CRIMINAL CLEAR STATEMENT RULES

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ABSTRACT

There is a broad consensus in the criminal justice community that our criminal statutes are a mess: They are imprecise, overly broad, and overly punitive. Legislatures write these laws because there are significant political incentives for them to be "tough on crime" and few incentives for them to write carefully crafted laws. The problems of over-criminalization thus seem to be both a predictable yet intractable consequence of the incentives that legislatures face. But this Article offers a novel solution: Judges should develop new clear statement rules to interpret criminal statutes. The Supreme Court has created clear statement rules to protect important values, such as federalism and the separation of powers. Legislatures can overcome those values, but only if they do so affirmatively and unambiguously. Just as existing clear statement rules protect important structural values, new criminal clear statement rules would protect important criminal justice values. Unless statutes clearly state that they reject those values, clear statement rules will result in statutory interpretations that better protect the interests of criminal defendants. The result will be clearer and more thoughtful criminal laws—both because legislatures will write better statutes and because judges will construe poorly drafted statutes in a more narrow and predictable manner. In addition to making the case for criminal clear statement rules as a general interpretive tool, this Article proposes two specific clear statement rules. One rule would create a default presumption of a knowing mental state requirement for material elements. The other would impose a substantial harm requirement. Both would markedly improve the state of modern criminal law.

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INTRODUCTION

There is near-universal consensus in the legal community that our criminal laws are a mess.[1] Our laws are imprecise: they fail to define key

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terms, and they regularly omit key information, such as what mental state is required to trigger the law. Our laws are overly broad: they include conduct that seems only marginally related to the problem the legislature claimed to have been addressing, and they include seemingly trivial or harmless behavior in their sweeping terms. Our laws are also overly punitive: they routinely contain harsh sentences that are designed to pressure defendants into pleading guilty rather than to delineate appropriate levels of punishment. As a result, the United States has the highest incarceration rate in the Western world.[2]

These criminal laws are the product of legislative dysfunction. Crime is exploited for political gain. As others have noted, criminal legislation essentially serves as campaign literature for legislators.[3] Legislatures package unrelated crimes with a similar feature as a "new crime problem" and refer to those committing the crimes in sensationalized terms, like "superpredators."[4] Legislators rarely mention the fact that the behavior they are purporting to address is already criminal and subject to significant punishment. What is more, there is no organized lobby against criminal legislation.[5] As a result, there is little debate or pushback on imprecise, overly broad, or overly punitive criminal laws. Instead, legislators line up to pass new criminal laws without any shared understanding of what they mean, how far they sweep, and how they fit into the existing criminal laws.

Because of this legislative dysfunction, the meaning of criminal statutes often must be resolved in the context of specific cases. In the case of imprecise laws, judges are left to determine what that language actually means. And in the case of overly broad laws, no one expects the laws to be enforced as written. Instead, we rely on prosecutors to use their discretion to weed out cases involving only trivial behavior.[6] But if a prosecutor

and Criminal Justice Reform, 61 B.C. L. REV. (forthcoming 2020) (manuscript at 1–8) (noting that public attitudes towards the criminal justice system are in flux and, as a result, criminal justice reform has been adopted in several jurisdictions), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3391800.

2. Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1713 (2006).

3. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 774 (1999).

4. Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 870–73 (2000).

5. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1029–30 (2006).

6. DOUGLAS HUSAK, THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS 368–69 (2010); *see also* William J. Stuntz, Bordenkircher v. Hayes*: Plea Bargaining and the Decline of the Rule of Law*, *in* CRIMINAL PROCEDURE STORIES 351, 378 (Carol S. Steiker ed., 2006) ("The *real* law, the 'rules' that determine who goes to prison and for how long, is not written in code books or case reports. Prosecutors . . . define it by the decisions they make when ordering off the menus their states' legislatures have given them.").

exercises her sweeping discretion under these laws in a way that is not politically popular, legislators can claim that the result was not what they intended.[7] And when courts step in to make the hard choices the legislators failed to make, the same legislators often complain that judges are overstepping their bounds.[8] This is a win-win for legislators. They get to criticize others for doing the job that they themselves refused to do in the first place. Nice work if you can get it.

Prosecutors and judges bear some of the blame in this dysfunctional relationship. In some instances, prosecutors are the reason for poorly drafted and overlapping statutes. Prosecutors routinely lobby for new, sweeping legislation, even when existing laws would address perceived wrongdoing.[9] And when efforts have been made to reform criminal codes, prosecutors have often stood in the way of that reform.[10]

Judges also enable this state of affairs. Courts fail to set clear and consistent rules about how legislatures should speak to them. Many judges say that they will interpret statutes based only on their text, while others say they will interpret laws in conformity with the legislature's purpose for enacting them. Under the textualist approach, courts base their interpretive decisions on what they believe an ordinary speaker of English would understand the text to say. But it is extremely difficult to predict what judges will conclude is the ordinary meaning of a statute. Purposivist approaches do not fare much better. While legislatures clearly intend to extend the scope

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7. *See, e.g.*, Matt Bokor, *Prosecutors Have Little Sympathy for Senior Gamblers*, ASSOCIATED PRESS, Feb. 4, 1982, LEXIS (reporting that upon learning that prosecutors filed illegal gambling charges against eight seniors who were playing a "nickel-and-dime card game," House Criminal Justice Chairman Larry Smith, "while not advocating a change in the statute, said he would hope prosecutors would use better judgment"); Michael E. Miller, *N.C. Just Prosecuted a Teenage Couple for Making Child Porn—of Themselves*, WASH. POST (Sept. 21, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/09/21/n-c-just-prosecuted-a-teenage-couple-for-making-child-porn-of-themselves [https://perma.cc/6XMS-B59Y] (noting that the legislator "who wrote the law . . . said he never intended for it to be used against kids in a consensual relationship" even though the text of the statute did not include any such limitations); Brendan Sasso & Jennifer Martinez, *Lawmakers Slam DOJ Prosecution of Swartz as 'Ridiculous, Absurd*,*'* HILL (Jan. 15, 2013, 10:52 PM), https://thehill.com/policy/technology/277353-lawmakers-blast-trumped-up-doj-prosecution-of-internet-activist [https://perma.cc/A8BU-2RZ9] (reporting that, when charges filed by prosecutors under the notoriously imprecise Computer Fraud and Abuse Act led to a defendant committing suicide, federal legislators criticized prosecutors' decision to bring charges).

8. *See, e.g.*, *Okla. Lawmakers Move to Change Sodomy Law After Teen Suspect Cleared*, FOX NEWS (Apr. 29, 2016), https://www.foxnews.com/us/okla-lawmakers-move-to-change-sodomy-law-after-teen-suspect-cleared [https://perma.cc/9M53-FVVB] (quoting state lawmaker who described courts' decision not to read missing language into a criminal statute as a "grave error").

9. *See, e.g.*, Josie Duffy Rice, *Prosecutors Aren't Just Enforcing the Law—They're Making It*, APPEAL (Apr. 20, 2018), https://theappeal.org/prosecutors-arent-just-enforcing-the-law-they-re-making-it-d83e6e59f97a/ [https://perma.cc/3X5M-DKLD].

10. *See* Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, NATION (Oct. 18, 2017), https://www.thenation.com/article/prosecutors-are-banding-together-to-prevent-criminal-justice-reform/ [https://perma.cc/CW5U-SPN5].

of existing criminal codes when they enact new criminal legislation, it is difficult to determine precisely how far they intended to extend it. And so judges routinely invent intent by imagining that legislators considered grammar, punctuation, and statutory scheme as they carefully chose each word[11]—a vision so at odds with the fast-paced sausage-making of criminal legislating that it would be funny if it were not the source of such serious problems.

Legislative dysfunction is, of course, not limited to criminal law.[12] But it has a number of particularly harmful effects in this area. It creates too much prosecutorial discretion. Prosecutors effectively decide the scope of imprecise or overbroad laws when charging and plea bargaining.[13] Because the laws are often also overly punitive, prosecutors have significant leverage to secure pleas. Given the drastic potential consequences they face, defendants cannot risk the possibility of losing at trial, so they forgo the opportunity to have a judge pass on the meaning of the statute in return for a favorable plea bargain.[14] The result is a system that routinely and systematically deprives people of liberty without the safeguards that the Constitution supposedly guarantees.

Imprecise and overly broad criminal laws also place the individual members of the public in an impossible position. People must either risk criminal liability when engaging in conduct that they reasonably believe might be legal, or they must refrain from innocuous or even beneficial behavior.[15] And for laws that everyone breaks sometimes—such as traffic laws—these overly broad laws are rarely enforced in an evenhanded manner.[16] Law enforcement is more likely to enforce these laws against

11. *E.g.*, United States v. Weisser, 417 F.3d 336, 348 (2d Cir. 2005) (relying on the placement of a semi-colon in order to determine whether defendant was subject to a sentencing enhancement).

12. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1–7 (1982) (highlighting the difficulties in revising laws once they are passed and noting the problems associated with that difficulty); Michael J. Teter, *Letting Congress Vote: Judicial Review of Arbitrary Legislative Inaction*, 87 S. CAL. L. REV. 1435, 1441–50 (2014) (discussing the problems associated with legislative gridlock).

13. *See* Hessick, *supra* note 1, at 992–96.

14. The rules of criminal procedure contribute to this dynamic, as they do not provide for the same robust motions to dismiss as do the rules of civil procedure. In order to have a judge rule on the scope of a statute, criminal defendants are forced to proceed to trial and move for a directed verdict—but by that point a plea agreement is no longer a viable option. *See* James M. Burnham, *Why Don't Courts Dismiss Indictments?*, 18 GREEN BAG 2D 347, 348–51 (2015); James Fallows Tierney, *Summary Dismissals*, 77 U. CHI. L. REV. 1841, 1852–58 (2010).

15. *See* Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1152–56 (2016).

16. David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 278–88 (1999).

people of color and in poor communities.[17] Indeed, racial profiling is made easier by the significant discretion that these laws give to police.[18]

The legislative dynamics that produce these criminal statutes also diminish political accountability. Past accounts of statutory interpretation have stressed dialogue between the legislature and the courts.[19] But we should also conceive of legislation as a dialogue between the legislature and the public. Voters will evaluate their representatives based on the laws that they pass (or fail to pass). But voters cannot hold legislators politically accountable for statutes that voters cannot understand or whose meaning is supposed to be determined by other actors—namely prosecutors (and perhaps judges). In this sense, the failure to clearly define crimes denies criminal defendants—and all voters—their day in the legislature.

This Article suggests a novel approach that may fundamentally change these dynamics: criminal clear statement rules.[20] A clear statement rule is a particularly strong presumption that a judge uses when interpreting a statute to protect certain values or interests. Specifically, clear statement rules presume that the legislature did not intend the statute to undermine a value or interest unless the legislature has affirmatively and clearly stated its intent to do so. Clear statement rules protect the value or interest at issue by requiring a particular outcome unless the statute contains explicit and unambiguous language to the contrary.

Although courts have, on occasion, used clear statement rules in criminal cases, existing clear statement rules are rarely relevant to the interpretation of criminal laws. Existing clear statement rules vindicate non-criminal

17. *See, e.g.*, Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813 (2007) (finding that people of African American and Hispanic descent were stopped more frequently than whites during New York City's stop-and-frisk initiative); Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 L. & SOC'Y REV. 129, 143 (2000) ("In middle-class areas, policing tends to be reactive (responses to residents' calls), whereas poor neighborhoods experience greater proactive policing (officers initiate contacts and engage in more obtrusive stops of people on the streets)." (first citing W. Eugene Groves, *Police in the Ghetto*, *in* SUPPLEMENTAL STUDIES FOR THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 103 (1968); and then citing PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE (1967))).

18. *See* Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1511–38 (2007).

19. *See* Finley v. United States, 490 U.S. 545, 556 (1989) (expressing an interest "that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts"); Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 210–18 (2013) (describing and documenting the "dialogic" theory of statutory interpretation).

20. As explained in more detail below, we are advocating for what some have called "super-strong clear statement rules," *see* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611–29 (1992), not merely presumptions.

values, such as federalism or separation of powers, and most criminal statutes do not implicate those values. Our proposal expands the universe of clear statement rules to vindicate values that are necessary to a fair and just criminal justice system.[21]

Criminal clear statement rules have a number of benefits. They would make it easier for citizens to understand the scope of what is being prohibited. They would make it more likely that legislators actually deliberate about the scope of the crime being created. And they would make legislators more politically accountable for their decisions.

Clear statement rules would also make it more politically palatable for judges to constrain legislatures. That is because clear statement rules do not require judges to take sides between the individual rights of criminal defendants and public safety. Rather, they require legislators to strike that balance and to speak clearly and affirmatively about which balance they struck. Absent such a clear statement, judges can legitimately say that the legislature failed to criminalize certain conduct because the legislature did not use the words required by the clear statement rule to make that choice clear. In this way, the use of clear statement rules protects judges against the politically loaded charge of judicial activism.

To be sure, clear statement rules are not content-neutral. They effectively constitute default settings that privilege certain outcomes. This privileging of outcomes entails substantive choices that require justification. We show how this can be done by proposing two specific clear statement rules to be applied in the absence of a clear statutory language to the contrary: (1) that the mental state for all elements in a felony statute be knowing, and (2) that a defendant must have intended or caused substantial harm in order to be liable for a felony. These two clear statement rules provide a default setting with a clear policy preference: they are specifically designed to act as a bulwark against the pathological politics that have shaped criminal law to become more punitive in recent decades.

We readily acknowledge that there are other potential criminal clear statement rules that could be formulated and justified. Those other clear

21. While criminal clear statement rules have been proposed before, previous proposals for the use of criminal clear statement rules were significantly narrower in scope. *See, e.g.*, Kennedy, *supra* note 1, at 862 ("In cases where defendants are likely to face mandatory imprisonment at sentencing, the use of the term willfully in a federal criminal statute shall require the government to prove that the defendant knew he was violating a legal duty when performing the acts described by the offense. In cases where defendants are likely to face mandatory imprisonment at sentencing, the use of the term knowingly shall require the government to prove that the defendant had knowledge with respect to all factual elements of the offense charged."); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1053 (1999) ("The Court will interpret a statute to require the government to prove moral blameworthiness if the Court can imagine an extreme hypothetical in which the government's interpretation would reach action that is not culpable according to an unwritten moral code.").

statement rules need not be as provocative or as sweeping as the ones we propose here. Indeed, the core contribution of this Article is that clear statement rules can—and should—be used to vindicate criminal law values. Although we believe that the two specific clear statement rules we propose would make criminal justice fairer and more efficient, one could reject or modify these specific rules and yet accept our primary argument—that courts should adopt criminal clear statement rules on the grounds that clear statement rules can help ameliorate the dysfunction that plagues criminal legislation.

Criminal clear statement rules will require legislators to say what they mean and mean what they say when defining criminal liability. If consistently deployed, they will have both short-term and long-term benefits. In the short term, they will give society more notice about what is prohibited, provide legislators a clearer idea about how to express themselves, and modestly decrease prosecutorial discretion over the substance of criminal laws. In the long term, they will restore a measure of accountability to a legislative process by forcing legislators to internalize the political costs of the decisions they make. This, in turn, might lead legislators to deliberate more carefully about the crimes they create. Criminal clear statement rules will also help to safeguard the legitimacy of the courts at a time when the legitimacy of the justice system is under attack. Finally, the specific rules we propose would protect criminal defendants from thoughtlessly punitive penal statutes.

This Article proceeds in three parts. Part I describes legislative dysfunction in the area of criminal law and explains how existing doctrines have failed to deal with imprecise, overly broad, and overly punitive laws. Part II makes the affirmative case for criminal clear statement rules. It begins by describing the role that clear statement rules currently play in statutory interpretation. It then explains how to expand clear statement rules to vindicate criminal law values, as well as how adopting criminal clear statement rules could ameliorate legislative dysfunction. In particular, it argues for the adoption of criminal clear statement rules that are grounded in history, longstanding practices, and constitutional or quasi-constitutional principles. Part III proposes our two specific clear statement rules—one requiring a knowing mens rea, and the other requiring substantial harm.

I. DYSFUNCTION IN DEVELOPMENT OF THE CRIMINAL LAW

Criminal legislation is deeply dysfunctional. Legislators engage in a "bidding war" to see who can strike the most punitive tone in response to public reports about crime. There are essentially no countervailing forces to advocate in favor of more modest or more narrow legislation. The result is

the routine enactment of crime laws that are imprecisely drafted, overly broad, and overly punitive.

Current doctrine is ineffective at addressing these problems. Neither the rule of lenity nor the void-for-vagueness doctrine have provided a meaningful check against imprecise or overly broad laws. The overbreadth doctrine, despite its name, plays only a small role in policing overly broad laws. And outside of the death penalty and life-without-parole sentences for juveniles, the courts will not police excessively punitive sentences.

A. Legislative Dysfunction

A wide and deep scholarly consensus exists that criminal legislation has been dysfunctional for many years.[22] This is true at both the federal and state level. Legislatures pass penal laws that are severe and sweeping in scope. Neither the public nor the other branches of government push back. The cycle repeats itself again when some new crime captures the public's attention.

The eagerness of legislatures to write new criminal laws has resulted in an explosion of criminal statutes. One study of federal legislation calculated that, between 2000 and 2007, Congress enacted an average of fifty-six new crimes each year.[23] Another calculated that criminal statutes were enacted at a rate that was 45 percent higher than all other types of legislation.[24]

This explosion has many causes. Victoria Nourse has described crime legislation as driven by a cyclical series of "wars on crime."[25] Sara Sun Beale has emphasized the role the media plays in distorting legislative politics.[26] And many have emphasized the sensitivity of legislators to moral panics about crime over the last few decades.[27] As Michael Tonry explained:

> Something or someone emerges who dramatically threatens

22. *See supra* note 1 (collecting sources).

23. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes* 1 (Heritage Found. Memo No. 26, 2008), https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes.

24. BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND., WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 13 (2010), https://www.heritage.org/crime-and-justice/report/without-intent-how-congress-eroding-the-criminal-intent-requirement.

25. V. F. Nourse, *Rethinking Crime Legislation: History and Harshness*, 39 TULSA L. REV. 925, 925 (2004).

26. Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 44–51 (1997); *see also* HUSAK, *supra* note 1, at 16 ("Tabloids and the popular media thrive on accounts of how offenders 'get away' with crime by escaping through loopholes and technicalities.").

27. *See* Kennedy, *supra* note 4, at 868–76; *see also* JOEL BEST, RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS 64–67 (1999).

> established values and interests, the media and state agencies overreact and exaggerate the nature and scale of the threat, public opinion becomes polarized and demands decisive government responses, public officials adopt extreme policies, and no one has very much patience for suggestions that the problem is less serious or more complicated than it looks.[28]

When legislators are responding to the outrage of the moment, they often enact new legislation even though existing laws had already criminalized the conduct and punished it with substantial penalties.[29] The new legislation does not have to be effective; it just has to strike the right chord with the public's anxieties of the moment.[30] Such legislation satisfies symbolic needs, not real ones. As a result, it is often poorly drafted and ill-considered.

Poor drafting results in imprecise or overly broad laws. Some laws fail to define key terms[31] or to clearly specify the required mental state.[32] Others are drafted so broadly that they include behavior that is blameless and harmless.[33] Once enacted, these laws are rarely repealed,[34] even when their extraordinary breadth becomes apparent.[35]

There are understandable reasons why legislators might write imprecise or overly broad laws: "Carefully crafted laws require significant time and effort, and both are often in short supply when legislatures are in session."[36] Precise laws also create a risk that would-be wrongdoers will circumvent them.[37] But investing this time and effort to strike the appropriate balance

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28. TONRY, *supra* note 1, at 88.

29. *See, e.g.*, Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 966 (2009) ("Legislators gain political credit for responding to the crime du jour with a new crime or an increased penalty, even if the new crime is redundant."); Robinson & Cahill, *supra* note 1, at 635 (documenting that, over four decades, Illinois added "hundreds of new offenses, many of which cover the same conduct as previous offenses (and, in some cases, provide for conflicting levels of punishment)").

30. TONRY, *supra* note 1, at 44 ("The inherently expressive character of much crime control policy distinguishes it from other policy subjects.").

31. *See* Hessick, *supra* note 1, at 987–91 (collecting examples).

32. WALSH & JOSLYN, *supra* note 24, at 13.

33. *See* Richman, *supra* note 3, at 761 ("Although the absolute or relative degree of breadth is quite difficult to prove, let alone quantify, anyone with more than a passing familiarity with federal criminal law is struck by the extraordinary extent to which Congress has eschewed legislative specificity in this highly sensitive area.").

