

# Defining Crime, Delegating Authority—How Different Are Administrative Crimes?

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*As the Supreme Court reconsiders whether Congress can so freely provide for criminal enforcement of agency rules, this Article assesses the critique of administrative crimes through a federal criminal law lens. 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 Article destabilizes the critique’s doctrinal foundations. It then suggests that if one really cares about liberty—not the abstract “liberty” said to be protected by the separation of powers, but rather the lived liberty gained through careful and accountable criminal lawmaking that is free from the pathologies that have bedeviled federal criminal law for more than a century—administrative crimes are normatively quite attractive.*

Introduction.....	306
I. Critique of Administrative Crimes .....	310
A. Administrative Crimes .....	311
B. Nature of Critique.....	313
C. Scope of Critique.....	317
II. Exploring Other Criminal Law Delegations.....	320
A. Courts .....	321
1. Judicial Co-authorship of Federal Criminal Law from Its Beginnings—Common-Law Elements .....	322
2. Limiting and Expanding Criminal Liability Across Offenses .....	326
3. Judicially Crafted Elements .....	331
4. Assessing Judicial Delegation in Context.....	337
B. States .....	341
1. State Law Predicates .....	341
2. The ACA and Wholesale Adoption of Non-Duplicative State Penal Law for Federal Enclaves .....	344

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Defining Crime, Delegating Authority

C. Delegations to Foreign and International Institutions .....	349
1. Foreign States.....	350
2. International Organizations and Conventions.....	353
3. Delegation to the Law of Nations–Piracy .....	355
III. Reconsidering Administrative Crimes .....	358
A. Agencies and Their Institutional Counterparties .....	359
B. A World Without Administrative Crimes?.....	364
C. Judging Delegations .....	370
Conclusion .....	373

## Introduction

Although—putting aside standard narcotics cases—they comprise a relatively small fraction of federal criminal prosecutions brought each year,<sup>1</sup> a number of remarkably varied defendants are regularly charged with criminal offenses that are largely defined by administrative agencies, executive or independent. The executive who trades on inside information; the drug trafficker of newer and ever-more-dangerous substances; the business that violates U.S.-imposed sanctions on Iran; the immigration policy protestor who obstructs a Senator’s office;<sup>2</sup> and the greedy hoarder of personal protective equipment during the COVID-19 pandemic<sup>3</sup>—all have been charged with offenses arising from Congressional delegations of substantial criminal lawmaking authority to the bureaucratic administrative process.

While the Supreme Court has occasionally looked askance at these “administrative crimes” (also known as “regulatory crimes”),<sup>4</sup> they remain a well-accepted feature of federal criminal law,<sup>5</sup> albeit one strongly condemned by those worried about the anti-democratic creep of the administrative state.<sup>6</sup> This acceptance, however, may soon change. In *Gundy v. United States*, a plurality of the Court found no violation of longstanding delegation principles in the criminal

1. Cf. Dep’t of Justice, *U.S. Attorneys’ Annual Statistical Report*, Fiscal 2020, tbl. 3A at 11-12 (2020), <https://www.justice.gov/usao/page/file/1390446/download> [<https://perma.cc/R6QF-MEXJ>] (noting that, of 57,822 cases charged in fiscal year 2020, 24,445 were immigration cases, 12,607 were drug cases, and 13,803 were violent crimes); Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 6 (2012) (noting that “[a]side from prosecutions of drug and immigration violators, which have increased significantly in recent years, the rate of prosecution for most other federal offenses remains low and surprisingly static from year to year.”).

2. *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*, No. 3:17-CR-0008-JCC, 2017 WL 652449, at \*3-4 (D. Or. Feb. 16, 2017) (prosecution for causing disturbance in federal courthouse); *United States v. Komatsu*, 18-cr-651 (ST), 2019 WL 2358020 (E.D.N.Y. Jun. 4, 2019) (same).

3. Complaint and Affidavit in Support of Application for Arrest Warrants, *United States v. Bulloch*, No. 20-MJ-327 (E.D.N.Y. Apr. 27, 2020) (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).

4. See *Whitman v. United States*, 574 U.S. 1003, 1004 (2014) (Scalia, J., statement respecting denial of certiorari) (“[T]he rule of lenity . . . vindicates the principle that only the legislature may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts — much less to the administrative bureaucracy.” (citing *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820)); *Touby v. United States*, 500 U.S. 160, 166 (1991) (acknowledging that “our cases are not entirely clear” as to whether Congress need give “more specific” guidance for “regulations that contemplate criminal sanctions,” but finding no need to resolve that issue in the case at hand)).

5. See, e.g., *Loving v. United States*, 517 U.S. 748, 768-74 (1996) (finding appropriate Congress’s delegation to the President to set aggravating factors in capital murder cases trial under military law). In *Loving*, the Court determined that “[t]here is no absolute rule[] [] against Congress’ delegation of authority to define criminal punishments.” *Id.* at 768. The Court noted further: “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.* (quoting *United States v. Grimaud*, 220 U.S. 506, 518 (1911)).

6. See Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. IRVINE L. REV. 855, 859 (2020); Philip Hamburger, *IS ADMINISTRATIVE LAW UNLAWFUL?* 2-3, 377-78 (2014).

prosecution of a defendant for violating regulations promulgated by the Attorney General under the Sex Offender Registration and Notification Act (SORNA).<sup>7</sup> 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?<sup>8</sup>

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.”<sup>9</sup> While Justice Kavanaugh took no part in the case, he later wrote that Justice Gorsuch’s dissent “raised important points.”<sup>10</sup>

It remains to be seen whether a majority of the Court favors recalibrating—or jettisoning—the “intelligible principle” standard for assessing delegations.<sup>11</sup> Nor did Justice Gorsuch’s analysis in *Gundy* explicitly call out delegations of criminal lawmaking authority for special, more searching scrutiny.<sup>12</sup> It is possible that some of the Justices joining the dissent, particularly the Chief Justice, are more concerned with regulatory delegation generally, rather than criminal delegation specifically. Yet Justice Gorsuch made his own position clear before *Gundy*, and it is not surprising that concerns about delegations often sound loudest in the criminal context. Here, liberty interests are greatest, and governmental authority is most scrutinized.

In a SORNA case while serving as a judge on the Tenth Circuit, Justice Gorsuch elaborated on the intelligible principle’s place in criminal law:

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7. 139 S. Ct. 2116, 2129-30 (2019) (plurality opinion).

8. *Id.* at 2131 (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., statement respecting denial of certiorari).

11. *See, e.g.*, Kristin E. Hickman, *Gundy, Nondelegation, and Never-Ending Hope*, REGULATORY REV. (July 8, 2019), <https://www.theregreview.org/2019/07/08/hickman-nondelegation> [<https://perma.cc/4ZX4-C6TR>] (“[T]he intelligible principle standard survives another round, while its opponents are given ample reason to hope and predict that, surely, the next case will see the standard’s end.”); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 288-89 (2021) (assessing the future of the *Gundy* dissent); *see also* Daniel E. Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We’re Expecting*, 71 EMORY L.J. (forthcoming 2022) (manuscript at 3), <https://ssrn.com/abstract=3809905> [<https://perma.cc/L26T-PRPX>] (surveying nondelegation case law in the states and concluding that “the changes envisioned [by the wing of the Court in favor of nondelegation] in and of themselves will not fundamentally change anything about how courts approach the problem of delegation”).

12. *See* F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 283 (2021) (“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.”).

It's easy enough to see why a stricter rule [than the “intelligible principle”] would apply in the criminal area. 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 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?<sup>13</sup>

It thus does not take much reading of the tea leaves to expect that, amid a general reconsideration of the administrative state,<sup>14</sup> the Court will soon return to the issue of administrative crimes. Yet, before embracing the broad proposition that only “the people's elected representatives” can set the terms of federal criminal offenses,<sup>15</sup> the Court would do well to think more broadly about federal criminal law. After all, administrative agencies are not the only entities to which Congress has dynamically delegated the power to define crimes—the power to set, on an on-going basis, the terms of the criminal offenses that federal prosecutors are empowered to charge.

Delegation abounds in federal criminal law, extending far beyond the agencies and departments that are the usual grist of nondelegation doctrine discussions. Even as federal courts assiduously speak in the language of statutory interpretation, a clear-eyed view of the role courts play in federal criminal law—giving content to common-law terms, setting the scope of accessorial and entity liability, defining defenses, setting mens rea terms, and defining liability under statutes from antitrust to criminal civil rights—cannot avoid speaking in delegation terms. Moreover, the elements of numerous federal criminal offenses<sup>16</sup> are often determined by dynamic delegation to state legislatures, and, when there are gaps in federal coverage,<sup>17</sup> state penal law is incorporated wholesale under the Assimilative Crimes Act.<sup>18</sup> Even foreign law can be the basis of criminal prosecutions under several federal criminal statutes related to such matters as wildlife regulation and bribery.<sup>19</sup> The inclusion of marijuana on a

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

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

15. *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

16. *Infra* Section II.B.1.

17. 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).

18. 18 U.S.C. § 13 (2018).

19. See *infra* Section II.C.1.

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 Article 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 (and delegated) criminal lawmaking? Does doctrinal acceptance of formal or effective delegations to courts, states, foreign nations, and perhaps even international organizations,<sup>20</sup> undercut the critique or, alternatively, strengthen it?

As a normative matter, this Article is neither a full-throated defense of delegation nor a devastating rejoinder to those who question it. A critic of administrative crimes might, for instance, stick to her guns and flatly condemn every criminal offense that is not defined by Congress. She will, however, have to confront the size and strength of her target.

The Article will first seek to ring changes on the delegation theme by exploring the broad variety of partners that Congress has recruited to the federal criminal lawmaking project. Then, by applying Justice Gorsuch’s administrative crime critique to these delegations, the Article destabilizes the critique’s doctrinal foundations. Central to Justice Gorsuch’s critique is the notion that any delegation of crime-definition authority requires heightened scrutiny and constitutional justification. It turns out, however, that the delegation of just such authority to a broad range of institutions is a regular, and largely well-accepted, feature of federal criminal law.

From the broader vantage point of federal criminal law, however, a powerful normative point does emerge—one which might support an affirmative embrace of administrative agencies in particular as crime-definers, subject to congressional review. If one really cares about liberty—not the abstract “liberty” said to be protected by the separation of powers, but rather the lived liberty gained through careful and accountable criminal lawmaking that is 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. Once one considers Congress’s legislative track record and the strategic advantages of federal prosecutors, the contributions of agencies to offense-definition are more to be welcomed than scorned.

Part I of this Article explores the contours of Justice Gorsuch’s nondelegation challenge and its implications for the legitimacy of administrative crimes. On what constitutional or jurisprudential principles has that challenge been based? The most straightforward and simple version of the critique is based on arguments that appeal to the structure of the Constitution: in a world in which legislative powers have been vested in Congress, and legislative supremacy is

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20. 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* 867-900 (2d ed. 2019).

constantly hailed as the touchstone of 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 condemns the affront to separation-of-powers principles entailed by the conferral of such powers on the Executive, and it draws yet more strength from the very nature of criminal law, which is supposed to represent some authoritative community condemnation rather than bureaucratic promulgation.

In Part II, I turn to the reality of federal criminal law. 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. In each case, I explore the extent to which these institutions’ delegations find (or fail to find) justifications that immunize them from the administrative crimes critique. Moreover, these crime-definition powers, like those delegated to agencies, are conditional on the exercise of an extraordinary delegation that Justice Gorsuch’s critique leaves unscathed: the delegation to federal prosecutors of absolute, unreviewable gatekeeping power over the bringing of criminal charges.<sup>21</sup>

In Part III, I reconsider the normative appeal of administrative crimes by placing them in their larger context, a regime not just of sweeping prosecutorial authority but of a broader political economy of federal criminal legislation that 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 considerably reduce the specificity and clarity of federal criminal law. Embracing a formalist conception of “liberty” along the lines of Justice Gorsuch’s critique would likely come at the expense of actual liberty. I conclude by suggesting how the methodology employed here—looking beyond Justice Gorsuch’s formalism to institutional interactions—draws into question judicial competence to police congressional delegations of crime-definition authority.

### I. Critique of Administrative Crimes

The challenge to administrative crimes draws on two separate lines of authority that reinforce one another. One line of authority arises out the very nature of legislative power under constitutional separation of powers doctrine. With Article I’s vesting of “[a]ll legislative Powers” in Congress comes, we are told, a “mandate that Congress generally cannot delegate its legislative power to

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21. See Daniel M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 470 (1996) (“[F]ederal criminal law, as a whole, is best conceptualized as a regime of delegated common law-making.”); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999); Hessick & Hessick, *supra* note 12, at 329-37 (discussing this in a section titled “The Charging Power and Implicit Delegation”).

another Branch.”<sup>22</sup> The logic of this nondelegation principle—whatever its precise contours—should bar not just the Executive from exercising the legislative power that is Congress’s alone, but any other governmental or non-governmental entity. The authority of administrative agencies to promulgate rules or specifications that have the force of law must therefore be carefully constrained.<sup>23</sup>

Where the rules or specifications of an administrative agency not only carry the force of law but provide the bases for a criminal prosecution (because Congress has allowed the agency—via penal statutes that dynamically incorporate agency terms by reference—to define the elements of the offense), the second line of authority comes into play. That line looks to the special nature of criminal law and demands that Congress alone define crimes, not simply because of its exclusive legislative role, but because it is the only true voice of the community and the institution most capable of constraining executive efforts to restrict liberty. Note how this second, criminal analysis, if taken seriously, might easily extend to contexts in which other institutions besides administrative agencies define federal crimes.

This Part will first consider the nature and prevalence of administrative crimes. I define these as those crimes that Congress has broadly defined as criminal offenses but whose operative terms—the precise conduct covered and the offense elements thereof—are derived from an administrative agency’s rule or specification. This Part then considers the nature and scope of Justice Gorsuch’s constitutional 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.<sup>24</sup> And it is certainly true, as Darryl Brown has noted, that “willful violations of civil regulation are routinely and innumerable defined as crimes.”<sup>25</sup> Sometimes the legislative

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22. *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989).

23. See Gary Lawson, “I’m Leavin’ It (All) Up to You”: Gundy and the (Sort-Of) Resurrection of the Subdelegation Doctrine, 2019 CATO SUP. CT. REV. 31, 33; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 334 (2002); Justin Walker, *The Kavanaugh Court and the Schechter-To-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 938 (2020).

24. See, e.g., Julie R. O’Sullivan, *The Federal Criminal “Code”: Return of Overfederalization*, 37 HARV. J.L. & PUB. POL’Y 57, 57-58 (2014) (“No definitive count of federal crimes is extant, and such a count is probably not possible without too much work to make the task worthwhile.”); see also Neil M. Gorsuch, *Law’s Irony*, 37 HARV. J.L. & PUB. POL’Y 743, 747 (2014) (“But today we have about 5000 federal criminal statutes on the books, most added in the last few decades. And the spigot keeps pouring, with hundreds of new statutory crimes inked every few years. Neither does that begin to count the thousands of additional *regulatory* crimes buried in the federal register.”).

25. Darryl K. Brown, *Criminal Law’s Unfortunate Triumph Over Administrative Law*, 7 J.L. ECON. & POL’Y 657, 664 (2011).

mechanism broadly allows for the criminal enforcement of some category of rules promulgated by an agency.<sup>26</sup> Other times, a statute sets up a criminal enforcement regime in which offense terms are supplied by an agency through an administrative process.<sup>27</sup> Whatever the agency's contribution to the production of federal criminal law, however, the decision to invoke that law to prosecute remains in the exclusive discretionary control of federal prosecutors in the Department of Justice (DOJ), who will also have full responsibility for the way a case is pursued.<sup>28</sup>

Consider *United States v. Grimaud*,<sup>29</sup> 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.”<sup>30</sup> In 1897, Congress initially authorized 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.”<sup>31</sup> Violation of these rules could be pursued either criminally or civilly. When the Forest Service found civil injunctions inadequate, it prevailed on DOJ to replead regulatory violations as criminal indictments. Thus, a California shepherd who violated forest grazing rules found himself charged with a misdemeanor.<sup>32</sup> 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.”<sup>33</sup>

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26. See, e.g., Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10(b), 48 Stat. 881, 891 (codified at 15 U.S.C. § 78j(b) (2018)) (making 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 Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”); National Wildlife Refuge System Act, 16 U.S.C. § 668dd(f)(1) (2018) (“Any person who knowingly violates or fails to comply with any of the provisions of this Act or any regulations issued thereunder shall be fined under Title 18 or imprisoned for not more than 1 year, or both.”).

27. See 18 U.S.C. § 2339B (2018) (criminalizing the provision of material support or resources to “foreign terrorist organizations” so designated by Secretary of State); 21 U.S.C. §§ 811, 841 (2018) (providing for prosecution of trafficking in controlled substances so scheduled by the Attorney General).

