mandate. The Regulatory Flexibility Act<sup>102</sup> is designed to ensure that agencies document the effects of rules on small businesses. The most ambitious attempt to force regulations back

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95. See Davies, *supra* note 80, at 372.

96. Compare *id.* at 348 (arguing for a “reinvigoration” of a broad bar on ignorance of the law as a defense), with John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1161–62 (arguing that exceptions to the rule are warranted to ensure that only morally culpable individuals are punished).

97. For a general discussion, see Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 756 (2002) (explaining what he terms the “New Lenity”); see also Wiley, *supra* note 96, at 1022 (discussing the notion of “mandatory culpability” in statutory construction).

98. Pilcher, *supra* note 64, at 34.

99. Davies, *supra* note 80, at 413.

100. *Id.*

101. 44 U.S.C. §§ 3501–3520 (2006).

102. 5 U.S.C. §§ 601–612 (2006).

through bicameralism and presentment is the Congressional Review Act.<sup>103</sup> The Small Business Regulatory Fairness Enforcement Act, enacted in 1996<sup>104</sup> as part of the Contract With America, created the Congressional Review Act,<sup>105</sup> which established an expedited legislative process to permit Congress to review and, if it so chose, to reverse virtually all federal agency rules via a joint resolution of disapproval.<sup>106</sup> While the existence of this mechanism shows that the business community had sufficient clout to convince Congress to create mechanisms that enable it to roll back some regulation, it is less clear that Congress has the will or the attention span to actually do so. Between 1996 and March 31, 2008, agencies submitted reports on 731 major rules (those expected to have more than \$100 million in effect on the economy), and the GAO cataloged 47,540 nonmajor rules.<sup>107</sup> Of those, forty-seven joint resolutions of disapproval were introduced and exactly one OSHA regulation was overturned.<sup>108</sup>

### C. Executive Oversight

The president has the duty to oversee the federal agencies, and, at various times, the president has issued executive orders designed to force agencies to consider the concerns of the regulated, or of the states.<sup>109</sup> Various administrations have seen the roles of the agencies differently, and have limited agency action in different contexts for different reasons. President Reagan, for example, committed to rolling back some of the regulatory state in the interest of protecting federalism.<sup>110</sup> However, his successors in both parties have been more agency-friendly. Regardless of the political interests a particular

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103. 5 U.S.C. §§ 801–808 (2006).

104. Small Business Regulatory Fairness Enforcement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified as amended at 5 U.S.C. §§ 801–808 (2006)).

105. MORTON ROSENBERG, CONG. RESEARCH SERV., RL 30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE 1 (2008).

106. *Id.*

107. *See id.* at 3; *see also* Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 102–03 (1997) (arguing that the Act’s “broad definition of ‘rule’ seems likely to defeat [the] goal” because of the “great volume of regulatory actions that Congress will theoretically be called upon to consider”); Julie A. Parks, Note, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187, 203 (2003) (noting the risk of the involvement of special interests).

108. ROSENBERG, *supra* note 105, at 6.

109. *See, e.g.*, Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601, at 77–80 (Supp. III 2009).

110. *See* Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J.L. & POL. 483, 496–98 (1988) (explaining Reagan’s use of executive orders to rein in agency action).

president might have in exercising executive power to meet the interests of constituents, it is hardly surprising that presidents seek to maintain or expand executive branch prerogatives. We can therefore expect presidents to seek to retain the power to regulate, whether or not they exercise it.

## VII. AN INTRACTABLE PROBLEM?

Professor William Stuntz has noted that the politics of criminal law are pathological, and that it is virtually impossible to repeal criminal laws once they are in place.<sup>111</sup> Nonetheless, for the reasons detailed above, we should be committed to shrinking, not expanding the criminal code. If we were, we would institutionalize rolling back old crimes,<sup>112</sup> weed out regulations regularly, and apply cost-benefit analysis to much of the machinery of the regulatory state. Congress and the president have tried to do so, by Office of Management and Budget (“OMB”) oversight,<sup>113</sup> by reporting requirements,<sup>114</sup> and by executive order.<sup>115</sup> But none of these attempts seem to be working. This does not mean that we should give up. There are some solutions we might consider.

### A. *Stop*

The simplest solution would be simply to use the existing political processes to get the legislature to stop creating new regulatory crimes. Instead of passing thousands of new regulations, we should rely instead on old, well-understood statutes that map our moral intuitions. There is considerable resiliency of the moral norms that underlie the criminal law. Old moral precepts easily adapt to new information. If something is newly discovered to be harmful to human beings, for example, there are old moral notions and old crimes that govern the moral component of the behavior. It has long been

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111. See Stuntz, *supra* note 66, at 556–57 (explaining that politicians are rewarded for enacting crimes in times of crisis, but receive no such benefits from repeal).