34. Myers, *supra* note 1, at 1337–39 (explaining why criminal laws are rarely repealed, even when they no longer reflect public opinion).

35. *E.g.*, Bokor, *supra* note 7 (reporting that, when a broad statute was used to prosecute marginal behavior, a lawmaker responded that he wished prosecutors would use better judgment, but that he was not advocating for a change to the law itself).

36. Hessick, *supra* note 1, at 993.

37. *See generally* Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008) (arguing that overly broad laws may, in some circumstances, be beneficial because they allow the state to punish those who adapt their behavior to legal regimes).

between catching wrongdoers and protecting the innocent is precisely the job that legislators are supposed to do.

Importantly, there is no real political pressure on legislatures to write carefully crafted laws. Legislative response to crime need not take account of competing interests because the politics of crime are asymmetrical.[38] Crime does not invite compromise and horse-trading because the issue is framed in terms of good and evil, and no one likes to be seen as negotiating in favor of evil.[39] The interests of would be criminal defendants are routinely neglected in legislative politics because no interest group represents them. As Bill Stuntz explained:

> In other fields, legislation is about tradeoffs and compromises. When writing and enacting criminal prohibitions, legislators usually ignore tradeoffs and rarely need to compromise. Save for law enforcement lobbies, few organized, well-funded interest groups take an interest in criminal statutes; criminal defendants' interests nearly always go unpresented in legislative hallways. Legislators thus have little reason to focus carefully on the consequences of the prohibitions they write.[40]

As a result, "both major parties have participated in a kind of bidding war to see who can appropriate the label 'tough on crime.'"[41]

Finally, there is a cognitive and rhetorical bias that has distorted the legislative process for decades. For a variety of sociological, cultural, and psychological reasons, crime and criminal offenders are conceived of, in the abstract, in the worst possible terms. Drug dealers, burglars, and those committing violent crimes are imagined to be monstrous offenders who are

38. *See* Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1980 (2006) (explaining that, with the exception of those who care about white collar crime, "the groups that seek shorter sentences and more flexible sentencing authority do not wield much political power"); Barkow, *supra* note 5, at 1029–31 (contrasting the powerful lobbies for expansive and punitive criminal laws with the weak groups that would oppose them). *But cf.* Richman, *supra* note 3, at 774–76 (noting that some criminal laws, such as mail and wire fraud, target politically powerful white-collar individuals, and yet "one rarely sees high-profile efforts by interest groups to limit purely criminal statutes" even for white-collar crimes).

39. *See* Beale, *supra* note 26, at 41–43 (recounting that Democrats "realized in the 1990s that their traditional support of more liberal crime policies had become a major political liability" and describing how "Democratic Congressional leaders deliberately adopted a strategy of taking the crime issue away from the Republicans"); Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, *in* PRISONS 63, 71 (Michael Tonry & Joan Petersilia eds., 1999).

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

41. Stuntz, *Pathological*, *supra* note 1, at 509; *see also* HUSAK, *supra* note 1, at 15 (noting that "neither political party has been willing to allow the other to earn the reputation of being tougher on crime").

dangerous, remorseless, and irredeemable.[42] Serious crimes are defined in sweeping terms in part to ensure that these monsters do not escape punishment through some failure of proof. It is not that voters support criminalization and punishment of trivial behavior. It is that they worry prosecutors will be unable to find the evidence needed to prove that these bad people did other, truly bad things.[43] The result is a dysfunctional case of bait-and-switch in which an enraged and fearful public support criminal laws whose scope includes lesser offenders in addition to the monsters that are the staple of legislative debate.[44] Often lost in this dysfunctional game is any guarantee that the offender intended or even contemplated the serious harm that motivated the passage of the crime statute in the first place.[45]

This bias not only affects the drafting of the laws, but also the level of punishment they impose. Criminal statutes increasingly contain harsher sentences in the form of mandatory minimums and higher statutory maximums.[46] Since the 1970s, the percentage of defendants convicted of

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42. Kennedy, *supra* note 4, at 829–33, 858–76; *see also* BEST, *supra* note 27, at 24–26; PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 4–19 (1998). For example, most "drug dealers" are relatively minor offenders. Joseph E. Kennedy et al., *Sharks and Minnows in the War on Drugs: A Study of Quantity, Race and Drug Type in Drug Arrests*, 52 U.C. DAVIS L. REV. 729, 767–73 (2018).

43. *See* Stuntz, *Pathological*, *supra* note 1, at 519 (noting that when an element of a crime is difficult to prove, legislatures can write a new statute that omits that element, leaving it to prosecutors to decide when that element is present or not; the legislature is not so much redefining criminal conduct—the real crime remains the same—but rather making it easier for the prosecutor to obtain a conviction by removing the element as a formal matter).

Perhaps nowhere is this phenomenon more pronounced than in the case of child pornography cases. In recent decades, Congress and state legislatures have dramatically increased the sentences for possession of child pornography. These sentences have been increased not because lawmakers and voters think that possession deserves this punishment, but rather because they have assumed that anyone who possesses child pornography either has or will physically molest a child. *See generally* Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853 (2011). In other words, they have adjusted the punishment for one crime so that it captures the harm and seriousness of another crime. And, although the evidence is far from uncontested, it appears that many people who possess child pornography do not pose an actual threat to children. *See* Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1694–1714 (2012).

44. Kennedy, *supra* note 4, at 829–33, 858–76; *see also* FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 19 (1999); Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 929 (2006).

45. ZIMRING & HAWKINS, *supra* note 44, at 20.

46. As Darryl Brown has explained:

> [S]tates concluded harsh sentencing policies were successful elsewhere, and they feared being a lower-sentence jurisdiction to whom harsh-sentencing states might push their criminals. The competitive dynamic set up a cycle of states competing with each for ever-harsher criminalization, enforcement, and punishment policies, which seems to have leveled off—after exceeding the incarceration rates of all other democracies—only due to the substantial strain that high incarceration rates put on state budgets.

Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 455 (2009).

felonies who were sentenced to incarceration, rather than probation, tripled.[47] And sentence lengths have increased significantly.[48] In short, we are putting far more people in prison, and for much longer periods of time.

The executive branch has encouraged rather than checked this legislative dysfunction. As Bill Stuntz has explained, the "pathological politics" of criminal law result in legislators and prosecutors cooperating to endlessly expand the criminal law:

> [T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones. . . . Prosecutors are better off when criminal law is broad than when it is narrow. Legislators are better off when prosecutors are better off. The potential for alliance is strong, and obvious. . . .
>
> . . . A deeper politics, a politics of institutional competition and cooperation, *always* pushes toward broader liability rules, and toward harsher sentences as well.[49]

Cooperation with prosecutors also insulates legislatures against voter backlash. One might expect that the prosecution of individuals for innocuous behavior under broadly written laws would provoke a response by voters, but legislators can easily frame such a prosecution as a failure of prosecutorial discretion.[50] They can claim that this sort of prosecution is not what they intended when they passed the imprecise or overbroad statute, and instead simply reflects poor judgment on the part of the prosecutor filing the charge.[51] This evasion works, in part, because it is usually not clear to anyone what the law meant in the first place. It is hard to hold legislators accountable for the application of a law that no one understands. Thus, legislators evade political responsibility for their decisions about the content and scope of criminal laws.

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47. Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 295 (2013).
48. *Id.*; *see also* Barkow, *supra* note 2, at 1713 n.5.
49. Stuntz, *Pathological*, *supra* note 1, at 510.
50. *Id.* at 548.
51. *See supra* note 7 (collecting sources).

B. The Courts' Failure to Address Dysfunction and Its Effects

One might expect the courts to step in when legislatures write imprecise, overly broad, or overly punitive laws. Our Constitution separates power between different branches in order to preserve individual liberty,[52] and imprecise, overly broad, and overly punitive laws present a threat to liberty.[53] In addition, the text of the Constitution includes a prohibition on excessive punishment.[54] But there are both procedural and doctrinal reasons why the courts have not served as an effective check.

As a procedural matter, the practice of plea bargaining has made it very difficult for defendants to challenge a prosecutor's interpretation of a broad or imprecise statute. In contrast to civil cases, where judges routinely decide the scope of statutes in the context of motions to dismiss, judges in criminal cases usually refuse to make decisions about the scope of a criminal law at the beginning of a criminal case.[55] Instead, defendants' substantive law arguments are often addressed only after the jury has returned a verdict. Since most cases do not go to trial, judges address the scope of the substantive criminal law only in a small number of cases.[56]

Plea bargaining limits not only defendants' ability to challenge prosecutors' interpretation of statutes, but also their ability to challenge overly punitive sentences. Prosecutors routinely require defendants to waive not only their right to a jury trial, but also many other procedural rights as part of the plea bargain.[57] Those waived rights often include the right to appeal the sentence actually imposed on the defendant.[58]

Not only does plea bargaining insulate punitive sentences from review, but our punitive sentences also help to drive plea bargaining. Our statutes

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52. Bond v. United States, 564 U.S. 211, 223 (2011) (stating that individuals have standing to challenge separation of powers violations because the "constitutional structure of our Government . . . protects individual liberty"); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 29–32 (1965); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009); Hessick, *supra* note 1, at 1014; *see also* Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1083–84 (2017) (articulating these checks and noting that they have, at times, been underenforced).

53. Hessick, *supra* note 15, at 1146–59 (explaining how imprecise and overly broad laws create problems of notice and arbitrary and discriminatory enforcement).

54. U.S. CONST. amend. VIII.

55. *See supra* note 14 and accompanying text.

56. And, even if the case proceeds to trial, the way that post-trial motions are structured also results in opinions that do not clearly articulate the limits of criminal statutes. Russell M. Gold et al., *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1632–33, 1640–44 (2017).

57. Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 92 (2015) (conducting study establishing that "a significant number of prosecutors seek waivers of all statutory and constitutional claims regardless of whether such violations occurred pre-trial, during the entry of a guilty plea, at the sentencing hearing, or thereafter").

58. *Id.* at 86–87, 122 app. H.

authorize harsh punishments—punishments that legislators have conceded exist to pressure defendants into pleading guilty and cooperating with prosecutors.[59] A defendant facing a harsh mandatory minimum, for example, can escape that sentence by negotiating a guilty plea to a different charge. The consequences of losing at trial are so severe that even innocent people have pleaded guilty to serious crimes in order to secure a less severe punishment.[60] Our plea bargaining system has been highly effective. More than 90 percent of convictions are the result of guilty pleas.[61]

Even when procedural hurdles have not prevented defendants from challenging imprecise, overly broad, and overly punitive laws, those challenges have rarely succeeded. That is because existing doctrines are not particularly effective at dealing with imprecise, overly broad, and overly punitive statutes. Courts have used several doctrinal tools—most notably the rule of lenity, the vagueness doctrine, and the overbreadth doctrine—to narrow or invalidate certain criminal laws that are imprecise or overly broad. But, as explained in more detail below, those tools have limitations that keep them from effectively policing imprecise and overly broad laws. Similarly, the Supreme Court has interpreted the Eighth Amendment to essentially avoid judicial review of harsh sentences of imprisonment. As a result, courts have failed to act as a check on overly punitive laws.

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59. For example, Senator Chuck Grassley opposed legislation that would have reduced mandatory minimum sentences, not because he disagreed with the argument that those sentences were disproportionately harsh, but instead because prosecutorial discretion meant that those penalties were not actually being imposed in all cases. He noted that:

> [J]ust under half of all drug courier offenders were subject to mandatory minimum sentences, but under 10 percent were subject to mandatory minimum sentences at the time of their sentencing.
>
> There are two main reasons so few of these offenders are actually sentenced to a mandatory minimum. The first is they may fall within the safety valve Congress has enacted to prevent mandatory minimum sentences from applying to low-level, first-time drug offenders or, second, they may have provided substantial assistance to prosecutors in fingering high-level offenders in a drug conspiracy.
>
> That is an intended goal of current Federal sentencing policy, to put pressure on defendants to cooperate in exchange for a lower sentence so evidence against more responsible criminals can be attained. As a result, even for drug couriers the average sentence is 39 months. That seems to be an appropriate level.

161 CONG. REC. 2240 (2015) (statement of Sen. Grassley).

60. For a list of more than 2,000 individuals who pleaded guilty and were later exonerated, see NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx# [https://perma.cc/TA85-RUW2].

61. Murat C. Mungan & Jonathan Klick, *Identifying Criminals' Risk Preferences*, 91 IND. L.J. 791, 816 (2016).

1. The Rule of Lenity

The rule of lenity is generally understood to require judges to construe ambiguous criminal statutes in favor of defendants.[62] The Supreme Court has offered two justifications for the rule:

> First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." Second, because 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. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."[63]

The rule of lenity is one of the oldest rules of statutory interpretation.[64] The rule was previously stated in somewhat different terms—judges were instructed to "narrowly construe" criminal statutes.[65] Under this original formulation, the rule was intended to soften the harsh effects of penal law.[66] As a result, the rule benefitted defendants even when a law was not necessarily ambiguous; instead, a judge was "to identify all the plausible readings of the statute" and then "select the narrowest interpretation within that set of plausible options."[67]

In the hands of modern courts, however, the rule of lenity provides far less protection to defendants. Modern courts use the rule of lenity as a tool

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62. *See Rule of Lenity*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "rule of lenity" as "[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment").

63. United States v. Bass, 404 U.S. 336, 348–49 (1971) (citations omitted) (first quoting McBoyle v. United States, 283 U.S. 25, 27 (1931); and then quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 209 (1967)).

64. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 128 (2010); *see also* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 87–96 (1998) (recounting lenity's history in England and the early United States).

65. Barrett, *supra* note 64, at 128–29.

66. Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 897 (2004).

67. *Id.* at 894, 896. Arguably, the rule of lenity originally operated as a clear statement rule of sorts: if the statutory text did not clearly foreclose a more lenient interpretation, then the court would construe the statute in that way. But unlike other clear statement rules, the rule of lenity did not identify a particular issue that legislatures had to speak clearly about; they just generally had to avoid writing criminal statutes that could be plausibly read to exclude certain behavior.

of last resort.[68] Only if they have exhausted all other interpretive tools without deriving an interpretation of the statute will judges use the rule of lenity to break the tie between competing interpretations.[69] Even when many judges have disagreed about the meaning of a particular statute, a court will nonetheless say that the statute is not ambiguous and refuse to employ the rule of lenity. Consequently, in its current form, the rule of lenity only very occasionally serves as a check on imprecise criminal laws.[70]

Even though lenity could serve (and on occasion has served) as a check on imprecise criminal laws, it cannot address the other consequences of criminal lawmaking dysfunction. That is because lenity comes into play only when statutes are ambiguous. Thus, lenity would not help the defendant who wanted to argue that a statute was written so broadly that it included harmless or trivial behavior. She would have to show that the statute *could be read* to exclude her behavior, not merely that it *should have been written* to exclude it.[71] Nor can lenity serve as a check on overly punitive laws. So long as the scope of a law is clear, the rule of lenity does not apply, no matter how harsh the penalty associated with that law.

In addition to providing no protection against overly broad or overly punitive laws, lenity provides very little protection against imprecise laws. Lack of precision is a necessary, but not sufficient condition, to trigger the rule of lenity. Even a statute that is ambiguous on its face may be construed to favor prosecution. That is because the courts look not only to the text of the statute, but to all other possible sources of interpretation—including legislative history[72] and "motivating policies" of the statute[73]—before deciding whether a statute is sufficiently ambiguous for the rule of lenity to apply. As Dan Kahan has noted, "[r]anking lenity 'last' among interpretive conventions all but guarantees its irrelevance."[74]

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68. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 384–86.

69. *See* Moskal v. United States, 498 U.S. 103, 108 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980))); United States v. Bass, 404 U.S. 336, 347 (1971) (stating that a court should rely on lenity only if, "[a]fter 'seiz[ing] every thing from which aid can be derived,'" it is "left with an ambiguous statute" (alteration in original) (quoting United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805))); *see also* Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 106–20 (2016) (tracing the decreasing force of lenity in court opinions); Price, *supra* note 66, at 891 (noting that prevailing doctrine "ranks lenity dead last in the interpretive hierarchy").

70. Price, *supra* note 66, at 891 ("Lenity comes into play only in the unlikely event that other conventions yield an interpretive 'tie.'").

71. *See* Solan, *supra* note 64, at 79 (making this distinction).

72. *See* Dixson v. United States, 465 U.S. 482, 500 n.19 (1984).

73. *Moskal*, 498 U.S. at 108 (quoting *Bifulco*, 447 U.S. at 387).

74. Kahan, *supra* note 68, at 386.

A number of commenters have argued that we should reinvigorate the rule of lenity and return to a system in which statutes that are not entirely clear on their face are interpreted in favor of criminal defendants.[75] We also regret that the rule of lenity has become a shadow of its former self. But we do not believe that lenity is likely to make a comeback any time soon. Given the current political hostility to "activist" interpretive practices, it is hard to imagine judges ignoring legislative history and purpose in order to revive an ancient judicial canon.

Furthermore, the theoretical underpinning of the rule of lenity—that it is necessary to ensure that defendants had notice that their conduct was illegal—is both unlikely to be persuasive in a particular case, and it is not consistent with modern criminal practice. The modern regulatory state contains many criminal prohibitions and so the idea that precisely worded statutes provide notice is a legal fiction in all but the most formal sense of the word.[76] Most importantly, lenity requires judges to place a thumb on the interpretive scale in favor of criminal defendants simply because they are criminal defendants. That is hardly the sort of action that is likely to be palatable to judges—especially judges who must stand for reelection.[77] Thus, the prospects for meaningful reform through a reinvigorated rule of lenity are poor, and a solution to the legislative dysfunction around criminal law making must come from elsewhere.

2. The Vagueness Doctrine

The void-for-vagueness doctrine requires that a criminal statute "clearly define the conduct it proscribes."[78] While related to lenity on a conceptual

75. *See, e.g.*, Hopwood, *supra* note 1, at 740–42; Price, *supra* note 66, at 940–41; *see also* Solan, *supra* note 64, at 123–28, 134–43 (arguing against modern trends in the states to abolish lenity via legislation). *But see* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985) (arguing that lenity should be replaced by a principle requiring courts to interpret statutes to maximize the rule of law); Kahan, *supra* note 68 (arguing that lenity should be abolished).

76. *See* Jeffries, *supra* note 75, at 205–12.

77. Although federal judges are appointed and enjoy life tenure, the vast majority of state judges owe their seats to either direct elections or retention elections. *See* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 3 (2012). Indeed, interest groups seeking to advance non-criminal law interests have targeted state judges who are opposed to those interests in their reelection campaigns by running ads about their defense-friendly rulings. *See id.* at 1–3 (collecting recent incidents); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 14 n.74 (1995) (collecting incidents from the 1980s and 1990s).

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

level,[79] vagueness differs in two very important respects. First, the rule of lenity leads courts to construe statutes strictly, but the vagueness doctrine leads courts to strike down laws.[80] Second, while lenity is a rule of statutory construction, vagueness is a constitutional doctrine.[81]

Vague criminal laws violate the Due Process Clauses.[82] Over the years, the Supreme Court has found a number of laws to be unconstitutionally vague. In *Kolender v. Lawson*,[83] the Court struck down a California statute requiring persons who loiter or wander on the streets to provide "credible and reliable" identification whenever requested by the police. The Court held that the statute was unconstitutionally vague because it failed to clarify what constituted "credible and reliable" identification. In *Smith v. Goguen*,[84] the Court struck down a Massachusetts statute that criminalized public contemptuous treatment of the U.S. flag because it failed to define "contemptuous treatment." More recently, in *Johnson v. United States*,[85] the Court struck down as unconstitutionally vague a provision of the Armed Career Criminal Act that defined a violent felony as, *inter alia*, a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[86]

79. *See, e.g.*, United States v. Lanier, 520 U.S. 259, 266 (1997) (describing vagueness and lenity as "related manifestations of the fair warning requirement" of the right to due process); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 95 (1968) (describing lenity as a sort of "junior version of the vagueness doctrine"); Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1174, 1176–77 (2013) (describing vagueness and lenity as two "main features of due process notice doctrine").

80. Justice Thomas has recently challenged whether this aspect of the vagueness doctrine is appropriate. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1243–44 (2018) (Thomas, J., dissenting); Johnson v. United States, 135 S. Ct. 2551, 2568 (2015) (Thomas, J., concurring).

