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# A Political Interpretation of Vagueness Doctrine

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# A POLITICAL INTERPRETATION OF VAGUENESS DOCTRINE

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*The "void-for-vagueness" doctrine requires the specific definition of criminal offenses. In this Article, though, we claim it does more: it largely restricts criminalization decisions to legislatures, which are unlikely to criminalize conduct they see as both harmless and widespread. Thus, rather than constitutionalizing the harm principle and thereby assuming a judicial obligation to define harm, the Supreme Court has used the vagueness doctrine to constrain majorities to make their own assessments of harmfulness. While American law has no explicit requirements that criminal liability be created by legislation or conditioned on harm, the vagueness doctrine achieves those ends indirectly.*

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## I. INTRODUCTION

What conduct can be punished as a crime, and who can proscribe such crimes? American constitutional law appears to say little about either question. To be sure, punishment must be for past conduct,[1] previously proscribed,[2] and some conduct is protected by fundamental rights.[3] Yet constitutional law says little more about what conduct can be punished.[4] It does not, as some theorists have proposed, restrict crimes to acts harming or threatening a legal interest.[5]

1. *See* Robinson v. California, 370 U.S. 660, 666 (1962) (punishment cannot be for status or future propensities).

2. U.S. CONST. art I, §§ 9–10; Bouie v. City of Columbia, 378 U.S. 347, 354–55 (1964) (due process forbids retroactive judicial creation of or expansion of liability); United States. v. Tynen, 78 U.S. 88, 95 (1871) (criminal liability cannot be predicated on a law repealed before the offense); Calder v. Bull, 3 U.S. 386, 390 (1798) (explaining that Article I, Section 10 forbids state statutes punishing conduct not criminal when committed).

3. *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 715 (2012) (explaining that the First Amendment prohibited punishment for making false claims about receipt of military decorations or medals); Lawrence v. Texas, 539 U.S. 558, 567 (2003) (stating that the right to privacy covers intimate sexual conduct, which cannot be punished absent harm to a person or institution).

4. But capital punishment in particular, may not be imposed for crimes against persons other than homicide. Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (precluding capital punishment for rape of a child).

5. JEREMY BENTHAM, OF LAWS IN GENERAL 32–33 (H.L.A. Hart ed., Univ. London, Athlone Press 1970); JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 26 (1984) (defining harm principle as principle that harmfulness is a good reason, although not necessarily a sufficient reason or the only good reason, to criminalize conduct); *id.* at 106–09 (applying harm principle in that harm is best understood as a setback to an interest that violates a right); H.L.A. HART, LAW, LIBERTY AND MORALITY 4–5 (1963); JOHN STUART

Moreover, unlike the many countries requiring legislative criminalization,[6] the United States has no constitutional requirement that criminal offenses be defined by one branch of government. Thus, the Constitution does not preclude criminalization by state courts,[7] or executive agencies.[8] In this Article, however, we will argue that there is a doctrine of American constitutional law that imposes a practical limit on what kinds of conduct can be criminalized, and on who can make that decision: the doctrine of unconstitutional vagueness, requiring that criminal prohibitions be specific enough to provide notice to those who must obey them and to cabin the discretion of those who enforce them.[9]

As we will explain in Part II, vagueness doctrine was initially used in the early twentieth century to attack economic regulations for failing to provide notice of what conduct they forbade.[10] Dean Risa Goluboff's historical research, however, has shown that the vagueness doctrine flowered again during the Warren and Burger Courts as a judicial tool to protect out-groups from the pretextual and discriminatory enforcement of generally applicable laws.[11] By 1983, the Court did not hesitate to summarize the jurisprudence of the 1960s and 1970s as recognizing an aspect of specificity "more important" than notice: "the requirement that a legislature establish minimal guidelines to govern law enforcement" so as to guard against "arbitrary enforcement."[12] Scholarly commentary, tracking this application of the doctrine, concluded either that vagueness was being used to create "buffer zones" around fundamental rights,[13] or as a proxy to protect new

MILL, ON LIBERTY 9 (Elizabeth Rapaport Ed., Hackett Publ'g Co. 1978) (1859) (endorsing principle that government coercion justified only to prevent harm). The principle that crimes should be limited to attacks on a legal interest or *Rechtsgut* was developed by nineteenth century German criminal law theorists P.J.A. Feuerbach, J.M.F. Birnbaum and Karl Binding, and remains influential in German criminal law. *See generally* Markus Dirk Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. COMP. L. 679 (2006). But it is not required by German constitutional law. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Feb. 26, 2008, 120, 224 (Ger.) (upholding criminal prohibition on incest without identifying legal interest protected). *See generally* Markus D. Dubber, *Policing Morality: Constitutional Law and the Criminalization of Incest*, 61 U. TORONTO L.J. 737 (2011).

6. For a discussion of this principle as a constitutional requirement in other nations, see MARKUS D. DUBBER & MARK KELMAN, AMERICAN CRIMINAL LAW: CASES, STATUTES, AND COMMENTS 115, 123 (2005).

7. It does preclude criminalization by federal courts. United States v. Hudson, 11 U.S. 32, 34 (1812) (common law crimes unconstitutional in federal system).

8. United States v. Grimaud, 220 U.S. 506, 521 (1911).

9. "[T]he terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Const. Co., 269 U.S. 385, 391 (1926). "It would certainly be dangerous if the legislature could 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 should be set at large." Kolender v. Lawson, 461 U.S. 352, 358 n.7 (1983) (quoting United States v. Reese, 92 U.S. 214, 221 (1875)).

10. Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1181–88 (2013).

11. RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND MAKING OF THE 1960S, at 276–332 (2016).

12. *Kolender*, 461 U.S. at 357–58.

13. Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine In the Supreme Court*, 109 U. PA. L. REV. 67, 84–85 (1960).

rights that the Court did not want to recognize explicitly.[14] Dean Goluboff's research confirms that the Court chose vagueness over the recognition of new liberty rights as its rationale for striking down vagrancy laws.[15] Scholars from the left have sometimes criticized the Court for failing to explicitly declare substantive liberty rights,[16] and those from the right have criticized the Court for doing so stealthily.[17] We note that the Court has also identified a third strategy for regulating criminalization: a constitutional requirement of harm.[18] We conclude that thus far, however, the Court has used it only in protecting fundamental liberty rights.

After laying this groundwork, we present our own interpretation of vagueness doctrine in Part III. We argue that vagueness doctrine works in concert with requirements of conduct and prospectivity to achieve a procedurally effectuated requirement of harm. Vagueness doctrine reinforces the requirements of conduct and prospectivity by impeding legislatures from defining criminal conduct so vaguely as to allow law enforcement or courts to decide what conduct to punish after it has been committed.[19] Thus, while there is no formal constitutional requirement of legislative criminalization, a requirement of specificity makes legislative crime definition more effectual and impedes other branches from diluting legislative authority.

Confining the definition of criminal conduct to legislatures ensures that conduct will be assessed on the basis of "basic policy matters,"[20] general and prospective evaluation of categories of conduct rather than retrospective evaluation of persons. Legislatures fix their policy judgments in a written text, after public deliberation, by officials democratically accountable to those whose conduct will be judged thereby. Limiting criminalization decisions to an elected legislature makes it more likely they will be based on appropriate policy considerations, like the costs and benefits of the conduct. Because legislators decide by and are elected by majority vote, they are unlikely to criminalize conduct widespread among most constituents unless it is, on balance, harmful to them. Ma-

14. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 661–62 (1981).

15. GOLUBOFF, *supra* note 11, at 313–22.

16. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 621–22 (1997); Ryan McCarl, *Incoherent and Indefensible: An Interdisciplinary Critique of the Supreme Court's "Void-for-Vagueness" Doctrine*, 42 HASTINGS CONST. L.Q. 73, 93 (2014); Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CALIF. L. REV. 491, 507 (1994).