28. See, e.g., Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758 (2003) (“At its heart, the relationship between federal prosecutors and federal enforcement agents is a bilateral monopoly. Prosecutors are the exclusive gatekeepers over federal court, but they need agents to gather evidence. Agencies control investigative resources, but they are not free to retain separate counsel. If agents want criminal charges to be pursued against the target of an investigation, they will have to convince the prosecutor to take the case.”); Michael Hertz, *Structures of Environmental Criminal Enforcement*, 7 FORDHAM ENV'T L. REV. 679, 694-97 (1996) (discussing the DOJ's own arguments in favor of gatekeeping power). Deviations from this rule of exclusive gatekeeping by prosecutorial bureaucracy may be found outside the federal system. See Roger A. Fairfax, *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 413 (2009).

29. 220 U.S. 506 (1911).

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

31. *Grimaud*, 220 U.S. at 522.

32. See generally Logan Sawyer, *Grazing, Grimaud, and Gifford Pinchot: How the Forest Service Overcame the Classical Nondelegation Doctrine to Establish Administrative Crimes*, 24 J.L. & POL. 169 (2008) (discussing the background and impact of the case).

33. *Grimaud*, 220 U.S. at 522.

*Grimaud* licensed the broad and varied regime that exists today.<sup>34</sup> Thus, section 32 of the 1934 Exchange Act makes violation of certain rules promulgated by the Securities and Exchange Commission (SEC) into federal crimes punishable by up to twenty years imprisonment.<sup>35</sup> Among these is Rule 10b-5,<sup>36</sup> which is regularly charged in securities fraud cases, most notably those involving insider trading. A statute targeting the smuggling of goods out of the country looks to whether the exportation was “contrary to any law or regulation of the United States.”<sup>37</sup> The Ocean Dumping Act makes it a criminal offense to “knowingly violat[e] any provision of this subchapter, any regulation promulgated under this subchapter, or a permit under issued under this subchapter[.] . . .”<sup>38</sup> The Resource Conservation and Recovery Act (RCRA) provides for up to five years’ imprisonment for anyone who “knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter.”<sup>39</sup> 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.”<sup>40</sup> Quite a few of these offenses, dynamically incorporating agency rules, are misdemeanors,<sup>41</sup> but many, like securities fraud, are punished quite severely.

### B. Nature of Critique

The historical unwillingness<sup>42</sup> of the Supreme Court to find any delegation before it to lack the requisite “intelligible principle” has long been noted, and

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34. *Grimaud* was foreshadowed by *In re Kollock*, 165 U.S. 526 (1896), which upheld Kollock’s conviction for selling margarine without complying with the labelling rules set by the Commissioner of Internal Revenue, occasioning the Court to note that “[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,” *id.* at 533. See Mark D. Alexander, *Increased Judicial Scrutiny for the Administrative Crime*, 77 CORNELL L. REV. 612, 617-18 (1992).

35. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 32, 48 Stat. 881, 891 (codified at 15 U.S.C. § 78ff (2018)).

36. 17 C.F.R. 240.10b-5 (2020).

37. 18 U.S.C. § 554 (2018). Although the statute covering smuggling *into* the country looks to whether the “merchandise” was brought in “contrary to law,” 18 U.S.C. § 545 (2018), some, but not all, courts have read the “law” reference to include administratively promulgated regulations, *see* *United States v. Sterling Islands, Inc.*, 391 F. Supp.3d 1027, 1042-59 (D.N.M. 2019) (reviewing conflicting case law and concluding that “the statute’s text and legislative history unambiguously indicate that “contrary to law” encompasses all laws and regulations”).

38. 33 U.S.C. § 1415(b)(1) (2018). For this and other examples, see Fissell *supra* note 6, at 860-61.

39. 42 U.S.C. § 6928(d) (2018).

40. Richard E. Myers II, *Complex Times Don’t Call for Complex Crimes*, 89 N.C. L. REV. 1849, 1852 (2011).

41. See, e.g., *Grimaud v. United States*, 220 U.S. 506, 509 (1911); 40 U.S.C. § 1315(c)(2) (establishing a maximum punishment of thirty days for violation of GSA rules).

42. See, e.g., 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.

complained about by those on and off the Court.<sup>43</sup> As will be seen, it is impossible to fully separate the issue of administrative crimes from the scholarly—and to some extent, judicial—debate about whether closer judicial scrutiny of *all* congressional delegations of rulemaking authority to agencies is appropriate.<sup>44</sup> Yet this Article will attempt 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 reexamination of *Grimaud* and its progeny, and the issue of administrative crimes seems well worth peeling off for separate treatment to the extent possible. The focus here will thus be on that aspect of Justice Gorsuch’s critique that specifically turns on the delegation of crime-definition authority to executive and independent agencies and finds such delegation of especial constitutional concern.

For an extended elaboration of Justice Gorsuch’s critique and the sins of delegating specifically criminal lawmaking authority to agencies, the most useful sources—which complement the perhaps limited opportunities offered by Gorsuch’s dissenting opinions—are recent pieces by Andrew and Carissa Hessick,<sup>45</sup> and by Brenner Fissell.<sup>46</sup> Basic doctrines placing substantive and procedural limits on criminal laws are foundational to this critique. A long line of cases rejecting the existence of common-law crimes provides support for a rule of absolute legislative control in this area.<sup>47</sup> This separation-of-powers analysis not only would protect criminal law from non-congressional incursions but would also make Congress squarely accountable for it.<sup>48</sup>

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.<sup>49</sup>

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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”).

43. 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); Hamburger, *supra* note 6, at 377-402; 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 & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 285-87 (2021) (discussing the influence that Hamburger and other scholarly supporters of the nondelegation doctrine have had on Justices Thomas and Gorsuch); Metzger, *supra* note 14 at 22-24 (describing the criticisms of delegation levied by Justices Thomas and Alito).

44. For an excellent overview of the debate, see Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 858-82 (2020).

45. Hessick & Hessick, *supra* note 12, at 300-21.

46. Fissell, *supra* note 6, at 881-906.

47. See, e.g., Hessick & Hessick, *supra* note 12, at 314 (quoting cases); *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.”).

48. 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) (arguing that the separation-of-powers doctrine precludes agencies from making criminal law).

49. See RICHMAN, STITH, & STUNTZ, *supra* note 20, at 97 (describing the “so-called rule of lenity”).

As Dan Kahan has noted, “lenity is best understood as a ‘nondelegation doctrine’”<sup>50</sup> 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.<sup>51</sup>

Coming at the issue from a different angle is the void-for-vagueness doctrine, which demands that “[a] criminal statute must clearly define the conduct it proscribes,”<sup>52</sup> 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, rather than 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*)<sup>53</sup> and its own regulations (*Auer* and *Kisor*)<sup>54</sup> make matters even worse, if they are allowed to override the criminal law default of lenity.<sup>55</sup>

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50. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347.

51. Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 887-88 (2004).

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

53. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (establishing that the administering agency’s interpretation of a statute “is entitled to deference” from the courts”); *see also* *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (reasoning that “*Chevron* is rooted in a background presumption of congressional intent,” and that Congress intentionally delegated interpretive authority to the agency by enacting a statute with “capacious terms” rather than “plain terms.”).

54. *Auer v. Robbins*, 519 U.S. 452 (1997); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *see* Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 186 (2019).

55. *See, e.g.*, *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part), *rev’d*, 137 S. Ct. 1562 (2017) (“*Chevron* has no role to play in the interpretation of criminal statutes.”); *Guedes v. BATF*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement respecting denial of certiorari) (“[W]hatever else one thinks about *Chevron*, it has no role to play when liberty is at stake.”); Patrick J. Glen & Kate E. Stillman, Sixth Circuit Review, *Chevron Deference or the Rule of Lenity? Dual-Use Statutes and Judge Sutton’s Lonely Lament*, 77 OHIO ST. L.J. FURTHERMORE 129, 137-40 (2016) (examining and questioning Judge Sutton’s approach in *Esquivel-Quintana*); *see also* Kristin Hickman, *Of Lenity, Chevron, and KPMG*, 26 VA. TAX REV. 905 (2007) (analyzing the interplay between *Chevron* deference and criminal tax law).

The application of *Chevron* to firearms regulations with penal consequences remains the subject of considerable debate. *See* *Gun Owners of Am. v. Garland*, 992 F.3d 446, 468 (6th Cir. 2021), *vacated and reh’g. en banc granted*, 2 F.4th 576 (6th Cir. 2021) (“Declining to grant *Chevron* deference to agency interpretations of criminal statutes respects the community’s responsibility to make value-laden judgments on what should be criminalized, upholds the separation of powers, complies with the rule of lenity, and avoids fair-notice concerns.”); *Aposhian v. Wilkinson*, 989 F.3d 890, 892 (10th Cir. 2021) (Tymkovich, C.J., dissenting from decision to vacate en banc order as improvidently granted) (“I believe the panel majority went looking for ambiguity where there was none. Then, having found ambiguity, it unnecessarily placed a thumb on the scale for the government by invoking *Chevron* deference.”).

Separation of powers promotes not merely accountability but liberty itself.<sup>56</sup> A second aspect of that principle is less about who makes the laws than ensuring that legislative power is quite separate from prosecutorial power.<sup>57</sup> In *Gundy*, Justice Gorsuch drew particular attention to the fact that DOJ had both promulgated the rule being criminally enforced and chose to enforce it against Gundy.<sup>58</sup> The concern is not just of executive aggrandizement but of self-dealing, since executive enforcers can shape substantive law to facilitate their targeting preferences. This problem goes beyond cases where the promulgating and the enforcing agency are the same. Madison’s point—“[t]here can be no liberty where the legislative and executive powers are united in the same person”—can easily extend to the argument that liberty is best protected when the agreement of two different branches is a prerequisite for prosecution.<sup>59</sup> Thus, while Justice Gorsuch’s critique gains special force when the same executive department first defines criminal offenses and then prosecutes them, the critique extends to the promulgations of any executive agency (and perhaps even to those of independent agencies). Adherence to the requirements of bicameralism and presentment not only inherently limits the supply of laws generally, but also ensures that a body whose members might fear overreaching prosecutions of themselves and their friends passes on all criminal laws.<sup>60</sup> It also slows the rate of legal change, since “agencies can change laws more quickly than Congress can.”<sup>61</sup>

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.”<sup>62</sup> 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. They argue that

agencies do not have the 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.<sup>63</sup>

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

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56. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1534 (1991).

57. Hessick & Hessick, *supra* note 12, at 308.

58. *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

59. Hessick & Hessick, *supra* note 12, at 307 (quoting THE FEDERALIST NO. 47 (James Madison)).

60. See *id.* at 308.

61. *Id.* at 317.

62. *Id.* at 321.

63. *Id.* at 324.

supposed to express the moral condemnation of specific conduct by a community that speaks through its representatives. Fissell notes that “[t]he 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.”<sup>64</sup> Bureaucratic condemnation is no substitute, even where an agency is supposedly “accountable” to the legislature.<sup>65</sup>

### C. Scope of Critique

The forgoing critique could support a categorical condemnation of criminal offenses defined by administrative agencies pursuant to congressional delegation.<sup>66</sup> Yet Justice Gorsuch’s *Gundy* dissent suggested that executive agencies could play a limited, factfinding role in crime-definition.<sup>67</sup> Even the needed reform of the “intelligible principle” standard, he noted, would leave the analysis in *Touby v. United States*<sup>68</sup>—which upheld the Attorney General’s ability to temporarily schedule a controlled substance—largely undisturbed.<sup>69</sup>

In *Touby*, the defendant, who had been 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.”<sup>70</sup> Noting that its “cases are not entirely clear on the point,” the Court found that the statutory provision “passes muster even if greater congressional specificity is required in the criminal context.”<sup>71</sup> 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.”<sup>72</sup> Since very significant sentencing consequences follow from the scheduling of a drug at a particular level, the Controlled Substances Act comes close to authorizing crime-definition by the very department in charge of prosecutions. Yet this, the most frequently charged administrative crime, would apparently survive Justice Gorsuch’s scrutiny.<sup>73</sup>

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64. Fissell, *supra* note 6, at 891.

65. *See id.* at 893-95.

66. *See* Hessick & Hessick, *supra* note 12, at 333.

67. *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting); *cf.* Aditya Bamzai, *supra* note 54, at 184 (noting that this principle “requires a theory that distinguishes between presidential ‘factfinding’ and presidential ‘policymaking’”).

68. 500 U.S. 160, 166 (1991).

69. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

70. 500 U.S. at 165-66.

71. *Id.* at 166.

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

73. *See supra* note 1.

Justice Gorsuch also seemed open to delegations that “at least arguably, implicate[] the [P]resident’s inherent Article II authority.”<sup>74</sup> In this framing, he acknowledged the authority of precedents<sup>75</sup> like *Cargo of the Brig Aurora*, which upheld Congress’s delegation to the President of authority to impose an embargo against Great Britain conditional on the President’s finding that Britain’s enemy France had stopped interfering with American trade.<sup>76</sup> Indeed, he found two bases on which the delegation in *Cargo of the Brig Aurora* passed muster: it involved not only “limited executive fact-finding,” but also the sphere of foreign affairs, where the authority the Constitution vested in the Executive can overlap with Congress’s legislative authority.<sup>77</sup>

Justice Gorsuch’s reference to “at least arguably” could be taken as a quiet acceptance of other cases, recently noted by Alexander Volokh, that allow 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.”<sup>78</sup> 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;<sup>79</sup> the executive designation of “foreign terrorist organizations” that someone can be prosecuted for providing “material assistance” to;<sup>80</sup> and the President’s ability to promulgate sanctions under the International Emergency Economic Powers Act that, if violated, can be criminally prosecuted.<sup>81</sup> Presumably, the prosecution of hoarders of personal protective equipment during the COVID-19 pandemic<sup>82</sup> would similarly pass muster, as the sweeping terms of Defense Production Act of 1950<sup>83</sup> arguably implicate the domestic application of the President’s national security powers.<sup>84</sup>

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74. *Gundy*, 139 S. Ct. at 2140 (Gorsuch, J., dissenting).

75. *Id.* at 2136 (Gorsuch, J., dissenting).

76. *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 382-85 (1813); *see also* Note, *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1145-46 (2021).

77. *Gundy*, 139 S. Ct. at 2136-37 (Gorsuch, J., dissenting).

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

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

80. 18 U.S.C. § 2339B (2018) (criminalizing 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 (8<sup>th</sup> Cir. 2015) (rejecting a nondelegation challenge); *United States v. Hammoud*, 381 F.3d 316, 331 (4<sup>th</sup> Cir. 2004) (en banc) (same).

81. 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 (9<sup>th</sup> Cir. 2012) (rejecting nondelegation challenge in prosecution under Arms Export Control Act).

82. Complaint and Affidavit in Support of Application for Arrest Warrants, *United States v. Bullock*, No. 20-MJ-327 (E.D.N.Y. Apr. 27, 2020), <https://www.justice.gov/usao-edny/press-release/file/1271741/download> [<https://perma.cc/63QC-BZMK>].

83. 50 U.S.C. §§ 4501 *et seq.* (2018).

84. *See* *United States v. Curtiss-Wright Export*, 299 U.S. 304 (1936); *see also* *United States v. Melgar-Diaz*, 2 F.4th 1263, 1268 (9<sup>th</sup> Cir. 2021) (finding no violation of nondelegation doctrine in

The line Justice 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.<sup>85</sup> He did cite *United States v. Grimaud*, seemingly with approval.<sup>86</sup> 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?<sup>87</sup>

One need not, however, be sure of which administrative crimes would survive Justice Gorsuch’s analysis to suspect that a great many would not, which is, presumably, his goal. While on the Tenth Circuit, when presented with a criminal prosecution, arising out of a tussle on the grounds of the Denver Federal Center involving violations of regulations promulgated by the General Services Administration (GSA) and the Department of Homeland Security, Justice Gorsuch mused (in dicta, 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?<sup>88</sup>

Justice Gorsuch’s approach to criminal delegations would substantially end the current regime, in which, in many policy spaces, broadly delegated rulemaking authority to agencies is accompanied by statutory provisions making violations of certain regulations a federal crime. Relative to all federal prosecutions, these offenses are not often prosecuted, and many are misdemeanors (carrying potential sentences of less than a year). But the cases that are brought, or threatened, are of particular significance to individuals operating within the regulatory purview. Firms in heavily regulated industries will be even more concerned, because the criminal liability of any employee will

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misdemeanor statute’s effective delegation to immigration officials of the designation of legal border entry points, and noting that inherent executive power over immigration allows for even broader delegation than usual).

85. See Sunstein, *supra* note 42, at 326 (“[T]he real question is: How much executive discretion is too much to count as ‘executive’?”).

86. *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

87. See Christopher R. Green, *Justice Gorsuch and Moral Reality*, 70 ALA. L. REV. 635, 663-66, 663 n.174 (2019) (cataloging opinions in which Justice Gorsuch has called for reconsideration of precedent, and discussing broader trends in his approach to *stare decisis*).