81. States can presumably abrogate a rule of statutory construction. *See Dimaya*, 138 S. Ct. at 1244 (Thomas, J., dissenting) ("[L]enity is a tool of statutory construction, which means States can abrogate it—and many have. The vagueness doctrine, by contrast, is a rule of constitutional law that States cannot alter or abolish." (citations omitted)). But some courts have persisted in applying the rule even when legislatures have abrogated it. *See, e.g.*, State v. Pena, 683 P.2d 744, 748–49 (Ariz. Ct. App. 1983) ("A.R.S. § 13-104 abolishes the general rule that penal statutes are to be strictly construed; nevertheless, where the statute itself is susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant."); *see also* Solan, *supra* note 64, at 123–28 (describing similar dynamics in New York and California).

82. U.S. CONST. amends. V, XIV, § 1; *see also Dimaya*, 138 S. Ct. at 1224–26 (Gorsuch, J., concurring in part and concurring in the judgment) (tracing the vagueness doctrine's "due process underpinnings").

83. 461 U.S. 352 (1983).

84. 415 U.S. 566 (1974).

85. 135 S. Ct. 2551 (2015).

86. *Id.* at 2557; *see also* 18 U.S.C. § 924(e)(2)(B)(i)–(ii) (2012) (defining a violent felony to include state or federal court convictions for any felony that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another").

The Supreme Court has offered three reasons why a vague criminal statute violates the right to due process.[87] First, vague laws give insufficient notice to citizens about what conduct is permitted and what conduct is prohibited.[88] Without such notice, an individual may accidentally engage in illegal conduct.[89] In order to avoid conviction under vague statutes, citizens may be deterred from engaging in lawful behavior out of fear that the conduct is actually prohibited.[90] So not only are vague statutes a trap for the unwary, they may also result in over-deterrence.

The second rationale for the vagueness prohibition is that vague statutes provide "insufficient standards for enforcement."[91] When a statute fails to give police and prosecutors a clear indication of what conduct is legal, the statute "vests virtually complete discretion in the hands" of law enforcement.[92] According to the Court, such unfettered discretion may result in "arbitrary and discriminatory enforcement"[93] because it "allows policemen, prosecutors, and juries to pursue their personal predilections."[94]

The third rationale is that vague statutes delegate too much of the legislature's power to make the law.[95] In *United States v. Reese*, the Court stated that it would be dangerous if the legislature were to write a statute that "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who

87. *E.g.*, Skilling v. United States, 561 U.S. 358, 402–03 (2010) ("To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" (alterations in original) (quoting *Kolender*, 461 U.S. at 357)); *see also* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (adding excessive delegation as a third reason).

88. *Goguen*, 415 U.S. at 572 ("The doctrine incorporates notions of fair notice or warning.").

89. *Grayned*, 408 U.S. at 108–09 ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.").

90. United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 36 (1963) ("[W]e are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct.").

91. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 503 (1982).

92. *Kolender*, 461 U.S. at 358; *see also Goguen*, 415 U.S. at 578 (remarking on the "the unfettered latitude thereby accorded law enforcement officials and triers of fact" under a vague statute).

93. *Goguen*, 415 U.S. at 573.

94. *Id.* at 575.

95. *See* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 284–86 (2003) (collecting cases on the delegation issue and noting that the separation of powers "stood for decades as the second requirement of vagueness analysis"). While the Court has mentioned notice and arbitrary and discriminatory enforcement in all of its modern vagueness opinions, the delegation issue appears in only some of those opinions. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1248 (2018) (Thomas, J., dissenting) ("[T]his Court's precedents have occasionally described the vagueness doctrine in terms of nondelegation. But they have not been consistent on this front." (citation omitted)).

should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."[96] In *Sessions v. Dimaya*, Justice Gorsuch underscored the vagueness doctrine's commitment to preserving the separation of powers.[97] He emphasized that:

> [L]egislators may not "abdicate their responsibilities for setting the standards of the criminal law," by leaving to judges the power to decide "the various crimes includable in [a] vague phrase" . . . . Nor is the worry only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions.[98]

Although the vagueness doctrine seems ready-made to limit imprecise laws, the courts have failed to develop a clear standard for what constitutes an impermissibly vague law.[99] As Justice Frankfurter famously observed, the standard for determining whether a statute is unconstitutionally imprecise is, itself, imprecise.[100] That has led to what appear to be inconsistent applications of the standard.

For example, in *United States v. L. Cohen Grocery Co*. the Court struck down a price gouging statute which prohibited any person from "mak[ing] any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."[101] The Court reasoned that such an open-ended, qualitative standard was unconstitutionally vague because it made the legality or illegality of conduct wholly contingent upon whether the defendant's conduct was "unjust and unreasonable in the estimation of the court and jury."[102] But in *Nash v. United States*, the Court rejected a similar vagueness challenge to the Sherman Act, which has been applied using the

96. 92 U.S. 214, 221 (1876); *see also* United States v. L. Cohen Grocery Co., 255 U.S. 81, 92 (1921) (noting that standardless statutes "delegate legislative power").

97. *Dimaya*, 138 S. Ct. at 1227–28 (Gorsuch, J., concurring in part and concurring in the judgment).

98. *Id.* (citations omitted) (first quoting *Goguen*, 415 U.S. at 575; and then quoting Jordan v. De George, 341 U.S. 223, 242 (1951) (Jackson, J., dissenting)).

99. *See* Jeffries, *supra* note 75, at 196 ("The difficulty is that there is no yardstick of impermissible indeterminacy.").

100. "'[I]ndefiniteness' is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept." Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting). At the time, the Court frequently referred to the concept of vagueness as "indefiniteness." *See id.* ("This requirement of fair notice that there is a boundary of prohibited conduct not to be overstepped is included in the conception of 'due process of law.' The legal jargon for such failure to give forewarning is to say that the statute is void for 'indefiniteness.'").

101. *L. Cohen Grocery Co.*, 255 U.S. at 86 (quoting Act of October 22, 1919, Pub. L. No. 66-63, § 2, 41 Stat. 297, 298).

102. *Id.* at 89.

so-called "rule of reason."[103] Writing for the majority in *Nash*, Justice Holmes stated that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."[104] Compounding the confusion, in a recent decision, the Court reaffirmed both *L. Cohen Grocery* and *Nash* despite their apparent incompatibility.[105]

One assumes that the Justices have been, well, vague about vagueness because they understand that precise laws are difficult to write. Language is necessarily imprecise.[106] Overly precise laws permit would-be criminals to circumvent the law.[107] And, as the Court observed in *Schall v. Martin*, the law often requires judgment calls, and the factors that are necessary to make such judgments "cannot be readily codified."[108] But whatever the reason, because the vagueness doctrine has not developed as a predictable standard, it is a very limited tool to restrict imprecise laws.

Even if the courts were to develop a more precise standard for when a law is vague, the vagueness doctrine would not be able to solve the problem of overly broad or overly punitive laws. The vagueness doctrine prohibits only imprecise laws; it does not place limits on precisely worded laws that sweep in large amounts of seemingly innocuous conduct or on laws that impose harsh punishments. To be sure, the enforcement of overly broad laws raises some of the same problems as vague laws.[109] Indeed, the Supreme Court has recognized that "the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse."[110] But the Court has

103. Nash v. United States, 229 U.S. 373 (1913); *see also* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933) (applying the rule of reason to the Sherman Act); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911) (same); Note, *Potential Restraint of Trade Under the Sherman Anti-Trust Act*, 2 VA. L. REV. 140, 142 (1914) (describing how the Court "firmly and finally established" the "rule of reason" in its antitrust cases).

104. *Nash*, 229 U.S. at 377–78.

105. *Compare* Johnson v. United States, 135 S. Ct. 2551, 2561 (2015) ("[W]e have deemed a law prohibiting grocers from charging an 'unjust or unreasonable rate' void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. . . . These decisions refute any suggestion that the existence of *some* obviously risky crimes establishes the residual clause's constitutionality." (citing *L. Cohen Grocery Co.*, 255 U.S. at 89)), *with id.* ("As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct; 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'" (quoting *Nash*, 229 U.S. at 377)).

106. *E.g.*, Robinson v. United States, 324 U.S. 282, 286 (1945) ("In most English words and phrases there lurk uncertainties.").

107. *See* Buell, *supra* note 37, at 1507–12.

108. Schall v. Martin, 467 U.S. 253, 278–80 (1984). This may explain why the Supreme Court recently indicated that qualitative standards, standing alone, are not enough to render a statute unconstitutionally vague. *Johnson*, 135 S. Ct. at 2561.

109. *See* Hessick, *supra* note 15, at 1152–62 (making this argument in detail).

110. Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978).

limited the vagueness doctrine to statutes that are vague as written, rather than as applied.[111]

Finally, there may be practical reasons why the Court has not developed a robust vagueness doctrine. The remedy for a successful vagueness challenge is the invalidation of a statute—a remedy that runs counter to the principles of judicial self-restraint.[112] As others have explained, courts will sometimes narrow the substance of a right in order to avoid awarding a substantial remedy.[113] Thus, it is possible that the courts have failed to develop a robust vagueness doctrine—and will fail to do so in the future—in order to avoid striking down a large number of statutes.

3. The Overbreadth Doctrine

At one point, the Supreme Court appeared poised to place substantive limits on the legislature's ability to enact broad criminal laws—in particular laws that swept in blameless everyday activity. Early drafts of Justice Douglas's opinion in *Papachristou v. City of Jacksonville*[114] argued that the Ninth Amendment's catchall limitation on government power[115] created an individual right to walk, stroll, and loaf; and, if such rights existed, then laws infringing on such rights were subject to strict scrutiny.[116]

But *Papachristou* was ultimately decided on vagueness grounds, and the modern view is that the legislature is (and ought to be) the primary decisionmaker about the scope of criminal law.[117] Legislatures decide which

111. *See* Hessick, *supra* note 15, at 1153–54.

112. *Cf. Johnson*, 135 S. Ct. at 2567–70 (Thomas, J., concurring in the judgment) (questioning the validity of the vagueness doctrine in part based on whether the Constitution gives the courts the power "to nullify statutes on that ground").

113. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–85 (1999).

114. 405 U.S. 156 (1972).

115. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

116. Risa L. Goluboff, Essay, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1365–66, 1376–77 (2010) (describing Draft Opinion, Papachristou v. City of Jacksonville, No. 70-5030 (Dec. 28, 1971) (Douglas Papers, Box 1558)).

117. *See, e.g.*, Jones v. Thomas, 491 U.S. 376, 381 (1989) (noting that "the substantive power to define crimes and prescribe punishments" lies with the "legislative branch of government"); Liparota v. United States, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."); *see also* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594 (1995) ("Our legal culture's understanding of the link between statutory interpretation and democratic theory verges on the canonical and is embodied in the principle of 'legislative supremacy.'"). That is not to say that the legislature is the only decisionmaker. Historically, judges were the institution that defined most crimes and defenses. *See* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.1 (2d ed. 2003) (noting that "the substantive criminal law

conduct to criminalize, and there are only modest limits on this legislative power. Laws that infringe on the clearly established constitutional rights of individuals are prohibited.[118] But there is no limit on how much unprotected behavior can be criminalized. Consequently, legislatures have been able to pass criminal laws that sweep in conduct that is unremarkable or morally blameless. The proliferation of such laws is often referred to as "overcriminalization."[119]

To be sure, the Court has adopted an overbreadth doctrine, but that doctrine is quite limited. The overbreadth doctrine applies only in a small number of contexts, such as when criminal laws sweep so broadly as to include conduct that is protected by the First Amendment.[120] The legislative dysfunction described above only rarely results in laws that implicate conduct protected by the First Amendment. Thus, the overbreadth doctrine is simply not a viable tool to check that dysfunction.

4. Prohibitions on Excessive Punishment

The Eighth Amendment of the Constitution prohibits "excessive bail," "excessive fines," and "cruel and unusual punishment."[121] Although the constitutional text speaks in terms of "cruel and unusual punishment," rather than "excessive punishment," the courts have read the Amendment to limit excessive punishment as well. In particular, the Supreme Court has said that

began as common law for the most part, and only later became primarily statutory"). And judges retain at least some of that power today. *See* Hessick, *supra* note 1, at 980–87.

118. Some of the most well-known constitutional law cases were challenges to criminal laws. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (holding unconstitutional a state law that criminalized interracial marriages); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding it unconstitutional to prohibit the dispensation of contraception to married persons despite a state law that imposed a fine and at least sixty days imprisonment for using contraception).

119. Hopwood, *supra* note 1, at 699 n.24.

120. *See* Sabri v. United States, 541 U.S. 600, 609–10 (2004) (cataloguing the "relatively few settings" in which the Court has "relax[ed] familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand"); Massachusetts v. Oakes, 491 U.S. 576, 581 (1989) (noting "the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others"); Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217, 219–20 (1912) (refusing to entertain an overbreadth argument that a statute would be unconstitutional if applied in different circumstances not presented by the instant case); *see also* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 859–60 (1991) ("Outside the First Amendment context . . . . absent a relationship that makes the actual enjoyment of rights by a third party dependent on a challenger's capacity to assert those rights, one party may not escape the application of a statute on the ground that it would be unconstitutional as applied to someone else." (footnote omitted)).

121. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

a punishment violates the Eighth Amendment if it is disproportionate to the defendant's crime.[122]

Importantly, the Court has adopted different standards of disproportionality for different types of punishment.[123] The Justices have closely monitored whether death penalty sentences are disproportionate.[124] More recently, they have also conducted searching review in cases involving life-without-parole sentences for juveniles.[125] But for adult sentences of incarceration, the Court has all but abdicated its judicial review function. The Court has said that an adult's sentence of incarceration is permitted by the Eighth Amendment as long as the government "has a reasonable basis for believing" that the sentence "advance[s] the goals of [its] criminal justice system in any substantial way."[126] This test is essentially low-level rational-basis review.[127]

Given the test that the Court has adopted, it is entirely unsurprising that it has almost never held an adult sentence of incarceration to be unconstitutional.[128] Unless and until the Court decides to adopt a different doctrinal test, the Eighth Amendment will not serve as a check on overly punitive laws.[129]

II. CLEAR STATEMENT RULES AS A SOLUTION FOR DYSFUNCTION

Current doctrine has proven ineffective at addressing the legislative dysfunction associated with criminal law. But an existing doctrinal tool—if it were extended—could help to ameliorate the dysfunction. In particular, if

122. *See, e.g.*, Weems v. United States, 217 U.S. 349, 367 (1910) (noting the basic "precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense").

123. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1155–62 (2009) (documenting how the Supreme Court's proportionality review is more robust in capital cases than in non-capital cases).

124. *E.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008); Roper v. Simmons, 543 U.S. 551 (2005).

125. *See* Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010).

126. Ewing v. California, 538 U.S. 11, 28 (2003) (alterations in original) (quoting Solem v. Helm, 463 U.S. 277, 297 n.22 (1983)).

127. *See* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 741–42 (2005) (suggesting that the test is akin to rational basis). It is noteworthy that the Court has adopted this test because it runs counter to the general principle that claims of individual rights violations must be protected by something more than rational basis review. *E.g.*, District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008).

128. "There has been only a single case in the Court's history in which a term of incarceration, standing alone, was held to be disproportionate to an otherwise validly defined crime." Barkow, *supra* note 123, at 1160 (referring to *Solem v. Helm*, in which the Court rejected as unconstitutional a mandatory life sentence without the possibility for parole for a defendant who had six prior non-violent felonies and who wrote a "no-account" check for $100).

129. *See, e.g.*, State v. Berger, 134 P.3d 378 (Ariz. 2006) (rejecting an Eighth Amendment challenge to a two-hundred-year sentence for possession of child pornography).

new clear statement rules were adopted to vindicate criminal justice values, then legislatures would be forced to speak more clearly and to internalize more fully the political costs associated with their decisions to increase the scope of criminal law. And, to the extent legislatures failed to speak clearly, then courts would interpret criminal laws in a less punitive fashion.

This Section describes how clear statement rules currently operate and explains why courts should develop additional clear statement rules that protect important criminal justice values. To be clear, we are not attempting to justify, in the abstract, the use of clear statement rules in statutory interpretation. For one thing, others have already offered such justifications.[130] For another, courts routinely use clear statements to vindicate other values.[131] Indeed, courts have used clear statement rules to interpret criminal statutes when those statutes implicate the other, non-criminal justice values protected by existing clear statement rules.[132] Our argument is simply that, in light of the fact that we already use clear statement rules in the interpretation of statutes, we should adopt additional clear statement rules to counteract the legislative dysfunction that plagues criminal law.

A. Clear Statement Rules Generally

A clear statement rule is a particularly strong presumption that applies during statutory interpretation.[133] A clear statement rule presumes that a statute does not infringe on a particular value unless the legislature has affirmatively and clearly stated that it intends to do so.[134] There are many individual clear statement rules that operate in various areas. For example, the Supreme Court has adopted a number of federalism clear statement

130. *See, e.g.*, David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 958–59 (1992); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000).

131. *See* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1542–48 (1998) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)) (documenting a large number of cases decided between 1987 and 1994 in which a wide variety of substantive canons, including clear statement rules, were invoked). *But see* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 855–59 (2017) (documenting far fewer cases invoking a smaller number of substantive canons during the first six and a half terms of the Roberts Court).

132. *E.g.*, Bond v. United States, 572 U.S. 844, 858 (2014).

133. Eskridge & Frickey, *supra* note 20, at 595 n.4 (distinguishing between clear statement rules, super-strong clear statement rules, and less strong presumptions in statutory interpretation).

134. *See, e.g.*, John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 401–02 (2010); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457–58 (1989).

rules.[135] Those rules include the rule against congressional waiver of states' Eleventh Amendment immunity from suit in federal court and the rule against congressional regulation of core state functions.[136] When interpreting federal statutes that affect the states, the courts use these specific clear statement rules in order to preserve the balance of state and federal power. For example, courts will not interpret a statute to subject a state to suit in the federal courts unless the statute specifically says so.[137]

The term "clear statement rule" has sometimes been used to refer to a presumption that can be overcome relatively easily. But we are using the term "clear statement rule" to refer to what others have called "super-strong clear statement rules"—namely "very strong presumptions of statutory meaning that can be rebutted only through unambiguous statutory text targeted at the specific problem."[138] Put differently, as we use the term, a "clear statement rule" would require a particular outcome unless a statute affirmatively and clearly required the opposite result.[139]

Clear statement rules have a long history in American jurisprudence. Take, for example, the rule against retroactive application of civil statutes.[140] The Constitution prohibits both Congress and the states from passing retroactive criminal laws; but that prohibition does not extend to civil laws.[141] Nonetheless, courts will not apply a civil statute retroactively

135. Elizabeth Garrett, *Step One of* Chevron v. Natural Resources Defense Council, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 55, 74 (John Fitzgerald Duffy & Michael Herz eds., 2005); Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1968–73 (1994) [hereinafter Note, *Clear Statement Rules*].

136. *See* Eskridge & Frickey, *supra* note 20, at 619–29 (grouping together these clear statement rules with others as "federalism canons").

137. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000); Dellmuth v. Muth, 491 U.S. 223, 228 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

138. Eskridge & Frickey, *supra* note 20, at 611–12; *see also* Krishnakumar, *supra* note 131, at 835 (contrasting presumptions and clear statement rules).

139. *See* Garrett, *supra* note 135, at 73 (contrasting clear statement rules, which "require a textual statement to defeat them," from "[o]ther canons of construction . . . [that] can be overcome by specific evidence in the text or legislative history"); Shapiro, *supra* note 130, at 940 (stating that "clear statement rules are akin to 'presumptions' or 'tie-breakers,' but go one step further" because they "embody the view that the legislature can achieve a particular result only by *explicit* statement").

140. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 268–73 (1994). *But see* Garrett, *supra* note 135, at 73 (stating that the rule against retroactive application of statutes is not a clear statement rule, but rather a canon of construction which can be overcome (at least in some cases) by legislative history, rather than requiring a statement in the text of legislation).

141. U.S. CONST. art. I § 9, cl. 3 (prohibiting Congress from passing *ex post facto* laws); *id.* art. I, § 10, cl. 1 (prohibiting the states from passing *ex post facto* laws); *see* Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 NEV. L.J. 63, 66–68 (2013) (noting that the *ex post facto* clauses are not textually limited to criminal, as compared to civil laws, but that they have nonetheless been consistently interpreted in that fashion).

unless the legislature "made clear its intent."[142] As early as 1806, the Supreme Court refused to give retroactive effect to a civil statute that did not include "clear, strong, and imperative" language requiring retroactive application.[143]

Clear statement rules diverge from other contemporary approaches to statutory interpretation.[144] The two leading schools of statutory interpretation are textualism and purposivism.[145] Textualism tells judges that they must interpret statutes based solely on the words in the statute. It also tells them to interpret those words based on how an ordinary or reasonable listener would understand them.[146] Purposivism, in contrast, instructs judges to interpret a statute based on the legislature's purpose for enactment, even if that purpose is not necessarily reflected in the text of the statute.[147] Clear statement rules do not seek to determine the meaning of a statute based on either a hypothetical reasonable listener or the purpose of lawmakers. Instead, clear statement rules create a substantive bias in favor of a particular interpretive outcome—a bias that can be overcome only if the legislature includes an affirmative, unambiguous statement indicating that it intended the opposite result.

