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Daniel C. Richman
Columbia Law School, drichm@law.columbia.edu

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Defining Crime, Delegating Authority - How Different are Administrative Crimes?

Daniel Richman¹

Abstract: As the Supreme Court reconsiders whether Congress can so freely provide for criminal enforcement of agency rules, this Essay assesses the critique of administrative crimes through a Federal Criminal Law lens. And it explores the extent to which this critique carries over to other instances of mostly well-accepted, delegated federal criminal lawmaking - to courts, states, foreign governments, and international institutions. By considering these other delegations through the lens of the administrative crime critique, the Essay destabilizes that critique's doctrinal foundations. It then suggests that if one really cares about not the abstract "liberty" said to be protected by the separation of powers, but the lived "liberty" gained through careful and accountable criminal lawmaking, free from the pathologies that have bedeviled federal criminal law for more than a century, then administrative crimes are normatively quite attractive.

Although -- putting aside drug cases -- they comprise a relatively small fraction of the federal criminal prosecutions brought each year,² a number of remarkably varied defendants are regularly charged with criminal offenses that were largely defined by administrative agencies -- executive or independent. The insider trader charged with violating the SEC's Rule 10b-5; the drug trafficker in newer and ever more dangerous substances; the violator of Iranian sanctions; the obstructive immigration policy protestors at a senator's office;³ the greedy hoarders of personal protective equipment during the COVID-19 pandemic⁴ -- each has been charged based on a Congressional delegation of substantial criminal lawmaking authority to a bureaucratic process.

While the Supreme Court has occasionally looked askance at these "administrative crimes," they remain a well-accepted feature of federal criminal law,⁵ albeit one strongly condemned by those

¹ Paul J. Kellner Professor, Columbia Law School. Huge Thanks to Tom Merrill, Kate Stith, Michael Dreeben, Jeremy Kessler, Jessica Bulman-Pozen, Sam Buell, Sarah Seo, Peter Strauss, Mike Park, Daphne Renan, Stephen Smith, John Rappaport, Payvand Ahdout, Gillian Metzger, Miriam Baer, Lori Damrosch, Alexandra Bowie, Alex Raskolnikov, and attendees at a Columbia workshop for extremely helpful comments, and Ben Covington, for extraordinary research assistance.

² Dep't of Justice, U.S. Attorneys' Annual Statistical Report, Fiscal 2019, tbl. 3A at 11 (2019), <https://www.justice.gov/usao/page/file/1285951/download> (noting of 69,412 defendants charged in fiscal 2019, 30,665 immigration cases; 13,704 drug cases; and 15,899 violence cases); Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 *Emory L.J.* 1, 6 (2012) (noting that drug cases comprised 30% of federal prosecutions in 2011).

³ *United States v. Gosar*, Case Nos. 19-306; 19-307; 19-308; 19-313; 19-315; 19-320, 2020 WL 231083 (W.D. Wash. Jan. 15, 2020) (protest at Senator Cantwell's office relating to immigration detention centers); see also *United States v. Mumford*, 2017 WL 652449, *3-4 (D. Or. Feb. 16, 2017) (prosecution for causing disturbance in federal courthouse); *United States v. Komatsu*, 18-cr-651 (ST) (E.D.N.Y. Jun. 4, 2019) (same).

⁴ Complaint and Affidavit in Support of Application for Arrest Warrants, *United States v. Bulloch*, No. 20-MJ-327 (filed E.D.N.Y. Apr. 27, 2020), <https://www.justice.gov/usao-edny/press-release/file/1271741/download> (prosecution for accumulating with intent to resell for excessive profit surgical masks that had been designated by the President as "scarce and critical material" under the Defense Production Act).

⁵ See *Loving v. United States*, 517 U.S. 748, 768–74 (1996) (finding appropriate congressional delegation to President to set aggravating factors in capital murder cases trial under military law). In *Loving*, the Court found "no absolute rule . . . against Congress' delegation of authority to define criminal punishments.," and noted: "We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations 'confine themselves within the field covered by the statute.'" *Id.* at 768 (first quoting *United States v. Grimaud*, 220 U.S. 506, 518 (1911); then citing *Touby v. United States*, 500 U.S. 160 (1991)).

worried about the anti-democratic creep of the Administrative State.⁶ This acceptance, however, may soon change. Last Term, in *Gundy v. United States*, a plurality of the Court found no violation of longstanding delegation principles in the criminal prosecution of a defendant for violating regulations promulgated by the Attorney General under the Sex Offender Registration and Notification Act (SORNA).⁷ The Chief Justice and Justice Thomas joined a scorching dissent by Justice Gorsuch that opened:

The Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation’s chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?⁸

Justice Alito, while finding the plurality’s specific application of nondelegation doctrine unobjectionable, noted: “If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”⁹ While Justice Kavanaugh took no part in the case, he later noted that Gorsuch’s dissent “raised important points.”¹⁰

Whether or not a majority favors recalibrating or jettisoning the “intelligible principle” standard for assessing delegations in general remains to be seen.¹¹ Nor did Gorsuch’s analysis in *Gundy* call out delegations of criminal lawmaking authority for special, more searching, scrutiny.¹² It is indeed possible that some of those joining the dissent, particularly the Chief Justice, are more concerned with regulatory delegation generally, and not criminal delegation specifically. Yet Gorsuch’s own position is quite clear, and it is not surprising that concerns about delegations often sound loudest in the criminal context (at least when national security is not implicated), where liberty interests are greatest and governmental authority most scrutinized. Indeed before coming to the Court and in the context of yet another SORNA case, Gorsuch wrote that “[i]t’s easy enough to see why a stricter rule” than the “intelligible principle” analysis “would apply in the criminal arena.”¹³ He explained:

The criminal conviction and sentence represent the ultimate intrusions on personal liberty and carry with them the stigma of the community’s collective condemnation — something quite different than holding someone liable for

⁶ See Brenner M. Fissell, When Agencies Make Criminal Law, 10 UC Irvine L. Rev. 855 (2020); Philip Hamburger, Is Administrative Law Unlawful (2014).

⁷ 139 S.Ct. 2116, 2129–30 (2019) (conurrence) (Kagan, J.)

⁸ Id. at 2131 (2019) (Gorsuch, J., dissenting).

⁹ Id. at 2131 (Alito, J., concurring in the judgment).

¹⁰ Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of cert.).

¹¹ See Kristin E. Hickman, Gundy, Nondelegation, and Never-Ending Hope, *The Regulatory Review*, July 8, 2019; Julian Davis Mortenson and Nicholas Bagley, Delegation at the Founding, 121 Colum. L. Rev. ___ (2021) (assessing future of Gundy dissent).

¹² See F. Andrew Hessick & Carissa Byrne Hessick, Nondelegation and Criminal Law, 107 Va. L. Rev. at *4 (2020). (“None of the opinions in the case asked whether Congress’s ability to delegate policy decisions ought to be assessed differently when the power being delegated is the power to determine the scope of criminal laws.”).

¹³ *United States v. Nichols*, 784 F.3d 666, 672-73 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of reh’g en banc), rev’d, 136 S. Ct. 1113 (2016).

a money judgment because he turns out to be the lowest cost avoider. . . . Indeed, the law routinely demands clearer legislative direction in the criminal context than it does in the civil and it would hardly be odd to think it might do the same here. . . . When it comes to legislative delegations we've seen, too, that the framers' attention to the separation of powers was driven by a particular concern about individual liberty and even more especially by a fear of endowing one set of hands with the power to create and enforce criminal sanctions. And might not that concern take on special prominence today, in an age when federal law contains so many crimes — and so many created by executive regulation — that scholars no longer try to keep count and actually debate their number?¹⁴

It thus doesn't take much tea-leaf reading to expect that, amid a general reconsideration of the Administrative State,¹⁵ the Court will be returning to the issue of administrative crimes soon. Any serious confrontation of that issue, however, requires a broader consideration of many aspects of Federal Criminal Law, for it turns out that administrative agencies are not the only entities to which Congress has dynamically delegated the power to define crimes -- the power to, on an on-going basis, establish the criminal offenses that federal prosecutors are empowered to charge.

Delegation indeed abounds in federal criminal law, going far beyond that to agencies and departments that are the usual grist of nondelegation doctrine discussions. Even as federal courts assiduously speak in statutory interpretation terms, a clear-eyed view of the role courts play in giving content to common-law terms; setting the scope of accessorial and entity liability; defining defenses; setting mens rea terms; and defining liability under criminal civil rights and antitrust statutes cannot avoid speaking in delegation terms. Dynamic delegation to state legislatures sets the elements of numerous federal criminal offenses, and, when there are gaps in federal coverage,¹⁶ state penal law is incorporated wholesale under the Assimilative Crimes Act. Even foreign law -- on such matters as wildlife regulation and bribery -- can be the basis of criminal prosecutions under several federal criminal statutes. The inclusion of marijuana on a Controlled Substances Act schedule was in part pursuant to an international treaty. And to define the federal piracy offense, courts look to the "law of nations."

The goal of this essay is largely positive. It seeks to assess the critique of administrative crimes not through an administrative law lens but a Federal Criminal Law one. To what extent does this critique carry over to other instances of mostly well-accepted, delegated, criminal lawmaking? Does doctrinal acceptance of formal or effective delegations to states, courts, foreign nations, perhaps even international organizations¹⁷ undercut the critique? Strengthen it?

¹⁴ *Id.*

¹⁵ See Gillian E. Metzger, Foreword: 1930s Redux: The Administrative State Under Siege, 131 *Harv. L. Rev.* 1, 5 (2017) (noting "With Justice Gorsuch on the Court, some constitutionally rooted pullback in deference doctrines appears increasingly likely.").

¹⁶ See Nikhil Bhagat, Note, Filling the Gap? Non-Abrogation Provisions and the Assimilative Crimes Act, 111 *Colum. L. Rev.* 77, 103 n.153 (2011) (collecting cases on whether agency regulations constitute an "enactment of Congress" for purposes of the ACA).

¹⁷ For a tour of contexts in which federal criminal lawmaking has been delegated, see Daniel C. Richman, Kate Stith & William J. Stuntz, *Defining Federal Crimes*, chap. 12 (2d ed. 2019).

As a normative matter, this essay is neither a full-throated defense of delegation nor a devastating rejoinder to those who question it. A critic of administrative crime might, for instance, stick to her guns and flatly condemn every non-congressionally defined criminal offense. But the plan is, first, to ring changes on the delegation theme, exploring the broad variety of partners that Congress has recruited to the federal criminal lawmaking project. Then, by applying the administrative crime critique to these delegations, I plan, as a positive matter, to destabilize that critique's doctrinal foundations.

From a broader perspective of federal criminal law, however, a powerful normative point does emerge: If one really cares, not about the abstract "liberty" said to be protected by the separation of powers, but the lived "liberty" gained through careful and accountable criminal lawmaking, free from the pathologies that have bedeviled Federal Criminal Law for more than a century, then administrative crimes are promising indeed, as is crime definition by any number of legislative sources other than Congress. Put differently, once one considers Congress' track record and the strategic action of federal prosecutors, criminal law may be a special case for nondelegation doctrine. But not in the way that Justice Gorsuch and critics of administrative crimes suggest.

This article will start, in Part I, by exploring the contours of the challenge to the sweep, even legitimacy, of administrative crimes. On what constitutional or jurisprudential principles have these challenges been based? The most straightforward and simple critique is based on the structure of the Constitution. In a world in which Legislative Powers have been vested in Congress, and Legislative Supremacy is constantly hailed as the touchstone to Federal Criminal Law, why should it be acceptable for Congress to abdicate its responsibilities and delegate constitutional authority lying at the core of sovereign powers? The critique draws yet more power from the very nature of criminal law, which is supposed to represent some authoritative community condemnation, not a bureaucratic promulgation.

In Part II, I turn to the reality of federal criminal law, in which Congress has delegated sweeping crime definition powers -- often explicitly but sometimes implicitly -- to a variety of governmental institutions that are far less responsive to Congress than are federal agencies. I consider how, to varying degrees, these powers are exercised by federal courts; states; foreign nations, and international institutions (or norms), and I explore the extent to which these delegations find (or don't find) justification in rationales that immunize them from the administrative crimes critique. Moreover, these delegated crime definition powers, like those to agencies, are conditional on the exercise of an extraordinary delegation that Gorsuch's critique leaves unscathed: the delegation to federal prosecutors of absolute gatekeeping power over the bringing of criminal charges, and unreviewable control over which legally applicable offenses will charge.¹⁸

Finally, in Part III, I reconsider the normative appeal of administrative crimes once they are placed in the context not just of prosecutorial authority but of the political economy of federal criminal legislation, which has been extraordinarily resistant to change. Not only is it highly questionable that the elimination of administrative crimes -- which to prosecutors are often mere items on a longer menu -- would change the mix of defendants actually prosecuted, but any such curtailment would

¹⁸ See Daniel M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469 (1996); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. Rev. 757 (1999); Hessick & Hessick, *Delegation at 46*.

considerably reduce the specificity and clarity of federal criminal law. Embrace of formal “liberty” values along the lines of Justice Gorsuch’s critique would likely come at the expense of actual liberty.

II. Critique of Administrative Crimes

A. Administrative Crimes

Those condemning the creep of “overcriminalization” in federal criminal law regularly decry the impossibility of determining the precise number of criminal offenses and point to the number of regulatory violations that can amount to crimes as a key cause of this indeterminacy.¹⁹ And it is certainly true, as Darryl Brown has noted, that “willful violations of civil regulation are routinely and innumerably defined as crimes.”²⁰

Consider *United States v. Grimaud*,²¹ which, in 1911, established that Congress could “delegate power to an agency to adopt regulations subject to criminal penalties, provided that Congress itself legislated the penalties.”²² In 1897, Congress authorized, initially, the Interior Department and, later, the Agriculture Department “to adopt rules regulating the “occupancy and use” of public forests to protect them from “destruction” and “depredations.”²³ Violation of these rules could be pursued either criminally or civilly. When the Forest Service found civil injunctions inadequate, it prevailed on the Justice Department to replead regulatory violations as criminal indictments. And so a California shepherd who violated forest grazing rules found himself charged with a misdemeanor.²⁴ Upholding the charges, the Supreme Court reasoned that the Secretary of Agriculture had simply acted within the scope of his delegation when promulgating the rules, and the violation of these rules had been “made a crime, not by the Secretary, but by Congress.”²⁵

Grimaud licensed the broad and varied regime that exists today.²⁶ Thus, section 32 of the 1934 Exchange Act made violation of certain rules promulgated by the Securities & Exchange

¹⁹ Michael B. Mukasey & Paul J. Larkin, J., *The Perils of Overcriminalization 2*, Heritage Found.: Legal Memo (Feb. 12, 2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM146.pdf; Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, 15 *Engage: J. Federalist Soc’y Prac. Groups* 14 (2014), <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/7KYhKjjxOLT0n6wrwvJ8BpPNLkH8JeLkkiwRPeow.pdf>.

²⁰ Darryl K. Brown, *Criminal Law’s Unfortunate Triumph Over Administrative Law*, 7 *J. L. Econ. & Pol’y* 657, 664 (2011) (“[I]nstead of civil sanctions and administrative remedies replacing criminal ones, criminal law continues to duplicate and supplement administrative law so pervasively in regulatory regimes, that criminal offenses accompany civil ones, and willful violations of civil regulation are routinely and innumerably defined as crimes.”)

²¹ 220 U.S. 506 (1911).

²² Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with Force of Law*, 116 *Harv. L. Rev.* 467, 501-02 (2002).

²³ *Grimaud*, 220 U.S. at 522.

²⁴ See Logan Sawyer, *Grazing, Grimaud, and Gifford Pinchot: How the Forest Service Overcame the Classical Nondelegation Doctrine to Establish Administrative Crimes*, 24 *J.L. & Pol.* 171 (2008).

²⁵ *Grimaud*, 220 U.S. at 522.

²⁶ *Grimaud* was foreshadowed by *In re Kollock*, 165 U.S. 526, 533 (1896) (upholding conviction for selling margarine without complying with labelling rules set by the Commissioner of Internal Revenue, and noting “[t]he criminal offence [was] fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail”); see Mark D. Alexander, *Increased Judicial Scrutiny for the Administrative Crime*, 77 *Cornell L. Rev.* 612, 617-18 (1992).

Commission into federal crimes punishable by up to twenty years imprisonment.”²⁷ Among these is Rule 10b-5, which is regularly charged in securities fraud cases, most notably those involving insider trading. The Ocean Dumping Act makes it a criminal offense to “knowingly violat[e] any provision of this subchapter, [or] any regulation promulgated under this subchapter.”²⁸ Indeed, “Congress regularly passes statutes that delegate to an agency the power to promulgate regulations, while providing that violations of the yet to be written regulations will be crimes subject to statutory penalties.”²⁹ Quite a few of these offenses, dynamically incorporating agency rules, are misdemeanors,³⁰ but many, like securities fraud, are punished quite severely.

B. Nature of Critique

The historical unwillingness³¹ of the Supreme Court to find any delegation before it to lack the requisite “intelligible principle” has long been noted, and complained about by those on and off the Court.³² As will be seen, it is impossible to fully separate the issue of administrative crimes from the more general scholarly, and to some extent, judicial debate about whether closer judicial scrutiny of all congressional delegations of rulemaking authority to agencies is appropriate.³³ Yet this Article will try mightily to do so both because it offers no special perspective on that larger debate, and because I do not foresee the Court implementing an across-the-board nondelegation doctrine with teeth. *Gundy*, however, may well presage a re-examination of *Grimaud* and its progeny, and the issue of administrative crimes seems well worth peeling off for separate treatment to the extent possible.

For an extended elaboration of the sins of delegating specifically criminal lawmaking authority to agencies, the most useful sources are recent pieces by Andrew and Carissa Hessick,³⁴ and by Brenner Fissell.³⁵ Foundational to this critique are, appropriately, basic doctrines placing substantive and procedural limits on criminal laws. A long line of cases rejecting the existence of a common law of

²⁷ Securities Exchange Act of 1934, Pub. L. No. 73-291, § 32, 48 Stat. 881, 891 (codified at 15 U.S.C. § 78ff).

²⁸ 33 U.S.C. § 1415(b) (2012); see Fissell at 860-61 for this and other examples.

²⁹ Richard E. Myers II, Complex Times Don't Call for Complex Crimes, 89 N.C. L. Rev. 1849, 1852 (2011).

³⁰ See, e.g., *Grimaud*, 220 U.S. at 509; 40 U.S.C. § 1315(c) (“Law enforcement authority of Secretary of Homeland Security for protection of public property”) (maximum punishment of 30 days for violation of GSA rules).

³¹ See Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 322 (2000) (stating the nondelegation doctrine has had “one good year and [over 200] bad ones,” since the Supreme Court’s only two invalidations of statutes on nondelegation grounds came in 1935); cf. Keith E. Whittington & Jason Iuliano, The Myth of the Nondelegation Doctrine, 165 U. Pa. L. Rev. 379, 382–83, 417–29 (2017) (arguing, based on a dataset of 2500 federal and state supreme court decisions in the nineteenth- and early-twentieth centuries, that “[t]here was no golden age in which the courts enforced a robust nondelegation doctrine”).

³² See William K. Kelley, Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument, 92 Notre Dame L. Rev. 2107, 2108-15 (2017); Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 333 (2002); Philip Hamburger, Is Administrative Law Unlawful? 377-402 (2014); Douglas H. Ginsburg & Steven Menashi, Our Illiberal Administrative Law, 10 N.Y.U. J. L. & Liberty 475, 491–93 (2016); see also Julian Davis Mortenson and Nicholas Bagley, Delegation at the Founding, 121 Colum. L. Rev. ___ (2021) (citing other sources); Metzger, *supra*, at 22–24 (describing criticisms of delegation levied by Justices Thomas and Alito).

³³ For an excellent overview of the debate, see Jeffrey A. Pojanowski, Neoclassical Administrative Law, 133 Harv. L. Rev. 852, 858-82 (2020).

³⁴ Hessick & Hessick, *supra*

³⁵ Fissell, *supra*.

crimes provides support for a rule of absolute legislative control in this area.³⁶ This separation of powers analysis not only would protect criminal law from non-Congressional incursions but would make Congress squarely accountable for it.³⁷

The unique nature of criminal law is captured by the “rule of lenity,” under which statutory ambiguities are to be construed in favor of criminal defendants.³⁸ As Dan Kahan has noted, this rule “is best understood as a ‘nondelegation doctrine’”³⁹ peculiar to the liberty interests implicated by criminal statutes. In other spheres, Congress might be permitted to legislate in broad strokes, leaving other government actors to fill in the details. But by “compel[ing] legislatures to detail the breadth of prohibitions in advance of their enforcement,” as Zachary Price explains, the rule of lenity ensures that Congress is wholly accountable to voters when criminalizing conduct.⁴⁰

Coming at the issue from a different angle is the void-for-vagueness doctrine, which demands that a criminal law “clearly define the conduct it prescribes,”⁴¹ not only to prevent inappropriate legislative delegation but to give notice to citizens and avoid arbitrary enforcement. If this doctrine’s objects of analysis are statutes broadly providing that violations of rules promulgated by an agency are criminal offenses (and not, say, the rules themselves) the relevant “laws” will often be troublingly vague indeed. Moreover, the argument goes, standard administrative law doctrines counselling judicial deference to an agency’s interpretation of statutes (*Chevron*)⁴² and its own regulations⁴³ (*Auer/Kisor*) make matters even worse, if they are allowed to override the criminal law default of lenity.⁴⁴

Separation of powers promotes not merely accountability but liberty itself.⁴⁵ A second aspect of that principle is less about who makes the laws than ensuring that legislative power is quite separate from prosecutorial power. In *Gundy*, Gorsuch drew particular attention to the fact that the Justice Department had both promulgated the rule being enforced criminally and chose to enforce it against *Gundy*. Yet the self-dealing problem goes beyond cases where the promulgating and the enforcing agency are the same. Madison’s point -- “There can be no liberty where the legislative and executive

³⁶ Hessick & Hessick at 21 (quoting cases); see *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.); (“[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”).