88. *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).

usually trigger corporate criminal liability, which in turn can bring significant collateral consequences.<sup>89</sup> Moreover, while institutional fissures between civil and criminal enforcement authorities often preclude fully-rationalized sorting of the egregious (i.e., criminal) from the merely bad,<sup>90</sup> 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 lose 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. It turns out that administrative agencies are far from the only institutions that Congress has permitted to define federal criminal offenses. Like agencies, these institutions also lack the democratic accountability of Congress, the competence to speak for the federal "community," and the formal separation from the Executive that only Congress can provide. Acceptance of Justice Gorsuch's rationale casts a harsh negative light on these other delegations. Conversely, acceptance of their legitimacy casts a harsh negative light on Justice Gorsuch's critique.

## II. 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 these entities susceptible to Justice Gorsuch's critique of administrative crimes, because they too suffer from deficiencies of democratic accountability, community condemnation, notice, and lack of any separation-of-powers check? If these entities are to survive the adoption of that critique, how might they be justified? To the extent those justifications lack analytical power, the survival and wide acceptance of these other mechanisms of delegated criminal law-making severely weakens the force of Justice Gorsuch's critique and argues against its adoption.

This Part will consider the broad variety of institutions to which Congress has explicitly—or in the case of courts, sometimes implicitly—delegated the power to define the elements of federal criminal offenses. It starts with federal courts, in part because the crime-definition work of these unelected actors is so at odds with both formal separation-of-powers doctrine and Justice Gorsuch's demand for legislative authorship of criminal law. Starting with courts is also historically appropriate, since their crime-definition work dates back to the very beginnings of federal criminal law. Finally, appreciation of how the juris-generative capacity of courts and prosecutors—indispensable actors in any

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89. RICHMAN, STITH & STUNTZ, *supra* note 20, ch. 11 (on corporate criminal liability).

90. 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).

criminal case—can far exceed “normal” expectations of interstitial lawmaking gives important context to Justice Gorsuch’s embrace of ostensible legislative supremacy. For it turns out that the role of the Executive in helping to define criminal offenses is endemic to federal criminal law.

After courts, this Part considers other institutions to which Congress has perhaps more explicitly delegated the authority to define federal crimes— institutions that, unlike administrative agencies, are not even part of the federal government: states, foreign states, and international law. What is the nature of these delegations? What doctrinal or normative justifications can be offered for them that would distinguish their constitutional legitimacy from that of administrative crimes?

### A. Courts

Much of the analytical rigor of Justice Gorsuch’s 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.<sup>91</sup> Yet a closer look at the context of those pronouncements reveals, first, that they related only to Congress’s authority vis-à-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.”<sup>92</sup>

Any exploration of judicial crime-definition faces a terminological challenge. Federal courts almost invariably speak the language of “statutory interpretation,” not lawmaking.<sup>93</sup> Equally, if one rejects judicial self-categorization and looks for effective delegation, some degree of the latter can always be found.<sup>94</sup> 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 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

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

92. For recognition that denial of the existence of a federal common law of crimes is largely a “myth,” see Kahan, *supra* note 50, at 347; see also Kahan, *supra* note 21, at 471 (“[T]he proposition that federal crimes are ‘solely creatures of statute’ is a truth so partial that it is nearly a lie.” (quoting Liparota v. United States, 471 U.S. 419, 424 (1985))); Julie O’Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 666 (2006) (calling the denial that there are federal common-law crimes “a central myth of federal criminal jurisprudence”); Hessick, *supra* note 91, at 969 (noting how “common law continues to play an important role in shaping the substance of criminal law”).

93. See, e.g., *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997); *Sorrells v. United States*, 287 U.S. 448 (1932).

94. See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 421 (2008) (“[S]ome degree of lawmaking inheres in the task of statutory interpretation and application . . .”).

been more like authorization or acquiescence, not definitional. In short, I highlight 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, in which 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.

This Part highlights the scope of these judicial contributions by laying out a continuum from ostensible statutory interpretation to wholesale lawmaking for which the explicit congressional authorization seems quite plenary. The Part then views these contributions through the lens of the Gorsuch critique and sees how they fare.

### 1. Judicial Co-authorship of Federal Criminal Law from Its Beginnings— Common-Law Elements

The foundational 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*.<sup>95</sup> That case did not hold that courts cannot create crimes, but rather that such power—if it existed—could come only from Congress, which had not delegated it.<sup>96</sup> Still, the case reflected a growing acceptance that crime-definition was not within the judicial province. Years before, while riding circuit, Justice Samuel Chase had found it “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.”<sup>97</sup> 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

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95. 11 U.S. (7 Cranch) 32 (1812); *see also* *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”).

96. *See Hudson & Goodwin*, 11 U.S. (7 Cranch) at 34 (“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, e.g.*, Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267, 274 (1986).

97. *United States v. Worrall*, 2 U.S. (2 Dall.) 384, 394 (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 *Worrall* as example of one line of judicial thinking at the time).

prohibited in federal criminal statutes to the federal circuit courts.”<sup>98</sup> 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.<sup>99</sup>

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 can only with extreme disingenuity be called statutory interpretation.<sup>100</sup> As Kahan relates, the Court’s key initial move was, in *United States v. Kelly*,<sup>101</sup> to use Congress’s deployment of a common-law term as an implicit invitation for courts to exercise their common-lawmaking powers.<sup>102</sup> In *Kelly*, presented with the claim that Congress had failed sufficiently to define the offense of “endeavoring to make a revolt” aboard ship in the 1790 Crimes Act, Justice Bushrod Washington (whom Kahan persuasively suggests was channeling Justice Story<sup>103</sup>) wrote: “[A]lthough the act of Congress does not define this offence, it is, nevertheless, competent to the Court to give a judicial definition of it.”<sup>104</sup>

*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

98. 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 97, at 258-59 (describing Justice Story’s lobbying efforts).

99. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); see also *United States v. Bevans*, 16 U.S. (3 Wheat.) 336, 391 (1818) (Marshall, C.J.) (finding the inquiry to be “not the extent of the power of Congress, but the extent to which that power has been exercised”); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825) (“It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”); RICHMAN, STITH & STUNTZ, *supra* note 20, at 83 (citing *Wiltberger* and *Bevans* as evidence of Chief Justice Marshall’s acceptance of the result in *Hudson & Goodwin*).

100. Kahan, *supra* note 50, at 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” and “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).

101. *United States v. Kelly*, 4 U.S. (11 Wheat) 417, 418 (1826).

102. Kahan, *supra* note 50, at 372-73 (“*Kelly* supplied what was, in effect, a blueprint for the hidden rule of delegated lawmaking in federal criminal law. Through enacting incompletely specified criminal statutes, Congress could implicitly transfer lawmaking authority to the judiciary.”).

103. *Id.* at 373 n.127.

104. *Kelly*, 4 U.S. (11 Wheat) at 418.

“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.’”<sup>105</sup> Finding no effort by Congress to preclude the imposition of this element, the Court did so.<sup>106</sup> Justice Scalia’s analysis of why the “extortion” charged in *United States v. Sekhar*<sup>107</sup> was not “extortion” under the Hobbs Act began in similar terms, quoting Felix Frankfurter: “[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”<sup>108</sup>

This is not to say that the Court will invariably reach for common law as a constraining principle. In *Durland v. United States*,<sup>109</sup> it brushed aside the defendant’s (correct) claim that common-law 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. . . .<sup>110</sup>

Congress’s response to *Durland* was to codify it in 1909.<sup>111</sup> Since then, the Court has embraced the protean flexibility of the federal fraud statutes, at least with respect to non-governmental property deprivations.<sup>112</sup> Similarly, the Court has paid little heed to Justice Thomas’s recurring point that the Court’s interpretation of “extortion” “under color of official right” in the Hobbs Act to

105. *Neder v. United States*, 527 U.S. 1, 21 (1999) (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).

106. *Neder*, 527 U.S. at 25.

107. 570 U.S. 729 (2013).

108. *Id.* at 733 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

109. 161 U.S. 306 (1896).

110. *Id.* at 313; *see* RICHMAN, STITH & STUNTZ, *supra* note 20, 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.”).

111. *See McNally v. United States*, 483 U.S. 350, 357 & n.6 (1987) (detailing amendments to the mail fraud statute).

112. *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, 2029 (2006); *see also* RICHMAN, STITH & STUNTZ, *supra* note 20, 181-264 (discussing the sweep of fraud liability for property deprivations). For the Court’s constrained understanding of governmental property deprivations, *see Kelly v. United States*, 140 S. Ct. 1565, 1572 (2020); and *Cleveland v. United States*, 531 U.S. 12, 23 (2000).

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.<sup>113</sup>

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, Justice 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.<sup>114</sup>

It is worth noting that the Court’s articulated rationale in *McNally* for cutting back on judicial handiwork was substantially based in federalism and the need to restrain the federal government’s “setting standards of disclosure and good government for local and state officials.”<sup>115</sup> The Court’s mail fraud analysis thus distinguished,<sup>116</sup> and fully accepted, an extraordinarily broad reading of a different statute that covers “fraud” against the federal government.<sup>117</sup> When it comes to “defraud[ing] the United States,” current case law pushes beyond the term’s traditional common-law definition to a capacious and bespoke interpretation 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.”<sup>118</sup>

So far, my focus has been on the Supreme Court’s role in giving content to broad common-law terms. But the real work occurs in the lower courts and, in a

113. See 18 U.S.C. § 1951(b)(2) (2018); *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, 234 (2017) (“Justice Thomas showed that the Court’s interpretation effectively eliminated the longstanding distinction between bribery and extortion”).

114. *McNally*, 483 U.S. at 372-73 (Stevens, J., dissenting); see also *United States v. Kozminski*, 487 U.S. 931, 965-66 (1988) (Stevens, J., dissenting); cf. Kahan, *supra* note 50, at 375 (“If anything, the criminal fraud statutes have proven even more potent as fonts of independently operative legal rules than any of the recognized ‘common law’ statutes, including the Sherman Act.”).

115. *McNally*, 483 U.S. at 360.

116. See *id.* at 358 n.8 (distinguishing the broad interpretation given to “the scope of the predecessor statute” in *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

117. See 18 U.S.C. § 371 (2018) (criminalizing conspiracies to, among other things, “defraud the United States, or any agency thereof in any manner or for any purpose”).

118. *United States v. Coplan*, 703 F.3d 46, 61 (2d Cir. 2012) (quoting *Dennis v. United States*, 384 U.S. 885, 861 (1966)); see also *United States v. Gas Pipe, Inc.*, 997 F.3d 231, 235 (5th Cir. 2021) (rejecting, as “foreclosed,” defendants’ argument that “the word ‘defraud’ as used in 18 U.S.C. § 371, should be cabined to its common law,” noting that “a long line of Supreme Court and circuit precedent holds otherwise”) (citing cases).

world in which most defendants eventually plead guilty and waive their appellate remedies, it stays there.<sup>119</sup> To be sure, the Supreme Court will occasionally upset robust lines of common-law development below, as it did in *McNally*,<sup>120</sup> and later in *Skilling v. United States*.<sup>121</sup> Yet one of the most notable aspects of these cases is how long it took for the Court to intervene in a doctrinal issue fully teed up and briefed for years.<sup>122</sup>

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.<sup>123</sup> 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, in so doing, implicitly invoked the expertise and traditions of courts. Perhaps the "inherent" common-law making authority that the Court denied itself in *Hudson & Goodwin* springs back with the explicit blessing of Congress? Yet judicial crime-definition does not stop there.

## 2. Limiting and Expanding Criminal Liability Across Offenses

Moving onward on the continuum between, on one end, ostensible exercises in statutory interpretation—as one may characterize cases that use common-law terms as points of analytical departure—and the other, of wholesale judicial crime-definition, we come to a middle ground: federal criminal lawmaking by courts where statutes are utterly silent, or where 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*,<sup>124</sup> even though the statute criminalizing escape from federal custody failed to mention a defense of duress or coercion, 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.<sup>125</sup>

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119. See generally RICHMAN, STITH & STUNTZ, *supra* note 20, at 18-19 (providing an introduction to federal criminal practice).

120. See *McNally*, 483 U.S. at 368 (Stevens, J., dissenting) (noting how decision "upset the settled, sensible construction that the federal courts have consistently endorsed").

121. 561 U.S. 358, 408-09 (2010) (paring down "honest services" fraud to cases of bribery and kickback only).

122. See *Sorich v. United States*, 555 U.S. 1204 (2009) (Scalia, J., dissenting from denial of certiorari); *United States v. Rybicki*, 354 F.3d 124, 158-65 (2d Cir. 2003) (en banc) (Jacobs, J. dissenting); Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815, 1822 (2011) (noting conflicts among Circuits between enactment of § 1346 and *Skilling*).

123. See *supra* note 78 and accompanying text.

124. 444 U.S. 394 (1980).

125. *Id.* at 414 n.11.

The 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*.<sup>126</sup> But by 2006, in *Dixon v. United States*,<sup>127</sup> 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. The Court, citing *Bailey*, assumed the existence of a federal duress defense, but it disclaimed any need to nail down its elements.<sup>128</sup> It needed only to determine who bore the burden of proof and by what standard. Because federal crimes are “solely creatures of statute,”<sup>129</sup> 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.<sup>130</sup> 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,”<sup>131</sup> the Court would simply look to “the long-established common-law rule.”<sup>132</sup>

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.<sup>133</sup>

Put differently, in Justice Kennedy’s view, Congress had left defense-definition to the Court, and the Court 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 Justice Stevens’s 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 Justice Stevens said).<sup>134</sup> For Justice 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

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126. See 532 U.S. 483, 489-95 (2001); *id.* at 490 n.3.

127. 548 U.S. 1 (2006).

128. *Id.* at 4 n.2.

129. *Id.* at 12 (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)).

130. *Id.* at 13.

131. *Id.*

132. *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.’” *Id.* at 14 n.8 (quoting S. 1437, 95th Cong., § 501 (1978)).

133. *Id.* at 18 (Kennedy, J., concurring).

134. *Id.* at 19 (Alito, J., concurring).

kept passing new criminal laws, Justice Alito would presume that the 1789 version remained operative.<sup>135</sup>

Justice Breyer, joined by Justice Souter, dissented. Like every member of the Court except for Justice Stevens, he thought defenses should look the same across all statutes.<sup>136</sup> But Justice Breyer—second only to Justice 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.”<sup>137</sup> Across all the opinions in *Dixon*, Congress looms more as a figurehead than a legislature.

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.”<sup>138</sup> 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 *Sorrells* for a reminder that the extensive judicial crafting of this defense finds its ostensible roots in a legislative enactment.<sup>139</sup> In *Sorrells*, a Prohibition agent had badgered the defendant into selling him some whiskey. Here the Court, finding nothing in the National Prohibition Act<sup>140</sup> on point, 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.<sup>141</sup>

Lest one think that the Court’s exercises a broad license to tailor criminal liability only to constrain it, one need look no further than the *Pinkerton*<sup>142</sup> 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.”<sup>143</sup> Conspiracy

135. *Id.* at 19-20 (Alito, J., concurring).

136. *Id.* at 21-22 (Breyer, J., concurring).

137. *Id.* at 22 (Breyer, J., dissenting).

138. Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 756 & n.439 (2013) (citing cases); see also RICHMAN, STITH & STUNTZ, *supra* note 20, at 112-18 (examining range and bases of federal defenses); *United States v. Waldman*, 835 F.3d 751 (7th Cir. 2016) (setting contours of self-defense defense in prison context).

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

140. Pub. L. No. 66-66, 41 Stat. 305 (1919), *voided by* U.S. Const. amend XXI.

141. *Id.* at 448; see *Jacobson v. United States*, 503 U.S. 540, 553 (1992) (quoting same passage from *Sorrells*); 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).

142. See *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946).

143. *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*

liability is a statutory creation that draws on a long Anglo-American statutory tradition.<sup>144</sup> But nothing in conspiracy statutes—which, after all, often carried 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.<sup>145</sup> That extension of substantive liability was a purely judicial construct—albeit one anchored in common-law agency principles—and a massively consequential one at that.<sup>146</sup>

Corporate criminal liability is also a largely judicial creation. Congress has explicitly allowed for such liability in certain statutes—including the one charged in the landmark 1909 *New York Central* case.<sup>147</sup> Yet that principle had already been established long before by prosecutors and courts “applying general criminal laws—laws that, by their terms, did not extend to corporations as entities—to corporate conduct.”<sup>148</sup> Thereafter, corporate criminal liability spread across all offenses, even to those without clear statutory authorization for that doctrine.<sup>149</sup>

Another purely judicial construct, just as consequential, has been the establishment of “willful blindness” as satisfying the requirement of “knowledge” across federal statutes.<sup>150</sup> This was largely the handiwork of the lower courts,<sup>151</sup> with the Supreme Court deigning to acknowledge the doctrine only recently, in the context of a civil patent infringement case.<sup>152</sup> Even when

*Judicially-Created Criminal Liability*, 67 MONT. L. REV. 89 (2006); Miriam H. Baer, *Insider Trading’s Legality Problem*, 127 YALE L.J. F. 129, 135 (2017) (citing *Pinkerton* and willful blindness as examples of “judge-developed doctrines that curtail or extend criminal liability”).

