

PUBLIC CHOICE THEORY AND OVERCRIMINALIZATION

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I. THE PROBLEM OF OVERCRIMINALIZATION

Much contemporary criminal justice scholarship describes the system as a dystopia.¹ That is an old phenomenon come

1. The late Professor William Stuntz was the leading figure in this regard. *See, e.g.*, WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011) [hereinafter STUNTZ, *COLLAPSE*]; William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) [hereinafter Stuntz, *Pathological Politics*]; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997). Others have pursued the same systemic approach. *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); NICOLA LACEY, *THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008); JOHN PRATT, *PENAL POPULISM* (2007); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* (2004); Tim Newburn, *Contrasts in Intolerance: Cultures of Control in the United States and Britain*, in *THE POLITICS OF CRIME CONTROL* 227 (Tim Newburn & Paul Rock eds., 2006); Daniel Richman,

“round again.”² In the “bad old days,” back when many states operated criminal justice systems that were “a pious charade,”³ so far removed from the textbook ideal as to be a parody of how the criminal process should work,⁴ academics took delight in identifying systemic flaws in state and local criminal processes and in skewering their law enforcement officials for pur-

Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE* 64 (Michael Klarman et al. eds., 2012).

2. “But here’s some advice, boy. Don’t put your trust in revolutions. They always come around again. That’s why they’re called revolutions.” TERRY PRATCHETT, *NIGHT WATCH* 234 (2002).

3. Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 806 (1970).

4. In one case, a defendant was hauled into court still exhibiting the rope burns from where he had been hung until he confessed. See *Brown v. Mississippi*, 297 U.S. 278, 281 (1936). The police might isolate defendants for days of intensive “grilling” to secure a confession. See *Chambers v. Florida*, 309 U.S. 227, 229–35 (1940). A suspect who claimed that he was tortured and beaten until he talked would find that he was not the first one to have that experience. See *White v. Texas*, 310 U.S. 530, 532 (1940). If physical evidence were needed, the police could break into a suspect’s home without a search warrant. See *Mapp v. Ohio*, 367 U.S. 643, 644–45 (1961). If a warrant were needed, all that it might contain to establish probable cause is the allegation that a credible source had told the affiant that the defendant had contraband or evidence of a crime in his home, see *Aguilar v. Texas*, 378 U.S. 108, 109–14 (1964), *abrogated by Illinois v. Gates*, 462 U.S. 213 (1983), or that the defendant was a “known” criminal, see *Spinelli v. United States*, 393 U.S. 410, 414 (1969), *abrogated by Gates*, 462 U.S. 213. An indigent defendant had no right to appointment of counsel to represent him at trial, see *Powell v. Alabama*, 287 U.S. 45, 71 (1932), and if he were lucky enough to get one, the lawyer might have but three days to prepare for a capital murder prosecution, see *Avery v. Alabama*, 308 U.S. 444, 447–52 (1940). The prosecutor might knowingly present perjured testimony at trial, see *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), or allow a witness’s lies on the stand to go uncorrected, see *Pyle v. Kansas*, 317 U.S. 213, 216 (1942). He might also withhold from a defendant evidence exonerating him from the crime. See *Brady v. Maryland*, 373 U.S. 83, 84–86 (1963). Community sentiment would exert pressure on judges and juries to “get it right” and convict the defendant. See *Moore v. Dempsey*, 261 U.S. 86, 87 (1923). If that pressure did not work, some communities took the law into their own hands and strung up the accused. See *United States v. Shipp*, 214 U.S. 386, 388 (1909). The system was even worse for African Americans. They were not immune to the problems described above—in fact, the defendants in most of those cases were black—and they were regularly excluded from playing any role in halting such miscarriages of justices. For a long time, they were not permitted to sit on grand or petit juries. See *Norris v. Alabama*, 294 U.S. 587, 589 (1935); *Strauder v. West Virginia*, 100 U.S. 303, 304 (1879). Once they gained that right, they were struck with regularity in some locales by peremptory challenge. See *Swain v. Alabama*, 380 U.S. 202, 209–10 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986).

suings an atavistic approach to justice.⁵ Later, as the Supreme Court roped in the outliers, commentators analyzed the doctrinal development of substantive criminal law⁶ and the course taken by the Supreme Court in its attempts to iron out the remaining procedural wrinkles in federal and state efforts to investigate crimes and dispose of cases.⁷

Today, the academy less often analyzes Supreme Court case law than it pursues systems analysis of the criminal justice process.⁸ The problems depicted are not minor blemishes. The system seems beset by core defects that should have been fixed long ago: prosecutors withholding or concealing obviously exculpatory evidence,⁹ the government's refusal to fund forensic

5. See, e.g., Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 545–54 (1960); Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1150–52 (1960). Of course, in the earlier days of the *ancien régime*, academics tended to focus on broad, less emotional issues, such as what conduct should be made a crime or on particular substantive criminal law doctrines. See, e.g., H. L. A. HART, *LAW, LIBERTY AND MORALITY* (1963); Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937); Livingston Hall, *The Substantive Law of Crimes—1887–1936*, 50 HARV. L. REV. 616 (1937); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 423 (1963); Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1939).

6. See, e.g., Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 (1962); Louis B. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics, and Prospects*, 41 LAW & CONTEMP. PROBS. 1 (1977); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

7. See, e.g., Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525 (1975); Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319 (1977); Yale Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1 (1978); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Wayne R. LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127 (1974). Academics were not the only ones to get into the act. See, e.g., Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1 (1964); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

8. Naturally, there still is, and always will be, plenty of scholarship dealing with traditional subjects or new applications of old doctrines. See, e.g., Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005); Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1 (2012); Neal K. Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003); Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005 (2010).

9. See, e.g., Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, *In Re Special Proceedings*, 842 F. Supp. 2d 232 (2012).

examinations—DNA tests in particular—that could establish with near certainty whether a given individual committed a particular crime,¹⁰ the conviction of innocent defendants represented by appointed defense counsel too swamped with cases and too severely underfunded to properly investigate the charges against their clients,¹¹ and the sight of prisoners stacked like cordwood in the nation's prisons.¹²

One of those flaws is “overcriminalization.” The crux of that neologism consists of the use of the criminal law to punish conduct that traditionally would not be deemed morally blameworthy.¹³ Every society has found it necessary to identify some conduct as *verboten* in order for civil society to exist, and to accompany that list with some form of punishment in order to give those prohibitions teeth. The alternative is *bellum om-*

(Misc. No. 09-0198 (EGS)), 2012 WL 858523; BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 168 (2011). The Supreme Court still has to take prosecutors to the woodshed for this practice. See, e.g., *Smith v. Cain*, 132 S. Ct. 627, 630–31 (2012); *Cone v. Bell*, 556 U.S. 449, 451, 475 (2009); *Banks v. Dretke*, 540 U.S. 668, 675, 705–06 (2004).

10. See, e.g., *Skinner v. Switzer*, 131 S. Ct. 1289, 1295 (2011). The Supreme Court has said that when it comes to having the state test DNA to prove their innocence, defendants are on their own. See *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 62 (2009).

11. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994); Emily Chiang, *Indigent Defense Invoigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443, 443 (2010); Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 285 (2008).

12. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1923–24 (2011) (“The degree of overcrowding in California's prisons is exceptional. California's prisons are designed to house a population just under 80,000, but at the time of the three-judge court's decision the population was almost double that. The State's prisons had operated at around 200% of design capacity at least 11 years.”).

13. See Marie Gryphon, *The Better Part of Lenity*, 7 J.L. ECON. & POL'Y 717, 717 (2011). Overcriminalization comes in several forms: “(1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations.” Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005). An especially pernicious form of overcriminalization occurs when the legislature intentionally outlaws entirely innocent and harmless conduct because it is too difficult to prosecute something nefarious and harmful, and because the inchoate crimes of attempt, solicitation, and conspiracy do not reach far enough. See Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 62 & n.19, 64 (1998).

nium contra omnes.¹⁴ Having too many criminal laws, however, creates a different set of problems.¹⁵

If the penal code regulates too much conduct that is beyond the common law definitions of crimes or that is not inherently blameworthy, several problems arise. It becomes a formidable task for the average person to know what the law forbids, because the moral code offers no lodestar. It is difficult for the courts to curtail law enforcement excesses, because the police almost always will have probable cause to arrest someone for something. It is challenging for the criminal process to avoid being captured and corrupted by special interest groups, because every private party will vie for economic rents by making a criminal out of a rival. If new statutes are merely copies of existing laws with different labels, they are, at best, prescriptions for inefficiency (maybe even useless), or, at worst, fraudulent. If they outlaw the same conduct but multiply the penalties, the punishments become grossly disproportionate to the harm they seek to avoid and empower prosecutors to stack charges against a defendant to coerce a guilty plea. And, for those reasons, having too many criminal laws damages the respectability of the process that enforces them.

Overcriminalization is becoming an increasingly important issue in modern-day criminal law. Numerous commentators in the academy and elsewhere have discussed this phenomenon,¹⁶ as has the American Bar Association (ABA).¹⁷ Several former

14. See THOMAS HOBBS, *LEVIATHAN* 80 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651).

15. See, e.g., Erik Luna, *Overextending the Criminal Law*, in *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING* 1, 6–7 (Gene Healy ed., 2004); STUNTZ, *COLLAPSE*, *supra* note 1, at 263; Richman, *supra* note 1, at 65.

16. See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2009); *ONE NATION UNDER ARREST: HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVIST JUDGES THREATEN YOUR LIBERTY* (Paul Rosenzweig & Brian W. Walsh eds., 2010); BRIAN W. WALSH & TIFFANY M. JOSLYN, *HERITAGE FOUND. & NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW* (2010); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).

17. See ABA TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, *THE FEDERALIZATION OF CRIMINAL LAW* (1998), www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_pubs_catalog_fedcri/mlaw1.authcheckdam.pdf.

senior Justice Department officials have expressed their concern about it.¹⁸ The House Judiciary Committee has looked into it.¹⁹ Even the media has picked up on it.²⁰

Is overcriminalization inevitable? If recent history is a guide, it would seem so. As discussed in Part II, the actors in the political process have come to acquiesce in—some would say spur—the public’s demand for more and more criminal laws, along with harsher and harsher treatment of criminals. Can we halt that train? Part III explains that it will be difficult, but not impossible, to find a remedy to overcriminalization in the political process. All of the incentives lead political actors to use criminal law as the first resort to a social problem (and often the second, the third, the fourth, and so on), not the last. In contrast, courts are not part of the warp and woof of politics. As explained in Part IV, the judiciary may be able to intervene, if not to stop the train, at least to slow it down until the public comes around. The public could put a halt to overcriminalization, but it needs to be persuaded and motivated to do so. Perhaps the courts can do just that. Part V offers reasons to hope that a solution to overcriminalization will be found.

18. See, e.g., Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1 (1997); Edwin Meese, III, *Overcriminalization in Practice: Trends and Recent Controversies*, 8 SETON HALL CIRCUIT REV. 505 (2012); George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417 (2007); Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279 (2007).

19. See, e.g., *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2010); *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2009).

20. See, e.g., Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J., Sept. 27, 2011, <http://online.wsj.com/article/SB10001424053111904060604576570801651620000.html>; Adam Liptak, *Right and Left Join Forces on Criminal Justice*, N.Y. TIMES, Nov. 24, 2009, http://www.nytimes.com/2009/11/24/us/24crime.html?_r=0; George F. Will, Op-Ed., *Blowing the whistle on the federal Leviathan*, WASH. POST, July 27, 2012, http://www.washingtonpost.com/opinions/george-will-blowing-the-whistle-on-leviathan/2012/07/27/gJQAAsRnEX_story.html.

II. THE CAUSES OF OVERCRIMINALIZATION:
THE INCENTIVES OF THE ACTORS IN THE
CRIMINAL JUSTICE SYSTEM

Overcriminalization is less a problem with the substantive criminal law than it is with the lawmaking process. Each new criminal law or sentence enhancement may be eminently sensible on its own, but may turn out to be utterly unreasonable when it is considered against the background of laws already on the books. In economic terms, the marginal benefit of each new criminal law may be nil, yet the marginal cost that each one imposes could be considerable. If that is the case, if we are at the point where any additional contribution to the supply of criminal laws diminishes public welfare, we ought just to leave well enough alone.²¹ We can rely on the stock of criminal statutes we have and ask whether we need more actors in the criminal process (for example, police, prosecutors, judges, defense counsel) or better equipment for the personnel we already have (for example, computers, courtrooms, communications devices). It therefore makes sense to analyze overcriminalization using the tools of standard economic analysis.

Economic analysis, however, will ultimately not help us scrutinize overcriminalization. The criminal process is not a free market where private parties vie for goods and services with their own dollars. Rather, the criminal justice system is a public good, and the market cannot reliably produce the ideal amount of such goods.²² The government also is no ordinary monopolist. Unlike cases where a private company holds a monopoly over some industry, the government's "power cannot be eroded by new entry, and no party in the crosshairs of the prosecutor can just walk away."²³ Finally, the elected and appointed government personnel who operate that system are directly or indirectly responsible to the voters through the elec-

21. See N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 294–95 (4th ed. 2007) (stating that the profit-maximizing point is the intersection of marginal cost and price).

22. See *id.* at 223–37.

23. Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, in *PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 49 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

toral process, not to the public through the market.²⁴ Those factors militate against using the “dismal science” as the guide for determining what causes overcriminalization, what makes it “tick,” and what can be done about it.

There is, however, a close cousin to economics that might prove a worthwhile tool. Public choice theory is the use of economic analysis to scrutinize the political process.²⁵ Public choice theory treats political actors as if they were consumers in a free market seeking to maximize their own utility, rather than the public welfare.²⁶ Public choice theory does not require us to make altruistic assumptions about our allies, colleagues, neighbors, or friends. Rather, it assumes, in classic Adam Smith fashion, that everyone is selfish, egoistical, and out solely for himself, regardless of the effect on others that his actions may have. The theory seeks to determine just what impact egocentric political actors will have on the public welfare. As it turns out, public choice theory explains perfectly how we wound up in this state of affairs.

A. *Surveying the Battlefield*

1. *The Ultimate Cause of Overcriminalization: A Design Defect in The Political Process*

Analysis starts with the legislature, the branch most representative of the electorate, where political power ultimately re-

24. The President appoints the Attorney General, U.S. Attorneys, the Director of the FBI, and other senior federal law enforcement officials, who in turn appoint subordinates. *See, e.g.*, 28 U.S.C. §§ 503, 532–533, 541–542 (2006). The crown appointed sheriffs at common law, but in this country, sheriffs are elected officials. *See, e.g.*, *McMillian v. Monroe Cnty.*, 520 U.S. 781, 787, 791–95 (1997). The public, by and large, also elects state and local prosecutors. *See, e.g.*, Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 *YALE L.J.* 1528, 1530 (2012).

25. *See, e.g.*, James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in 2 *THE THEORY OF PUBLIC CHOICE* 11, 13 (James M. Buchanan & Robert D. Tollison eds. 1984); Dennis C. Mueller, *Public Choice: A Survey*, in 2 *THE THEORY OF PUBLIC CHOICE*, *supra*, at 23.

26. For a general discussion of public choice theory, see KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (3d ed. 2012); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); DENNIS C. MUELLER, *PUBLIC CHOICE III* (2003); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971).

sides.²⁷ In our system there can be no crimes without statutes,²⁸ which only a legislature (with the chief executive's help)²⁹ can enact.³⁰ Moreover, as far as overcriminalization goes, legislatures are the biggest offenders. Over the last fifty years, "legis-

27. See CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 112 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748) (stating in a democracy, political power largely resides in the electorate).

28. The propositions "*nullum crimen sine lege*" and "*nulla poena sine lege*"—that is to say, there can be no crime or punishment without law—have been characterized as two of the most "widely held value-judgment[s] in the entire history of human thought." JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 59 (2d ed. 1960); see also *Rogers v. Tennessee*, 532 U.S. 451, 467–68 (2001) (Scalia, J., dissenting); CESARE BECCARIA, AN ESSAY ON CRIMES & PUNISHMENTS 16–17 (M. De Volt ed., New York, Gould & Van Winkle 1809) (1764). At one time, the Supreme Court applied that principle vigorously. See, e.g., *United States v. Evans*, 333 U.S. 483, 495 (1948) (refusing to construe an ambiguous sentencing provision as applicable to a particular offense, even though the alternative was that there would be no punishment for the crime). Today, the principle has an uncertain life. See, e.g., *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[C]larity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute.").

29. See U.S. CONST. art. I, § 7, cl. 2 (Presentment and Pocket Veto Clauses); U.S. CONST. art. I, § 7, cl. 3 (Presentment of Resolutions Clause); *INS v. Chadha*, 462 U.S. 919, 945–46 (1983).

30. Agencies cannot enact laws. See *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) ("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.") (citations omitted). Agencies, however, can "fill in the blanks" that Congress left for them in statutes. See, e.g., *Touby v. United States*, 500 U.S. 160, 164–69 (1991) (holding that Congress can delegate to the Attorney General the authority to list controlled substances); *Yakus v. United States*, 321 U.S. 414 (1944) (upholding statute that made violations of the Price Administrator's regulations an offense); *United States v. Grimaud*, 220 U.S. 506 (1911) (holding that Congress can delegate authority to an administrative agency to promulgate regulations whose violation is punishable as a crime); cf. *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (noting that administrative agency rulemaking is not subject to the Presentment Clause). Agencies, though, cannot start from scratch. Congress may delegate rulemaking authority to an agency as long as it gives the agency an "intelligible principle" to use as a yardstick. See *Whitman*, 531 U.S. at 472–73. As generous as that principle is, however, a Congress that simply told an administrative agency to decide what to make a crime would likely go too far. See *id.* at 474 ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.' (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).)").

latures have become ‘offense factories’ that churn out new statutes each week.”³¹

What explains this phenomenon? On occasion, Congress reacts to a crisis³²—Michael Tonry called such occasions “moral panics”³³—in the only way that Congress can act quickly: by passing legislation. There are numerous examples of this phenomenon. The kidnapping of Charles Lindbergh’s son led to enactment of the Federal Kidnapping Act, also known as the Lindbergh Law.³⁴ The murders of Martin Luther King, Jr., and Robert Kennedy by firearms led to the passage of the Gun Control Act of 1968.³⁵ Just as the murder of Kimber Reynolds and Polly Klaas led to California’s “Three Strikes” recidivist law,³⁶ the rape and murder of Megan Khanka led to the enactment of sex offender registration and notification legislation.³⁷ Timothy McVeigh’s bombing of the Oklahoma City federal building led to enactment of the Antiterrorism and Effective Death Penalty Act.³⁸ Most of the time, however, legislation steadily drips out of Congress like water falling from a leaky faucet: Congress created more than 450 new crimes from 2000 through 2007, a rate of more than one a week.³⁹

This problem did not always exist. The Framers were concerned that a voluminous criminal code was a threat to lib-

31. HUSAK, *supra* note 16, at 34.

32. “‘Rule one: Never allow a crisis to go to waste,’ [then-White House Chief of Staff-designate Rahm] Emanuel said. ‘They are opportunities to do big things.’” Jeff Zeleny, *Obama Weighs Quick Undoing of Bush Policy*, N.Y. TIMES, Nov. 10, 2008, <http://www.nytimes.com/2008/11/10/us/politics/10obama.html?pagewanted=all>.

33. TONRY, *supra* note 1, at 5, 85–96.

34. 18 U.S.C. § 1201 (2006).

35. Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified in scattered provisions of 18 U.S.C.).

36. *See* Newburn, *supra* note 1, at 252.

37. *See* Megan’s Law, Pub. L. No. 104-145, 110 Stat. 1345 (repealed and replaced by the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006)).

38. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, and 42 U.S.C.); *see also* Paul J. Larkin, Jr., *John Kingdon’s “Three Streams” Theory and the Antiterrorism and Effective Death Penalty Act of 1996*, 28 J.L. & POL. 25, 41–42 (2012).

39. *See* WALSH & JOSLYN, *supra* note 16, at 24. Members of the 109th Congress (2004–2005) introduced bills proposing 446 new criminal offenses that did *not* involve violence, firearms, drug trafficking, pornography, or immigration violations. *Id.* at ix.

erty,⁴⁰ so federal criminal law started out small, protecting only what was necessary to get the new, limited national government up and running. The first federal criminal statute outlawed no more than approximately thirty crimes, and each one was closely tied to the needs of the new enterprise.⁴¹

As it turned out, that law was just an acorn. Today, there are approximately 3,300 federal criminal statutes.⁴² Moreover, those statutes are not limited to the ones listed in Title 18, the federal penal code. Federal criminal laws are interspersed across the fifty-one titles and 27,000 pages that make up the United States Code.⁴³ There are so many federal criminal laws that no one, including the Justice Department, the principal federal law enforcement agency, knows the actual number of crimes.⁴⁴

Many of those statutes are outright copycats. Consider the federal mail and wire fraud statutes, §§ 1341 and 1343 of Title 18,⁴⁵ laws that the federal government has sought to grow far beyond their common law antecedents.⁴⁶ Those laws reach al-

40. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 207 (2001).