³⁷ See Harlan S. Abrahams & John R. Snowden, *Separation of Powers and Administrative Crimes: A Study of Irreconcilables*, 1 S. Ill. U. L.J. 1, 4-5 (1976) (separation of powers doctrine precludes agencies from making criminal law).

³⁸ See Richman, Stith, & Stuntz, at 97 (on “so-called rule of lenity”).

³⁹ Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 347.

⁴⁰ Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *Fordham L. Rev.* 885, 887 (2004).

⁴¹ *Skilling v. United States*, 561 U.S. 358, 415 (2010) (Scalia, J., concurring in part and concurring in the judgment).

⁴² See *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (suggesting “*Chevron* has no role to play in the interpretation of criminal statutes”), rev’d, 137 S. Ct. 1562, 1567 (2017); Patrick J. Glen & Kate E. Stillman, *Chevron Deference or the Rule of Lenity? Dual-Use Statutes and Judge Sutton’s Lonely Lament*, 77 *Ohio St. L.J. Furthermore* 129, 137–38 (2016); Kristin Hickman, *Of Lenity, Chevron, and KPMG*, 26 *Va. Tax Rev.* 905 (2007).

⁴³ See Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 *Harv. L. Rev.* 164, 184 (2019).

⁴⁴ See *Guedes v. BATF*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J.) (statement) (noting *Chevron* “has no role to play when liberty is at stake”).

⁴⁵ See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 *U. Pa. L. Rev.* 1513, 1534 (1991).

powers are united in the same person” -- can easily extend to the argument that liberty is best protected when a coincidence of the policies of two different branches is a prerequisite for prosecution.⁴⁶ Adherence to the requirements of bicameralism and presentment not only inherently limits the supply of laws generally, but ensures that a body whose members might fear overreaching prosecutions of themselves and their friends passes on all criminal laws.⁴⁷ It also slows the rate of legal change, since “agencies can change laws more quickly than Congress can.”⁴⁸

Hessick & Hessick go further and suggest that reasons like “expertise, compromise, and efficiency” “that are traditionally offered in support of broad delegations to agencies do not support—or at least do not strongly support—delegations in the criminal law.”⁴⁹ A specialized expertise justification resting on an agency's use of objective data and methodologies does not extend, Hessick & Hessick suggest, to the moral judgments or even utilitarian calculi that ought to be at the heart of criminal lawmaking. Agencies, they argue, lack

relevant expertise in determining the costs and benefits of criminal sanctions. Their expertise is in the substantive area that they regulate—such as the environment, the securities markets, and the airwaves. They do not specialize in determining either the benefits of criminal prohibitions to potential victims and communities or the costs of criminal convictions to offenders, their families and communities, and the department of prisons.⁵⁰

Perhaps the most damning critique of administrative crimes arises out of the very nature of criminal law, which, at least in a liberal democracy, is supposed to express the moral condemnation of specific conduct by the community, speaking through its representatives. Fissell notes: “The insight of expressivist punishment theory is that the symbolic communication of condemnation must come from the community and that therefore the duties imposed by criminal law must be determined by a democratic institution.”⁵¹ Bureaucratic condemnation is no substitute, even where an agency is supposedly “accountable” to the legislature.⁵²

C. Scope of Critique

The forgoing critique could support a categorical condemnation of criminal offenses defined by administrative agencies.⁵³ Yet Justice Gorsuch's *Gundy* dissent suggested that executive agencies could play a limited, factfinding role in crime-definition.⁵⁴ Even the needed reform of the “intelligible principle” standard, he noted, would leave the analysis in *Touby v. United States*.⁵⁵ -- which

⁴⁶ Hessick & Hessick at 25-26 (quoting *The Federalist* No. 47).

⁴⁷ *Id.* at 27.

⁴⁸ *Id.* at 35.

⁴⁹ *Id.* at 39.

⁵⁰ *Id.* at 41.

⁵¹ Fissell, *supra*, at 891

⁵² *Id.* at 893-95.

⁵³ Hessick & Hessick, *supra*, at 54.

⁵⁴ See Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 *Harv. L. Rev.* 164, 184 (2019) (noting that this principle “requires a theory that distinguishes between presidential ‘factfinding’ and presidential ‘policymaking’”).

⁵⁵ 500 U.S. 160, 166 (1991).

upheld the Attorney General’s ability to temporarily schedule a controlled substance -- largely undisturbed.⁵⁶

In *Touby*, the defendant, prosecuted for manufacturing temporarily-scheduled “Euphoria,” claimed unconstitutional delegation, arguing “that something more than an “intelligible principle” is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions.”⁵⁷ Noting that its “cases are not entirely clear on the point,” the Court found the statutory provision “passes muster even if greater congressional specificity is required in the criminal context.”⁵⁸ While the Court addressed only the Attorney General’s temporary scheduling powers, lower courts have found its analysis a fortiori applies to the more rigorous permanent scheduling process, and that “collateral attacks are not permitted in criminal cases involving permanent scheduling orders.”⁵⁹ Since very significant sentencing consequences follow from the scheduling of a drug at a particular level, the Controlled Substances Act comes close indeed to authorizing crime definition by the very Department in charge of prosecutions. Yet this, the most frequently charged administrative crime, would apparently survive Gorsuch’s scrutiny.⁶⁰

Gorsuch also seemed open to delegations that “at least arguably, implicate[] the president’s inherent Article II authority.”⁶¹ His reference “at least arguably” might be taken as a quiet acceptance of a line of cases, recently noted by Alexander Volokh, allowing Congress to “delegate without an intelligible principle even when the delegate lacks inherent power, as long as the subject matter of the delegation is interlinked with an area where the delegate does have inherent power.”⁶² Thus extended, the executive power to define crimes, or at least substantially contribute to crime definition, would easily encompass the President’s devising aggravating factors in capital murder cases tried under military law;⁶³ the executive designation of “foreign terrorist organizations” that someone can be prosecuted for providing “material assistance” to,⁶⁴ and the President’s ability to promulgate sanctions under the International Emergency Economic Powers Act that, if violated, can be prosecuted criminally.⁶⁵ Presumably, the prosecution of hoarders of personal protective equipment during the COVID-19 pandemic⁶⁶ would similarly pass muster, as the sweeping terms of

⁵⁶ 139 S Ct. at 2141 (Gorsuch, J., dissenting).

⁵⁷ 500 U.S. at 165-66.

⁵⁸ *Id.* at 166.

⁵⁹ *United States v. Forrester*, 616 F.3d 929, 937 (9th Cir. 2010); see also *United States v. Carlson*, 87 F.3d 440, 446 (11th Cir.1996).

⁶⁰ See *supra* note ___ (collecting sources on annual number of federal drug cases).

⁶¹ *Id.* at 2140; see, e.g. *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 382-85 (1813).

⁶² Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 *Emory L.J.* 1391, 1394 (2017).

⁶³ *Loving v. United States*, 517 U.S. 748 (1996).

⁶⁴ 18 USC § 2339B (Providing material support or resources to “foreign terrorist organizations” designated by Secretary of State); see *United States v. Ali*, 799 F.3d 1008, 1019–20 (8th Cir. 2015) (rejecting nondelegation challenge); *United States v. Hammoud*, 381 F.3d 316, 331 (4th Cir. 2004) (en banc);

⁶⁵ 50 U.S.C. § 1701 et seq.; *United States v. Dhafir*, 461 F.3d 211 (2d Cir. 2006) (upholding IEPPA prosecution against delegation challenge); *United States v. Ali Amirnazmi*, 645 F.3d 564 (3d Cir. 2011) (same); see also *United States v. Chi Tong Kuok*, 671 F.3d 931 (9th Cir. 2012) (rejecting nondelegation challenge in prosecution under Arms Export Control Act).

⁶⁶ Complaint and Affidavit in Support of Application for Arrest Warrants, *United States v. Bullock*, No. 20-MJ-327 (filed E.D.N.Y. Apr. 27, 2020), <https://www.justice.gov/usao-edny/press-release/file/1271741/download>

Defense Production Act of 1950⁶⁷ arguably engage the domestic manifestations of the President’s national security powers.⁶⁸

The line Gorsuch would draw between criminal delegations subject to intense scrutiny and those he would find more within the executive’s ken is a bit hazy, as may be inevitable in such projects.⁶⁹ He did cite *United States v. Grimaud*, with seeming approval.⁷⁰ Did he really find the broad delegation of criminal authority in that case acceptable? Or was he simply nodding his respect for stare decisis, notwithstanding his willingness to question that principle in other contexts?⁷¹

One need not, however, be sure of which administrative crimes would survive Gorsuch’s analysis to suspect that a great many would not, which is, presumably, his goal. When presented, while on the Tenth Circuit, with a tussle on the grounds of the Denver Federal Center that led the defendant’s criminal prosecution for violating regulations promulgated by the General Services Administration and the Department of Homeland Security, Gorsuch mused (as the defendant had not raised the issue):

Can Congress so freely delegate the core legislative business of writing criminal offenses to unelected property managers at GSA? Might this arrangement, though arrived at with Congress’s assent, still blur the line between the Legislative and Executive functions assigned to separate departments by our Constitution? . . . Thanks to this and many other similar and similarly generous congressional delegations, the Code of Federal Regulations today finds itself crowded with so many “crimes” that scholars actually debate their number. . . . And quite apart from the separation of powers questions these arrangements pose, what about the “reasonableness” limitation found in the specific delegation before us? In the statute at issue here, Congress says agency officials may prescribe only “reasonable” criminal penalties within the limits it has prescribed (30 days in prison, usually no more than \$5,000 in fines). Who’s to say what in that range is reasonable, and by what measure?⁷²

Gorsuch’s approach to criminal delegations would substantially end the current regime in which, in many policy spaces, broad delegated rulemaking authority to agencies is accompanied by statutory provisions making violations of certain regulations a federal crime. Relative to all federal prosecutions, these crimes are not often prosecuted. But the cases that are brought, or threatened, are of particular significance to individuals operating within the regulatory purview and perhaps even more to firms, because of both the respondeat superior approach federal law takes to corporate criminal liability and the collateral consequence that attend corporate criminal convictions.⁷³ Moreover, while institutional fissures between civil and criminal enforcement authorities often

⁶⁷ 50 U.S.C. §§ 4501 et seq.

⁶⁸ See *United States v. Curtiss-Wright Export*, 299 U.S. 304 (1936).

⁶⁹ See Sunstein, *Nondelegation Canons*, supra note __, at 326 (“[I]he real question is: How much executive discretion is too much to count as ‘executive?’”).

⁷⁰ 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

⁷¹ See Christopher R. Green, *Justice Gorsuch and Moral Reality*, 70 *Ala. L. Rev.* 635, 663-66, 663 n.17 (2019) (cataloging opinions in which Justice Gorsuch has called for reconsideration of precedent, and discussing broader trends in his approach to stare decisis).

⁷² *United States v. Baldwin*, 745 F.3d 1027, 1030-31 (10th Cir. 2014); see also *United States v. Wasylyshyn*, 979 F.3d 165 (2d Cir. 2020) (upholding similar prosecution without addressing delegation issue).

⁷³ Richman, *Stuntz & Stith*, ch. 11.

preclude fully rationalized sorting of the egregious (criminal) from the merely bad,⁷⁴ the possibility of a criminal referral surely affects the civil regulatory regime as well, providing coercive leverage to civil enforcers.

Substantially curtailing the administrative crimes regime along the lines of the Gorsuch critique would thus be quite consequential, at least to the extent that federal prosecutors lost certain charging options. Yet even more consequential, as we will see, would be the wholesale application of the critique's rationale to other aspects of federal criminal law.

III. Exploring Other Criminal Law Delegations

Let us turn to other contexts in which entities other than Congress have long been permitted to define federal crimes. To what extent are they susceptible to Gorsuch's critique of administrative crimes, because they too suffer from deficiencies of democratic accountability, community condemnation, notice, and any separation-of-powers check? If they are to survive the adoption of that critique, how might they be justified? And what light might their justification shed on the terms of the critique?

A. Courts

Much of the analytical rigor of the Gorsuch critique comes from a proposition deeply rooted in the structure of the Constitution and two centuries of judicial pronouncements: Federal criminal law is created by Congress and Congress alone.⁷⁵ Yet a closer look at the context of those pronouncements reveals, first, that they related only to Congress's authority vis a vis the courts -- denying the existence of federal common law crimes -- and, second, that they are true only if one counts the broad delegation of lawmaking authority to courts to still be a species of congressional "creation."⁷⁶

Any exploration of judicial crime definition faces a terminological challenge. Federal courts almost invariably speak the language of "statutory interpretation," not lawmaking. Equally, if one rejects judicial self-categorization and looks for effective delegation, some degree of the latter can always be found.⁷⁷ Every application of even a well-tailored statute to a specific case is likely to involve interpretative work that can -- if one is so perversely inclined -- be called "delegation." The

⁷⁴ See Anthony O'Rourke, *Parallel Enforcement and Agency Interdependence*, 77 *Md. L. Rev.* 985 (2018); Daniel C. Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, in *The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz* 64 (Michael Klarman et al. eds., 2012).

⁷⁵ See *United States v. Bass*, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."); Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 *U. Va. L. Rev.* 965, 972 n. 17 (2019) (collecting citations).

⁷⁶ For recognition that denial of the existence of a federal common law of crimes is largely a "myth," see Dan M. Kahan, *Lenity and Federal Common Law Crimes*, *The Supreme Court Review*, Vol. 1994, 345, 347 (1994); Dan M. Kahan, *Is "Chevron" Relevant to Federal Criminal Law*, 110 *Harv. L. Rev.* 469, 471 (1996) ("the proposition that federal crimes are 'solely creatures of statute' is a truth so partial that it is nearly a lie"); Julie O'Sullivan, *The Federal Criminal "Code" is a Disgrace: Obstruction Statutes as Case Study*, 96 *J. Crim. L. & Criminology* 643, 666 (2006); Hessick, *Myth*, *supra*.

⁷⁷ See Lemos, *The Other Delegate*, *supra*, at 421 ("some degree of lawmaking inheres in the task of statutory interpretation and application").

challenge, which I hope to meet, is to highlight significant areas of federal criminal law where courts have exercised particular license to define crimes, and where the congressional contribution has been more like authorization or acquiescence than definitional -- in short, areas where judicial crime definition has much in common with agency rulemaking that becomes the basis of administrative crimes. To be sure, the fiction is generally that Congress licensed common-law type development by either explicitly deploying a common law term or implicitly legislating against an intended backdrop of dynamic common law principles. But fiction it is, absent heroic imputations of congressional will or aggressive reliance on theories of ratification. Not only do such areas of judicial crime definition abound, but they cannot be explained as a species of asymmetrical textualism, where courts deploy common law principles to constrain liability but not expand it. As we will see, while constraining efforts may well dominate, such principles have led to expansion as well.

The key case usually cited for the proposition that only Congress can create crimes and that courts lack the power to create common law crimes is *United States v. Hudson & Goodwin*.⁷⁸ That case did not hold that courts cannot have power to create crimes, merely that such power -- if it existed -- could come only from Congress, which had not so delegated it.⁷⁹ Still, it reflected a growing acceptance that crime definition was not within the judicial province. Years before, while riding circuit, Justice Samuel Chase had found it as “essential” “that Congress should define the offences to be tried, and apportion the punishments to be inflicted, as that they should erect Courts to try the criminal, or to pronounce a sentence on conviction.”⁸⁰ Yet, some, particularly Justice Joseph Story (who stayed silent in *Hudson*), would not give up. Shortly after *Hudson*, Story drafted a bill that “would have delegated broad powers to punish conduct not expressly prohibited in federal criminal statutes to the federal circuit courts.”⁸¹ It did not pass, however, and by 1820, Chief Justice Marshall could explain that the rule of lenity is

founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.⁸²

⁷⁸ *United States v. Hudson & Goodwin*, 11 US (7 Cranch) 32 (1812); see *Skilling v. United States*, 561 U.S. 358, 415 (2010) (Scalia, J., concurring in part and concurring in the judgment) (citing *Hudson* for proposition that the Court had “long ago” “abjured” “the power to define new federal crimes”).

⁷⁹ *United States v. Hudson & Goodwin*, 11 US (7 Cranch) 32, 34 (1812) (“The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense.”). Charles Warren thought the case reflected a misunderstanding of the drafting history of the 1789 Judiciary Act, see Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *Harv. L. Rev.* 49, 73 (1923), but others have pushed back on his conclusions. See Robert C. Palmer, *The Federal Common Law of Crime*, 4 *Law & Hist. Rev.* 267, 275 (1986).

⁸⁰ *United States v. Worrell*, 28 F. Cas. 774 (C.C.D. Pa. 1798); see Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 *Law & Hist. Rev.* 223, 231-32 (1986) (citing *Worrell* as example of one line of judicial thinking at the time).

⁸¹ Gary D. Rowe, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 *Yale L. J.* 919, 926 n.44 (1992); see also Preyer, *supra* note ___, at 258-59.

⁸² *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); see also *United States v. Bevens*, 16 U.S. (3 Wheat.) 336 (1818) (Marshall, C.J.); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825) (Congress could not “delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative”); Richman, *Stith & Stuntz*, at 82-83.

As Dan Kahan has noted, however, the rule of lenity, as a guarantee of legislative supremacy in the criminal law arena, has always been in competition with the Court’s quiet embrace of a delegated judicial lawmaking authority that only extreme disingenuity can call statutory interpretation.⁸³ As Kahan relates, the Court’s key initial move was to use Congress’s deployment of a common law term as an implicit invitation for courts to exercise their common-lawmaking powers.⁸⁴ In 1826, in *United States v. Kelly*, presented with the claim that Congress, in the 1790 Crimes Act, had failed sufficiently to define the offense of “endeavoring to make a revolt” aboard ship, Justice Bushrod Washington -- who Kahan persuasively suggests was channeling Justice Story⁸⁵ -- wrote: “although the act of Congress does not define this offence, it is, nevertheless, competent to the Court to give a judicial definition of it.”⁸⁶

Kelly began a line of cases that continues to this day. Where a federal criminal statute includes a common law term like “fraud,” the Court will have no compunction tapping into robust lines of common law authority -- drawing on tradition but adding its own elaborations. Vagueness issues will be dismissed, if they even come up, as the Court will find the broad statutory language clear enough. To be sure, the Court will speak the language of interpretation. Thus in *Neder v. United States*, when finding that the government needed to show “materiality,” notwithstanding the absence of that element from several fraud statutes, the Court invoked the “well-established rule of construction that “[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.”⁸⁷ Finding no effort by Congress to preclude the imposition of this element, the Court did so.⁸⁸ Justice Scalia’s analysis of why the “extortion” charged in *United States v. Sekbar*⁸⁹ was not “extortion” under the Hobbs Act began in similar terms, quoting Felix Frankfurter: “if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”⁹⁰

This is not to say that the Court will invariably reach for common law as a constraining principle. In *Durland v. United States*,⁹¹ the Court brushed aside the defendant’s (correct) claim that common law

⁸³ Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 S. Ct. Rev. 345, 367 (“[L]enity is in competition with -- indeed, has been largely eclipsed by -- another basic principle of federal criminal jurisprudence, a principle that has never been formally acknowledged but that is as old as lenity itself[;] . . . that Congress may delegate, and courts legitimately exercise, criminal lawmaking authority”). For an exploration of “federal courts’ hesitancy to strike down criminal statutes as violating legality-related doctrines or the frequency with which the courts expansively interpret statutory language,” see Samuel W. Buell, The Upside of Overbreadth, 83 N.Y.U. L. Rev. 1491, 1521 (2008).

⁸⁴ Kahan at 372-73 (“*Kelly* supplied what was, in effect, a blueprint for the hidden rule of delegated lawmaking in federal criminal law.”).

⁸⁵ *Id.* at 373 n.127.

⁸⁶ *United States v. Kelly*, 4 US (11 Wheat) 417 (1826).

⁸⁷ *Neder v. United States*, 527 U.S. 1, 21 (1999) (alteration in original) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)). But see *United States v. Wells*, 519 U.S. 482, 490-99 (1997) (declining to read a “materiality” element into a false statement statute that lacked any such reference even though many false statement statutes have explicit “materiality” requirements).

⁸⁸ *Id.* at 25.

⁸⁹ 570 U.S. 729 (2013).

⁹⁰ 570 at 733 (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947)).