Take, for example, the clear statement rule against federal regulation of core state functions.[148] Although Congress clearly has the authority to preempt state policies,[149] the courts will presume that federal legislation does not preempt state law in areas traditionally regulated by the states

142. *Landgraf*, 511 U.S. at 270. There was, in the early days of the Republic, disagreement about whether the *ex post facto* clauses extended to civil statutes as well. *See* Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KY. L.J. 323, 327–33 (1992) (collecting sources). But the clauses were, even in early cases, interpreted to extend only to criminal cases. *See* Usman, *supra* note 141, at 66–68.

143. United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806) (opinion of Paterson, J.).

144. *See* Barrett, *supra* note 64, at 121–25; Note, *Clear Statement Rules*, *supra* note 135, at 1959–60.

145. *See* Barrett, *supra* note 64, at 112; *see also* Richard H. Fallon, Jr, *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1237 (2015) ("Prominent competing theories of statutory interpretation include textualism, legislative intentionalism, and purposivism.").

146. *See, e.g.*, SCALIA, *supra* note 131, at 17; Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988).

147. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1118–26 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

148. *See* Eskridge & Frickey, *supra* note 20, at 623–25.

149. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

unless Congress explicitly says otherwise.[150] Thus, in *Gregory v. Ashcroft*,[151] the Supreme Court refused to apply the Federal Age Discrimination in Employment Act (ADEA) to prevent Missouri from requiring its judges to retire by age seventy. The ADEA explicitly included the states as employers,[152] but it exempted some state officials. The Court conceded that a straightforward reading of the statutory exemption did not extend it to judges.[153] (In other words, the most sensible reading of the statute would prohibit Missouri's mandatory retirement age for judges.) But the Court nonetheless upheld the mandatory retirement age for judges, stating: "We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*."[154]

Clear statement rules differ not only from these general approaches to statutory interpretation, but also from the specialized doctrines that apply to the interpretation of criminal statutes. The rule of lenity—especially the modern version—provides an example. Lenity tells judges that they should resolve ambiguity in criminal statutes in favor of defendants.[155] In that respect, one might argue that lenity is a type of clear statement rule: if the legislature does not clearly indicate that particular behavior is illegal, then the courts will presume that conduct is permitted. Indeed, commenters have sometimes grouped together clear statement rules, lenity, and other substantive canons of construction in their discussions of statutory interpretation.[156] But the modern rule of lenity is a tool of last resort; courts will employ it only if all other interpretive tools have been exhausted.[157] In

150. Michael P. Lee, *How Clear is "Clear"?: A Lenient Interpretation of the* Gregory v. Ashcroft *Clear Statement Rule*, 65 U. CHI. L. REV. 255, 255–56 (1998).

151. 501 U.S. 452 (1991).

152. *Id.* at 456 (citing 29 U.S.C. § 630(b)(2) (2012)).

153. *Id.* at 466–67 (stating that the language of the statutory exemption "is an odd way for Congress to exclude judges").

154. *Id.* at 467.

155. *See, e.g.*, United States v. Bass, 404 U.S. 336, 347 (1971); Rewis v. United States, 401 U.S. 808, 812 (1971).

156. *E.g.*, Eskridge & Frickey, *supra* note 20, at 598–611 (grouping the rule of lenity together with traditional clear statement rules and other constitutionally-based presumptions); Sunstein, *supra* note 134, at 471 (characterizing the rule of lenity as one example of "a clear-statement principle in favor of the 'rule of law': a system in which legal rules exist, are clear rather than vague, do not apply retroactively, operate in the world as they do in the books, and do not contradict each other"); *see also* Shapiro, *supra* note 130, at 925 (rejecting distinctions between so-called linguistic canons, including the "much maligned canon that statutes in derogation of the common law should be strictly construed, the more sympathetically viewed rule of lenity, the presumption against implied repeal, and virtually all of the recently strengthened 'clear-statement' rules articulated by the Supreme Court").

157. *See* Moskal v. United States, 498 U.S. 103, 108 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980))); *Bass*, 404 U.S. at 347 (stating that a court should rely on lenity only if, "[a]fter 'seiz[ing] every thing from which aid can be derived,'" it is "left with an

contrast, clear statement rules are a tool of first resort. Courts will employ a clear statement rule at the beginning of the interpretive process—the stage at which they are deciding on the "plain meaning" of statutory language.[158]

The rule of lenity also differs from clear statement rules with respect to specificity. Lenity applies whenever a statute is ambiguous. Legislatures are unable to anticipate the multitude of factual situations that will arise in the future, and thus they cannot always clearly indicate how their statute ought to be applied in all of those future situations. In other words, legislatures do not know whether the statutory language they choose will later be deemed ambiguous. In contrast, clear statement rules identify specific questions of statutory construction and tell legislators that courts will interpret those questions a particular way unless the statute includes a clear statement to the contrary.

Clear statement rules have been the subject of academic debate.[159] While some have defended the practice or even called for their expansion,[160] others have voiced concerns about clear statement rules.[161] One major criticism of clear statement rules is that they allow the judiciary to intrude on the domain of the legislature when they elevate one value above others.[162] For example, many of the federalism clear statement rules prioritize the ability of states to set local policy above the interest of the federal government in promoting uniform policy across states.[163] The reconciliation of conflicting values, so the argument goes, is a matter for the legislature, not the courts.[164] And when the courts use a clear statement rule to choose between competing values, they are arguably acting in a countermajoritarian fashion.[165]

Some have responded that this competing values critique is less persuasive when the values that the courts choose to elevate through clear

ambiguous statute" (quoting United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805))); *see also* Ortner, *supra* note 69, at 106–20 (tracing the decreasing force of lenity in court opinions); Price, *supra* note 66, at 891 (noting that prevailing doctrine "ranks lenity dead last in the interpretive hierarchy").

158. *See* Garrett, *supra* note 135, at 74 ("Generally, courts use substantive canons, including the clear statement rules, at [*Chevron*] step one to determine the extent to which statutory meaning is clear.").

159. *See* Krishnakumar, *supra* note 131, at 835–39 (collecting sources).

160. *E.g.*, Sunstein, *supra* note 130; Young, *supra* note 130.

161. *E.g.*, Barrett, *supra* note 64; Eskridge & Frickey, *supra* note 20; Manning, *supra* note 134.

162. In this respect, the arguments against clear statements fall within a broader trope of arguments in favor of "judicial minimalism" or "judicial restraint," in which a court ought to "limit its interpretive work to a fairly mechanical retrieval of legislative meaning" and thus "permit majorities to identify and evaluate policy choices made by elected officials and to keep such choices uncluttered by judicial policymaking that masquerades as interpretation." Schacter, *supra* note 117, at 597.

163. It also sets the policies chosen by states above the particular policies that the federal government chooses to promote.

164. Manning, *supra* note 134, at 426.

165. Eskridge & Frickey, *supra* note 20, at 637.

statement rules are grounded in the Constitution.[166] After all, countermajoritarianism is necessary when majorities would act contrary to the Constitution.[167] But, as John Manning has countered, the Constitution does not merely enshrine certain principles in abstract terms; instead the text of the Constitution itself represents a compromise. So, in Manning's view, efforts to elevate some of the principles behind those compromises through clear statement rules is misguided because "the Constitution does not adopt values in the abstract."[168]

Despite these criticisms, clear statement rules have proven to be quite popular in recent decades.[169] And, as we explain below, they are a promising means of mitigating legislative dysfunction in criminal lawmaking.

B. Criminal Clear Statement Rules

Just as the courts have developed clear statement rules to protect important values such as federalism and the separation of powers, so too should they adopt clear statement rules to protect important criminal justice values. In addition to protecting those values, clear statement rules will soften the effects of the legislative dysfunction we described above.[170] Clear statement rules would force legislatures to speak explicitly and unambiguously if they wanted to enact criminal laws that implicate various constitutional or common law rights. Otherwise, their statutes will be interpreted in a way that is more protective of individual liberty.

This Section makes the affirmative case for criminal clear statement rules. It identifies the many ways in which criminal clear statement rules are consistent with the substance and the structure of the Constitution. It explains how criminal clear statement rules can provide a counterweight to the current punitive dysfunction in the legislatures while maintaining an appropriate balance of power between the courts and the legislative branch.

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166. Young, *supra* note 130, at 1591–94.

167. As Alexander Hamilton noted in the Federalist Papers:

> From a body which had had even a partial agency in passing bad laws we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to operate in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators would be disposed to repair the breach in the character of judges. . . .
>
> These considerations teach us to applaud the wisdom of those States who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men.

THE FEDERALIST NO. 81, at 483–84 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

168. Manning, *supra* note 134, at 428–32.

169. Eskridge & Frickey, *supra* note 20, at 619–28. *But see* Krishnakumar, *supra* note 131, at 847–59 (documenting a relatively low number of Roberts Court cases employing clear statement rules).

170. *See supra* Part I.A.

It argues that criminal clear statement rules allow judges to interpret statutes narrowly while providing political insulation for those decisions. And it also gives more detail about how criminal clear statement rules would operate in practice.

1. Identifying Criminal Justice Values

Because clear statement rules elevate some values over others,[171] it is important to identify the values that would form the basis of criminal clear statement rules. Some have suggested that clear statement rules ought to be grounded in the Constitution.[172] And courts have often justified clear statement rules by explaining how the rule furthers values protected elsewhere in the Constitution.[173] Ample constitutional text exists to warrant clear statement rules in the area of criminal law. But explicit constitutional guarantees should not be the only basis for clear statement rules; values from the common law or historical practice can also serve as the basis for criminal clear statement rules.

The Constitution clearly values protecting criminal defendants from state power, as well as protecting liberty more generally. It contains a number of explicit protections for criminal defendants: it secures the writ of habeas corpus,[174] protects against *ex post facto* laws,[175] secures the right to a trial by jury,[176] secures the right to be free from unreasonable searches and seizures,[177] secures the right to a grand jury indictment,[178] protects against double jeopardy,[179] provides for the due process of law,[180] secures the right to a local and public trial,[181] secures the right to confrontation,[182] provides for the right of compulsory process,[183] secures the right to counsel,[184] and

171. *See supra* notes 162–168 and accompanying text.
172. *See* Young, *supra* note 130, at 1591–94; *see also* Garrett, *supra* note 135, at 74 (stating that clear statement rules "must be justified by convincing reasons rooted in the Constitution or a theory of democratic governance").
173. *E.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) (justifying a clear statement rule against the retroactive application of civil statutes by reference to "the antiretroactivity principle [which] finds expression in several provisions of our Constitution").
174. U.S. CONST. art. I, § 9, cl. 2.
175. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1.
176. U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI.
177. U.S. CONST. amend. IV.
178. U.S. CONST. amend. V.
179. *Id.*
180. U.S. CONST. amends. V, XIV.
181. U.S. CONST. amend. VI.
182. *Id.*
183. *Id.*
184. *Id.*

protects against excessive bail, excessive fines, and cruel and unusual punishment.[185]

The Constitution also—both explicitly and through its structure—protects personal liberty. The Preamble states that the Constitution is meant to "secure the Blessings of Liberty to ourselves and our Posterity."[186] The Preamble to the Bill of Rights states that the amendments were being added because delegates at a number of state conventions adopting the Constitution "expressed a desire, in order to prevent misconstruction or abuse of [the government's] powers, that further declaratory and restrictive clauses should be added."[187] The Ninth Amendment makes clear that the enumeration of rights in the Constitution "shall not be construed to deny or disparage others retained by the people."[188] And the major structural features of the Constitution—the separation of powers and federalism—have long been explained as features that protect individual rights.[189]

To be sure, the Constitution also creates some affirmative power for the government in criminal prosecutions,[190] and Article I plainly contemplates that Congress will use its powers to create criminal laws.[191] But that affirmative power is far more circumscribed than the protections that it affords to individuals. For example, the Constitution assigns to Congress the "Power to declare the Punishment of Treason," but it also places limitations on what that punishment can be, gives an exclusive definition for the crime of treason, and sets a floor for what type of evidence is necessary to establish the crime of treason.[192] In short, it is impossible to read the text of the Constitution and not be left with the distinct impression that those who wrote and ratified it did so, in significant part, in order to protect individuals from government power, in general, and to protect those individuals accused and convicted of crimes, in particular. Thus, an ample constitutional foundation exists for the adoption of clear statement rules to regulate the legislative definition of criminal liability.

185. U.S. CONST. amend. VIII.

186. U.S. CONST. pmbl.

187. U.S. CONST. pmbl. bill of rights, *reprinted in* CONSTITUTION OF THE UNITED STATES AND THE DECLARATION OF INDEPENDENCE, POCKET EDITION 20, 20 (2007).

188. U.S. CONST. amend. IX.

189. *E.g.*, Bond v. United States, 564 U.S. 211, 221 (2011); New York v. United States, 505 U.S. 144, 181 (1992); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677 (2012); Rhett B. Larson, *Interstitial Federalism*, 62 UCLA L. REV. 908, 922 (2015).

190. For example, it creates the power of extradition, U.S. CONST. art. IV, § 2, cl. 2.

191. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 6 (granting Congress the power to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States").

192. U.S. CONST. art. III, § 3.

Importantly, the repeated and cumulative protection of criminal defendants in the Constitution suggests that Manning's Constitution-as-compromise critique of clear statement rules applies with far less force to criminal clear statement rules.[193] Manning articulated his critique in response to clear statements designed to protect the separation of powers and federalism—areas in which the Constitution is more equivocal. It is clear, for example, that the Constitution does not whole-heartedly embrace separated powers.[194] Indeed, it includes multiple instances in which a branch is assigned a power ordinarily reserved for another, such as the power of the Vice President to break congressional ties in the Senate,[195] and the requirement that the President seek the advice and consent of the Senate for treaties and the appointment of executive officers.[196] Nor does the Constitution reliably elevate the interests of the states over the federal government.[197] To the contrary, as the Supremacy Clause demonstrates, the Constitution also explicitly favors federal interests above states' interests.[198] Thus, Manning may well be correct that the Constitution represents a compromise when it comes to issues of separation of powers and federalism. But the Constitution does not express similar ambivalence about individual liberty or the rights of criminal defendants. To the contrary, the document overwhelmingly seeks to protect liberty and criminal defendants. Courts should, thus, construe statutes "in the direction of constitutional policy."[199]

That the Constitution clearly embodies values of individual liberty and the protection of criminal defendants from state power is not the only reason to adopt criminal clear statement rules. As others have noted, many of the existing clear statement rules "protect structural or institutional constitutional norms."[200] We are often told that structural and institutional rights, such as federalism and the separation of powers, are important because they protect individual liberty from government power.[201] If the courts are using clear statement rules to protect structural rights because those structural rights indirectly provide protection to individual liberty, then it should be entirely uncontroversial to use clear statement rules to protect liberty directly.

193. Manning, *supra* note 134, at 428–32; *see also supra* note 168 and accompanying text.

194. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 380 (1989) ("[T]he Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct.").

195. U.S. CONST. art. I, § 3, cl. 4.

196. U.S. CONST. art. II, § 2, cl. 2.

197. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 432 (1819) (stating that "the American people . . . did not design to make their government dependent on the States").

198. U.S. CONST. art. VI, cl. 2.

199. United States v. Johnson, 323 U.S. 273, 276 (1944).

200. Garrett, *supra* note 135, at 74.

201. *See supra* note 189 and accompanying text.

Of course, to say that the Constitution embodies values of individual liberty does not tell us how to operationalize those values and principles in clear statement rules. A general clear statement rule to protect individual liberty would not be meaningfully different than the rule of lenity—at least the rule of lenity as it was originally formulated and employed. Instead, criminal clear statement rules must identify particular issues about which legislatures must speak clearly. This is no different than the current clear statement rules that protect federalism and the separation of powers. There is no general federalism clear statement rule, but rather a series of specific rules, such as the rule against congressional waiver of states' Eleventh Amendment immunity from suit in federal court, and the rule against congressional regulation of core state functions.[202] When interpreting federal statutes that affect the states, courts use these specific clear statement rules in order to preserve the balance of state and federal power.

Specific criminal clear statement rules could be derived from a number of sources. They could be derived from explicit constitutional guarantees. Of course, courts must already protect the values embodied in explicit constitutional guarantees: if a statute runs afoul of the text of the Constitution (or the courts' doctrine interpreting that text), then courts will strike down the legislation. Constitutionally-derived clear statement rules would sweep more broadly than the text or the doctrine. They would protect a broader class of individuals or a broader course of conduct than what the Constitution explicitly protects. That is to say, criminal clear statement rules would create a zone-of-interest around various constitutional rights,[203] and they would require legislators to speak clearly if they intend to encroach on that zone-of-interest.[204]

For example, the courts could create a clear statement rule that protects juveniles from harsh penalties based on the Eighth Amendment's prohibition on cruel and unusual punishments. Current Eighth Amendment doctrine shields persons under eighteen from capital punishment and from

202. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991) (requiring a clear statement authorizing congressional regulation of core state functions); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (requiring a clear congressional waiver of states' Eleventh Amendment immunity from suit).

203. Anthony Amsterdam has suggested that the Court has used the void-for-vagueness doctrine to create zones of interest around certain individual rights during certain periods of time. Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75–80 (1960).

204. To be clear, we are not advocating for an expansion of constitutional rights themselves. Clear statement rules are different than, say, penumbras. *See* Young, *supra* note 130, at 1591–93 (distinguishing substantive canons from penumbras). Clear statement rules do not expand the reach of the Constitution. While they make it more difficult for legislatures to act on issues that come close to, but do not violate, constitutional rights, clear statement rules do not prohibit legislatures from taking such actions.

life-without-parole sentences in some circumstances.[205] A clear statement rule could extend that constitutional protection by making mandatory minimum penalties inapplicable to defendants under the age of eighteen, unless the legislature clearly states otherwise. In its Eighth Amendment cases, the Supreme Court noted that harsh penalties often apply to individuals under the age of eighteen only because of how statutory schemes have been drafted, not because legislators specifically decided to subject minors to those penalties.[206] The hypothetical clear statement rule would require legislatures to specifically state that mandatory minimum penalties apply to those under eighteen, even if those defendants are being tried as adults.

Importantly, the individual rights enshrined in the text of the Constitution should not be the only basis for criminal clear statement rules.[207] In creating federalism clear statement rules and separation of powers clear statement rules, the courts have not limited themselves to the text of the Constitution. They have also looked to tradition and historical practice. For example, the Court has developed a presumption against divesting the judiciary of its traditional equity power.[208] This presumption was not derived from specific text in the Constitution, but rather from practice and the vague reference to "judicial power" in Article III.[209]

The language in the Due Process Clause similarly supports the use of the common law and historical practice as bases for clear statement rules. The Due Process Clause is understood to protect "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[210] Common-law-based clear statement rules can also be based on the long tradition of construing statutes against the backdrop of the common law.[211]

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205. *See* Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012); Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

206. *See, e.g.*, *Graham*, 560 U.S. at 66–67 (recognizing that harsh penalties applying to individuals under the age of eighteen appear to be unintended byproducts of statutory schemes rather than the intended consequences of legislative action).

207. *Cf.* Shapiro, *supra* note 130, at 946 ("This notion of giving what might be called sub-constitutional or extra-constitutional protection to certain rights and interests has long had a pervasive impact on the thinking of judges.").

208. *E.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991).

209. *See* Eskridge & Frickey, *supra* note 20, at 605, 607–08.

210. Speiser v. Randall, 357 U.S. 513, 523 (1958) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)); *see also* Leland v. Oregon, 343 U.S. 790, 798 (1952).