144. 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).

145. See Alex Kreit, *Vicarious Liability and the Constitutional Dimensions of the Pinkerton Doctrine*, 57 AM. U. L. REV. 585, 595 (2008) (“As a matter of statutory interpretation, [the *Pinkerton* dissent’s] reasoning appears to be far more persuasive than the majority’s. Indeed, 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.”).

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

147. *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) (“[B]oth before and after *New York Central*, Congress enacted thousands of statutes creating new or additional criminal liability for corporations.”).

148. Diskant, *supra* note 147 at 136; see also RICHMAN, STITH & STUNTZ, *supra* note 20, at 806-07 (on development of corporate criminal liability doctrine).

149. Diskant, *supra* note 147, at 136-37.

150. 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* note 20, at 510-11; Gregory M. Gilchrist, *Willful Blindness as Mere Evidence*, 54 LOY. L.A. L. REV. 405, 411-16 (2021).

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

152. See *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011) (“The doctrine of willful blindness is well established in criminal law.”); see also *United States v. Goffer*, 721 F.3d 113,

complicity liability has a clear statutory basis, as is the case for aiding and abetting,<sup>153</sup> the Court continues to treat broad issues of criminal responsibility as among its special provinces,<sup>154</sup> 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.<sup>155</sup> When setting mens rea standards, however, it must reckon with variegated statutory language, with little consistency in how Congress uses, or doesn’t use, terms like “knowingly,” or “willful.” Yet this legislative insouciance 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 of the requisite mens rea (if there is one), and much to do with the Court’s larger project of protecting the “morally blameless” from punishment.<sup>156</sup> In a cogent distillation of the cases, Stephen Smith explains:

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

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128 (2d Cir. 2013) (“*Global-Tech* simply describes existing case law.”); cf. *Spurr v. United States*, 174 U.S. 728, 738 (1899) (using a concept similar to willful blindness).

153. See 18 U.S.C. § 2 (2018).

154. See *Rosemond v. United States*, 572 U.S. 65, 72–81 (2014) (refining actus reus and mens rea requirements in the context of an aiding and abetting case); Kit Kinports, Rosemond, *Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 143 (2015) (critiquing *Rosemond*).

155. The exception is the insanity defense, which Congress redefined after the acquittal of John Hinckley, Jr. See 18 U.S.C. § 17 (2018); see also Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 1 (1988) (noting that the Insanity Defense Reform Act of 1984 was “first time in history[] [that] Congress passed comprehensive legislation pertaining to the defense of criminal responsibility”).

156. Stephen F. Smith, “*Innocence*” and the *Guilty Mind*, 69 *Hastings L.J.* 1609, 1653 (2018) (“[T]he 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, 130–31 (2012) (noting how judicial interpretative “canons are instead designed simply to yield interpretations that fulfill legislative intent regarding mens rea and culpability, which is no easy goal given the congressional track record of employing a range of statutory drafting conventions”); John S. Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 U. VA. L. REV. 1021, 1023 (1999) (finding that “the Court now routinely assumes that Congress believes that criminal liability should follow moral culpability,” and therefore “suppose[s] that Congress does not want blameless people to be convicted of serious federal crimes”); Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 HASTINGS L.J. 137, 139 (2007) (criticizing the Court’s “apparent innocence rule” for “quietly allow[ing] the conviction of a wide range of blameless defendants for crimes that are among the most commonly charged in our federal courts today”); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 834 (1999) (finding “Court’s consistent adherence” to the principle of “constitutional innocence,” under which “strict liability is constitutional when, but only when, the intentional conduct covered by the statute could be made criminal by the legislature”).

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.<sup>157</sup>

Since the Court has generally resisted constitutionalizing substantive criminal law<sup>158</sup> and it can hardly declare mens rea—a foundational element of every offense—as a common law space, its opinions must sound in statutory interpretation. Yet as Smith notes, “To 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.”<sup>159</sup> 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.”<sup>160</sup>

In cases involving criminal offenses that lack a common law origin and are not *mala in se*, a statute’s mens rea requirement will often be consequential indeed, with the defendant’s guilt frequently turning on it. Yet courts have carved out this space as their special province, usually looking to Congress only for material, not direction.

### 3. Judicially Crafted Elements

Moving along the continuum of judicial lawmaking engagement, we have seen the statutory use of common law words being taken as an invitation to provide content to open-textured terms, and the reliance on statutory silence (defenses) or perceived under-specification (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 see 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 2009

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157. Smith, *supra* note 156, at 1653.

158. See William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 6-7 (1996) (discussing the underdevelopment of substantive constitutional criminal law); Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 Mich. L. Rev. 1269, 1333 (1998) (“[T]he tale of the unfulfilled promise of substantive constitutional criminal law . . . is incomplete and misleading so long as it omits the process account of the Constitution and criminal law.”).

159. Smith, *supra* note 156, at 1657.

160. *Id.* at 1657-58 (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

Hate Crimes statute a conspicuous example.<sup>161</sup> But two stalwarts of federal criminal civil rights enforcement remain: 18 U.S.C. § 241, which traces its lineage back to the Enforcement Act of 1870,<sup>162</sup> and 18 U.S.C. § 242, whose origins are in the Civil Rights Act of 1866.<sup>163</sup> Once its commitment to Reconstruction crumbled in the 1870s, DOJ stopped enforcing these statutes until the mid-1930s, and to this day, it has exercised considerable control on their deployment.<sup>164</sup>

Once charged, however, these statutes have extraordinary 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.”<sup>165</sup> Section 242 has an explicit state action component and targets anyone 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.”<sup>166</sup> The Reconstruction Amendments gave enforcement authority to Congress, which in turn exercised that authority to create offenses whose content is tethered to judicial constitutional interpretations. Put differently, these crimes are defined by constitutional common law.<sup>167</sup>

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*,<sup>168</sup> its first criminal civil rights case since the demise of Reconstruction, to impose a “willfulness” standard for both statutes.<sup>169</sup> This requires the government to show that the defendant acted with a specific intent to interfere with the federal right in question. To be sure, figuring out what this

161. The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, 123 Stat. 2835 (codified at 18 U.S.C. § 249 (2018)); see also 18 U.S.C. § 245 (2018) (criminalizing interference with specified “federally protected activities”).

162. Ch. 114, 16 Stat. 140.

163. Ch. 31, 14 Stat. 27; see RICHMAN, STITH & STUNTZ, *supra* note 20, at 430; Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2138 (1993).

164. RICHMAN, STITH & STUNTZ, *supra* note 20, 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).

165. 18 U.S.C. § 241 (2018).

166. *Id.* §242.

167. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458 (2001) (suggesting that “through most of our history, the amendment process has not been an important means of constitutional change”); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877 (1996) (“[I]n the day-to-day practice of constitutional interpretation, . . . the specific words of the text play at most a small role, compared to evolving understandings of what the Constitution requires”).

168. 325 U.S. 91 (1945).

169. This standard was then applied to § 241 in *Anderson v. United States*, where the Court stated that, “since 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.” 417 U.S. 211, 223 (1974).

standard means has not always been easy for the lower courts, but the need for some heightened inquiry is well-established.<sup>170</sup>

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” of which Sections 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 answer, as well as the attending 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. He was charged with 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.”<sup>171</sup> Writing for an en banc majority, Judge Merritt spoke the language of statutory interpretation: in passing and codifying section 242, “Congress [did] not [evince] . . . 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.”<sup>172</sup> 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.”<sup>173</sup> 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 publicly known or understood . . . [to] rise[] to the level of a ‘constitutional right,’” and because it was not “declared as such by the Supreme Court,” nor is it “listed in the Constitution, nor . . . a well-established right of procedural due process,”<sup>174</sup> 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.”<sup>175</sup> 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

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170. RICHMAN, STITH & STUNTZ, *supra* note 20, at 442-43.

171. *United States v. Lanier*, 520 U.S. 259, 261-62 (1997) (internal quotation marks and citation omitted), *vacating and remanding* 73 F.3d 1380 (6th Cir. 1996) (en banc).

172. *Lanier*, 73 F.3d at 1387.

173. *Id.* at 1391.

174. *Id.* at 1392.

175. *Lanier*, 520 U.S. at 265.

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.<sup>176</sup>

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 . . . . Further, the Sixth Circuit’s conclusion 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 . . . .<sup>177</sup>

As a practical matter, Section 242 liability is quite limited. DOJ brings a relatively small number of these 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.<sup>178</sup> 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.”<sup>179</sup> Still, every aspect of the offense is an artifact of judicial decision making, subject only to a congressional delegation that both encompasses the entire scope of rights established through ongoing judicial interpretations of the Constitution and attaches penalties to deprivations of those rights. 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

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176. *Id.* at 269; see also Trevor Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 469 (2001) (“[T]he 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 *Lanier*, 520 U.S. at 266)).

177. *Lanier*, 520 U.S. at 267 n.6 (quoting *Lanier*, 73 F.3d at 1387) (internal citations omitted).

178. *Police Officers Rarely Charged for Excessive Use of Force in Federal Court*, TRAC (June 17, 2020), <https://trac.syr.edu/tracreports/crim/615> [<https://perma.cc/9PPW-G562>] (“Altogether in FY 2019, federal prosecutors brought § 242 charges in just 49 cases in the United States. . . . Historically very few referrals under § 242 are actually prosecuted by the Department of Justice.”). The George Floyd Justice in Policing bill that has passed the House of Representatives and now pends in the Senate would reduce the mens rea demanded by § 242 from “willfully” to “knowingly or recklessly.” H.R. 1280, 117th Cong. § 101 (passed by the House, Mar. 3, 2021); see also Michael D. Shear & Nicholas Fandos, *George Floyd’s Family Meets with Biden Amid Push for Police Reform*, N.Y. TIMES (May 25, 2021), <https://www.nytimes.com/2021/05/25/us/politics/george-floyd-white-house-meeting.html> [<https://perma.cc/SKY9-W2HA>].

179. *United States v. Baroni*, 909 F.3d 550, 585 (3d Cir. 2018) (internal citation omitted), *rev’d on other grounds sub nom.*, *Kelly v. United States*, 140 S. Ct. 1565 (2020).

specific area are to be developed by the federal courts in accordance with the incremental decisionmaking process of the common law.”<sup>180</sup>

The Court can sometimes seem to be in almost comic denial of its civil rights crime-definition role. Thus, in *United States v. Kozminski*,<sup>181</sup> where defendants were charged under Section 241, as well as another more specific statute,<sup>182</sup> for 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.”<sup>183</sup> Invoking the rule of lenity, the Court 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.<sup>184</sup>

But, of course, for guidance in the “inherently legislative task” of defining Thirteenth Amendment “coercion,” the Court simply cited its own constitutional precedents.<sup>185</sup>

When casting about for areas in which Congress has delegated criminal lawmaking authority to the courts, Justice Stevens would regularly cite antitrust cases,<sup>186</sup> and, as a formal matter, he was quite correct to do so. Indeed, in this area, as Tom Merrill explains, the Court has largely dropped the pretense of statutory interpretation, making “Section 1 of the Sherman Act . . . a paradigm of implied delegated lawmaking.”<sup>187</sup> 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

180. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 40 (1985).

181. 487 U.S. 931 (1988).

182. 18 U.S.C. § 1584 (2018) (making it a crime knowingly and willfully to hold another person “to involuntary servitude”).

183. 487 U.S. at 944.

184. *Id.* at 949.

185. *Id.* at 943.

186. *Id.* at 965-66 (Stevens, J., concurring in judgment); *McNally v. United States*, 483 U.S. 350, 372-73 (1987) (Stevens, J., dissenting); *see also* Kahan, *supra* note 50, at 395 n.254 (collecting these same citations in support of the fact that “Justice Stevens has declined to apply lenity when he has concluded that Congress intended [a criminal statutory] definition to be developed in the common-law tradition of case-by-case adjudication,” due to the fact that if “lenity [were] to be treated as lexically prior to all other conventions, it would preclude recourse to all the sources of normative inspiration that guide delegated lawmaking” (internal quotation omitted)).

187. Merrill, *supra* note 180, at 45; *see, e.g.*, Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 688 (1978) (explaining that the scope of § 1 of the Sherman Act was 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*, 96 NOTRE DAME L. REV. 1205, 1207 (2021) (going further and suggesting that, in the antitrust area, “courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process” but “[r]ather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business”); *see also* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 267, 267-68 n.9 (1986) (noting separation-of-powers concerns with judicial lawmaking under the Sherman Act).

and monopolistic behaviors.<sup>188</sup> But the offense was originally a misdemeanor, and as Daniel Sokol notes:

More than a generation 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.<sup>189</sup>

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.<sup>190</sup> This case selection is a matter of articulated prosecutorial policy. The DOJ’s Antitrust Manual states that “current . . . policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements.”<sup>191</sup> 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.”<sup>192</sup> 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.<sup>193</sup> What might seem as a massive space for common law criminal development has thus, by dint of executive and judicial restraint, been compressed to a series of discrete and well-defined offenses. The Antitrust Division’s recent prosecutions of firms for agreeing not to “poach” each other’s employees is thus raising the issue of whether such agreements are per se illegal.<sup>194</sup>

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 Racketeer Influenced and Corrupt Organizations (RICO) statute. It criminalizes little conduct that was not already covered by a federal or state penal

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

189. D. Daniel Sokol, *Reinvigorating Criminal Antitrust?*, 60 WM. & MARY L. REV. 1545, 1557 (2019).

190. 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 F. App’x 533 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 909 (2020).

191. U.S. DEP’T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION MANUAL, at III-12 (5th ed. 2018).

192. *United States v. Kemp*, 907 F.3d 1264, 1274 (10th Cir. 2018) (quoting the government’s brief).

193. *See Sokol, supra* note 189, 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 Kemp*, 907 F.3d at 1278.

194. *See Alex Malyshev & Jeffrey S. Boxer, With DOJ’s Focus on Wage Fixing and No Poach Agreements, Non-compete and Antitrust Laws Collide*, REUTERS (Aug. 23, 2021), <https://www.reuters.com/legal/legalindustry/with-doj-focus-wage-fixing-no-poach-agreements-non-compete-antitrust-laws-2021-08-23/> [<https://perma.cc/2MQC-MXTR>]; *see also* Matthew Perlman, *Surgical Care Blasts DOJ Criminal Case Over Employee Pacts*, LAW360 (May 17, 2021, 6:59 PM EDT), <https://www.law360.com/articles/1385417/surgical-care-blasts-doj-criminal-case-over-employee-pacts> [<https://perma.cc/A39U-TTWY>] (describing defense arguments that challenged conduct is not per se illegal and that criminal prosecution is thus a due process violation).

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”<sup>195</sup>) 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.<sup>196</sup>

#### 4. Assessing 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. Moreover, broad delegation does not preclude congressional intervention and full appreciation by courts and prosecutors of that possibility. Still, broad acceptance of this state of affairs should pose a considerable challenge to a formalist attracted to the Gorsuch critique.

How do these crime-definition delegations to courts—particularly maximal ones like Sections 241 and 242—fare when judged against the challenged delegations to administrative agencies? As Margaret Lemos has noted, “[V]irtually no effort has been made to fit delegations to courts into nondelegation theory or practice.”<sup>197</sup> The “intelligible” principle for these civil rights statutes is the U.S. Constitution, as interpreted by courts over time. Most readers surely find the Constitution quite intelligible, and the case establishing the “intelligibility” standard allows for considerable flexibility. 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.”<sup>198</sup> Yet it is hard to see how such a massive delegation is consistent with the standards Justice Gorsuch would demand for crime-definition. As Lemos notes, “The focus of the intelligible principle requirement is not on the characteristics of Congress’s chosen delegate, but on Congress itself

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195. See *United States v. Martinez*, 994 F.3d 1, 14-17 (1st Cir. 2021).

196. RICHMAN, STITH & STUNTZ, *supra* note 20, at 576-608; see Kahan, *supra* note 21, at 473 (“RICO is best conceptualized . . . as an implicit delegation of authority to courts to fashion their own rules.”); Brian Slocum, *RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking*, 31 *LOY. U. CHI. L.J.* 639, 655-56 (2000).

197. Lemos, *supra* note 94, at 408.

198. *W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928); see also *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (“[T]his 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 *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946))).

and the choices it must make.”<sup>199</sup> Perhaps justification can be found in the analysis—which Justice 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.<sup>200</sup> But that is an idiosyncratic and limited analysis.

Measured against the criteria usually used by those normatively assessing delegations to agencies, particularly the concern about democratic accountability, 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 “judges are more insulated from the political process and so pose a lesser danger to liberty than do agencies.”<sup>201</sup> Yet other features of maximal judicial delegations push hard in the opposite direction, since the accountability that Justice Gorsuch seeks is the antithesis of insulation. Courts are not subject to controls that Congress can place on agencies<sup>202</sup> or to the political accountability that agencies have through the President.<sup>203</sup>

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-driven decision making can lead to dramatic legal discontinuities demanding close scrutiny.<sup>204</sup> But 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 inexpert) Executive.<sup>205</sup> Because agencies proceed categorically rather than case-by-case, they can also more easily be held to account for changing the legal landscape.