41. See *An Act for the Punishment of certain Crimes against the United States*, ch. 9, 1 Stat. 112 (1790). The First Congress enacted laws making it a crime to interfere with functions of the new government, such as treason, misprison of treason, perjury in federal court, bribery of federal judges, forgery of federal certificates and securities. It also outlawed common law crimes with a connection to federal property or particular federal interests, such as murder, robbery, larceny, and receipt of stolen property on federal property or on the high seas. Congress increased that number over time as it began to regulate interstate commerce more aggressively and to include vice crimes within the federal criminal code. See, e.g., *Champion v. Ames*, 188 U.S. 321, 354–55 (1903) (upholding federal statute prohibiting the mails from being used for the purpose of promoting a lottery); LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 264–65 (1993); STUNTZ, *COLLAPSE*, *supra* note 1, at 158–59.

42. HUSAK, *supra* note 16, at 9.

43. *Id.*

44. See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 735–36 (2012); Paul Rosenzweig, *The History of Criminal Law*, in *ONE NATION UNDER ARREST*, *supra* note 16, at 127, 131.

45. See 18 U.S.C. §§ 1341, 1343 (mail and wire fraud, respectively) (2006). Section 1346 of Title 18 defines the term “scheme or artifice to defraud” for purposes of the mail and wire fraud laws to include a “scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346 (2012). Whether that aspect of the general federal fraud laws can be used in a criminal prosecution is dubious. See *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847 (8th Cir. 2012) (holding that provision unconstitutional).

46. For more than forty years, the Justice Department has sought to persuade the federal courts to use the mail and wire fraud statutes to reach seemingly every instance of public corruption or private dishonesty. See, e.g., *Skilling v. United*

most any use of the mails or telecommunications facilities to carry out virtually any dishonest scheme.⁴⁷ As a result, it would seem that no other federal fraud law would be necessary to enable the federal government to prosecute swindling in its myriad forms. Yet, there are dozens of other federal fraud laws focused on different regulatory fields.⁴⁸ It seems that Congress cannot enact a new regulatory law without including its own

States, 130 S. Ct. 2896, 2926–29 (2010) (discussing the history of the “intangible rights” doctrine). On several occasions the Supreme Court rejected the extreme versions of the government’s position. *See id.* at 2933 (limiting term “honest services” in revised mail fraud statute to bribery and kickbacks); *Cleveland v. United States*, 531 U.S. 12, 26–27 (2000) (holding that government licenses are not government “property” for mail fraud purposes); *McNally v. United States*, 483 U.S. 350, 352, 356 (1987) (rejecting government’s attempt to bring the deprivation of “honest services” within the reach of mail fraud).

47. Federal jurisdiction exists if use of the mails or wires is an intended or foreseeable act in furtherance of the scheme. *See, e.g.*, *Schmuck v. United States*, 489 U.S. 705 (1989). Once that jurisdictional element is established, the substantive reach of the two statutes is quite broad. *See, e.g.*, *Pasquantino v. United States*, 544 U.S. 349, 354–55 (2005) (holding that a foreign nation’s right to collect taxes on imported liquor is “property” for mail fraud purposes); *Carpenter v. United States*, 484 U.S. 19, 24 (1987) (labeling confidential business information as “property” protected by the mail and wire fraud statute); *Durland v. United States*, 161 U.S. 306, 313 (1896) (construing the term “any scheme or artifice to defraud” to reach not only common law fraud but also “everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future”).

48. *See, e.g.*, STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 152 (2006) (“Under American federal law, for example, there are now dozens of statutory provisions that criminalize offenses such as mail fraud, wire fraud, bank fraud, health care fraud, tax fraud, computer fraud, securities fraud, bankruptcy fraud, accounting fraud, and conspiracy to defraud the government.”); *id.* at 152 n.23 (citing 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), 1347 (health care fraud), 26 U.S.C. § 7201 (tax fraud), 18 U.S.C. § 1030 (computer fraud), 15 U.S.C. §§ 77x, 78ff (securities fraud), 18 U.S.C. §§ 157 (bankruptcy fraud), 371 (conspiracy to commit fraud against the United States) (2006)); Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 730–31 (1999) (“Although fraud is not a crime in itself, fraud is an integral aspect of several criminal statutes. For example, one finds generic statutes such as mail fraud and conspiracy to defraud being applied to an ever-increasing spectrum of fraudulent conduct. In contrast, other fraud statutes, such as computer fraud and bank fraud, present limited applications that permit their use only with specified conduct. In recent years, criminal fraud statutes have multiplied, offering new laws that often match legislative or executive priorities.”); *id.* at 740 (“The terms ‘fraud,’ ‘fraudulent,’ ‘fraudulently,’ or ‘defraud’ appear within the text of a total of ninety-two substantive statutes in title 18 of the United States Code.”).

fraud provision.⁴⁹ “Overkill” is not too strong a term to describe our approach to fraud.⁵⁰

This growth has been particularly immense with regard to the twentieth century pursuit of “regulatory crimes,” also known as *malum prohibitum* crimes,⁵¹ which occur when someone violates a regulatory scheme governing commerce, finance, the environment, or health and safety.⁵² The nineteenth century birthed the concept of regulatory crimes,⁵³ but they truly blossomed in the last one hundred years.⁵⁴ Statutes are not the only positive law

49. See, e.g., the Patient Protection and Affordable Care Act of 2010 (PPACA), Pub. L. No. 111-148, 24 Stat. 119, 1008 (2010), as modified by the Health Care Education and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). Although the courts, commentary, and public have focused on the constitutionality of the PPACA, two provisions buried deeply in the law have received virtually no attention, and both define criminal offenses. The first provision, Section 6402, revises the criminal code to weaken the proof requirements of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(a) (2006). The other provision, Section 10606, is found at the tail end of the act and deals with health care fraud. Section 10606 modified the existing federal health care fraud law, 18 U.S.C. § 1347 (2006).

50. Another statute that has exhibited similar protean shape is the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2012). See Paul J. Larkin, Jr., *United States v. Nosal: Rebooting the Computer Fraud and Abuse Act*, 8 SETON HALL CIRCUIT REV. 257, 260-61 (2012).

51. *Malum prohibitum* is an old term used to describe offenses that are crimes only because the legislature has enacted a law to that effect. They often are contrasted with *malum in se* crimes, which are inherently harmful offenses. See WAYNE R. LAFAVE, CRIMINAL LAW § 1.6(b) (5th ed. 2010) (defining those terms).

52. See, e.g., FRIEDMAN, *supra* note 40, at 282-83; Kadish, *supra* note 5, at 424-25; Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 37 (1997) (“Legislatures, concerned about the perceived weakness of administrative regimes, have put criminal sanctions behind administrative regulations governing everything from interstate trucking to the distribution of food stamps to the regulation of the environment.”).

53. See Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 595 (1958) (footnotes omitted):

For it was in the latter half of the nineteenth century that the great chain of regulatory statutes was initiated in England, which inaugurated a new era in the administration of the criminal law. Among them are the Food and Drugs Acts, the Licensing Acts, the Merchandise Marks Acts, the Weights and Measures Acts, the Public Health Acts and the Road Traffic Acts. With these statutes came a judicial readiness to abandon traditional concepts of *mens rea* and to base criminal liability on the doing of an act, or even upon the vicarious responsibility for another’s act, in the absence of intent, recklessness or even negligence.

54. See FRIEDMAN, *supra* note 40, at 282-83:

There have always been regulatory crimes, from the colonial period onward But the vast expansion of the regulatory state in the twentieth century meant a vast expansion of regulatory crimes as well.

defining such offenses; regulations often have that effect, too. If regulations enforceable in criminal prosecutions are included, the number of potentially relevant federal laws could exceed 300,000.⁵⁵ That count only reflects federal crimes; some states also have an unhealthy appetite for criminal statutes.⁵⁶ The result is that American criminal law today “covers far more conduct than any jurisdiction could possibly punish.”⁵⁷

The situation is not improving. According to the ABA, more than forty percent of the federal criminal laws enacted since the Civil War have gone on the books since 1970.⁵⁸ The number of federal criminal statutes was one-third larger in 2004 than it was in 1980.⁵⁹ Most of those statutes created offenses that already are crimes under state law.⁶⁰ At the rate Congress is going, we someday may run out of arable land, potable water, and breathable air, but we never will run out of new federal criminal statutes.

Why? Someone might say the new laws are a necessary response to an increase in crime. That explanation does not get us

Each statute on health and safety, on conservation, on finance, on environmental protection, carried with it some form of criminal sanction for violation Wholesale extinction may be going on in the animal kingdom, but it does not seem to be much of a problem among regulatory laws. These now exist in staggering numbers, at all levels. They are as grains of sand on the beach.

55. Edwin Meese III, *Introduction to ONE NATION UNDER ARREST*, *supra* note 16, at xv–xvi. Furthermore, as Professor Richard Lazarus has noted:

At some level of abstraction there may be “no distinction better known, than the distinction between civil and criminal law,” but in practice the precise dividing line between the two has become increasingly blurred. Civil sanctions seem more and more like criminal sanctions in their severity and harshness. Moreover, at the federal level, Congress has virtually criminalized civil law by making criminal sanctions available for violations of otherwise civil federal regulatory programs. An estimated 300,000 federal regulations are now subject to criminal enforcement.

Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2441–42 (1995) (footnotes omitted).

56. New York, for example, has more than 150 possession offenses, with penalties going as high as life imprisonment. HUSAK, *supra* note 16, at 44.

57. Stuntz, *Pathological Politics*, *supra* note 1, at 507; see generally Podgor, *supra* note 16.

58. THE FEDERALIZATION OF CRIMINAL LAW, *supra* note 17, at 7.

59. Gene Healy, *Introduction*, in GO DIRECTLY TO JAIL, *supra* note 15, at vii.

60. Gene Healy, *There Goes the Neighborhood: The Bush-Ashcroft Plan to “Help” Localities Fight Gun Crime*, in GO DIRECTLY TO JAIL, *supra* note 15, at 99.

very far, however, because the crime rate has declined since 1992.⁶¹ Other apologists might say that criminals have found new ways to outwit “suckers,” new venues for old crimes, or new loopholes or technicalities to exploit. Perhaps, but that explanation likely accounts for only a fraction of the new statutes. Prosecutors prefer to use tried-and-true laws that they and courts know well, even if prosecutors must use them in novel ways,⁶² because the transaction costs and uncertainties are far smaller. The existence of settled case law interpreting long-standing statutes and standardized jury instructions reduce the risk of reversal on appeal and eliminate uncertainty from plea negotiations. Another explanation might be that contemporary challenges to the nation (for example, international terrorism) compel a national response, and new criminal laws are just one component. That answer may explain the need for loosening restrictions on evidence gathering by law enforcement (for example, electronic surveillance⁶³) or permitting greater information sharing between the law enforcement and intelligence communities (for example, giving the Central Intelligence Agency (CIA) access to grand jury materials⁶⁴), but it does not explain Congress’s reflexive response to every domestic controversy (for example, Enron⁶⁵) or media event (for example, carjacking⁶⁶) by passing a new federal criminal law. In particular, overcriminalization cannot be blamed on the terrorist attacks of September 11, 2001. Overcriminalization existed before

61. See, e.g., FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* (2008); Alfred Blumstein & Joel Wallman, *The Recent Rise and Fall of American Violence*, in *THE CRIME DROP IN AMERICA 2* (Alfred Blumstein & Joel Wallman, eds., rev. ed. 2006).

62. Consider the Justice Department’s efforts to make virtually any use of an Internet-connected computer a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2006). See, e.g., Owen S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561 (2010); Larkin, *supra* note 50.

63. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act)* of 2001, Tit. II, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of the U.S. Code) (revising the federal electronic surveillance laws).

64. See *id.* § 203 (adding 18 U.S.C. § 2517(6) (2006) and Fed. R. Crim. P. 6(e)(3)(D), which allow information discovered through electronic surveillance and grand jury materials to be disclosed to intelligence officials).

65. See the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

66. See the Anti Car Theft Act of 1992, Pub. L. No. 102-519, title I, subtitle A, § 101(a), 106 Stat. 3384 (1992), (codified as amended at 18 U.S.C. § 2119 (2006)).

the events of that day⁶⁷ and manifests itself today in laws and bills having no tenable relationship to terrorism.⁶⁸

Cynics have numerous explanations for overcriminalization. A politically savvy cynic would say that we pursue regulation through criminalization out of necessity. Only criminal laws can garner bipartisan endorsement, only the criminal justice system can receive public support for greater appropriations, and only a criminal enforcement program can earn respect and assistance from other federal agencies.⁶⁹ A politically incorrect cynic would say that the federalization of crime reflects the conceit that federal agents and prosecutors have resources, training, and skills superior to their state and local counterparts. In reality, those allegations should be answered “Yes,” “Maybe,” and “No,” respectively. A true cynic would say that legislators resort to the criminal law as an answer to social problems to trade on the public’s respect for the criminal process and because legislators lack a better option.⁷⁰ To legislators so inclined, the criminal law is not just a tool for governance, it is the means of governance itself.⁷¹ An inveterate cynic would say that the legislative process works like the parlor game of “telephone”: Common law crimes (for example, murder, robbery, burglary, and so on) form the core, but each new statute resembles its ancestors less and less. Eventually, society winds up with a penal code that Blackstone would not recognize. An irredeemable cynic would say that passing criminal laws is a cheap and easy way for a legislator to appear concerned about crime without actually having to do anything. Outlawing new conduct, outlawing old conduct twice, thrice, or more often, or upping the punishment for offenses on the books, costs legislators noth-

67. For example, former Attorney General Edwin Meese III criticized the phenomenon of overcriminalization in 1997. See Meese, *supra* note 18, at 1.

68. See, e.g., Paul J. Larkin, Jr., *When Fighting Crime Becomes Piling On: The Overcriminalization of Fraud*, THE HERITAGE FOUND., LEGAL MEMORANDUM, Jan. 9, 2012, available at <http://www.heritage.org/research/reports/2012/01/when-fighting-crime-becomes-piling-on-the-overcriminalization-of-fraud> (discussing the MAPLE Act, which would make it a federal crime, punishable by up to five years imprisonment, for anyone knowingly and willfully to distribute into interstate commerce a product that is falsely labeled as maple syrup).

69. See, e.g., Richman, *supra* note 1, at 66–81.

70. *Id.* at 66.

71. *Id.* at 79–80; see also SIMON, *supra* note 1.

ing and garners them political capital.⁷² A recovering cynic would say that legislators use the ability to pass new criminal laws as a means of capturing the endorsement of police and prosecutors, who can parlay new criminal laws into a larger share of the budget, more guilty pleas, and enhanced prestige.⁷³

Cynics may exaggerate their disenchantment with the politics of the criminal law for the sake of emphasis, but they are right to be suspicious that the actors in the political process (particularly Congress) may be using their lawmaking authority to promote their own interests. The Framers, after all, created a system of checks and balances because they had precisely the same fear. Just as it always is wise to hope for the best but prepare for the worst, it makes sense to pray that our legislators will be governed by the “better angels of our nature,”⁷⁴ but to expect that they will be motivated by the same parochial, quotidian concerns animating the rest of us. Today’s elected officials are markedly different from the members of the First Congress in various ways—for example, the club is no longer limited to white, male members of the landed gentry—but there is no reason to believe that today’s members of Congress are any more immune than their eighteenth-century predecessors to the temptation to act in their self-interest. People may have changed somewhat over two hundred years, but not that much.

The Framers protected the nation against many of the ways that we could be harmed by criminal justice legislation. They required candidates to win elections in order to hold even the limited terms of office that the Constitution created, they defined and limited the powers of the new government, and they required that Congress and the President cooperate in order to pass laws. The Framers also guaranteed minimal standards of fairness in federal prosecutions. Unfortunately, what they did not do, perhaps because they saw no reason to fear abuse, was limit the number and type of criminal laws that the federal government could enact. Perhaps, the Framers believed that

72. “[P]unishment is popular. It is a good sell to concerned and frightened citizens by politicians who care more about reelection than what works. Punitiveness makes good copy, but not necessarily good policy.” SALLY S. SIMPSON, *CORPORATE CRIME, LAW, AND SOCIAL CONTROL* 154 (2002).

73. See Richman, *supra* note 1, at 65.

74. President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).

there was no reason to fear the proliferation of federal criminal legislation that we now see because they believed that the enumerated and limited powers given to the federal government by Article I could not justify enactment of more than a narrowly defined set of criminal statutes.⁷⁵ If so, the Supreme Court's twentieth-century transformation of the Commerce Clause from a narrow grant of macro-level commercial regulatory authority to what nearly has become a national version of a state's micro-level police power has shown that the Framers' assumption was mistaken.⁷⁶ Perhaps, if the Framers had foreseen the possibility of overcriminalization they would have built structural protections against it into the legislative process. The Framers could have required that all statutes defining crimes or imposing (or enhancing) punishments originate in

75. The first federal criminal law would offer evidence of that belief. *See supra* note 41. Professor Stuntz offered three reasons why the Framers focused on procedure, not substance: (1) the criminal law was not politicized late in the 18th century; (2) like tort law, criminal law was enforced by private parties, rather than government officials; and (3) juries could decide questions of fact and law, which gave juries the power to define criminal conduct. *See* STUNTZ, *COLLAPSE*, *supra* note 1, at 83–84. He may have been right, but, as he would have admitted, figuring out why the Framers were not concerned about the expansion and misuse of the criminal law is less important than deciding what to do about it today.

76. For most of the last century, the Supreme Court has read the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, as a broad grant of authority to Congress to regulate virtually any activity that has any remote relationship to interstate commerce. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1 (2005) (Congress can regulate home-grown cannabis); *Wickard v. Filburn*, 317 U.S. 111 (1942) (Congress can regulate a small-scale activity—home-growth of wheat—if the totality of that activity nationwide can affect interstate commerce). Recently, the Supreme Court has started to trim Congress's power because it has concluded that the Commerce Clause is not infinitely elastic. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (holding unconstitutional a statute making rape a federal crime); *United States v. Lopez*, 514 U.S. 549 (1995) (holding unconstitutional as exceeding Congress's commerce power a federal law which made it a crime to possess a firearm in the vicinity of a school). The Court revisited this issue in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), which involved the constitutionality of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). Five justices concluded that Congress's Commerce Clause power is not a plenary police power, but there was no majority opinion. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito concluded that Congress lacked authority under the Commerce Clause to adopt that law, *see Sebelius*, 132 S. Ct. at 2577–609 (opinion of Roberts, C.J.); *id.* at 2642–76 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting), but they were not all on the same side of the judgment. By contrast, Justices Ginsburg, Breyer, Sotomayor, and Kagan concluded that the Act was a lawful exercise of Congress's Commerce Clause power. *Id.* at 2609–42 (opinion of Ginsburg, J.). It remains to be seen how the law will play out in this area.

the Senate, the chamber deemed less susceptible to transitory passions,⁷⁷ that criminal laws must satisfy a supermajority voting requirement in order to pass through Congress,⁷⁸ or that criminal statutes satisfy a particularly demanding necessity standard in order to become law.⁷⁹ At the end of the day, however, the Framers did not anticipate the corruption of the legislative process that has occurred because members of Congress have effectively abdicated their responsibility to act in the best interests of the public when voting on criminal legislation. That failure kept them from building any safeguards into the legislative process that would prevent future Congresses from overusing their criminal lawmaking power.

It is possible to characterize overcriminalization as just the unfortunate result of a particular machine going awry, to say that a machine designed to create good X does not work well when asked to create good Y. But this characterization is possible only if we concede that the machine has malfunctioned over and over again, and will continue doing so, whenever Y is the sought-after product. This phenomenon has recurred on a regular basis over the last forty years as Congress has continued to pass unnecessary criminal laws, and there is no reason to expect that this machine can fix itself. We always will get more Y than we can use or need.

There is a better description available. None of the Framers anticipated that the legislative machine would operate in the way that it has for the last forty years in the realm of substantive criminal law. The Framers did not foresee that the legislative process would be so easily and repeatedly manipulated by numerous, aggressive factions and pliant, all-powerful federal legislators to turn out products that have as their principal utility, not the collective expression of community mores backed up by punishment administered by the federal government for

77. Cf. U.S. CONST. art. I, § 7, cl. 1 ("All Bills for Raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

78. Cf. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

79. Cf. U.S. CONST. art. I, § 8, cl. 18 ("Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.").

the overall public welfare, but the ability to trip up morally blameless parties, to coerce guilty pleas from defendants seeking only to avoid unduly harsh punishments, to obtain economic rents by hamstringing competitive rivals, to avoid the dreaded “soft on crime” label, or to snooker the public into believing that there is a way to address any and every crime problem seen on television news without spending money. The Framers did not anticipate that scenario because the factors that undergird it, such as the expansion of Congress’s power to legislate, lay a century and a half in the future. The Framers built safeguards to deal with the problems they knew and feared, as well as similar ones they anticipated. Overcriminalization was not one of them.

The cause of overcriminalization, therefore, is a latent design defect in the political process, a defect that perhaps did not become hazardous until an existing safeguard, the principle of limited federal lawmaking power, gradually eroded and other factors overwhelmed the structure that the Framers put into place. If overcriminalization results from a design defect in the legislative process, we need to begin our analysis of it in the same way that we would start our analysis of any other design defect: at the factory—to learn what went wrong, why that happened, and how we can fix it.