112. For one possible way to roll back crimes on a mandated schedule, see Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1356 (2008) (arguing for the passage of a constitutional amendment that would provide time limits for all criminal laws, resulting in mandatory sunset).

113. See *supra* notes 109–10 and accompanying text. See generally Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006) (describing attempts to create regulatory watchdogs outside the agencies).

114. See Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *revoked by* Exec. Order 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601, at 77–80 (Supp. III 2009).

115. See, e.g., *id.*

immoral and illegal to knowingly hurt another member of one's society. The crimes of murder, assault, or battery, depending on local definition, already cover the wrong.

Can this be right? If the behavior is truly new, then it cannot already have been outlawed, can it? Clearly new problems call for new crimes. So the flexibility and resiliency that I suggest exists in these old laws should run into legality problems, shouldn't it? Not so. The underlying harms are old, they are simply being committed in new ways. In fact, if we want more coverage on new ways of committing old crimes, we should rely on the broadly stated crimes, and rely on a combination of harm focus and mens rea to ensure that the crimes do in fact cover immoral conduct. Otherwise, the "bad man" will rely on the specific crimes to engage in "loopholing."<sup>116</sup>

To the extent that the civil regulations matter to the criminal law, it is because they demonstrate notice regarding the harmfulness of behavior. Because the transmission of new knowledge requires time, civil enforcement and regulation will allow the general public to understand the way that new conduct maps onto old harms. Mens rea requirements ensure that the social condemnation associated with a criminal conviction reaches only those who deserve it.<sup>117</sup> The time between the discovery of new information and the transmission of that information at a sufficiently wide level for a new moral consensus to form is uncertain, but there is no question that moral notions and beliefs about harm change over time.<sup>118</sup> Requiring the prosecution to prove mens rea, even at the level of negligence, permits the jury to serve as a test bed for the dissemination of the necessary information about harm. If a reasonable person would know that the practice was

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116. See Dan M. Kahan, *Ignorance of Law Is An Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 138 (1997). This is what Professor Kahan has called the "prudence of obfuscation." *Id.*

Moral judgments are too rich and particular to be subdued by any set of abstract rules; as a result, law will always embody morality only imperfectly . . . . The more readily individuals can discover the law's content, the more readily they'll be able to discern, and exploit, the gaps between what's immoral and what's illegal.

*Id.* at 129.

117. There are some who support strict liability regimes, at least for public welfare offenses. But their support often rests on a legal fiction: that strict liability is acceptable, especially in regulated areas, because such statutes affect the public welfare, the penalties are low, and the regulated parties have plenty of opportunity to learn the regulations that affect them. As we have seen above, as notions of the public welfare have exploded, and regulation has multiplied, a participant in a regulated market might have to know thousands of regulations and be responsible to dozens of regulators.

118. This change over time in moral beliefs is referred to by Professors Ball and Friedman as "intergenerational drift." See Ball & Friedman, *supra* note 60, at 221.

harmful, or if this particular defendant was on notice that the practice was harmful, then knowledge had spread far enough to serve as a proxy for social condemnation of the practice.

But there is no evidence that we intend to stop. As Professor Stuntz said, “[C]riminal law expands in different areas at different times and places, but it always expands.”<sup>119</sup>

### B. *Sunset*

If we are not willing to stop, we might proceed, but with greater caution. There are a number of possible mechanisms that would permit a precommitment to caution. Congress could insert sunset provisions into enabling legislation, and has done so in some contexts.<sup>120</sup> In other work, I have suggested amending the Constitution to insert a provision that would have all criminal laws sunset after twenty-five years, guaranteeing that crimes passed in haste could be reassessed at leisure.<sup>121</sup> This approach would also short circuit the political problems that arise when observers conflate a vote to repeal a statute with condoning the underlying conduct. Because it would guarantee work in the future, but only if the statute was criminal, we could also expect regulators to be more parsimonious with criminal laws, leading them to prefer civil regulations.

### C. *The Jury*

If we will not constitutionally precommit to limiting the criminal code, lack the resources or political will to clean up the existing code, and cannot count on the courts to police these problems except in the most cursory way and in the narrowest possible class of cases, is there another mechanism we could employ? In addition to a front-end check on the legislature, I also propose a reinvigorated jury as a vital check on runaway regulation.

The criminal jury is both adaptable and resilient. In some ways, the story of the jury has been one of increasing egalitarianism. Jury service was once limited to the same elite class that served in the legislature, white male landholders. Over a series of constitutional

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119. Stuntz, *supra* note 66, at 527–28.

120. See Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 255–59 (2007) (providing examples of “temporary” or sunset legislation by both federal and state legislatures). Gersen cites among his many examples: the legislation creating the independent counsel who investigated President Clinton, certain tax cuts, portions of the USA PATRIOT Act, bankruptcy rules, immigration rules, and energy policy. *Id.* at 255–59, 277.