Maybe judicial law development derives accountability from its institutional setting, for it cannot occur without prosecutors presenting factual

199. Lemos, *supra* note 94, at 436.

200. See *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.”).

201. Volokh, *supra* note 78, at 1414 (citing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 113, 189 (1993)).

202. Whatever agenda control Congress has over courts has rarely been exercised in practice. See 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 209 and accompanying text.

203. Lemos, *supra* note 94, at 449; Volokh, *supra* note 78, at 1414; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 93-94 (1985).

204. 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) (Gorsuch, J., statement with respect to denial of certiorari).

205. See Peter L. Strauss, *The Trump Administration and the Rule of Law*, 170 REVUE FRANÇAISE D’ADMINISTRATION PUBLIQUE 433, 439 (2019) (noting “trend to presidentialism” in recent administrations); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272-2363 (2001) (offering 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) (examining sources of independent agency “dependence” on the President).

narratives and crafting legal liability theories.<sup>206</sup> How does the conditional nature of judicial crime-definition cut with respect to the Gorsuch critique? Prosecutorial gatekeeping ensures some separation of powers 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.<sup>207</sup> But even mine-run decisions come with a degree of networked accountability that I have described elsewhere.<sup>208</sup> 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 DOJ 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.<sup>209</sup>

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 separate concern of Justice Gorsuch.<sup>210</sup> Dan Kahan has cogently suggested that the prosecutorial “power of initiative” comes with its own pathology.<sup>211</sup> Prosecutors not only anchor judicial lawmaking to a larger political environment but also pursue their own agendas. By 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 DOJ.<sup>212</sup>

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206. See Richman, *supra* note 28, at 758 (discussing the gatekeeping role of prosecutors).

207. Hessick, *supra* note 91, at 1003.

208. Daniel Richman, *Accounting for Prosecutors*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 40, 68 (M. Langer & D. Sklansky eds., 2017).

209. See, e.g., 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) (2018)), *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) (2018)), *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, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988) (codified at 18 U.S.C. § 1346 (2018)), *overriding* McNally v. United States, 483 U.S. 350 (1987). See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (detailing the phenomenon of statutory overrides).

210. See *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

211. See Kahan, *supra* note 21, at 479-80; see also 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.”).

212. 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

Indeed, relying on agencies to craft regulations on which prosecutors can base criminal charges is far 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 rulemaking process may be far greater than their separation from the crime-definition process that, to varying extents, plays out in federal courts. The latter context has an independent judge tethered to a process over which prosecutors have considerable sway. The former offers an agency that is usually quite separate from prosecutors, one that must comply with an open and transparent rule-making process, with notice and comment from affected parties,<sup>213</sup> 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).<sup>214</sup> Interested parties will be able to challenge a rule's consistency with the asserted statutory mandate or claim policy arbitrariness<sup>215</sup> in a process that finds no parallel for theories of liability generated by courts and prosecutors.<sup>216</sup> DOJ 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 cannot rely on internal guidance manuals.<sup>217</sup> Moreover, an APA rulemaking challenge to an agency rule will be facial and brought by a party that need not suffer from the bad facts that are the usual burden of a criminal defendant. Nor do the functional

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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.”)

213. See Peter L. Strauss, Speech, *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, 663-64 (2016) (arguing that notice-and-comment rulemaking promotes both participatory and epistemic democracy by involving the public in the regulatory process on the one hand, and drawing on its “widely dispersed information power” on the other).

214. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–706) (2018)).

215. Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C) (2018).

216. 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”).

217. Kahan, *supra* note 21, at 497 n.145 (explaining DOJ’s reluctance to promulgate binding internal regulations); U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 1-1.200 (2018), <https://www.justice.gov/jm/jm-1-1000-introduction> [<https://perma.cc/XS8Q-ZDRV>] (“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.<sup>218</sup>

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.

Digging into the Code of Federal Regulations in addition to the U.S. Code involves extra work. Yet the potential defendant required to do that by an administrative crime will generally (but not always) find clarity and detail unavailable to the person worried about being charged under a congressionally drafted statute with a judicial gloss—particularly when that gloss arises primarily in lower federal courts and is not always consistent across them. In short, the main reason crime-definition delegations to courts come out so well compared to those to agencies (which pass, but sometimes with grumbling<sup>219</sup>) is probably 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. First, we will consider federal statutory regimes in which Congress has explicitly incorporated a specific set of state penal laws into an offense definition. We will then turn to the Assimilative Crimes Act (ACA)<sup>220</sup> and its explicit adoption of a far broader range of offenses defined by the relevant state legislature. The most significant aspect of this continuum, for our purposes, is complete doctrinal acceptance, even by Justice Gorsuch, of the effective delegation of federal crime-definition authority to institutions whose very lack of federal status is considered a source of comfort, not concern.

### 1. State Law Predicates

State law figures prominently in federal criminal law. This ought not to 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

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218. Lemos, *supra* note 92, at 444.

219. *See supra* note 4.

220. 18 U.S.C. § 13(a) (2018).

government itself, its property, or its programs,”<sup>221</sup> by the beginning of the twentieth century, “[federal] legislators began to think of [f]ederal criminal jurisdiction . . . as supplementing local enforcement efforts supporting local exertions, and compensating for local inadequacies or corruption . . . .”<sup>222</sup> Initially the federal offense created to support state efforts deployed a modified common law term, as when the 1919 Dyer Act criminalized interstate car thefts.<sup>223</sup> 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.”<sup>224</sup> It wasn’t until 1986 that Congress 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,” implicitly drawing on existing state and federal offenses.<sup>225</sup>

This state law incorporation strategy would not only alleviate the troubling vagueness of a federal definition but would accommodate state laboratories of experimentation,<sup>226</sup> 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.”<sup>227</sup> 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.<sup>228</sup>

221. RICHMAN, STITH & STUNTZ, *supra* note 20, at 3.

222. Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 NAT’L INST. OF JUSTICE, CRIMINAL JUSTICE 2000: BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81, 87 (Charles M. Friel ed., 2000); *see also* Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1548 (2002).

223. 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) (holding that the National Motor Vehicle Theft Act is 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.”).

224. Ch. 395, 36 Stat. 825 (1910) (codified at 18 U.S.C. § 398 (1940)). For cases broadly applying the “immorality” prong, *see*, for example, Caminetti v. United States, 242 U.S. 470 (1917) (upholding the conviction of a man who transported a woman to be his “concubine and mistress”) and Cleveland v. United States, 329 U.S. 14 (1946) (upholding the conviction of a Fundamentalist Mormon who transported a woman for purposes of polygamy).

225. Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5, 100 Stat. 3510, 3511 (codified as amended at 18 U.S.C. § 2421 (2018)); *see* Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, CORNELL J. L. & PUB. POL’Y 99, 116-17 (1996).

226. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“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.”).

227. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 803(a), 84 Stat. 922, 937 (codified as amended at 18 U.S.C. § 1955 (2018)); *see* G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 979 (1978).

228. United States v. Sacco, 491 F.2d 995, 1003 (9th Cir. 1974). *But see id.* at 1004 (Ely, J., dissenting) (“[T]he statute in question . . . is intolerably discriminatory and thus denies to some . . . the

Arguably even more explicit instances of dynamic incorporation of state law occurred in the Travel Act of 1964<sup>229</sup> and the RICO statute<sup>230</sup> 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.”<sup>231</sup> 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).<sup>232</sup> A similar strategy has been used in a proposed federal domestic terrorism statute.<sup>233</sup>

One challenge to the Travel Act condemned it as “an unconstitutional delegation of Federal legislative power to the States.”<sup>234</sup> In response, a DOJ official, Herbert J. Miller, Jr., noted that, unlike the Assimilative Crimes Act, which entailed wholesale delegation to the states, “the ‘Travel Act’ is restricted to certain defined kinds of criminal activity . . . .”<sup>235</sup> Indeed, subsequent years would see a line of Supreme Court and lower court cases determining whether conduct charged both violated some state penal law and fit within some generic federal definition of “extortion,”<sup>236</sup> “bribery,”<sup>237</sup> arson,<sup>238</sup> 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

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equal protection of the law. By its express terms, the criminal sanctions of the statute may be applied only to those citizens who commit their alleged unlawful gambling activities in communities wherein gambling is already prohibited by local law.”).

229. Interstate Travel in Aid of Racketeering, Pub. L. No. 87-228, § 1(a), 75 Stat. 498, 498 (1961) (codified as amended at 18 U.S.C. § 1952 (2018)).

230. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, title IX, §901(a), 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (2018)).

231. 18 U.S.C. § 1955(b); 18 U.S.C. § 1961(1)(A).

232. See Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 245 (1984).

233. See *Confronting the Threat of Domestic Terrorism Act*, H.R. 4192, 116th Cong. (2019) (designating “prohibited acts” with reference to both state and federal laws). More recent domestic terrorism legislative proposals have not sought to create new offenses. See, e.g., S. 964, 117th Cong. (2021); H.R. 350, 117th Cong. (2021).

234. Herbert J. Miller, Jr., *The “Travel Act”: A New Statutory Approach to Organized Crime in the United States*, 1 DUQ. U. L. REV. 181, 185 (1963).

235. *Id.* at 189.

236. *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.”).

237. *Perrin v. United States*, 444 U.S. 37, 49 (1979) (concluding that Congress intended “the generic definition of bribery, rather than a narrow common-law definition”).

238. *United States v. Conway*, 507 F.2d 1047, 1051 (5th Cir. 1975) (concluding that there was no need for the jury to have been instructed on the definition of “arson” under Maryland law); see also *United States v. Owens*, 159 F.3d 221, 228 (6th Cir. 1998) (rejecting claim that court failed to instruct on elements of state gambling and prostitution offenses); *United States v. Gomez*, 801 F. App’x. 715 (11th Cir. 2020) (following *Conway* and finding “no requirement that the jury be instructed on the state-specific definition of the predicate crime”).

accountable, but, unlike state legislatures, they are federal. And, at least so far, the federal statutes on which their gatekeeping is based have not been deemed void for vagueness.<sup>239</sup>

Still, strategic recourse to state criminal law predicates via the Travel Act can permit federal prosecutors to circumvent limitations, whether congressionally devised or judicially constructed, on purely federal statutes. One such limitation arose in 2016, when, in *McDonnell v. United States*, the Supreme Court construed the federal fraud and extortion statutes to reach only those cases of bribery where the *quid pro quo* was with respect to a rather limited range of “official acts.”<sup>240</sup> Prosecutors quickly responded, in at least one case, by charging bribery defendants under the Travel Act, using state law predicates that lacked any such limitation.<sup>241</sup>

## 2. The ACA and Wholesale Adoption of Non-Duplicative State Penal Law for Federal Enclaves

The gatekeeping-role federal 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.<sup>242</sup> 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.<sup>243</sup>

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

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239. It has been argued, so far unsuccessfully, that the Supreme Court’s recent void-for-vagueness cases, *see, e.g.,* *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, Columbia Law School ’21, on whose research and analysis I draw.

240. 136 S. Ct. 2355 (2016).

241. *See* *United States v. Ferriero*, 866 F.3d 107, 128 (3d Cir. 2017) (finding *McDonnell*’s limitations not to apply to New Jersey bribery statute charged as Travel Act predicate). Of course, prosecutors have also used other federal statutes to avoid *McDonnell*’s limitations. *See* *United States v. Ng Lap Seng*, 934 F.3d 110, 130 (2d Cir. 2019) (declining to read *McDonnell*’s limitation into either 18 U.S.C. § 666 (2018) or the Foreign Corrupt Practices Act).

242. 18 U.S.C. § 13(a) (2018).

243. *Id.*

vexed question), they are wholly dispunishable. 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 legitimate authority? That Congress has power to provide for all crimes against the United States is [incontestable].<sup>244</sup>

Justice Story thereafter drafted the original ACA, which Representative Daniel Webster introduced in 1825.<sup>245</sup>

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.<sup>246</sup> Then in 1948, Congress changed its drafting strategy, opting for dynamic incorporation of state law. As the Court put it in *United States v. Sharpnack*, which upheld 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.”<sup>247</sup> The ACA does not authorize recourse to state law where some applicable federal enactment was intended to fill the field or otherwise preclude such recourse.<sup>248</sup> 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.”<sup>249</sup>

Before *Sharpnack*, two lower courts found the ACA’s dynamic incorporation of “future legislation constituted an improper delegation and

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244. *United States v. Press Pub. Co.*, 219 U.S. 1, 12 (1911) (quoting 1 JOSEPH STORY, LIFE OF JUSTICE STORY 293 (Boston 1851)).

245. *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).

246. *United States v. Sharpnack*, 355 U.S. 286, 291 (1958); see also *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.”).

247. *Sharpnack*, 355 U.S. at 293.

248. *Lewis v. United States*, 523 U.S. 155, 164 (1998); see also *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”); see also *United States v. Do*, 994 F.3d 1096, 1102 (9th Cir. 2021) (noting that ACA’s “application is predicated on analysis of the federal statute, not a prosecutorial desire to obtain a higher sentence.”).

249. 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)).

abdication of legislative duties,”<sup>250</sup> and indeed pre-New Deal precedent held: “Congress cannot transfer its legislative power to the States—by nature this is nondelegable.”<sup>251</sup> 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 state laws themselves.”<sup>252</sup> 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.<sup>253</sup>

Since Congress could undoubtedly incorporate state law piecemeal or wholesale, and “obviously” could “renew such assimilation annually or daily,”<sup>254</sup> why force it to go through the charade?

“To protect liberty,” an adherent to the Gorsuch critique might respond, and she might echo 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.

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250. Note, *The Assimilative Crimes Act*, 7 U. RICH. L. REV. 116, 123 (1972) (citing *Hollister v. United States*, 145 F. 773, 779 (8th Cir. 1906); and *United States v. Barnaby*, 51 F. 20, 23 (D. Mont. 1893)).

251. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (McReynolds, J.); see also *Sharpnack*, 355 U.S. at 294 n.10 (distinguishing *Knickerbocker*); Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 139, 140 (2008) (citing *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851)); *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 629 n.8 (3d 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.”).

252. *Sharpnack*, 355 U.S. at 293.

253. *Id.* at 294.

254. *Id.* at 293.

Federal laws grow like mushrooms without Congress passing a bill. But convenience is not material to the constitutional problem.<sup>255</sup>

Why then is the wholesale delegation of federal criminal-definition to the states—that is, once a federal court identifies a gap in federal law—so uncontroversial that even then-Judge Gorsuch could laud the arrangement, going so far as to observe that “[a] testament to its efficacy and economy of design, the ACA remains today little changed from its original form”?<sup>256</sup> Certainly, if one puts aside the delegation doctrine, disregards the lack of an “intelligible” principle, and uses a grading rubric anchored in federalism, comity, and the traditional primacy of states in criminal law matters, the ACA passes with flying colors. As the Court noted in 1911 regarding 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.<sup>257</sup>

More recently, Joshua Divine has suggested, “[I]t is not clear that a nationally representative body cannot 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.”<sup>258</sup> 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.<sup>259</sup> 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 local conduct (as its violent crime work generally does).<sup>260</sup>

Yet unless alternative values like federalism and local consistency are “trumps,”<sup>261</sup> 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

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

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

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

258. Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 VA. L. REV. 127, 184 (2020).

259. *See* Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn’t*, 117 YALE L.J. 1374, 1405-11(2008).

260. *See id.* at 1403-07.

261. *See* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 67 (1990) (stating that 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”).

crimes. As Wayne Logan notes, “By utilizing state laws and outcomes to achieve its own policy ends, the U.S. [Congress] abdicates its criminal lawmaking authority in deference to individual states[,] . . . undermining U.S. political transparency and democratic accountability.”<sup>262</sup> One might respond with “an alternative view[,] [that] federal deference actually enhances sensitivity to democratic norms by tying U.S. law to decisions of ‘the People’ of individual states,”<sup>263</sup> 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.”<sup>264</sup> Certainly, federal agencies are more accountable to the federal government than are their state counterparts. Nor can the ACA’s regime find justification in the fact that those charged will also be citizens of the state whose law applies.<sup>265</sup> Maybe they will be, but there is no reason to assume that those who, say, visit “Indian country,”<sup>266</sup> a military base,<sup>267</sup> or are incarcerated in a federal prison<sup>268</sup> 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 do not do that frequently in serious cases.<sup>269</sup> Yet that explanation 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

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262. Logan, *supra* note 249, at 85.

263. *Id.* at 89; *see also* Krent, *supra* note 261 (explaining that 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”).

264. Logan, *supra* note 249, at 89.

265. *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.”).