211. *E.g.*, Neder v. United States, 527 U.S. 1, 21 (1999) ("It is a 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.'" (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992))); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (stating that "where a common-law principle is well established, . . . the courts may take it as given that Congress has

The courts have a long history of reading the Due Process Clause in this fashion. For example, neither the burden of proof beyond a reasonable doubt nor the requirement that the government bear that burden appear in the text of the Constitution. And yet the courts have not permitted the states to do away with these protections.[212] The Court will forbid the states from taking an action that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[213]

But the Supreme Court has been hesitant to incorporate many common law principles via the Due Process Clause. It has characterized the showing that a principle is "so rooted in the traditions and conscience of our people as to be ranked as fundamental" as a heavy burden.[214] And it has stated that due process requires that only the most basic safeguards be observed.[215] This hesitance stems, at least in part, from the Court's unwillingness to remove the ability of legislatures to experiment with other criminal justice rules and procedures.[216] As a consequence, there are many common law principles with deep historical roots that have not been employed to cabin legislative dysfunction. Criminal clear statement rules would allow the courts to vindicate those principles without completely removing the ability of legislatures to experiment and set other criminal justice priorities. Legislatures would have to speak clearly and affirmatively if they wanted to act counter to those principles, but they would retain the power to do so.

2. Justifying Criminal Clear Statement Rules

An obvious reason to adopt criminal clear statement rules is that they would provide a counterweight to the legislative dysfunction associated with modern criminal law. As we explain in Part I, legislatures often respond to well-publicized crimes with hastily written criminal legislation. That legislation often fails to clarify important questions, such as the required mental state, and it often sweeps more broadly to include more conduct than the situation would appear to warrant. As a result, our criminal

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legislated with an expectation that the principle will apply"); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense . . . ."); *see also* 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 76 (2d ed. 1858) (stating that "we are to construe statutes according to the rules and reasons of the common law").

212. *E.g.*, Sandstrom v. Montana, 442 U.S. 510 (1979); *In re* Winship, 397 U.S. 358 (1970).

213. *Speiser*, 357 U.S. at 523 (quoting *Snyder*, 291 U.S. at 105).

214. Clark v. Arizona, 548 U.S. 735, 748–49 (2006) (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

215. *Patterson*, 432 U.S. at 210.

216. *See id.* at 207–08 (noting that the challenged law was part of a revision undertaken by the state to make its criminal code less draconian).

codes are littered with ambiguous and overly broad criminal laws. And, because our system relies so heavily on prosecutorial discretion, legislators can shift the blame for any unpopular prosecution, rather than being held responsible for their failure to write an appropriately specific and narrow statute in the first instance.

Criminal clear statement rules could counteract some of these tendencies. They would force legislatures to address explicitly the issues that are subject to clear statement rules.[217] If legislatures failed to specifically address an issue associated with a clear statement rule, then that issue would be resolved in favor of the more narrow, liberty-enhancing construction. And if legislators did explicitly address the issue, and if they opted for a statute that is less protective of liberty, then they would have to deal with the political ramifications associated with that decision.

Clear statement rules are likely to be particularly effective at protecting otherwise sympathetic defendants or conduct. Take, for example, the recent changes that Congress made to federal child pornography laws.[218] Some protested that the new statute did not exempt minors from the fifteen-year mandatory minimum penalty, and thus the statute could be triggered by a teenager who attempted to send a sexually explicit photo of him- or herself to a peer.[219] Legislators did not bother to defend the application of such a penalty to minors; instead they simply ignored the concern and voted for the generally applicable language.

Now imagine that the juvenile clear statement rule— that mandatory minimum penalties do not apply to juveniles, even if being tried as adults— had been in effect.[220] Courts would interpret Congress's failure to address juveniles in the statute as excluding everyone under eighteen from those penalties. If members of Congress had wanted to overcome that clear statement rule, its proponents would have to explicitly endorse an application of the law's harsh penalties to juveniles, forcing them to grapple with the fact that the law could be used to prosecute the very children it was supposed to protect.[221] One suspects that many legislators would not have been willing to vote in favor of language that specifically targeted minors.

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217. *See* Garrett, *supra* note 135, at 74 (stating that a clear statement rule "ensures that certain sensitive decisions are made explicitly and transparently by the most democratically accountable branch, the legislature").

218. Protecting Against Child Exploitation Act of 2017, H.R. 1761, 115th Cong. (2017).

219. *See* Janet Burns, *House Passes Bill That Could Have Teens Facing 15 Years for Trying to Sext*, FORBES (June 2, 2017, 1:23 PM), https://www.forbes.com/sites/janetwburns/2017/06/02/house-passes-bill-that-could-jail-teens-15-years-for-sexting/#69e501b04cf6 [https://perma.cc/J237-BHMX].

220. *See supra* text accompanying notes 205–206.

221. At present, most jurisdictions do not exempt minors from their child pornography laws. *See* Carissa Byrne Hessick & Judith M. Stinson, *Juveniles, Sex Offenses, and the Scope of Substantive Law*, 46 TEX. TECH L. REV. 5, 27–28 (2013).

Minors are a sympathetic group, and so there are political costs of treating young people harshly. Lawmakers who affirmatively wanted to impose those mandatory minimum penalties on minors would have to expend political capital to obtain majority support for legislation that explicitly punished the very group it was designed to protect.

One might object to criminal clear statement rules on the grounds that determining the content of the criminal laws is a legislative, rather than a judicial, power.[222] But the fact that legislatures have the power to determine the content of criminal laws does not tell us criminal clear statement rules are inappropriate. Indeed, the argument that judges must be careful not to encroach on the power of the legislature to write the laws ignores the long history—both in this country and in England—of judges taking an active role in interpreting criminal laws.[223] Until relatively recently, judges were widely understood to have a significant role to play in shaping the content of the criminal law.[224] The mere fact that the legislature had enacted a criminal statute did not settle the scope of criminal law.[225] Instead, judges saw their role as reining in legislatures when their statutes departed too far from the criminal common law.[226]

History also contains multiple examples of courts narrowing criminal liability in response to excessively punitive behavior by other criminal justice actors. For example, the rule of lenity grew out of the extremely harsh laws of seventeenth-century England.[227] Because so many felony offenses carried an automatic sentence of death, judges adopted the "practice of construing all penal statutes as strictly as possible to avoid hanging those who did not deserve it."[228] The benefit of clergy provides a similar example. The benefit of clergy was "[o]riginally introduced to keep the royal courts from exercising jurisdiction over clerics charged with

222. *See* United States v. Bass, 404 U.S. 336, 348 (1971) ("[L]egislatures and not courts should define criminal activity."); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("[T]he plain principle [is] 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.").

223. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1005, 1008–09, 1024–25 (2001).

224. *See* Hessick, *supra* note 1, at 979–81.

225. *E.g.*, BISHOP, *supra* note 211, §§ 91, 114 (discussing how to interpret overlapping statutes and statutes "in derogation of common law").

226. *See* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 754–56 (1935); *see generally* Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

227. Hall, *supra* note 226, at 749–51; Solan, *supra* note 64, at 87.

228. Kennedy, *supra* note 1, at 755.

crime."[229] But the benefit of clergy was subsequently extended to people outside of the church as a "device to ameliorate the rigors of a harsh paper criminal code,"[230] and it eventually "evolved into a rule of lenity for all first-time felony offenders."[231] In short, judges have, until recently, been active participants in shaping the content of criminal law and limiting overly punitive tendencies of other government officials.

In any event, clear statement rules do not actually limit legislative power—they simply require legislatures to focus on particular issues and make extra efforts to state their intent.[232] To be sure, courts can use clear statement rules to make the exercise of legislative power more difficult when that power is in tension with other important constitutional values. Crafting laws that contain clear statements takes time and effort. That is why some have referred to clear statement rules as exacting a "clarity tax" from lawmakers.[233] As the clarity tax moniker indicates, clear statement rules make it more costly for legislatures to achieve certain ends. That increased cost is likely to result in fewer laws that encroach on important constitutional values.[234] But clear statement rules do not actually prevent legislatures from enacting such laws.

Importantly, in assessing whether clear statement rules provide an appropriate balance of power between the legislature and the courts, we should not lose sight of how much the legislature has failed in its responsibility to write the criminal laws. When people say that it is the job of the legislature to write the criminal law, that argument conjures up the image of lawmakers writing discrete, clearly-worded criminal statutes.[235] But, as we explained in Part I, that is not the case. Instead, legislatures often have passed overly broad and imprecise statutes.

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229. Richard B. Morris, *Benefit of Clergy in America and Related Matters*, 105 U. PA. L. REV. 436, 436 (1957) (book review); *see also* Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 B.Y.U. L. REV. 1099, 1122–26 (tracing the benefit of clergy to the backlash following the murder of Archbishop Thomas Becket during the reign of Henry II).

230. Morris, *supra* note 229, at 436.

231. Hamilton, *supra* note 229, at 1123; *see also* Solan, *supra* note 64, at 87.

232. Garrett, *supra* note 135, at 73.

233. Manning, *supra* note 134, at 425–27; *see also* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 11–16, 40 (2008).

234. *See* Garrett, *supra* note 135, at 73 (noting that "the amount of legislation intruding on areas of constitutional concern should decline" when clear statement rules are employed). More generally, there is evidence that rules which create defaults, but do not otherwise constrain choices, are very effective in changing behavior. *See, e.g.*, Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 5 (2013) ("For retirement savings, automatic enrollment appears to have a far larger effect than even substantial tax incentives . . . .").

235. Hessick, *supra* note 1, at 992–93 ("When we speak of criminal statutes, we often assume that the statute is written in specific rather than general terms, and we also assume that the statutes are written to target only particular harmful behavior.").

As these overly broad and imprecise laws illustrate, the countermajoritarian critique of clear statement rules applies with less force in the context of criminal laws. The countermajoritarian critique "treats as uncontroversial the 'democratic' character of the legislative process as currently constituted. In other words, once a statute is enacted and comes to the court for interpretation, the democratic pedigree of the legislative process that produced the statute goes unchallenged and unscrutinized."[236] But there are many reasons to challenge the "democratic pedigree" of criminal laws. Legislatures fail to do the hard work associated with crafting clearly and narrowly worded statutes that balance the need for public safety and the need to protect liberty. Instead, they leave it to prosecutors (and, to a lesser extent, judges) to determine what is legal or illegal.[237]

Criminal clear statement rules would help society deal with these imprecise and overly broad statutes. They would give notice to both citizens and the legislature as to how imprecise statutes would be interpreted. Individuals who might otherwise have to decide whether to risk having an imprecise statute interpreted against them will be able to rely on clear language (or the absence thereof) in determining whether their conduct falls within a statute. Clear statement rules would also provide legislatures with better information about what is required to achieve a certain result. If legislators know that a statute will be interpreted in a particular fashion unless they say otherwise, they will be able to make better *ex ante* decisions about what language to choose in order to criminalize certain types of behavior.[238]

Criminal clear statement rules would provide more certainty and predictability than the rule of lenity or the vagueness doctrine—both in terms of when they apply and in terms of how a judge will interpret a statute. Lenity and vagueness have been inconsistently applied because it is unclear when a statute is sufficiently ambiguous or sufficiently vague for the doctrines to apply.[239] In contrast, clear statement rules have a well-defined trigger—the clear statement rule flags a particular issue, such as whether a mandatory minimum penalty applies to juveniles. And unlike the rule of lenity—which tells judges only that they must construe an ambiguous

236. Schacter, *supra* note 117, at 597.

237. One might argue that prosecutors are better situated to vindicate democratic accountability concerns than are judges. But that argument neglects two important facts—namely that most judges are elected and that prosecutorial decisions are rarely transparent. *See* Hessick, *supra* note 1, at 1001–06.

238. *Cf.* Landgraf v. USI Film Prods., 511 U.S. 244, 273 (1994) (justifying a clear statement rule against retroactive application of civil statutes because it "has the additional virtue of giving legislators a predictable background rule against which to legislate").

239. *See supra* notes 72–74, 99–105 and accompanying text.

statute in the defendant's favor—clear statement rules dictate more precisely how the judge will interpret the statute.

Because clear statement rules can be applied in a straightforward fashion, they not only provide more guidance for legislators and the general public, but they are also less likely to trigger complaints about judges usurping the legislative role. That is because, unlike lenity and vagueness, there will be less doubt about what a legislature must do to satisfy a clear statement rule. Language is inherently ambiguous,[240] and when courts have rejected vagueness challenges they have sometimes done so on the theory that the legislature could not draft a specific statute that was sufficiently comprehensive to cover every inevitability.[241] In contrast, clear statement rules identify the particular issues about which legislatures must speak clearly.

More generally, clear statement rules could help to ease political pressure on judges. Judges often face political pressure not to issue defense-friendly interpretations of statutes. That pressure is especially intense for elected judges.[242] Clear statement rules might relieve some of that political pressure. For example, clear statement rules could disrupt the common complaint that a judge's pro-defense ruling allowed a dangerous criminal to "go free."[243] Clear statement rules allow judges to place those decisions at the feet of the legislature. That is, a judicial opinion could explain that legislators were on notice and, if they wanted to intrude upon this particular constitutional principle or historical value, then they needed to do so explicitly and unambiguously. In this way, clear statement rules would "stop the buck" where it belongs—at the legislature.[244]

This buck-stopping feature of criminal clear statement rules could forestall charges of judicial activism.[245] At present, legislatures are cast as the sole appropriate decisionmaker in substantive criminal law;[246] and any effort by judges to intrude upon the substance of criminal law is decried as

240. *See* Ernst Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437, 438 (1921) ("Every common abstraction has its 'marginal' ambiguity, which mere elaboration of definition cannot altogether remove.").

241. *Cf.* Muscarello v. United States, 524 U.S. 125, 138 (1998) (noting that "most statutes are ambiguous to some degree").

242. *See supra* note 77 and accompanying text.

243. *Cf.* Herring v. United States, 555 U.S. 135, 141 (2009) (limiting the scope of the exclusionary rule because its application would "let[] guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system'" (quoting United States v. Leon, 468 U.S. 897, 908 (1984))).

244. It is for this reason that Cass Sunstein has described clear statement rules as serving nondelegation purposes. Sunstein, *supra* note 130, at 337–40.

245. *Cf.* Garrett, *supra* note 135, at 74 (noting the possibility that clear statement rules "effectively" allow courts "to strike down legislation without appearing to be activist").

246. *See supra* notes 117 and 229 and accompanying text.

activism.[247] Criminal clear statement rules would re-cast judges in the role of protectors of individual rights and constitutional guarantees—a role that the courts already play in other areas of the law. Judges could use their opinions as an opportunity to explain why the particular principle or value is so important, and thus why it is important to protect that principle or value unless the legislature decides otherwise.[248] Because the legislature is still free to make a contrary decision, the court can credibly claim that its decision is not thwarting the majority's will. To the contrary, clear statement rules ensure that legislatures are making important policy decisions because they minimize that possibility that the judge is allowing her policy preferences to shape the interpretation of less-than-clear statutory text.[249] Indeed, a judge could go so far as to claim that the absence of a clear statement about the issue was an indication from the legislature that it wanted to protect liberty or rights in this situation because the legislature itself was on notice as to how the statute would be interpreted.[250]

What is more, because clear statement rules also serve as external constraints on judicial preferences, criticisms that judges are simply indulging their own policy preferences will have less force.[251] Put differently, clear statement rules *require* judges to issue certain rulings unless the legislature explicitly and unambiguously says otherwise. Therefore, we cannot say that a judge whose ruling is based on a clear statement rule is using her interpretive discretion to achieve some hidden goal because the clear statement rule restricts judicial discretion.[252]

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247. *See, e.g.*, People v. Flores, 227 174 Cal. Rptr. 3d 390, 392 (Cal. Ct. App. 2014) (refusing to find a certain statute to be impermissibly vague because it "would 'overrule' the voters and be the height of judicial activism" and because "[w]e do not sit as a 'super Legislature'"); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 490 (2013) (positing that the Justices' increasing reliance on dictionaries in statutory interpretation "may well reflect the Court's search for an oasis from which to deflect or rebut charges of judicial activism").

248. In contrast, the rule of lenity and the vagueness doctrine only give judges an opening to speak about the due process principles that underlie those doctrines—principles that are relatively abstract and often ignored. *See* Hessick, *supra* note 15 (documenting how due process principles are routinely ignored in the modern criminal justice system).

249. *Cf.* Landgraf v. USI Film Prods., 511 U.S. 244, 273 (1994) (stating that the clear statement rule against retroactive application of civil legislation "allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes").

250. "If lawmakers know that precise textual language is required . . . the absence of such language sends a strong signal about the correct meaning of the text." Garrett, *supra* note 135, at 75.

251. That is not to say that judges have not faced criticism for developing clear statement rules, or that clear statement rules cannot be the product of judicial policy preferences. But the application of *existing* clear statement rules are less open to such criticisms.

252. *Cf.* Krishnakumar, *supra* note 131, at 859–64 (documenting that most Supreme Court Justices appear to use substantive canons to arrive at results that are not consistent with their political ideology).

To be sure, some might argue that judges are acting according to their own policy preferences in those cases where a clear statement rule is initially adopted.[253] In such cases the judges' discretion is not yet restricted. But even in those cases, charges that judges are acting to vindicate their own policy preferences are not likely to be as strong as in cases where they interpret cases without clear statement rules. That is because adopting a clear statement rule limits judicial discretion in future cases. The judges do not know what their policy preferences will be in those future cases, and so they are likely to be more circumspect about adopting clear statement rules that will govern them going forward. Indeed, that is why some opponents of broad judicial discretion have advocated that judges adopt more bright-line rules—because those rules reduce judicial discretion in future cases.[254]

3. Criminal Clear Statement Rules in Practice

Before turning to a detailed discussion of our two specific criminal clear statement rules, a few words are in order about how criminal clear statement rules would operate, as a general matter, in practice. In particular, we want to address how legislatures might satisfy clear statement rules, as well as the question of retroactivity.

Courts should permit legislatures to overcome criminal clear statement rules only on a statute-by-statute basis. Legislatures should not be permitted to overcome a clear statement rule by a legislative enactment that applies to the entire penal code or to entire sections of the code.[255] So, for example, a legislature could not satisfy a clear statement rule about juveniles and mandatory minimum penalties by enacting a single, generally-applicable statute that says "all mandatory minimum sentences in the penal code apply to juvenile defendants who are tried as adults." If legislatures were permitted to satisfy a clear statement rule through such a general statute, then many benefits associated with clear statement rules would be lost. That

253. This assumes that judges will acknowledge when they are adopting a new rule. But they often obfuscate this fact. *See infra* note 258.

254. *E.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–79 (1989).

255. For example, the Arizona legislature has attempted to abrogate the rule of lenity through generally applicable statutes. *See* ARIZ. REV. STAT. ANN. § 1-211(C) (2019) ("The rule of the common law that penal statutes shall be strictly construed has no application to these Revised Statutes. Penal statutes shall be construed according to the fair import of their terms, with a view to effect their object and to promote justice."); ARIZ. REV. STAT. ANN. § 13-104 (2019) ("The general rule that a penal statute is to be strictly construed does not apply to this title, but the provisions herein must be construed according to the fair meaning of their terms to promote justice and effect the objects of the law . . . ."). But the courts have—in our view, correctly—continued to employ the rule of lenity in at least some cases. *See, e.g.*, Cawley v. Ariz. Bd. of Pardons & Paroles, 701 P.2d 1195, 1196 n.1 (Ariz. Ct. App. 1984); State v. Pena, 683 P.2d 744, 748–49 (Ariz. Ct. App. 1983).

is because the clear statement rule would no longer require legislatures to pay the "clarity tax" and internalize the political costs of their clear statement with each new piece of legislation.[256] Nor would it be clear whether future legislators actually intended the general rule to apply, because they would not be required to confront and decide the issue each time that they enacted a new law with a mandatory minimum penalty.[257]

Some might think that clear statement rules will not serve as a particularly onerous clarity tax because legislatures could develop stock phrases to routinely insert into new criminal legislation. Once a stock phrase had been developed, inserting a stock phrase might not require that a legislator spend much time to overcome a clear statement rule when passing a new criminal law. But, as our example of the juvenile punishment clear statement rule illustrates, there may still be political costs because legislators would still have to endorse applying harsh penalties to juveniles.

Also, because we expect criminal clear statement rules to change how many statutes are interpreted, we feel compelled to offer an opinion about whether these interpretive rules ought to apply retroactively. In short, the answer is "yes." When a court adopts a new clear statement rule that protects a particular criminal law value, it ought to apply that clear statement rule to all criminal statutes—including criminal statutes that were enacted before the court first announced the rule.

To be clear, the question of retroactivity presents challenges for *all* clear statement rules; it is not unique to criminal clear statement rules. In the context of non-criminal clear statement rules, the courts have largely dodged this question, rather than addressed it head-on. In particular, they ordinarily fail to acknowledge when they are announcing a new clear statement rule; instead they suggest that the rule predates the decision.[258]

Some might argue against retroactivity based on the idea of dialogue between the courts and the legislature.[259] A clear statement rule places the legislature on notice that it must make an unambiguous, affirmative

256. *See supra* notes 219–221, 232–234 and accompanying text.