2. *The Principal Form of Overcriminalization:
Unnecessary Criminal Laws*

The principal form that overcriminalization takes is the passage of unnecessary criminal statutes. Some of those laws expand the criminal code to reach conduct not historically considered morally blameworthy, others will be redundant because they just duplicate criminal laws already in effect, and some will increase the penalty for conduct already outlawed. But most, perhaps all, of the problems underlying the promiscuous use of the criminal law stem from new substantive criminal statutes. Legislators do have other tools that they can use to affect the crime rate. Congress must approve annually law enforcement agencies’ budgets, and Congress can conduct oversight hearings to learn how well the public’s money is being spent. But those powers have manifold limitations. They work indirectly, at best; they cost the public money and cost legislators time; their results are not immediately apparent, if at all; they force legislators to make enemies; they do not guaran-

tee credit for legislators, rather than law enforcement officials; and, even if they generate credit for legislators, they do not ensure that credit goes to the *right* legislators.

Hiring additional investigative personnel imposes direct costs (for example, salaries, equipment, office space, vehicles, medical coverage, and pension plans), indirect costs (for example, supervision of a larger number of agents), and ancillary costs (for example, an increased number of inter-employee disputes that personnel offices must referee). By contrast, making something a crime only costs whatever it takes to print the relevant pages in the Congressional Record and the United States Code. Oversight is time-consuming. Members of Congress need to become experts in the day-to-day workings and problems facing law enforcement agencies, a field where practical experience is an asset that few legislators possess. By contrast, outlawing an activity does not require a legislator to learn anything about the investigative and enforcement agencies charged with implementing the statute. In fact, the agencies will draft the bill for him. Deciding where public funds will go—guns or butter, law enforcement or education, and so forth—makes friends of some agencies and their supporters, in and out of government, but it also makes enemies out of the colleagues and citizens who do not receive funds for their own projects. By contrast, making something a crime makes enemies only from “the criminal element,” and those people do not count, largely because they cannot vote.⁸⁰ The appropriations committees in the legislature are responsible for funding law enforcement, while the judiciary committees have oversight authority. Members who sit on neither committee cannot take credit for a personal or direct role in either activity. Only through new statutes can a legislator have a direct effect on crime. Perhaps more importantly, for some members, only new legislation allows them to be *seen* as doing something. The relationship between approving funds for law enforcement and arrests is too remote to be of much benefit in the media, and oversight hearings generally are more theatrical than substantive, especially when members of opposing parties line up

80. See, e.g., Newburn, *supra* note 1, at 243–44 (discussing the disenfranchisement of convicted felons).

across from each other.⁸¹ The game, therefore, is passing new criminal legislation.

Even then, the opportunity to claim credit can be as fleeting as one press conference. Prosecutors must actually use these new statutes for a legislator to receive credit for fighting crime on an ongoing basis.⁸² Prosecutors who make that choice thereby make an ally in the halls of the legislature—an ally who can help pass more laws that benefit prosecutors. The consequence, as Professor Stuntz termed it, is a symbiotic relationship between prosecutors and members of Congress.⁸³ “Legislators gain when they write statutes in ways that benefit prosecutors. Prosecutors gain from statutes that more easily allow them to induce guilty pleas.”⁸⁴ It is a “beautiful friendship.”⁸⁵

3. *The Criminal-Regulatory Partnership*

Other factors help keep that partnership going.⁸⁶ One is use of criminal investigative tools as a component of an ongoing regulatory program. Regulatory statutes establish requirements for private parties to follow. To help ensure compliance with federal laws and regulations, an administrative agency may require regulated parties to obtain a permit to conduct a particular activity or to file periodic reports with the agency so that it can monitor a company’s compliance.⁸⁷ A company that files a false report can be prosecuted for making a false state-

81. See, e.g., *Times Topics: Eric Holder*, N.Y. TIMES, July 2, 2011, http://topics.nytimes.com/top/reference/timestopics/people/h/eric_h_holder_jr/index.html (“In a letter released on June 29, the Justice Department said it would not prosecute Mr. Holder for contempt of Congress, declaring that his decision to withhold information about a bungled gun-tracking operation did not constitute a crime.”). Contempt of Congress is a federal offense. See 2 U.S.C. § 192 (2006).

82. See, e.g., Richman, *supra* note 1, at 74.

83. See Stuntz, *Pathological Politics*, *supra* note 1, at 528; see also STUNTZ, *COLLAPSE*, *supra* note 1, at 68–69.

84. Stuntz, *Pathological Politics*, *supra* note 1, at 528.

85. *Casablanca* (Warner Bros. 1942).

86. See LACEY, *supra* note 1, at 68–95.

87. For instance, the Clean Water Act requires a party to obtain a permit to discharge a pollutant into the “waters of the United States,” and imposes monitoring and reporting requirements as well. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified in scattered sections of 33 U.S.C.); see also Duke K. McCall, III, *Clean Water Act*, in ENVIRONMENTAL LAW HANDBOOK 319–28 (Thomas F. P. Sullivan ed., 21st ed. 2011).

ment,⁸⁸ and perhaps also for a substantive violation of the governing regulatory scheme.⁸⁹ But without the authority and resources to investigate alleged violations, agencies are essentially helpless when there is a need to ensure that a regulated firm is being honest. Someone needs to investigate a regulated company's compliance efforts, and federal criminal investigators are ready at hand for the assignment.

Congress could create civil investigative arms for federal agencies and grant them the power to compel private parties to submit to on-site civil inspections.⁹⁰ Civil compliance officers, however, lack the authority and respect given to federal agents. In comparison to civil inspectors, FBI agents wearing "raid jackets" emblazoned with the Bureau's logo will receive far more deference from a judge, a corporation, and the public. To take advantage of the nimbus that law enforcement officers radiate, Congress may create a minor crime (that is, a misdemeanor or minor offense)⁹¹ so that a regulatory agency can call on the full federal investigative apparatus for inspection purposes, instead of being forced to show up at a plant with hat in hand to negotiate with a corporation's lawyers over the scope of an inspection.⁹² Adding criminal statutes to an otherwise entirely civil regulatory scheme allows Congress to cash in on the

88. See 18 U.S.C. § 1001 (2006) (making it a crime to file a materially false statement on a matter within the jurisdiction of the federal government).

89. See McCall, *supra* note 87, at 362–63.

90. See, e.g., the Antitrust Civil Process Act of 1962, Pub. L. No. 87-664, 76 Stat. 548 (codified in various sections of 15 U.S.C. § 1311) (authorizing Justice Department attorneys to issue civil investigative demands to obtain documents from the target of a civil antitrust investigation); *New York v. Burger*, 482 U.S. 691 (1987) (upholding state law authorizing the warrantless search of the premises of vehicle dismantlers and junkyards).

91. Generally, felonies are crimes punishable by death or imprisonment of more than one year, misdemeanors are crimes punishable by a fine or by confinement in jail for one year or less, and petty offenses are crimes punishable by a fine or confinement for less than six months. See, e.g., LAFAVE, *supra* note 51, § 1.6(a), (e); 18 U.S.C. § 19 (2006) (defining "petty offense").

92. That rationale may explain why we often see small-scale criminal penalties in new regulatory bills. See, e.g., the Contaminated Drywall Safety Act of 2012, H.R. 4212, 112th Cong. (2012) (creating a strict liability offense for importing contaminated drywall, punishable by 90 days in custody); the Commercial Motor Vehicle Safety Enhancement Act of 2011, S.1950, 112th Cong. (2011) (punishing violations of the bill with up to 90 days in prison).

leverage that a criminal investigation enjoys with the public and the media.⁹³

A closely related factor is the growth of specialized federal investigative agencies. Federal law enforcement agencies differ from state and local police departments with respect to the scope of their authority. As an incidence of a state's "police power," a state can authorize state and local police forces to investigate any and all violations of state law. This is not the case for federal investigators. Just as the federal government is a polity of limited powers, so too, federal law enforcement agencies have only the authority that Congress grants them.⁹⁴ Most people are familiar with agencies, such as the FBI, which has broad investigative authority.⁹⁵ But there is "a dizzying array" of other federal investigative agencies,⁹⁶ which may be limited in the crimes that they are directed to investigate.⁹⁷ Creation of specialized law enforcement agencies raises a prob-

93. See Lynch, *supra* note 52, at 37. That phenomenon may explain the provenance of the criminal provisions of the federal environmental laws. Initially, those laws created only misdemeanors. See Lazarus, *supra* note 55, at 2446–47.

94. That is why federal investigators are called "Special Agents." "Special" is used, not in the *Saturday Night Live* Church Lady's sense of "favored," but in the dictionary sense of "limited."

95. The FBI has the broadest authority of any federal law enforcement agency. See, e.g., 18 U.S.C. §§ 351, 3052, 3107 (2006); 28 U.S.C. §§ 533, 540, 540A, 540B (2006); 50 U.S.C. §§ 402–404o-2, §§ 1801–1812 (2006). The Secret Service and Marshals Service have somewhat less authority, but still a significant amount of power. See, e.g., 28 U.S.C. §§ 561, 564 & 566 (2006) (authority of U.S. and Deputy U.S. Marshals); 18 U.S.C. § 3056 (2006) (authority of Secret Service agents).

96. Louise Radnofsky, Gary Fields & John R. Emshwiller, *Federal Police Ranks Swell to Enforce a Widening Array of Criminal Laws*, WALL ST. J., Dec. 17, 2011, at A1 available at <http://online.wsj.com/article/SB10001424052970203518404577094861497383678.html#project%3DREGS121520111215%26articleTabs%3Darticle> ("For years, the public face of federal law enforcement has been the Federal Bureau of Investigation. Today, for many people, the knock on the door is increasingly likely to come from a dizzying array of other police forces tucked away inside lesser-known crime-fighting agencies. They could be from the Environmental Protection Agency, the Labor or Education departments, the National Park Service, the Bureau of Land Management or the National Oceanic and Atmospheric Administration, the agency known for its weather forecasts.").

97. The Government Accountability Office has found that thirty-two small government agencies such as the EPA, the Fish and Wildlife Service, the National Oceanographic and Atmospheric Administration, and the National Gallery of Art, have their own law enforcement personnel. See, e.g., GENERAL ACCOUNTING OFFICE, FEDERAL LAW ENFORCEMENT: INVESTIGATIVE AUTHORITY AND PERSONNEL App. II, at 12–19 (2006), <http://www.gao.gov/assets/230/224401.pdf>.

lem analogous to one that existed with respect to the independent counsel provisions of the Ethics in Government Act of 1978.⁹⁸ loss of perspective.⁹⁹ Agencies with wide-ranging investigative responsibility see the entire range of human conduct and can put any one party's actions into a broad perspective. Agencies with a narrow charter see only what they investigate. If the only tool that one has to use is a hammer, everything looks like a nail. The result is that specialized agencies may wind up pursuing trivial criminal cases to justify their existence and continued federal funding.¹⁰⁰

It also is difficult to change a criminal investigation into a civil inquiry midstream. Differences in evidentiary rules, sources of information, and the certainty required to impose sanctions all complicate a hand off between federal agents and administrators.¹⁰¹ Crimes committed in regulated industries are generally "white-collar" in nature, which means that federal investigators need to wade through a sea of documents.¹⁰² The easiest way to get documents from the target of an investigation is by issuing the company a grand jury subpoena¹⁰³ because a federal grand jury has broad investigative authority¹⁰⁴

98. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

99. Cf. *Morrison v. Olson*, 487 U.S. 654, 727-32 (1988) (Scalia, J., dissenting).

100. See, e.g., Amsterdam, *supra* note 3, at 793 (police departments measure efficiency by arrests, not convictions); George F. Will, Op-Ed., *Blowing the whistle on the federal Leviathan*, WASH. POST, July 27, 2012, http://www.washingtonpost.com/opinions/george-will-blowing-the-whistle-on-leviathan/2012/07/27/gjQAAsRnEX_story.html. If a single-mission law enforcement office is part of a regulatory agency, there is a risk that, if the agency gets "captured," the law enforcement division can be effectively nullified. See *infra* note 119.

101. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1810-12 (1992) (explaining the differences between civil and criminal procedure in evidentiary rules, sources of information, and the certainty required for imposition of sanctions).

102. See Robert L. Echols & Eli J. Richardson, *White-Collar Defense: A Former Federal Judge and Former Federal Prosecutor Tell You What to Do . . . and What Not to Do*, 47 TENN. B.J. 14, 18 (2011).

103. See Fed. R. Crim. P. 6, 17(c).

104. See, e.g., *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)) ("[T]he grand jury 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'"); *United States v. Calandra*, 414 U.S. 338, 343 (1974) ("The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. 'It is a grand inquest, a body with powers of investiga-

and there is little that a firm can do to challenge a subpoena.¹⁰⁵ Once the federal government gets its mitts on subpoenaed documents, however, it is extremely difficult for the government to transfer them to civil enforcers.¹⁰⁶ Federal law enforcement officers cannot routinely disclose grand jury materials to their civil colleagues; the government must instead make a showing of “particularized need” for grand jury materials in order to make use of them in a civil proceeding.¹⁰⁷ This difficulty gives the government a strong incentive to maintain as a criminal investigation any inquiry begun as such. As a result, Congress need only label any penalty as criminal, rather than civil, and, *voilà*, an inquiry whose heart and soul is (or should be) fundamentally regulatory, instead, is born, lives, and dies as a criminal investigation.

4. *The Involvement of Private Single-Interest Groups*

Another important factor is the emergence of organized single-issue, special interest groups, particularly groups focused on non-economic issues such as abortion or gun control.¹⁰⁸ Such groups see themselves as warriors in a battle of good versus evil. Motivated by moral concerns not susceptible to compromise, special interest groups throw their weight behind like-minded politicians regardless of their stance on other issues, and those politicians attempt to repay their supporters with favorable leg-

tion and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.” (quoting *Blair v. United States*, 250 U.S. 273, 282 (1919))).

105. See, e.g., *R. Enterprises*, 498 U.S. at 301 (a district court may not quash a subpoena on relevancy grounds unless there is no reasonable possibility that the category of sought-after materials will lead to “information relevant to the general subject of the grand jury’s investigation”).

106. See PETER C. YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* 35 (1991).

107. See *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 443 (1983) (the government must make a “strong showing of particularized need” under Fed. R. Crim. P. 6(e)(3)(c)(i) to be able to disclose grand jury materials to civil litigators); cf. *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987) (attorneys who had access to grand jury materials during a criminal investigation may make use of those documents without additional authorization).

108. See SIMON, *supra* note 1, at 24; TONRY, *supra* note 1, at 45; Stuntz, *Pathological Politics*, *supra* note 1, at 553.

isolation.¹⁰⁹ Often, those statutes include criminal laws, not just civil fines, to back up their promises and threats.¹¹⁰

One of the most important groups represents crime victims.¹¹¹ Victims are latecomers to the political process,¹¹² but they have made up for lost time.¹¹³ They enjoy the same efficiencies that other single-interest groups do,¹¹⁴ but have one feature few other groups have: the ability to generate a wealth of public sympathy, an enormously powerful weapon in politics, particularly when used in conjunction with media coverage.¹¹⁵ A compelling story about an attractive victim with whom the public can identify is worth far more than all policy

109. The phenomenon is not peculiar to this nation. In countries with a civil law tradition, the term “special legislation” is used to describe such features of the codes. “According to an Italian scholar, the classic civil code provision that ‘the contract is law for the parties’ has been reversed in the case of special legislation to ‘the law is the contract of the parties.’” JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 153 (3d ed. 2007).

110. Abortion and firearms legislation, for example, ordinarily contain criminal punishments. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997) (discussing the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536 (1997) (codified at 18 U.S.C. §§ 921–922)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (discussing the Pennsylvania Abortion Control Act of 1982, 18 Pa. Cons. Stat. §§ 3203–3220 (1990)).

111. *See* Andrew Atkins, Note, *A Complicated Environment: The Problem with Extending Victims’ Rights to Victims of Environmental Crimes*, 67 WASH. & LEE L. REV. 1623, 1630 (2010) (explaining that the victims’ rights movement rose to national prominence in 1981 and has influenced significant reforms to the criminal justice system).

112. For most of our history, victims played no role in the criminal justice system other than as complainants or witnesses. Organized police forces and public prosecutors offices developed in the nineteenth century, gained a monopoly over decision-making authority in the criminal process, and shunted victims to the side. *See, e.g.*, FRIEDMAN, *supra* note 40, at 28, 67–71, 149–55, 358–60. Beginning early in the 1980s, however, victims began to assert their right to be involved in a process that began when they were defrauded, robbed, or assaulted. *See, e.g.*, PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649 (1976).

113. *See* Elayne Rapping, *Television, Melodrama, and the Rise of the Victims’ Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 670 (2000).

114. The costs of organizing and communicating are far less for special interest groups than for the general public. Single-issue groups also can focus their energies—and, more importantly, their campaign contributions and votes—on legislators inclined toward their viewpoint. *See* OLSON, *supra* note 26, at 1–2, 33–52.

115. *See, e.g.*, PRATT, *supra* note 1, at 85–89.

arguments combined.¹¹⁶ That asset has made victims one of the most powerful nongovernmental interest groups in the criminal and political processes.¹¹⁷

Victims, however, are not the only relevant group. Overcriminalization can arise in connection with regulatory offenses, where the traditional adversaries are private special interest groups and members of the regulated community or one of its associations.¹¹⁸ Their presence alters the calculus.¹¹⁹ Special interest groups have an interest in seeing business become subject to expansive and expensive criminal liability, so that they or the government can use it to club a corporate defendant into going along with an administrative resolution, which does not require the Justice Department to become involved.¹²⁰ On occasion, companies might even favor the government's reliance on criminal prosecution if it can be swung as part of a deal that decreases industry regulation.¹²¹ The business community may conclude that a criminal prosecution affects only the indicted company, not the entire industry, unlike a regulation, which applies to all.¹²² Criminal prosecution may wind up being the only game in town, and everyone is satisfied—except

116. See, e.g., *id.*; FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 4–6, 12–16 (2001) (discussing how the rape and murder of a twelve-year-old by a parolee led to the adoption of California's "Three-Strikes" law by popular referendum).

117. See, e.g., Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 868 & n.9 (1996).

118. See, e.g., *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177 (5th Cir. 1989); *Nat'l Res. Def. Council, Inc. v. EPA*, 822 F.2d 104 (D.C. Cir. 1987); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980).

119. Their involvement also could pose a concern with "agency capture"—that is, the fear (or fact) of agency bias toward a private party or regulated entity on which it relies for factual information, policy ideas, or political support. See, e.g., SIMPSON, *supra* note 72, at 85–90; W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* 375, 379–80 (4th ed. 2005). That concern is absent when a traditional federal crime-fighting agency—for example, the Justice Department or the FBI—is responsible for investigation. Those agencies lack regulatory authority, and unless the suspects or defendants are members of an organized crime family, there is no ongoing relationship between them and the government.

120. See, e.g., Andrew S. Hogeland, *Criminal Enforcement of Environmental Laws*, 75 MASS. L. REV. 112, 114, 118 (1990) (providing examples of private environmental groups working with criminal prosecutors).

121. Stuntz, *Pathological Politics*, *supra* note 1, at 553.

122. See Richman, *supra* note 1, at 81–82.

the “designated felons” at the companies charged with a crime. They are the sacrificial lambs.

But some companies seek their own version of a particular criminal law for anticompetitive purposes. Companies can use an industry-specific law to lobby the prosecutor by arguing that Congress must have wanted offenders (including rivals) to be prosecuted, because it passed a specially targeted criminal statute.¹²³ Some companies also will use industry-specific criminal laws to garner economic rents—namely, supernormal profits obtained because of government regulation.¹²⁴ For example, a business threatened by a particular imported commodity may persuade the government to impose strict regulations on importing that item, backed with criminal sanctions, to restrict competition.¹²⁵ Economists and antitrust experts have long be-

123. Often, bills can only be explained on the ground that certain industries want their own criminal law for lobbying purposes. For example, the Maple Agricultural Protection and Law Enforcement Act of 2011 (MAPLE Act), S. 1742, 112th Cong. (2011), and H.R. 3363, 112th Cong. (2011), would make it a crime to falsely label a product as maple syrup even though fraud is already a crime under state and federal law, as well as common law. See Larkin, *supra* note 68. Similarly, the Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety Act of 2012 (SAFE DOSES Act), Pub. L. No. 112-186, § 2, 126 Stat. 1427 (2012), makes it a crime to steal medical products. Theft has been a crime since common law and is already a crime under federal law.

124. Lanier Saperstein, Comment, *Copyrights, Criminal Sanctions and Economic Rents: Applying the Rent Seeking Model to the Criminal Law Formulation Process*, 87 J. CRIM. L. & CRIMINOLOGY 1470, 1503 (1997).