⁹¹ 161 U.S. 306 (1896).

understanding precluded using the mail fraud statute against a defendant who misled investors only about future performance:

[B]eyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. . . .
In the light of this the statute must be read, and, so read, it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. . . .⁹²

Congress's response to *Durland* was to codify it in 1909.⁹³ Since then, the Court has embraced the protean flexibility of the federal fraud statutes, at least with respect to non-governmental property deprivations.⁹⁴ Similarly, the Court has paid little heed to Justice Thomas' recurring point that the Court's interpretation of "extortion" "under color of law" in the Hobbs Act to encompass bribery of public officials amounts to a judicially created crime -- quite different from common law understandings of extortion by a public officer, which required pretense of official entitlement.⁹⁵

Justice Stevens was the rare justice to explicitly speak in delegation terms. Dissenting from the Court's 1987 rejection, in *McNally v. United States*, of the "right to honest services" as a cognizable deprivation under the mail fraud statute, Stevens noted:

Statutes like the Sherman Act, the civil rights legislation, and the mail fraud statute were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress had identified. The wide open spaces in statutes such as these are most appropriately interpreted as implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case-by-case adjudication. The notion that the meaning of the words "any scheme or artifice to defraud" was frozen by a special conception of the term recognized by Congress in 1872 is manifestly untenable.⁹⁶

⁹² *Id.* at 313; see Richman, Stith & Stuntz, at 85 ("It is hard to square *Durland* and *Neder*. The bottom line seems to be that common-law definitions are sometimes controlling, and sometimes not.").

⁹³ See *McNally v. United States*, 483 U.S. 350, 357 (1987)

⁹⁴ See *United States v. Maze* 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting) ("When a 'new' fraud develops -- as constantly happens -- the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil."); Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. Rev. 1971 (2006); see also Richman, Stith & Stuntz, *supra* note __, ch. 4 (on sweep of fraud liability for property deprivations).

⁹⁵ See *Evans v. United States*, 504 U.S. 255, 278 (1992) (Thomas, J., dissenting); *Ocasio v. United States*, 136 S. Ct. 1423, 1437 (2016) (Thomas, J., dissenting); see also Kate Stith, *No Entrenchment: Thomas on the Hobbs Act, the Ocasio Mess, and the Vagueness Doctrine*, 127 *Yale L.J.F.* 233(2017); Charles F. C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 *Geo. L.J.* 1171 (1977).

⁹⁶ *McNally v. United States*, 483 U.S. 350, 372-73 (1987) (Stevens, J., dissenting); see also Kozminski; Kahan, *Common Law*, *supra* _ at 375.

It is worth noting that the Court’s rationale in *McNally* was substantially driven by federalism concerns. The Court distinguished,⁹⁷ and continues to accept, an extraordinarily broad reading of “fraud” against the federal government,⁹⁸ one that pushes beyond its traditional common law definition to a capacious and bespoke one, lacking clear foundation in “plain meaning, legislative history, or interpretive canons” and reaching ““any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.””⁹⁹

Perhaps we can see the Court’s embrace of something more than interstitial common lawmaking authority as a species of Volokh’s “inherent powers corollary” for assessing delegations.¹⁰⁰ Even a firm adherent to legislative supremacy might see the legitimacy of considerable judicial crime definition where Congress has explicitly spoken in common law terms and implicitly invoked the expertise and traditions of courts. Perhaps the “inherent” common law making authority that the Court denied itself in *Hudson and Goodwin* springs back with the explicit blessing of Congress? Yet judicial crime definition does not stop there.

Moving onward on the continuum between ostensible exercises in statutory interpretation -- as one may characterize cases that use common law terms as points of analytical departure -- to wholesale judicial crime definition, we come to a middle ground: federal criminal lawmaking by courts when statutes are utterly silent, or when statutory language is largely unheeded.

Defenses are one area over which the Court has taken virtual ownership. Perhaps this is not strictly an area of substantive criminal lawmaking, as it does not involve offense definition. Yet if the former term is understood to cover law that sets the terms of who can be convicted, it certainly covers defenses. In *United States v. Bailey*,¹⁰¹ even though the statute criminalizing escape from federal custody failed to mention any such defense, the Court, after a brief nod to legislative supremacy, reasoned that “because Congress . . . legislates against a background of Anglo-Saxon common law” when it enacts federal criminal statutes, “a defense of duress or coercion may well have been contemplated by Congress when it enacted” the escape offense.¹⁰² Concern that defense recognition can undermine a statutory scheme underlay the Court’s hostility to the necessity defense in *United States v. Oakland Cannabis Buyers’ Cooperative*.¹⁰³ But by 2006, in *Dixon v. United States*,¹⁰⁴ the Court unanimously took on a broad defense definition role -- to the extent that one takes the operationalization of a defense as part of its definition -- with methodology being the only issue.

Reading *Dixon* is like walking into an ALI Restatement drafting meeting. That there was a federal duress defense was uncontested, with the Court citing *Bailey* but disclaiming any need right now to nail down its elements.¹⁰⁵ The Court needed only to determine who bore the burden and by what

⁹⁷ *McNally*, 483 U.S. at 358 n. 8 (distinguishing *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

⁹⁸ See 18 U.S.C. § 371 (criminalizing conspiracies to, among other things, “defraud the United States, or any agency thereof in any manner or for any purpose”).

⁹⁹ *United States v. Coplan*, 703 F.3d 46, 61 (2d Cir. 2012) (quoting *Dennis v. United States*, 384 U.S. 885, 861 (1966)).

¹⁰⁰ See *supra* note __ and accompanying text.

¹⁰¹ 444 US 394 (1980).

¹⁰² *Id.* at 414 n.11.

¹⁰³ 532 US 483, 489-95, 490 n.3 (2001).

¹⁰⁴ 548 US 1 (2006).

¹⁰⁵ *Id.* at 4 n.2.

standard of proof. Because federal crimes are “solely creatures of statute,”¹⁰⁶ Justice Stevens, writing for the Court, felt bound to decide how Congress “may have contemplated” the duress defense when, in 1968, it enacted the particular offenses in the case. But in the absence of “evidence in the [Omnibus Crime Control and Safe Streets] Act’s structure or history that Congress actually considered the question of how the duress defense should work,”¹⁰⁷ the Court would simply look to “the long-established common-law rule.”¹⁰⁸

Concurring Justice Kennedy noted: “While the Court looks to the state of the law at the time the statute was enacted, . . . the better reading of the Court’s opinion is that isolated authorities or writings do not control unless they were indicative of guiding principles upon which Congress likely would have relied. Otherwise, it seems altogether a fiction to attribute to Congress any intent one way or the other in assigning the burden of proof.”¹⁰⁹ Put differently: Congress had left defense definition to the Court, and it was free to draw on a range of respectable sources like the Model Penal Code and the National Commission on Reform of Federal Criminal Laws to set a consistent rule for *all* criminal statutes.

Justice Alito, joined by Justice Scalia, concurred in Stevens’ opinion “with the understanding that it does not hold that the allocation of the burden of persuasion on the defense of duress may vary from one federal criminal statute to another” (thus denying precisely what Stevens said).¹¹⁰ For Alito, however, the contours of this transsubstantive defense would come from the common law in 1789. Congress started passing criminal statutes against a common law backdrop, and since it had never addressed the defense but simply kept passing new criminal laws, Alito would presume that the 1789 version remained operative.

Justice Breyer, joined by Souter, dissented. Like every member of the Court except for Stevens, he thought defenses should look the same across all statutes. But Breyer -- second only to Stevens in embracing the notion that the Court exercises delegated power to refashion criminal statutes -- read congressional silence to mean “that Congress expected the courts to develop burden rules governing affirmative defenses as they have done in the past, by beginning with the common law and taking full account of the subsequent need for that law to evolve through judicial practice informed by reason and experience.”¹¹¹

As Caleb Nelson has observed, “the lower federal courts do not use the rhetoric of statutory interpretation quite so consistently,” and one regularly sees references to “common-law defenses” and “federal common law.”¹¹² But the Supreme Court largely makes a pretense of engaging in statutory interpretation, even though in entrapment cases, one needs to follow the citations back to

¹⁰⁶ Id. at 12 (citing *United States v. Liporata*, 471 U.S. at 424).

¹⁰⁷ Id. at 13.

¹⁰⁸ Id. at 14. Justice Stevens took comfort in the fact that “when a congressional committee did consider codifying the duress defense, it would have had the courts determine the defense ‘according to the principles of the common law as they may be interpreted in the light of reason and experience.’ S. 1437, 95th Cong., 2d Sess., § 501 (1978).” Id. at 14. n.8.

¹⁰⁹ Id. at 18 (Kennedy, J. concurring).

¹¹⁰ Id. at 19 (Alito, J., concurring).

¹¹¹ Id. at 22 (Breyer, J., dissenting).

¹¹² Caleb Nelson, *State and Federal Models of the Interaction between Statutes and Unwritten Law*, 80 U. Chi. L. Rev. 657, 757 & n. 439 (2013) (citing cases); see also Richman, Stith & Stuntz at 112-18; *United States v. Waldman*, 835 F.3d 751 (7th Cir. 2016) (setting contours of self-defense defense in prison context).

Sorrells for a reminder that the extensive judicial crafting of this defense finds its ostensible roots in a legislative enactment.¹¹³ The key move was in *Sorrells* -- where a Prohibition agent had badgered the defendant into selling him some whiskey. Here the Court simply reached for the absurdity doctrine and found itself

unable to conclude that it was the intention of the Congress, in enacting this statute, that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.¹¹⁴

Lest one think that the Court's exercises a broad licence to tailor criminal liability only to constrain it, one need look no further than the *Pinkerton*¹¹⁵ doctrine -- "a judicially-created rule that makes a conspirator criminally liable for the substantive offenses committed by a co-conspirator when they are reasonably foreseeable and committed in furtherance of the conspiracy."¹¹⁶ Conspiracy liability is a statutory creation -- drawing on a long Anglo-American statutory tradition¹¹⁷-- but nothing in conspiracy statutes -- which after all, often set lesser punishments than the substantive offense a defendant is alleged to have conspired to commit -- makes a defendant automatically liable for the foreseeable substantive crimes of his co-conspirators.¹¹⁸ That was a purely judicial construct -- albeit one anchored in common law agency principles -- and a massively consequential one at that.¹¹⁹ Congress has explicitly allowed for corporate criminal liability in certain statutes - including the one charged in the landmark 1909 *New York Central* case.¹²⁰ Yet that principle had already been established long before by prosecutors and courts "applying general criminal laws — laws that, by

¹¹³ *Sorrells v. United States*, 287 U.S. 435 (1932).

¹¹⁴ 287 U.S. at 448; see Jessica A. Roth, *The Anomaly of Entrapment*, 91 Wash. U. L. Rev. 979 (2014) (exploring the consequences of the treatment of entrapment as substantive law question rather than a procedural protection).

¹¹⁵ *Pinkerton v. United States*, 328 U.S. 640, 645–48 (1946).

¹¹⁶ *United States v. Long*, 301 F.3d 1095, 1103 (9th Cir. 2002); see Michael Manning, Comment, *A Common Law Crime Analysis of Pinkerton v. United States: Sixty Years of Impermissible Judicially-Created Criminal Liability*, 67 Mont. L. Rev. 89 (2006); Miriam H. Baer, *Insider Trading's Legality Problem* (March 16, 2018), 127 Yale L.J. F. at 129, 135 (June 2017) (citing *Pinkerton* and willful blindness as example of "judge-developed doctrines that curtail or extend criminal liability").

¹¹⁷ See Mark L. Noferi, *Towards Attenuation: A "New" Due Process Limit on Pinkerton Conspiracy Liability*, 33 Am. J. Crim. L. 91, 95 n.14 (2006); Francis Sayre, *Criminal Conspiracy*, 35 Harv L. Rev. 393, 394-409 (1922); Note, *Developments In the Law, Criminal Conspiracy*, 72 Harv. L. Rev. 922, 923 (1959).

¹¹⁸ See Alex Kreit, *Vicarious Liability and the Constitutional Dimensions of the Pinkerton Doctrine*, 57 Am. U. L. Rev. 585, 595 (2008) (noting that "[a]s a matter of statutory interpretation," *Pinkerton* dissent's "reasoning appears to be far more persuasive than the majority's," and that "the majority did not identify any statutory basis at all for holding defendants liable for the substantive crimes of their co-conspirators in the absence of proof of aiding and abetting").

¹¹⁹ See Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. Crim. L. & Criminology 147, 147-48 (2008) (noting sweep of *Pinkerton* liability).

¹²⁰ *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 491-92, 495 (1909) (upholding the corporate-criminal-liability provisions of the Elkins Act); Edward B. Diskant, Note, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 Yale L.J. 126, 138 (2008) (noting "both before and after *New York Central*, Congress enacted thousands of statutes creating new or additional criminal liability for corporations").

their terms, did not extend to corporations as entities — to corporate conduct.”¹²¹ And it thereafter spread across all offenses, even without clear statutory authorization.¹²²

Another purely judicial construct, perhaps even more consequential, has been the establishment of “willful blindness” as satisfying the requirement of “knowledge” across federal statutes.¹²³ This largely was the handiwork of the lower courts,¹²⁴ with the Supreme Court deigning to acknowledge it only recently, in the context of a civil patent infringement case.¹²⁵ Even when complicity liability has a clear statutory basis, as it the case for aiding and abetting,¹²⁶ the Court continues to treat broad issues of criminal responsibility as another of its special provinces,¹²⁷ perhaps as an extension of yet another area in which the Court has assumed considerable ownership -- *mens rea*.

When recognizing and defining defenses, the Supreme Court at least has the “benefit” of absolute legislative silence.¹²⁸ When setting *mens rea* standards, however, it must reckon with variegated statutory language. Yet the latter has not particularly inhibited the Court from taking the laboring oar in defining the statute-specific contours of this critical element.

Teaching the Court’s *mens rea* cases is a joy for those who love pushing students hard. Relatively stable principles do emerge from those cases, but they often have little to do with the statutory definition (if there is one) of the requisite *mens rea*, and much to do with the Court’s larger project of protecting the “morally blameless” from punishment.¹²⁹ In a cogent distillation of the cases, Stephen Smith explains:

¹²¹ *Id.* at 136; see also Richman, Stith, Stuntz, at 806-07.

¹²² Diskant, *supra* at ___, at 136-37.

¹²³ Under the willful blindness doctrine, the prosecution may satisfy a *mens rea* of knowledge by proving that the defendant consciously chose “to avoid learning the truth.” *United States v. Jewell*, 532 F.2d 697, 700-04 (9th Cir. 1976) (en banc); see Richman, Stith & Stuntz, *supra* at 510-11; Gregory M. Gilchrist, Willful Blindness as Mere Evidence, 54 *Loy. L.A. L. Rev.* (forthcoming 2021) (manuscript at 17), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3690351.

¹²⁴ See Jonathan L. Marcus, Note, Model Penal Code Section 2.02(7) and Willful Blindness, 102 *Yale L.J.* 2231, 2233-34 (1993).

¹²⁵ *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068-69 (2011) (“[t]he doctrine of willful blindness is well established in criminal law”); see *United States v. Goffer*, 721 F.3d 113, 128 (2d Cir. 2013) (finding that *Global-Tech* “simply describes existing case law”); cf. *Spurr v. United States*, 174 U. S. 728, 738 (1899) (using similar concept).

¹²⁶ 18 U.S.C. § 2.

¹²⁷ See *Rosemond v. United States*, 134 S. Ct. 1240, 1246-47 (2014) (refining *actus reus* and *mens rea* requirements in aiding and abetting case); Kit Kinports, *Rosemond, Mens Rea, and the Elements of Complicity*, 52 *San Diego L. Rev.* 133 (2015).

¹²⁸ The exception is the insanity defense, which Congress redefined after the acquittal of John Hinckley, Jr. See 18 U.S. Code § 17; Jodie English, *The Light between Twilight and Dawn: Federal Criminal Law and the Volitional Insanity Defense*, 40 *Hastings L.J.* 1, 1 (1988) (noting that Insanity Defense Reform Act of 1984 was “first time in history” that Congress “passed comprehensive legislation pertaining to the defense of criminal responsibility”).

¹²⁹ Stephen F. Smith, “Innocence” and the Guilty Mind, 69 *Hastings L.J.* 1609, 1653 (2018) (“the project of limiting the reach of criminal statutes in accordance with moral blameworthiness takes a back seat to inferences of presumed legislative intent”); see also Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability’s Relevance*, 75 *L. & Contemp. Probs.* 109, 126 (2012); John S. Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 *Va. L. Rev.* 1021, 1057-1130 (1999); Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 *Hastings L.J.* 137 (2007); Alan C. Michaels, *Constitutional Innocence*, 112 *Harv. L. Rev.* 828 (1999).

The first step of the mens rea analysis, at which the Court seeks to identify the potential for morally undeserved punishment, operates outside of the literal definition of the crime. The Court decides whether conduct encompassed within the literal terms of a criminal law might nonetheless be regarded as “innocent” or “blameless.” Quite inconsistently, however, the important second stage, devoted to fashioning the heightened standards of mental culpability necessary to guarantee blameworthiness, operates within the definition of the offense. That is to say, the Court looks to the wording of the statute for clues about whether or not Congress would have accepted additional, more demanding mens rea requirements.¹³⁰

Since the Court has generally resisted constitutionalizing substantive criminal law¹³¹ and it can hardly declare mens rea -- a foundational element of every offense -- as a common law space, its moves must sound in statutory interpretation. Yet as Smith notes, “[t]o the extent the Court . . . remains in the business of enforcing judicially created mens rea requirements, it must be because the Court is not fully committed to the textualist faithful-agent model in this context.”¹³² Its approach instead is what Smith calls the “cooperative/partnership model,” which entails an

institutional division of labor between Congress and the courts in criminal cases. Congress focuses primarily on defining the prohibited act and grading the offense. The definition of the mental element of federal crimes, however, is left principally to the courts. Naturally, when Congress has selected a particular mens rea option, the choice is binding upon the courts. Courts are otherwise impliedly delegated the power to flesh out the mental elements of the crime in light of background principles of the criminal law, including the notion that “an injury can amount to a crime only when inflicted by intention.”¹³³

Judicially Crafted Elements

Moving along the continuum of judicial lawmaking engagement, we have seen the statutory use of common law words taken as an invitation to provide content to open-textured terms, and the heavy use of statutory silence (defenses) or perceived underspecification (mens rea) to justify transsubstantive judicial projects. What we haven’t yet seen is judicial crime definition akin to the explicit and self-conscious criminal lawmaking we saw agencies do when exercising delegated powers. Yet, one can find examples of just those sorts of common law criminal projects (within the context of a sweeping congressional delegation).

The most dramatic example of criminal common lawmaking comes in the area of civil rights crimes. Since 1968, Congress has taken some pains to define civil rights offenses, particularly with respect to private conduct, with The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 a conspicuous example.¹³⁴ But two stalwarts of federal criminal civil rights enforcement remain:

¹³⁰ Smith, *supra* note __ at 1653.

¹³¹ See William J. Stuntz, Substance, Process, and the Civil-Criminal Line, 7 J. Contemp. Leg. Issues 1, 6-7 (1996) (arguing for the development of substantive constitutional criminal law); Louis D. Bilionis, Process, the Constitution, and Substantive Criminal Law, 96 Mich. L. Rev. 1269, 1333 (1998) (noting that “the tale of the unfulfilled promise of substantive constitutional criminal law.” while largely true “is incomplete and misleading so long as it omits the process account of the Constitution and criminal law”).

¹³² Smith *supra* _ at 1657.

¹³³ *Id.* at 1657-58 (quoting *Morrisette v. United States*, 342 U.S. 2476, 250 (1952)).

¹³⁴ 18 USC § 249; see also 18 USC § 245.

18 USC § 241, which traces its lineage back to the Enforcement Act of 1870, and 18 USC § 242, whose origins are in the Civil Right Act of 1866.¹³⁵ Once its commitment to Reconstruction crumbled in the 1870s, the Justice Department stopped enforcing these statutes until the mid 1930s, and to this day, the Department has exercised considerable control on their deployment.¹³⁶

Yet once charged, these statutes have an extraordinarily sweep. Section 241 broadly targets conspiracies “to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same.” Section 242 has an explicit state action component and targets any who “under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”¹³⁷ Put differently, these crimes are defined by constitutional common law.¹³⁸

Concern about the sweep and vagueness of these offenses -- as well as the free hand the Court has long exercised in setting mens rea terms -- led the Court in *Screws v. United States* (1945) -- its first criminal civil rights case since the demise of Reconstruction -- to impose a “willfulness” standard for both statutes that requires the Government to show that the defendant acted with a specific intent to interfere with the federal right in question.¹³⁹ To be sure, figuring out what this standard means has not always been easy for the lower courts, but the need for some heightened inquiry is well established.¹⁴⁰

Yet even as these *mens rea* interventions sought to address notice concerns, there remained a legislative specificity problem: how to define the *actus reus* of these offenses. In particular, what are the “rights” that §§ 241 and 242 protect against deprivation, and who would decide this question. Apparently, the scope of protections would be defined solely through judicial dynamic incorporation of constitutional common law, with (possibly) no legislative contribution save the invocation of the Constitution in those statutes. It was just this problem, as well as notice concerns, that troubled the Sixth Circuit when the Government charged a Tennessee judge with sexually assaulting a number of women who had the misfortune to have business before him, thereby depriving them of “rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from willful sexual assault.”¹⁴¹ Writing for an en banc majority, Judge Merritt spoke the

¹³⁵ Richman, Stith & Stuntz, at 430; see Frederick M. Lawrence, Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes, 67 Tul. L. Rev. 2113, 2138 (1993).