17. Johnson v. United States, 135 S. Ct. 2551, 2570 (2015) (Thomas, J., concurring); Paul Larkin, *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 323 (2016) (calling vagueness a "lost" doctrine in "need [of] a home").

18. Lawrence v. Texas, 539 U.S. 558, 576–78 (2003).

19. *See generally* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

20. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972). As will be discussed *infra* Section III.A, our interpretation is bolstered by the recent clarification by the Court that separation of powers is an additional "pillar" of the vagueness doctrine (along with due process). *See* United States v. Davis, 139 S. Ct. 2319 (2019); *see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (plurality).

joritarianism makes legislative deliberation *self-regarding*. Of course, majoritarianism does not preclude criminalization of harmless conduct valued primarily by minorities. Because legislatures deliberate in public, however, supporters of discriminatory decisions to criminalize will have to publicly answer challenges from representatives of burdened minorities. Discrimination is more visible to reviewing courts if accomplished by legislatures than by police on street corners. In this way, representation, deliberation, publicity, and judicial review combine to makes legislative decision *other-regarding*. Together, these self-regarding and other-regarding aspects of legislative deliberation make criminalization on the basis of harm more likely.

While vagueness doctrine, by encouraging legislativity, encourages considerations of harm generally, we argue that the doctrine does especially important work when a court reviews a vaguely defined offense covering harmless, widespread conduct that is selectively enforced against an unpopular minority group. By forcing a majority to proscribe conduct explicitly, the vagueness doctrine forces it to share some of its protective self-regard with minorities.[21]

Finally, vagueness doctrine is valuable even in the case of an offense that covers harmless activity that is not widespread, but concentrated among a minority group. Here, even if legislativity will be less likely to result in decriminalization, vagueness doctrine will at least require that the offense be specific enough to make avoidance of the activity possible. Narrow offenses can be maneuvered around.

A constitutional requirement of specificity is best understood as operating in conjunction with requirements of conduct and prospectivity to provide a process-based protection of diversity. A conduct requirement prevents the explicit criminalization of identity or supposed disposition.[22] A prospectivity requirement reinforces a conduct requirement by preventing the pretextual criminalization of conduct because of the identity of the person who has committed it.[23] Finally, a specificity requirement reinforces both requirements by checking pretextual prosecution of dissidents and members of disfavored groups for conduct that is widespread and difficult to avoid.[24]

21. The intuition here is that standards requiring normative judgment of conduct—such as "vagrant," "suspicious," "lewd," "immoral," "unreasonable," "excessive," or even "harmful" or "dangerous," are attractive to majorities because the American criminal justice system offers many veto points at which such discretion can be exercised in favor of a majority defendant. A majority will be less willing to prohibit and punish its own harmless conduct if they must do so explicitly, as this would allow a single witness—whether vindictive, officious, or conscientious—the power to initiate a prosecution that subsequent decisionmakers may feel they have no discretion to stop.

22. Robinson v. California, 370 U.S. 660, 666 (1962).

23. Bouie v. City of Columbia, 378 U.S. 347, 351–52 (1964).

24. *See* Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2115 (2015) ("The usual 'tests' for vagueness—fair notice to ordinary citizens from the language of the statute and fear of arbitrary enforcement—provide superficial explanations for applications of the vagueness doctrine. We believe that the *Robinson* conduct requirement and the *Bouie*-*Shuttlesworth* correlation requirement have significantly greater explanatory power in supporting a conclusion that a statute is or is not unconstitutionally vague. Attention to these principles can provide meaningful insight into whether a statute has transgressed acceptable vagueness limits.").

In sum, we suggest that rather than constitutionalizing the harm principle and thereby assuming a judicial obligation to define harm, the Court has preferred to constrain majorities to make their own assessments of harmfulness. As Dean Goluboff's research shows, the Court reached a fork in the road in the early 1970s, and it deliberately chose to fashion procedural limits on criminalization instead of announcing new fundamental rights to engage in certain conduct.[25] As we argue, though, the Court's chosen strategy may have a somewhat similar effect to the one rejected, while showing greater deference to democratic majorities.

After presenting our interpretation of vagueness doctrine, we will illustrate it in Part IV with several categories of offenses found vague for proscribing harmless or innocent conduct. These categories include offenses defined by presence in public while arousing police suspicion; offenses defined only by a subjective judgment that the conduct is offensive; offenses defined by a subjective judgment that the conduct violates sexual propriety; and offenses of possessing objects judged dangerous. In all these cases, we see courts concerned that defining crimes by reference to evaluative standards invites discriminatory enforcement.

Finally, in Part V we will discuss a commonly accepted practice that raises vagueness problems, and that may illustrate a limitation of our interpretation: criminalization by administrative agency. Although objecting to legislative delegation of criminal lawmaking to law enforcement in its vagueness decisions, the Supreme Court has ratified administrative crimes repeatedly. Administrative criminalization is troubling in that criminal lawmaking involves moral judgments better made by democratic representatives than by technocratic experts. For such reasons, many other countries require legislative criminalization.[26] American acceptance of administrative crimes thus suggests that vagueness doctrine may not be centrally concerned with legislativity, but instead with virtues inhering in legislative decision-making, some of which may be replicated in a sufficiently constrained administrative agency.

## II. SPECIFICITY AS A CONSTITUTIONAL PRINCIPLE

### *A. The Constitution of Criminal Law*

Should the Supreme Court constitutionalize principles of criminal law? Lawyers learn that criminal punishment is traditionally and properly conditioned on legal prohibition, harmful conduct, and culpable choice.[27] Yet the Supreme

25. *See* GOLUBOFF, *supra* note 11, at 298–332.

26. DUBBER & KELMAN, *supra* note 6, at 108–09.

27. *See generally* GUYORA BINDER, THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW 7 (2016); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 71–102, 266–267 (1968).

Court has only partially incorporated these principles of legality,[28] harm,[29] and choice[30] into our constitutional law, praising principle generously but applying it economically.[31] In criminal law, the Court has seemingly embraced Gerald Gunther's parody of Alexander Bickel's prudential theory, by practicing "100 % insistence on principle, 20 % of the time."[32]

The result is a patchwork: punishable offenses must include conduct,[33] but the conduct need not be voluntary,[34] or even sane.[35] Criminal conduct must cause or threaten harm, but perhaps only when it would otherwise be protected by a fundamental liberty.[36] It must be prohibited in advance of commission,[37] but not

28. The principle of legality embraces a number of requirements and so may be enforced in whole or in part. In its fullest form, it requires that all punishment be conditioned on commission of a crime specifically and narrowly defined in a previously, publicly, and legislatively enacted canonical text. This idea has many sources, but one early influential formulation was: "The laws only can determine the punishment of crimes; and the authority of making penal laws can only reside with the legislator, who represents the whole society united by the social compact. No magistrate then, (as he is one of the society) can, with justice, inflict on any other member of the same society punishment that is not ordained by the laws." CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 9 (1986) (orig. pub. 1764). In the many jurisdictions influenced by German criminal law, the canonical formulation is "nulla poena sine lege . . . nulla poena sine crimene . . . , nullum crimen sine poena legali." PAUL JOHANN ANSELM FEUERBACH, LEHRBUCH DES GEMEINEN IN DEUTSCHLAND GÜLTIGEN PEINLICHEN RECHTS 20 (Danila Drischmann ed., GRIN Verlag 2002) (1801). An influential American restatement of these maxims is: "(1) No one may be subjected to criminal punishment except for conduct. (2) Conduct may not be treated as criminal unless it has been so defined by appropriate lawmakers before it has taken place. (3) This definitional role is assigned primarily and broadly to the legislature, secondarily and interstitially to the courts, and no one else. (4) . . . the definitions of conduct must be precisely enough stated to leave . . . little room for arbitrary application." PACKER, *supra* note 27, at 72–73.

29. *See* sources cited *supra* note 5 (sources on harm principle).

30. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 22, 44–47 (1968) ("For [punishment] . . . a moral license is required in the form of proof that the person punished broke the law by an action which was the outcome of his free choice . . . .") ("Consider the law not as a system of stimuli but as . . . a *choosing* system, in which individuals can find out . . . the costs they have to pay if they act in certain ways."); MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 404, 548 (1997) ("[O]ne is culpable if he chose to do wrong in circumstances where that choice was freely made.") ("[W]e are responsible for wrongs we freely choose to do, and not responsible for wrongs we lacked the freedom (capacity and opportunity) to avoid doing."); PACKER, *supra* note 27, at 69 (both fairness and compliance depend on "making culpability a necessary condition of liability to punishment.").

31. Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 509–510 (2004); Brenner M. Fissell, *Federalism and Constitutional Criminal Law*, 46 HOFSTRA L. REV. 489, 489 (2017); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107–08 (1962); Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859 (1999).

32. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964). *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986).

33. Robinson v. California, 370 U.S. 660, 666–67 (1962).

34. Powell v. Texas, 392 U.S. 514, 533–37 (1968).

35. Clark v. Arizona, 548 U.S. 735, 752–53 (2006).

36. *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003); Thornhill v. Alabama, 310 U.S. 88, 104–06 (1940).

37. Rogers v. Tennessee, 532 U.S. 451, 456–62 (2001); Bouie v. Columbia, 378 U.S. 347, 353–55 (1964); Calder v. Bull, 3 U.S. (3 Dall.) 386, 390–91 (1798).

necessarily by legislation.[38] It must nevertheless be prohibited with sufficient precision to provide notice to potential offenders,[39] to restrict arbitrary and discriminatory enforcement by police[40] against people engaged in "innocent" conduct,[41] and to define an "ascertainable standard of guilt" for courts,[42] that they may not unduly expand through "unexpected or indefensible" interpretations.[43] Yet the Court has drawn back from defining innocent conduct or declaring a constitutional right to engage in it.[44] Prohibitions must be drawn narrowly enough to exclude conduct protected by the constitution,[45] or maybe only by the First Amendment.[46] While routinely intoning the importance of culpability in statutory cases,[47] the Court has only made culpability a constitutional requirement for punishing the exercise of a constitutional liberty,[48] or an omission,[49] or for imposing an extreme penalty.[50] The Court has required that culpable mental

38. For recent examples of common law crimes, see *In re* May, 584 S.E.2d 271, 273–74 (N.C. 2003), Commonwealth v. Triplett, 686 N.E.2d 195, 196 (Mass. 1997), Street v. State, 513 A.2d 870, 871–72 (Md. 1986). For statutes incorporating common law crimes see FLA. STAT. § 775.01 (2018), IDAHO CODE § 18-303 (2018).

39. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

40. Kolender v. Lawson, 461 U.S. 352, 357–58 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); *Thornhill*, 310 U.S. at 97–98; Herndon v. Lowry, 301 U.S. 242, 257 (1937).

41. *Papachristou*, 405 U.S. at 163–64.

42. United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921); *see also* United States v. Reese, 92 U.S. 214, 233 (1875).

43. Rogers v. Tennessee, 532 U.S. 451, 455–62 (2001); Bouie v. City of Columbia, 378 U.S. 347, 354 (1964).

44. *See Papachristou*, 405 U.S. at 164; GOLUBOFF, *supra* note 11, at 294–97. *But see* City of Chicago v. Morales, 527 U.S. 41, 53–54 (1999); Lazarus v. Faircloth, 301 F. Supp. 266, 272–73 (S.D. Fla. 1969), *vacated sub nom.* Shevin v. Lazarus, 401 U.S. 987 (1971) (striking down Florida loitering statute as overbroad, on grounds that: "All loitering, loafing, or idling on the streets and highways of a city, even though habitual, is not necessarily detrimental to the public welfare nor is it under all circumstances an interference with travel upon them. It may be and often is entirely innocuous. The statute draws no distinction between conduct that is calculated to harm and that which is essentially innocent.").

45. Aptheker v. Secretary of State, 378 U.S. 5000 (1964); *Thornhill*, 310 U.S. at 95–103.

46. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 611–15 (1973).

47. Rosemond v. United States, 572 U.S. 65, 67 (2014); Morissette v. United States, 342 U.S. 246, 250–52 (1952).

48. United States v. X-Citement Video, Inc., 513 U.S. 64, 72–73 (1994); Smith v. California, 361 U.S. 149, 155 (1959); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 834 (1999).

49. Lambert v. California, 355 U.S. 225, 228 (1957). For differing interpretations of this cryptic opinion, compare Commonwealth v. Levesque, 766 N.E.2d 50, 56 (Mass. 2002) (imposing novel duty to prevent harm one has risked without fault), *with* State v. Lisa, 919 A.2d 145, 160 (N.J. Super. Ct. App. Div. 2007) (finding that imposing such a duty without notice would violate due process).

50. *Compare* Graham v. Florida, 560 U.S. 48, 67 (2010), *and* Roper v. Simmons, 543 U.S. 551, 568–69 (2005), *and* Atkins v. Virginia, 536 U.S. 304, 318–19 (2002) (stating that culpability required to justify death as a retributive and deterrent penalty), *and* Tison v. Arizona, 481 U.S. 137, 158 (1987), *and* Enmund v. Florida, 458 U.S. 782, 798 (1982), *with* Ewing v. California, 538 U.S. 11, 26–28 (2003) (reasoning that lengthy sentences of incarceration can be based on incapacitation without regard to desert or deterrence), *and* Shelton v. Sec'y, Dep't of Corr., 691 F.3d 1348, 1349 (11th Cir. 2012) (reasoning that strict liability for drug possession does not violate a clearly established constitutional norm).

states be proven beyond a reasonable doubt if they are defined as offense elements,[51] but not if their absence is redefined as a defense.[52]

The Court's prudential ambivalence in constitutionalizing substantive criminal law principles can be accounted for in two slightly different ways, emphasizing two different historical periods. One account would hark back to the New Deal when the Court rejected substantive due process as a counter-majoritarian obstacle to regulatory legislation, and projected a more modest role for judicial review in policing the boundaries of majoritarian process.[53] On this apologetic account, the Court has avoided constraining majorities from criminalizing by declaring new substantive liberties to engage in unpopular conduct and has instead sought to channel majority will through a fair process. In short, the Court has been prudent on principle. A more disenchanted account would focus on political conflict over race discrimination and rising crime in the Warren and Burger court eras, leading to political attacks on the judiciary and ultimately an ideologically altered composition of the Court.[54] On this account, the Court has simply retreated from precedent and abandoned principle.

No doubt both accounts have some truth, but this Article will build on the apologetic version, offering an interpretation of one of the most venerable and robust constitutional doctrines constraining criminalization, the void for vagueness doctrine. We defend the Supreme Court's use of vagueness doctrine, in conjunction with requirements of conduct and prospective offense definition, as a principled choice to require legality in proscribing conduct,[55] while leaving normative judgments about what conduct to condemn for legislative resolution. The Court thereby endeavored to establish a due process of criminalization, while relying on legislative transparency and democratic oversight to constrain substantive value choices.

This choice was not a panacea. William Stuntz argued that the Court's choice to impose procedural limits on criminal investigation without corresponding substantive limits on criminal law led legislatures to expand criminal liability.[56] The obvious must then be conceded: the expansion of vagueness doctrine did not prevent mass incarceration. But it did impede states from criminalizing identity, opinion, and nonconformity. In her celebrated history, *Vagrant Nation*, Dean Goluboff showed that eliminating punishment for being suspicious was an

51. Mullaney v. Wilbur, 421 U.S. 684, 704 (1975); *In re* Winship 397 U.S. 358, 364 (1970).

52. *See* Patterson v. New York, 432 U.S. 197, 210 (1977). Facts permitting a higher punishment are now considered offense elements. *See* Blakely v. Washington, 542 U.S. 296, 301–02 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476–77 (2000).

53. *See generally* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980).

54. *See generally* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 112–32 (2007); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 216–43 (2011).