125. Recent events illustrate this practice. Last year Congress considered amending the Lacey Act, 16 U.S.C. §§ 1701, 3371–3372 (2006), a federal law making it a crime to import flora or fauna in violation of a foreign nation’s laws. A violation of any foreign law, however trivial and however unforeseeable, can land a person in prison for a considerable period of time. See *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003) (defendant sentenced to eight years in prison for importing undersized, egg-bearing lobsters from Honduras in violation of Honduran law). More recently, the federal government began an investigation of the Gibson Guitar Company for manufacturing guitars from wood allegedly imported in violation of a foreign labor law. The House of Representatives was about to consider a bill that would have amended the Lacey Act and afforded Gibson relief when twenty-four Virginia forest products companies wrote to a powerful Virginia congressman and objected that modifying the Lacey Act to increase foreign imports would damage those companies. The congressman pulled the bill from a floor vote. See Geof Koss, *Lacey Act Overhaul Stalls Amid Push-Back by Virginia Companies*, CONG. Q. TODAY ON-LINE NEWS, July 23, 2012, available at Westlaw, 2012 WLNR 15869677; Brendan Sasso, *House to vote on easing environmental regulations after Gibson Guitar raid*, THE HILL, May 25, 2012, <http://thehill.com/blogs/e2-wire/e2-wire/229545-house-to-vote-on-easing-environmental-regulations-after-gibson-guitar-raid> (last visited July 29, 2012).

lieved that individual businesses will use the competition laws or regulatory process as a form of economic predation, especially if a company can persuade the government to do the heavy lifting itself by bringing a criminal prosecution or civil lawsuit against a rival.¹²⁶ The principle seems to be, “if you can’t beat ‘em, outlaw ‘em.”

B. *Building the Defenses*

Legislators take three defensive positions. The first redoubt is half substantive, half political: Criminal laws prevent crime, protect the public, and foster a safe environment.¹²⁷ New laws also reflect new dangers,¹²⁸ and greater penalties reflect a re-examination of and upgrade in the seriousness of laws already on the books.¹²⁹ Stiff penalties also make sense from an economic perspective: the likelihood, celerity, and severity of punishment all influence its deterrent effect.¹³⁰ Lengthy prison sentences are particularly favored in instances where the chance of detection is low, allowing communities to conserve enforcement resources while enjoying the same deterrent benefit.¹³¹

126. See, e.g., VISCUSI, *supra* note 119, at 381–92 (collecting authorities); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985).

127. Advocates for the “broken windows” theory of policing—that is, the theory that aggressive police enforcement of low-level street crimes both reduces the crime rate and enhances public safety—emphasize the importance to a community of the fact and perception of physical safety. See, e.g., L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1998); George L. Kelling & James Q. Wilson, *Broken Windows: The police and neighborhood safety*, THE ATLANTIC, Mar. 1982, available at <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465/>.

128. See, e.g., *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act)* of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

129. See, e.g., the *Anti-Drug Abuse Act of 1986*, Pub. L. No. 99-570, 100 Stat. 3207 (codified at various sections of 21 U.S.C.).

130. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

131. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 178–85 (1968); Posner, *supra* note 130, at 1212–13. As for the argument that receiving an onerous penalty is unfair because it is freakishly rare, like “being struck by lightning,” *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring), legislators would respond by pointing a finger at the offender and saying that “[t]he criminal justice system is voluntary: you keep out of it by not committing crimes.” Posner, *supra* note 130, at 1213.

Moreover, the Supreme Court has so constitutionalized the law of criminal procedure that any effort to regulate the criminal process would be futile.¹³² The only room that Congress has left to maneuver is with substantive criminal law.¹³³ Faced with pressure to keep crime low, the response is criminalization not by affirmative choice, but rather “because it is easier and cheaper than less punitive options.”¹³⁴ Finally, the public wants crime reduced and does not care whether the federal, state, or local government gets the job done: Legislators therefore are merely satisfying consumer demand.

The legislators’ second parapet is legal. Pointing to Parliament’s interference in criminal cases,¹³⁵ the Framers limited the role that the legislative branch can play in the criminal process. Article I authorizes legislators to pass laws, to fund actors in the criminal justice system, and to conduct oversight hearings to learn how well those actors are performing and what funding they should receive.¹³⁶ Otherwise, members of Congress are just bystanders.¹³⁷ Congress cannot pass legislation affecting a final judgment or make a specific individual an outlaw; the Bill of Attainder and Ex Post Facto Clauses stand in the way.¹³⁸ Members cannot decide which cases to investigate or prosecute; the Incompatibility Clause bars members from serving in the Congress and Executive Branch at the same time.¹³⁹ A

132. See Carol Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 780 (1997).

133. See, e.g., Richman, *supra* note 1, at 66.

134. *Id.*

135. Parliament would enact laws identifying a specific person or group and retroactively imposing various “pains and penalties” on them, including death, imprisonment, banishment, and confiscation of property. See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 474 (1977).

136. See U.S. CONST. art. I, § 7, cl. 1; U.S. CONST. art. I, § 8, cl. 1, 2, 6, 10, 15–18.

137. Bystanders with far greater media access than the average person, one could say. True, but legislators will reply that their access is far more limited than what journalists enjoy. We can leave it to legislators and the media to argue over who has less airtime and effect.

138. See U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”).

139. The Incompatibility Clause, U.S. CONST. art. I, § 6, cl. 2, provides as follows:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any

member cannot even decide how to staff the agencies with those responsibilities.¹⁴⁰ The Appointments Clause of the Constitution¹⁴¹ creates two routes for appointment of “Officers of the United States”—a term that includes any person who exercises the power of the federal government,¹⁴² which surely includes a prosecutor¹⁴³—and a member of Congress cannot direct traffic on either route.¹⁴⁴ If he serves in the House of Representatives, rather than the Senate, a member cannot even directly influence the appointment of officials to the Department of Justice or the federal bench; only the Senate plays a role in the appointment process.¹⁴⁵ Senators and Representatives cannot adjudicate cases or impose sentences. They may leave Congress to become judges (and judges may leave the bench for Congress),¹⁴⁶ but they must resign one position to accept another.¹⁴⁷ Members may vote as legislators one day and sit as judges the next, but wearing both hats simultaneously pushes separation of powers principles past the breaking point.¹⁴⁸

A legislator’s last battlement is practical. What is the problem, they will argue, with superfluous criminal laws? A law on the books has no practical effect until it is used in an indictment. If it is so used, the prosecutor must have found the law

Office under the United States, shall be a Member of either House during his Continuance in Office.

140. See *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976).

141. See U.S. CONST. art. II, § 2, cl. 2.

142. See, e.g., *Buckley*, 424 U.S. at 125–26 (1976).

143. See 28 U.S.C. § 516 (2006) (the Attorney General has the authority to direct the federal government’s litigation); Fed. R. Crim. P. 7(c)(1) (an indictment must be signed by “an attorney for the government” in order to be valid).

144. See *Bowsher v. Synar*, 478 U.S. 714 (1986); *Myers v. United States*, 272 U.S. 52 (1926).

145. See U.S. CONST. art. II, § 2, cl. 2 (only the Senate gives its “advice and consent” to the President’s appointments).

146. For example, Hugo Black was a U.S. Senator from Alabama before becoming a Supreme Court Justice, and Representative Louis Gohmert was a Texas state court trial judge before being elected to Congress.

147. See U.S. Const. art. I, § 6, cl. 2.

148. See *Mistretta v. United States*, 488 U.S. 361, 407–08 (1989) (upholding the requirement in the Sentencing Reform Act that Article III judges sit as members of the Sentencing Commission, but noting that the Act did not require the Commission to adopt criminal laws).

useful and must have acted legitimately by invoking it.¹⁴⁹ So what if there are too many criminal *laws*? If there are not too many *prosecutions*, let alone *convictions* or *sentences*, there is no harm and no foul.

C. *Storming the Battlements*

Some of those defenses appear formidable, at least from afar. But it turns out that there are so many holes in those defenses that it is difficult to know where to begin.

Consider the third pretense that laws have no practical effect until they show up in an indictment. That proposition ignores “the freedom-limiting, anxiety-producing, and guilt-inducing effects the criminal law may have on those who take its demands seriously, even apart from the threat of punishment.”¹⁵⁰ Moreover, that argument ignores the blatant dishonesty surrounding the enactment of superfluous criminal statutes. Passing new laws that duplicate statutes on the books is an attempt to euchre the public into believing that the legislature has done something more than kill a few trees for paper to print the laws. Dishonesty in government breeds cynicism and distrust, which are damaging to the criminal law and social fabric.¹⁵¹

As for the justification that legislators cannot become involved in particular cases, it is true that a senator or representative cannot implement statutes in any way. Strictly speaking,

149. At least there is a presumption to that effect. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

150. HUSAK, *supra* note 16, at 14. The legislator’s defense seeks to draw strength from the theory that the law is necessary only to keep “bad men” in line because “moral men” will hew the line without a criminal law. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). Under that theory, the criminal law will not trouble an innocent man, regardless of however many statutes there are, because he will not venture close to that line. But there is not much support in the common law or in common sense for the proposition that people act willy nilly regardless of what is forbidden. There is also the contrary theory that bad men invariably miscalculate or discount the risk of getting caught and punished, and so will pay little or no heed to the criminal law. See MARK A.R. KLEIMAN, *WHEN BRUTE FORCE FAILS* 79–80 (2009). If so, a criminal law threatens only those persons who are least likely to violate it.

151. That is particularly true if, as social science suggests, people generally follow the law if they respect it, not because they fear it. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006); YEAGER, *supra* note 106, at 9 (“As criminologists have long known, where laws lack legitimacy, violation rates are likely to be relatively high, other factors held constant.”).

he only can vote for or against legislation. Ironically, however, the legal incapacity to exercise authority over a specific case or to serve in more than one branch simultaneously is a valuable political benefit for legislators. A legislator who cannot investigate, arrest, prosecute, sentence, or imprison cannot be held responsible for defaults in how the system makes those decisions or otherwise implements legislation. With power comes responsibility and accountability. Take away the first one, and the other two fall away on their own.

Henry Hart believed that the criminal law should not embrace whatever a legislature deemed objectionable and should be limited to conduct that the community found seriously morally offensive.¹⁵² Most people mistakenly hold precisely that romantic view of the criminal law.¹⁵³ They believe that it is limited to violent crimes (murder, rape, and robbery), as well as serious “white collar” crimes, such as large-scale fraud. The media and popular culture reinforce that view. The public sees on television Charles Manson, Bernie Madoff, and more serial killers each week than law enforcement sees in a year, and people assume that only such offenders can wind up ensnared by the law. The community feels comfortable treating such offenders with disapproval, even contempt in some cases, not only because they have injured others, but also because criminals are thought to be a small set of readily identifiable indi-

152. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (“It is not simply anything which a legislature chooses to call a ‘crime.’ It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a ‘criminal’ penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.”). Hart was not alone in that viewpoint. See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 47 (John Harvard Library ed., Belknap Press of Harvard Univ. Press 2009) (1881) (“It is not intended to deny that criminal liability . . . is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.”); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 72 (1933) (“To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice . . .”).

153. See Alex Kozinski & Misha Tseytlin, *You’re (Probably) a Federal Criminal*, in *IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE “THE AIMS OF THE CRIMINAL LAW”* 43, 49 (Timothy Lynch ed. 2009).

viduals whose value systems (and looks) conflict with those of the community.

But the continual expansion of the criminal law puts the lie to that notion. When we know that everyone could be found guilty of something because there is no activity that the criminal law does not reach, we may look at a defendant as being unlucky, not immoral.¹⁵⁴ There, but for the grace of God, go I. Extending criminal law to the point where nearly everyone at some time has done something for which he could be sent to prison erodes the law's ability to signal that certain conduct and certain people are out of bounds. The law can no longer distinguish "'us' from 'them.'"¹⁵⁵ Instead, to quote Walt Kelly, "we have met the enemy, and he is us."¹⁵⁶

New technologies and new social attitudes may justify, even demand, new criminal laws or harsher sanctions.¹⁵⁷ But the number of criminal laws we have now cannot be justified on that ground, not when they include entirely trivial offenses, such as misusing Smokey the Bear's image or the slogan "Give a Hoot, Don't Pollute,"¹⁵⁸ polling a service member before an election,¹⁵⁹ transporting alligator grass across state lines,¹⁶⁰ or using a surfboard on a beach designated for swimming.¹⁶¹ We have extended the criminal law so far as to create the risk that there is almost no activity that a statute cannot reach,¹⁶² even if all or most of the public have done it one time or another—for example, downloading copyrighted music from the Internet, lying to a highway patrolman about our vehicle's speed, driving while

154. See HUSAK, *supra* note 16, at 25; Stuntz, *Pathological Politics*, *supra* note 1, at 511.

155. HUSAK, *supra* note 16, at 24.

156. WALT KELLY, *POGO: WE HAVE MET THE ENEMY AND HE IS US* (Simon & Schuster 1972).

157. See, e.g., *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (aircraft are not "vehicles"); HUSAK, *supra* note 16, at 18 (interspousal rape did not become a crime in England until 1991).

158. See 18 U.S.C. §§ 711–711a (2006).

159. See 18 U.S.C. § 596 (2006).

160. See 18 U.S.C. § 46 (2006).

161. See 16 U.S.C. §§ 1, 1a–2(h), 1a–6 & 9a (2006); 36 C.F.R. § 3.17(b) (2012).

162. Witness the federal government's use of the mail fraud statute to fight every possible instance of corrupt or unethical behavior. See *Skilling v. United States*, 130 S. Ct. 2896, 2925–27 (2010) (discussing the history of the Justice Department's efforts to use the mail and wire fraud statutes to reach public corruption and private dishonesty not constituting fraud); *supra* notes 51–57 and accompanying text.

intoxicated, writing a check for an amount less than \$1,¹⁶³ installing a toilet that uses too much water per flush, and so on.¹⁶⁴ That claim is no hyperbole. People have wound up in prison for equally trivial offenses, such as importing marginally small lobsters in violation of subsequently invalidated foreign laws.¹⁶⁵

There are costs to universalizing criminality. Once the legislature cuts the criminal law loose from community morality, the average person has no ready guidance. Like a vague law, a surfeit of laws makes it difficult to know what is and is not outlawed. Fair notice of what the law forbids is a longstanding requirement for imposing criminal punishment.¹⁶⁶ Moreover, if criminal charges approximate parking tickets in their ubiquity, we have deprived the criminal law of the moral force necessary for it to persuade people to respect and obey its commands. Fear becomes the only reason to toe the line, and there never will be enough cops, prosecutors, and jailers for fear alone to work.

Overcriminalization also creates a serious risk of arbitrary enforcement.¹⁶⁷ One risk is that prosecutors will make charging decisions based on irrational factors, such as the value that a par-

163. See 18 U.S.C. § 336 (2006).

164. See HUSAK, *supra* note 16, at 25, 30–31 & n.147; DeLong, *in* GO DIRECTLY TO JAIL, *supra* note 15, at 34–35; Kozinski & Tseytlin, *in* IN THE NAME OF JUSTICE, *supra* note 153, at 45–49; Stuntz, *Pathological Politics*, *supra* note 1, at 515.

165. See *United States v. McNab*, 331 F.3d 1228, 1240–42 (11th Cir. 2003). For a list of others examples, see Meese & Larkin, *supra* note 44, at 747 n.115.

166. See Meese & Larkin, *supra* note 44, at 136–38. James Madison made that point long ago:

It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.

THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961).

167. The classic work on prosecutorial discretion is KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* (1969). The classic example of the risk of arbitrary enforcement is a police officer's decision to stop a motorist for violating a traffic law. The risk is present because of the fact that everyone violates some traffic regulation at one point or another, which allows the police to stop a vehicle and arrest its occupants even if the traffic stop is a pretext for investigation of another crime. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *Whren v. United States*, 517 U.S. 806 (1996). The ability of law enforcement to selectively exercise its arrest or charging authority when everyone can be found responsible for something poses a risk of arbitrary enforcement. See HUSAK, *supra* note 16, at 30 & n.147, 31.

particular case holds for an ambitious lawyer¹⁶⁸ or the number of points it will add to his batting average.¹⁶⁹ As Judge Alex Kozinski put it, “a ubiquitous criminal law becomes a loaded gun in the hands of any malevolent prosecutor or aspiring tyrant.”¹⁷⁰

Another risk is that the luck of the draw will decide whether one person or another winds up in the dock. That risk should be no less disconcerting. We do not allow charging decisions to be made by a flip of the coin. We presume that the majority of the community is law-abiding and that the decision to single out one person for arrest and prosecution rests on the legitimate ground that there is sufficient proof that he has broken the law, not because of his race, religion, or any of the other analogous, invidious factors.¹⁷¹ If almost the entire community is guilty of some crime, though, we no longer can rely on that presumption. The question of why a particular individual was selected becomes far more debatable, particularly given that arrest and charging decisions are generally invisible and, absent a confession of wrongdoing by the prosecutor or extraordinary circumstances, are virtually unchallengeable. Rather

168. See, e.g., Kozinski & Tseytlin, *supra* note 153, at 52; Adam Liptak, *For Federal Prosecutors, Politics Is Ever-Present*, N.Y. TIMES, Mar. 18, 2007, <http://www.nytimes.com/2007/03/18/weekinreview/18liptak.html> (“They are political appointees who serve at the pleasure of the president, and they often use their jobs as political steppingstones. Rudolph W. Giuliani, a candidate for the Republican presidential nomination, started his political career as the United States attorney in Manhattan.”).

169. “Federal prosecutors already operate under an incentive structure that forces them to focus on the statistical ‘bottom line.’ Statistics on arrests and convictions are the Justice Department’s bread and butter. They are submitted to the department’s outside auditors, are instrumental in assessing the ‘performance’ of the U.S. Attorneys’ Offices, and are the focus of the department’s annual report. As George Washington University Law School professor Jonathan Turley puts it, ‘In some ways, the Justice Department continues to operate under the body count approach in Vietnam . . . They feel a need to produce a body count to Congress to justify past appropriations and secure future increases.’”

Healy, *supra* note 60, at 105–06.

170. Kozinski & Tseytlin, *supra* note 153, at 44.

171. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *McCleskey v. Kemp*, 481 U.S. 279, 291–99 (1987). That presumption is eminently justified. In the federal system alone there are thousands of prosecutors, see *infra* note 202, and the overwhelming majority will act only and always out of a desire to serve the public good. The risk always is present, though, that some will not.

than promote neighborhood well being, criminal enforcement has an *in terrorem* effect on the community.¹⁷²

Increasing the penalty for existing crimes without good reason is equally objectionable. Piling on punishment after punishment distorts society's judgment regarding the seriousness of a crime. If five years' imprisonment is the maximum penalty that should be imposed on someone who commits fraud, the number of fraud statutes he violated should be immaterial. Under today's double jeopardy law, however, it is not.¹⁷³ Counting statutory violations independently also allows a prosecutor to throw the book at someone in an effort to coerce a guilty plea.¹⁷⁴ Such a tactic is not unconstitutional,¹⁷⁵ but it is

172. It is for much that reason that we hold unconstitutional unduly vague criminal laws. See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 215 (1985) ("Packer is correct in suggesting that the chief locus of concern is not the courts, but the police and prosecutors. The power to define a vague law is effectively left to those who enforce it, and those who enforce the penal law characteristically operate in settings of secrecy and informality, often punctuated by a sense of emergency, and rarely constrained by self-conscious generalization of standards. In such circumstances, the wholesale delegation of discretion naturally invites its abuse, and an important first step in constraining that discretion is the invalidation of indefinite laws.").

173. Double jeopardy law is a porous barrier to multiple punishments. The starting point is the *Blockburger* test. *Blockburger* presumes that the legislature intended to impose multiple sentences for the same conduct under different laws if each statute requires proof of a fact that the others do not. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Adding a new curlicue to each new fraud statute permits multiple punishments for the same course of conduct. Yet, *Blockburger* does not prohibit a legislature from imposing multiple punishments for the identical conduct if it makes its intent clear. See *Missouri v. Hunter*, 459 U.S. 359 (1983). The opportunity for abuse is evident. If the crux of the defendant's conduct is simple, old-fashioned fraud, that he defrauded (1) the federal government, (2) a particular federal agency, (3) a state, (4) a particular state agency, and (5) a cooperative federal-state program would not justify treating him as a five-time loser. He is still just a con artist who pulled off just one scam.

174. See HUSAK, *supra* note 16, at 31. For a colorful description of that process, see Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425, 1426 (2012) (reviewing STUNTZ, *COLLAPSE*, *supra* note 1):

In the state criminal courts, which do most of the work in our system, we see high-volume, bureaucratic justice dominated by plea bargains . . . [M]uch of the litigation we do see is about peripheral procedural matters . . . [J]ury trials almost never happen in part because trials almost never happen . . . [W]e skimp on and dither about police budgets, while prison populations swing widely with political winds and turn upward even at a time of lowering or flat crime rates . . . [A]nd prosecutorial discretion often takes the cynical, even sadistic, form of strategically choosing from a menu of highly technical criminal laws with

hardly desirable behavior that society wants to encourage in a legal system ostensibly committed to guaranteeing every defendant a fair trial—especially when that threat leads an innocent person to plead guilty to avoid long-term imprisonment.¹⁷⁶ And there is no effective control over a prosecutor's decision.