¹³⁶ Richman, Stith & Stuntz, 432-44; see Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876* (1985); Robert K. Carr, *Federal Protection of Civil Rights: Quest for a Sword* 29 (1947); Brian K. Landsberg, *Enforcing Civil Rights: Race Discrimination and the Department of Justice* (1997).

¹³⁷ §§ 241 & 242

¹³⁸ See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457 (2001); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996).

¹³⁹ *Screws v. United States*, 325 U.S. 91 (1945) (§ 242); *Anderson v. United States*, 417 U.S. 211, 223 (1974) (“[S]ince the gravamen of the offense under § 241 is conspiracy, the prosecution must show that the offender acted with a specific intent to interfere with the federal rights in question”).

¹⁴⁰ Richman, Stith & Stuntz at 442-43.

¹⁴¹ *United States v. Lanier*, 520 U.S. 259 (1997).

language of statutory interpretation: In passing and codifying § 242, Congress hardly evinced “a deliberate intent to create an evolving criminal law which expands to include new constitutional rights as they become a part of our civil constitutional law.”¹⁴² But, he complained, the Supreme Court had regrettably been undeterred: “*Screws* is the only Supreme Court case in our legal history in which a majority of the Court seems willing to create a common law crime.”¹⁴³ Lacking the ability to overturn this troubling artifact, the Sixth Circuit would substantially limit its scope to situations in which the Supreme Court had announced the right in question on fundamentally similar facts. Because “the right not to be assaulted” was not “understood” as a “constitutional right,” and was not “declared as such by the Supreme Court,” “listed in the Constitution, nor is it a well-established right of procedural due process,”¹⁴⁴ its deprivation could not form the basis for criminal liability.

When the Supreme Court took the case and reversed, it showed none of the Sixth Circuit’s qualms with this judicially defined offense. Justice Souter, writing for a unanimous Court in *United States v. Lanier*, recognized “the irony that a prosecution to enforce one application of its spacious protection of liberty can threaten the accused with deprivation of another.”¹⁴⁵ But rather than engage with the Sixth Circuit’s separation-of-powers challenge, he focused on the fair warning concerns that had also troubled the Sixth Circuit and found them amply answered without any methodological restrictions on how a right had been made sufficiently specific. He noted:

Although the Sixth Circuit was concerned, and rightly so, that disparate decisions in various Circuits might leave the law insufficiently certain even on a point widely considered, such a circumstance may be taken into account in deciding whether the warning is fair enough, without any need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide it.¹⁴⁶

In a footnote, and only there, Souter addressed Judge Merritt’s scurrilous allegation: “*Screws* did not ‘create a common law crime’; it narrowly construed a broadly worded Act of Congress, and the policies favoring strict construction of criminal statutes oblige us to carry out congressional intent as far as the Constitution will admit.” Moreover, any suggestion that “Congress never intended § 242 to extend to ‘newly-created constitutional rights,’ is belied by the fact that Congress has increased the penalties for the section’s violation several times since *Screws* was decided, without contracting its substantive scope.”¹⁴⁷

As a practical matter, § 242 liability is quite limited. The Justice Department brings a relatively small number of cases -- at least relative to what are likely the far more numerous instances of malicious or reckless violence or other rights-violating misconduct by officials at all levels of government.¹⁴⁸

¹⁴² *United States v. Lanier*, 73 F.3d 1380, 1387 (6th Cir. 1996) (en banc), rev’d 520 U.S. 259.

¹⁴³ *Id.* at 1391.

¹⁴⁴ *Id.* at 1392

¹⁴⁵ *Lanier*, 520 U.S. at 265.

¹⁴⁶ *Id.* at 269; see Trevor Morrison, Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes, 74 S. Cal. L. Rev. 455, 469 (2001) (the fair warning requirement described in *Lanier* “bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.” (quoting 520 U.S. at 266)).

¹⁴⁷ *Id.* at 267 n.6 (quoting *Lanier*, 73 F.3d at 1387)

¹⁴⁸ TRAC Reports, Police Officers Rarely Charged for Excessive Use of Force in Federal Court (June 17, 2020), <https://trac.syr.edu/tracreports/crim/615/#:~:text=Number%20of%20Prosecutions%20Under%20C2%A7,cases%2>

And lower courts have proceeded gingerly, as when the Third Circuit rejected the Government’s effort to charge the Bridgegate defendants with violating New Jersey residents “right to localized travel on public roadways free from restrictions unrelated to legitimate government objectives.”¹⁴⁹ Still, every aspect of the offense is an artifact of judicial decision making, subject only to a congressional delegation that encompasses the entire scope of rights established through ongoing judicial interpretations of the Constitution and attaches penalties to deprivations. Here, as Tom Merrill put it, the Court has interpreted “the text to mean that the enacting body specifically intended that the relevant legal norms in a specific area are to be developed by the federal courts in accordance with the incremental decisionmaking process of the common law.”¹⁵⁰

The Court can sometimes seem to be in almost comic denial of its civil rights crime-definition role. Thus, in *United States v. Kozminski*,¹⁵¹ where defendants were charged under § 241 and another more specific statute with conspiring to interfere with an individual’s Thirteenth Amendment right to be free from “involuntary servitude,” the Court rejected a prosecution theory of “involuntariness” that went beyond “the use or threatened use of physical or legal coercion.” Invoking the rule of lenity, it noted that the

Government’s interpretation would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes. It would also subject individuals to the risk of arbitrary or discriminatory prosecution and conviction.¹⁵²

But, of course, for guidance in the “inherently legislative task” of defining Thirteenth Amendment “coercion,” the Court simply cited its own constitutional precedents.¹⁵³

When casting about for areas in which Congress has delegated criminal lawmaking authority to the courts, Justice Stevens would regularly cite Antitrust.¹⁵⁴ Indeed, in this area the Court has largely dropped the pretence of statutory interpretation, making Section 1 of the Sherman Act, in Tom Merrill’s words, a paradigm of implied delegated lawmaking.¹⁵⁵ And violations of the Sherman Act can be and are regularly prosecuted as crimes. Indeed, during the Act’s early years, prosecutors brought criminal cases charging a broad variety of anticompetitive and monopolistic behaviors.¹⁵⁶ But the offense was originally a misdemeanor, and as Daniel Sokol notes: “More than a generation

in the *United States*. Thus, these cases represent just 100,000 prosecutions or 0.027 percent (reporting only forty-nine § 242 prosecutions in fiscal year 2019 and that historically the DOJ has declined close to ninety percent of § 242 referrals).

¹⁴⁹ *United States v. Baroni*, 909 F.3d 550, 585 (3d Cir. 2018), rev’d on other grounds, 140 S.Ct. 1565 (2020).

¹⁵⁰ Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 40 (1985).

¹⁵¹ 487 U.S. 931 (1988).

¹⁵² *Id.* at 949.

¹⁵³ *Id.* at 943.

¹⁵⁴ See *Kozminski*, 487 US at 965-66 (Stevens concurring in judgment); *McNally*, 483 US at 372-73 (Stevens dissenting); Dan Kahan, *Rule of Lenity*, *supra* at 395 n.254.

¹⁵⁵ Merrill, *Common Law Powers*, at 45; see *Nat’l Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (scope of Sherman Act sec. 1 determined by a process of giving “shape to the statute’s broad mandate by drawing on common-law tradition.”); see also Daniel A. Crane, *Antitrust Antitextualism*, ___ *Notre Dame L. Rev.* ___ (2021); see also Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 *Cal. L. Rev.* 263, 267, 267–68 n.9 (1986) (noting separation-of-powers concerns with judicial lawmaking under the Sherman Act).

¹⁵⁶ Gregory J. Werden, *Individual Accountability Under the Sherman Act: The Early Years*, 31 *Antitrust* 100, 100 (2017).

has passed since there have been any criminal indictments, let alone jail time, for § 1 and § 2 noncollusion cases. The DOJ has brought a single criminal noncollusion antitrust case since the introduction of the felony penalties.¹⁵⁷ What might seem as a massive space for common law criminal development has thus, by dint of prosecutorial and judicial restraint, been compressed to a series of discrete and well-defined offenses.

Virtually all criminal cases have been limited to *per se* illegal instances of horizontal collusion -- like price-fixing, bid rigging, and market allocation -- involving little or doctrinal development.¹⁵⁸ Some combination of executive and judicial restraint has thus constrained the ostensible sweep of the Court's criminal lawmaking authority in the antitrust area. The Department's Antitrust Manual states that "current [] policy is to proceed by criminal investigation and prosecution in cases involving horizontal, *per se* unlawful agreements[.]"¹⁵⁹ And in recent litigation, the Government noted that it had "long eschewed prosecuting conduct subject to the rule of reason, and it has no interest in doing so here."¹⁶⁰ Sokol goes on to suggest that any effort to proceed criminally beyond *per se* illegal conduct might well render the Sherman Act void for vagueness.¹⁶¹

For an example of a purely statutory space -- with no common law or constitutional roots -- that Congress has left for courts to fill in, one need only consider the RICO statute. It criminalizes little conduct that was not already covered by a federal or state penal law, nor does it necessarily increase a defendant's sentencing exposure. But it massively increases the ability of federal prosecutors to pull together a sprawling set of offenses and defendants, gaining proof synergies (known to defendants as "spillover prejudice") that incentivize the investment of investigative resources and extend the scope and likelihood of conviction. Access to this powerful charging tool requires -- over and above proof of predicate federal or state crimes -- proof of elements like "enterprise," "pattern," and "association," that, with scant assistance from Congress, courts have made their peculiar province.¹⁶²

Judicial delegation in context

The Sherman Act and the Reconstruction civil rights criminal statutes thus offer dramatic instances of both maximal legislative delegation and considerable doctrinal self-restraint by prosecutors and courts. A pragmatist might sit back and posit some natural equilibrium of criminal lawmaking across all three branches, in the shadow of constitutional notice and vagueness concerns. Still, broad

¹⁵⁷ D. Daniel Sokol, *Reinvigorating Criminal Antitrust?*, 60 *Wm. & Mary L. Rev.* 1545, 1557 (2019).

¹⁵⁸ So hardened has the adjudicative presentation of *per se* cases become that defendants recently challenged the judicial framing as a violation of their right to have the jury decide all the elements of the crime. See *United States v. Sanchez*, 760 *Fed. App'x* 533 (9th Cir. 2019), cert. denied., 140 *S. Ct.* 909 (2020).

¹⁵⁹ U.S. Dep't of Justice, Antitrust Div., *Antitrust Division Manual*, at III-12 (5th Ed. 2018).

¹⁶⁰ *United States v. Kemp*, 907 *F.3d* 1264, 1274 (10th Cir. 2018).

¹⁶¹ Sokol at 1594 ("Without a clear and objective standard for what criminal enforcement would look like for noncollusion cases under the Sherman Act, antitrust may have a void for vagueness problem."). Recently, the Government argued that it was free to bring criminal charges involving anticompetitive conduct not *per se* illegal, but the issue was ultimately mooted. See *United States v. Kemp*, 907 *F.3d* 1264, 1278 (10th Cir. 2018), on remand, 2019 WL 763796 (D. Utah 2019).

¹⁶² Richman, Stith & Stuntz, at 576-608; see Kahan, *Chevron* at 473 (RICO "best conceptualized" "as an implicit delegation of authority to courts to fashion their own rules.").

acceptance of this state of affairs should pose a considerable challenge to a formalist attracted by the Gorsuch critique.

How do these crime definition delegations to courts -- particularly maximal ones like §§ 241 and 242 -- fare when judged against the challenged delegations to administrative agencies? As Margaret Lemos has noted: “virtually no effort has been made to fit delegations to courts into nondelegation theory or practice.”¹⁶³ The “intelligible” principle for these civil rights statutes is the U.S. Constitution, as interpreted by courts over time. As a big fan of the Constitution, I find it quite intelligible, and one can invoke the case inventing that principle and find considerable flexibility in it. Back in 1928, the Court noted that when “determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government coordination.”¹⁶⁴ Yet it’s hard to see how such a massive delegation is consistent with the standards Justice Gorsuch would demand for crime definition. As Lemos notes “[t]he focus of the intelligible principle requirement is not on the characteristics of Congress’s chosen delegate, but on Congress itself and the choices it must make.”¹⁶⁵ Perhaps justification can be found in the analysis -- which Gorsuch found applicable to certain delegations to the Executive -- that excuses sweeping delegations that overlap with the delegatee branch’s inherent powers. After all, the courts are the final arbiters of the Constitution.¹⁶⁶ But that’s an idiosyncratic and limited analysis.

Measured against the criteria usually used by those normatively assessing delegations to agencies, the delegations to courts explored here -- at least those at the maximal end of the continuum -- fare poorly. Perhaps courts -- at least federal ones with life tenure judges -- should be excused from standard delegation scrutiny because their insulation from the political process means that they “pose a lesser danger to liberty than do agencies.”¹⁶⁷ Yet other features of maximal judicial delegations push hard in the opposite direction -- since the accountability that Gorsuch seeks is the antithesis of insulation. Courts are not subject to controls that Congress can place on agencies¹⁶⁸ or the political accountability that agencies have through the President.¹⁶⁹

Perhaps the very nature of courts, with their adherence to precedent-based reasoning and incremental change, makes their accountability of less concern than that of agencies, where policy-

¹⁶³ Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. Cal. L. Rev. 405, 408 (2008).

¹⁶⁴ *W. Hampton, Jr., & Co. v. United States*, 276 U. S. 394, 276 U. S. 406 (1928); see also *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (noting “this Court has deemed it ‘constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority’” (quoting *American Power & Light Co. v. SEC*, 329 U. S. 90, 329 U. S. 105 (1946))).

¹⁶⁵ Lemos, *supra* at 436.

¹⁶⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province of the judicial department to say what the law is.”).

¹⁶⁷ See *Volokh 66 Emory* at 1414

¹⁶⁸ Whatever agenda control Congress has over courts has rarely been exercised in practice. Richard Fallon, *Jurisdiction-Stripping Reconsidered*, 96 Va. L. Rev. 1043, 1045 (2010). But Congress can, and particularly in the criminal area, has legislatively nullified statutory rulings. See *infra* note (172) and accompanying text.

¹⁶⁹ Lemos, at 449; *Volokh 66 Emory* at 1414; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. Econ. & Org. 81, 93-94 (1985).

driven decisionmaking can lead to dramatic legal discontinuities demanding close scrutiny.¹⁷⁰ Yet one can flip that point and draw on the literature on the *political accountability of agencies*, which would valorize (or condemn) these discontinuities as reflecting the increasing domination of the bureaucracy by a politically responsive (albeit inept) Executive.¹⁷¹ Because they proceed categorically, and not case by case, agencies can also more easily be accountable for changing the legal landscape.

Yet maybe judicial law development derives accountability from its institutional setting. For it cannot occur without prosecutors presenting factual narratives and crafting legal liability theories.¹⁷² How does the conditional nature of judicial crime definition cut with respect to the Gorsuch critique? Prosecutorial gatekeeping ensures some separation of power and brings a degree of political accountability. To be sure, direct prosecutorial accountability is somewhat limited because, as Hessick notes, federal prosecutorial decisions are usually made below the level of a political appointee.¹⁷³ But even mine-run decisions come with a degree of networked accountability that I have described elsewhere.¹⁷⁴ More importantly, prosecutors must take at least co-ownership of any judicial expansions of criminal liability, an ownership that comes with at least potential accountability to Congress. One need only look at the exceptional centralized control that the Justice Department has exercised over criminal civil rights and antitrust prosecutions -- two spheres of ostensible common law development that also potentially target groups with considerable political power -- to see this political accountability at work. Conversely, when judicial legal development curtails criminal liability, the Executive will regularly turn to Congress for a legislative fix.¹⁷⁵

Of course, the democratic accountability that prosecutorial gatekeeping and prosecutorial mediated Congressional oversight bring to the judicial crime definition project comes with the risk of self-dealing that is a different concern of Gorsuch. Dan Kahan has cogently suggested that the prosecutorial “power of initiative” comes with its own pathology.¹⁷⁶ For prosecutors not only anchor judicial lawmaking to a larger political environment but pursue their own agendas. By

¹⁷⁰ Justice Gorsuch recently complained that “these days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations.” *Guedes v. BATF*, 140 S. Ct. 789, 790 (2020) (mem.) (statement in respect to cert. denial).

¹⁷¹ See Peter L. Strauss, *The Trump Administration and the Rule of Law*, 170 *Française d’Administration Publique* 433, 433–46 (2019); Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2272–2363 (2001) (offering some normative critiques and defenses of presidential accountability and control); see also Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *Cornell L. Rev.* 769, 818–24 (2013).

¹⁷² See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 *Colum. L. Rev.* 749, 758 (2003) (discussing prosecutors’ gatekeeping role).

¹⁷³ Hessick, *Common Law Crimes*, at 1003.

¹⁷⁴ Daniel Richman, *Accounting for Prosecutors*, in *Prosecutors and Democracy: A Cross-National Study* 40, 68 (M. Langer & D. Sklansky eds., 2017).

¹⁷⁵ See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *Yale L.J.* 331 (1991); *Fraud Enforcement and Recovery Act of 2009*, Pub. L. No. 111-21, § 2(f)(1)(B), 123 Stat. 1617, 1618 (codified at 18 U.S.C. § 1956(c)(9)) (overriding *United States v. Santos*, 553 U.S. 507 (2008)); *Riegle Community Development and Regulatory Improvement Act of 1994*, Pub. L. No. 103-325, § 411(c)(1), 108 Stat. 2160, 2253 (codified as amended at 31 U.S.C. § 5324(c)) (overriding *Ratzlaf v. United States*, 510 U.S. 135 (1994)); *An Act to Prevent the Manufacturing, Distribution, and Use of Illegal Drugs, and for Other Purposes*, § 7603, Pub. L. No. 100-690, 102 Stat. 4181, 4508 (1988) (codified at 18 U.S.C. § 1346) (overriding *McNally v. United States*, 483 U.S. 350 (1987)).

¹⁷⁶ See Dan Kahan, *Is Chevron Relevant to Criminal Law*, 479–80; See Samuel Buell, *The Upside of Overbreadth*, 83 *N.Y.U. L. Rev.* 1491, 1514 (2008) (“Broader liability rules afford prosecutors more freedom to apply them to novel contexts, generating more cases that require courts to decide whether to interpret liability rules broadly, and so on.”).

controlling what courts learn about an enforcement environment, picking cases whose facts counsel liability expansion in sometimes troubling directions, and pleading out cases that would lead to adverse decisions, prosecutors have an influence on judicial law development that is likely greater and is certainly less transparent than the influence they have over agency rule-promulgation, particularly when the agency is not the Justice Department.¹⁷⁷

Indeed, relying on agencies to craft regulations that prosecutors can rely on for criminal charges is quite superior to common law development if one worries about the combination of crime-definition and enforcement power. In both scenarios, prosecutorial gatekeeping and litigation control will bring a degree of influence over effective crime definition that can be abused. But the separation between prosecutors and an agency rule-making process may be far greater than their separation from the crime definition process that, to varying extents, plays out in federal courts. On one hand is an independent judge tethered to a process over which prosecutors have considerable sway. On the other is an agency that must comply with an open and transparent rule-making process, with notice and comment from affected parties,¹⁷⁸ and that may worry about losing control over law development once prosecutors take a case.

A rulemaking agency will not only be focused on its own equities but will be obliged to adhere to the Administrative Procedure Act (APA). Interested parties will be able to challenge a rule's consistency with the asserted statutory mandate or claim policy arbitrariness¹⁷⁹ in a process that finds no parallel for liability theories generated by courts and prosecutors.¹⁸⁰ The Justice Department has, in contrast, not shown the slightest interest in offering up its legal theories for notice and comment rulemaking, and has taken pains to ensure that litigants can't rely on internal guidance manuals.¹⁸¹ Moreover, an APA rule-making challenge to an agency will be facial, and brought by a party that needn't suffer from the bad facts that are the usual burden of a criminal defendant. Nor do the functional

¹⁷⁷ Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *Stan. L. Rev.* 869, 882-83 (2009) (“With his or her power to choose from a range of federal criminal laws, to exercise significant leverage over defendants to obtain pleas and cooperation, and to control the sentence or sentencing range through charging decisions, the prosecutor combines enforcement and adjudicative power.”).

¹⁷⁸ See Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 *Wake Forest L. Rev.* 745, 755-56 (1996) (describing a shift in the 1960s and 1970s from agency adjudication as the primary method of regulation to informal rulemaking due in part to the belief rulemaking was “more democratic”); Lauren Moxley, *E-Rulemaking and Democracy*, 68 *Admin. L. Rev.* 661, 665-72, 690-97 (2016) (arguing that notice-and-comment rulemaking promotes participation-based and epistemological “democratic ideals” by involving the public in the regulatory process and drawing on its “widely dispersed information power”).

¹⁷⁹ Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C).

¹⁸⁰ See Roberta A. Karmel, *Regulation by Prosecution: The Securities and Exchange Commission vs. Corporate America* 96 (1982) (noting that in a criminal prosecution “[o]ther regulated persons who will become subject to that regulatory policy do not have the opportunity to object to or to comment upon the new interpretation or rule, as they would have in a rulemaking proceeding”).