55. *See generally* Jeffries, Jr., *supra* note 19 (stating that the unconstitutional vagueness doctrine as an aspect of legality).

56. STUNTZ, *supra* note 54, at 209–43; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997).

important social and political change fought for by a national network of progressive lawyers during the Warren Court years.[57] She recounted that these lawyers presented the courts with a variety of legal objections to vagrancy and loitering laws, including overbreadth based on unenumerated fundamental liberty rights to move about in public.[58] Yet one argument ultimately achieved traction with the Court: that vagrancy statutes were unconstitutionally vague.[59] She argues that this success made public spaces safer for the expression of political and cultural nonconformity and thereby made a difference for a wide range of social movements.[60] Although the Court eschewed the recognition of new liberty rights, it nevertheless used the doctrine of unconstitutional vagueness to protect liberty.

### *B. The Doctrine of Unconstitutional Vagueness*

What does the doctrine of unconstitutional vagueness require? As we will see, there is a typical formulation of the doctrine of unconstitutional vagueness in the Supreme Court's cases, and there is also a common reception of it in the scholarly community.

The Due Process Clauses of the Fifth and Fourteenth Amendments have been interpreted to prohibit excessively "vague" criminal laws, empowering courts to declare such laws "void-for-vagueness."[61] The doctrine of unconstitutional vagueness has roots in the practice of common law courts refusing to apply statutes providing insufficient guidance.[62] In the decades between the Civil War and the New Deal, the Supreme Court rooted this principle in separation of powers concerns,[63] and the Sixth Amendment right to notice of charges,[64] before settling on due process as the source of this prohibition.[65] The doctrine that vague criminal prohibitions violates the Due Process Clause was first applied to business regulation—especially antitrust offenses—in the early twentieth century.[66] These decisions emphasized the unfairness of imposing criminal liability without notice of what conduct was forbidden. The Court became less willing to strike

57. GOLUBOFF, *supra* note 11, at 247–48.

58. *Id.*

59. *Id.* at 313–22.

60. *Id.* at 323–32.

61. Note that whether vagueness challenges outside of the First Amendment context must be made "as-applied" and not "facially" is an issue currently in flux. *See* Sohoni, *supra* note 10, at 1188. Sohoni describes the Court's "vacillating approach," but characterizes the modern position to be that only as-applied challenges are permitted. *Id.* at 1187. Since Sohoni made this observation, however, the Court has accepted two facial challenges not implicating the First Amendment. *See generally* Sessions v. Dimaya, 138 S. Ct. 1204 (2018); Johnson v. United States, 135 S. Ct. 2551, 2557 (2015). It may be that the prior rule has been effectively abrogated.

62. WAYNE R. LAFAVE, CRIMINAL LAW 108 (5th ed. 2010).

63. For an overview of cases which strike down offenses criminalizing election law violations, see James v. Bowman, 190 U.S. 127, 142 (1903); United States v. Brewer, 139 U.S. 278, 287 (1891); United States v. Reese, 92 U.S. 214, 221 (1875).

64. United States v. L. Cohen Grocery Co., 255 U.S. 81, 92–93 (1921).

65. LAFAVE, *supra* note 62, at 108–09.

66. Cline v. Frink Dairy Co., 275 U.S. 445, 465 (1927); Connally v. General Const. Co., 269 U.S. 385, 393 (1926); Collins v. Kentucky, 234 U.S. 634, 638 (1914); Int'l Harvester Co. of America v. Kentucky, 234 U.S. 216, 223–24 (1914); Sohoni, *supra* note 10, at 1181–88.

down vague economic regulations during the New Deal.[67] Unconstitutional vagueness doctrine then was used to suppress status crimes[68] and, increasingly, speech regulation.[69]

Today, as the Court stated most recently, "[t]he prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'"[70] A law can be excessively vague in addressing either of two audiences: (1) it can fail to provide adequate notice of what conduct it prohibits and punishes, and (2) it can be so standardless that it provides too much discretion to enforcing officials.[71] It is worth quoting in full the Court's canonical description of these "principles"[72]:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement."[73]

The constitutional requirement, then, is definiteness for the purposes of notice to citizens and constraint of officials.

This second principle—guidance for law enforcement—also implies various subprinciples, some of which appear explicitly in the Court's opinions. First, the Court has tied arbitrary enforcement concerns to discrimination against minority groups. If officials are given complete enforcement discretion, this allows applications of the law to conform to majority prejudices about other, less powerful groups. Thus, in striking down a loitering law that criminalized assembling "in a manner annoying to persons passing by," the Court wrote, "such a prohibition . . . contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle,

67. Sohoni, *supra* note 10, at 1188.

68. Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939) (holding that a statute punishing for being a gangster is unconstitutionally vague).

69. NAACP v. Button, 371 U.S. 415, 444 (1963) (holding laws prohibiting third party assistance to litigation unconstitutionally vague as applied to NAACP); Winters v. New York, 333 U.S. 507 (1948) (holding that a statute punishing publishing magazine so devoted to crime stories as to incite crime unconstitutionally vague); Herndon v. Lowry, 301 U.S. 242, 263–64 (1937) (holding that a statute punishing urging others to resist lawful authority unconstitutionally vague).

70. Johnson v. United States, 135 S. Ct. 2551, 2556–57 (2015) (quoting Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).

71. *Id.*

72. Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1166–67 (2016).

73. Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (citations omitted). I say "canonical" because *Kolender* is the case cited by the Court in its most recent formulation of the test, *Johnson*, and also in *Morales*. *See Johnson*, 135 S. Ct. at 2556; City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

or their physical appearance is resented by the majority of their fellow citizens."[74] Beyond minority discrimination, though, vagueness doctrine seeks to contain official discretion because unbounded discretion in enforcement outsources the decision about what is and is not a crime. "A vague law," wrote the Court in 1972, "impermissibly delegates basic policy matters to policemen, judges, and juries."[75] The appropriate body for the determination of "basic policy" is the *legislature*: "Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law."[76]

These principles are an important tool in contemporary criminal litigation. Vagueness doctrine is alive and well, and forms the basis of frequent constitutional attacks on legislation both at the federal and state levels.[77] In the five year period from 2012–2017, unconstitutional vagueness was raised or discussed in approximately 3,000 state cases, 4,900 U.S. District Court cases, and 1,200 U.S. Court of Appeals cases.[78] Since 2012, the Supreme Court has addressed a vagueness claim in eleven of the criminal law cases it has heard—most recently in June 2019.[79]

### *C. Scholarly Reception*

The history of modern scholarly commentary regarding the vagueness doctrine begins in 1960 with the publication of an important analysis by Anthony Amsterdam.[80] Amsterdam's note would later be cited repeatedly by the Court in describing the contours of its own doctrine, and his argument would continue to be echoed by later scholars even as the doctrine developed over the subsequent half century.[81] As we will see, Amsterdam presented what eventually became the received wisdom about vagueness: it is most often a tool used to advance deeper substantive commitments which are themselves unrelated to a law's linguistic precision.[82]

Surveying decades of previous cases, Amsterdam concluded that vagueness doctrine was really a "means to an end": "[I]n the great majority of instances the

74. Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971); *see also* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("Second, if arbitrary *and discriminatory* enforcement is to be prevented, laws must provide explicit standards for those who apply them.") (emphasis added).

75. *Grayned*, 408 U.S. at 108–09.

76. Smith v. Goguen, 415 U.S. 566, 575 (1974).

77. *See* McCarl, *supra* note 16, at 73.

78. These numbers come from a Westlaw next search of [advanced: ("unconstitutionally vague" "void #for vagueness" void-for-vagueness) & DA(aft 06-01-2012)].