That leaves the defense that the overcriminalization problem is a mirage. The argument goes as follows: There may be one or two extreme cases here and there where a prosecutor has exercised poor judgment and has charged someone who may have technically violated a regulatory law, but truly is morally blameless, utterly contrite, and completely harmless. A few mistakes here and there, however, do not justify tarring the entire criminal process or treating every police officer as a modern-day Inspector Javert.

It is true that no one knows exactly how many cases of injustice have resulted from overuse of the criminal law. Part of the reason is that the only parties in a position to have that information—prosecutors' offices, such as the Justice Department—lack a duty or incentive to tally examples. They even would express hostility to the notion that injustices can result from

rigid mens rea requirements and strict and severe sentencing schemes such that there is little left for a trial judge—or any honest jury—to do[.]

175. See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

176. If the charges are stacked against them, innocent defendants will plead guilty just to avoid risking a stiff sentence from a judge known to be a long-ball hitter, to take advantage of a judge who is a known singles hitter (sometimes to "buy off" an appeal to a legally dubious charge), or, when the defendant is jailed pending trial, to accept a plea offer of time served or probation. See Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1413–14 (2003) ("The plea bargaining system effectively substitutes a concept of partial guilt for the requirement of proof of guilt beyond a reasonable doubt. It is marvelously designed to secure conviction of the innocent."); Amsterdam, *supra* note 3, at 789–90. In fact, a defendant can plead guilty while professing his innocence, a scenario known as an *Alford* plea, named after the Supreme Court decision upholding that practice. See *North Carolina v. Alford*, 400 U.S. 25 (1970). *Alford* pleas, though lawful, are troublesome. See Alschuler, *supra*, at 1417–18 ("Public confidence and faith in the justice system are essential to the law's democratic legitimacy, moral force, and popular obedience. When citizens learn that defendants are pleading and being punished while refusing to admit guilt and even protesting their innocence, they may well suspect coercion and injustice. They also may conclude that our system does not care enough about separating guilty from innocent defendants.") (quoting Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1387 (2003)).

having “too many criminal laws.” But that failing should be a cause for alarm, not a comfort. The problem here is not that the criminal process has run off the tracks in the same manner that it did before the Supreme Court regulated the system through a vigorous application of the Bill of Rights. By contrast, here the process causes injustices because it operates *precisely* as it has been programmed to work.¹⁷⁷ The criminal process suffers from a design defect that enables actors to create havoc just by getting their parts right. *Remember*: The Supreme Court laid down foul lines and ground rules governing how police and prosecutors can play the game, but the Court did not cap the number of games in a season. The amount and variety of criminal laws means that everyone could be at risk of losing every game, most of the time by forfeiting (that is, by pleading guilty).¹⁷⁸ The losses and punishments give every appearance of being inflicted, not randomly and arbitrarily, but mechanically, relentlessly, inevitably, and all-inclusively. We should not want the public to look at the criminal justice system that way. A system that results in injustices from the overuse of the criminal law will erode the respect and support that the criminal process needs.¹⁷⁹

177. See PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE* 7 (2006).

178. Criminal trials are becoming as scarce as hen's teeth. “Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.” *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012); *id.* (“To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.” (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992))) (alteration in original).

179. Commentators have said that overcriminalization was born in America and that criminal punishments in America are far harsher than in Europe. See, e.g., LOÏC WACQUANT, *PRISONS OF POVERTY* (expanded ed. 2009). It is an interesting question whether those developments are related and whether they are the product of one or more factors unique to the United States. Professor Nicola Lacey and Professor James Whitman think so. See LACEY, *supra* note 1; JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003). Professor Lacey argues that certain types of electoral processes are more likely than others to suffer from overcriminalization. In countries like the United States, candidates compete head-to-head, and the first one past the post, by a majority or a plurality, wins the election. In those nations, politicians need to cobble together voters from different coalitions, but especially from the middle, and assuring voters of being tough on crime has proved a valuable campaign promise for forty years. By contrast, in other nations parties com-

III. THE LIMITED POLITICAL REMEDIES AVAILABLE TO STEM AND REDUCE OVERCRIMINALIZATION

A. Uphill Battles

In an ideal world, there would be a way to dissuade or prevent legislators from endlessly passing additional unnecessary criminal laws. For example, Congress could require that all new bills adding to the penal code be referred to the Senate or House Judiciary Committee, to allow those presumably expert committees to filter out superfluous bills. Any such reform, however, is difficult to achieve for entirely political reasons. Members who sit on other committees are reluctant to cede the authority to add criminal sections to their own regulatory bills. Having that ability gives every legislator skin in the game and an opportunity to entreat the Director of the FBI to allocate additional resources to fight bank fraud, home-loan fraud, securities fraud, or any other kind of fraud.¹⁸⁰ Policy-based appeals to members also likely would be futile. Too many members want to drop new crime bills into the hopper to appeal to constituencies interested in crime or to fend off conservative challenge on that issue, and self-interest generally trumps the public interest.

Nor can we expect that the cost of overcriminalization will exert discipline on Congress. The cost of law enforcement, particularly corrections, constrains the states more than the federal

pete against each other in a proportional representation system. By virtue of the guarantee of representation, candidates and parties do not need to gather in every available voter in the middle to have a voice in government. European countries with proportional representation schemes therefore are less likely to be afflicted by overcriminalization, she concludes. See LACEY, *supra* note 1, at 69–95. Whitman sees a different cause at play. He reasons that the difference is due to the presence of an historic class structure in Europe, the absence of one in this nation from its very founding, and the historic American distrust of a powerful state bureaucracy. In Europe, elites pursue a less punitive approach for fear of being caught up in the criminal justice system. America punishes everyone equally because it lacks a formal class system. See U.S. CONST. art. I, § 9, cl. 8 (“No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.”). Overcriminalization and harsh punishments have electoral benefits, so there is a surfeit of criminal laws with severe punishments in this nation. See WHITMAN, *supra*, at 6–15, 95.

180. See GREEN, *supra* note 48, at 152; Podgor, *supra* note 48, at 730–31.

government.¹⁸¹ State penal codes address a broader range of conduct than federal law because states must address the average, everyday “street crimes” that the federal government lacks jurisdiction to prosecute.¹⁸² The cost of law enforcement, particularly operating a correctional system,¹⁸³ is a considerable part of a state’s budget. State legislators also must decide how much law enforcement taxpayers can afford, because states must balance their budgets annually.¹⁸⁴ By contrast, the cost of operating the federal prison system is a miniscule component of the federal budget,¹⁸⁵ and the federal government is under no requirement to balance its budget—the government can borrow to make up for a deficit.¹⁸⁶ Finally, both parties are responsible for overcriminalization, which means that there is no political check on increased spending for politically favored programs.¹⁸⁷ The upshot is that in this very-less-than ideal

181. See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1300–03 (2005).

182. See *id.* The federal government must justify a statute under one of the powers enumerated in Article I. That cannot always be done successfully. See *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (holding unconstitutional a statute making rape a federal crime); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding unconstitutional a statute that made it a federal offense to possess knowingly a firearm in the vicinity of a school).

183. In 1978, the cost of operating the nation’s prisons was \$5 billion. That number increased to \$9 billion in 1982 and \$31 billion in 2003. If you include expenditures for jails, probation, and parole, the number now approaches \$50-60 billion. See 42 U.S.C. § 17501(b)(4) (2012); H.R. Rep. No. 110-140, at 2 (2007); JOAN PETER-SILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 4 (2003).

184. See Barkow, *supra* note 181, at 1301–02.

185. *Id.* at 1301.

186. See *id.* at 1302.

187. Both major political parties are to blame for the problem of overcriminalization. See Kevin McKenzie, *Law Professor Slams Expansion of Federal Crimes*, COMMERCIAL APPEAL (Oct. 25, 2011) <http://www.commercialappeal.com/news/2011/oct/25/law-professor-slams-expansion-federal-crimes/> (“[Law professor John S.] Baker blamed Republicans as well as Democrats for the trend, saying that both parties fuel it. One-third of about 4,200 federal crimes on the books have been passed since 1970 and Republican President Richard Nixon’s ‘war on crime.’”). The problem may be most acute during election years. See Thornburgh, *supra* note 18, at 1282 (“A significant aspect of this increase in federal crimes over the past ten years, incidentally, is the wholly unsurprising fact that a disproportionate number of these criminal laws were passed in three election years, 1998, 2000, and 2002. The ‘jail-centric’ approach by the Congress, which is fueled by the almost reflexive notion that being ‘tough on crime’ is good fodder on the campaign trail while trolling for votes, has deep societal costs that are especially poignant in the regulatory and business arenas.”).

world, there may be little that can be done to resolve this problem on Capitol Hill.

But there is hope. Legislators in both chambers have introduced bills that would cut back on some of the overreach found in present-day law. Senator Rand Paul and Representative Paul Broun each introduced a bill entitled the Freedom from Over-Criminalization and Unjust Seizures Act of 2012 (FOCUS Act) that would repeal the criminal penalties from the Lacey Act,¹⁸⁸ a statute that makes it a crime to import flora or fauna in violation of a foreign nation's law.¹⁸⁹ Those bills reveal that at least some members of Congress are concerned about the overuse and misuse of the criminal law, and are willing to do something about it.¹⁹⁰ The introduction of those bills is a small step, but it is a step in the right direction. As a result, although persuading Congress to halt further overcriminalization (to say nothing of rolling back existing criminal laws) would be quite an uphill battle, the task may not be Sisyphean.

One scholar has offered a procedural route to criminal justice reform. Professor William Stuntz recommended, among other things, that we should take some of the starch out of our sentencing laws, that we should restrain prosecutorial charging discretion, and that the criminal justice system should become more decentralized.¹⁹¹ The first two recommendations, however, ask legislators and prosecutors to agree to an amicable divorce, which is unlikely to happen any time soon. The third recommendation would enable community members sitting on juries to become more directly involved in the criminal justice system. That proposal is a reasonable one for cases that go to trial, although there are a few kinks that need to be worked out.¹⁹² Unfortunately, however, most cases are resolved

188. The Senate bill, S. 2062, 112th Cong. (2012) and the House bill, H.R. 4171, 112th Cong. (2012), were identical as introduced.

189. See 16 U.S.C. §§ 3371–78 (2006).

190. As noted above, the House Judiciary Committee also has taken note of this issue. See *supra* note 19.

191. See, e.g., STUNTZ, COLLAPSE, *supra* note 1, at 285–309.

192. Juries may be selected from a wider geographic base than the community most beset with the problem. The federal system recognizes and tries to deal with that problem. See, e.g., Jury Selection and Service Act, 28 U.S.C. § 1863(b)(2)–(3) (2006) (federal grand and petit jurors may be selected from the district or division in which the district court sits, but should ensure proportional representations of local

through plea-bargained guilty pleas, not trials, and that proposal does little to prevent legislators from turning out more criminal statutes or prosecutors from doubling down on a defendant by adding ever more charges to an indictment. By itself, that recommendation also will not solve the problem.¹⁹³

counties, parishes, and districts). But every jurisdiction may not resolve this problem, in which case the voice of a local community could be drowned out by others.

193. Two simple and (hopefully) uncontroversial legislative proposals would be the following.

First: Start small by directing the Attorney General to fill out the roster of federal criminal laws. No one knows exactly how many federal offenses exist, so we cannot know the full extent of the overcriminalization problem. Congress could direct the Justice Department to compile an inventory, but the Department tried to do so years ago and gave up short of finding the answer. See Meese & Larkin, *supra* note 44, at 739 & n.74. The remedy, therefore, is for Congress to pass a statute providing that no act of Congress can serve as a basis for criminal liability unless it is codified in Title 18 or is expressly listed in an omnibus statute identifying all federal criminal statutes codified elsewhere in the U.S. Code. That small step will help identify all federal criminal statutes, thereby providing the public both some notice of what is outlawed as well as some information about the scope of this problem.

Second: Direct the Attorney General to work out arrangements with state and local governments to cross-designate federal prosecutors as state prosecutors. Frequently, the conduct that Congress seeks to outlaw already is a crime under state law, and cannot be made a federal offense without stretching the boundaries of one of Congress's enumerated powers in Article I—usually the Commerce Clause. Recently, however, the Supreme Court has cut back on Congress's power to outlaw noncommercial activity not shown to be part of or to have a direct effect on interstate commerce. See, e.g., *Morrison v. United States*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). Therefore, that approach may not always be open. Although the standard way for federal prosecutors to pursue offenders is through a federal indictment, government lawyers also could prosecute state criminal cases in state court if they were so empowered by state law. Federal law does not limit Justice Department lawyers to the prosecution of federal offenses in federal court. The Attorney General is the nation's principal law enforcement officer and designee of the President to see to the enforcement of federal law. The Attorney General could enter into a "Memorandum of Understanding" with a state attorney general or a local district attorney allowing the Attorney General to designate Justice Department lawyers to serve as assistant district attorneys for the purpose of bringing traditional state law prosecutions of terrorists, organized crime figures, or other offenders under the same statutes that the state would use to prosecute those offenders.

For a list of other legislative proposals that could help alleviate some of the problems due to overcriminalization, see WALSH & JOSLYN, *supra* note 16, at ix–xiii.

B. *Likely Dead Ends*

1. *Traditional Approaches*

It is unlikely that an appeal to the leadership of the two major political parties could prove successful at present. Politics in the United States is highly decentralized. National party platforms matter far less than the name recognition, record, agenda, promises, and charisma of individual candidates. The national committee for each political party has weak control over candidates and their positions and generally lacks the ability to discipline its members for taking positions that the leadership views as unorthodox or wrongheaded.¹⁹⁴ Admittedly, the national committee can decide whom to endorse in a primary, whom and how much to fund in the general election, whether to persuade well-known figures (e.g., the current or a former president) to appear at campaign events, and what committee assignments to offer elected officials. Those carrots, though, may offer little incentive to a well-known or well-funded candidate, especially one with ready, independent access to the media, or one seeking election or re-election in a “safe” district or state. Leadership also may find it difficult to dislodge incumbents, especially those with long tenure, from chairs or positions on powerful committees, because of longstanding relationships that incumbents have with their colleagues. The consequence is that the parties possess little ability to control candidates who go “rogue.”¹⁹⁵ Accordingly, even if party leaders were committed to reigning in overcriminalization, they are poorly equipped to do so.

There also is no reason to assume that either major party wants to reduce overcriminalization. For good or ill, since 1970 the parties have relied more and more on the opinions of the public than the views of criminologists and other members of the academy, and the public has demanded punitive treatment of criminals, without regard to the efficacy of or results pro-

194. See LACEY, *supra* note 1, at 70.

195. The case of Senator Joe Lieberman is a good example. A longtime Democrat, Senator Lieberman left the Democratic Party, became an independent, and still was re-elected. See Sarah Wheaton, *Anti-Surge Protests Against McCain, Lieberman*, THE CAUCUS, (Jan 5, 2007, 6:13 PM), <http://thecaucus.blogs.nytimes.com/2007/01/05/anti-surge-protests-against-mccain-lieberman/>.

duced by that approach.¹⁹⁶ Accordingly, politicians ditched the rehabilitative ideal in favor of incapacitation and implemented that approach through increasingly punitive sanctions for any number of crimes. Indeed, the last thirty years have witnessed a contest between the two parties over their ability to be and appear more punitive than the other. Turning to national parties to stem overcriminalization, therefore, likely would be a dead end.

In theory, the presence of an opposition party or an election opponent could offer some hope of restraining this tendency. History, however, is to the contrary. Overcriminalization is a bipartisan problem.¹⁹⁷ Sometimes it becomes a bidding war as each party hopes to show that it is “tougher” and more committed to eliminating crime than the other.¹⁹⁸ “In other fields, legislation is about tradeoffs and compromises. When writing and enacting criminal prohibitions, legislators usually ignore tradeoffs and rarely need to compromise.”¹⁹⁹ Whatever benefits our two-party system may create in other contexts, that system does nothing to halt the trend toward ever more criminal laws and ever-stiffer punishments.

In the federal system, the Attorney General could refuse to participate with Congress in this mutual back-scratching enterprise because he possesses the ultimate authority to direct the conduct of federal criminal litigation.²⁰⁰ Two former Attorneys General—Edwin Meese and Richard Thornburgh—have been outspoken and repeated critics of overcriminalization.²⁰¹ But no sitting Attorney General yet has done so, and it is easy to see why. The Justice Department is a large entity²⁰² and has a

196. See, e.g., Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. (2013) (forthcoming).

197. See *supra* note 187.

198. See HUSAK, *supra* note 16, at 15 (“[N]either political party has been willing to allow the other party to earn the reputation of being tougher on crime.”); PRATT, *supra* note 1, at 23.

199. STUNTZ, *COLLAPSE*, *supra* note 1, at 173.

200. See 28 U.S.C. §§ 503, 506, 509–519 (2006).

201. See *supra* note 18 (former Attorneys General Meese and Thornburgh publicly criticizing overcriminalization).

202. There are 93 U.S. Attorneys (including those in territories) and 6,186 Assistant U.S. Attorneys. *United States Attorneys’ Mission Statement*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/usao/about/mission.html> (last visited Feb. 6, 2013); DEPARTMENT OF JUSTICE, U.S. ATTORNEYS (U.S.A.) FY 2013 BUDGET REQUEST, available at <http://www.naaua.org/publications/11.pdf> (last visited Feb. 6, 2013).

strong institutional interest in having as much charging discretion as possible and as many charging options as Congress can provide.²⁰³ The Department has strong allies on Capitol Hill who often are willing to give the Department whatever it requests. The fear of being seen as “soft on crime” — and of facing campaign ads making that allegation on television — also motivates members to give the Department (to say nothing of the Director of the FBI) the benefit of the doubt on many issues. Finally, because the Attorney General is a presidential appointee,²⁰⁴ the presidents in office over the last forty years ultimately bear responsibility for the Department’s positions, and no president has asked Congress to cut back on the expansion of federal criminal law.

The criminal defendants and their attorneys are no more likely to be successful. Convicted felons are pariahs; accused defendants are only slightly less disreputable. The number of past and current offenders may be sizeable, but they are socially disorganized and politically powerless. Many cannot vote, and most lack the skills, resources, or interest to mobilize. The media is unlikely to champion the case of more than one or two people who can prove that they are innocent, often through DNA evidence. Established private organizations, such as the Innocence Project or the National Association of Criminal Defense Lawyers, have limited assets, some of which must be spent protecting the rights of people not yet charged with a crime.

We are not likely to see the birth of new public interest organizations devoted to the repeal of old criminal laws. Any person or company who contributed to such a group would be pilloried in the media for trying to immunize their own activities. Government-created organizations equivalent to the federal public defender service also would be unlikely to oppose the passage of new criminal laws. The public would be outraged at the thought that its tax dollars might be used to assist an organization that lobbies on behalf of would-be criminals. Public defenders, seeing this entity as a rival for limited public funds, would complain they would lose money to this new en-

203. Prosecutorial discretion has an ancient lineage. *See* *The Confiscation Cases*, 74 U.S. (7 Wall.). 454, 457–58 (1868).

204. *See* 28 U.S.C. § 503 (2006).

tity. And the Justice Department would hardly welcome an opponent into the legislative arena.

Law schools are also unlikely to be able to successfully lobby Congress for repeal of unnecessary criminal laws. Only law schools within driving distance of Washington could even consider the logistical expenses this would require. Further, the impact of law school clinics and lobbying activities on the activities of Congress is, unfortunately, likely to be small to none.

The bottom line is this: Traditional approaches are not likely to be effective. With little constituency to oppose new laws, and none to urge repeal of old ones, the criminal law becomes a ratchet.

2. *The “Hydraulic Theory of Overcriminalization” and Asking the Supreme Court for Help*

The “hydraulic theory of overcriminalization” maintains that the procedural regulations imposed by the Supreme Court on criminal procedure leave Congress with no option but to amp up the substantive criminal law if members want to deal with crime.²⁰⁵ If so, the Supreme Court could respond by showing that it is a “team player.” It could loosen some of the procedural restrictions that now exist and let Congress rethink criminal procedure in its entirety. The Court could do all this, but it won’t.

If the Rehnquist Court had any inclination to walk back from any of the (in)famous Warren Court criminal procedure decisions, the Court would have taken the opportunity in *Dickerson v. United States*²⁰⁶ to modify or overrule *Miranda v. Arizona*.²⁰⁷ *Dickerson* raised the question whether, in the Omnibus Crime Control and Safe Streets Act of 1968,²⁰⁸ Congress had effectively repealed the need for *Miranda* warnings or created an adequate substitute. The case presented the perfect opportunity for revising judicial dominance of criminal procedure. *Miranda* is the paradigmatic example of the Warren Court acting like a legislature, and the Omnibus Crime Control and Safe Streets Act was

205. See *supra* notes 133–34.

206. 530 U.S. 428 (2000).

207. 384 U.S. 436 (1966).