¹⁸¹ Kahan, *Chevron* at 497 n.145 (explaining Department’s reluctance to promulgate binding internal regulations); DOJ, *Justice Manual* § 1-1.200 (2018), <https://www.justice.gov/jm/jm-1-1000-introduction> (“The Justice Manual provides internal DOJ guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigation prerogatives of DOJ.”); *United States v. Apel*, 571 U.S. 359, 369 (2014) (rejecting defendant’s citation of U.S. Attorneys’ Manual to support statutory interpretation and stating the Court has “never held that the Government’s reading of a criminal statute is entitled to deference”); *United States v. Holder*, 256 F.3d 959, 965 n.10 (10th Cir. 2001) (giving no deference to the U.S. Attorneys’ Manual’s interpretation of a criminal statute).

defenses of agency lawmaking easily apply to courts, which cannot offer the access to information, national uniformity, and flexibility that agencies can.¹⁸²

Finally, while the advantage of administrative crimes over broad statutes that hand interstitial lawmaking authority to a prosecutorial-judicial collective is only arguable with respect to self-dealing concerns, it seems certain with respect to due process values like notice and ex ante specificity. An agency's expertise and civil enforcement experience will not invariably push it to such specificity, particularly when it prefers enforcement to rulemaking. But when self-consciously executing a delegated rulemaking assignment, an agency faces a legal accountability that Congress rarely faces in the criminal area.¹⁸³ Digging in the CFR in addition to the US Code is extra work. Yet the potential defendant required to do that by an administrative crime will generally (but not always) find a clarity and detail unavailable to the person worried about being charged under congressionally drafted statute with a judicial gloss. In short, the main reason crime-definition delegations to courts come out so well compared to those to agencies is likely that judges are grading their own papers.

B. States

As we have seen, broad congressional crime-definition delegations to courts not only flout formal notions of legislative supremacy but raise special problems relating to the nature of the institution. How, then, ought one assess delegations to not federal, but state, legislatures? Here again, one finds a continuum of contexts in which state statutes provide the terms of a federal criminal offense.

That state law figures prominently in federal criminal law ought not be surprising to anyone familiar with the federal history. While federal criminal law started as a means of “targeting activity that injured or interfered with the federal government itself, its property, or its programs,”¹⁸⁴ by the beginning of the twentieth century, federal legislators began to think of criminal jurisdiction “as supplementing local enforcement efforts—supporting local exertions, and compensating for local inadequacies or corruption.”¹⁸⁵ Initially the federal offense created to support state effort deployed a modified common law term, as when the 1919 Dyer Act criminalized interstate car thefts.¹⁸⁶ But sometimes Congress employed a more capacious term of its own devising, as when the 1910 Mann Act criminalized the interstate transportation of a woman or girl “for the purpose of prostitution or debauchery, or for any other immoral purpose.”¹⁸⁷ It wasn't until 1986 that Congress

¹⁸² Lemos at 444.

¹⁸³ Note that the Justice Department has never shown the least interest in rulemaking that would limit the liability theories federal prosecutors can pursue. See Kahan, *Chevron*.

¹⁸⁴ Richman, Stith & Stuntz at 3.

¹⁸⁵ Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 *Criminal Justice 2000: Boundary Changes in Criminal Justice Organizations* 81, 87 (2000); see also Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 *Cal. L. Rev.* 1541, 1548 (2002).

¹⁸⁶ Daniel Richman & Sarah Seo, *How Federalism Built the FBI, Sustained Local Police, and Left Out the States* 17 *Stan. J. C.R. & C.L.* (forthcoming 2021); see *United States v. Turley*, 352 U.S. 407, 416–41 (1957) (National Motor Vehicle Theft Act not limited to “situations which at common law would be considered larceny” because “[p]rofessional thieves resort to innumerable forms of theft and Congress presumably sought to meet the need for federal action effectively rather than to leave loopholes for wholesale evasion”).

¹⁸⁷ 36 Stat. 825, 18 U.S.C. § 398. For cases broadly applying the “immorality” prong, see *Caminetti v. United States*, 242 U.S. 470 (1917) (upholding conviction of man who transported a woman to be his “concubine and mistress”); *Cleveland v. United States*, 329 U.S. 14 (1946) (upholding conviction of fundamentalist Mormon who transported a woman for purposes of polygamy).

withdrew the invitation to courts to judge morality and amended the statute to cover transportation for the purpose of prostitution “or [] any sexual activity for which any person can be charged with a criminal offense,” drawing on existing state and federal offenses.¹⁸⁸

This state law incorporation strategy would not only alleviate the troubling vagueness of a federal definition but would accommodate state laboratories of experimentation¹⁸⁹ whose main experiment was legal gambling. Thus, when Congress rolled out its first comprehensive gambling statute in 1970, it defined an “illegal gambling business” with reference to “the law of a State or political subdivision in which it is conducted.”¹⁹⁰ Complaints that the gambling statute was deficient because, by relying on state law, its effect would “not be uniform throughout the United States” were largely brushed aside.¹⁹¹

Arguably even more explicit instances of dynamic incorporation of state law occurred in the Travel Act of 1964¹⁹² and the RICO¹⁹³ statute in 1970, both of which created complex federal offenses whose elements could, should prosecutors so choose, include violations of specified varieties of state law relating to, say, “extortion or bribery.” These statutes made perfect sense as a policy matter, since they allowed federal enforcers to selectively take crimes defined by state law and usually handled by local authorities and pursue them as part of an “organized crime” project (without, at least for the Travel Act, bearing any legal burden of showing a connection to a larger criminal operation).¹⁹⁴ A similar strategy has been used in the proposed federal domestic terrorism statute.¹⁹⁵

One challenge to the Travel Act condemned it as “an unconstitutional delegation of Federal legislative power to the States.”¹⁹⁶ Responding, a Justice Department official noted that, unlike, say the Assimilative Crimes Act (ACA), which entailed wholesale delegation to the States, the Travel Act “is restricted to certain defined kinds of criminal activity.”¹⁹⁷ Indeed, subsequent years would see a line of Supreme Court and lower court cases determining whether conduct charged both violated

¹⁸⁸ Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3511-12 (1986); see Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, Cornell J. L. & Pub. Pol’y 99, 116-117 (1996). Note that Act has since been amended further. 21 U.S.C. § 2421.

¹⁸⁹ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”)

¹⁹⁰ Organized Crime Control Act of 1970, (codified at 18 U.S.C. § 1955); see G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 Cornell L. Rev. 923, 979 (1978).

¹⁹¹ *United States v. Sacco*, 491 F.2d 995, 1003 (9th Cir. 1974). But see *id.* at 1004 (Ely, J. dissenting) (condemning statute because “it is intolerably discriminatory and thus denies to some . . . the equal protection of the law” because its sanctions “may be applied only to those citizens who commit their alleged unlawful gambling activities in communities wherein gambling is already prohibited by local law”).

¹⁹² *Interstate Travel in Aid of Racketeering*, Pub. L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498 (codified as amended at 18 U.S.C. § 1952).

¹⁹³ RICO (Racketeer Influenced and Corrupt Organization), 18 U.S.C. §§ 1961-1968.

¹⁹⁴ See Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 Am. Crim. L. Rev. 213 (1984).

¹⁹⁵ See *Confronting the Threat of Domestic Terrorism Act*, H.R. 4192 (2019).

¹⁹⁶ Herbert J. Jr. Miller, *The Travel Act: A New Statutory Approach to Organized Crime in the United States*, 1 Duq. U. L. Rev. 181, 185 (1963).

¹⁹⁷ *Id.*

some state penal law and fit within some generic federal definition of “extortion,”¹⁹⁸ “bribery,”¹⁹⁹ arson,²⁰⁰ and other Travel Act terms, and they found no need for juries to be instructed as to the state crime definition. Concerns about ostensible legislative delegation of federal criminal lawmaking authority to states will thus be mitigated when federal courts exercise a gatekeeping role in assessing what conduct and which state statutes “count” for federal criminal law purposes. Federal courts may not be democratically accountable, but unlike state legislatures, they are federal. And, at least so far, the federal statutes on which their gatekeeping is based has not been deemed void for vagueness.²⁰¹

The gatekeeping role courts play when deciding which state statutes can apply to a defendant via the Travel Act or RICO is substantially (but not completely) absent when a defendant in a federal enclave is charged under the ACA.²⁰² Here, there is wholesale dynamic incorporation (in the absence of a federal statute on point). The ACA provides in pertinent part:

Whoever [in a federal enclave] . . . is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

It dates back to Joseph Story’s dismay that, after *Hudson and Goodwin*, federal prosecutors and courts simply lacked an adequate supply of federal criminal law from Congress to address core federal interests. Failing to obtain legislative authorization for a federal common law of crimes, Story complained:

The criminal Code of the United States is singularly defective and inefficient . . . Few, very few, of the practical crimes (if I may so say) are now punishable by statutes, and if the courts have no general common law jurisdiction (which is a vexed question), they are wholly dispensable. The state courts have no jurisdiction of crimes committed on the high seas, or in places ceded to the United States. Rapes, arsons, batteries, and a host of other crimes may in these places be now committed with impunity. Suppose a conspiracy to commit treason in any of these places, by civil persons, how can the crime be punished? These are cases where the United States have an exclusive local jurisdiction. And can it be less fit that the government should have power to protect itself in all other places where it exercises a

¹⁹⁸ *United States v. Nardello*, 393 U.S. 286, 295 (1969) (“[T]he inquiry is not the manner in which States classify their criminal prohibitions but whether the particular State involved prohibits the extortionate activity charged.”).

¹⁹⁹ *Perrin v. United States*, 444 U.S. 37 (1979).

²⁰⁰ *United States v. Conway*, 507 F.2d 1047 (5th Cir.1975); see also *United States v. Owens*, 159 F.3d 221, 228 (6th Cir.1998); *United States v. Gomez*, 801 Fed. App’x. 715 (11th Cir. 2020).

²⁰¹ It has been argued, so far unsuccessfully, that the Supreme Court’s recent void for vagueness cases, see *United States v. Davis*, 139 S. Ct. 2319 (2019), require reconsideration of this line of Travel Act cases. See *United States v. Rogers*, 389 F. Supp. 3d 774, 790 (C.D. Cal. 2019). Considerable credit for my discussion of this statute goes to Jillian Williams, CLS 2021, on whose research and analysis I draw.

²⁰² 18 U.S.C. § 13(a) (2000).

legitimate authority? That Congress has power to provide for all crimes against the United States is incontestable.²⁰³

Story therefore drafted the original ACA, which Daniel Webster introduced in 1825.²⁰⁴

Initially, the ACA provided for “static conformity” with the state law of a federal enclave: the relevant state crime definition was that in force when the ACA, or subsequent versions of it, was enacted.²⁰⁵ Then in 1948, Congress changed its drafting strategy, opting for dynamic incorporation of state law. As the Court put in *United States v. Sharpnack*, upholding the new statute’s constitutionality: “Congress has thus at last provided that within each federal enclave, to the extent that offenses are not preempted by congressional enactments, there shall be complete current conformity with the criminal laws of the respective States in which the enclaves are situated.”²⁰⁶ The ACA will not authorize recourse to state law where some applicable federal enactment was intended to fill the field or otherwise preclude such recourse.²⁰⁷ But, as Wayne Logan explains, absent such preclusion, the ACA effects “a legal metamorphosis,”

transforming “a crime against the state into a crime against the federal government.” Upon conviction, the sentence imposed by the federal court is not to “exceed any maximum sentence and may not fall below any mandatory minimum sentence that is required under the law of the state in which the crimes occur.”²⁰⁸

Before *Sharpnack*, two lower courts found the ACA’s dynamic incorporation of “future legislation constituted an improper delegation and abdication of legislative duties,”²⁰⁹ and indeed pre-New Deal precedent held: “Congress cannot transfer its legislative power to the States -- by nature this is nondelegable.”²¹⁰ The *Sharpnack* Court, however, calmly rejected the delegation challenge on pragmatic grounds. Vagueness was not a problem: “Whether Congress sets forth the assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as are the

²⁰³ *United States v. Press Pub. Co.*, 219 U.S. 1, 12 (1911) (quoting 1 Joseph Story, *Life of Justice Story*, Boston 293 (1851)).

²⁰⁴ *Williams v. United States*, 327 U.S. 711, 721 (1946) (identifying Daniel Webster as the bill’s sponsor); see also Note, *The Federal Assimilative Crimes Act*, 70 *Harv L. Rev.* 685, 685 (1957).

²⁰⁵ *United States v. Sharpnack*, 355 U.S. 286, 291 (1958); *Franklin v. United States*, 216 U.S. 559, 569 (1910) (“There is plainly no delegation to the states of authority in any way to change the criminal laws applicable to places over which the United States has jurisdiction”).

²⁰⁶ *Sharpnack*, 355 at 293.

²⁰⁷ *Lewis v. United States*, 523 U.S. 155, 164 (1998); see *United States v. Rocha*, 598 F.3d 1144 (9th Cir. 2010) (rejecting ACA charge based on assimilation of California penal law in a federal prison assault case, on finding that “Congress has enacted a comprehensive assault statute by which it has fully occupied the law of assault within federal enclaves”).

²⁰⁸ Wayne A. Logan, *Creating a “Hydra in Government”: Federal Recourse to State Law in Crime Fighting*, 86 *B.U. L. Rev.* 65, 72-73 (2006) (first quoting *United States v. Kiliz*, 694 F.2d 628, 629 (9th Cir. 1982); then quoting *United States v. Garcia*, 893 F.2d 250, 251-52 (10th Cir. 1989)).

²⁰⁹ Note, *The Assimilative Crimes Act*, 7 *U. Rich. L. Rev.* 116, 123 (1972).

²¹⁰ *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) (McReynolds, J.); *Sharpnack* at n.10 (distinguishing *Knickerbocker*); see also Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 *U. Pa. L. Rev.* 103, 139 (2008) (citing *Cooky v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851)); *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 629 n.8 (3rd Cir. 1994) (“Although [*Knickerbocker* and similar cases] have not been explicitly overruled by the Court, they rest on a strong nondelegation doctrine the likes of which has not been seen since the 1930s.”).

state laws themselves.”²¹¹ Neither was wholesale and dynamic incorporation of state criminal statutes constitutionally troubling:

Rather than being a delegation by Congress of its legislative authority to the States, it is a deliberate continuing adoption by Congress for federal enclaves of such unpreempted offenses and punishments as shall have been already put in effect by the respective States for their own government. Congress retains power to exclude a particular state law from the assimilative effect of the Act. This procedure is a practical accommodation of the mechanics of the legislative functions of State and Nation in the field of police power where it is especially appropriate to make the federal regulation of local conduct conform to that already established by the State.²¹²

Since Congress could undoubtedly incorporate state law piecemeal or wholesale, and “obviously” could “renew such assimilation annually or daily,”²¹³ why force it to go through the charade?

“To protect liberty,” an adherent to the Gorsuch critique might respond, and indeed that point was as the heart of Justice Douglas’ dissent in *Sharpnack*:

Under the scheme now approved, a State makes such federal law, applicable to the enclave, as it likes, and that law becomes federal law, for the violation of which the citizen is sent to prison.

Here, it is a sex crime on which Congress has never legislated. Tomorrow it may be a blue law, a law governing usury, or even a law requiring segregation of the races on buses and in restaurants. It may be a law that could never command a majority in the Congress, or that in no sense reflected its will. It is no answer to say that the citizen would have a defense under the Fifth and Sixth Amendments to unconstitutional applications of these federal laws or the procedures under them. He is entitled to the considered judgment of Congress whether the law applied to him fits the federal policy. That is what federal lawmaking is. . . .

There is some convenience in doing what the Court allows today. Congress is saved the bother of enacting new Assimilative Crimes Acts from time to time. Federal laws grow like mushrooms without Congress passing a bill. But convenience is not material to the constitutional problem.²¹⁴

Why then is the wholesale delegation of federal criminal definition to the States -- once a federal court identifies a gap in federal law -- so uncontroversial that even then-Judge Gorsuch could laud the arrangement, noting “[a] testament to its efficacy and economy of design, the ACA remains today little changed from its original form”?²¹⁵ Certainly, if one puts aside delegation doctrine, disregards the lack of an “intelligible” principle, and uses a grading rubric anchored in federalism,

²¹¹ 355 U.S. at 293.

²¹² *Id.* at 294.

²¹³ *Id.* at 293.

²¹⁴ *Id.* at 299 (Douglas, J., dissenting).

²¹⁵ *United States v. Christie*, 717 F.3d 1156, 1170 (10th Cir. 2013) (Gorsuch, J.).

comity, and the traditional primacy of states in criminal law matters, the ACA passes with flying colors. As the Court noted in 1911 of the static version of the ACA:

Congress, in adopting it, sedulously considered the twofold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the states on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdiction but for the existence of a United States reservation.²¹⁶

More recently, Joshua Divine has embraced the possibility that “a nationally representative body” might “conclude that the problem of crime is primarily local, not national, and that criminal laws should thus conform to local laws and the facts and needs underlying those laws.”²¹⁷ Sure, national uniformity and horizontal equity across federal districts are regularly proclaimed transcendent values within the federal criminal justice system, particularly for sentencing. But especially since the demise of mandatory federal sentencing guidelines (and even before, because of massive variation in prosecutorial discretion), such values regularly give way to local norms.²¹⁸ There is something to be said for measures that recognize and formalize the adoption of these norms -- at least to the extent that federal enforcement targets the local (as its violent crime work generally does).

Yet unless alternative values like federalism and local consistency are “trumps”²¹⁹ -- which would raise the question of what, if any, other values are also trumps -- one is hard pressed indeed to see how the arrangement squares with very real concerns of the sort raised by the Gorsuch critique of administrative crimes. As Wayne Logan notes: By using “state laws and outcomes to achieve its own policy ends,” Congress “abdicates its criminal lawmaking authority in deference to individual states,” “undermining U.S. political transparency and democratic accountability.”²²⁰ One might respond that “federal deference actually enhances sensitivity to democratic norms by tying U.S. law to decisions of ‘the People’ of individual states,”²²¹ but this “misses the essential point that what is lacking is federal decision-making input, which ideally reflects collective national interests and values. State laws naturally reflect the distinct positions of state legislators, who are not held accountable to, and need not accommodate the interests of, the nation as a whole.”²²² Certainly the federal accountability of federal agencies is tautologically greater than that of state legislatures. Neither can the ACA’s regime find justification in the fact that those charged will also be citizens of the state

²¹⁶ *United States v. Press Pub. Co.*, 219 U.S. 1, 9 (1911); see also Paul J. Larkin, Jr., *Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 *Harv. J. L. Pub. Pol’y* 337, 376 (2014) (noting the “Constitution as a whole expressly recognizes the pre-existing, independent sovereignty of the states,” and “presumes the fact and legitimacy of the rule that state law will serve as the primary vehicle for regulating private conduct”).

²¹⁷ Divine at 184.

²¹⁸ Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds - The Center Doesn’t*, 117 *Yale L. J.* 1374-1418 (2008); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 *Yale L.J.* 1420 (2008).

²¹⁹ See Krent, *Fragmenting* at 67 (delegations to states “can perhaps be justified by the principle of federalism--the constitutional interest in state sovereignty may trump the competing constitutional norm of a centralized federal executive”).

²²⁰ Logan at 85.

²²¹ See Krent, *Fragmenting* at 102 (state legislators “possess an independent interest in fashioning public-regarding laws, and are checked by “the state electorate,” which “serves, in essence, as a replacement for the executive branch”).

²²² *Id.* at 89.

whose law applies.²²³ Maybe they will be, but there is no reason to assume that those who, say, visit “Indian country,”²²⁴ a military base,²²⁵ or are incarcerated in a federal prison²²⁶ come from the surrounding state.

To be sure, a considerable degree of federal accountability comes from the vast discretion federal prosecutors exercise over whether to invoke state law via the ACA. And they don’t do that frequently in serious cases.²²⁷ Yet that rationale proves too much, as it is true for all federal offenses, however and by whomever defined. Indeed, Joshua Divine has turned the vastness of federal enforcement discretion, and the paucity of effective constraining mechanisms into an argument for extending the ACA’s dynamic incorporation of state law in the ACA to other contexts. “State legislatures, subject to less inertia and politically more distant from the federal system,” he suggests “can check enforcement discretion where Congress has not.”²²⁸

Absent clarity on precisely what game we’re playing, what grading rubric we’re using, normative bottom lines are elusive. Suffice it to say, however, that notwithstanding its troubling effects -- summarized by Logan as “the lessening of democratic pluralism and experimentation, resulting from the attendant lack of direct congressional input; the blurring of federal political accountability; and the injection of a large measure of arbitrariness into the federal criminal justice system²²⁹ -- the ACA remains not only quite secure doctrinally, but apparently excused from the terms of the Gorsuch critique.

C. Delegations to Foreign States and International Organizations

While Congress has never matched the sweep of the ACA in its delegations to foreign states and international organizations, it has given some crime definition authority to those entities. Perhaps the comparatively limited nature of these delegations suggests far more congressional oversight and adoptive lawmaking than we have yet considered. That possibility, combined with prosecutorial gatekeeping, could argue for broad acceptance of this sort of delegation.

²²³ See *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19-20 (1852) (“Every citizen . . . may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either”).