257. The problems associated with individuals whose decisions at T1 will bind subsequent actors at T2 is hardly limited to legislatures. *See, e.g.*, Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673, 719–20 (2018) (identifying problems associated with "intertemporal externalit[ies]").

258. Take, for example, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), which is generally thought to be the case that first adopted the modern clear statement rule regarding congressional waiver of states' Eleventh Amendment immunity from suit. *See* Note, *Clear Statement Rules*, *supra* note 135, at 1962 (identifying *Atascadero* as the case that "has formed the basis of the Court's adoption of clear statement rules"). The majority opinion did not explicitly acknowledge that it was, for the first time, requiring a clear statement from Congress. Instead, it characterized its holding as "consistent with" a number of previous cases, and it insisted that the "adoption of the dissent's position would require us to overrule numerous decisions of this Court." *Atascadero*, 473 U.S. at 243 & n.3.

259. *See supra* note 19.

statement to accomplish a certain end. Before a clear statement rule is announced, the legislature is not on notice about the form that its legislation has to take. Thus, so the argument goes, it is inappropriate to apply these rules retroactively.

We do not find the dialogue argument against retroactivity persuasive. The idea that judges ought to give notice seems attractive, but it does not hold up under closer scrutiny. Although it has long been thought that *legislatures* must give notice of any rule change before using that rule, this limitation is largely limited to rules that burden private rights.[260] An interpretive rule aimed at legislatures is not a rule aimed at private rights. In addition, the same notice limitations do not apply to judges.[261] That is why, for example, when a court interprets a statute for the first time, that interpretation nonetheless applies to the defendant in the case before it.[262]

More generally, when courts have shifted interpretive methodologies, they have not let the lack of notice to legislatures stop them. Take, for example, the relatively recent shift to textualism. Before courts embraced textualism, they would often seek to construe statutes in a way that would best further legislative purpose.[263] As a result, legislators were probably less careful about the precise text of a statute; they knew that if the legislative history of a statute made their purpose clear, courts would endeavor to construe the statute in a way that was compatible with that purpose. But textualists do not interpret statutes in light of the legislative purpose; they interpret based on the text.[264] And, as a result, textualists may never consider the committee reports, floor speeches, or legislative history that those legislators assumed would be part of any future litigation over the meaning of the statute. Textualists routinely interpret statutes that were enacted long before the rise of textualism. Yet, textualists have not limited their methodology to only statutes enacted after legislators were on notice that these other legislative materials would not be considered to interpret the text.

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260. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994) ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent. . . . The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact.").

261. *See* Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 AM. J. COMP. L. 37, 38 (2014) ("The strong presumption is that statements of law in judgments that announce new rules or overturn old ones apply to conduct predating that judgment.").

262. *See* Rogers v. Tennessee, 532 U.S. 451, 462 (2001). It is only when a judicial interpretation was "unforeseeable," that courts will find that interpretations can implicate "the right to fair warning." *Id.* at 457.

263. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71–73 (2006).

264. *Id.* at 73–75.

As the textualism example illustrates, the idea that judges and legislators are engaged in a dialogue when it comes to statutory interpretation might be best understood as a legal fiction.[265] To be clear, there is evidence that those who draft statutes are familiar with interpretive rules, and that those rules may affect how statutes are drafted.[266] But that does not mean that judges have constrained (or should constrain) themselves when interpreting statutes that pre-date a shift in their interpretive rules. That may explain why retroactivity concerns have not diverted the courts from using clear statement rules that vindicate non-criminal law values.

Nonetheless, the retroactivity question might give us greater pause in the context of criminal statutes. That is because a more narrow interpretation of a criminal statute under a clear statement rule could result in the release of people from prison who were convicted under that statute. In this respect, we have to decide whether clear statement rules would apply retroactively to individual defendants, rather than to individual statutes. Again, we think that they should.

As a general matter, when courts construe a statute, the legal fiction is that they are simply declaring what the law *always meant* rather than changing the meaning of the statute going forward.[267] As a consequence, when the Supreme Court has issued a definitive interpretation of a federal criminal statute that narrows the scope of the statute, lower courts will apply that more narrow interpretation on collateral review. [268] That is to say, even if a defendant's conviction has already become final, she can file a habeas corpus petition to argue that her conduct did not fall within the statute as newly interpreted by the courts.[269]

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265. Lon Fuller famously defined a "legal fiction" as "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility." LON L. FULLER, LEGAL FICTIONS 9 (1967). But we are employing the term in a slightly different manner to mean what Peter Smith has deemed a "new legal fiction," namely, "crafting a legal rule on a factual premise that is false or inaccurate." Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1437 (2007).

266. *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013).

267. *E.g.*, *In re* McIntire, 936 N.E.2d 424, 428 (Mass. 2010) ("Where a decision does not announce new common-law rules or rights but rather construes a statute, no analysis of retroactive or prospective effect is required because at issue is the meaning of the statute since its enactment.").

268. *See, e.g.*, Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 63 n.43 (2015) (collecting sources).

269. *See* Bousley v. United States, 523 U.S. 614, 619–21 (1998) (explaining why a defendant who pleaded guilty prior to the Court's narrowing interpretation of a federal statute was not barred by *Teague v. Lane*, 489 U.S. 288 (1989), from challenging the guilty plea on collateral attack).

Some might argue that this individual retroactivity counsels against adopting criminal clear statement rules because post-conviction claims by defendants could lead to the release of dangerous defendants. But we are not convinced that this should deter courts from adopting criminal clear statement rules. That is because we believe that the benefits of clear statement rules outweigh the costs of retroactive application.[270] In particular, we do not believe that many defendants will actually be released from prison if these clear statement rules were applied retroactively, and the most dangerous offenders are the least likely to be released.

There are at least three reasons why the number of people affected is likely to be small. First, legislatures are likely to act quickly if they want to overcome clear statement rules. Criminal legislation is popular, and the legislative process is less balanced than in other areas.[271] If a statute is construed narrowly under a clear statement rule, legislatures are likely to react quickly. As a result, the retroactivity problem is not likely to persist for very long—at least not for those statutes where there is a true legislative consensus in favor of a broader or harsher statute.

Second, there must be a specific ruling involving the particular statute in order for that decision to apply retroactively to other defendants convicted under the same statute.[272] Even if one defendant obtained a narrowing interpretation of a statute, other defendants who have been convicted under that same statute may serve their entire sentence (or a significant portion thereof) before they would be able to navigate the collateral review process and obtain release.[273] And, in the meantime, the legislature can enact a revised statute that includes a clear statement, which would apply to any future defendants.

Third, even those defendants who were convicted under laws that were subsequently narrowed by clear statement rules will not necessarily be

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270. That is not to say that we think, as a general matter, courts ought to be deterred from adopting new criminal law doctrines out of concern that too many defendants would benefit from those doctrines. But, even assuming that were an appropriate consideration, we think that the costs of retroactive application of clear statement rules are overstated.

271. *See supra* text accompanying notes 23–41.

272. *See* 28 U.S.C. § 2255(a), (f)(3) (2012).

273. As Eve Brensike Primus has noted:

> [M]ost defendants have served their full sentences by the time they reach the collateral review stage. Under the current system, only defendants sentenced to more than four or five years in prison have an incentive to challenge their convictions on collateral review, because it takes that long to exhaust the appellate process in many jurisdictions. In fact, inmates in many state jurisdictions may work off as much as a third of their sentences by earning "good time" credit. In these states, only those defendants sentenced to six or more years in prison would still be incarcerated after completing the appellate process.

Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 693 (2007) (footnotes omitted).

released. That is because the defendant will have to prove not only that she was convicted under an incorrectly broad reading of the statute, but also that she is factually innocent of the charges.[274] In rebutting that claim, the government is not limited to the existing record, but can present any admissible evidence.[275]

Even if the defendant would no longer qualify for conviction under that particular statute, that does not mean she will necessarily be released from jail. That is because the people serving lengthy sentences for serious crimes—*i.e.*, those people who would most likely benefit from criminal clear statement rules[276]—are likely guilty of some other crime for which they could be convicted. For example, many states allow a defendant to be convicted of murder even if she did not intend to bring about the death of another; it is enough that the defendant acted recklessly and with a disregard for the sanctity of human life, and in so doing, caused the death of another. Some states permit such a conviction explicitly in their statutes, while others have allowed such convictions as a matter of judicial interpretation.[277] If a court were to adopt the mens rea clear statement rule that we propose below, then defendants convicted of depraved heart murder in the absence of a statute would no longer be guilty of murder, though they would still be guilty of a lesser homicide offense. The state would be free to retry them on those other, lesser-included charges, such as manslaughter.[278] And if legislatures wanted to continue to treat such people as murderers, they could write a statute that does so explicitly.

* * *

In sum, criminal clear statement rules can help ameliorate legislative dysfunction. And they can do so while maintaining an appropriate balance of power between the courts and the legislative branch and providing political insulation for judges' decisions.

274. *Bousley*, 523 U.S. at 623–24.

275. *Id.* at 624.

276. *See supra* note 273.

277. *E.g.*, State v. Woodall, 744 P.2d 732, 734–35 (Ariz. Ct. App. 1987); People v. Sarun Chun, 203 P.3d 425, 433 (Cal. 2009); State v. Clark, 931 P.2d 664, 671 (Kan. 1997); DeBettencourt v. State, 428 A.2d 479, 530 (Md. Ct. Spec. App. 1981); Windham v. State, 602 So. 2d 798, 801–02 (Miss. 1992); State v. Mosley, 806 S.E.2d 365, 368 (N.C. Ct. App. 2017); State v. Draves, 524 P.2d 1225, 1229 (Or. Ct. App. 1974). Our clear statement rule would matter only in those jurisdictions that have not adopted depraved heart murder via statute.

278. It is possible that the statute of limitations may have run out on lesser-included charges. In that situation, the government may be limited to bringing other charges that they decided not to bring in exchange for a defendant's guilty plea. *Bousley*, 523 U.S. at 624.

III. EXAMPLES OF CRIMINAL CLEAR STATEMENT RULES

The primary purpose of this Article is to identify criminal clear statement rules as an important doctrinal tool to combat the legislative dysfunction surrounding criminal laws. But we have also chosen to propose two particular clear statement rules. We have done this to give a clearer sense of what a criminal clear statement rule would look like, how such a rule could be justified, and how such a rule would operate in practice. To be sure, we believe that courts ought to adopt the particular criminal clear statement rules we propose. But it is not necessary to accept these particular rules in order to accept the broader idea of criminal clear statement rules.

The first clear statement rule we propose involves mental states: we propose that courts read all criminal statutes as requiring a knowing mental state for every material element. The second clear statement rule involves the harm that the defendant caused or intended: we propose that a defendant must have caused or intended to cause substantial harm in order for her conduct to fall within the scope of a criminal statute. Both of our clear statement rules are limited to the interpretation of felony statutes. And, as with all clear statement rules, they can be overcome by an affirmative and unambiguous statement by the legislature.

Out of many potential clear statement rules, we have chosen these two particular clear statement rules for specific reasons. First, we deliberately chose one rule that is relatively radical and one rule that is quite tame. The substantial harm rule—though supported by both history and policy—is likely to strike readers as a dramatic departure from current doctrine. The mens rea rule, in contrast, represents only a minor departure from current doctrine; the Supreme Court has, on occasion, flirted with adopting a similar clear statement rule.[279] Second, we deliberately chose one rule that addressed a problem associated with imprecise statutes (the mens rea rule) and one rule that addressed a problem with overly broad statutes (the substantial harm rule). Of course these proposed rules do not address all of the problems associated with imprecise statutes or overly broad statutes. But they do address problems that have resulted in repeated litigation and doctrinal confusion.

A. Mens Rea Clear Statement Rule

Nowhere is the need for clear statement rules greater than in the area of mens rea. Legislative efforts to address confusion surrounding mental states have failed. Many modern cases of criminal statutory interpretation involve

279. *See* Staples v. United States, 511 U.S. 600, 618–19; *see also* discussion *infra* notes 293–296.

disputes about required mental states. The current doctrine surrounding mens rea is confusing and unpredictable. A criminal clear statement rule that specifies a default mental state and applies that mental state to all elements of a crime could bring significant clarity and predictability to the law.

Sometimes legislatures completely omit mental state terminology from the definition of a crime. For example, imagine that a statute simply read "it shall be a misdemeanor to come to class unprepared." That statute omits any mental state, and an interpreting court would have to decide whether to read in a mental state requirement and, if so, what mental state requirement to read in. A judge might require that a student know that she was unprepared. Or, the judge might require only that the student be reckless or negligent as to whether she was unprepared. Or, the judge might not require any mental state, leaving the student strictly liable for appearing in class unprepared. We refer to this statutory problem as an issue of omission.

Now, imagine that the statute reads that "it shall be a crime to knowingly come to class unprepared when a student is on call." This statute raises an issue of modification. It is clear that the student must know that they are coming to class. Most judges would assume that the crime also requires the student to know that they are unprepared. The difficult modification issue is whether the student must also know that they are on call that day. The problem here is not one of omission, but rather one of modification—we do not know to which elements the stated mental state is supposed to apply.

We propose one clear statement rule to deal with issues of omission and issues of modification: absent a clear statement to the contrary, every material element of a felony offense requires proof of a knowing mental state. Under this rule a knowing mental state requirement would be applied to all material elements of a statutory crime that omitted any mention of mental state. Similarly, a knowing mental state requirement would be applied in the case of an ambiguous modification issue.

One might say that the Supreme Court has long employed a *de facto* clear statement rule with respect to the omission issue. The Court has long held that it will not assume that Congress intended to omit a mental state requirement simply from the fact that none was given in the text of the statute.[280] But there are exceptions to this general presumption, and those exceptions are not very well delineated.

One exception is the public welfare offense doctrine. The standard definition of a public welfare offense is a crime that is regulatory in nature,

280. *E.g.*, Morissette v. United States, 342 U.S. 246 (1952); United States v. U.S. Gypsum Co., 438 U.S. 422 (1978).

addresses threats to public health, public safety, public morals, or public order, and that carries a modest fine or short incarceration term.[281] All public welfare offenses are *malum prohibitum* as opposed to *malum in se*,[282] but not all *malum prohibitum* offenses are public welfare offenses.[283] If a court finds an offense to be a public welfare offense, it will not read in a mental state. But the public welfare doctrine has become very confused because the Court has struggled with how to treat dangerous regulated activities. In some cases the Court reads in a mens rea requirement even where the activity regulated is dangerous. But in other cases the Court refuses to read traditional mens rea requirements into regulatory statutes dealing with dangerous behavior.

Take, for example, the thinly-reasoned opinion in *United States v. Balint*.[284] There, the Court refused to read a mens rea requirement into a narcotics statute that required tax stamps for certain types of drugs. Dismissing the due process challenge largely out of hand, the Court observed that the narcotics statute "merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic."[285] As such, the statute fell into a category of regulatory measures whose "manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute."[286]

Balint muddles the traditional distinction between *malum in se* and *malum prohibitum* offenses. The *Balint* Court characterized the narcotics statute as "a taxing act with the incidental purpose of minimizing the spread of addiction to the use of poisonous and demoralizing drugs."[287] A taxation crime seems to be a clear example of a *malum prohibitum* offense. The only reason one should pay taxes is that the government prohibits failure to pay them. In contrast, a vice statute aimed at restraining use of a "poisonous and demoralizing drug" would seem to be *malum in se*; poisonous and demoralizing substances sound like things that are themselves evil. Did the *Balint* Court refuse to read in a mens rea requirement because the statute was a mere regulatory measure that did not mark the offender as a serious

281. Darryl K. Brown, *Public Welfare Offenses*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 862, 863 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

282. *Id.*

283. *See* Liparota v. United States, 471 U.S. 419, 433 (1985) (holding that criminal violations of food stamp regulations are not strict liability offenses); *U.S. Gypsum Co.*, 438 U.S. at 437–38 (holding that the Sherman Antitrust Act's criminal provisions do not create strict liability).

284. 258 U.S. 250 (1922).

285. *Id.* at 254.

286. *Id.* As is often the case when a court declares a legislative purpose to be "manifest," the Court cited no legislative history supporting its strict liability reading.

287. *Id.* at 253.

criminal or because the statute was aimed at a dangerous social evil whose violators deserved no quarter?

The Court subsequently tried to clarify the issue. In *United States v. Dotterweich*, the Court stated that otherwise innocent people "in responsible relation to a public danger" are subject to criminal liability in the interests of the larger good.[288] The strict liability that this "responsible relation to a public danger" standard created was something that the criminal law had long abhorred. And so, in *Morissette v. United States*, the Court tried to put the strict liability genie back in the bottle and to label the bottle more clearly.[289] *Morissette* clearly stated that a traditional common law offense such as theft or conversion cannot be a public welfare offense. The Court also offered four factors that might indicate that a crime is a public welfare offense: 1) the criminalization is not of an actual injury but the risk of injury; 2) a person could prevent the risk with relative ease; 3) the penalties are small; and 4) there is little stigma associated with conviction.[290]

Unfortunately, these factors proved to be unreliable predictors of the Court's future decisions. Instead, subsequent cases strongly suggested that the Court would not read in mental states to statutes that dealt with dangerous substances, but would read them in if the subject matter of the regulation was not dangerous.[291] In those cases the Court justified not

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288. 320 U.S. 277, 281 (1943). In order to reach this decision, however, the *Dotterweich* Court had to read in not only a mental state, but also congressional intent to create criminal liability for both the corporation and the corporation's officers. *Id.* at 282–83.

In dissent, however, Justice Murphy raised serious questions about whether Congress had intended any such thing. Murphy argued that courts should only find such individual criminal liability when the intent to create it was clearly stated by Congress:

> [I]n the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge. Before we place the stigma of a criminal conviction upon any such citizen the legislative mandate must be clear and unambiguous.

Id. at 286 (Murphy, J., dissenting). Justice Murphy's dissent in *Dotterweich* represents a path not taken by the Court. Although he did not use the phrase "clear statement rules," he argued that strict criminal liability should be applied only when clearly stated by Congress. *Id.* at 292–93.

289. 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

290. *Id.* at 256.

291. *Compare* United States v. Freed, 401 U.S. 601, 609–10 (1971) (holding that because hand grenades are highly dangerous offensive weapons no mental state was required with respect to the registration element under the National Firearms Act), *and* United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 564–65 (1971) (holding that a statute making it a crime to "knowingly violate" any of the Interstate Commerce Commission's regulations for the transportation of corrosive liquids did not require the defendant to have knowledge of those regulations because of the dangerous nature of the materials shipped), *with* United States v. U.S. Gypsum Co., 438 US. 422, 445–46 (1978) (reading in an intent requirement to criminal antitrust violations), *and* Liparota v. United States, 471 U.S. 419, 433 (1985) (holding that violating food stamp regulations was not a public welfare offense because food

applying any mental state requirement for an element of a crime on the theory that the dangerousness of the activities being regulated should have made the defendant aware of the relevant regulations.[292]

The Court came close to establishing a clear statement rule in *Staples v. United States*.[293] That case asked whether the defendant had to know that his rifle was a machine gun in order to be guilty of violating the National Firearms Act. Lower courts had split on the issue, and the trial court instructed the jury that the defendant simply had to know that he possessed a "dangerous device of a type as would alert one to the likelihood of regulation."[294] The Court held that, notwithstanding the dangerousness of machine guns, the government had to prove that the defendant knew his firearm was capable of fully automatic fire. The Court emphasized the severity of the penalty involved—a possible ten year prison sentence—as well as the stigma that any felony conviction carries.[295]

The Court came tantalizingly close to adopting a clear statement rule. But it ultimately decided not to do so:

> In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*.
>
> We need not adopt such a definitive rule of construction to decide this case, however. Instead, we note only that where, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply.[296]

Unfortunately, the rule that the Court announced in *Staples* is anything

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stamps, unlike hand grenades or sulfuric acid, were neither dangerous nor subject to stringent regulation).

292. Ironically and instructively for our purposes, in *International Minerals* the most relevant piece of legislative history was generated in response to a request to Congress from the Interstate Commerce Commission (ICC) for a clearer statement of congressional intent. The ICC's request for a clear statement by Congress had been prompted by a circuit court decision holding that knowledge of the regulations was required. *Int'l Minerals*, 402 U.S. at 567–68 (Stewart, J., dissenting) (citing United States v. Chi. Express, Inc., 235 F.2d 785 (7th Cir. 1956); St. Johnsbury Trucking Co. v. United States, 220 F.2d 393 (1st Cir. 1955)).