208. Pub. L. No. 90-351, Title II, § 701(a), 82 Stat. 197 (codified at 18 U.S.C. § 3501 (2006)).

an archetypal instance of a legislature acting like a court. The symmetry was poetic, yet the Supreme Court was unreceptive. In no uncertain terms, the Court made it clear, by a 7 to 2 vote, that Congress has no business doing the Court's job.²⁰⁹ With a nod in the direction of *Dirty Harry* movies and television cop shows, the Court also refused to rescript police interrogation practices: "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."²¹⁰ Accordingly, after teetering on the edge of being overruled for more than thirty years, *Miranda* survived, and *Dickerson* makes futile any hope that the Supreme Court will take its foot off the throat of legislative efforts to reform criminal procedure. Accordingly, the prospect of a balanced, comprehensive legislative approach to criminal justice died in *Dickerson*. All that Congress has left to play with is substantive criminal law.

At the end of the day, the public always could stop or slow the passage of new criminal legislation. Insofar as the current trend toward large-scale imprisonment reflects legislative acquiescence to the actual or perceived public demand for a punitive reaction to crime, that acquiescence could slow, or even reverse, if the public were persuaded that this policy is wasteful as a fiscal matter or counterproductive as a penological matter.²¹¹ There is a fair amount of evidence to support those arguments today. The cost of our incarceration policy is considerable,²¹² and we may have reached the tipping point at

209. See *Dickerson*, 530 U.S. at 437 ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution.").

210. *Id.* at 443.

211. See PRATT, *supra* note 1, at 151 (the "Achilles' heel" of "penal populism" is the expense of imprisonment).

212. In 1940, the federal system was home to 24,360 prisoners. In 1980, the number was 24,252. *A Brief History of the Bureau of Prisons*, FED. BUREAU OF PRISONS, <http://www.bop.gov/about/history.jsp>. As of February 6, 2013, it is 217,905. *BOP: Weekly Population Report*, FEDERAL BUREAU OF PRISONS (last visited Feb. 6, 2013), http://www.bop.gov/locations/weekly_report.jsp. In 1980, there were 293,661 state prisoners. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S.: 1981; LAW ENFORCEMENT, COURTS, AND PRISONS tbl. 330 (1980). In 2009 the number was 1,405,622. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S.: 2012, LAW ENFORCEMENT, COURTS, AND PRISONS tbl. 347 (2011), available at www.census.gov/prod/2011pubs/12statablaw.pdf. As of 2010, there were more than 2.2 million Americans in federal, state, and local jails and prisons. LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010 (2011).

which further imprisonment actually leads to an *increase* in the crime rate.²¹³ But the evidence has not yet reached the critical mass necessary to persuade the public, or to prompt policy-makers to make that attempt. Until we reach that point, the prospect of convincing the public to make a 180-degree turn is likely to remain slim.

IV. THE BACKSTOP: THE JUDICIARY

A. *The Limitations of the Judiciary*

The only player left is the judiciary. Courts, however, have only a limited ability to stave off overcriminalization. An elect-

That increase in size has meant a corresponding increase in expenses. The cost of operating the nation's prisons increased to \$9 billion in 1982 and then jumped to more than \$50 billion in 2007. *See* 42 U.S.C. § 17501(b)(4); H.R. Rep. No. 110-140, at 2 (2007). By 2010, the average annual cost for each federal prisoner was \$28,284.16, and the cost was even higher for state inmates, at roughly \$31,286. CHRISTIAN HENRICHSON & RUTH DELANEY, THE VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9 (last updated July 20, 2012), <http://www.vera.org/download?file=3495/the-price-of-prisons-updated.pdf>; *Newly Available: Costs of Incarceration and Supervision in FY 2010*, U.S. COURTS, http://www.uscourts.gov/News/NewsView/11-06-23/Newly_Available_Costs_of_Incarceration_and_Supervision_in_FY_2010.aspx (last visited July 12, 2012). It therefore is not surprising that "[c]orrections spending, as a share of state budgets, rose faster than health care, education, and natural resources spending from 1986 to 2001." SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., ECONOMIC IMPACTS OF PRISON GROWTH 9 (2010).

213. Penologists agree that our incapacitation policy has reduced the crime rate, but they disagree over the amount. *See, e.g.,* ZIMRING, *supra* note 61, at 55 ("A best guess of the impact of post-1990 changes in incarceration rates on post-1990 declines in the crime rate would range from 10% of the decline at the low end to 27% of the decline at the high end.") (citation omitted); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSPECTIVES 163, 177-79 (2004); Joan Petersilia, *Beyond the Prison Bubble*, 35 WILSON QUARTERLY 1, 52 (2011) (imprisonment accounted for about 25% of the 1990s crime reduction). There also seems to be a consensus that, at some point, additional incarceration squanders public funds and increases the crime rate. The incarceration of large numbers of (principally) male adults decimates a neighborhood. It disrupts family and social life as fathers carom back and forth between prison and the community, or leave the community for extended periods. Incarceration also weakens the informal social controls that are a community's first line of defense against illegal or unruly behavior. *See, e.g.,* KLEIMAN, *supra* note 150, at 15; Jeremy Travis & Christy Visher, *Introduction: Viewing Crime and Public Safety Through the Reentry Lens*, in PRISONER REENTRY AND CRIME IN AMERICA 1, 3 (Jeremy Travis & Christy Visher eds., 2005).

ed bench is a particularly uncertain guardian. There is a serious risk that a judge who must face the voters for re-election will reflect public opinions when deciding cases.²¹⁴ That risk is accentuated here because legislators and prosecutors can double-team a judge who does not play along. Article III of the Constitution seeks to forestall that problem by guaranteeing life tenure and salary protection for federal judges.²¹⁵ In theory, that protection should enable federal courts to intervene when necessary. In reality, however, even federal courts have limited ability to address this problem.²¹⁶

The doctrinal explanation for the judiciary's weakness is that, although the Constitution abounds with procedural restrictions on the operation of the criminal process, with the exception of treason²¹⁷ and certain other obvious limitations imposed by the

214. See, e.g., Richard Briffault, *Judicial Campaign Codes after Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 181 (2004) ("87% of the state and local judges in the United States have to face the voters at some point if they want to win or remain in office.").

215. Federal judges hold office during their "good behavior." U.S. CONST. art. III, § 1. The Framers believed that only by affording judges protection against removal or impoverishment would courts be able to play their constitutionally assigned role of standing between a potentially autocratic or overweening government and individuals. See *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011). As one commentator has explained, judicial independence is critical if courts are to have the power to order the government to stand down:

The Founders believed that government abuse could be limited by separating the powers of government into three co-equal branches and that the judicial branch would curb misconduct by the legislative and the executive branches. An important part of the judiciary's participation in this balance of powers scheme was the power to refuse to give effect to unconstitutional misconduct by the other branches through judicial review. Finally, the power of judicial review would be significantly less effective if the other branches could effectively control the judiciary.

Hence arose the need for judicial independence.

William R. Casto, *If Men Were Angels*, 35 HARV. J.L. & PUB. POL'Y 663, 666 (2012) (citations omitted).

216. See, e.g., STUNTZ, *COLLAPSE*, *supra* note 1, at 83–84; Richman, *supra* note 1, at 65; Stuntz, *Pathological Politics*, *supra* note 1, at 528.

217. Article III, § 3, cl. 1 defines "treason" as follows: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." The Constitution refers to other subjects that may be punished via the criminal law, see, e.g., U.S. CONST., art. I, § 8, cl. 6 ("The Congress shall have Power To . . . provide for the Punishment of counterfeiting the Securities and current Coin of the United States"), but the only offense that it defines is treason.

Bill of Rights,²¹⁸ the Constitution is silent when it comes to limitations on Congress's ability to outlaw conduct.²¹⁹ Occasionally, the Supreme Court will rely on the Cruel and Unusual Punishment or Due Process Clauses to hold a statute unconstitutional.²²⁰ But the fear that the Court will be accused of reawakening the era of *Lochner*²²¹ has kept the Court from taking more than a few, tentative steps down that path.²²²

The political explanation for the judiciary's weakness is that the bench cannot pay the price of admission into a negotiation or logrolling contest: Judges have nothing to trade because they must decide cases impartially, regardless of the law or politics involved.²²³ Individual judges may sit on commissions created by Congress, the President, or the judiciary,²²⁴ and they may speak their mind in those positions.²²⁵ Judges may even write

218. See, e.g., U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

219. See, e.g., HUSAK, *supra* note 16, at 122–23; Richman, *supra* note 1, at 68. It was precisely this problem that led to Professor Henry Hart's famous lament, "What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?" Hart, *supra* note 152, at 431.

220. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Robinson v. California*, 370 U.S. 660 (1962); *Lambert v. California*, 355 U.S. 225 (1957).

221. See *Lochner v. New York*, 198 U.S. 45 (1905).

222. See, e.g., Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (1962).

223. See *Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship.").

224. See 28 U.S.C. §§ 331–332 (2006) (judicial councils); *Mistretta*, 488 U.S. at 380–408 (1989) (neither the Incompatibility Clause, U.S. CONST. art. I, § 6, cl. 2, nor separation of powers principles bar Article III judges from serving as U.S. Sentencing Commissioners); *id.* at 398–401 (listing examples where Supreme Court justices have served on commissions); *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 76 (1970).

225. *Mistretta*, 488 U.S. at 407–08:

[T]he participation of federal judges on the Sentencing Commission does not threaten, either in fact or in appearance, the impartiality of the Judicial Branch. We are drawn to this conclusion by one paramount consideration: that the Sentencing Commission is devoted exclusively to the development of rules to rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch. In our view,

law review articles or give speeches offering their personal views as to how legal analysis should be conducted or what the law is, was, or should be.²²⁶ But there is a limit to how far individual judges may go in those capacities before they overstep their judicial role and compromise their integrity.²²⁷ Federal courts, of course, cannot get involved in politics at all. The Article III case or controversy requirement prevents federal courts from acting outside the confines of a specific case²²⁸ and bars federal courts from issuing advisory opinions.²²⁹

B. *The Judiciary's Strengths*

Despite the judiciary's limitations, there remains a legitimate role for the courts. The judiciary's strengths are two-fold: Appellate courts offer dispassionate, nonpartisan reasons for the entry of their judgments, and the public respects the judiciary more than the other two branches. Over time, the opinions that courts write explaining the legal issues involved in their cases, the competing arguments on each side of the disputes, and the considerations that drive the courts toward their chosen dispositions perform a valuable pedagogic function. The reasons that

this is an essentially neutral endeavor and one in which judicial participation is peculiarly appropriate. Judicial contribution to the enterprise of creating rules to limit the discretion of sentencing judges does not enlist the resources or reputation of the Judicial Branch in either the legislative business of determining what conduct should be criminalized or the executive business of enforcing the law. Rather, judicial participation on the Commission ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch's own business—that of passing sentence on every criminal defendant. To this end, Congress has provided, not inappropriately, for a significant judicial voice on the Commission.

226. See, e.g., STEPHEN G. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) (revised Aug. 14, 2003), available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html.

227. See, e.g., 28 U.S.C. § 455 (2006) (federal judge must disqualify himself when "he has a personal bias or prejudice concerning a party" to a case, when he has "expressed an opinion concerning" the outcome of a case, or when his "impartiality might reasonably be questioned"); *Liteky v. United States*, 510 U.S. 540, 544 (1994).

228. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *Muskrat v. United States*, 219 U.S. 346, 352–57 (1911).

229. See, e.g., *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

courts offer for and against a particular rule help their colleagues on the bench, at the bar, and in the academy mull over a legal problem. In fact, it is fair to say that the courts are at their best when they reassess old doctrines in light of new circumstances and change common law rules to meet the demands of new settings.²³⁰ Moreover, lower courts may engage in this exercise even when they are bound to apply the law adopted by a higher court. The judiciary is not the military. Expressing disagreement with a rule is not insolence. On the contrary, even though an inferior court must follow rules adopted by superior courts, judges may criticize those rules in the hope that their reasons ultimately will lead higher courts, the legislatures, or the public to change the law.²³¹

There are several criminal law doctrines or statutory interpretation tools available to courts that they legitimately may use to prevent an injustice from occurring due to overcriminalization. Each one would better the administration of criminal justice today.

1. Revitalize the “Rule of Lenity”

The first option is to make better use of a canon of statutory construction, the “rule of lenity.” One of the oldest interpretative guidelines,²³² the rule of lenity requires that ambiguous criminal laws or terms of doubtful meaning in a criminal statute be construed in favor of a defendant.²³³ Said differently, when the gov-

230. Justice Holmes wrote the still-classic rationale explaining why courts should be willing to reappraise ancient common law rules that have outlived their usefulness: “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” HOLMES, *supra* note 152, at 469.

231. See, e.g., *Dronenburg v. Zech*, 746 F.2d 1579, 1582 (D.C. Cir. 1984) (statement of Bork, J., on denial of rehearing en banc) (criticizing the Supreme Court’s privacy decisions); *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970) (Friendly, J.) (criticizing Supreme Court decisions exempting professional baseball from antitrust laws); *United States v. Dennis*, 183 F.2d 201, 207–12 (2d Cir. 1950) (Learned Hand, J.) (criticizing the Supreme Court’s “clear and present danger” formulation and proposing a different test, which the Supreme Court later adopted on appeal), *aff’d* 341 U.S. 494 (1951).

232. See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

233. See, e.g., *United States v. Santos*, 553 U.S. 507, 514 (2008); *United States v. Bass*, 404 U.S. 336, 347–49 (1971) (collecting cases). Unless the text, structure, and

ernment's and a defendant's interpretations of a criminal law are equally persuasive, the tie goes to the defendant.²³⁴

The common law courts originally created the rule to save defendants from a bloodthirsty Parliament by narrowly construing the vast number of capital crimes then on the books.²³⁵ Today, the rule serves much the same purpose as the aphorism, drawn from the Bible,²³⁶ that it is better that ten guilty men go free than that one innocent man be convicted.²³⁷ The rationale for the rule is three-fold: The government ought not to hold someone accountable for acts not clearly outlawed, or subject him to punishment not clearly defined; Congress, not the courts, should define the criminal law and should do so with precision; and "the weight of inertia" should rest on the executive, which is best positioned to persuade Congress to draft criminal statutes clearly.²³⁸

Unfortunately, however, the rule of lenity has become a disfavored canon of statutory interpretation. The Supreme Court

history of the act establish that the government's interpretation is "unambiguously correct," a court must resolve any ambiguity in a defendant's favor. *United States v. Granderson*, 511 U.S. 39, 54 (1994).

234. *Santos*, 553 U.S. at 514. The rule has been described as a "junior version of the vagueness doctrine." HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 95 (1968).

235. "The origins of this policy lie in the legislative blood lust of eighteenth-century England. Faced with a vast and irrational proliferation of capital offenses, judges invented strict construction to stem the march to the gallows. Sometimes aptly called the rule of lenity, strict construction was literally 'in favorem vitae'—part of a 'veritable conspiracy for administrative nullification' of capital penalization." Jeffries, *supra* note 172, at 198 (footnotes omitted).

236. See *Genesis* 18:23–32 (God agrees to spare Sodom if ten righteous men can be found there).

237. See *Coffin v. United States*, 156 U.S. 432, 456 (1895) ("[I]t is better that ten guilty persons escape than that one innocent suffer") (quoting 2 WILLIAM BLACKSTONE, *COMMENTARIES* *358)).

238. See, e.g., *Santos*, 553 U.S. at 514. The rule does not rest on the fiction that people will read the penal code before acting. Instead, the rule of lenity requires that, were someone to make that effort, the criminal statutes must be written with sufficient clarity that a reader could understand them. See *McBoyle v. United States*, 283 U.S. 25, 27 (1931):

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

has made it clear that courts may rely on the rule to construe a statute, but the courts should never begin with it. Rather, a court always must start with the text of a statute and give its terms their ordinary, dictionary meaning.²³⁹ If that approach does not itself answer the question, the courts then must turn to the ordinary tools of statutory construction: the structure of the law, the problem that it appears to have been designed to solve, and, for some Justices at least, the legislative history of the statute.²⁴⁰ The rule of lenity does not often play an important role in that process.²⁴¹ Instead, it comes into play only when every other clue to the legislature's intent has been examined without success.²⁴²

The courts created the rule of lenity, and they have placed it last in the lineup of statutory construction canons. The Supreme Court could increase its prominence in statutory interpretation, or Congress could codify the rule in the hope that the courts would give it more emphasis. Perhaps this approach

239. *See, e.g.*, *Pasquantino v. United States*, 544 U.S. 349, 355–56 (2005). Of course, an exception exists where the statute defines a term. That definition trumps the one found in the dictionary.

240. At one time, it was entirely uncontroversial for the Supreme Court to rely on the legislative history of a statute when construing its terms. *See, e.g.*, *Howe v. Smith* 452 U.S. 473, 483–85 (1981). Justice Scalia has almost single-handedly dragged the Court in the opposite direction. *See, e.g.*, Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369 (1999).

241. The Supreme Court has applied the rule of lenity often in the last decade. *See, e.g.*, *Fowler v. United States*, 131 S. Ct. 2045, 2055 (2011); *Skilling v. United States*, 130 S. Ct. 2896, 2932–33 (2010); *United States v. Santos*, 553 U.S. 507, 515–19 (2008); *Clark v. Martinez*, 543 U.S. 371, 378–83 (2005); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408–09 (2003). More often than not, however, the Court read the statute so as to avoid implicating the rule. *See, e.g.*, *Kawashima v. Holder*, 132 S. Ct. 1166, 1176 (2012); *DePierre v. United States*, 131 S. Ct. 2225, 2237 (2011); *Abbott v. United States*, 131 S. Ct. 18, 31 (2010); *Dolan v. United States*, 130 S. Ct. 2533, 2536 (2010); *Barber v. Thomas*, 130 S. Ct. 2499, 2508–09 (2010); *Boyle v. United States*, 556 U.S. 938, 950–51 (2009); *Dean v. United States*, 556 U.S. 568, 577 (2009); *United States v. Hayes*, 555 U.S. 415, 429 (2009); *Burgess v. United States*, 553 U.S. 124, 135–36 (2008); *Lopez v. Davis*, 531 U.S. 230, 244 n.7 (2001); *Johnson v. United States*, 529 U.S. 694, 713 n.13 (2000); *United States v. Johnson*, 529 U.S. 53, 59 (2000).

242. *See, e.g.*, *Moskal v. United States*, 498 U.S. 103, 107–08 (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.”) (citations and internal punctuation omitted).

would help address this problem; perhaps not.²⁴³ The rule applies only when a statute is ambiguous, and “ambiguity” is a matter of degree.²⁴⁴ Moreover, interpretation of the law is a quintessentially judicial function,²⁴⁵ and one that is difficult to accomplish in a statute. In addition, the Supreme Court has expressed pique when Congress has directed it to apply rules of law that Congress itself has chosen as the correct rule of decision.²⁴⁶ There is the risk that the Court would treat such a statute as just another attempt to meddle in the Court’s affairs. Even if the Court treated any such law as a benign attempt to accomplish the original purpose of the rule as placing a thumb on the scale in the defendant’s favor, it would be difficult for Congress to articulate how much the balance should be shifted.

Nevertheless, there may be another way that the rule of lenity could prove useful. The Supreme Court has adverted to the “reasonable doubt” standard of proof in the criminal law when discussing the use of the rule of lenity.²⁴⁷ Today, the reasonable doubt standard most often is used as a shorthand expression of the due process requirement that the government must prove a defendant’s guilt to an extremely high degree of factual certainty to convict him of a crime and impose a punishment.²⁴⁸

243. Gryphon, *supra* note 13, at 721.

244. See, e.g., Moskal, 498 U.S. at 107–08 (1990):

[T]he “touchstone” of the rule of lenity “is statutory ambiguity.” Stated at this level of abstraction, of course, the rule “provides little more than atmospherics, since it leaves open the crucial question—almost invariably present—of *how much* ambiguousness constitutes . . . ambiguity.” Because the meaning of language is inherently contextual, we have declined to deem a statute “ambiguous” for purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the Government. Nor have we deemed a division of judicial authority automatically sufficient to trigger lenity. . . . If that were sufficient, one court’s unduly narrow reading of a criminal statute would become binding on all other courts, including this one.

(internal citations omitted).

245. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

246. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding unconstitutional the Religious Freedom Restoration Act, Pub. L. No. 101-141, 107 Stat. 1488 (1993) (currently codified at 42 U.S.C. §§ 2000bb–2000bb-4 (2006)), on the ground that the Supreme Court, not Congress, has the ultimate authority to interpret the Constitution).

247. See *Moskal*, 498 U.S. at 108.

248. See, e.g., *Victor v. Nebraska*, 511 U.S. 1 (1994); *Jackson v. Virginia*, 443 U.S. 307, 331 n.2 (1979); *In re Winship*, 397 U.S. 358, 364 (1970).

That use and understanding of the term, though, does not reflect its provenance or original meaning. The reasonable doubt standard emerged in the eighteenth century not to protect a defendant by requiring the jury to be nearly certain of his guilt before returning a verdict against him, but as a means of overcoming jurors' reluctance to render a guilty verdict due to their fear of eternal damnation if they mistakenly voted to convict an innocent man.²⁴⁹ The jury system developed in England as a replacement for other methods of adjudicating criminal charges, such as the ordeal or armed combat. Jurors initially proved reluctant to convict a defendant, however, in part because of their fear that they, too, would suffer by "blood" if they mistakenly convicted the accused. By the eighteenth century, however, the common law and English moral philosophy had combined to eliminate this disincentive. Together, they gave birth to the reasonable doubt standard to give jurors the confidence they needed that convicting a defendant would not expose them to the risk of an eternity in Hell. Trial courts used the reasonable doubt standard to advise jurors that they would not forfeit their salvation by returning a guilty verdict if they had no reasonable doubt of the defendant's guilt.²⁵⁰ The common law history of the reasonable doubt standard shows that it embodies at least as much a concern with the morality of a conviction as with the accuracy of the government's accusations and the jury's verdict.