²²⁴ See *United States v. Smith*, 925 F.3d 410, 418 (9th Cir. 2019) (explaining how ACA applies to Indian country under the Indian Country Crime Act, 18 U.S.C. § 7).

²²⁵ See *Lewis v. United States*, 523 U.S. 155 (1998) (prosecution under ACA for murder of child on military base); *United States v. Dotson*, 615 F.3d 1162 (9th Cir. 2010) (prosecution under ACA for furnishing liquor to underage servicemen on military base).

²²⁶ See *United States v. Rocha*, 598 F.3d 1144 (9th Cir. 2010) (reversing conviction under ACA and California law for assault in federal prison because federal assault statute deemed to leave no gap to fill).

²²⁷ See FY 2019 Annual Statistical Report at 11, tbl. 3A (only 132 ACA cases filed in district courts); 32 C.F.R. § 634.25(e) (providing “[i]n States where traffic law violations are State criminal offenses, such laws are made applicable under the provisions of 18 U.S.C. § 13 to military installations having concurrent or exclusive Federal jurisdiction.”)

²²⁸ Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 Va. L. Rev. 127, 181 (2020); see also Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 Yale L.J. 1920, 1935 (2014) (“The main role states play in federal statutory schemes is as administrators of national programs, a sort of second executive branch operating alongside the President and the D.C. bureaucracy.”).

²²⁹ Logan 67-68.

Yet this is one area where the Supreme Court has not treated Executive control as much of a guarantee of federal accountability in this area. Thus, in *Small v. United States*,²³⁰ where the defendant was charged with being a felon-in-possession of a weapon, based on his prior conviction in a Japanese court, the Court nodded at the presumption against extraterritoriality, even as it admitted it didn't really apply here: defendant's possession occurred in the US and the only question was whether a foreign conviction could supply the felony element. But its rationale for quashing the conviction focused on foreign offenses for conduct that the US would consider untroubling or even laudable, noting that judges and prosecutors would not be up to the job of "weed[ing] out inappropriate foreign convictions."²³¹ It mattered not that, as Justice Thomas noted in dissent, "the handful of prosecutions thus far rested on foreign convictions perfectly consonant with American law."²³²

A lower court drew on *Small's* reasoning where an American was charged under the Mann Act²³³ with molesting a Russian boy he had brought to the United States for ballet training, with the specified "criminal offense" a provision of the Russian Criminal Code that "criminalizes compelling a person to engage in a sexual act 'by means of blackmail, threat of destruction, damaging, or seizure of property or by taking advantage of the material or other dependence of the victim.'"²³⁴ Throwing out defendant's conviction post-trial, upon finding the Russian offense "too vague to satisfy American standards of due process," the court declined to reach defendant's argument that because "many other countries outlaw sexual conduct which is legal in the United States, including non-marital sexual activity and sexual activity between two people of the same sex," the statute was unconstitutional. But confidence that federal prosecutors would refrain from proceeding in such cases did not figure in the court's reasoning.

Another statute that might find US courts proceeding gingerly is 18 U.S.C. § 1956(c)(7)(B)(iv), which criminalizes the use of a U.S. financial institution to launder the proceeds of "an offense against a foreign nation . . . involving bribery of a public official or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official."²³⁵ Particularly in nations where corruption laws are passed for show or strategic enforcement, such offenses potentially can be broad indeed. As yet, however, lower courts have been quite deferential when drawing on foreign crime definition in this context, with one citing "principles of international comity."²³⁶ Perhaps respect for "international comity," and recognition of the importance of transborder cooperation against transborder criminal activity will turn such concerns into "trumps" like federalism in the case

²³⁰ *Small v. United States*, 544 U.S. 385 (2005)

²³¹ *Id.* at 390.

²³² *Id.* at 403 (Thomas, J., dissenting).

²³³ The Mann Act, 18 U.S.C. § 2421, provides:

Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

²³⁴ *United States v. Schneider*, 817 F. Supp. 2d 586, 602-03 (E.D. Pa. 2011),

²³⁵ Considerable credit for my discussion of this statute goes to Jake Sidransky, CLS 2021, on whose research and analysis I draw.

²³⁶ See *United States v. Thiam*, 934 F.3d 89, 94 (2d Cir. 2019); see also *United States v. Heon-Cheol Chi*, 936 F.3d 888, 897 (9th Cir. 2019) (drawing on Travel Act cases and finding that South Korean statute falls within the generic federal definition of "bribery").

of the ACA. The centrality of federalism to the constitutional structure, however, makes that path contestable.²³⁷

Perhaps because it is more of a regulatory offense of the sort that critics of criminal delegation like to target, the Lacey Act has been the subject of far more scrutiny, at least by commentators. That Act makes it “unlawful for any person . . . to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law”²³⁸ -- with “law” defined as those that “regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants.”²³⁹ Paul Larkin, a Heritage Foundation scholar, calls it “bizzare” “that the world’s oldest surviving representative democracy should give to a foreign country the bedrock right that our ancestors, families, and friends have purchased with blood, treasure, and honor for more than two centuries,” and he condemns the Act as an unconstitutional delegation because it supplies “no ‘intelligible principle’ for foreign governments to use when deciding what conduct to make a crime and leaves American importers, for example, bereft of the ability to rely on the general legal principles that someone learns in the United States.”²⁴⁰

For their part, lower courts have been remarkably accepting of this broad delegation. As the Ninth Circuit noted:

Because of the wide range the forms of law may take given the world’s many diverse legal and governmental systems, Congress would be hard-pressed to set forth a definition that would adequately encompass all of them. . . . Thus, if Congress had sought to define “any foreign law” with any kind of specificity whatsoever, it might have effectively immunized . . . [conduct] under the Act despite violation of conservation laws of a large portion of the world’s regimes that possess systems of law and government that defy easy definition or categorization.²⁴¹

²³⁷ A negative variety of delegated lawmaking can be found in the Foreign Corrupt Practices Act, which, even while seeking to promote international anti-corruption norms, provides an affirmative defense for payments that are “lawful under the written laws and regulations” of a foreign official’s country. 15 U.S.C. § 78dd-2(c); see *United States v. Kozeny*, 582 F. Supp. 2d 535, 537-40 (S.D.N.Y. 2008).

²³⁸ 16 U.S.C. § 3372(a)(2)(A).

²³⁹ 16 U.S.C. § 3371(d).

²⁴⁰ Paul J. Larkin, Jr., *Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 *Harv. J. L. & Pub. Pol’y* 337, 340 & 346 (2014); see also Michael C. Dorf, *Dynamic Incorporation Foreign Law*, 157 *U. Pa. L. Rev.* 103, 115 (2008) (“Dynamic incorporation of foreign law poses a prima facie threat to the democracy of the incorporating polity because it takes decisions out of the hands of the people’s representatives in that polity delegates them to persons and bodies that are accountable only different polity.”).

²⁴¹ *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 827-28 (9th Cir. 1989) (O’Scannlain, J.); see also *United States v. Lee*, 937 F.2d 1388, 1392 (9th Cir. 1991) (rejecting the argument -- by fisherman convicted of illegal salmon fishing -- that Congress did not intend to impose criminal penalties under the Lacey Act for violations of a regulation that itself carried no criminal sanctions); *United States v. McNab*, 331 F.3d 1228, 1235-47 (11th Cir. 2003) (upholding Lacey Act conviction even though (1) the “law” defendant violated consisted of Honduran regulations, not statutes, governing lobster fishing, and (2) the Honduran government filed papers in the appeal saying that its prior official representations of Honduran law were invalid”); *United States v. Hansen-Sturm*, 44 F.3d 793, 795 (9th Cir.1995), (rejecting claim that Lacey Act is unconstitutional delegation of congressional authority as “frivolous”); Richman, Stith & Stuntz at 895-96.

Foreign legislative processes are categorically different from State legislative processes. Indeed, since the foreign regulations enforced criminally through the Lacey Act need not have carried penal sanctions, one cannot assume that any thought was given to criminal responsibility and community condemnation. And while federal prosecutorial gatekeeping injects a degree of federal accountability, that does not, as we have seen, seem to carry weight doctrinally. Analogies have therefore been made to caselaw constraining delegations to private entities.²⁴² Yet what the Lacey Act has going for it are the limited subject matter of the delegation and the inherent demands of a concerted federal legislative policy to support international conservation efforts in a way that values both comity and notice to those operating (at least initially) in a foreign jurisdiction (even though American defendants might not be able to read the foreign laws).

What about delegation to international organizations or conventions? How much of a leap is it from a domestic regime that delegates classification, say of controlled substances, to an expert federal agency and provides for criminal prosecutions based on those classifications, to a regime in which such classifications are delegated by international treaty signatories (including the United States) to a group of international experts?²⁴³ As with foreign states, these crime-defining authorities cannot be held to account as a domestic agency may be through congressional oversight hearings.²⁴⁴ Yet, unlike foreign legislation, the US has a direct role in the international process,²⁴⁵ and the involvement of other states in that process can provide a needed source of restraint.²⁴⁶ The issue²⁴⁷ has yet to squarely emerge, for when a defendant was charged under the Lacey Act with violating the Convention on International Trade in Endangered Species of Wild Fauna and Flora²⁴⁸ the First Circuit was careful to explain how the Treaty's provisions had been codified by separate US law.²⁴⁹

Still, delegation to a treaty obligation has figured prominently in the long saga of marijuana's scheduling under the Controlled Substances Act. Soon after it was scheduled, the Government urged, as one justification for scheduling, that Act's provision requiring the Attorney General -- without regard to the normal administrative process -- to select the "appropriate" schedule for a

²⁴² Larkin at 403.

²⁴³ See James M. Rice, Note, The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations, 105 Cal. L. Rev. 539, 542 (2017).

²⁴⁴ Kristina Daugirdas, International Delegations and Administrative Law, 66 Md. L. Rev. 707, 738 (2007).

²⁴⁵ Dorf at 152 ("[P]olitical representation of the dynamically incorporating polity (or representation of its citizens) within the polity whose laws are incorporated can compensate for the loss of local democratic control that irrevocable or nearly irrevocable dynamic incorporation entails.").

²⁴⁶ Edward T. Swaine, The Constitutionality of International Delegations, 104 Col. L. Rev. 1492, 1613 (2004) (noting that "delegations of lawmaking authority to international institutions may promote the values underlying domestic federalism").

²⁴⁷ This issue is quite different from the one raised where Congress passes a federal enabling statute, carefully or thoughtlessly, pursuant to a treaty obligation. See *Bond v. United States*, 134 S. Ct. 2077, 2083 (2014); see also *The Hostage Taking Act*, 18 U.S.C. § 1203 (implementing statute passed to effectuate the International Convention Against the Taking of Hostages, Dec. 18, 1979, T.I.A.S. No. 11,081); *United States v. Ferreria*, 275 F.3d 1020, 1022 (11th Cir. 2001) (upholding prosecution under Hostage Taking Act); *United States v. Wang Kun Lue*, 134 F.3d 79, 80-81 (2d Cir. 1997) (same); Curtis A. Bradley, Federalism, Treaty Implementation, and Political Process: *Bond v. United States*, 108 Am. J. Int'l L. 486, 493 n.46 (2014).

²⁴⁸ Convention on International Trade in Endangered Species of Wild Fauna and Flor (CITES), Mar. 3, 1973, 27 U.S.T. 1087.

²⁴⁹ *United States v. Place*, 693 F.3d 219, 222-23 (1st Cir. 2012); see also *United States v. Lawson*, 377 Fed. App'x. 712, 716 (9th Cir. 2010) (finding a violation of regulations related to the CITES punishable under 18 U.S.C. § 545 because violation of regulations was criminalized under Endangered Species Act).

drug where “control is required by United States obligations under international treaties, conventions, or protocols,” as marijuana was indeed covered by the Single Convention on Narcotic Drugs.²⁵⁰ And it continues to cite that Convention as a reason for denying petitions to reschedule marijuana.²⁵¹ The D.C. Circuit has found that the Attorney General has some discretion on where she put marijuana.²⁵² but it is far from clear she could refuse to put it on any schedule.²⁵³

Perhaps a principle will emerge that international organization delegations of crime definition authority going beyond the explicit terms of a domestic statute are acceptable as long as they closely resemble the narrow expertise-justifications that even Justice Gorsuch find acceptable in the domestic context.²⁵⁴ But, of course, this approach relies on the assumption that expertise has no national boundaries, which some -- whether because of their deep immersion in the sociology of science or their naked parochialism -- might question. Suffice it to say that should the political will to revisit marijuana’s scheduling develop domestically to the extent that scheduling rested solely on the Single Convention, the principles comity and transborder cooperation would be tested indeed.

D. Delegation to the Law of Nations - Piracy

Whatever constitutional or policy concerns one has with the delegation of crime-definition authority to foreign authorities must reckon with one such delegation that dates back nearly to the Founding: the law of piracy. Article I gave Congress the power to “define and punish Piracies and Felonies committed on the high Seas.”²⁵⁵ The First Congress exercised this power in 1790 and, in the first criminal statute, broadly defined piracy to include what was well understood to be “piracy” under international law as well as “a variety of maritime misdeeds” beyond that.²⁵⁶ When Congress

²⁵⁰ 21 U.S.C. § 811(d); see *United States v. Kiffer*, 477 F.2d 349, 351-52 (2d Cir. 1973) (noting government’s position that because marijuana was covered by the Single Convention on Narcotic Drugs, March 30, 1961, [1967] 18 U.S.T. 1407, T.I.A.S. No. 6298 (ratified by United States in 1967), its scheduling could not be reconsidered); see also *Petition to Remove Marihuana From Control or in the Alternative To Control Marihuana in Schedule V of the Controlled Substances Act*, 37 Fed. Reg. 18097, 18,907–08 (Sept. 7, 1972) (denying a petition on the grounds that the Attorney General has the sole authority to schedule drugs when U.S. treaty obligations require doing so).

²⁵¹ *Denial of Petition to Initiate Proceedings to Reschedule Marijuana*, 81 Fed. Reg. 53,688, 53,688–89 (Aug. 12, 2016) (citing the Single Convention on Narcotics for the proposition that “schedules I and II [of the CSA] are the only possible schedules in which marijuana may be placed”).

²⁵² *Nat’l Org. for Reform of Marijuana Law (NORML) v. Drug Enf’t Admin.*, 559 F.2d 735, 752 (D.C. Cir. 1977) (“Even under a narrow reading of subsection (d), the Attorney General to satisfy treaty requirements is directed to establish a minimum schedule below which the substance in question may not be placed”).

²⁵³ But see *Washington v. Barr*, 925 F.3d 109, 119-20 (2d Cir. 2019) (reading D.C. Circuit to have held that “foreign treaty commitments have not divested the Attorney General of the power to re- or deschedule marijuana”); see also Eric Blumenson, Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 Va. J. Soc. Pol’y & L. 43 n.121 (2009) (arguing that the decriminalization of marijuana possession is, in light of the Single Convention’s “consistent with national constitutional principles” caveat, “likely consistent” with the U.S. treaty obligations); *State v. Kurtz*, 309 P.3d 472, 476 n.7 (Wash. 2013) (en banc) Wash. Rev. Code Ann. § 69.50.203 (2013) (noting, in a challenge to a state agency’s placement of marijuana in Schedule I of a CSA analog, that the now-repealed statute required the state to mirror CSA scheduling where the federal government acted to comply with treaty obligations). In December 2020, the U.N. Commission for Narcotic Drugs voted to recommend the removal of cannabis from the Single Convention. See Isabelle Kwai, *U.N. Reclassifies Cannabis as a Less Dangerous Drug*, N.Y. Times, Dec. 2, 2020.

²⁵⁴ See supra ____

²⁵⁵ U.S. Const., art. I, § 8, cl. 10.

²⁵⁶ Eugene Kontorovich, *The “Define and Punish” Clause and the Limit of Universal Jurisdiction*, 103 Nw. L. Rev. 149, 175 (2009).

revisited the matter in 1819, it changed strategies and explicitly incorporated international law by reference:

That if any person or persons whatsoever shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof ... be punished by death.²⁵⁷

The current provision, 18 U.S.C. §1651, is almost identical, save for a mandatory punishment of life imprisonment, not death.²⁵⁸ This is one of the offenses charged against some Somali pirates who “imprudently launched an attack on the USS Nicholas, having confused that mighty Navy frigate for a vulnerable merchant ship.”²⁵⁹ Defendants claimed that “piracy” entailed only robbery at sea, i.e., seizing or otherwise robbing a vessel (which they never had a chance to do). The district court, however, found that the statute necessarily incorporated modern developments in international law, and, for authority, it looked to the Geneva Convention on the High Seas, adopted in 1958 and ratified by the United States in 1961, and the United Nations Convention on the Law of the Sea, which the United States has not ratified but recognizes as reflecting customary international law.²⁶⁰ Affirming defendants’ conviction, the Fourth Circuit agreed and noted

if the Congress of 1819 had believed either the law of nations generally or its piracy definition specifically to be inflexible, the Act of 1819 could easily have been drafted to specify that piracy consisted of “piracy as defined on March 3, 1819 [the date of enactment], by the law of nations,” or solely of, as the defendants would have it, “robbery upon the sea.”²⁶¹

This sort of dynamic incorporation regularly happens, the court observed, citing the Lacey Act, among other provisions. As for defendants’ claim that “giving ‘piracy’ an evolving definition would violate the principle that there are no federal common law crimes,” the Fourth Circuit backhanded it in much the same way as the Supreme Court did in *Lanier*: This was not a common law crime “because Congress properly ‘ma[de] an act a crime, affix[ed] a punishment to it, and declare[d] the court that shall have jurisdiction of the offence.’”²⁶² And it noted that back in 1820, the Supreme Court “unhesitatingly approved of the piracy statute’s incorporation of the law of nations, looking to various sources to ascertain how piracy was defined under the law of nations.”²⁶³

To be sure, federal courts play a key mediating role when dynamically incorporating international norms, thus rendering the “federal” role in crime definition more salient than in the Lacey Act. And the stability of the international law definition of “piracy”-- as opposed to “municipal” definitions

²⁵⁷ Act of March 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14 (1819); Kontorovich *supra* at 188.

²⁵⁸ 18 U.S.C. § 1651 (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”).

²⁵⁹ *United States v. Dire*, 680 F.3d 446, 449 (4th Cir. 2012).

²⁶⁰ *Id.* at 459-64

²⁶¹ *Id.* at 468.

²⁶² *Id.* (citing *Hudson*, 11 U.S. (7 Cranch) at 34); see also *United States v. Said* 798 F.3d 182, 193 (4th Cir. 2015) (following *Dire*); *United States v. Beyle*, 782 F.3d 159, 169 (4th Cir. 2015) (same);

²⁶³ 680 F.3d at 468 (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159-61 (1820); see Eugene Kontorovich, Note on *Dire*, 107 *Am. J. Int’l L.* 644, 648 (2013) (“That a crystal-clear customary definition can substitute for a congressional definition has been clear since *Smith*.”).

that are artifacts of national will²⁶⁴-- might be said to encompass a clear “intelligible principle.” Moreover, courts can -- perhaps through void-for-vagueness or lenity doctrine -- ensure that troubling shifts in the international understanding of “piracy” will not be the basis of federal criminal charges. Yet they cannot be counted on to do so, and one might well worry about courts, spurred by prosecutors, “cobbling potentially diffuse and debatable international legal sources into an open-ended criminal norm.”²⁶⁵ After all, the statute entails less a delegation to courts than a delegation to the collectively established “law of nations,” as mediated by federal courts. In any event, this legislative delegation to some mix of federal courts and international authorities is about as far removed from the model valorized by the Gorsuch critique as can be realistically imagined.

Query which is better: Congress’s original strategy of using its own definition of “piracy,” which presumably would have led federal courts to develop the term in their own common law fashion, the way they do for “fraud”? Or the strategy it selected, which has federal courts anchoring their definition of the term in the “law of nations”? The first makes the offense purely American but hostage to ad hoc judicial lawmaking and prosecutorial pressure. The second is far more stable and perhaps ascertainable, but only by using an international benchmark. Of course, neither approach has the legislative supremacy demanded by Gorsuch, who would have Congress do all the definitional work.

Perhaps a “trump” can be found in the transcendent value less of comity than of transnational uniformity in what, operationally, must be a multilateral effort. Should US courts embrace that reasoning, they would do well to “consult the numerous decisions by courts around the world arising from the eruption of Somali piracy.”²⁶⁶ The point goes beyond operational utility: While those decrying administrative crimes are dismayed by the lack of community condemnation,²⁶⁷ there is an international community, of which the US and any defendant are members, that stands united on so few things. Piracy is one, and the availability of prosecutorial and judicial gatekeepers to protect American interests allows sufficient national modulation of that international condemnation.

D. Revisiting Administrative Crimes: A Cautionary Story(?) from Securities Law

Having explored the doctrinal and normative justifications for broad congressional delegations to federal courts and to state legislatures, and, through infrequently, to foreign and international entities, it’s worth pausing to consider how the delegation of crime definition authority to federal administrative agencies fares against a federal criminal law backdrop, as opposed to the administrative law backdrop against which the Gorsuch critique places it.

This is not to say that administrative crimes necessarily look bad through an administrative law lens. As a formal matter, Tom Merrill has cogently suggested that Article I, Section 1 simply entails an “exclusive delegation doctrine,” not a nondelegation doctrine, with two “subsidiary principles”:

²⁶⁴ See Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 *Harv. L. Rev.* 334, 335 (1925) (noting piracy “has long been regarded as an international crime as well as a crime by municipal law”).