293. 511 U.S. 600 (1994).

294. *Id.* at 604.

295. *Id.* at 616.

296. *Id.* at 618–19 (citation omitted).

but clear. Whether one is engaged in "traditionally lawful conduct"—as opposed to the sort of conduct that would alert one to the likelihood of government regulation—lies largely in the eye of the beholders.

In the wake of *Staples*, confusion has reigned about the scope of the public welfare offense doctrine. Does the dangerousness of the offense mean that no mental state is required, as was the case with the hand grenade in *Freed* and the sulfuric acid in *International Minerals*?[297] Or does the possible innocence of a person facing felony conviction and prison mean that a mental state must be read in, as was the case with the machine gun owner in *Staples*?[298]

Statutes that impose harsher penalties on traditional crimes based on an additional aggravating element pose similar modification problems. Legislatures often leave the mental state requirements for the aggravating elements ambiguous, and courts often engage in tortured logic to avoid applying traditional mental state requirements to these additional elements. *United States v. Chin* illustrates this problem.[299] Chin was charged and convicted of possessing cocaine with intent to distribute.[300] He was also charged with the separate federal offense of using a person under eighteen years of age to avoid detection for a drug offense in violation of the Juvenile

297. For example, the Minnesota Supreme Court held that "first-degree burglary possession of a dangerous weapon . . . is not ambiguous and does not include a mens rea requirement with respect to a defendant's possession of a dangerous weapon." State v. Garcia-Gutierrez, 844 N.W.2d 519, 526 (Minn. 2014). In *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012), the D.C. Circuit held that a statute that imposes a mandatory thirty-year sentence for any person who carries a machinegun while committing a crime of violence "does not require the government to prove that a defendant knew that the weapon he used, carried, or possessed was a machinegun." *Id.* at 516. The Ninth Circuit held in *United States v. Jefferson*, 791 F.3d 1013 (9th Cir. 2015), that the government need not prove that the defendant knew the specific type and quantity of the drugs he imported in order to trigger a ten-year mandatory minimum under title 21 U.S.C. section 960(b)(1)(H). *Id.* at 1019.

298. The Minnesota Supreme Court held in *In re Welfare of C.R.M.*, 611 N.W.2d 802 (Minn. 2000), that the "[State] was required to prove that [the juvenile] *knew* he possessed the knife on school property as an element of the . . . offense charged." *Id*. at 810 (emphasis added). The Nebraska Supreme Court held in *State v. Carman*, 872 N.W.2d 559 (Neb. 2015), that "public welfare offenses such as traffic infractions which do not contain the element of criminal intent cannot support convictions for manslaughter." *Id.* at 565. The California Supreme Court held in *People v. King*, 133 P.3d 636 (Cal. 2006), that a statute prohibiting possession of a variety of weapons was not a public welfare offense, thus requiring that the prosecution prove the possessor's knowledge of the weapon's illegal characteristics. *Id.* at 641. Similarly, the California Supreme Court held in *In re Jorge M.*, 4 P.3d 297 (Cal. 2000), that a statute prohibiting the possession of an assault weapon was not intended to define a strict liability offense and required either proof of either negligence or knowledge with respect to the characteristics of the weapon. *Id.* at 299. The Second Circuit held in *United States v. Bronx Reptiles, Inc.*, 217 F.3d 82 (2d Cir. 2000), that "the government was required to prove not only that the defendant knowingly caused the transportation to the United States of a wild animal or bird, but also that the defendant knew the conditions under which the animal or bird was transported were 'inhumane or unhealthful.'" *Id.* at 83.

299. 981 F.2d 1275 (D.C. Cir. 1992).

300. *Id.* at 1276.

Drug Trafficking Act of 1986.[301] The text of that statute makes it a crime to "knowingly and intentionally . . . employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to assist in avoiding detection or apprehension for any [listed federal drug offense] by any . . . law enforcement official."[302] Despite the fact that the language clearly required not just knowing but intentional conduct and the fact that both adverbs preceded the age element, the D.C. Circuit followed three other circuits in holding that a defendant did not have to know that the person employed was a juvenile to be guilty of this separate crime.[303]

In an opinion written by then-circuit judge Ruth Bader Ginsburg, the *Chin* court brushed aside the use of the phrase "knowingly and intentionally" as "not a model of meticulous drafting."[304] Ginsburg asserted that "[o]ne cannot tell from the words alone whether the person's juvenile status must be known and 'intended,' or whether it suffices that the act of using a person to avoid detection be 'knowing[] and intentional[].'"[305] The court seized what it saw as ambiguity to hold that a defendant need neither be purposeful nor even knowing as to the age of the juvenile employed. The holding was clearly based on policy concerns: the court said that to require even knowledge would be to "invite blindness by drug dealers to the age of youths they employ" and to ignore the special purpose of the statute to "protect a vulnerable class defined by age."[306]

The rule of lenity operated as little more than a speed bump on the *Chin* court's road to a strict liability reading of the statute. That is because lenity applied only if the court could not infer the statute's meaning. The *Chin* court inferred that no mental state was required because it was "implausible that Congress would have placed on the prosecution the often impossible burden of proving, beyond a reasonable doubt, that a defendant knew the youth he enticed was under eighteen."[307]

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301. *Id.* at 1276 n.2 (citing 21 U.S.C. § 861(a)(2) (2012)).

302. *Id.* at 1279 (quoting 21 U.S.C. § 861(a)(2)).

303. *Id.* at 1279–80 (citing United States v. Williams, 922 F.2d 737, 738–39 (11th Cir. 1991); United States v. Valencia-Roldan, 893 F.2d 1080, 1083 (9th Cir. 1990); United States v. Carter, 854 F.2d 1102, 1108–09 (8th Cir. 1988)).

304. *Id.* at 1279.

305. *Id.* (alteration in original).

306. *Id.* at 1280.

307. *Id.* In a final flourish that is fairly typical of such opinions, the *Chin* court used the fact that the crime of using a juvenile in the illegal drug trade was a separate crime from selling drugs as a reason not to read in a knowledge requirement. Because the offense clearly required knowingly and intentionally using another for the purpose of concealing a violation of federal narcotic laws, this was not a case where interpreting the statute broadly "threatens to criminalize 'apparently innocent conduct.'" *Id.* This final move adds insult to injury. Purposely concealing an ongoing violation of federal narcotics laws is already punishable under basic principles of complicity. *See* WAYNE R. LAFAVE, CRIMINAL LAW 713 (5th ed. 2010) ("Generally, it may be said that accomplice liability exists when the

Chin is noteworthy only because it is typical. Typical not only of how courts handle ambiguous mens rea modification issues, but also, more generally, of the way courts twist themselves into knots dealing with unclear, or potentially unpopular, statutory language.

The confusion and unpredictability of the Court's mens rea doctrines establish the need for clear statement rules. Judges interpreting statutes should not have to balance innocence against dangerousness, to decide what types of danger mean that an offender is not acting innocently, or to choose between competing ways of framing the behavior in question that make it seem more or less innocent. Such choices are value-laden, subjective, and yield unpredictable results. Therefore, those choices should be made by legislators in clear and politically accountable ways.

But legislatures have failed to make such choices—or at least they have failed to make such choices clear. Take, for example, the recent mens rea reform efforts.[308] A number of groups have been advocating for reforms to mens rea in federal criminal law. In particular, they have advocated adopting a statutory default mental state requirement, as well as a requirement that a defendant knew that their behavior was illegal if the statute criminalizes behavior that a reasonable person would not know was prohibited.[309] But, as Ben Levin has detailed, these reform efforts have faced stiff opposition from those who want to ensure robust prosecution of environmental and other regulatory crimes.[310] As a result, federal crimes continue to fail to specify a mental state. And political disagreement ensures that the ambiguity in these statutes will endure.

Our clear statement rule not only repairs the damage done by the Court's mishandling of the public welfare doctrine, but it also removes ambiguity as a tool for legislative compromise. A clear statement rule that requires legislatures to clearly state if they intend to impose criminal liability for defendants who acted without knowledge removes the need for the public welfare doctrine. And it makes the stakes clear for legislatures—they cannot omit mental states from statutes in the hope that courts will later interpret statutes in a way that furthers their own agenda.

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accomplice intentionally encourages or assists, in the sense that this purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state.").

The Supreme Court has used similar reasoning in interpreting mandatory minimum sentencing provisions. *See, e.g.*, Dean v. United States, 556 U.S. 568, 574–76 (2009). *But see* Flores-Figueroa v. United States, 556 U.S. 646, 656–57 (2009).

308. *E.g.*, Mens Rea Reform Act of 2018, S. 3118, 115th Cong. (2018).

309. Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 509–12 (2019).

310. *Id.* at 523-27.

Of course, it is not enough to say that there ought to be a clear statement rule about mens rea; it is also necessary to state what that rule would be. That is because, if there is to be a presumption against strict liability, courts must supply a particular mental state when faced with statutes that omit a mental state but do not include a clear statement in favor of strict liability. Put differently, there must be a default mens rea standard that applies when statutes are unclear. We believe that the default standard ought to be "knowingly."[311]

There are many reasons to adopt a clear statement rule that imposes a default mens rea standard, and thus requires legislatures to speak clearly if they intent to impose strict liability. First, such a rule is strongly supported by history. The common law has always been hostile to strict liability. Outside of statutory rape and a few other criminal offenses relating to the protection of minors, strict liability did not exist in the common law of crimes.[312] Scienter—knowledge of wrongfulness—was required at common law not just for criminal law but for many actions in tort and contract as well. This hostility to stricter standards of liability made the passage to the American colonies.[313] The public welfare doctrine developed as an exception to the general rule that all crimes required a truly culpable mental state. The Model Penal Code went a step further and precluded strict liability for all crimes.[314]

Second, requiring a clear statement for strict liability also finds support in the Constitution's protection of notice.[315] Notice is a "core due process concept[]."[316] Courts have traced its protection in the Constitution to both

311. In selecting this standard, we are relying—as many do, in modern criminal law—on the mens rea categories articulated in the Model Penal Code. *See* MODEL PENAL CODE § 2.02(2) (AM. LAW INST. 1985). Those categories have been enormously influential in the years since the Model Penal Code was written, as they brought rigor and precision to the concept of mens rea that had previously been lacking.

312. *See* LAFAVE, *supra* note 117, § 5.5 ("For several centuries (at least since 1600) the different common law crimes have been so defined as to require, for guilt, that the defendant's acts or omissions be accompanied by one or more of the various types of fault (intertion, knowledge, recklessness or—more rarely—negligence); a person is not guily of a common law crime without one of these kinds of fault.").

313. Morissette v. United States, 342 U.S. 246, 251–52 (1952) ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation." (footnote omitted)).

314. MODEL PENAL CODE § 2.02(1) (AM. LAW INST. 1985). The Model Penal Code recognized the possibility of strict liability for mere infractions, an offense below the level of a misdemeanor and an offense for which the penalty can only be a fine. MODEL PENAL CODE § 2.05(1)(a) (AM. LAW INST. 1985).

315. *See* Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL'Y 1065, 1088 (2014).

316. Rogers v. Tennessee, 532 U.S. 451, 459 (2001).

the Due Process and *Ex Post Facto* Clauses.[317] Strict liability crimes fail to give notice because they allow punishment based only on conduct, no matter how blameless. Even a reasonable belief is not defense to a strict liability standard. A defendant who was entirely unaware of material circumstances could be punished under a strict liability standard—even if the defendant had taken all reasonable precautions.[318]

Importantly, our clear statement rule is not simply aimed at strict liability; it also sets a default mental state of "knowingly." That is to say, unless the legislature clearly says otherwise, prosecutors will have to demonstrate that defendants acted knowingly—rather than merely negligently or recklessly—with respect to each element of a crime or with respect to aggravating factors.

For example, our proposed clear statement rule would have decided *Chin* differently. Because Congress did not clearly state that it intended to impose liability even if the defendant did not know the age of the person that he or she employed in a drug transaction, courts would have no choice but to interpret the statute to require the government to prove beyond a reasonable doubt that the defendant knew the person employed was under eighteen.

To be sure, our preferred default mental state does not have the same historical pedigree as a clear statement rule against strict liability. Many common law crimes, such as battery, are general intent crimes and require only a general awareness of one's conduct.[319] One could easily translate this general intent requirement into the modern mens rea category of "recklessness"—that is, the conscious disregard of a substantial and unjustifiable risk. This may explain why the Model Penal Code adopted a default mens rea of recklessness for statutes that omitted a mental state.[320]

But, despite the weak historical foundation, we think that "knowing" is the appropriate default standard for a mens rea clear statement rule. For one thing, conscious disregard of a substantial risk is a somewhat convoluted mental state to apply to non-result crimes. How does one recklessly assault someone? Commit a burglary? Or steal property? For another, voters tend to imagine the worst case scenario when evaluating criminal legislation and criminal punishment.[321] It is quite clear that people perceive crimes

317. *See* Lynce v. Mathis, 519 U.S. 433, 439–40, 440 n.12 (1997).

318. *See, e.g.*, Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 417 (1993); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 731–32 (1960).

319. *E.g.*, LAFAVE, *supra* note 307, at 267–68, 861–63.

320. MODEL PENAL CODE § 2.02(3) (AM. LAW INST. 1985).

321. When asked about crime in the abstract, voters (and presumably legislators) imagine an aggravated version of the crime. For example, when asked what the sentence for burglary ought to be, voters falsely assume that burglars are commonly armed, that the average burglar has a longer criminal record, and that a burglar is likely to inflict physical harm. These assumptions lead that voter to articulate

committed knowingly to be more serious, and more deserving of punishment, than crimes committed recklessly.[322] Thus, knowledge (rather than recklessness) likely better captures what both legislators and voters imagine when they think about crime and criminals. Legislatures are free to decide that the same penalties ought to apply to intentional and non-intentional behavior. But that decision should be made explicitly, and the statutory text should clearly inform voters about the decision that their representatives are making.

In sum, we set the default standard at knowing because knowledge is a simpler mental state to apply and because we believe—in keeping with the anti-punitive values underlying criminal clear statement rules—that the default standard should err on the side of greater culpability rather than less. We acknowledge that the choice of this particular default mental state may be controversial. But, even if one thinks that recklessness is the appropriate default mental state, as opposed to knowledge, that should not lessen the force of our argument that courts should adopt a mens rea clear statement rule.

B. Substantial Harm Clear Statement Rule

Our second proposed clear statement rule targets overly broad statutes. Some statutes are written so broadly that they include both serious and trivial conduct. We propose that courts adopt a clear statement rule that excludes trivial conduct from felony liability absent a clear statement to the contrary. Specifically, we propose a clear statement rule that requires a defendant to have either caused or intended to cause substantial harm in order for her conduct to fall within the scope of a felony statute. Such a clear statement rule will force legislatures who wish to impose severe penalties for trivial conduct to say so clearly.

Legislators (and their constituents) are willing to endure laws that include innocent behavior or trivial wrongdoing because they do not expect the laws to be fully enforced. They assume that law enforcement will use these laws only to target serious offenders—an idea that Josh Bowers calls

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a preference for a longer sentence. But the voter's assumptions about the typical burglary are incorrect; most burglars are unarmed, have shorter criminal histories, and are less likely to harm a victim than the voter assumes. Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE. L.J. 1775, 1781 (1999). Put differently, when deciding how and whether to punish certain conduct, people tend to imagine the worst. *See generally* Kennedy, *supra* note 4.

322. *See* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 94–97 (1995) (reporting results from empirical studies indicating that people assign a higher degree of liability to knowing versus reckless conduct).

"equitable discretion."[323] But most defendants have no recourse when prosecutors fail to use their equitable discretion to prosecute only serious offenders.[324] So long as defendants' behavior falls within the text of the statute, prosecutors are free to charge and convict them.

Legislatures have many incentives to pass such overly broad statutes. It is not just that precisely crafted laws require time and effort.[325] Precise laws also make it easier for wrongdoers to escape liability through a "loophole."[326] And precise laws are more likely to be rendered obsolete by technology or other changes in circumstances. Broadly written laws are less likely to be circumvented or rendered obsolete. But they accomplish this by criminalizing more conduct than is necessary to achieve the legislature's goal.[327]

Bond v. United States[328] provides a helpful illustration. *Bond* involved a prosecution under the Chemical Weapons Convention Implementation Act, which was enacted to fulfill the United States' treaty obligations.[329] But the statute defines "chemical weapon" very broadly.[330] And so federal

323. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1658 (2010). As Bowers explains, a prosecutor might decide not to charge a person because she is unsure that she has enough evidence to prove guilt, because she wishes to conserve resources for other cases, or because she decides that a particular defendant—though guilty—is not sufficiently blameworthy. *Id.* at 1657. It is this last type of decision—"whether defendants normatively *ought* to be charged"—that is an exercise of equitable discretion. *Id.* at 1658.

324. As noted below, defendants in some jurisdictions are able to seek a dismissal under specialized statutes. *See infra* note 365 and accompanying text. And a small number of defendants have succeeded in convincing judges to label facially clear statutes as ambiguous—so that they could render a more narrow interpretation that excluded the defendants' trivial conduct. *See infra* notes 342–344 and accompanying text.

325. *See supra* note 36.

326. *See* Buell, *supra* note 37.

327. *See* Buell, *supra* note 37, at 1502–04 (providing an example of different iterations of a law banning pitbulls and other dogs in order to address strategic behavior by those who train and own aggressive and dangerous dogs).

328. 572 U.S. 844 (2014).

329. *Id.* at 848–49. The statute was enacted to implement the United Nations Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. *Id.* at 844. The preamble of the Convention states that the "Parties to this Convention [are] [d]etermined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction." Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. No. 103-21 (1993), *reprinted in* 32 I.L.M. 800 (1993).

330. That statute forbids anyone from, *inter alia*, knowingly possessing or using "any chemical weapon." 18 U.S.C. § 229(a)(1) (2012). It defines "chemical weapon" to include "toxic chemical[s]" which it defines as

> any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

prosecutors used the statute to convict Carol Anne Bond, who put two caustic chemicals (one of which she ordered on Amazon) on the car door, mailbox, and door knob of a woman who had an affair with her husband.[331] Although the two chemicals could be lethal at high doses, it was undisputed that Bond did not intend to kill her victim. "She instead hoped that [the victim] would . . . develop an uncomfortable rash."[332] Even this did not happen. Instead, the victim "suffered a minor chemical burn on her thumb, which she treated by rinsing with water."[333] Yet Bond was convicted under a statute that allowed a sentence of life imprisonment.

This is a clear case of an overly broad law. Although Bond's behavior fell within the text of the statute, it is highly unlikely that Congress was thinking of defendants like Bond when it enacted the Chemical Weapons Convention Implementation Act. Both the intended and actual injury in the *Bond* case were less than one would suffer from being pepper sprayed—and one can buy pepper spray at ordinary retailers, such as Walmart. No one would say that Bond used a weapon of mass destruction; she targeted a single individual, and her actions barely posed a threat to her particular victim. Indeed, when Bond appealed her conviction, the Third Circuit acknowledged that "[t]he Act's breadth is certainly striking, seeing as it turns each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." [334] But the court noted that "the Act's wide net was cast 'for obvious reasons,'" and so it upheld the conviction.[335] The Supreme Court subsequently reversed on different grounds.[336]

Broadly written statutes are hardly an isolated occurrence. In the past several years, the Supreme Court has heard several cases, including *Bond*, in which they were forced to grapple with the government's decision to use broad laws to reach trivial behavior.[337] For example, in *Yates v. United States*,[338] the government prosecuted a fisherman under 18 U.S.C. § 1519 for destroying or concealing a "tangible object with the intent to impede" an investigation of a matter within the jurisdiction of a department or agency

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18 U.S.C. § 229F(1)(A), (8)(A). The statute specifically exempts "any individual self-defense device, including those using a pepper spray or chemical mace." 18 U.S.C. § 229C. It also exempts chemicals that are intended for peaceful purposes, protective purposes, and unrelated military purposes. 18 U.S.C. § 229F(7).

331. *Bond*, 572 U.S. at 852.

332. *Id.*

333. *Id.*

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

335. *Id.*

336. *Bond*, 572 U.S. at 866.

337. *See* Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 ARIZ. L. REV. (forthcoming 2019) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3205783 (collecting cases).