266. *See* United States v. Smith, 925 F.3d 410, 418 (9th Cir. 2019) (explaining how the ACA applies to “Indian country” under the Indian Country Crime Act, 18 U.S.C. § 7 (2018)).

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

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

269. *See* Divine, *supra* note 258, at 140 (suggesting most ACA prosecutions are for traffic offenses); FY 2020 Annual Statistical Report at 11, tbl. 3A (detailing only eighty-eight ACA cases filed in district courts); *cf.* 32 C.F.R. § 634.25(e) (2020) (“In 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.”)

politically more distant from the federal system,” he suggests, “can check enforcement discretion where Congress has not.”<sup>270</sup>

Federal courts can also help ensure that state offenses invoked via the ACA are fit for federal purposes. Recently, in an ACA prosecution of a soon-to-be released federal prisoner for violating Colorado’s stalking statute, the Tenth Circuit found that the district court had rightly imported federal mens rea principles when applying the statute.<sup>271</sup> The Court reasoned that “[o]nce [the state statute was] assimilated, the district court was free to interpret [its] elements in the same way it would any other federal statute.”<sup>272</sup> If the ability of federal courts to deploy standard interpretative principles is a saving grace of the ACA’s delegation regime, so too should it benefit administrative crimes or indeed all federal offenses, regardless of which institutions defined them. The weight one gives judicial interpretive freedom as a delegation safeguard, however, will affect the degree to which one sees *Chevron* deference as appropriate for administrative crimes.

Absent clarity on precisely what game we’re playing—that is, 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 system”<sup>273</sup>—the ACA remains not only quite secure doctrinally, but apparently excused from the terms of the Gorsuch critique.

Broad doctrinal acceptance of the role Congress has permitted state criminal law to play when defining federal crimes has left the constitutional justifications for this regime undertheorized. Yet the foregoing discussion should drive home the extent to which state law is embedded in and mediated through federal institutional interactions. The federal “brand” is protected because federal prosecutors and courts will be exclusive gatekeepers. But with prosecutorial gatekeeping comes the strategic use of state law, along with the attendant self-dealing concerns that loom so large in the Gorsuch critique.

### C. Delegations to Foreign and International Institutions

While lacking any specified role in the formal separation-of-powers doctrine that Justice Gorsuch looks to, states are most certainly not just American, but federal constitutional actors, channeling the views of citizens through liberal democratic processes that adhere to the U.S. Constitution. The

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270. Divine, *supra* note 258, at 181; cf. 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.”).

271. *United States v. Twitty*, 859 F. App’x 310 (10th Cir. 2021).

272. *Id.* at 315.

273. Logan, *supra* note 249, at 67-68.

same is not, however, necessarily true of foreign states, international institutions, and the “law of nations.” None of these have anything like the federal accountability of administrative agencies, yet Congress has effectively delegated to each of these some degree of authority over federal criminal offenses. 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, weighs in favor of broad acceptance of this sort of delegation. Yet it is also a reminder that congressional delegation to administrative agencies can also involve a considerable degree of deliberation, as opposed to abdication.

### 1. Foreign States

Where federal criminal offenses turn on the conduct specifications of foreign states, one might expect that a degree of comfort could be drawn from the degree of federal executive involvement required in any criminal prosecution. After all, the Executive’s broad foreign affairs authority regularly mediates between U.S. persons and the actions of foreign sovereigns.<sup>274</sup> Indeed, given the recent proliferation of criminal cases with foreign affairs implications, federal prosecutors have increasingly become significant foreign policy actors.<sup>275</sup>

Yet this is one area where the Supreme Court has not treated Executive control as much of a guarantee of federal accountability and appropriate deliberation. Thus, in *Small v. United States*,<sup>276</sup> 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 did not really apply here: defendant’s possession occurred in the U.S. and the only question was whether a foreign conviction could supply the felony element.<sup>277</sup> But its rationale for quashing the conviction focused on foreign offenses for conduct that the U.S. would consider untroubling or even laudable, seeming to suggest that judges and prosecutors may not be well-equipped for the job of “weed[ing] out inappropriate foreign convictions.”<sup>278</sup> It didn’t matter, as Justice Thomas noted in dissent, that “the handful of

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274. See Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1109 (1999) (noting “executive domination” in the area); see also Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1903-04 (2015) (noting recent inroads into that long-standing principle).

275. Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 342 (2019) [hereinafter Koh, *Foreign Affairs Prosecutions*] (describing “foreign affairs prosecutions”); Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 FORDHAM L. REV. 737, 787 (2021) [hereinafter Koh, *The Criminalization of Foreign Relations*] (suggesting that “overzealous prosecutors and overinclusive legislators . . . are combining with overreaching presidential authority to propel U.S. law enforcement abroad” and calling for “a principled role for U.S. extraterritorial law enforcement policy”).

276. 544 U.S. 385 (2005).

277. *Id.* at 389-91.

278. *Id.* at 389-90.

prosecutions thus far rested on foreign convictions perfectly consonant with American law.”<sup>279</sup>

A lower court drew on *Small*’s reasoning where an American was charged under the Mann Act<sup>280</sup> with molesting a Russian boy he had brought to the United States for ballet training.<sup>281</sup> The specified criminal offense for purposes of the Mann Act was 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.’”<sup>282</sup> Throwing out the 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 the law was “potentially unconstitutional, insofar as 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.”<sup>283</sup> 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 U.S. 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.”<sup>284</sup> Particularly in nations where corruption laws are passed for show or strategic enforcement, such offenses can potentially be broad and poorly considered. 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.”<sup>285</sup> 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 of the ACA. The centrality of federalism to the constitutional structure, however, makes it hard (but not impossible) to argue that international comity should get equal weight.<sup>286</sup>

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

280. The Mann Act, 18 U.S.C. § 2421 (2018), 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.

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

282. *Id.* (citation omitted).

283. *Id.* at 605.

284. Considerable credit for my discussion of this statute goes to Jake Sidransky, Columbia Law School ’21, on whose research and analysis I draw.

285. *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 a South Korean statute falls within the generic federal definition of “bribery”).

286. 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

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.”<sup>287</sup> The relevant “law” here is defined as that which “regulate[s] the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants.”<sup>288</sup> Paul Larkin writes that “[it] would certainly seem bizarre to most Americans to suggest 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.”<sup>289</sup> Larkin 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.”<sup>290</sup>

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.<sup>291</sup>

Foreign legislative processes are categorically different from state legislative processes. Indeed, since the foreign regulations enforced criminally through the Lacey Act need not carry penal sanctions, one cannot assume that

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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) (2018); see *United States v. Kozeny*, 582 F. Supp. 2d 535, 537-40 (S.D.N.Y. 2008).

287. 16 U.S.C. § 3372(a)(2)(A) (2018).

288. *Id.* § 3371(d) (2018).

289. Larkin, *supra* note 257, at 340.

290. *Id.* at 346; 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 and delegates them to persons and bodies that are accountable only different polity.”).

291. *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, 1392-94 (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 the claim that the Lacey Act is an unconstitutional delegation of congressional authority as “frivolous”); RICHMAN, STITH & STUNTZ, *supra* note 20, at 895-96.

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.<sup>292</sup> Analogies have therefore been made to caselaw constraining delegations to private entities.<sup>293</sup> Yet what the Lacey Act has going for it is 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 relevant foreign laws).

## 2. International Organizations and Conventions

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?<sup>294</sup> As with foreign states, these crime-defining authorities cannot be held to account in the same way that a domestic agency subject to congressional oversight hearings may be.<sup>295</sup> Yet, unlike foreign legislation, the U.S. has a direct role in the international process,<sup>296</sup> and the involvement of other states in that process can provide a needed source of restraint.<sup>297</sup> The issue<sup>298</sup> 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 Flora (CITES),<sup>299</sup> the First

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292. See *infra* text accompanying notes 272-275.

293. Larkin, *supra* note 257, at 403.

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

295. Kristina Daugirdas, *International Delegations and Administrative Law*, 66 MD. L. REV. 707, 738 (2007).

296. Cf. Dorf, *supra* note 290, 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.”).

297. Cf. Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1613 (2004) (“[D]elegations of lawmaking authority to international institutions may promote the values underlying domestic federalism . . .”).

298. 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*, 572 U.S. 844, 848 (2014); Curtis A. Bradley, *Federalism, Treaty Implementation, and Political Process: Bond v. United States*, 108 AM. J. INT’L L. 486, 493 n.46 (2014). Compare *The Hostage Taking Act*, 18 U.S.C. § 1203 (2018) (implementing the International Convention Against the Taking of Hostages, Dec. 18, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205), with *United States v. Ferreria*, 275 F.3d 1020, 1022 (11th Cir. 2001) (upholding prosecution under Hostage Taking Act), and *United States v. Wang Kun Lue*, 134 F.3d 79, 80-81 (2d Cir. 1997) (same).

299. Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

Circuit was careful to explain how the treaty's provisions had been codified by separate U.S. law.<sup>300</sup>

Still, delegation to a treaty obligation has figured prominently in the long saga of marijuana's scheduling under the Controlled Substances Act (CSA).<sup>301</sup> Soon after it was scheduled, the government urged, as one justification for scheduling, that the Act's provision requiring the Attorney General (without regard to the normal administrative process) to select the "appropriate" schedule for a drug where "control is required by United States obligations under international treaties, conventions, or protocols,"<sup>302</sup> was indeed covered by the Single Convention on Narcotic Drugs.<sup>303</sup> And it continues to cite that Convention as a reason for denying petitions to reschedule marijuana.<sup>304</sup> The D.C. Circuit has found that the Attorney General has some discretion on where to schedule marijuana.<sup>305</sup> But it is far from clear she could refuse to put it on any schedule.<sup>306</sup>

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 finds acceptable in the domestic context.<sup>307</sup> But, of course, this approach relies on the assumption that expertise

300. *United States v. Place*, 693 F.3d 219, 222-23 (1st Cir. 2012); *see also* *United States v. Lawson*, 377 F. 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 the Endangered Species Act).

301. 21 U.S.C. §§ 801 *et seq.* (2018).

302. 21 U.S.C. § 811(d)(1) (2018).

303. March 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 280 (ratified by United States in 1967); *see* *United States v. Kiffer*, 477 F.2d 349, 351-52 (2d Cir. 1973) (noting the government's position that because marijuana was covered by the Single Convention on Narcotic Drugs, 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).

304. 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").

305. *See Nat'l Org. for Reform of Marijuana Law (NORML) v. DEA*, 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.").

306. *But see* *Washington v. Barr*, 925 F.3d 109, 119-20 (2d Cir. 2019) (citing *NORML*, 529 F.2d 735, for the proposition that "the D.C. Circuit has [] 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) (suggesting that "decriminalization and/or nonenforcement [of marijuana possession] are likely consistent with [U.S. treaty obligations]," while legalization may violate the Single Convention on Narcotic Drugs of 1961, March 30, 1961 18 U.S.T. 1407, 50 U.N.T.S. 280); *State v. Kurtz*, 309 P.3d 472, 476 n.7 (Wash. 2013) (en banc) (noting, in a challenge to a state agency's placement of marijuana in Schedule I of a CSA analog, that the now-outmoded statute, WASH. REV. CODE ANN. § 69.50.203 (1993), 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) <https://www.nytimes.com/2020/12/02/world/europe/cannabis-united-nations-drug-policy.html> [<https://perma.cc/FC4T-89DH>].

307. *See supra* text accompanying note 66.

has no national boundaries, which some—either 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 rests solely on the Single Convention, the principles of comity and transborder cooperation would be tested.<sup>308</sup> In that test, however, a U.S. court might well consider that the United States was the primary driver of the cannabis prohibition in the Convention.<sup>309</sup> Query whether that dominating U.S. role would argue for greater deference or less to those principles.

### 3. 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” (in the sense of dynamic incorporation by reference of lawmaking done by others) that dates back nearly to the Founding: the law of piracy. Article I gives Congress the power to “define and punish Piracies and Felonies committed on the high Seas.”<sup>310</sup> As Eugene Kontorovich writes, “[t]he First Congress exercised [this] power when it enacted the first criminal statute in 1790,” broadly defining piracy to include what was well-understood to be “piracy” under international law, while further exercising its “defining” authority to expand the offense to include “a variety of maritime misdeeds” beyond that well-understood meaning.<sup>311</sup> When Congress revisited the matter in 1819, it changed strategies and explicitly incorporated international law by reference:

[I]f 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.<sup>312</sup>

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308. See Robert A. Mikos, *Using One Dying Regime to Save Another: The Influence of International Drug Conventions on United States’ Cannabis Research Policy*, 114 AM. J. INT’L L. UNBOUND 296, 296 (2020) (discussing how “international conventions are currently helping to stifle national cannabis reforms”).

309. See Ely Aaronson, *The Strange Career of the Transnational Legal Order of Cannabis Prohibition*, 4 UC IRVINE J. INT’L, TRANSNAT’L, AND COMP. L. 78, 82 (2019) (citing cannabis prohibition in the Convention as “a paradigmatic example” of “globalized localism,” “a process by which policy models that originated in the distinctive cultural and institutional contexts of a powerful country come to be perceived as global standards due to their inclusion in treaties”).

310. U.S. CONST. art. I, § 8, cl. 10; cf. Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1302 (2021) (exploring explicit congressional delegation of coercive, domestic rulemaking authority in 1798 tax legislation).

311. Eugene Kontorovich, *The “Define and Punish” Clause and the Limit of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 175 (2009); see Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 243 (1990) (“Stepping beyond the law of nations, Congress also extended the definition of piracy to include murder on the high seas, running away with a ship or vessel or with goods or merchandise of the value of fifty dollars, or any other offense punishable by death on land.”).

312. Act of March 3, 1819, ch. 77, § 5, 3 Stat. 510, 513-14; see also Kontorovich, *supra* note 311, at 188.

The current provision, 18 U.S.C. § 1651, is almost identical, save for a mandatory punishment of life imprisonment (rather than death), and thus effectively delegates authority to “define” piracy to the “law of nations.”<sup>313</sup> 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.”<sup>314</sup> 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; for authority, it looked to the Geneva Convention on the High Seas,<sup>315</sup> adopted in 1958 and ratified by the United States in 1961, and the United Nations Convention on the Law of the Sea,<sup>316</sup> which the United States has not ratified but recognizes as reflecting customary international law.<sup>317</sup> Affirming defendants’ conviction, the Fourth Circuit agreed and noted

[I]f 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.”<sup>318</sup>

The piracy statute’s dynamic incorporation strategy is certainly not unique, the court observed, citing the Lacey Act, among other provisions.<sup>319</sup> 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*: “The 18 U.S.C. § 1651 piracy offense cannot be considered a common law crime,” the court explained, “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.’”<sup>320</sup> And it noted that “in its 1820 *Smith* decision, 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.”<sup>321</sup>

To be sure, federal courts play a key mediating role when dynamically incorporating international norms, thus rendering the “federal” role in crime-

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313. 18 U.S.C. § 1651 (2018) (“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.”).

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

315. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11.

316. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

317. *Dire*, 680 F.3d at 459-64.

318. *Id.* at 467-68.

319. *Id.* at 468.

320. *Id.* at 468 (citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)); *see also United States v. Said* 798 F.3d 182, 193 (4th Cir. 2015) (following *Dire*, 680 F.3d 446); *United States v. Beyle*, 782 F.3d 159, 169 (4th Cir. 2015) (same).

321. 680 F.3d at 468 (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159-61 (1820)); *see also 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*.”).

definition more salient than in the Lacey Act. The stability of the definition of “piracy” under international law (as opposed to “municipal” definitions that are artifacts of national will<sup>322</sup>) might therefore be said to encompass a clear “intelligible principle.” Moreover, courts can—perhaps through the void-for-vagueness or lenity doctrines—ensure that troubling shifts in the international understanding of “piracy” will not be the basis of federal criminal charges.<sup>323</sup> Yet courts cannot be counted on to do so, and one might well worry about courts, spurred by prosecutors in the face of egregious facts, “cobbling potentially diffuse and debatable international legal sources into an open-ended criminal norm.”<sup>324</sup> After all, the piracy 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: on the one hand is Congress’s original strategy of setting 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.” On the other is the strategy Congress 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 Justice Gorsuch, who would have Congress do all the definitional work.<sup>325</sup>

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 U.S. courts embrace the reasoning that they would do well to “consult the numerous decisions by courts around the world arising from the eruption of Somali piracy”?<sup>326</sup> The point goes beyond operational utility: while those decrying administrative crimes are dismayed by the lack of community condemnation,<sup>327</sup> there is an international community, of which the United States 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

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322. See Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 335 (1925) (“[T]he crime of piracy . . . has long been regarded as an international crime as well as a crime by municipal law.”).

323. See *United States v. Hasan*, 747 F. Supp. 2d 599, 637-39 (E.D. Va. 2010) (rejecting the claim that 18 U.S.C. § 1651 is unconstitutionally vague, noting “the high hurdle for establishing customary international law, namely the recognition of a general and consistent practice among the overwhelming majority of the international community”).