The ultimate concern with the morality of a conviction is an important one for the courts in connection with the rule of lenity. The criminal law created that rule and the reasonable doubt standard at a time when the governing theology made acting as a juror a perilous undertaking because of the gravity of the judgment of conviction in a criminal case. The theological and moral concerns that prompted the courts to adopt those rules still have importance in our secular times. It is necessary to enforce the criminal law, but that enforcement always must be treated as a serious matter. The promiscuous use that Congress has made of the criminal law for the past thirty years in an effort to be "tough on crime" is anything but serious. "In-

249. See JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 186-200* (2008).

250. See *id.*

structing jurors forcefully that their decision is ‘a moral one,’ about the fate of a fellow human being, is, in the last analysis, the only meaningful modern way to be faithful to the original spirit of reasonable doubt.”²⁵¹ If appellate courts do not liberally apply the rule of lenity when interpreting criminal statutes, trial courts should apply the concern that gave rise to the reasonable doubt standard when instructing the jury. Courts should instruct the jurors in a criminal case that they must find beyond a reasonable doubt not only that the facts alleged by the government are true; that those facts violate the statute charged against the defendant; that, absent some legal error, the jurors’ decision is final; and that a guilty verdict exposes the defendant to a potentially serious penalty. As one scholar has reminded us:

There were tough-on-crime programs in the past just as there are now. But in our own tough-on-crime era, we find it easy to forget what Christian jurists remembered during the tough-on-crime era of the late fifteenth century: “[T]he judge must be brought to punish only in sorrow . . . if the judge glories in the death of a man, as no small number do in our age, he is a murderer.” We have lost any sense that the challenge facing any humane system of law is to protect the guilty as well as the innocent. That does not mean that we should glorify criminals, of course. The old moral theologians were right: it is a part of our sober public duty to punish. But it is a *sober* duty. Open-heartedly human beings condemn others in a spirit of humility, or duteousness, of fear and trembling about their own moral standing. That is what our ancestors, for all their bloodiness, believed; and it is why they spoke about “reasonable doubt.”²⁵²

If Congress will not take lawmaking seriously, then juries should be told to take their fact-finding responsibilities with the degree of seriousness that their job entails.

2. *Reject Flatly the “Trust Us” Argument*

The next logical step is to reject flatly, once and for all time, the government’s oft-expressed “trust us” argument. The government at times tries to defend its narrow interpretation of an

251. *Id.* at 212.

252. *Id.* (alteration in original) (footnote omitted).

overbroad law²⁵³ (or its overbroad interpretation of a vague law²⁵⁴) by representing to the courts that they can trust the government to be selective in the cases it brings. At bottom the argument is a plea for a favor that no court would grant to a private party: namely, reliance on the exercise of judgment in the enforcement of an overbroad criminal law such that the government will use it against only “really guilty” parties. The gravamen of the submission is that the law should be willing to allow some overbreadth in criminal statutes because it can rely on the “conscience and circumspection in prosecuting officers.”²⁵⁵ Justices Holmes and Frankfurter endorsed that argument long ago, and a position endorsed by those justices cannot readily be tossed aside. Nevertheless, it is wrong.

To start with, the government cannot keep that promise. There are more than ninety U.S. Attorneys nationwide and hundreds of individual attorneys in those offices and at the Justice Department headquarters.²⁵⁶ The Attorney General has the legal authority to supervise criminal litigation in the federal courts, but, even aided by his lieutenants at the department, he cannot oversee every criminal prosecution that the department brings. It is inevitable that some U.S. Attorneys or Justice Department Divisions will pursue a case that the Attorney General never would prosecute. Some targets will prove just too tempting for a prosecutor to pass up.²⁵⁷ Whatever the case may

253. See, e.g., *United States v. Stevens*, 130 S. Ct. 1577 (2010) (rejecting the government’s argument that a federal statute outlawing the depiction of animal cruelty for commercial gain, 18 U.S.C. § 48 (2006), should be read as limited to instances of extreme cruelty).

254. See, e.g., *Skilling v. United States*, 130 S. Ct. 2896, 2928–34 (2010) (rejecting the government’s argument that the term “the intangible right of honest services” in the mail and wire fraud statutes, 18 U.S.C. §§ 1341–42, 1336 (2006), should be construed to include dishonesty and self-dealing).

255. *United States v. Dotterweich*, 320 U.S. 277, 285 (1943) (Frankfurter, J.) (quoting *Nash v. United States*, 229 U.S. 373, 378 (1913) (Holmes, J.)).

256. See *supra* note 202.

257. See *United States v. Nosal*, 676 F.3d 854, 862 (9th Cir. 2012) (en banc). An oft-cited example is *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009). The government prosecuted Lori Drew under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2006), for bullying her daughter’s classmate on-line, under the theory that Drew had misrepresented her age in violation of the MySpace service agreement. For critical evaluations of the government’s decision to prosecute Drew, see Larkin, *supra* note 50, at 280–81; Ryan Patrick Murray, *MySpace-ing Is*

have been in 1913 and 1943, when Justices Holmes and Frankfurter endorsed this proposition, it no longer is the case in 2013 that the “conscience and circumspection in prosecuting officers” will prove inerrant.

More importantly, for more than two centuries the American legal system has been based on the proposition—set forth by Chief Justice John Marshall in *Marbury v. Madison* and unmentioned by Justices Holmes and Frankfurter—that ours is “a government of laws, and not of men.”²⁵⁸ In this context that principle means that it is the legislature’s job to draft criminal laws with precision, not the court’s job to fill in the blanks, and certainly not the prosecutor’s job to decide where the line between lawful and illegal conduct belongs. The government’s “Trust us” argument flips that principle on its head. It asks the courts to look the other way and force the public to bear the risk of a government that might not be trustworthy. That was the system of government before America became a nation, a system in which the King had the role of making those calls. But the Framers quite clearly opted for a different system of government, a system where the written Constitution interposes itself between the government and the public. One of the virtues of our system is that no one has to rely on the judgment of a benevolent king or fear the wrath of a malevolent one. *Marbury* made clear that it is the function of the written law to protect us against the mistakes of the former and the wickedness of the latter.

This step does not require the courts to do anything novel. The Supreme Court recently spurned the government’s “trust us” advances in *United States v. Stevens*.²⁵⁹ *Stevens* involved the constitutionality of a federal statute prohibiting the possession

Not a Crime: Why Breaching Terms of Service Agreements Should Not Implicate the Computer Fraud and Abuse Act, 29 LOY. L.A. ENT. L. REV. 475 (2009).

258. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

259. 130 S. Ct. 1577 (2010). The government made the same argument in the Stolen Valor Act, 18 U.S.C. §§ 704(b)–(c) (2006), case from last term, *United States v. Alvarez*, 132 S. Ct. 2357 (2012). See Brief for the United States at 55, *Alvarez*, 132 S. Ct. 2357 (No. 11-210) (“Section 704(b) permits *carefully chosen prosecutions*—where the government can prove that the defendant’s claim was false and that he was aware of its falsity—to deter all knowingly false claims to have received military honors.”) (emphasis added). The Court rejected that argument without comment. See 132 S. Ct. at 2543–51 (plurality opinion); *id.* at 2551–56 (Breyer & Kagan, J.J., concurring in the judgment).

of depictions of animal cruelty for commercial purposes.²⁶⁰ In attempting to defend the statute against a First Amendment challenge, the government argued that it interpreted the law as limited to depictions of “extreme cruelty” and that, in the exercise of its prosecutorial discretion, the Justice Department would not prosecute anyone “for anything less.”²⁶¹ The Court’s response was short and sweet: “[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”²⁶² That rationale also applies to the job of statutory interpretation. One of the principal criticisms of overcriminalization, in fact, is that it transfers interpretive authority from courts to prosecutors. No one should be obliged to rely on prosecutorial discretion to avoid being charged with a crime. As Professor Henry Hart put it, the notion that a person must rely for his freedom on the discretion of a prosecutor, rather than the clarity of the law, is “immoral.”²⁶³

3. *Reconsider the mistake of law defense*

Another step is to recognize that the federal courts may shape common law defenses to criminal charges. Consider self-defense. No federal statute defines that defense or permits a party to raise it, but it was inconceivable that a federal defendant could not raise a self-defense claim to a criminal charge in the

260. 18 U.S.C. § 48 (2006).

261. 130 S. Ct. at 1591 (quoting Reply Brief for the United States at 6–7, *Stevens*, 130 S. Ct. 1577 (No. 08–769)).

262. *Id.*

263. Henry M. Hart made the point well:

Moral, rather than crassly utilitarian, considerations re-enter the picture when the claim is made, as it sometimes is, that strict liability operates, in fact, only against people who are really blameworthy, because prosecutors only pick out the really guilty ones for criminal prosecution. This argument reasserts the traditional position that a criminal conviction imports moral condemnation. To this, it adds the arrogant assertion that it is proper to visit the moral condemnation of the community upon one of its members on the basis solely of the private judgment of his prosecutors. Such a circumvention of the safeguards with which the law surrounds other determinations of criminality seems not only irrational, but immoral as well.

Hart, *supra* note 152, at 424 (footnote omitted).

eighteenth, nineteenth, or twentieth centuries, and it remains inconceivable today. The English common law courts recognized that doctrine,²⁶⁴ the state courts further refined it,²⁶⁵ and the federal courts, including the Supreme Court, have done so as well.²⁶⁶ Self-defense is just one of a good-sized, grab-bag of defenses recognized today.²⁶⁷ Another one that the courts should consider in an appropriate case is a “mistake of law” defense.

Relying on the proposition that “ignorance of the law is no excuse,” the courts generally have refused to recognize a mistake of law defense.²⁶⁸ Nonetheless, there is a strong argument to be made that the courts should reconsider their position.²⁶⁹ The ignorance-is-no-defense principle came into being at a time when there were few criminal offenses, and the entire corpus of criminal law was coincident with the moral code.²⁷⁰ That is no longer true today. Since early in the twentieth century, legisla-

264. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *183–85; MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 478–84 (Thomas Dogherty, ed., London, E. Rider, Little-Britain 1800) (1678); FIONA LEVERICK, KILLING IN SELF-DEFENCE 6 (2006).

265. See, e.g., LAFAVE, *supra* note 51, § 10.4 at 569–82; Joseph H. Beale, Jr., *Retreat From a Murderous Assault*, 16 HARV. L. REV. 567 (1903).

266. See, e.g., *Brown v. United States*, 256 U.S. 335, 343–44 (1921) (construing self-defense doctrine); *Rowe v. United States*, 164 U.S. 546, 555–58 (1896) (same); *Beard v. United States*, 158 U.S. 550, 555–56 (1895) (same).

267. See generally GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW §§ 10.1–10.5, at 759–875 (1978). For examples of other defenses, see, e.g., *Jacobson v. United States*, 503 U.S. 540, 548–49 (1992) (entrapment defense); *United States v. Bailey*, 444 U.S. 394, 409–15 (1980) (duress or necessity defense); *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 673–75 (1973) (defense of reliance on opinions of government officials interpreting a federal law within their jurisdiction); *Sinclair v. United States*, 279 U.S. 263, 299 (1929) (reliance on advice of private counsel); *Davis v. United States*, 160 U.S. 469, 476–77 (1895) (insanity defense).

268. See, e.g., *Bryan v. United States*, 524 U.S. 184, 193 (1998); *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (“Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law.”); *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833) (“It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.”).

269. This argument is developed at length in Meese & Larkin, *supra* note 44.

270. See, e.g., LAFAVE, *supra* note 51, § 1.2(f); JOHN SALMOND, JURISPRUDENCE 426–27 (8th ed. 1930) (“The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right.”); Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 644 (1940) (“[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as ‘custom.’”); Meese & Larkin, *supra* note 44, at 733–37.

tures have used the penal law to enforce regulatory programs that are designed to deal with the modern industrial state by making it a crime to commit acts that, from the common law through the nineteenth century, were enforced only (if at all) by tort law. Today, however, there are more than 4,000 federal criminal laws alone, and the number of regulations affecting the reach of the criminal code has been estimated to exceed 300,000.²⁷¹ The criminal justice system also no longer resembles the community-based systems that existed at common law. They have become large, bureaucratic machines that, particularly in urban areas, are designed not to police community norms among neighbors and acquaintances, but to deal with commission of crimes by strangers.²⁷² The combination of those changes often makes it possible for a person to stumble over an unknown regulatory proscription with potentially severe consequences.²⁷³ Judicial adoption of a mistake of law defense therefore is a natural common law development in the defense of crimes, a process that the Supreme Court often has pursued without fear of overreaching its bounds.²⁷⁴

A mistake of law defense also draws on principles animating the void-for-vagueness doctrine, which directs courts to hold unenforceable individual criminal laws too vague to be readily understood.²⁷⁵ The difference is simply the level of generality: The void-for-vagueness doctrine focuses on one specific law, whereas a mistake of law defense also finds another application in cases where the thicket of criminal laws makes understanding

271. See Meese & Larkin, *supra* note 44, 739–40.

272. See *id.* at 733–37.

273. See *id.* at 739–48, 742 n.98 (collecting cases).

274. See *supra* notes 268–69.

275. As the Supreme Court explained in *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (footnote omitted), “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.” Accordingly, “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (citations omitted); see also, e.g., *FCC v. Fox Television Stations Inc.*, 132 S. Ct. 2307, 2317 (2012); *Chicago v. Morales*, 527 U.S. 41 (1999). See generally Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (discussing the historical development of the void-for-vagueness doctrine).

them too difficult to demand of “a person of ordinary intelligence.”²⁷⁶ In that setting, the courts could apply the “mistake of law” doctrine to afford protection against criminal prosecution of conduct that is neither dangerous nor blameworthy.²⁷⁷

Finally, it is possible that Congress could eliminate needless criminal laws by culling them from the United States Code individually or by substituting a new, comprehensive criminal code. Congress also could limit criminal liability to blamewor-

276. *United States v. Harriss*, 347 U.S. 612, 617 (1954). The classic statement of this argument is Professor Herbert Packer’s:

If the function of the vagueness doctrine is, as is so often said in the cases, to give the defendant fair warning that his conduct is criminal, then one is led to suppose that some constitutional importance attaches to giving people such warning or at least making such warning available to them. If a man does an act under circumstances that make the act criminal, but he is unaware of those circumstances, surely he has not had fair warning that his conduct is criminal. If “fair warning” is a constitutional requisite in terms of the language of a criminal statute, why is it not also a constitutional requisite so far as the defendant’s state of mind with respect to his activities is concerned? Or, even more to the point, if he is unaware that his conduct is labeled as criminal by a statute, is he not in much the same position as one who is convicted under a statute which is too vague to give “fair warning”? In both cases, the defendant is by hypothesis unblameworthy in that he has acted without advertence or negligent inadvertence to the possibility that his conduct might be criminal. If warning to the prospective defendant is really the thrust of the vagueness doctrine, then it seems inescapable that disturbing questions are raised, not only about so-called strict liability offenses in the criminal law, but about the whole range of criminal liabilities that are upheld despite the defendant’s plea of ignorance of the law.

Packer, *supra* note 6, at 123–24 (footnotes omitted); *see also, e.g.*, Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 687 (1976) (footnotes omitted) (quoting J. BARLOW, *ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE* (1792), *reprinted in* 3 *THE ANNALS OF AMERICA* 504, 511 (1968)):

An early objection to *ignorantia legis* was that it embodied the same unfairness as *ex post facto* laws, at least when applied to ignorance of “positive regulations, not taught by nature.” An author surveying American customs and institutions and comparing them with their European counterparts wrote in 1792: “Where a man is ignorant of [a positive regulation], he is in the same situation as if the law did not exist. To read it to him from the tribunal, where he stands arraigned for the breach of it, is to him precisely the same thing as it would be to originate it at the time by the same tribunal for the express purpose of his condemnation.

(alteration in original).

277. For a discussion of the meaning of “nonblameworthy” conduct and the scope of the mistake of law defense, *see* Meese & Larkin, *supra* note 44.

thy conduct by refining the elements of existing criminal laws and by ensuring that any new ones conform to whatever general requirements are added to the statutes on the books. Congress took tentative steps in that direction after the American Law Institute adopted the Model Penal Code, but the most recent comprehensive federal reform of the federal criminal process, the Comprehensive Crime Control Act of 1984,²⁷⁸ was limited to reform of criminal procedure (for example, bail and sentencing), and did not systematically revise the substantive code provisions.²⁷⁹ There is some indication that Congress is considering traveling down that path again.²⁸⁰ It is far simpler, though, for the courts to create a mistake of law defense by common law adjudication (or for Congress to do so by a single piece of legislation) than for Congress to go through a statute-by-statute reexamination of each specific offense in the federal criminal code. The problem caused by overcriminalization is that the average person does not know what the law prohibits because of the tremendous increase in the number of offenses. A mistake of law defense not only directly addresses that problem, but it does so in every case by allowing the courts to shape the defense's contours so that it applies whenever it is reasonable to do so. Congress can certainly act more quickly than the courts by legislating a mistake of fact defense. But the courts are better than Congress at defining what is "reasonable" by resort to the classic common law, case-by-case, adjudicatory process. To be sure, Congress could give the courts some direction, for example, by excluding some crimes from the defense or allocating the burdens of production and proof,²⁸¹ but the courts ultimately are in a better position than any legislature to refine the contours of a mistake of law defense.

278. Pub. L. No. 98-473, 98 Stat. 1976.

279. The story is told in Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291 (1993), and Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

280. See *supra* note 19 (listing witnesses who testified before Congress on comprehensive criminal code reform).

281. See Meese & Larkin, *supra* note 44.

4. Find a Place for the Desuetude Doctrine

Desuetude is an ancient and unconventional legal doctrine that empowers courts to suspend the operation of a statute after a long period of intentional governmental nonenforcement and notorious public disregard for it.²⁸² Desuetude plays the same role for the criminal law that spring cleaning does for garages, basements, and attics: It enables items to be discarded that perhaps once were thought valuable but have not been used recently. Various scholars have defended the doctrine on several grounds. Desuetude complements the “fair notice” principles undergirding the void-for-vagueness doctrine by recognizing that historically unprosecuted crimes (such as fornication) no longer signify conduct that society deems harmful or worth pursuing criminally. Desuetude also forces legislatures to take a clear position on the contemporary utility of moth-eaten laws that no longer make a material contribution to any legitimate penological goal. The doctrine helps offset the potential that delegation of criminal lawmaking authority to regulatory agencies can be used to trip up parties who follow practices that are innocuous, customary, and widespread. Desuetude helps avoid the risk of illegitimately motivated charging decisions. Finally, the doctrine compensates for the modern-day obsolescence of the common law, self-correction mechanism that existed when courts had authority to define the reach of the criminal law, but that has become defunct now that only legislatures and administrative agencies can define criminal offenses.²⁸³

The desuetude doctrine, however, has never gained even a toehold in Anglo-American law.²⁸⁴ The principal objection to it

282. See, e.g., Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 81 (1976); Note, *Desuetude*, 119 HARV. L. REV. 2209, 2210 (2006). Desuetude traces its lineage to the Roman jurist Julian, who believed that the tacit consent of the people could repeal a statute as effectively as the legislature. *Id.* at 2211 & n.10.

283. See, e.g., Stuntz, *Pathological Politics*, *supra* note 1, at 591–98; *Desuetude*, *supra* note 282, at 2215–28.

284. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 337–38 (5th ed. 1956):

On the [European] continent there was some speculation during the middle ages as to whether a law could become inoperative through long-continued desuetude. In England, however, the idea of prescription and the acquisition or loss of rights merely by the lapse of a particular length

rests on separation-of-powers principles. For a court to nullify a statute that was enacted in compliance with Article I and that offends no specific provision of the Constitution would be tantamount to exercise of a veto that the Constitution grants only to the President.²⁸⁵ The desuetude doctrine also would enable a president, through nonenforcement of a law, to flout the judgment of Congress that a bill should become law despite his veto.²⁸⁶ Neither result is consistent with Congress's lawmaking role. As the Supreme Court put it in *District of Columbia v. John R. Thompson Co.*,²⁸⁷ "The failure of the executive branch to enforce a law does not result in its modification or repeal. The repeal of laws is as much a legislative function as their enactment."²⁸⁸ Separation-of-powers principles therefore supply a powerful argument that a federal court cannot invoke desuetude as a barrier against a federal indictment. Moreover, the doctrine invites entirely subjective decisionmaking. Deciding exactly how many prosecutions constitute "use" of a statute, like determining the interval that should be used to aggregate that number, requires a court to engage in an undirected line-drawing exercise that is susceptible to abuse. Arguments such as these explain why the desuetude doctrine is nearly an orphan today.²⁸⁹

Although a federal court may not be able to invoke desuetude as an independent basis for refusing to enforce a criminal

of time found little favour. Moreover, statutes were definitely pronouncements of the Crown, and the royal prerogative included the maxim that "time does not run against the King". There was consequently no room for any theory that statutes might become obsolete.