²⁶⁵ Kontorovich, Note on *Dire*, at 648

²⁶⁶ *Id.* at 649. When looking at foreign case law, the district court in *Dire* was careful to note: “While the Court is mindful of the controversy regarding reference to judicial decisions of other countries, those concerns are not applicable where Congress has specifically chosen to define a crime by reference to the ‘law of nations.’” *United States v. Hasan*, 747 F. Supp.2d 599, 616 (E.D. Va. 2010).

²⁶⁷ See Fissell, *supra* at 894.

First, that executive and judicial officers have no inherent authority to act with the force of law, but must trace any such authority to some provision of enacted law. I call this the anti-inherency principle. Second, that Congress has the power to vest executive and judicial officers with authority to act with the force of law, including the authority to promulgate legislative regulations functionally indistinguishable from statutes. I call this the transferability principle.²⁶⁸

When Congress unambiguously transfers crime definition authority to agencies, it complies with these principles.²⁶⁹ Merrill also pushes back against the claim that a strict nondelegation doctrine “would promote greater deliberation,” noting “unless we stack the deck by defining deliberation to mean legislative deliberation, there is not much doubt that promoting deliberation is a policy that more generally favors broad delegation.”²⁷⁰

When one considers the values and pathologies of federal criminal law, agencies come out quite well, at least if over-criminalization and fear of excessive intrusions on liberty is a dominant concern. The deficiencies of Congress’s criminal work have been long noted, with legislative specificity poorly rewarded politically and concerns about overbreadth generally left for prosecutors to handle (and be blamed for).²⁷¹ Even when a disproportionately affected group has considerable political power, it rarely has been able, or even tried, to curtail the sweep of federal criminal statutes. Business interests have largely given up trying to legislatively cut back on the sweep of fraud statutes, and the breadth of the obstruction statute -- passed in the wake of Enron -- at issue in *Yates v. United States*,²⁷² is a reminder that white collar legislation is as crisis-driven as any other area of federal criminal law.²⁷³ Agency rulemaking and interpretation offers a far more accommodating sphere for “respectable constituencies” to shape crime-definition.²⁷⁴ Of course, if one is trying to balance liberty protection against concerns about agency-capture and under-regulation, this feature is a bug, but we will stick with liberty concerns for now.

The recent history of criminal securities fraud law, particularly with respect to insider trading, ought to give pause to those committed to legislative supremacy as a mechanism for liberty protection. It’s a story that reminds us not only that the actual institutional dynamic across agencies, Congress and courts often differs from the idealized one in the Gorsuch critique, but that the dynamic may not be amenable to change through the proposed interventions.

²⁶⁸ Thomas W. Merrill, Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation, 104 *Colum. L. Rev.* 2097, 2101 (2004).

²⁶⁹ See also Thomas W. Merrill & Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention, 116 *Harv. L. Rev.* 467, 472 (2002); *United States v. Palazzo*, 558 F.3d 400, 405-08 (5th Cir. 2009) (upholding prosecution based on failure of clinical investigators to adhere to the FDA’s regulations regarding record-keeping and reporting).

²⁷⁰ Merrill, Rethinking at 2154-55.

²⁷¹ See Dan M. Kahan, Is *Chevron* Relevant to Federal Criminal Law? 110 *Harv. L. Rev.* 469, 474-75 (1996), Richman, Congressional Delegation and Enforcement Discretion, *supra* note __, at 763-65; Stuntz, Collapse of American Criminal Justice; Buell, Upside of Overbreadth, *supra* at 1513-14..

²⁷² 135 S. Ct. 1074 (2015).

²⁷³ But note the absence of white collar mandatory minimums -- Congress’ way of really making a point. See Daniel C. Richman, Federal White Collar Sentencing in the United States: A Work in Progress, 76 *Law & Contemp. Probs.* 53, 56 (2013).

²⁷⁴ Einer Elhauge, Preference-Eliciting Statutory Default Rules, 102 *Colum. L. Rev.* 2162, 2202 (2002).

As Richard Meyer noted, “Insider trading is a textbook example of the process of creating crimes through delegation to an agency.”²⁷⁵ The crime-definition story begins with Congress’s passage of the Securities Exchange Act of 1934, which in §10(b) made it “unlawful” to “use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations” as the Securities and Exchange Commission” may prescribe as necessary or appropriate in the public interest or for the protection of investors.²⁷⁶ Section 32 of the Act made violation of rules so promulgated into federal crimes punishable by up to twenty years imprisonment while providing “no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.”²⁷⁷ This was no wholesale delegation of crime definition authority. As Steve Thel has noted: “While criminal penalties are available for willful violation of any section of the [Exchange Act], . . . they are available for only a subset of SEC rules.”²⁷⁸ And he reports that this limitation “was the product of considerable legislative attention to widely held concerns about the propriety of granting an administrative agency license to create new crimes.”²⁷⁹

For its part, the SEC did little in the way of prospectively articulating the limits of the fraud that would be targeted. The agency promulgated a rule, 10b-5, targeting any who employed “any device, scheme, or artifice to defraud,” or engaged “in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, . . . in connection with the purchase or sale of any security.”²⁸⁰ Thereafter, in the wake of these open-textured provisions, the work of crime definition soon moved to the courts, particularly with respect to insider trading. Thel notes: “The Supreme Court created the law, and, as it typically does in Rule 10b-5 cases, paid very little attention to the rule in its insider trading cases.”²⁸¹ The SEC contributed significantly to doctrinal development, but it did so chiefly through the cases it brought and the liability theories it offered.²⁸²

This judicial domination understandably provoked calls for greater legislative specificity. As a future SEC commissioner wrote in 1966:

It is suggested that ultimately better law, better national law, can be developed if the effort is made through legislative means, with the opportunity it affords for a more sweeping study of

²⁷⁵ Meyer, *supra* at 1853.

²⁷⁶ Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10b, 48 Stat. 881, 891 (codified at 15 U.S.C. § 78j(b)).

²⁷⁷ *Id.*, § 32, 48 Stat. 881, 904-905 (codified at 15 U.S.C. § 78ff).

²⁷⁸ Steve Thel, Taking Section 10(b) Seriously: Criminal Enforcement of SEC Rules, 2014 Colum. Bus. L. Rev. 1, 11 (2014).

²⁷⁹ *Id.* at 13.

²⁸⁰ Rule 10b-5; see Thel at 6 (noting that the SEC’s general authority to promulgate rules arises out of a different provision of the Exchange Act).

²⁸¹ *Id.* at 29; see *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (Rehnquist, C.J.) (calling the law of Rule 10b5 “a judicial oak which has grown from little more than a legislative acorn.”); Adam C. Pritchard, *United States v. O’Hagan: Agency Law and Justice Powell’s Legacy for the Law of Insider Trading*, 78 B.U. L. Rev. 13, 14 (1998) (“The law of insider trading is judicially created; no statutory provision explicitly prohibits trading on the basis of material, non-public information.”); Baer, *Inside Trading* at 144 (noting how both Congress and the SEC left definition of insider trading to the courts).

²⁸² See Jill E. Fisch, *Federal Securities Fraud Litigation as a Lawmaking Partnership*, Wash. U. L. Rev. 453, 481 (2015) (noting “[a]lthough enforcement has been the agency’s primary lawmaking role, the SEC has also responded to restrictive judicial decisions through formal rulemaking”).

the problems than is possible in the courts. As the law in this area develops, each district judge and each appellate judge confronting 10b-5 must become a legislator. Granted, judges often perform quasi-legislative functions, but it is suggested that the present state of the law permits and invites too great an admixture of legislation with adjudication.²⁸³

Securities lawyers and scholars would make similar calls through succeeding decades.²⁸⁴ But to no avail, as Congress was unwilling to clarify insider trading law, “for fear that a statutory definition would amount to a roadmap for fraud, charting ways for informed traders to circumvent prosecution.”²⁸⁵ For its part, the SEC may have resisted specificity less out of fear of providing a roadmap, but, as Donald Langevoort has suggested, than for fear that

the political character of the law-making process, so visible and contested, will one way or another lead to a prohibition that does not have the scope the Commission thinks it should. Special interests often disingenuously seek freedom in the name of clarity.²⁸⁶

As always, the Executive played a key gatekeeping role, deciding when this administrative rule with a common law content would be charged. But it has played its own strategic lawmaking rule as well. In the absence of clarity from the Supreme Court as to whether Rule 10b-5 covered misappropriation theories of insider trading liability, prosecutors reached for the Title 18 mail fraud statute, which the Supreme Court found to easily encompass the conduct.²⁸⁷ And when, in 1997, the Court finally found 10b-5 to encompass those theories,²⁸⁸ prosecutors often charged both offenses. Indeed, there is good reason to think that insider trading can more easily be prosecuted as mail/wire fraud than under Rule 10b-5.²⁸⁹

In 2002, in the wake of the Enron scandal, Congress was in a legislation-passing mood. So as part of the Sarbanes-Oxley package, it enacted a broad securities fraud statute, 18 U.S.C. § 1348. It was needed, according to Senator Leahy, because

there is no generally accessible statute that deals with the specific problem of securities fraud. In these cases, prosecutors are forced either to resort to a patchwork of technical Title 15 offenses and regulations, which may criminalize particular violations of securities law, or to

²⁸³ A. A. Sommer Jr., Rule 10b-5: Notes for Legislation, 17 *W. Res. L. Rev.* 1029, 1053 (1966).

²⁸⁴ See Miriam Baer, Insider Trading’s Legality Problem, 127 *Yale L.J.F.* 129 (2017); Donald C. Langevoort, Watching Insider Trading Law Wobble: *Obus, Newman, Salman, Two Martomas, and a Blaszcak*, 89 *Fordham L. Rev.* 507, 528 (echoing calls for Congress to “writ[e] a clear statutory definition of insider trading” and lamenting “the unnecessary complications courts have caused”). For a recent reform proposal, see Preet Bharara, et al., Report of the Bharara Task Force on Insider Trading 14-18 (2020), <https://www.bhararataskforce.com/>

²⁸⁵ *Thel* at 30.

²⁸⁶ Donald C. Langevoort, Rereading *Cady Roberts*: The Ideology and Practice of Insider Trading Regulation, 99 *Colum. L. Rev.* 1319, 1340 (1999).

²⁸⁷ *Carpenter v. United States*, 484 U.S. 19, 28 (1987); see William K.S. Wang, Application of the Federal Mail and Wire Fraud Statutes to Criminal Liability for Stock Market Insider Trading and Tipping, 70 *U. Miami L. Rev.* 220 (2015).

²⁸⁸ *United States v. O’Hagan*, 521 U.S. 642, 653-59 (1997).

²⁸⁹ William Wang, *supra* at 299.

treat the cases as generic mail or wire fraud cases and to meet the technical elements of those statutes . . .²⁹⁰

Of course, § 1348 added little in the way of specificity. And prosecutors initially had little use for it, preferring to stay on the well-trod paths of 10b-5 caselaw.²⁹¹ But the accretion of judicial doctrines designed to separate the illegal use of material nonpublic information from merely aggressive research in time limited their ability to pursue the “tippees” who traded on inside information obtained from “tippers” under some duty to keep it confidential. The Supreme Court’s key move was to require that the insider “tipper” have received some “personal benefit” for transmitting the information,²⁹² and lower courts soon found that requirement unsatisfied in some significant prosecutions of tippees.²⁹³ So prosecutors switched tracks and found they could side-step this 10b-5 requirement by resorting to Title 18 (where most but hardly all standard federal crimes are codified) and charging under § 1348.²⁹⁴ A Justice Department publication observed:

Bad cases make bad law, and section 10b-5 . . . has spawned a wide variety of cases across the circuits which can cause confusion for prosecutors and judges alike. Section 1348, both because of its newness and the lack of a civil cause of action, offers a simpler approach, without the unwelcome freight which decades of litigation—much of it civil—has piled onto 10b-5.²⁹⁵

In a case where the jury acquitted on Rule 10b-5 charges but convicted on wire fraud and § 1348 counts, the Second Circuit recently rejected the applicability of the “personal benefit test” to § 1348, reasoning that the test is a “judge made doctrine premised upon the Exchange Act’s statutory purpose,” and thus not applicable to the new statute.²⁹⁶

Perhaps this is just a path-dependent story, peculiar to securities fraud, with its high-frequency criminal litigation and parallel civil development. Moreover, as previously discussed, the common law-like history of federal “fraud” doubtless contributed to the openly collaborative role the courts sought to play in defining an ostensibly administrative crime.²⁹⁷ Yet, with these caveats, one might still find the story to show the very institutional dynamics that are occurring, or might occur

²⁹⁰ 148 Cong. Rec. S7420 (2002) (daily ed. July 26, 2002) (statement of Sen. Leahy), quoted in Karen E. Woody, *The New Insider Trading*, 51 *Ariz. St. L.J.* 505, 528 (2019).

²⁹¹ Woody *supra* at 528 (noting paucity of § 1348 cases).

²⁹² *Dirks v. SEC*, 463 U.S. 646, 648 (1983)

²⁹³ See *United States v. Newman*, 773 F.3d 438, 442 (2d Cir. 2014); see also *Salman v. United States*, 137 S. Ct. 420, 422 (2016); Miriam H. Baer, *Insider Trading’s Legality Problem*, 127 *Yale L.J.F.* June 129, 139-41, 148-49 (2017). In the course of paring back the Second Circuit’s analysis in *Salman*, the Supreme Court rejected the defendant’s appeal to the rule of lenity, finding that his conduct was within the “heartland” of Supreme Court doctrine. *Id.* at 149.

²⁹⁴ Peter J. Henning, *A New Way to Charge Insider Trading*, *N.Y. Times*, Aug. 24, 2015; Richman, Stith & Stuntz, at 883.

²⁹⁵ Sandra Moser & Justin Weitz, *18 U.S.C. § 1348—A Workhorse Statute for Prosecutors*, 66 *DOJ J. Fed. L. & Prac.* 111, 120-21 (2018).

²⁹⁶ *United States v. Blaszczyk*, 947 F.3d 19 (2d Cir. 2019). The Supreme Court recently vacated and remanded this case for “consideration in light of *Kelly v. United States*, [140 S. Ct. 1565 (2020)].” 2021 WL 78043 (mem.) (Jan. 11, 2021). But as *Kelly* does not implicate the Circuit’s “personal benefit” analysis, the latter appears likely to survive, at least in the near term.

²⁹⁷ See Fisch, *supra* at 483 (noting how “insider trading law is the product of a lawmaking partnership,” in which the “Court, Congress, and the SEC have made multiple adjustments and refinements”); Baer, *supra*, at 138-39. Note

elsewhere. The 10b-5 offense was authorized by Congress, unleashed by the SEC, developed by courts, and controlled (in its criminal form) by prosecutors. Renewed legislative attention simply gave prosecutors a new blank slate, with the level and nature of judicial attention yet to be determined, and the possibility, as Kim Wooley notes, that a § 10b-5 civil enforcement action could be harder to prove than a § 1348 criminal action arising from the very same conduct.²⁹⁸ If the core concern of *Gundy* is “the concentration of power in one branch,”²⁹⁹ one certainly finds no such concentration in this collaborative account, save for the usual (and massive) discretion that prosecutors have to choose among available statutory options.³⁰⁰

A Gorsuch critique’s gloss on this history would tell of Congressional abdication to the SEC in 1934, and marvel at how, in 2002, even in the face of a political need for some legislative response in response to a crisis, Congress still refrained from serious crime definition work. Would a more serious demand for legislative specificity -- effected through a more muscular use of the rule of lenity and a more searching inquiry into “intelligible principles” have forced Congress to do better? Not without a sea-change in the crime-defining load that the term “fraud” has been allowed to bear. One would hardly expect that change to come from courts, which, as we have seen, have embraced their definition role whenever that term has been used. Perhaps we are seeing a combination of legislative abdication and judicial imperialism. But it’s unrealistic to expect that courts, so comfortable with their outsized role in this area, would deploy the legislation-forcing interpretative canons that Gorsuch would invoke.³⁰¹ The story of § 1348 is thus an object lesson for those who believe that efforts to force congressional attention will be rewarded (as well as reminder that the “agency” of agencies with delegated authority can be quite limited).

Conclusion

A World Without Administrative Crimes?

A serious adherent to Gorsuch’s critique could fairly accuse this Article of egregiously leveling down. The Sixth Circuit attack on the sweep of § 242 liability has considerable intellectual rigor, as does the longstanding condemnation by many commentators, and sometimes lower courts, of the sweep of federal fraud liability. The Lacey Act has its critics, and pirates surely feel unfairly treated. Hasn’t this Article cherry-picked some of the worst examples of federal crime definition, and then turned around and suggested that administrative crimes are “no worse”?

My response is to deny the cherry picking, and simply welcome readers to the world of federal criminal law. Rather than leveling down, I am merely level setting. Consider a world without administrative crimes. Actually it might not be very different (except maybe for the criminal cases agencies threaten to refer to prosecutors). Already when it comes to pursuing environmental crimes, prosecutors turn to Title 18 in almost 45% of cases, charging standard conspiracy, false statement, obstruction, and fraud statutes.³⁰² That figure somewhat overcounts because the “object” of many of

²⁹⁸ Woody, at 552; see Langevoort, *Watching Insider Trading*, supra, at 525–28.

²⁹⁹ Divine at 194.

³⁰⁰ See *United States v. Batchelder*, 442 U.S. 114, 125 (1979); Stephen Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, 554 (2013); Hessick, *Myth of Common Law Crimes*, at 1015 (noting how overlapping statutes effectively “delegate the scope of the criminal law to prosecutors”).

³⁰¹ See Elhauge, *Preference-Eliciting Statutory Default Rules*, at 2165.

³⁰² David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime Redux: Charging Trends, Aggravating Factors, and Individual Outcome Data for 2005-2014*, 8 Mich. J. Envtl. & Admin. L. 297, 315 (2019); see also David M.

the conspiracy charges was a substantive violation of the underlying environmental statute.³⁰³ But it understates the availability of Title 18 charges because prosecutors have often been charging false statements under environmental statutes instead of the generic 18 U.S.C. § 1001, which punishes false statements to any federal official.³⁰⁴ Moreover, instead of charging conspiracies to violate environmental statutes, prosecutors could likely charge conspiracies to defraud the government of information, since the regulatory violations that are pursued criminally will inevitably entail some degree of deception. As the Supreme Court has noted, 18 U.S.C. § 371 “reaches any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.”³⁰⁵ A court recently noted: “[C]onspiracies to defraud the government by interfering with its agencies’ lawful functions are illegal because § 371 makes them illegal, not because they happen to overlap with substantive prohibitions found in other statutes.”³⁰⁶ Mail or wire fraud charges are also available, when the failure to disclose regulatory violations can be framed as the deceit of, say, customers, as one finds in the recent indictment of Blue Bell Creamery’s former president for his alleged efforts to conceal what the company knew about *Listeria* contamination.³⁰⁷

One finds the same pattern in cases involving workplace fatalities that could be pursued as criminal violations of OSHA regulations.³⁰⁸ One observed reported:

In the forty plus years since Congress enacted the OSH Act, there have been more than 400,000 workplace fatalities, yet fewer than eighty total OSH Act criminal cases have been prosecuted – fewer than two per year – and only approximately a dozen have resulted in criminal convictions. Historically, [prosecutors] typically have targeted cases in which the employers were alleged to have falsified documents and lied to OSHA in conjunction with underlying regulatory violations relating to an employee fatality.³⁰⁹

Doing away with explicit administrative crimes would thus vastly reduce the notice and legislative specificity of the charged offenses, with the prosecutorial landscape dominated by sweeping statutes that, because the federal interests implicated leave no room for constraining federalism canons, the

Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 *Harv. Envtl. L. Rev.* 159, 184 (2014); Joshua Ozymy & Melissa Jarrell, *Wielding the Green Stick: Criminal Enforcement at the EPA Under the Bush and Obama Administrations*, 24 *Envtl. Pol.* 38, 47 (2015).

³⁰³ *Id.* at 185.

³⁰⁴ On the sweep of liability under § 1001, see Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 *Cal. L. Rev.*, 1515, (2009); Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 *Geo. L.J.* 1435, 1468 (2009).

³⁰⁵ *Tanner v. United States*, 483 U.S. 107, 128 (1987); see *Dennis v. United States*, 384 U.S. 855, 861 (1966); *Glasser v. United States*, 315 U.S. 60, 66 (1942); *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924); *Haas v. Henkel*, 216 U.S. 462, 479 (1910); see also *United States v. Atilla*, 966 F.3d 118, 122, 130 (2nd Cir. 2020); *United States v. Kelerchian*, 937 F.3d 895, 905 (7th Cir. 2019); *United States v. Rodman*, 776 F.3d 638, 642 (9th Cir. 2015);

³⁰⁶ *United States v. Concord Mgmt.*, 347 F. Supp. 3d 38, 47 (D.D.C. 2018).

³⁰⁷ DOJ Press Release, *Former Blue Bell Creameries President Charged In Connection With 2015 Ice Cream Listeria Contamination*, (Oct. 21, 2020), <https://www.justice.gov/opa/pr/former-blue-bell-creameries-president-charged-connection-2015-ice-cream-listeria>.