121. Myers, *supra* note 112, at 1329, 1362.

decisions, the Supreme Court expanded jury service to include women<sup>122</sup> and racial minorities,<sup>123</sup> and guaranteed the right to jury trials for all felonies punishable by more than one year, in state or federal courts.<sup>124</sup>

At the same time that the right to serve and the right to a jury trial were expanding, the powers of the jury were shrinking. Between the framing and the present, judges have stripped much of the jury's original power, undermining its critical check and balance functions.<sup>125</sup> Judges ruled that jurors could not be informed of the punishment that the defendant was facing,<sup>126</sup> and that they were to be instructed that they had to follow the law as the judge read it to them,<sup>127</sup> and that attorneys could not ask the jury to acquit because the application of an otherwise just law was unjust in this particular case.<sup>128</sup> The jury is commanded not to perform independent research.<sup>129</sup> Jurors are generally not allowed to ask questions,<sup>130</sup> and in many cases, even extremely complex regulatory cases, are not allowed to take notes.<sup>131</sup> In some cases, judges have decided to strike for cause jurors who are aware of their power to nullify.<sup>132</sup> All of these

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122. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 523, 525 (1975) (holding a statute that required women to affirmatively register for jury service unconstitutional).

123. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (holding unconstitutional a statute limiting jury service to whites).

124. See *Duncan v. Louisiana*, 391 U.S. 145, 161–62 (1968).

125. See CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE passim* (1998).

126. See *Shannon v. United States*, 512 U.S. 573, 579 (1994) (stating that unless the jury is involved in sentencing, it should not be informed of the potential sentence). For a now-dated but insightful discussion of the issue, see generally Robert Bartels, *Punishment and the Burden of Proof in Criminal Cases: A Modest Proposal*, 66 IOWA L. REV. 899 (1981).

127. See CONRAD, *supra* note 125, at 117–24.

128. Cf. *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993) (“A trial judge, therefore, may block defense attorneys’ attempts to serenade a jury with the siren song of nullification.”).

129. See, e.g., SIXTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS § 8.02 (2009) (“Remember that you must make your decision based only on the evidence that you saw and heard here in court. Do not try to gather any information about the case on your own while you are deliberating.”).

130. See, e.g., Nicole L. Mott, *The Current Debate on Juror Questions: “To Ask or Not To Ask, That Is the Question,”* 78 CHI.-KENT L. REV. 1099, 1099–1100 (2003) (discussing the varying court practices and finding that while technically barred in a only a subset of jurisdictions, jury questions are generally discouraged).

131. See Valerie P. Hans, *U.S. Jury Reform: The Active Jury and the Adversarial Ideal*, 21 ST. LOUIS U. PUB. L. REV. 85, 89 (2002).

132. See Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 435 (1998) (“Venirepersons who admit during voir dire that they were exposed to nullification advocacy or who express doubts about or disagreement with the criminal law or its enforcement are being excluded from jury service with challenges for cause.”).

developments have stripped the jury of its intended constitutional functions.<sup>133</sup>

By reversing this trend, either by judicial ruling or by legislation, we could restore the jury to its role as “the very palladium of free government,” the “bulwark of liberty” that it was intended to be.<sup>134</sup> A fully informed jury—one that has read the statute and the regulation rather than jury instructions drafted by attorneys—can act as a check on the complexity of the regulation and, most importantly, can ensure that the regulation that is violated actually has stated a sufficient moral judgment to demand the social condemnation that comes with a criminal conviction.<sup>135</sup>

Juries are also available in theory more than in practice. At the same time that the administrative state has been growing, the relative number of trials has been shrinking. In their stead we have seen the rise of the administrative justice system, where the vast majority of cases are processed via plea bargain.<sup>136</sup> And the tools that might make that plea bargain system more successful—talented and well-trained lawyers on both sides of the case with sufficient time to weigh the issues, examine the facts, and reach a well-thought-out negotiated compromise—are shrinking. Prosecution offices and particularly public defenders are underfunded, to the point that we have a system of “justice for some.”<sup>137</sup>

#### D. More Lawyers

Whether we proceed by trial or by plea bargain, it takes well-trained lawyers to navigate a system as complex as ours. Critics suggest that, in theory, the American justice system offers great

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133. See Myers, *supra* note 29, at 155–58.

134. See Bruce A. Antkowiak, *The Ascent of the National Palladium: The Resurgent Importance of Trial by Jury and the Coming Revolution in Pennsylvania Sentencing*, 13 WIDENER L.J. 11, 22–36 (2003).