338. 135 S. Ct. 1074 (2015).

of the United States.[339] Yates had caught some fish that were smaller than what was permitted under applicable fishing regulations and he ordered a crew member to dispose of the fish in order to prevent federal authorities from confirming that he had violated these regulations.[340] Violating the regulations would have resulted in a fine.[341] But section 1519—which was adopted to address corporate fraud in the wake of the Enron scandal—carries a maximum sentence of twenty years in prison.

The Court reversed the conviction in *Yates*. In order to do so, it had to first find the statute ambiguous. As Justice Kagan illustrated in a biting dissent, it is simply not credible for the Court to claim that the statute was ambiguous—a fish is obviously a "tangible object."[342] *Yates* is not the only case where the courts have tried to deal with overly broad laws by claiming that clear text was ambiguous.[343] For example, the Supreme Court overturned the conviction in *Bond* by claiming that the statutory language was unclear.[344]

The modern embrace of textualism requires this sort of subterfuge. A court that has eschewed the practice of interpreting statutes according to the legislature's purpose can hardly make judgements about whether a statute is written more broadly than necessary—what is necessary can only be determined by looking at what purpose the legislature was attempting to

339. 18 U.S.C. § 1519 (2012) ("Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.").

340. *Yates*, 135 S. Ct. at 1078.

341. *Id.* at 1079–80. The Court also noted that, in the time between the defendant's actions and the government's indictment, the relevant fishing regulations had changed. *Id.*

342. *Yates*, 135 S. Ct. at 1090–1101 (Kagan, J., dissenting).

343. *See* Brennan-Marquez, *supra* note 337 (manuscript at 2).

344. The chemicals that Bond used fell quite clearly within the statutory language. Bond v. United States, 572 U.S. 844, 867–74 (2014) (Scalia, J., concurring in the judgment). Nonetheless, the defendant in *Bond* ended up prevailing because the majority used a federalism presumption—requiring a "clear indication" that Congress meant to "intrude[] on the police power of the States"—to read the statute more narrowly. *Id.* at 857–58, 860 (majority opinion). Unfortunately, lower courts have not read *Bond* to actually require a federalism clear statement when faced with other criminal statutes. *E.g.*, United States v. Walls, 784 F.3d 543, 547 (9th Cir. 2015); United States v. Looney, 606 F. App'x 744, 747 (5th Cir. 2015). And, even if courts were to faithfully apply this federalism clear statement rule to criminal laws, the rule is limited to federal criminal law. The clear statement rule does not protect defendants from overly broad *state* statutes. For example, Bond committed her crimes in Pennsylvania. Pennsylvania makes it a first degree felony to possess, manufacture, or use a weapon of mass destruction, and it defines "weapon of mass destruction" to include any "chemical element or compound which causes death or bodily harm." 18 PA. CONS. STAT. § 2716(i)(5) (2002). In other words, overly broad statutes are not merely a federalism issue.

achieve.[345] As *Yates*, *Bond*, and similar cases illustrate,[346] a statute that is overly broad can nonetheless be written quite clearly. Thus, we need to develop a rule that addresses overly broad laws based on their breadth.[347]

A clear statement rule requiring a defendant to have caused or intended to cause substantial harm would do precisely that, and it would go a long way to counteracting some of the worst problems associated with overly broad statutes. In particular, such a clear statement rule would reduce the risk that defendants are disproportionately punished for their acts. Defendants would not have to rely on the equitable discretion of prosecutors to avoid charges for trivial violations of a criminal statute. A clear statement rule would ensure that each defendant charged with a serious crime could argue that she ought not be convicted because her wrongful conduct was trivial. That is because the clear statement rule, in effect, adds a new element to all felony statutes: that the defendant either caused or intended to cause substantial harm. Unless the statute includes clear language to the contrary, the prosecutor must prove this substantial harm element beyond a reasonable doubt.[348] Prosecutors who know that they may have to prove such an element to a jury will be less likely to file charges in trivial cases.[349]

A substantial harm clear statement rule would be more effective at dealing with overcriminalization cases like *Bond* than current doctrine. Textualism does not exclude Bond's behavior from the statute because the chemicals she used fell within the extraordinarily broad definition of "chemical weapon"—that is, "any chemical" which "can cause death . . . regardless of their origin or of their method of production."[350] (The two chemicals that she used were essentially harmless as she employed them, but they could be lethal at much higher doses.) The rule of lenity could not help Bond because the statute does not seem to be ambiguous.[351] The statute

345. *Cf.* Brogan v. United States, 522 U.S. 398, 403 (1998) ("[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself.").

346. *E.g.*, Marinello v. United States, 138 S. Ct. 1101, 1106 (2018) (construing statutory language "this title"—which referred to title 26 of the U.S. Code—to refer only to particular IRS proceedings in order to avoid turning any non-compliance with IRS rules into a felony).

347. *See generally* Brennan-Marquez, *supra* note 337.

348. *Cf.* HUSAK, *supra* note 6, at 370–86 (discussing the prohibition on punishing *de minimis* infractions of criminal law as both an element of an offense and a defense to conviction). That will permit defendants both before trial—in the form of a motion to dismiss the indictment, *e.g.*, FED. R. CRIM. P. 12(b)(3)(B)(v) ("failure to state an offense")—and at trial to argue that she neither intended nor caused substantial harm.

349. Those prosecutors who do elect to charge trivial conduct run the risk of losing at trial, which gives them little leverage in plea bargaining.

350. 18 U.S.C. § 229F(8)(A) (2012).

351. To be sure, the Supreme Court stated that "the improbably broad reach of the key statutory definition" created statutory "ambiguity." Bond v. United States, 572 U.S. 844, 859–60 (2014). But the

defined the term "chemical weapon," and so it was not subject to a vagueness challenge. The statute did not affect First Amendment activity, and so it was not subject to an overbreadth challenge. Bond was not subject to the death penalty nor was she a juvenile facing a life-without-parole sentence, and so she could not challenge her punishment as excessive under the Eighth Amendment.

To be sure, legislatures could satisfy a substantial harm clear statement rule by stating that they intend a statute to apply to defendants no matter how little harm they caused or intended to cause. Indeed, one might imagine a world in which legislatures routinely included in statutes the phrase "a person need not intend or cause substantial harm to violate this statute." But there are at least three reasons to believe that legislatures are unlikely to include such statements, as a matter of course, in legislation combatting serious crimes.

First, an affirmative statement that legislation ought to be used in trivial situations undercuts any argument that the new statute is necessary to address substantial harms. As explained above, new criminal laws are often adopted when the threat of something or someone is greatly exaggerated.[352] Statutory language extending liability to trivial conduct is inconsistent with this moral panic narrative, and so the pressure to pass legislation will not extend to including language about trivial conduct.

Our legislative dysfunction is driven, at least in part, by public opinion—in particular a widely shared belief "that criminals are not receiving harsh enough punishment."[353] But this punitive public opinion is a result of several information deficits,[354] including an information deficit about the common characteristics of crimes. In particular, voters assume that the typical crime is more serious than the average crime actually is. For example, one study documented that voters supported harsher sentences for burglary because they assumed that burglars are commonly armed and that a burglar is likely to inflict physical harm. But these assumptions about the typical burglary

Court did not use the rule of lenity to resolve the case—instead, it used a clear statement rule. *Id.* That suggests the Court did not believe that the statute was ambiguous enough for lenity to apply.

352. *See supra* note 28 and accompanying text.

353. Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 6 (2010); *see also* Bibas, *supra* note 44, at 927 ("In polls, the public says in the abstract that it thinks that judges sentence too leniently."); Loretta J. Stalans & Arthur J. Lurigio, *Lay and Professionals' Beliefs About Crime and Criminal Sentencing: A Need for Theory, Perhaps Schema Theory*, 17 CRIM. JUST. & BEHAV. 333, 344 (1990) (reporting that 72 percent of the lay subjects in the study said that judges are too lenient in sentencing burglary).

354. Those information deficits include public misunderstanding about the crime rate and public perception about sentence lengths. *See* Carissa Byrne Hessick, *Mandatory Minimums and Popular Punitiveness*, 2011 CARDOZO L. REV. DE NOVO 23, 24–27 (identifying these information deficits and collecting sources).

are incorrect; most burglars are unarmed and are unlikely to harm a victim.[355]

If legislators were forced to explicitly state that they intended harsh penalties to apply to defendants who neither intend nor cause serious harm, then they would not be able to rely on public misperceptions about crime characteristics. Take, for example, the Controlled Substances Act.[356] The text of that statute criminalizes, among other behaviors, a person giving a prescription painkiller to her spouse who injures his back. Voters likely assume that this criminal statute targets commercial drug dealers. An explicit statement by the legislature that it intends to include trivial offenses would counterbalance the information deficit. It would tell voters that the harsh penalties would apply to less culpable defendants, rather than allowing voters to assume that the harsh penalties are needed to deal with more serious offenders.

Second, such a statement would mean that legislators could not blame prosecutors for prosecutions of trivial conduct. As we noted above, legislators can escape accountability for overly broad laws by blaming prosecutors for cases involving trivial conduct.[357] But if legislators include language that explicitly includes trivial conduct within the scope of the statute, they cannot say that trivial cases are the result of a failure of prosecutorial discretion.

Third, such language would make it easier for opponents of the legislation to challenge the legislation. That is, if legislatures explicitly state that they are targeting trivial or insubstantial conduct for felony liability, then they may lose political support for their punitive policies. The idea that trivial violations of the law ought not be punished is deeply intuitive, and likely widely shared.[358] If legislatures were to start explicitly targeting behavior that they were required to affirmatively label as "trivial" or "not substantial," it is difficult to believe that they will face no pushback on such legislation. That pushback would likely result in a legislative compromise that made no mention of the amount of harm required to trigger the statute.[359] And, if the statute did not explicitly include trivial harm, then the clear statement rule would require a more narrow interpretation so that the statute included only substantial harm.

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355. Lanni, *supra* note 321, at 1781–82.

356. *See* 21 U.S.C. § 829(a) (2012) (prohibiting the use of Schedule II drugs without a prescription).

357. *See* Stuntz, *supra* note 50 and accompanying text.

358. *See* HUSAK, *supra* note 6, at 362–89.

359. Ambiguity is a common method for obtaining legislative compromise. *See generally* Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002).

There is historical support for our substantial harm clear statement rule. A requirement of substantial harm has deep roots in the common law maxim *de minimis non curat lex*, which translates roughly to "the law does not concern itself with trifles."[360] The maxim can be traced back to Roman law,[361] and it appears in the major English and early American treatises.[362] It applies not only in civil cases, but also in criminal cases,[363] though with some limitations.[364] And its influence can be seen today: approximately a third of states, as well as the Model Penal Code, have codified the ability of judges to dismiss criminal cases involving trivial wrongdoing.[365]

Fittingly, *de minimis non curat lex* was often used as a rule of statutory construction.[366] The maxim was most often used in civil cases. But it was also used to dismiss prosecutions against criminal defendants whose wrongdoing was minimal. For example, in *State v. Goode*, the North Carolina Supreme Court vacated an accessory's conviction for receiving stolen goods after the fact.[367] The defendant had received goods of little value, and the punishment for the principals had been minimal, and so the court relied on an old English case and the maxim *de minimis non curat lex* to vacate the conviction.[368]

Similarly, in *Rex v. Tindall*,[369] the defendants were indicted for creating a nuisance in a harbor by building a structure to protect their shipyard. Although building the structure fell within the text of the relevant statute, the jury rendered a special verdict in which it noted that the structure had

360. *De Minimis Non Curat Lex*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 334–35 (2017); Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 MICH. L. REV. 537, 538 (1947) (noting that the maxim has also been translated as "the law doth not regard trifles," and arguing that this is the better translation).

361. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 258 n.1 (1966); Veech & Moon, *supra* note 360, at 538.

362. Veech & Moon, *supra* note 360, at 537, 539, 542–43.

363. United States v. Hocking Valley Ry. Co., 194 F. 234, 250 (N.D. Ohio 1911) ("Criminal law, as well as civil, honors the maxim, 'De minimis non curat lex,' which has controlling application to the enforcement of a statute which aims at the repression of real and substantial abuses . . . ."); *see also* 1 BISHOP, *supra* note 211, § 320 (labeling it "an old and familiar maxim, which, standing in the foremost rank of legal maxims, controls every department of our jurisprudence, civil and criminal"); Veech & Moon, *supra* note 360, at 542 (describing the maxim as "a rule of reason, a substantive rule that may be applied in all courts and to all types of issues" (footnote omitted)).

364. 1 BISHOP, *supra* note 211, §§ 320–21 (noting limitations on the doctrine in cases involving larceny and arson).

365. Roberts, *supra* note 360, at 332–37 (collecting and categorizing the relevant statutes and court rules).

366. Veech & Moon, *supra* note 360, at 542.

367. State v. Goode, 8 N.C. (1 Hawks) 463, 466 (1821).

368. *Id.* at 464–66. In particular, the *Goode* Court relied on the case of Abraham Evans, which is discussed in MICHAEL FOSTER, CROWN LAW 73–74 (3d ed. 1792).

369. Rex v. Tindall (1837) 112 Eng. Rep. 55, 58; 6 Ad. & E. 143, 152.

only a small effect on the rest of the harbor.[370] The appellate court directed that a verdict of not guilty be entered against the shipyard owners because "no person can be made criminally responsible for consequences so slight, and uncertain, and rare."[371]

There is also modern precedent for our substantial harm rule. As Anna Roberts has documented, nineteen states have "given trial courts the power to dismiss prosecutions for the sake of justice."[372] Some states style this power as the power to dismiss "in furtherance of justice," while others characterize it as the power to dismiss *de minimis* prosecutions.[373] Regardless of how it is phrased, these statutes permit judges to dismiss charges when the offense is insufficiently serious or did not cause sufficient harm. A *de minimis* provision also appears in the Model Penal Code.[374] Although these statutes have not received much attention,[375] they appear to be uncontroversial. That may be because they are seen as a necessary safety valve to mitigate the excesses of the criminal justice system,[376] or because we share the intuition that we should not impose the heavy costs association with a criminal conviction on those whose conduct is not seriously wrongful.[377] It is precisely for these reasons—because the criminal justice system is too harsh and because it is unjust to punish trivial conduct—that courts should adopt the substantial harm clear statement rule.

Some might object that our rule does not give any criteria for deciding what actual or intended harm is substantial and what is not. Whether harm was sufficiently serious will require a case-by-case determination based on individual facts. But the need for case-by-case determinations without clearly articulated criteria is hardly unique to our proposed rule. The law is

370. *Id.* at 57.

371. *Id.* at 58.

372. Roberts, *supra* note 360, at 330.

373. *Id.*

374. MODEL PENAL CODE § 2.12 (AM. LAW INST. 1985) ("The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct . . . did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction . . . .").

375. *See* HUSAK, *supra* note 6, at 362 (noting how little attention these laws have received); *see also* Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense*, 1997 BYU L. REV. 51, 51–52; Roberts, *supra* note 360, at 330; Melissa Beth Valentine, *Defense Categories and the (Category-Defying) De Minimis Defense*, 11 CRIM. L. & PHIL. 545, 545–46 (2017).

376. *See* Roberts, *supra* note 360, at 339–46 (discussing how these provisions push back against the size and the harshness of the criminal justice system).

377. *See* HUSAK, *supra* note 6, at 365 (stating that the statutes which are "literally over-inclusive, prohibiting a range of conduct broader than that which causes the harm or evil sought to be prevented," can "create a powerful case for exculpation," and that when a "defendant's conduct *did* cause the harm or evil sought to be prevented by the law defining the offense, but did so" to a trivial extent, then liability "would be unjust, even though persons may disagree about exactly what is unjust about it").

replete with statutes requiring factfinders to make qualitative determinations about a defendant's conduct or the consequences of that conduct.[378] Asking a jury to decide whether harm is substantial is no different than asking them to determine whether something is reasonable or material.[379] And, while flexible standards in the criminal law can create their own problems,[380] a flexible standard is better than an obviously over-inclusive rule when it comes to criminal liability.[381]

In any event, as a practical matter, our current system already relies heavily on determinations such as whether a defendant caused or intended to cause substantial harm. Prosecutors routinely make those determinations in deciding whether to use their equitable discretion not to prosecute. Our clear statement rule just reassigns those determinations to juries. If decisions not to enforce the law are going to be made on a case-by-case basis, juries ought to be making those decisions. Our constitutional structure inserts the jury as an additional check on the punitive tendencies of government actors.[382] Asking juries to exercise the equitable discretion currently exercised by prosecutors will likely result in criminal prosecutions that more accurately reflect community norms about appropriate conduct.[383] And it would give a legitimate outlet for jurors to reject prosecutorial choices other than through nullification.

Some might object that juries would make these decisions arbitrarily. After all, jurors do not need to explain why they decided not to convict a

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378. *See* Supplemental Brief for the United States at 1a–99a, Johnson v. United States, 135 S. Ct. 2551 (2015) (No. 13-7120) (collecting federal criminal statutes and state criminal statutes that employ qualitative standards).

379. *See* United States v. Gaudin, 515 U.S. 506, 512 (1995).

380. *See* Hessick, *supra* note 1, at 992–1022; Hessick, *supra* note 15, at 1158–60.

381. One might think that, as a general matter, rules are preferable to standards when it comes to the imposition of criminal liability. That is because a system of rules makes clear the threshold for liability *before* an individual acts, while standards only clarify the matter after the individual acts through adjudication. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992) (observing that "the only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act"). In other words, rules provide more notice than standards, and notice is a bedrock principle of criminal justice. *See* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 347–48 (2005). But that analysis holds true only insofar as the rule sets both the actual threshold for liability. Because overly broad laws are not always enforced as written, they give less notice than other bright-line rules. *Cf.* Hessick, *supra* note 1, at 998–99 (explaining how overly broad laws fail to give notice).

382. *See* Blakely v. Washington, 542 U.S. 296, 306–07 (2004).

383. In this respect, the proposed clear statement rule is similar to various proposals aimed at incorporating more community input into the modern criminal justice system. *See, e.g.*, Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 741–48 (2010); Joshua Kleinfeld et. al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1694 (2017); Lanni, *supra* note 321; Richard E. Myers II, *Requiring A Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137, 146–51 (2009); Jocelyn Simonson, Essay, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 286–96 (2019).

defendant, and they need not be consistent across cases because they sit only one case at a time. But that is not very different from the status quo: prosecutors are under no obligation to explain their decisions not to prosecute, and they are under no obligation to decline to enforce cases in a consistent fashion.[384]

What is more, giving this power to juries does not completely remove it from prosecutors. Prosecutors will still have the power to decline to prosecute, and whether the defendant caused or intended to cause sufficient harm will continue to be one factor they consider. The proposed clear statement rule would only limit the power of prosecutors to bring charges in the absence of substantial harm. And it would install the jury as a new check on the prosecutor's judgment whether the harm or intended harm in a particular case was significant enough to warrant a felony conviction.[385] In this way, the substantial harm clear statement rule provides substantially more protection of individual liberty than our current system of relying on prosecutorial discretion.[386]

In sum, a substantial harm clear statement rule would mitigate one of the worst consequences of overly broad laws—the arbitrary and disproportionate punishment of trivial conduct. Such a rule is grounded in both history and modern practice. And, even if such a clear statement rule results in legislatures routinely enacting laws that include trivial conduct, at least it would require legislators to bear the political costs of imposing harsh penalties on those whose actions were not particularly harmful.

CONCLUSION

Clear statement rules are not a panacea for all that ails criminal justice. They are unlikely to have more than indirect effects on issues surrounding policing or racial inequality. Nor will they solve all of the legislative dysfunction that we and other observers have described. It is possible that a determinedly punitive legislature would amend its statutes to clearly describe the sweeping and harsh criminal liability that characterizes the status quo. To do so, however, they would have to take responsibility for their punitive choices. Clear statement rules will also not put an end to demagogic criticisms of "activist" judges. Judges who choose to adopt criminal clear statement rules are likely to face some scrutiny—especially when they adopt the rule for the first time.

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384. *See* Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 78 (2011).

385. *Cf.* Myers, *supra* note 383.

386. *See* Bowers, *supra* note 323, at 1704–23 (describing the "systemic pressures and institutional constraints" which cause prosecutors to "undervalue—or, at least, insufficiently act upon—equitable reasons for charge declination").

But clear statement rules are likely to be less controversial and more effective than the current doctrinal tools that courts use to intervene in substantive criminal law. And therefore, they are a promising path to at least some reduction in the harms caused by legislative dysfunction.

Perhaps the greatest virtue of criminal clear statement rules is the simplicity of their rationale. "Say what you mean, and mean what you say" is a clear, sharp message that just might cut—or at least fray—the Gordian knot of contemporary legislative dysfunction about crime.