³⁰⁸ See *United States v. DNRB, Inc.*, 895 F.3d 1063, 1066 (8th Cir. 2018) (upholding misdemeanor conviction of construction company for workplace fatality).

³⁰⁹ Eric J. Conn and Kate M. McMahon, *OSHA Criminal Cases on the Rise*, OSHA Def. Report (Jan. 22, 2016) (noting efforts by the Justice Department to do more in this area), <https://oshadefensereport.com/2016/01/22/osha-criminal-cases-on-the-rise/>.

Supreme Court refuses to curtail.³¹⁰ Instead of charging technical statutes that guide lawyers ex ante and leave defendants room to maneuver ex post, criminal cases would be about Doing the Government Wrong. And defendants might well face greater punishments, since Congress has often taken care to render certain regulatory projects toothless -- as it has by making criminal OSHA violations misdemeanors.

Would elimination of administrative crimes change who got prosecuted? Probably not substantially, at least with respect to felonies. It's already quite difficult for regulatory agencies to get prosecutors to take their cases. Part of the problem is that agencies often lack the resources to investigate the serious cases that are less likely to be declined. David Uhlmann reports that "In recent years, EPA often has had far less than the mandatory 200 agents, which makes it even more difficult to maintain a robust law enforcement program and results in fewer investigations and prosecutions."³¹¹ The larger problem is that agencies must compete hard for prosecutorial attention. The competition is most severe in U.S. Attorneys' offices, which have wide-ranging responsibilities, but even dedicated Main Justice units like the The Environment and Natural Resources Division -- which brings OSHA cases as well as environmental cases³¹² -- are likely to look for aggravating factors, going far beyond willful regulatory violations. As David Uhlmann recently reported:

Prosecutors continue to focus on violations that involve harm, deceptive or misleading conduct, or operating outside the regulatory system—and in most cases look for a combination of one or more of those factors plus repetitiveness. Relatively few cases involve isolated misconduct.³¹³

Conduct with those characteristics could likely be captured via Title 18, were prosecutors inclined to do so. Indeed, prosecutors would doubtless enjoy sticking with these more familiar statutes, and threatening the higher penalties often available with them.³¹⁴ Even though Congress chose not to authorize criminal prosecution of violations of rules promulgated by the Consumer Finance Protection Board, that agency can freely refer egregious conduct to a U.S. Attorney's office for prosecution as mail and wire fraud.³¹⁵

³¹⁰ For refusals to curtail § 1001, see *Brogan v. United States*, 522 U.S. 398 (1998) (rejecting "exculpatory no' defense"); *United States v. Yermian*, 468 U.S. 63, 68–70 (1984) (government need not prove that defendant knew of federal agency jurisdiction when making false statement). For § 371 cases, see supra note ____.

³¹¹ Uhlmann, *Redux* at 313.

³¹² See Memorandum of Understanding Between the U.S. Departments of Labor and of Justice on Criminal Prosecution of Worker Safety Laws (Dec. 17, 2015), <https://www.justice.gov/enrd/file/800526/download>.

³¹³ Uhlmann, *Redux* at 368; see TRAC Reports, *Fewer Criminal Prosecution of Environmental Crimes Under Trump* (Oct. 29, 2019), <https://trac.syr.edu/tracreports/crim/581/> (noting only 302 new environmental prosecutions in 2019, and showing significant and steady downward trend in such cases from 1999); see David M Uhlmann, *New Environmental Crimes Project Data Shows That Pollution Prosecutions Plummeted During the First Two Years of the Trump Administration 2* (October 1, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3710109> (reporting a respective seventy percent and fifty percent drops in Clean Water Act and Clear Air Act prosecutions under the Trump Administration compared to the Obama Administration).

³¹⁴ One open question is whether the returns to an agency for bringing cases -- measured in perceived deterrence, congressional funding, or some other metric -- turn on the use of subject-matter-specific administrative criminal charges.

³¹⁵ USAO, S.D.N.Y., Press Release, *Manhattan U.S. Attorney Charges Debt Settlement Company And Six Individuals For Multi-Million Dollar Scheme That Targeted Debt-Ridden Consumers* (May 7, 2013), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-charges-debt-settlement-company-and-six-individuals-multi-million>.

This examination of the regulatory enforcement environment is concededly cursory, and I make no rigorous claim that every regulatory crime case that prosecutors want to pursue can necessarily be captured via Title 18 charges. Still, three points emerge. First, a muscular judicial effort along the lines suggested by the Gorsuch critique that required Congress to do more to define administrative crimes would not necessarily result in Congress doing anything of the kind -- except perhaps with respect to misdemeanor offenses that lie at the boundary of civil and criminal law.³¹⁶ Standard Title 18 offenses would likely capture the most of aggravated cases prosecutors deem worth pursuing. Prosecutors can charge those instead of administrative offenses or along with them. And because defendants will generally plead guilty, cases won't proceed beyond the district court. The pressure on Congress to mend its ways would therefore be quite limited.

Second, any such shift to Title 18 would nullify (for better or worse) whatever efforts Congress has made to dial down penal consequences in particular regulatory spaces. Those seeking more punitive responses to regulatory violations might well be pleased,³¹⁷ but political accountability would surely be lessened.

Finally, the self-dealing concerns that so troubled Gorsuch in *Gundy* are quite attenuated when the regulatory agency that defined an administrative crime is not the Justice Department.³¹⁸ One might indeed worry about an agency's promulgating rules to aggrandize its authority, or reduce its enforcement costs, but no rule will form the basis of a criminal prosecution unless a prosecutor decides that a defendant's conduct involves the kind of egregious illegality that would lead a judge or jury to think it it's really a "crime." Not only will prosecutors trained on a diet of violent crime, fraud and narcotics cases likely have internalized notions of due process that counsel against hypertechnical cases against individuals, but they well know that failure is likely unless they can tell a simple story of "fraud," "cheating," or "illegitimate greed." Stories of regulatory complexity are mostly likely to come from the defense.

Here, as in so much of the criminal enforcement regime, we see a true "separation of powers dynamic"³¹⁹ -- one that, on the margin, promotes agency (and perhaps prosecutorial) accountability and is quite different from the formal one that Gorsuch valorizes.³²⁰ No claim is made here about the majesty of the federal "criminal code." There really isn't one, and to the extent there is such a

³¹⁶ See, e.g., *United States v. Caronia*, 703 F.3d 149, 152, 164-69 (2d Cir 2012) (reversing, in light of First Amendment infirmity, misdemeanor conviction under 21 U.S.C. § 333(a)(2) for promoting an FDA-approved drug for off-label use); see John Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, Heritage Found.: Legal Memorandum (Aug. 6, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/LM130.pdf (citing charge as example of "regulatory overcriminalization.").

³¹⁷ See Vanessa Dick, *Dirty Money and Wildlife Trafficking: Using the Money Laundering Control Act to Prosecute Illegal Wildlife Trade*, 49 *Env'tl. L. Reporter News & Analysis* 10334, 10337-40 (2019) (urging Congress to incorporate Lacey Act violations as predicates for RICO and the Money Laundering statute, noting the "harsh fines and prison penalties," as well as civil asset forfeiture, authorized by those Title 18 offenses); see also Michael O'Hear, *Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime*, 95 *J. Crim. L. and Criminology* 133, 197-202 (2004) (noting low sentences for environmental offenses).

³¹⁸ Even within the Justice Department, a regulatory unit might be quite removed from prosecutorial units.

³¹⁹ See Richman, *Prosecutors and Their Agents* at 754; see also Neal K. Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *Yale L.J.* (2006); Gillian Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 *Emory L.J.* 423 (2009).

³²⁰ See Daniel Richman, *Accounting for Prosecutors*, at 53 (discussing prosecutor's ability to hold police to account); Daniel Richman, *Law Enforcement Organization Relationships*, ch. 14, *Oxford University Handbook on Prosecutors and Prosecution* (Ronald Wright, Russell Gold & Kay Levine eds., 2021) (same).

“code” scattered throughout Title 18 and elsewhere,” it is, in Julie O’Sullivan’s excellent words, “a disgrace.”³²¹ Nor is any claim made that federal prosecutors make anything resembling appropriate judgements when making matters that would otherwise be targets of “merely” regulatory enforcement (which can be quite punitive indeed) into criminal cases. It’s simply that when prosecutors do pursue such cases -- using some mix of Title 18 offenses, specialized regulatory offenses created by Congress, and administrative crimes defined by regulatory agencies -- specific concerns a defendant might have about notice, overreach, and overcriminalization will usually have little to do with the legislative genealogy of the offenses charged.

Indeed, one might see administrative crimes as, to some extent, addressing Rachel Barkow’s critique of federal criminal law’s capacity for executive overreach, which draws considerable support from its comparison of the structural and procedural protections of administrative law with those afforded criminal defendants.³²² Only “to some extent,” as prosecutors still retain the untrammelled discretion that so troubles her. Yet Congress’s delegation of substantial crime-definition authority to agencies -- in lieu of leaving prosecutors to effectively define crime within extraordinarily broad (but not necessarily vague) criminal laws -- grafts some of the very structural and procedural protections from administrative law that Barkow covets without the need for deploying the formalist separation of powers doctrine that she seeks to bring to criminal law. To be sure, an agency may have its own self-dealing issues, which might, say, lead it to craft rules that lessen its proof burden in civil enforcement cases. But that’s an administrative law issue, not an administrative crimes one.

The structural separation between rulemaking and criminal prosecutors is not an unalloyed good of course. Were an agency to focus exclusively on its own regulatory concerns and enforcement realities, the prospect that a rule might become a basis for a criminal prosecution when violated “willfully,” may not be sufficiently salient for it when defining the conduct prohibition. To the extent that occurs, casual (over)criminalization is indeed a risk. A minor, but still salutary, proposal addressing this risk would require that agencies “list and make generally available in full text all regulations that carry potential criminal penalties, and perhaps that Congress then be required to ratify any such regulation before it can provide the basis for a criminal prosecution.”³²³ In the same vein, an Executive Order issued by the Trump Administration, on its way out, requires, among other things, (a) that all future regulations explicitly indicate whether violation of any provision therein can itself be a basis for criminal liability, and (b) that future regulations “explicitly state a mens rea requirement for each such provision or identify the provision as a strict liability offense.”³²⁴

³²¹ O’Sullivan, *supra* note ____.

³²² Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 *Stan. L. Rev.* 989, 993 (2006) (“[U]nlike the administrative law context, where agencies must adhere to the structural and process protections of the APA and their decisions are subject to judicial review, the government faces almost no institutional checks when it proceeds in criminal matters.”).

³²³ Mukasey & Larkin, *supra* at 5.

³²⁴ Executive Order 13980, Protecting Americans From Overcriminalization Through Regulatory Reform (Jan. 18, 2021), 86 *Fed. Reg.*, No. 13, at 6817.

The fate of these efforts remains to be seen. Moreover, against their potential contributions to thoughtful agency deliberation, one should weigh the possibility that, when the possibility of criminal prosecutions are squarely envisioned, interagency consultation with prosecutors in the regulatory process would ensure that prosecutorial equities and charging discretion shape, even drive, agency action. After all, the mere potential for criminal charges will regularly stiffen an agency's bargaining position even in matters that are likely to remain on the civil side.³²⁵

Judging Delegations

Having considered a world without them, let us return the “problem” of administrative crimes, and of delegated criminal lawmaking more generally. How does one normatively sort through the many contexts in which federal criminal law -- although always under the aegis of Congress -- is largely defined by bodies other than the national legislature? This becomes an exercise in doctrinal level-setting, for absolutes are hard indeed.

Originalism offers little leverage on the problem. One need not resolve the current debate on the extent to which non-delegation concerns troubled the Founders,³²⁶ to see that the Gorsuch critique's demand for heightened scrutiny of criminal law delegations finds little support in Founding understandings and practices. Legislators in the Early Republic were quite ready to anchor federal criminal law provisions in “the law of nations” for piracy, and the law of states for the Assimilative Crimes Act. So too did they freely give courts ample room to fill out vague statutory prohibitions through common law development.

The strong version of a separation-of-powers-based insistence on Congress as the sole “author” of all federal criminal law counsels the condemnation of every variety of delegation explored here. A weak version might embrace all these delegations, since Congress always sets terms of punishment and, as the *Sharpnack* Court suggested, ought to be excused from constantly revisiting statutes that dynamically incorporate the definitional work of another authority. Indeed, Congress's regular reversion to statutes that delegate considerable criminal lawmaking authority, to increase their penalties, recodify them, or make them predicates for other criminal offenses indicates far more than passive acquiescence.

But perhaps the *Sharpnack* license is peculiar to a regime designed to promote federalism. Given his kind words for the ACA, Justice Gorsuch himself may think so. But how far does respect for state sovereignty go. How, for instance, does one score the Resource Conservation and Recovery Act (RCRA)?³²⁷ Even as it provides for an EPA regime of permits for the transportation of hazardous waste, it allows the EPA to approve state hazardous waste programs that are equal or more stringent

³²⁵ The Executive Order sought to reduce agency leverage in ordinary cases by requiring agencies to issue guidance about how they “to administratively address regulatory offenses subject to potential criminal liability rather than refer those offenses to the Department of Justice for criminal enforcement,” *id.* at 6818, but I suspect that such plans, if issued, won't do more than set conversation rules.

³²⁶ Compare Mortenson & Bagley, *supra* note ___, and Christine Kexel Chabot, *The Lost History of Delegation at the Founding* (July 17, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3654564>. with Aaron Gordon, *Nondelegation Misinformation: A Rebuttal to “Delegation at the Founding”* (March 25, 2020), <https://ssrn.com/abstract=3561062>; Aaron Gordon, *Nondelegation*, 12 *NYU J.L. & Lib.* 718, 729, 778–79 (2019), and Ilan Wurman, *Nondelegation at the Founding*, 130 *Yale L.J.* (forthcoming 2021), <https://ssrn.com/abstract=3559867>.

³²⁷ 42 U.S.C. § 6928(d).

than federal standards. “When a state program is authorized under RCRA, federal regulations are displaced or supplanted by state regulations,” the Tenth Circuit has explained, but EPA “retains the power under RCRA to pursue civil and criminal remedies for violations of the state program.”³²⁸ Thus, if federal prosecutors bring a case in such a state, authority to proceed criminally will have come from Congress, with the source of law being state regulations, as approved by a federal agency that will have persuaded the prosecutors to go forward.

If federalism is a trump, what about international comity and cooperation? While perhaps not yet transcendent constitutional values, as US criminal enforcement increasingly bumps up against and requires the assistance of foreign sovereigns,³²⁹ why shouldn’t they gain that status?³³⁰ Of course, if these trumps are acceptable, the Gorsuch critique loses considerable formal power and opens itself up to justifications for administrative crimes that sound in pragmatism, expediency, and expertise.

As Dan Kahan noted decades ago, agency rulemaking offers considerable advantage over what effectively has been a regime of judicial lawmaking empowered by common law or just plain vague statutory terms.³³¹ Moreover, the risk of self-dealing highlighted by Gorsuch in *Gundy* and recognized by Kahan, is alleviated or even eliminated when agencies other than the Justice Department devise their own rules, according to proper rulemaking procedures, primarily for civil enforcement. Note how once can turn around the concern of Hessick and Hessick that agencies lack expertise when it comes to crime-definition.³³² The story of congressional authorship in the federal criminal sphere, for nearly a half-century, has largely been one of reliance on Justice Department drafting -- whenever the Department could slip a “fix” into the omnibus bills that used to be a staple of criminal lawmaking³³³ or when it provided material for a Congress looking to make a “tough on crime” statement.³³⁴ Congress of course has the greatest “expertise” on retribution, but that fact is both tautological and troubling, and on even that score Congress’s habit of using criminal lawmaking more to loudly condemn than to actually apportion punishment diminishes any claim to actual expertise. Weighed against the risks of self-dealing or sloppiness created by the “normal” means of crime definition, administrative rulemaking that treats regulation as structuring primary behavior in a complex world -- drawing lines within spheres of socially productive activity between prohibited and allowed conduct -- rather than providing tools for the exercise of prosecutorial discretion sounds pretty appealing.

³²⁸ *United States v. Richter*, 796 F.3d 1173, 1183 (10th Cir. 2015). A similar regime is found in the Clean Water Act, which provides for federal prosecutions for violations of state water treatment programs that have been approved by the EPA. 33 U.S.C. § 1319(c)(2); see *United States v. Iverson*, 162 F.3d 1015, 1019 (9th Cir. 1998).

³²⁹ See Steven Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. Rev. 340, 346-52 (2019); see also Brian Richardson and Steve Koh drafts

³³⁰ See Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 Va. L. Rev. 949 (2010); Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83 Fordham L. Rev. 1955 (2015).

³³¹ Kahan, *Chevron*, at 503-04.

³³² Hessick & Hessick, at 40-42.

³³³ See *supra* (with statutory overrides)

³³⁴ Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at scattered titles of U.S.C.); see also Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(f)(1)(B), 123 Stat. 1617, 1618 (codified at 18 U.S.C. § 1956(c)(9)) (overriding *United States v. Santos*, 553 U.S. 507 (2008)).

Note that nothing here resolves the question of how to resolve the tension between *Chevron* or *Auer/Kisor* and Lenity.³³⁵ One need not exalt the rule of lenity as a tool for ensuring strict legislative supremacy to hold criminal offense definition to a higher standard than we hold non-penal lawmaking.³³⁶ The sooner we get past wholesale efforts to delegitimize administrative crimes as a whole, the sooner we can get to this somewhat tougher question. Still, those addressing it would do well to recognize the advantages of thoughtful ex ante agency law development -- which will invariably occur outside the context of a special criminal case -- compared to the relatively freelance interpretations prosecutors offer (and courts often accept) on favorable facts.³³⁷ Particularly when one recognizes the rule of lenity's spotty record as a restraint on liability expansion,³³⁸ the relative process advantages of articulated and prospective interpretations by expert agencies ought to loom large indeed.

In the end, perhaps the sorry record of Congressional criminal lawmaking in the past half-century -- so dominated by a mix of broad statutes passed to address some perceived need for a political statement and a regular supply of Justice Department "fixes" -- is itself a "trump" of the Gorsuch critique. The accretion of administrative crimes has given federal criminal law and federal criminal practice so much more clarity and specificity than it would otherwise have, and perhaps has even made it less punitive. Congress's criminal lawmaking work generally entails a massive delegation of discretion to prosecutors and courts (to varying extents), with both driven by the facts of the case. If one looks not for community condemnation but real care for "liberty" in the form of well crafted legislation (not abstract separation of powers theories), administrative crimes look better and better. Indeed those whose chief motivation for targeting administrative crimes is to advance a broader anti-regulatory agenda might want to revisit their implicit assumption that the number of felony cases brought in service of a regulatory scheme would be any different without administrative crimes.³³⁹

As an aesthetic matter, administrative crimes and the proliferation of them may be uniquely disquieting. Judicial delegations can always be framed as "interpretation," the ACA addresses just the quirk of federal enclaves, and piracy is a special historically honored transnational crime. Administrative crimes, in contrast, explicitly demand that we confront the seeming abdication of a foundational legislative duty and the empowerment of bureaucracy. This Essay's goal is not to deny the power of formalist instincts but to challenge those with them to confront federal criminal law not just as it is, but as it conceivably can be.

Since the Founding, Congress has delegated considerable crime-definition authority to a range of entities -- from courts to states to the "law of nations." It is hard to imagine the Supreme Court or

³³⁵ See note 37 supra

³³⁶ See *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., respecting denial of cert.) ("Undoubtedly Congress may make it a crime to violate a regulation, see *United States v. Grimaud*, 220 U.S. 506, 519 (1911), but it is quite a different matter for Congress to give agencies—let alone for us to presume that Congress gave agencies—power to resolve ambiguities in criminal legislation").

³³⁷ See Sanford N. Greenberg, *Who Says It's a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. Pitt. L. Rev. 1, 42-60 (1996).

³³⁸ See Richman, Stith, & Stuntz, at 97 (on "so-called rule of lenity").

³³⁹ Some cases now charged as criminal misdemeanors might be pursued civilly, and to the extent that civil procedures offer more opportunities to inflict costs on the Government, defendants might thereby benefit. For an argument that overreliance on the criminal charges ought to be addressed by strengthening civil enforcement regimes, see Daniel Richman, *Corporate Headhunting*, 8 Harv. L. & Pol'y Rev. 265, 274-75 (2014).

lower courts changing that with even the most muscular and repeated deployments of “void for vagueness” and “rule of lenity” doctrine. The issue is not whether Congress will delegate but to whom, and what institutional, structural and procedural dynamics will thereby govern some or all of the federal crime-definition project. We have seen the range of possibilities Congress has actually used, and explored the distinct set of values promoted or diminished by each delegation and the institutional design of the delegatee. The contested nature of those values -- accountability, liberty, deliberation, federalism, international comity -- and the ways they interact challenge not just the Gorsuch critique of administrative crimes, but push us to think harder about the judicial competence to police these delegations.³⁴⁰

³⁴⁰ I owe this final point to Daphne Renan, who, with Niko Bowie, is working on a larger project arguing against judicial enforcement of separation of powers law. Cf. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2245 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (noting how “five unelected judges” had rejected the result of a “democratic process” in which “Congress and the President came together to create an agency with an important mission”).