135. See Myers, *supra* note 29, at 156–57 (“The jury enshrined in the Constitution is the jury that acquitted John Peter Zenger of seditious libel, one that had the power to determine the law as well as facts.”); see also Pilcher, *supra* note 64, at 6 (arguing that defendants should be able to argue “apparent innocence” to the jury in a “narrow class of cases,” forcing prosecutors and legislators to ensure that such cases reflect local moral norms).

136. See Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1080 (2004) (“As a collective, defense attorneys—as well as trial judges and prosecutors—are generally unaware of the existence and scope of collateral consequences. This lack of knowledge stems largely from the fact that these consequences are scattered throughout federal and state statutes as well as numerous regulations.”).

137. See *id.* at 1090.

opportunities to have one's case developed and tried, but only for those wealthy enough to afford it.<sup>138</sup> And almost no one is wealthy enough to afford it.<sup>139</sup> Public defenders are woefully underfunded.<sup>140</sup> As the law becomes increasingly complex, even well-trained, well-meaning lawyers cannot fully understand all of the implications of a criminal conviction.<sup>141</sup> The collateral consequences in many cases—offender registry laws, civil disabilities, loss of benefits, and deportation—are potentially more onerous than the punishment that attaches to the initial criminal conviction.<sup>142</sup> To combat this increasing complexity, we need more well-trained lawyers, on both sides of the case. We need prosecutors with the time, training, and motivation to carefully sort cases before they get to court, so that the innocent are protected, and uniformity in prosecution is assured. And we need compliance counsel and defense attorneys with the time and resources to investigate and understand the increasingly complex regulatory criminal regime, so that they can keep their clients from crossing very murky lines in the first instance, and defend them appropriately when they are accused of having done so.

#### CONCLUSION

So I end this brief Essay where I began, with an exhortation to parsimony and a call for checks and balances. A system that is too complex for citizens to know and understand is not a system that actually governs. If people cannot know the law they cannot follow it. Dispersing the crime-creation function to dozens of regulatory agencies with their own disparate agendas makes it unlikely that anyone is paying meaningful attention to the volume of law, or the ways in which different fields interact. If the volume of law is overwhelming, if the law has become unknowable, we can have beautifully crafted law that has no effect in the world. Such a system lacks moral authority and accountability.

A simpler criminal code, one in which far fewer and more flexible crimes are deployed, one that tracks old and well-understood

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138. See Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, EMORY L.J. 1169, 1169 (2003) (noting that under-funded public defenders “carry grossly excessive caseloads and are therefore severely restricted in how much time they can devote to individual clients”).

139. *Id.*

140. See Pinard, *supra* note 136, at 1090.

141. See *id.* at 1080.

142. See Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 253 (2002) (“[C]ollateral consequences may be the most significant penalties resulting from a criminal conviction.”).

harms, makes far more sense. Our old moral intuitions are very flexible, because they recognize that we can find new ways to lie, cheat, steal, and hurt people.<sup>143</sup> There is a natural impulse to name the new way of doing harm. It seems to fit our notions of legality to suggest that we should say that a particular way of committing the harm is banned.<sup>144</sup> But we can use civil regulation to inform people of the myriad ways in which harms are committed, and count on mens rea to ensure that we prosecute only those actors who have had fair notice. Complex times do not call for complex crimes. They do call for a commitment to doing the right thing.

If we are truly committed to limited and democratic government, we need political accountability and checks and balances. Our current system seems to have cascaded out of control, and needs institutionalized brakes on the front end and the back end. If the legislature cannot expend the time and energy required to make the moral judgments and to engage in the political balancing inherent in creating crimes, it should be barred from farming out that responsibility.<sup>145</sup> Multiple institutional actors must be required to take a thoughtful second look at the application of law to fact. Prosecutors should be fully funded so they can exercise independent judgment, defense counsel should be fully funded so that they can adequately investigate and defend the accused, and judges should have the power to render sentences that fully account for the defendant's true culpability. Mandating some intergenerational humility in the form of a criminal sunset amendment would also force parsimony in the use of the criminal sanction. Finally, we can and should empower the people's representatives in the criminal justice system, jurors fairly chosen from a cross-section of the community, to use deep intuitions about notice, fairness, and justice to decide in particular cases whether we have struck the right balance.

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143. See, e.g., Griffin, *supra* note 41, at 1829 (explaining that “[f]raud is about gaining advantage through deception” and corruption “takes creative forms and occurs in relationships structured to avoid detection,” so the offenses must be flexible “to keep pace with evolving forms of misconduct to protect an important but imprecise set of interests”); cf. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 8–11 (2007) (highlighting empirical work suggesting that intuitions of blameworthiness and justice are widely shared).

144. There may also be some magical thinking, that by naming and banning the specific type of thing that we fear, we increase the odds of banishing it.

145. Whether this be by renewed judicial attention to the nondelegation doctrine, by constitutional amendment, or by legislative precommitment is beyond the scope of this Essay.