324. Kontorovich, *supra* note 321, at 648.

325. *Gundy*, 139 S. Ct. at 2134-36 (Gorsuch, J., dissenting).

326. Kontorovich, *supra* note 321, 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.’” *Hasan*, 747 F. Supp. 2d at 616 n. 16.

327. See Fissell, *supra* note 6, at 894.

American interests allows sufficient national modulation of that international condemnation.

Good normative rationales thus support the instances of congressional delegation of crime defining authority to foreign and international institutions discussed here. But these delegations are nonetheless quite at odds with the constitutional framework on which the Gorsuch critique relies to challenge administrative crimes. To be sure, removal of those institutions from federal executive control addresses the Gorsuch critique's concern about Executive self-dealing and arrogation of power. But the self-dealing concern still rears its head when we consider prosecutorial charging discretion. And the democratic accountability and liberty-protecting restraints on legislative processes that Justice Gorsuch finds absent in federal administrative procedures are similarly absent—or at least limited—when undifferentiated foreign states (from democracies to autocracies) exercise legislative authority or when international norms arise out of treaties or practice.

### III. Reconsidering Administrative Crimes

So far, we have seen how the relative lack of controversy attending broad congressional delegations to federal courts, state legislatures, and foreign and international entities destabilizes Justice Gorsuch's critique of administrative crimes, which valorizes constitutional features and values that these delegations give short shrift to. Yet our exploration of the normative and doctrinal justifications for those other delegations also highlights aspects of administrative crimes to which Justice Gorsuch gives little consideration: the extent to which courts and prosecutors will inevitably be co-producers of federal criminal offenses, whatever their origin stories, and the consequent need for any normative assessment of administrative crimes to account for these institutional interactions. Indeed, full consideration of the actual role played by courts, prosecutors, and Congress ends up showing how the procedural regularity and ex ante clarity of agency promulgations can offset the pathologies of federal criminal law. In so doing, it ends up being a defense—albeit a measured one—of administrative crimes.

This Part begins by using securities fraud law to dramatize the constrained role that an administrative agency will often, or at least potentially, play in the construction of a federal offense that it formally “created” pursuant to congressional delegation. It then explains how the elimination of administrative crimes might, as a practical matter, change little in way of federal felony prosecutions, apart from reducing the ex ante clarity of the offenses charged. Finally, against this pragmatic backdrop and the reduced expectations it generates, a normative case for administrative crimes will emerge.

*A. Agencies and Their Institutional Counterparties*

Lacking a comparative advantage to do so, I have not engaged with Justice Gorsuch’s overall vision of the sorts of delegation the Constitution permits. Others, of course, have. As a formal matter, Tom Merrill has cogently suggested that

Article I, Section 1 should be construed as mandating the [so-called] exclusive delegation doctrine, not the nondelegation doctrine. Such an exclusive delegation doctrine would entail two subsidiary principles[:] 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. . . . [T]his [is] 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. . . . [T]his [is] the transferability principle.<sup>328</sup>

When Congress unambiguously transfers crime-definition authority to agencies, it complies with these principles.<sup>329</sup> Merrill also pushes back against the claim that a strict nondelegation doctrine “would promote greater deliberation,” noting that “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.”<sup>330</sup> We now turn to the issue of deliberation with respect to federal criminal legislation.

When one considers the values and pathologies of federal criminal law, agencies fare quite well, at least if over-criminalization and fear of excessive intrusions on liberty are 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 carry the blame for).<sup>331</sup> 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 make little effort to lobby for Congress to cut back on the sweep of fraud statutes, and the breadth of the obstruction statute (passed in the wake of Enron<sup>332</sup>) is a reminder that white collar legislation is as crisis-driven as any other area of federal criminal law.<sup>333</sup>

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328. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2101 (2004).

329. See 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 Food and Drug Administration’s (FDA) regulations regarding record-keeping and reporting).

330. Merrill, *supra* note 328, at 2154-55.

331. See Kahan, *supra* note 21, at 474-75; Richman, *supra* note 21, at 763-65; WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 305-07 (2011); Buell, *supra* note 100, at 1513-14.

332. See *Yates v. United States*, 574 U.S. 528, 531-32 (2015).

333. But note the absence of white-collar mandatory minimums—Congress’s 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).

Agency rulemaking and interpretation offers a far more accommodating sphere for so-called “respectable constituencies” to shape crime-definition.<sup>334</sup>

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 stricter scrutiny of administrative crimes might not bring the benefits Justice Gorsuch and others would seek.

As Richard Myers noted, “Insider trading is a textbook example of the process of creating crimes through delegation to an agency.”<sup>335</sup> The crime-definition story begins with Congress’s passage of the Securities Exchange Act of 1934, which, in Section 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 Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”<sup>336</sup> Section 32 of the Act made violation of rules so promulgated into federal crimes punishable by up to two (now twenty) years’ imprisonment, while providing that “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.”<sup>337</sup> 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.”<sup>338</sup> 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.”<sup>339</sup>

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 Rule 10b-5, which targets “any person” who “employ[s] any device, scheme, or artifice to defraud,” or “engage[s] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . . in connection with the purchase or sale of any security.”<sup>340</sup> Thereafter, in the wake of these open-textured provisions, the work of crime-definition soon moved to the courts,

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334. See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2202 (2002).

335. Richard E. Myers II, *Complex Times Don’t Call for Complex Crimes*, 89 N.C. L. REV. 1849, 1853 (2011).

336. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10b, 48 Stat. 881, 891 (codified at 15 U.S.C. § 78j(b) (2018)).

337. *Id.* § 32, 48 Stat. 881, 904-05 (codified at 15 U.S.C. § 78ff (2018)).

338. Steve Thel, *Taking Section 10(b) Seriously: Criminal Enforcement of SEC Rules*, 2014 COLUM. BUS. L. REV. 1, 11 (2014) (internal footnote omitted).

339. *Id.* at 13.

340. 17 C.F.R. § 240.10b-5(a), (c) (2020); see Thel, *supra* note 338, at 6 (noting that the SEC’s general authority to promulgate rules arises out of a different provision of the Exchange Act).

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.”<sup>341</sup> The SEC contributed significantly to doctrinal development, but it did so chiefly through the cases it brought and the liability theories it offered.<sup>342</sup>

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 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.<sup>343</sup>

Securities lawyers and scholars would make similar calls over succeeding decades.<sup>344</sup> But 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.”<sup>345</sup> For its part, the SEC may have resisted greater specificity less out of fear of providing a roadmap, than, as Donald Langevoort has suggested, 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.<sup>346</sup>

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 role as well. In the absence of clarity from the Supreme Court as to whether Rule 10b-5 covered misappropriation theories

341. Thel, *supra* note 338, at 29; see *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (Rehnquist, C.J.) (“When we deal with private actions under Rule 10b-5, we deal with 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, *supra* note 143, at 144 (noting how both Congress and the SEC left definition of insider trading to the courts).

342. See Jill E. Fisch, *Federal Securities Fraud Litigation as a Lawmaking Partnership*, 93 WASH. U. L. REV. 453, 481 (2015) (“Although enforcement has been the agency’s primary lawmaking role, the SEC has also responded to restrictive judicial decisions through formal rulemaking.”).

343. A. A. Sommer Jr., *Rule 10b-5: Notes for Legislation*, 17 CASE W. RES. L. REV. 1029, 1053 (1966).

344. See Baer, *supra* note 143, at 134; Donald C. Langevoort, *Watching Insider Trading Law Wobble: Obus, Newman, Salman, Two Martomas, and a Blaszczyk*, 89 FORDHAM L. REV. 507, 528 (2020) (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://static1.squarespace.com/static/5e1f2462d354fa5f5bac2699/t/5e2a1e9d12e0c33aefc41303/1579818654541/Report+of+the+Bharara+Task+Force+on+Insider+Trading.pdf> [<https://perma.cc/HU44-L2YH>].

345. Thel, *supra* note 338, at 30.

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

of insider trading liability, prosecutors reached for the Title 18 mail fraud statute, which the Supreme Court found to easily encompass the conduct.<sup>347</sup> And when, in 1997, the Court finally found Rule 10b-5 to encompass those theories,<sup>348</sup> prosecutors often charged both offenses. Indeed, there is good reason to think that insider trading can more easily be prosecuted as mail or wire fraud than under Rule 10b-5.<sup>349</sup>

In 2002, in the wake of the Enron scandal, Congress enacted a broad securities fraud statute, 18 U.S.C. § 1348, as part of the Sarbanes-Oxley package. As Karen E. Woody writes,

Senator Leahy explained that § 1348 was necessary 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 treat the cases as generic mail or wire fraud cases and to meet the technical elements of those statutes . . . .”<sup>350</sup>

Of course, Section 1348 added little in the way of specificity. And prosecutors initially had little use for it, preferring to stay on the well-trodden paths of Rule 10b-5 caselaw.<sup>351</sup> But in time, the accretion of judicial doctrines designed to separate the illegal use of material nonpublic information from merely aggressive research limited their ability to pursue the “tippees” who traded on inside information obtained from “tipsters” under some duty to keep it confidential. The Supreme Court’s key move was to require that the “tipster” have received some “personal benefit” for transmitting the information,<sup>352</sup> and lower courts soon found that requirement unsatisfied in some significant prosecutions of “tippees.”<sup>353</sup> Consequently, 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 Section 1348.<sup>354</sup> A DOJ 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

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347. *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, 248 (2015).

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

349. Wang, *supra* note 347, at 222.

350. Karen E. Woody, *The New Insider Trading*, 52 ARIZ. ST. L.J. 594, 615-16 (2019) (quoting 148 Cong. Rec. S7420 (2002) (daily ed. July 26, 2002) (statement of Sen. Leahy)).

351. *Cf. id.* at 616 (finding “far less precedent for the application and interpretation of § 1348 than for § 10(b), given that § 1348 was enacted just under twenty years ago”).

352. *Dirks v. SEC*, 463 U.S. 646, 647 (1983)

353. See *United States v. Newman*, 773 F.3d 438, 442 (2d Cir. 2014), *abrogated by* *Salman v. United States*, 137 S. Ct. 420, 429 (2016) (holding that “personal benefit” can include the benefit one receives by making a gift of confidential information). Paring back the Second Circuit’s *Newman* analysis, the Supreme Court in *Salman* rejected the defendant’s appeal to the rule of lenity, finding that his conduct was within the “heartland” of Supreme Court doctrine. Baer, *supra* note 143, at 149.

354. Peter J. Henning, *A New Way to Charge Insider Trading*, N.Y. TIMES (Aug. 24, 2015) <https://www.nytimes.com/2015/08/25/business/dealbook/a-new-way-to-charge-insider-trading.html> [<https://perma.cc/6LUL-MWLW>]; RICHMAN, STITH & STUNTZ, *supra* note 20, at 883.

action, offers a simpler approach, without the unwelcome freight which decades of litigation — much of it civil — has piled onto 10b-5.<sup>355</sup>

In a case where the jury acquitted on Rule 10b-5 charges but convicted on wire fraud and Section 1348 counts, the Second Circuit recently rejected the applicability of the so-called “personal benefit test” to Section 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.<sup>356</sup>

Perhaps this is just a story of path-dependence 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.<sup>357</sup> But, with these caveats, one might still find the story to highlight the role courts could play in shaping the contours of other such crimes. 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 Karen E. Woody notes, that a Section 10b-5 civil enforcement action could be harder to prove than a Section 1348 criminal action arising from the very same conduct.<sup>358</sup> If the core “non-delegation concern in *Gundy* . . . is the concentration of power in one branch,”<sup>359</sup> 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.<sup>360</sup>

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

356. *United States v. Blaszcak*, 947 F.3d 19, 35-36 (2d Cir. 2019). The Supreme Court vacated and remanded this case for “consideration in light of *Kelly v. United States*, [140 S. Ct. 1565 (2020)].” 141 S.Ct. 1040 (2021). Because, on remand, the government retreated, on the basis of *Kelly*, from its prior analysis of what constituted “property,” Letter Brief for the Government at 1, *United States v. Blaszcak*, Nos. 18-2811(L) et al., 2021 WL 2315183, at \*1 (June 4, 2021), the Second Circuit may reverse without reaching the personal benefit issue. For a thoughtful defense of the panel’s initial understanding of Section 1348, see Zachary J. Lustbader, Note, *Title 18 Insider Trading*, 130 YALE L.J. 1828, 1858-63 (2021).

357. Cf. Fisch, *supra* note 342, at 483 (“Existing 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* note 143, at 138 (“If one conceptualizes the legality principle as a spectrum between code-driven and common-law systems, one can quickly conclude that insider trading falls on the common-law side of that spectrum.”).

358. Woody, *supra* note 350, at 639-40; see Langevoort, *supra* note 344, at 525-28.

359. Divine, *supra* note 258, at 194.

360. See *United States v. Batchelder*, 442 U.S. 114, 123-25 (1979) (noting longstanding doctrine that “when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants,” and rejecting the argument that this discretion amounts to an unconstitutional delegation); Stephen Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 554 (2013) (criticizing doctrine that allows “incremental punishment” to be “determined solely by an arbitrary factor — namely, the prosecutor’s choice as to which statute to proceed under — rather than differences in culpability or a considered legislative judgment that higher penalties are warranted for that type of behavior”); Hessick, *supra* note 91, at 1015 (noting how overlapping statutes effectively “delegate the scope of the criminal law to prosecutors”).

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 political demand for some legislative response in the wake of a crisis, Congress still refrained from serious crime-definition work—presumably after the legislative deliberation that the critique valorizes. 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 is unrealistic to expect that courts, so comfortable with their outsized role in this area, would deploy the legislation-forcing interpretative canons that Justice Gorsuch would invoke.<sup>361</sup> The story of Section 1348 is thus an object lesson for those who believe that efforts to force congressional attention will be rewarded. It also serves as a reminder that the ability of agencies with delegated authority to define criminal offenses can be quite limited when their handiwork is filtered through courts and prosecutors.

#### *B. 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 Section 242 liability has considerable intellectual rigor, as does the longstanding condemnation of the sweep of federal fraud liability by many commentators and even some lower courts. 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, which in fact might not be very different (except maybe for the criminal cases agencies merely threaten to refer to prosecutors). Already, when it comes to pursuing environmental crimes, prosecutors turn to Title 18 in almost forty-five percent of cases, charging standard conspiracy, false statement, obstruction, and fraud statutes.<sup>362</sup> That

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361. See Elhauge, *supra* note 334, at 2165.

362. David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime Redux: Charging Trends, Aggravating Factors, and Individual Outcome Data for 2005-2014*, 8 MICH. J. ENV'T. & ADMIN. L. 297, 315 (2019) [hereinafter Uhlmann, *Redux*]; see also David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENV'T L. REV. 159, 184-86 (2014) [hereinafter, Uhlmann, *Prosecutorial Discretion*] (examining all cases investigated by the EPA from 2005-2010 and finding Title 18 used against 375 of 864 defendants); Joshua Ozymy & Melissa Jarrell, *Wielding the Green Stick: Criminal Enforcement at the EPA Under the Bush and Obama Administrations*, 24 ENV'T. POL. 38, 47

figure is somewhat inflated because “the object of the conspiracy charges will often be a substantive violation of the underlying environmental statute. . . .”<sup>363</sup> But the figure understates the availability of Title 18 charges because prosecutors often charge false statements under environmental statutes instead of the generic 18 U.S.C. § 1001, which punishes false statements to any federal official.<sup>364</sup> 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.”<sup>365</sup> 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.”<sup>366</sup> 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.<sup>367</sup>

One finds the same pattern in cases involving workplace fatalities that could be pursued as criminal violations of Occupational Safety and Health Administration (OSHA) regulations.<sup>368</sup> One observer reported:

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(2015) (reviewing environmental prosecutions for fiscal years 2001-2011 and finding 36.3 percent involved general non-environmental-specific offenses).

363. Uhlmann, *Prosecutorial Discretion*, *supra* note 362, at 185.

364. *Compare* Clean Water Act, 33 U.S.C. § 1319(c)(4) (2018) (providing for a two-year maximum for any person “who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter”), *with* 18 U.S.C. § 1001(a) (2018) (providing for a five-year maximum term of imprisonment); *see* Uhlmann, *Prosecutorial Discretion*, *supra* note 362, at 186 n.118. On the sweep of liability under Section 1001, *see* Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CALIF. L. REV. 1515, 1517 (2009); and Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1468 (2009).

365. *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. Gas Pipe, Inc.*, 997 F.3d 231, 235 (5th Cir. 2021) (prosecuting conspiracy to defraud the Food and Drug Administration by misbranding drugs); *United States v. Atilla*, 966 F.3d 118, 122, 130 (2d Cir. 2020) (prosecuting conspiracy to obstruct U.S. enforcement of economic sanctions laws); *United States v. Kelerchian*, 937 F.3d 895, 905 (7th Cir. 2019) (prosecuting conspiracy to defraud the FDA by obstructing the agency’s ability to perform two regulatory functions); *United States v. Rodman*, 776 F.3d 638, 642 (9th Cir. 2015) (“[T]he submission of fraudulent forms to a governmental agency by two or more persons when those fraudulent forms impede that agency’s lawful functions constitutes a conspiracy under 18 U.S.C. § 371”).