79. United States v. Davis, 139 S. Ct. 2319 (2019); Sessions v. Dimaya, 138 S. Ct. 1204 (2018); Beckles v. United States, 137 S. Ct. 886 (2017); Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017) (civil case challenging criminal provision); McDonnell v. United States, 136 S. Ct. 2355 (2016); Salman v. United States, 137 S. Ct. 420 (2016); Welch v. United States, 136 S. Ct. 1257 (2016); Johnson v. United States, 135 S. Ct. 2551 (2015); McFadden v. United States, 135 S. Ct. 2298 (2015); McCullen v. Coakley, 134 S. Ct. 2518 (2014); FCC v. Fox Television Stations, Inc., 567 U.S. 239 (2012).

80. Amsterdam, *supra* note 13.

81. *See, e.g.*, City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 290 (1982); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 779 (2013).

82. *See* Amsterdam, *supra* note 13, at 74–75.

concept of vagueness is an available instrument in the service of other more determinative judicially felt needs and pressures."[83] The "end" to which this "instrument" was normally employed, he argued, was the protection of "constitutional rights other than that of fair notice."[84] The right or freedom that vagueness was used to protect often varied with the jurisprudential climate of the era—vagueness began "in the sphere of economics" during the era of *Lochner*, and then moved to "the field of free expression."[85] Such a "pattern," according to Amsterdam, "affirm[ed] the view that the vagueness doctrine is chiefly an instrument of buffer-zone protection."[86] The Court identified an area of freedoms worthy of constitutional protection from criminalization, and it used vagueness to additionally protect conduct that was *close* to this fundamental freedom: "for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms."[87] Vagueness doctrine was used to extend the right beyond its core, so as to prevent any chilling effect that might deter protected conduct by persons reluctant to risk criminal prosecution by testing the boundaries of the right.[88]

Almost sixty years later, Amsterdam's "buffer zone" theory remains the primary interpretation of the Supreme Court's purpose in utilizing the void-for-vagueness doctrine.[89] Take, for example, this opinion by the D.C. Circuit in 2017, which upheld the federal crime against making a "harangue" or "oration" while in the gallery of the Supreme Court:

83. *Id.* at 75.

84. *Id.* at 87–88.

85. *Id.* at 84–85; Hessick, *supra* note 72, at 1166–67 ("As others have noted, the Court has previously used the vagueness doctrine in order to protect certain substantive rights. In the early twentieth century, the Court used the doctrine to protect economic rights against government regulation. And in the mid- to late-twentieth century, the Court used the vagueness doctrine to protect First Amendment rights. Notably, in both timeframes, the Court did not rely only on the vagueness doctrine to protect those substantive rights. It regularly struck down non-vague legislation that impaired those rights. In other words, the Court did not use the vagueness doctrine as its only method to protect those rights. It also developed substantive doctrines to protect those rights, and it employed the vagueness doctrine to create 'an insulating buffer zone of added protection at the peripheries' of those rights. This direct approach allowed the courts to act even when the legislation impairing those rights was written in precise terms that would have survived a vagueness challenge.").

86. Amsterdam, *supra* note 13, at 84–85.

87. *Id.* at 75, 85–88 ("It does not mean, in the first place, that unconstitutional uncertainty will never be found in a statute all of whose possible applications the enacting legislature would have had constitutional power to prescribe . . . . Second, recognition that the vagueness doctrine is most frequently employed as an implement for curbing legislative invasion of constitutional rights other than that of fair notice (or whatever due process may incorporate of the maxims *nulla poena sine lege* and *ubi jus incertum, ibi jus nullum*) does not mean that the doctrine may be indiscriminately invoked to curb all such invasions, or that there is not an actual vagueness component in the vagueness decisions.").

88. *Id.* at 80 ("[T]here is the danger that the state will get away with more inhibitory regulation than it has a constitutional right to impose, because persons at the fringes of amenability to regulation will rather obey than run the risk of erroneous constitutional judgment.").

89. Jeffries, Jr. *supra* note 19, at 196 ("As Professor Amsterdam has taught us, a paramount concern is whether the law's uncertain reach implicates protected freedoms."); Cristina D. Lockwood, *Creating Ambiguity in the Void for Vagueness Doctrine by Avoiding A Vagueness Determination in Review of Federal Laws*, 65 SYRACUSE L. REV. 395, 445 (2015) (noting but not necessarily agreeing that "the void for vagueness doctrine is widely believed to be used as a buffer zone for the protection of constitutional rights").

> The doctrine grew to take on constitutional status, allowing a court to not merely "save" an indefinite statute with judicial construction, but to strike the statute as unconstitutional when its vagueness transgressed the guarantees of the Due Process Clause within the Fifth and Fourteenth Amendments. *See generally* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) . . . ("[T]he doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms.").[90]

As years went by, however, the "buffer-zone" theory gave birth to a stronger claim. Vagueness, it has been said, is employed pretextually—not merely to insulate extant rights, but to protect new ones that the Court lacks the transparency or courage to openly proclaim as fundamental.[91] Mark Kelman, for example, agreed that vagueness doctrine was "predominantly" used to buffer rights,[92] but noted that another crucial factor was "whether the court believes that the core conduct described by the statute . . . is substantively innocent."[93] In this way, what seems like a "procedure-oriented constitutional jurisprudence" is used to invalidate "substantively objectionable statutes."[94] Similarly, Robert Post concluded that "vagueness doctrine serves as a vehicle for the implicit judicial resolution of independent questions of substantive constitutional law."[95] This theory of vagueness doctrine has been called "substantive vagueness review" by Judge Debra Livingston, with the most important criticism being that such a use of

90. United States v. Bronstein, 849 F.3d 1101, 1106 (D.C. Cir. 2017).

91. *See* Kelman, *supra* note 14, at 662.

92. "Vagueness doctrine is *predominantly* used when the conduct that is *ambiguously* covered by the statute, conduct that the court fears will be deterred because citizens are unsure whether or not it falls within the ambit of the statute, is either affirmatively constitutionally protected or at least desirable. When this 'nearby' conduct is unprotected or affirmatively undesirable in the judge's eyes, courts are less likely to overturn." *Id.*

93. *Id.* at 661. His primary evidence is *Papachristou*. "In *Papachristou*, for instance, the Jacksonville ordinance outlawed 'neglecting all business and habitually spending . . . time . . . where alcoholic beverages are sold or served.' This is not a particularly vague description of the illicit activity *unless* one assumes, as did Justice Douglas, that it cannot *possibly* be intended to apply to 'members of golf clubs and city clubs.'" *Id.*

94. *Id.*

95. This is not necessarily a criticism. Post, *supra* note 16, at 507 ("We can, on the one hand, view this as a weakness of vagueness doctrine, because the doctrine suppresses a full and frank judicial evaluation of these substantive constitutional issues. Thus we might criticize *Papachristou* for using vagueness doctrine to evade a complete and explicit analysis of the kinds of judgments that can constitutionally be exercised by the police in dealing with the public . . . . But, on the other hand, we might also reflect that courts are often neither equipped nor prepared to offer comprehensive and candid constitutional analyses of social relationships, and that in such circumstances vagueness doctrine offers a useful means of exercising discriminating, indirect, and yet effective judicial control. Thus even if the Court in *Papachristou* were intellectually or politically unwilling to offer a full-blown constitutional assessment of transactions between the police and the public, it could nevertheless deploy vagueness doctrine strongly to influence legislative regulation of these transactions. In the context of cases like *Papachristou*, *Cline*, and *Levy*, therefore, we may conclude that the value of vagueness doctrine lies essentially in the value of judicial and constitutional indirection."); *see also* McCarl, *supra* note 16, at 75 ("Scholars have criticized the void-for-vagueness doctrine as a fig leaf for judges' extraconstitutional substantive commitments.").

vagueness avoids answering the underlying question directly, thereby "offering little guidance to legislators."[96]