See also *Allen*, *supra* note 282, at 81–85 & nn. 97–109. See generally *Desuetude*, *supra* note 282, at 2210 n.6 (collecting authorities).

285. See U.S. CONST. art. I, § 7, cl. 2 (bill passed by both houses of Congress must be presented to the President for his signature or veto); *INS v. Chadha*, 462 U.S. 919, 945–48 (1983); *id.* at 960–67 (Powell, J., concurring) (a one-house legislative veto is tantamount to that chamber acting as a court to overturn an executive action).

286. See U.S. CONST. art. I, § 7, cl. 2 (Congress can override the President's veto by the two-thirds vote of each house).

287. 346 U.S. 100 (1953).

288. *Id.* at 113–14 (citations omitted); *cf. Ex parte United States*, 242 U.S. 27, 42 (1916) ("[T]he possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced.").

289. Only West Virginia seems to allow desuetude to serve as a criminal defense. *Desuetude*, *supra* note 282, at 2211–12.

statute,²⁹⁰ the doctrine may be a relevant factor in statutory interpretation, especially in conjunction with the rule of lenity. The total or near absence of criminal prosecutions under a statute for a decade after its enactment can constitute strong evidence that the conduct it prohibits is simply not considered immoral by society. In such a case, a common law court well might decide to be especially wary of interpreting a statute to reach conduct that lies at the periphery of its text. The practical interpretation of a regulatory statute by the parties against whom it is applied should not be disregarded in a criminal prosecution, even though it may matter little in a civil case.²⁹¹ A court should not fear that applying the rule of lenity to an unused or underused criminal statute would put an important government interest at risk. Desuetude therefore may have a role in the interpretation of criminal laws that are unenforced or sparingly used.

5. *Adopt a Common Law Presumption
for Concurrent Sentencing*

One of the most important criminal procedure developments in the last 25 years has been the rise of the role of the jury for sentencing purposes. Outside the context of punishments fixed by statute,²⁹² sentencing has generally been the prerogative of the trial judge.²⁹³ That all changed twice in the last quarter of the twentieth century. The first change came in the 1980s when legislatures sought to cabin trial judges' sentencing discretion via

290. Federal separation-of-powers principles do not bind the states, *see, e.g.*, *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937), so a state court could invoke the desuetude doctrine in an appropriate case as a matter of state common law or state constitutional law.

291. Generally speaking, unless Congress has answered a legal issue in the text of a statute, a reasonable interpretation adopted by the agency responsible for implementing the statute will carry the day. *See Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

292. *See, e.g.*, 18 U.S.C. § 1111 (2006) (mandatory life imprisonment under federal first-degree-murder statute); 21 U.S.C. § 848(b) (2006) (mandatory life imprisonment for violation of drug "super-kingpin" statute); *see also* *Chapman v. United States*, 500 U.S. 453, 467 (1991) (Congress may impose mandatory sentences).

293. *See, e.g.*, *Williams v. New York*, 337 U.S. 241 (1949); *see also* *Walton v. Arizona*, 497 U.S. 639 (1990); *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Hildwin v. Florida*, 490 U.S. 638 (1989); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Proffitt v. Florida*, 428 U.S. 242 (1976); *cf.* *Cabana v. Bullock*, 474 U.S. 376 (1986).

truth-in-sentencing laws and guideline sentencing systems.²⁹⁴ The second change came in 2000, when the Supreme Court for the first time recognized a right to jury sentencing.²⁹⁵ Since 2000, the prosecution must prove to the jury beyond a reasonable doubt any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum.²⁹⁶ The jury's findings cap the maximum sentence that a convicted defendant can receive, and the trial judge still maintains complete discretion to select a punishment under that cap, regardless of what any applicable sentencing guidelines might direct.²⁹⁷ Federal trial judges once again possess the virtually unlimited sentencing discretion they enjoyed for most of the twentieth century. The consequence is that courts have the opportunity to develop a common law of sentencing.

Courts could help address overcriminalization through sentencing by adopting a strong presumption that a single act, event, or transaction should be treated as one crime. Often there are overlapping or multiple statutes that can be charged against a defendant.²⁹⁸ But it is unclear whether Congress intended a defendant to receive a separate punishment for each

294. *See, e.g.,* *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding the constitutionality of the Sentencing Guidelines over various separation-of-powers-based challenges); Larkin, *supra* note 197.

295. *See* *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *see also* *S. Union Co. v. United States*, 132 S. Ct. 2344 (2012); *Cunningham v. California*, 549 U.S. 270 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002).

296. *S. Union Co.*, 132 S. Ct. at 2350; *Blakely*, 542 U.S. at 303–04; *Apprendi*, 530 U.S. at 490.

297. In *Booker*, the Supreme Court held that the Federal Sentencing Guidelines violated a defendant's rights under the Sixth Amendment Jury Trial Clause. The effect of *Booker* was to make those guidelines merely advisory. Post-*Booker* decisions also have explained that the Federal Sentencing Guidelines should not even be deemed presumptively reasonable. *See* *Pepper v. United States*, 131 S. Ct. 1229 (2011); *Dillon v. United States*, 130 S. Ct. 2683 (2010); *Nelson v. United States*, 555 U.S. 350 (2009); *Spears v. United States*, 555 U.S. 261 (2009); *Irizarry v. United States*, 553 U.S. 708 (2008); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Rita v. United States*, 551 U.S. 338 (2007).

298. *See, e.g.,* *Pasquantino v. United States*, 544 U.S. 349, 358 n.4 (2005) (“Any overlap between the antismuggling statute and the wire fraud statute is beside the point. The Federal Criminal Code is replete with provisions that criminalize overlapping conduct. The mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either.”) (citations omitted).

one.²⁹⁹ The federal courts therefore could presume that Congress enacted multiple laws to ensure that an offender could not escape liability by pointing to an element of one or more statutes that the government could not prove, but also presume that a defendant should not receive multiple punishments simply because the prosecutor could find multiple sections of the penal code to charge in an indictment. For example, a defendant who lies regarding a matter “within the jurisdiction of” the federal government has made a false statement that can be prosecuted under Section 1001 of Title 18. There is no reason to add to the punishment he should receive for that offense an additional term of imprisonment for violating one or more of the host of other false statement statutes in the U.S. Code.³⁰⁰ A presumption limiting the sentence that a defendant could receive for violating multiple statutes could go a long way toward eliminating the risk that a defendant will plead guilty just to avoid a more severe sentence.

6. *Remember That “Sauce For the Goose Is
Sauce for the Gander”*

The final step that the courts could take, ironically, is a step back: a reexamination of courts’ willingness to expand the concept of vicarious criminal liability to reach parties other than the specific individuals who actually carry out a particular crime. The courts have expanded the concepts of vicarious and

299. The leading case on multiple punishments is *Blockburger v. United States*, 284 U.S. 299 (1932). The critical discussion in *Blockburger* was directed at the question whether a defendant *could be convicted* of two separate offenses, not whether he *should be separately and cumulatively punished* for both. *See id.* at 304:

Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . [T]his court quoted from and adopted the language of the Supreme Court of Massachusetts . . . : “A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.” Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed.

(citations omitted).

300. *See GREEN, supra* note 48, at 161 & n.2

corporate criminal liability without ever pausing to consider whether the same rules that apply to private parties should also apply equally to the *government* when *its* personnel engage in misconduct. Should the courts consider this question, it is dubious that many of the current vicarious liability rules would exist.

The common law treated corporations as the artificial entities that they are: creatures of law, not biology.³⁰¹ The result was that corporations could not be charged with a crime; only their personnel could.³⁰² The Supreme Court changed that law in 1909, ruling in *New York Central & Hudson River Railroad Co. v. United States*³⁰³ that, just as a corporation can be held vicariously liable in tort for the negligent actions of its employees, so, too, can a corporation be held vicariously criminally liable for its employees' misconduct. Public policy demanded that rule, the Court explained, given the manifold harms that a modern industrial corporation can inflict on the public.³⁰⁴

Since then, the Justice Department has successfully persuaded the courts to expand that rule in several ways. The government has successfully urged some courts to adopt the "collective knowledge" doctrine, under which a corporation's knowledge is deemed to be the sum of everything that its employees know when they act within the scope of their responsibilities, even if

301. See, e.g., *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.").

302. See, e.g., *Anonymous Case (No. 935)*, 88 Eng. Rep. 1518, 1518 (K.B. 1701) ("A corporation is not indictable, but the particular members of it are."); *State v. Great Works Milling & Mfg. Corp.*, 20 Me. 41, 44 (1841) ("It is a doctrine then, in conformity with the demands of justice, and a proper distinction between the innocent and the guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business, and not the corporation should be indicted.").

303. 212 U.S. 481 (1909).

304. *Id.* at 495–96. The literature on the subject of corporate criminal liability is enormous. For a sampling of it, see John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386 (1981); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833 (2000); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996).

no one person knew all the necessary facts.³⁰⁵ The government also has successfully argued that corporate officers and managers should be held liable not only for their own wrongdoing, but also for the misdeeds of personnel they supervise or others below them in the organizational chart. In the food and drug area, for instance, a senior official can be held liable for violations committed by line personnel working at one of the company's facilities.³⁰⁶ The criminal liability of corporations and senior corporate officials parallels their tort liability.

Interestingly, courts never stopped to ask whether the same rules should apply to the government and its officers. If a corporation can be held liable for the wrongdoing of its employees as long as they are not on a "frolic and detour," why not a government department or agency?³⁰⁷ If a company president can be held liable for the misdeeds of the firm's personnel, why not the Attorney General or the Director of the FBI? It is no answer that they could not carry out the duties of their offices if they were forced to manage the day-to-day work of every Justice Department lawyer and FBI agent; the same is true of the president of a large corporation. Even if proximate cause principles would render the Attorney General or the FBI Director too remote from an actual violation to be held responsible,³⁰⁸ the U.S. Attorney for the district involved or the Special Agent-in-Charge of the local FBI Office could be a more plausible target,

305. See, e.g., *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987); KATHLEEN F. BRICKEY, ENVIRONMENTAL CRIME 25 (2008).

306. See, e.g., Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. ch. 9 (2006)); *United States v. Park*, 421 U.S. 658 (1975) (company president can be held liable for presence of rodent droppings at company warehouse).

307. It might be impossible as a practical matter for the Justice Department to prosecute a sitting Attorney General in the absence of public outrage, but there is no *per se* principle of criminal law barring such a prosecution. If the United States as sovereign can prosecute the President, see *United States v. Nixon*, 418 U.S. 683, 692–97 (1974), it can prosecute the Attorney General. For the argument that federal officials should be subject to criminal prosecution for violation of the federal and state environmental laws, see Margaret K. Minister, *Federal Facilities and the Deterrence Failure of Environmental Laws: The Case for Criminal Prosecution of Federal Employees*, 18 HARV. ENVTL. L. REV. 137, 168–82 (1994).

308. Cf., e.g., *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (district attorney cannot be held civilly liable under 42 U.S.C. 1983 (2006), for a prosecutor's failure to disclose exculpatory evidence absent proof that he knew or should have known of the failure and the need for training).

as they have but one office to manage.³⁰⁹ A plant manager does not receive immunity from prosecution for the misdeeds of his employees even though he cannot monitor everything going on in his plant, yet we appear to treat federal officials differently. The reason cannot be that there are adequate safeguards in place to ensure no wrongdoing can occur: Recent “miscues” put the lie to that claim.³¹⁰ There is nothing special about being a senior federal official that should render them immune from criminal liability.³¹¹ To be sure, lower-level government employees and law enforcement officers are entitled to rely on reasonable directions from senior officials that what they have been ordered to do is lawful. But any member of the public may rely on the legal opinion of senior federal officials that particular conduct is lawful.³¹²

The point is not that courts should be eager to hold senior federal officials vicariously liable for the criminal actions of subordinates. Even if the government ever were to bring such a

309. *Cf., e.g., Groh v. Ramirez*, 540 U.S. 551 (2004) (federal agent liable for participating in a search under a clearly invalid search warrant); *Burns v. Reed*, 500 U.S. 478 (1991) (prosecutor is entitled to absolute immunity for participation in probable cause hearing, but not for giving advice to the police); *Anderson v. Creighton*, 483 U.S. 635 (1987) (law enforcement officer is entitled to qualified immunity for conduct that a reasonable officer could deem lawful).

310. *See, e.g., OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF ATF'S OPERATION FAST AND FURIOUS AND RELATED MATTERS* (2012); *OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, REPORT: INVESTIGATION OF ALLEGATIONS OF PROSECUTORIAL MISCONDUCT IN UNITED STATES V. THEODORE F. STEVENS, CRIM. NO. 08-231 (D.D.C. 2009) (EGS)*; Report to Hon. Emmett G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009, *In re Special Proceedings*, 825 F. Supp. 2d 203 (D.C. Cir. 2011) (No. 09-0198).

311. Of course, in some instances there is. Ambulances may run stop signs en route to a hospital with a patient in critical condition; DEA agents may buy drugs in an undercover operation; police officers may use force that otherwise would constitute battery in order to make an arrest; and so forth. *See, e.g., LAFAVE, supra* note 51, § 10.7, at 590–600 (discussing defenses available to law enforcement officers). Status as a federal officer is not, however, a license to break the law. *See, e.g., United States v. Nixon*, 418 U.S. 683, 692–97 (1974).

312. The Due Process Clauses prohibit the government from holding a party criminally responsible for engaging in conduct that a government official has expressly authorized him to perform. *See, e.g., United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 670–75 (1973); *Cox v. Louisiana*, 379 U.S. 559, 568–74 (1965); *Raley v. Ohio*, 360 U.S. 423, 425–26 (1959). The doctrine sometimes goes by the name of “entrapment by estoppel” because both principles underlie the defense. *See, e.g., United States v. Smith*, 940 F.2d 710, 714 (1st Cir. 1991); *United States v. Tallmadge* 829 F.2d 767, 773 (9th Cir. 1987).

prosecution, neither the Attorney General nor the Director of the FBI should be held criminally liable for the crimes of lawyers and agents over whom they really lacked true control. The point is that private parties should be afforded the same treatment as government officials. Courts should refuse to adopt novel readings of criminal statutes which expand criminal liability to reach conduct that they find immoral or unethical and that they fear otherwise will go unpunished.³¹³ Courts might be willing to hesitate before expanding the breadth of federal criminal laws, and to force Congress to define crimes with precision and specificity, if they looked at the issue from the perspective of the government officials' *own* liability. After all, sauce for the goose should be sauce for the gander.

V. HOPE?

Is there a reasonable hope that the courts will step up to the plate when doing so risks earning the label of being "soft on crime" or being a "judicial activist"? The knowledge that the likely beneficiaries of judicial intervention are corporate executives, who have available the legal advice necessary to avoid stepping on a land mine, gives even less cause for hope.

Yet, it is not judicial activism to apply an ancient canon of statutory construction or to develop federal common law for defenses or punishments. Federal courts have crafted rules of statutory interpretation and defenses to crimes since early in the nineteenth century,³¹⁴ and trial courts exercised sentencing discretion even earlier.³¹⁵ It is not activism to use established doctrines to ensure that the judgment entered in a particular case reflects the intended application of a law. It is reasonable to ask if a harsh criminal statute truly commands a judge to accept an unjust guilty plea or jury verdict, or to impose a sen-

313. Consider in that regard the morphing of the federal mail fraud statute from a law designed to redress use of the mails to defraud private parties into a mechanism for imposing federal ethical standards on private parties, as well as state and local government officials. See *Skilling v. United States*, 130 S. Ct. 2896, 2926–33 (2010); *id.* at 2935–38 (Scalia, J., concurring).

314. See, e.g., *Beard v. United States*, 158 U.S. 550, 555–56 (1895) (self-defense); *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (lenity).

315. See, e.g., Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 692–97 (2010) (noting early sentencing discretion).

tence, that he knows to be excessive. That hesitation is justified by the fact that Congress largely has abdicated its responsibility to set intelligent criminal justice policy in favor of scoring easy political points. Scholars have argued that, for most of the twentieth century, the Supreme Court was forced to play “a backstopping role” in the criminal process since neither legislatures nor police departments were willing to restrain the day-to-day behavior of the police on the street.³¹⁶ The same need exists today in the case of the substantive criminal law.

Limits on the discretion of the courts has merely resulted in the transfer of that discretion to the legislature and the prosecutor. Each one can operate in a black box, making it difficult to discern exactly why a decision was made or what factors were most important other than politics and other features ordinarily deemed irrelevant or inappropriate to normative decision-making. Faced with a sometimes incoherent action by the legislature, courts would be acting responsibly, not lawlessly, by asking Congress to make clear its intent to achieve the unreasonable result of imprisoning a morally blameless individual. Congress may respond by issuing a statutory edict to that effect, which the courts must implement.³¹⁷ But even then there is considerable didactic value to the courts’ decision to highlight clearly unjust results that a robotic, assembly-line-like, politically manipulated legislative process can inflict on people unlucky enough to get tripped up by the substantive criminal law. The public respects the judiciary because it believes that, by and large, judges are not motivated by the same crass political considerations that they see playing out in the other two branches of government. Courts should repay the public’s confidence by using their rulings as an opportunity to explain the reasons for their rulings to the media and a public unversed in the criminal law beyond prime-time television.

Finally, it is no argument that the remedies suggested in this Article should be rejected because the principal beneficiaries might be senior corporate management officials, rather than someone else further down the white- or blue-collar food chain. First, any claim that senior corporate officials are the intended

316. Amsterdam, *supra* note 3, at 790.

317. An independent constitutional restriction, of course, could limit its implementation.

beneficiaries is a canard. Corporate directors, chief executive officers (CEOs), presidents, and other high-level officers are not involved in the day-to-day operation of plants, warehouses, shipping facilities, and the like. Lower level officers and employees, as well as small business owners, bear that burden. What is more, the latter individuals are in far greater need of the benefits from the remedies discussed in this Article precisely because they must make decisions on their own without resorting to the expensive advice of counsel. The CEO for DuPont has a white-shoe law firm on speed dial; the owner of a neighborhood dry cleaner does not. Senior officials may or may not need the aid of the remedies proposed here; lower-level officers and employees certainly do.³¹⁸

To be sure, the rules endorsed here are not, and could not be, limited to the lower echelons of a corporation or to persons earning below a certain income. The indigent can demand the appointment of counsel at the government's expense, but the criminal law has never created a similar divide for defenses to crimes, with some available only for the poor. Just as the sun "rise[s] on the evil and on the good" and it rains "on the just and the unjust,"³¹⁹ these remedies will aid senior corporate executives as well as entry-level employees. But any remedy for any of the ills caused by overcriminalization will have that effect. We ought not to reject remedies for a serious problem because the neediest are not the only ones who will benefit from them.

CONCLUSION

Professor Herbert Packer offered two metaphors for the criminal justice system in the 1960s.³²⁰ The Crime Control Model works like an assembly line. Cases, like automobiles, are processed until completion—from arrest, through plea negotiations, to sentencing. Each case is unique for each defendant, but

318. "A *New York Times* survey in 1979 (July 15) found that the federal government rarely brought criminal cases against major corporations. A top Justice Department official said that 'it's just a lot easier for us to pick on the small guy,' because large firms with their complex organizations are both difficult to investigate and capable of generating major legal resistance." YEAGER, *supra* note 106, at 37 n.15.

319. *Matthew* 5:45 (King James).

320. See Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

is just like every other case in the system. The goal is to keep the assembly line moving. By contrast, the Due Process Model resembles a minefield. It stipulates that every case must be individually and carefully scrutinized to ensure that no one is wrongly convicted or unjustly punished. The goal is to ensure that every decision is made as accurately as possible.

Overcriminalization does not readily fit into either model. The question is not how quickly or well each car should be built, or how the assembly line should be shaped, equipped, or staffed to keep cars moving smoothly toward the finish line. The question is not even how large of a plant we should construct to ensure that we can build an endless series of cars, trucks, or anything else that moves on four wheels. Those would be reasonable questions if the legislative process had a filter at the front or back to keep useless or decrepit vehicles from clogging the highways. We have no such filter, however, short of the elections that we hold for federal office every two, four, or six years. More importantly, nothing mediates between politicians who trick the public into believing that more criminal laws means less crime and the members of the public who do not know any better or who do but do not care. Populism rules.

If judges are persuaded that overcriminalization is a problem, they are in a position to change this situation without becoming "activist." Several criminal law doctrines can be dusted off and used by courts that would protect morally blameless parties from winding up in prison due to the rent-seeking conduct of private parties and the vote-seeking behavior of political actors. At a minimum, judges can use their prestige to tell the public the true effect of the overexpansion of criminal laws and why it is harmful.

At the end of the day, it is the public who ultimately has the power to solve the problem of overcriminalization. If we are lucky, the judiciary will tell the public that it must do something with that power, and the public will halt this phenomenon. If not, the overcriminalization machine will grind on, as it has for the last forty years, and we all will be worse off for it.