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

367. Press Release, Department of Justice, *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> [<https://perma.cc/2MAX-LBZZ>].

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

In the forty plus years since Congress enacted the [Occupational Safety and Health (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.<sup>369</sup>

Doing away with explicit administrative crimes would thus vastly reduce the notice and legislative specificity of the charged offenses, leaving the prosecutorial landscape dominated by sweeping statutes that the Supreme Court refuses to curtail—in part because the federal interests implicated leave no room for constraining federalism canons.<sup>370</sup> 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.

The claim is not that regulations will invariably be clear and technical. Consider Rule 10-5’s sweeping language and how courts took control of its meaning. Still, the *ex ante* clarity and notice of rule-based administrative crimes is likely to be far greater than that of a world dominated by Title 18 offenses.

Would elimination of administrative crimes change who is prosecuted? Probably not substantially, at least with respect to felonies. It is 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 “[i]n 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.”<sup>371</sup> 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 Environment and Natural Resources Division—which brings OSHA cases as well as environmental cases<sup>372</sup>—are likely to look for aggravating factors, going far beyond willful regulatory violations. As David Uhlmann recently reported:

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369. 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://osha.defensereport.com/2016/01/22/osha-criminal-cases-on-the-rise> [<https://perma.cc/HY7Q-ZC3N>] (noting efforts by the Justice Department to do more in this area).

370. For refusals to curtail Section 1001, see *Brogan v. United States*, 522 U.S. 398 (1998), in which the Court rejected an “‘exculpatory no’ defense”; and *United States v. Yermian*, 468 U.S. 63, 68-70 (1984), in which the Court held that the government need not prove that the defendant knew of federal agency jurisdiction when making a false statement. For Section 371 cases, see *supra* note 365.

371. Uhlmann, *Redux*, *supra* note 362, at 313.

372. 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> [<https://perma.cc/U46E-GXSB>].

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.<sup>373</sup>

Conduct with those characteristics could likely be captured via Title 18, were prosecutors so inclined. Indeed, prosecutors would doubtless enjoy sticking with these more familiar statutes, and threatening the higher penalties often available with them.<sup>374</sup> Agencies, for their part, would not need administrative crimes to add teeth to their regulatory mandates. 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.<sup>375</sup>

This examination of the regulatory enforcement environment is concededly cursory, and I make no general 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, which requires 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.<sup>376</sup> Standard Title 18 offenses would likely capture the most of aggravated cases prosecutors deem worth pursuing as felonies. Prosecutors can charge those standard offenses instead of, or in conjunction with, administrative offenses. And because defendants will generally plead guilty, cases often will not proceed beyond the district court. The pressure on Congress to mend its ways would therefore be quite limited.

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373. Uhlmann, *Prosecutorial Discretion and Environmental Crime Redux*, *supra* note 362, at 368; see REPORT, FEWER CRIMINAL PROSECUTION OF ENVIRONMENTAL CRIMES UNDER TRUMP, TRAC (2019), <https://trac.syr.edu/tracreports/crim/581> [<https://perma.cc/GK6Q-D8R9>] (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* (Mich. L. Sch., Pub. L. & Legal Theory Rsch. Paper No. 685, 2020), <https://ssrn.com/abstract=3710109> [<https://perma.cc/2E2H-36K3>] (reporting seventy percent and greater-than-fifty percent drops in Clean Water Act and Clear Air Act prosecutions, respectively, under the Trump Administration as compared to the Obama Administration).

374. 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.

375. Press Release, U.S. Att'y's Office for S.D.N.Y., 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> [<https://perma.cc/MMW3-R8MX>].

376. See, e.g., *United States v. Caronia*, 703 F.3d 149, 152, 164-69 (2d Cir. 2012) (reversing, in light of First Amendment infirmity, a misdemeanor conviction under 21 U.S.C. § 333(a)(2) for promoting an FDA-approved drug for off-label use); see John Malcolm, LEGAL MEMORANDUM, CRIMINAL LAW AND THE ADMINISTRATIVE STATE: THE PROBLEM WITH CRIMINAL REGULATIONS, HERITAGE FOUND. 5-6 (Aug. 6, 2014), <https://www.heritage.org/crime-and-justice/report/criminal-law-and-the-administrative-state-the-problem-criminal-regulations> [<https://perma.cc/Ry8X-FW7S>] (singling out the underlying charge in *Caronia* as an example of “regulatory overcriminalization.”).

Second, any such shift to Title 18 would nullify (for better or worse) any congressional effort to dial down penal consequences in particular regulatory spaces. Those seeking more punitive responses to regulatory violations might well be pleased,<sup>377</sup> but political accountability would surely be lessened.

Finally, the self-dealing concerns that so troubled Justice Gorsuch in *Gundy* are quite attenuated when the regulatory agency that defined an administrative crime is not the DOJ.<sup>378</sup> 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's really a "crime." Prosecutors are trained on a diet of violent crime, fraud, and narcotics cases and have likely internalized notions of due process that counsel against hyper-technical cases against individuals. They 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"—not an "external" one between constitutional branches but an "internal" one, involving distinct departments and agencies, each with its institutional structure and culture.<sup>379</sup> Although quite different from the external one that Justice Gorsuch valorizes, we ought not underestimate the degree to which this dynamic promotes agency (and perhaps prosecutorial) accountability.<sup>380</sup> No claim is made here about the majesty of the federal "criminal code." There really is not one federal "criminal code," and to the extent there is such a "code" scattered throughout Title 18 and elsewhere, it is, in Julie O'Sullivan's excellent words, "a disgrace."<sup>381</sup> I do not claim that federal prosecutors necessarily make appropriate judgements when charging matters that would otherwise be targets of "merely" regulatory enforcement (which can be quite punitive indeed). Rather, when prosecutors *do* pursue such cases—using

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377. See, e.g., Vanessa Dick, *Dirty Money and Wildlife Trafficking: Using the Money Laundering Control Act to Prosecute Illegal Wildlife Trade*, 49 ENV'T L. REP. 10,334, 10,337-40 (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. & CRIMINOLOGY 133, 197-202 (2004) (noting low sentences for environmental offenses).

378. Even within DOJ, a regulatory unit might be quite removed from prosecutorial units.

379. See Richman, *supra* note 28, at 754; see also Gillian Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 425 (2009) (calling for more attention to internal checks within the Executive Branch).

380. See Richman, *supra* note 208, at 53 (discussing prosecutor's ability to hold police to account); Daniel Richman, *Law Enforcement Organization Relationships*, in OXFORD UNIVERSITY HANDBOOK OF PROSECUTORS AND PROSECUTION (Ronald Wright, Russell Gold & Kay Levine eds., 2021) (same).

381. O'Sullivan, *supra* note 92, 643; see also *id.* at 648 n.21 ("Arriving at an accurate count of the number of federal crimes is difficult for two reasons. First, the statutes are numerous and scattered throughout the 50 Titles of the United States Code, federal regulations, and even rules of court. Second, compilers must determine what counts as a crime and differentiate, where different acts are criminalized within a single statutory section, whether that section ought to be counted as one crime or many.").

some mix of Title 18 offenses, specialized regulatory offenses created by Congress, and administrative crimes defined by regulatory agencies—the 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 to criminal defendants.<sup>382</sup> Administrative crimes do not fully address Barkow’s critique, as prosecutors still retain untrammelled discretion. Nonetheless, Congress’s delegation of substantial crime-definition authority to agencies—in lieu of leaving prosecutors to effectively define crime within extraordinarily broad criminal laws—creates some of the structural and procedural protections from administrative law that Barkow covets. And it does so without the need for deploying the formalist separation-of-powers doctrine that she seeks to bring to criminal law. An agency may have its own self-dealing issues, which might lead it to craft rules that lessen its proof burden in civil enforcement cases. But that is an administrative law issue, not an administrative crime one.

Of course, the structural separation between rulemaking and prosecution is not an unalloyed good. Were an agency to focus exclusively on its own regulatory concerns and enforcement realities, it might not give sufficient thought to the prospect that its rules will become a basis for a criminal prosecution when violated “willfully.” To the extent that this tunnel vision occurs, casual (over)criminalization is indeed a risk. A minor, but perhaps 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.”<sup>383</sup> In the same vein, but less susceptible to congressional gridlock, was an Executive Order issued by the Trump Administration (and since then revoked by President Biden) that required, 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 . . . .”<sup>384</sup>

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382. See 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.”).

383. Paul Larkin Jr. & Michael Mukasey, LEGAL MEMORANDUM, THE PERILS OF OVERCRIMINALIZATION, HERITAGE FOUND. 5 (Feb. 12, 2015), <https://www.heritage.org/report/the-perils-overcriminalization> [<https://perma.cc/Y6WC-A7GV>].

384. Protecting Americans From Overcriminalization Through Regulatory Reform, Exec. Order No. 13,980, § 4(a)-(b), 86 Fed. Reg. 6817, 6817 (Jan. 18, 2021), *revoked by* Revocation of Certain

Against the contributions that such measures might make to thoughtful agency deliberation, one should weigh the possibility that interagency consultation with prosecutors in the regulatory process would ensure that prosecutorial equities and charging discretion shape, and 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.<sup>385</sup> Coordination efforts thus might ironically incentivize more enforcer self-dealing. But the goal of facilitating congressional oversight is a worthy one.

### C. 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 is largely defined by bodies other than the national legislature (although it does always operate under the aegis of Congress)?

Originalism offers little leverage on the problem. One need not resolve the current debate on the extent to which nondelegation concerns troubled the Founders<sup>386</sup> to see that the Gorsuch critique's demand for heightened scrutiny of criminal law delegations finds little support in understandings and practices of the Founding. Legislators in the Early Republic were quite ready to anchor federal criminal law provisions in “the law of nations” for piracy<sup>387</sup> and the law of states for the Assimilative Crimes Act.<sup>388</sup> They also gave courts ample room to fill out vague statutory prohibitions through common law development.<sup>389</sup>

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 the terms of punishment and, as the *Sharpnack* Court suggested, ought to be excused from constantly revisiting

Presidential Actions and Technical Amendment, Exec. Order No. 14,029, § 1, 86 Fed. Reg. 27,025 (May 14, 2021).

385. The Executive Order sought to reduce agency leverage in ordinary cases by requiring agencies to issue guidance about how they plan “to administratively address regulatory offenses subject to potential criminal liability rather than refer those offenses to the Department of Justice for criminal enforcement.” *Id.* § 5(a), 86 Fed. Reg. at 6818. Yet I suspect that such plans, if issued, would not do more than set conversation rules.

386. Compare Mortenson & Bagley, *supra* note 11, and Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. (forthcoming 2022), <https://ssrn.com/abstract=3654564> [<https://perma.cc/824C-QF7B>], with Aaron Gordon, *Nondelegation Misinformation: A Rebuttal to “Delegation at the Founding”* (Mar. 25, 2020) (manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3561062](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561062) [<https://perma.cc/9TBW-2KCW>]; Aaron Gordon, *Nondelegation*, 12 NYU J.L. & LIBERTY 718, 729, 778-79 (2019), and Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1288 (2021).

387. See *supra* Section II.C.2.

388. See *supra* Section II.B.2; see also Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 (1803) (“An Act to prevent the importation of certain persons into certain states, where by the laws thereof, their admission is prohibited”) (targeting the foreign slave trade, before the Constitution allowed for a federal prohibition, see U.S. CONST. Art. I, §. 9, cl. 1, by looking to state law prohibitions).

389. See *supra* Section II.A.1.

statutes that dynamically incorporate the definitional work of another authority.<sup>390</sup> 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,<sup>391</sup> 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)?<sup>392</sup> 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 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.”<sup>393</sup> 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. Does the extent of state involvement make this regime better or worse under Justice Gorsuch’s analysis?

If federalism is a trump, what about international comity and cooperation? While perhaps not yet transcendent constitutional values, as U.S. criminal enforcement increasingly bumps up against and requires the assistance of foreign sovereigns,<sup>394</sup> why shouldn’t they gain that status?<sup>395</sup> 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 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.<sup>396</sup> Moreover, the risk of self-dealing highlighted by Justice Gorsuch in *Gundy* and recognized by Kahan is alleviated or even eliminated when agencies other than DOJ devise their own rules, according to proper rulemaking procedures, primarily for civil enforcement. And note how one can turn around the concern of Hessick and

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390. See *supra* text accompanying notes 251-252.

391. See *supra* text accompanying note 254.

392. 42 U.S.C. § 6928(d) (2018).

393. *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) (2018); see *United States v. Iverson*, 162 F.3d 1015, 1019 (9th Cir. 1998).

394. See Koh, *Foreign Affairs Prosecutions*, *supra* note 275, at 346-52; see also Koh, *The Criminalization of Foreign Relations*, *supra* note 275, at 740 (noting the extent of the criminalization of foreign relations).

395. See Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 U. VA. L. REV. 949 (2010); Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83 *FORDHAM L. REV.* 1955 (2015).

396. Kahan, *supra* note 21, at 503-04.

Hessick that agencies lack expertise when it comes to crime-definition.<sup>397</sup> The story of congressional authorship in the federal criminal sphere, for nearly a half-century, has largely been one of reliance on DOJ drafting—whenever the DOJ could slip a “fix” into the omnibus bills that used to be a staple of criminal lawmaking<sup>398</sup> or when it provided material for a Congress looking to make a “tough on crime” statement.<sup>399</sup> Congress supposedly has the greatest “expertise” on retribution, but its 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 proves appealing: it 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.

Note that nothing here resolves the question of how to resolve the tension between *Chevron* or *Auer/Kisor* and lenity.<sup>400</sup> 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.<sup>401</sup> 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 specific criminal case, compared to the relatively freelance interpretations prosecutors offer (and courts often accept) on favorable facts.<sup>402</sup> Particularly when one recognizes the rule of lenity’s spotty record as a restraint on liability expansion,<sup>403</sup> 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 DOJ “fixes”—is itself a “trump” of the Gorsuch critique. The accretion of administrative crimes has given federal criminal law and practice greater clarity

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397. Hessick & Hessick, *supra* note 12, at 322-25.

398. See *supra* note 209 (statutory overrides).

399. See 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) (2018)), *overriding* United States v. Santos, 553 U.S. 507 (2008).

400. See *supra* note 46 and accompanying text.

401. See *Whitman v. United States*, 574 U.S. 1003, 353 (2014) (Scalia, J., statement respecting the denial of certiorari) (“Undoubtedly Congress may make it a crime to violate a regulation, 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.” (first citing *United States v. Grimaud*, 220 U.S. 506, 519 (1911); and then citing *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring))).

402. 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).

403. See RICHMAN, STITH & STUNTZ, *supra* note 20, at 97 (addressing the “so-called rule of lenity”).

and specificity than it would otherwise have, and perhaps has even made it less punitive, since specialized regulatory offenses often come with lower statutory maximums than are allowed by general Title 18 offenses like “conspiracy to defraud the United States.”<sup>404</sup>

If one looks not for community condemnation but for “liberty” in the form of well-crafted legislation, rather than abstract separation-of-powers theories, administrative crimes are even more attractive. 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 in the absence of administrative crimes.<sup>405</sup>

### Conclusion

As an aesthetic matter, administrative crimes and their proliferation may be uniquely disquieting.<sup>406</sup> Within federal criminal law, 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 Article’s goal is not to deny the power of formalist instincts, but rather to challenge those who hold 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 lower courts changing that with even the most muscular and repeated deployments of void-for-vagueness and lenity doctrines. 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 delegations that Congress has actually deployed, and this Article explored the distinct set of values promoted or diminished by each delegation, as well as the institutional design of the delegatee. The contested nature of those values—accountability, liberty, deliberation, federalism, international comity—and the ways they interact not only challenge Justice Gorsuch’s critique of administrative crimes, but also push us to think harder about judicial competence to police these

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404. See *supra* notes 364-369 and accompanying text.

405. 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 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).

406. See Kristin E. Hickman, Foreword, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1137 (2021) (“[S]ome degree of formal adherence to separation of powers principles carries with it a certain symbolism that hits many ordinary people at a very visceral level and contributes to perceptions of the fairness and legitimacy of government.”).

delegations.<sup>407</sup> Given the outsized role that a handful of well-worn but expansive statutes already play in a federal criminal law landscape shaped by interactions between prosecutors and courts, we should welcome the discrete and limited contributions that expert agencies make to a newer range of offenses, however odd looking.

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407. I owe this final point to Daphne Renan. See Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. (forthcoming 2022) (arguing against judicial enforcement of separation-of-powers law); see also *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2244-45 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (“Recall again how this dispute got started. In the midst of the Great Recession, Congress and the President came together to create an agency with an important mission. . . . And now consider how the dispute ends—with five unelected judges rejecting the result of that democratic process.”).