Dean Goluboff's historical research has somewhat corroborated the suspicions of those who understand the Court to be engaging in substantive vagueness review.[97] She regards *Papachristou v. Jacksonville* as the critical case that finally established that vagrancy statutes were facially void for vagueness, regardless of their effect on speech.[98] It was a 7-0 decision striking down an ordinance authorizing punishment of various classes of persons including "[r]ogues and vagabonds, . . . common drunkards, common night walkers, thieves, . . . lewd wanton and lascivious persons . . . habitual loafers and disorderly persons" as well as "persons wandering and strolling from place to place without any lawful purpose or object."[99] The defendants included two with criminal records who had done nothing on the occasion, one man waiting for a ride to a potential employer, one suspect found with heroin in an illegal search, and two black men and two white women, all respectably employed, riding together from a restaurant to a night club one evening.[100] Thus, the case illustrated the use of vagrancy statutes to harass citizens because of race and sex, to punish nonconformity, and to evade the burdens of proving criminal conduct. Yet it posed no free speech issue that could have justified a first amendment overbreadth argument. The convictions might have been overturned on Eighth Amendment grounds as status offenses, but this rationale would not have invalidated the conduct crime of purposeless "strolling." The statute might have been overturned on grounds of overbreadth, as a district court had recently done in another Florida case, reasoning that loitering included "innocent" conduct, threatening no public interest.[101] And indeed, Dean Goluboff discovered that early drafts of Justice Douglas's opinion for the court pursued the overbreadth strategy, relying first on Ninth Amendment theory, and then substantive due process, to declare a fundamental right to wander in public.[102]

In his final opinion, however, Douglas opted to rely on vagueness alone to invalidate the statute.[103] In so doing, he maintained the court's unanimity by

96. "Consider loitering. Police in recent times have sometimes relied heavily on arrest without the intention to prosecute, or on orders to move along issued without legal authority, to deal with a range of community problems: youth gangs engaged in violent activity whose members loiter in local neighborhoods, intimidating residents; prostitutes who have adopted particular streets for solicitation to the distress of people living in the area; congregations of drug sellers and buyers in public parks; or the destitute who gather in the public areas of train stations and bus terminals, and whose presence sometimes inhibits others 'from making use of public facilities.' The prolonged use of such tactics—often either illegal at the start or prone to degenerate into illegality—is a clear indication 'of the need to craft a different response." Livingston, *supra* note 16, at 621–22.

97. *See generally*, Risa L. Goluboff, *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 (2010).

98. GOLUBOFF, *supra* note 11, at 303–05.

99. *Id.* at 300.

100. *Id.* at 304.

101. Lazarus v. Faircloth, 301 F. Supp. 266, 273 (S.D. Fla. 1969), *vacated sub nom*. Shevin v. Lazarus, 401 U.S. 987 (1971).

102. Goluboff, *supra* note 97, at 1365.

103. *Id.* at 1382.

yielding to Justice Stewart's objections to substantive due process.[104] He may also have been influenced by Justice Brennan's concern that expanding substantive due process in the context of vagrancy would erode support on the Court for doing so in the context of reproductive rights, in anticipation of the Court's impending decisions in *Eisenstadt v. Baird* and *Roe v. Wade*.[105] Yet despite dropping the fundamental liberty rationale, Douglas's opinion still extolled the social value and innocence of much of the conduct proscribed. It seems that for Douglas, at least, vagueness was not his most fundamental objection to vagrancy laws. Yet Goluboff reveals that Douglas, as a New Dealer, was himself reluctant to finally embrace substantive due process.[106]

Whether the Court is using "buffer zone vagueness" or "substantive vagueness," what both theories share is that the animating concern behind the doctrine is not indefiniteness—it is the protection of fundamental rights. This jaded or skeptical understanding of vagueness has gained so much traction that it appeared in a concurrence in a recent case addressing the doctrine—*Johnson v. United States* (2015).[107] The Court in *Johnson* invalidated a statute that enhanced sentences for a conviction of a "violent felony," defined as any felony that "involves conduct that presents a serious potential risk of physical injury to another."[108] Justice Thomas concurred in the judgment, but argued that the case could be decided statutorily.[109] In doing so, he traced the history of the vagueness doctrine from its early twentieth century origins as a constraint on economic regulation and criticized it as substantive vagueness review.[110] "Since [1914]," he wrote, "the Court's application of its vagueness doctrine has largely mirrored its application of substantive due process,"[111] and "their histories have disquieting parallels."[112]

That the Court is seen as needing the pretextual makeweight of vagueness in order to advance its substantive commitments reflects a larger controversy about judicial declaration of substantive limits on legislation. It is worth reviewing why Justice Thomas could cast a negative light on vagueness merely by associating it with substantive due process.

The Constitution explicitly grants certain substantive rights in its text, such as the freedom of speech, but provides in its Ninth Amendment that this "enumeration . . . of certain rights" leaves unaffected "others retained by the people."[113] Yet neither does it explicitly identify these unenumerated and retained rights as constitutional, leaving open whether violations of unenumerated rights

104. *See* GOLUBOFF, *supra* note 11, at 321.
105. *Id.* at 314–22.
106. *Id.*
107. 135 S. Ct. 2551, 2570 (2015) (Thomas, J., concurring).
108. *Id.* at 2555 (majority opinion).
109. *Id.* at 2563–65 (Thomas, J., concurring).
110. *Id.* at 2564–73.
111. *Id.* at 2570.
112. *Id.* at 2567.
113. U.S. CONST. amend. IX.

are "cases arising under the Constitution" for purposes of Article III.[114] As a matter of both text and original history, the most plausible locus for unenumerated rights claims in the Constitution is the Fourteenth Amendment's clause forbidding the states to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[115] Yet the use of this clause to enforce fundamental civil rights was largely foreclosed by *The Slaughterhouse Cases*, which narrowed the privileges or immunities of U.S. citizens to rights arising from their relationship with the federal government, like the right to travel across state lines.[116]

Yet this left the Due Process clause available as a source of substantive rights. In his dissent in the *Slaughterhouse Cases*, Justice Bradley identified the privileges and immunities of United States citizenship as including customary rights of English origin, "rendering life, liberty and property inviolable except by due process of law."[117] Justice Bradley reasoned that these rights included a broad liberty to pursue a livelihood, whether as an employee or proprietor, and property in the resulting acquisitions.[118] In the 1897 case of *Allgeyer v. Louisiana*, Justice Peckham drew on Bradley's *Slaughterhouse* dissent in interpreting the Due Process Clause to protect a liberty to make contracts, by requiring a sufficient legislative justification for any regulation of contracts.[119] Then, in perhaps "the most widely reviled decision" of the twentieth century,[120] *Lochner v. New York*, Justice Peckham applied this reasoning to strike down a maximum hours labor regulation.[121] As David Strauss observed, *Lochner* "symbolizes the era in which the Supreme Court invalidated nearly two hundred social welfare and regulatory measures."[122] These decisions were "ferociously attacked"[123] and eventually overruled by the New Deal era Court.[124]

114. *Id.* at art. III, § 2; *see* Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 530 (2011) (noting that the Ninth Amendment "does not compel equal treatment of enumerated rights and other retained rights") (internal quotation and alterations omitted); Louis Michael Seidman, *Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism*, 98 CALIF. L. REV. 2129, 2130–31 (2010) (arguing that the Constitution does not "embrace or imply" unenumerated rights).

115. U.S CONST. amend. XIV, § 1. In introducing the Fourteenth Amendment on the floor of the Senate on behalf of the Joint Committee on Reconstruction, Senator Jacob Howard offered an expansive interpretation of these rights drawn from Justice Bushrd Washington's opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (1823) as "those privileges and immunities . . . fundamental" including "protection by the Government, enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (quoting Corfield v. Coryell, 6 F. Cas. 546, 551–52 (1823)). Howard went on to state that these privileges or immunities "cannot be fully defined in their entire extent and precise nature" and that "to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution[.]" *Id.*

116. 83 U.S. 36, 82 (1872).

117. *Id.* at 115 (Bradley, J., dissenting).

118. *Id.* at 115–19.

119. 165 U.S. 578, 589–92 (1897).

120. David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003).

121. Lochner v. New York, 198 U.S. 45, 64 (1905).

122. Strauss, *supra* note 120, at 373.

123. *Id.* at 374.

124. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) (requiring only a rational basis for economic regulation); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 413 (1937) (rejecting liberty of contract as

*Lochner* and its progeny brought discredit upon "substantive due process," the contradiction in terms John Hart Ely once compared to the phrase "green pastel redness."[125] Extra-textuality is the first complaint against substantive due process,[126] although the text does not restrict "liberty" to otherwise enumerated rights.[127] The second—which follows from, but does not depend on, the first—is that substantive due process allows for entirely judge-made law. Supreme Court Justices are unelected, of course, and therefore unenumerated rights created by the judiciary and applied to constrain the decisions of elected officials are arguably undemocratic. Ely summarizes the problem: "[A] body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like."[128]

Of course, the New Deal was not the end of substantive Due Process. The Court later incorporated into "liberty," not only most of the rights enumerated in the Bill of Rights,[129] but also unenumerated privacy rights relating to family, reproduction, and sex,[130] and was accordingly accused of "Lochner[ing]."[131] This accusation explains the critical force of interpreting vagueness doctrine as a means of protecting unenumerated substantive rights. What appeared to be an uncontroversial application of due process to effect *procedural* justice—a prohibition on indefiniteness, not on creating the wrong definitions—is recast as courts imposing their own values on popular majorities without textual authorization.

### *D. Unenumerated Rights in Criminal Law & the Harm Principle*

Although substantive due process remains controversial, the Court has used it to declare unenumerated liberty rights, and so can constitutionalize principles of substantive criminal law when it chooses. One limit on substantive criminal liability supported by many theorists is the harm principle, permitting punishment only for conduct causing or risking harm.[132] Has the Court constitutionalized the harm principle?

a barrier to wage and hours regulation). *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998).

125. ELY, *supra* note 53, at 18 (1980).

126. Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1179 (1984); Strauss, *supra* note 120, at 378–81; Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 TEX. L. REV. 305, 309 n.24 (1993).

127. ELY, *supra* note 53, at 19.

128. *Id.* at 4–5.

129. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 147–48 (1968).

130. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015); Lawrence v. Texas, 539 U.S. 558, 578 (2003); Moore v. City of E. Cleveland, 431 U.S. 494, 505–06 (1977); Roe v. Wade, 410 U.S. 113, 166 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Loving v. Virginia 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

131. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 937–44 (1973).

132. MILL, *supra* note 5, at 21–22. For more on the harm principle, see Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999); *see also* sources cited *supra* note 5.

Possibly. Many believe that the case striking down same-sex sodomy offenses, *Lawrence v. Texas*,[133] did forbid punishment of all harmless conduct.[134] This interpretation, however, is not universally accepted by commentators,[135] and such a reading faces some obstacles. *Lawrence* clearly recognizes a specific fundamental right of sexual intimacy[136] as part of substantive due process and has been so applied by the Court.[137] It far less clearly identifies moral disapproval as an inadequate reason to criminalize unprotected conduct.

The interpretation of *Lawrence* as mandating the harm principle, relies largely on the following passage:

> In his dissenting opinion in *Bowers* Justice Stevens came to these conclusions:
>
> "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. Neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship . . . are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."
>
> Justice Stevens' analysis . . . should have been controlling in *Bowers* and should control here.[138]

This passage provokes the question whether such analysis would apply to conduct outside of any "'liberty' protected by the Due Process Clause."[139] The first "proposition," in which morality is deemed an insufficient ground for upholding a law, may apply generally to any criminal prohibition, but it may presuppose that the prohibition is being challenged for infringing a fundamental liberty, like that mentioned in the second "proposition." It may presume that the law is being challenged both for infringement of a fundamental liberty and for invidious discrimination, as was the anti-miscegenation statute struck down in

133. *Lawrence*, 539 U.S. at 578.

134. *See, e.g.*, Dubber, *supra* note 31, at 568 ("[*Lawrence*] struck down a homosexual sodomy statute on the ground that the proscribed conduct does not inflict harm in the relevant sense."); Adil Ahmad Haque, *Lawrence v. Texas and the Limits of the Criminal Law*, 42 HARV. CIV. RIGHTS-CIV. LIBS. L. REV. 1, 3 (2007) (arguing that *Lawrence*, when combined with Eighth Amendment requirements of rational punishment, promulgates harm principle); Nan D. Hunter, *Living With* Lawrence, 88 MINN. L. REV. 1103, 1112 (2004) (arguing the case requires "some form of objectively harmful effects"); J. Kelly Strader, *Lawrence's Criminal Law*, 16 BERKELEY J. CRIM. L. 41, 66 (2011) ("As discussed . . . above, *Lawrence*'s language leaves no doubt that the Court came down squarely on the Hart/harm side of the criminalization debate. Yet many disagree as to whether *Lawrence* adopted the harm principle at all, either fully or partially."); Eric Tennen, *Is the Constitution in Harm's Way? Substantive Due Process and Criminal Law*, 8 BOALT J. CRIM. L. 3, 15 (2004) (arguing that Lawrence was extension of harm principle already existing in substantive due process cases).

135. *See* Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN L. REV. 1140, 1157–58 (2004); Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1313 (2004); Strader, *supra* note 134, at 66.

136. 539 U.S. at 574, 578.

137. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

138. *Lawrence*, 539 U.S. at 577–78 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986)).

139. *Id*.

*Loving v. Virginia*.[140] Moreover, elsewhere in the opinion, injury to a person or abuse of an institution are offered as the only permissible justification for setting boundaries to a "personal relationship that . . . is within the liberty of persons to choose without being punished as criminals," thus suggesting a necessary connection between the requirement of harm and the infringement of a fundamental right.[141] Mention of this right would be superfluous to the argument if harm to a person or an institution were necessary for any criminal prohibition. Accordingly, it is far from clear that *Lawrence* recognized a fundamental liberty to engage in *any* harmless conduct. Conceivably rationality review could accept only harm as a sufficient rationale for criminal punishment, although the Court did not say so. Possibly a requirement of harm can be found implicit in Eighth Amendment jurisprudence, in the court's complaints that a law criminalizing addiction allowed punishment without "antisocial behavior" in *Robinson v. California*.[142]

This uncertainty over the scope and basis of *Lawrence's* condemnation of legal moralism is further evidenced by the observation that two circuit courts have divided on the question of whether *Lawrence* precludes punishment for the offense of selling sex toys.[143] But even if *Lawrence* eliminated morality as the sole basis for sustaining a criminal offense, this does not mean that other non-harm-based justifications, such as offense, are similarly impermissible.[144] *Lawrence* may establish the "non-morality principle," but that is not equivalent to a "harm principle."

For our purposes, however, the key issue is not whether a harm principle has become established in constitutional law. It suffices to observe that such a principle is spectral—mentioned obliquely or presupposed in cases decided on other grounds. By contrast, the requirement of specificity—invoked in thousands of cases—has routine operative significance. Moreover, a harm principle is not

140. 388 U.S. 1, 7, 12 (1963) (citing fundamental rights case, Meyer v. Nebraska 262 U.S. 390 (1923), and holding that marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

141. *Lawrence*, 539 U.S. at 567.

142. 370 U.S. 660, 666–68 (1962); *see* Haque, *supra* note 134, at 5.

143. *Cf.* Williams v. Morgan, 478 F.3d 1316, 1322–23 (11th Cir. 2007) ("Thus, while public morality was an insufficient government interest to sustain the Texas sodomy statute [in *Lawrence*], because the challenged statute in this case does not target private activity, but public, commercial activity, the state's interest in promoting and preserving public morality remains a sufficient rational basis."); Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 (5th Cir. 2008) ("The State's primary justifications for the statute are 'morality based.' These interests in 'public morality' cannot constitutionally sustain the statute after *Lawrence.* To uphold the statute would be to ignore the holding in *Lawrence* and allow the government to burden consensual private intimate conduct simply by deeming it morally offensive.").

144. Some language in *Lawrence* suggests that the privacy of the conduct was important to its protection from criminalization. *Lawrence*, 539 U.S. at 558, 567, 569 ("[T]he most private human conduct, . . . and in the most private of places, . . . adults may choose to enter upon this relationship in the confines of their homes and their own private lives. Laws . . . do not seem to have been enforced against consenting adults acting in private."). While the subsequent recognition of a right to marry in *Obergefell* may have expanded a particular fundamental right, it does not obviously alter the power to criminalize unprotected conduct in public on grounds of offense. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015) ("Outlaw to outcast may be a step forward but it does not achieve the full promise of liberty."). Consider, for example, a married couple having sex in Central Park.

necessarily superior to a requirement of specificity. Without a requirement of specificity, a harm principle would permit arbitrary and discriminatory enforcement. Thus, a legislature could simply enact an ordinance punishing all "harmful" or "dangerous" conduct.[145] This could invite police to arrest and courts to convict dissidents or minority members, while reviewing courts could only enforce the harm requirement by reviewing the facts of each case and making their own assessments of harmfulness. By contrast, a specificity principle (in combination with the additional procedural requirements of conduct, prospectivity and publicity) requires that particular conduct and harm elements be identified in advance of law enforcement decision-making, and makes this target visible to reviewing courts.[146] Thus, a harm principle without a specificity principle probably does not protect harmless conduct, while a specificity principle will tend to protect harmless conduct even without an explicit harm principle. In short, a specificity requirement is not an alternative to liberty rights, but a necessary means of effectuating them.

### *E. Summary*

We have described vagueness doctrine and its critical reception. Vagueness is purportedly a procedural requirement for definiteness in penal statutes, but many believe it is used pretextually to protect substantive rights the Court is unwilling to promulgate openly, for fear of associating itself with substantive due process. The harm principle, if constitutionalized, would be such a substantive right. Yet a requirement of harm may not have been adopted and can yield no benefit without an accompanying requirement of specificity. Such a requirement of specificity protects liberty not by widening permissions, but by requiring legislatures to delimit prohibitions.

## III. OUR INTERPRETATION: PROCEDURALLY MEDIATED HARM ASSESSMENTS

In what follows, we argue that vagueness doctrine does do substantive work, but not pretextually: it has the effect of implementing a substantive harm principle by imposing certain procedural requirements. By demanding specificity in criminal laws, vagueness doctrine, in conjunction with requirements of conduct and prospectivity, confines criminalization decisions to the legislative arena, where it is subject to popular control and judicial review. Together, these requirements make it unlikely that harmless, widespread conduct will be criminalized. They also make it less likely that concentrated harmless conduct will be criminalized, and they make liability for such conduct easier to avoid.

145. *See, e.g.*, CÓDIGO PENAL [CÓD. PEN.] Ley 62 (Cuba) art. 72, https://www.warnathgroup.com/wp-content/uploads/2015/03/Cuba-Penal-Code-Lawyers-Without-Borders-2009.pdf ("behavior in manifest contradiction to the rules of socialist morality"); *id*. art 73, § 1 ("antisocial behavior"); *id*. art. 73 § 2 ("Dangerousness is considered as antisocial behavior by whosoever habitually breaches the rules of social coexistence through acts of violence or provocation, or violates the rights of others.").

146. Roberts v. U.S. Jaycees, 468 U.S. 609, 629 (1984).

In presenting this political interpretation of vagueness, we begin by discussing an important principle animating the Court's vagueness rationales, the "legislativity" principle.[147] We identify multiple desirable features of allocating criminalization features to a legislature. Together, these features define the institutional virtue of legislativity. Vagueness doctrine serves legislativity, encouraging a politically-determined delineation between harmful and harmless conduct. As we will argue, vagueness doctrine does the most delineating work when the conduct criminalized is harmless and widespread, and also when it is concentrated, harmless, and avoidable by a minority.

In the discussion to follow, we have two goals. One is to is to achieve an understanding of the democratic function of vagueness doctrine not made explicit in the Court's opinions. A second is to defend the legitimacy and integrity of the doctrine against those who see it as substantive due process by another name (and therefore condemn it as alternately stealthy or cowardly, depending on the color of their politics). Vagueness doctrine, in combination with the other formal constraints on crime definition, establishes a due process of criminalization. It does not surreptitiously serve liberty while pretending to defer to democracy. It puts democratic majorities to work protecting their own liberty. We offer this argument in the spirit of John Hart Ely's interpretation of Warren Court jurisprudence as "a representation-reinforcing mode of judicial review."[148]

### *A. Vagueness Doctrine's Important Consequence: Legislativity*

If we return to the Court's opinions, we see that there is an underlying concern that helps to explain why excessive enforcement discretion is undesirable. Such discretion allows executive officials to make determinations about what should be punished, but such determinations should only be made by elected legislatures. Commentators have called this a "nondelegation" or "separation of powers" concern.[149] We will call it a "legislativity" concern: "conduct [should]

147. This is a term borrowed from Markus Dubber. *See* Markus Dirk Dubber, *The Historical Analysis of Criminal Codes*, 18 L. & HIST. REV. 433, 436 (2000) (calling legislativity a requirement that "the origin of the principles and rules of criminal law [be] the elected representatives of the people").

148. *See generally* John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 451 (1978). In combining doctrinal explication and justification, we aim at a "rational reconstruction" or "constructive interpretation." J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 122, 134 (1993). "[R]ational reconstruction is the attempt to see reason in legal materials—to view legal materials as a plausible and sensible scheme of human regulation." *Id.* at 122. *See also* RONALD DWORKIN, LAW'S EMPIRE 225 (1986) ("According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.").

149. *See, e.g.*, Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 285 n.45 (2003) (collecting cases, including older cases, calling principle "separation of powers"); Hessick, *supra* note 72, at 1144 (*"Grayned* raised the specter of arbitrary enforcement when it identified the delegation concern, and commentators often link the issue of delegation with the issue of discretion. Although the concerns are related, the two concepts are distinct.").

only be criminalized by an elected, representative body."[150] While vagueness has long been recognized by commentators as advancing the so-called "legality principle"[151] normally thought to implicate notice concerns,[152] the legality principle contains a significant sub-part:[153] legislativity.

One important invocation of legislativity occurs in *Kolender v. Lawson*, where the Court struck down a California law requiring loiterers to present "credible and reliable" identification when asked by law enforcement.[154] The Court cited the requirement of earlier cases that "a *legislature* establish minimal guidelines to govern law enforcement,"[155] and traced the principle back to an 1875 case, *United States v. Reese*:

> It would certainly be dangerous if the legislature could 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 should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.[156]

*Reese* criticized vague laws as substituting the judiciary for the legislature; *Kolender* applies the same principle to the executive.[157] The problem with this, as the Court stated in *Grayned v. City of Rockford*, is that only the legislature should be deciding "basic policy matters" such as criminalization.[158] These cases explain how vagueness constitutes an "impermissibl[e] delegat[ion]" of legislative power, and how the unbounded enforcement discretion that results is a bad thing.[159] They do little to explain, however, why the legislature is the better alternative. Put another way, they say why executive discretion is bad but not why legislative determination is good, other than that it prevents executive discretion.

The Court offers a positive theory of legislativity in an opinion written by Justice Brennan in 1984: *Roberts v. U.S. Jaycees*.[160] In *Roberts*, the Court upheld

150. Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 332 (2002); *see also* Dubber, *supra* note 147 ("[L]egislativity, that is, the origin of the principles and rules of criminal law in the elected representatives of the people.").

151. *See e.g.*, Jeffries, Jr., *supra* note 19, at 195 n.15, 196 (1985) ("[T]he vagueness doctrine is the operational arm of legality"). Jeffries has an interesting theory that conceptions of the legality principle came after the vagueness cases. *Id*. at 195. "In fact, it may be that the usual view of the vagueness doctrine as an offspring of the more general concept of legality turns history on its head. Academic celebration of the legality ideal seems to have flowered after, not before, judicial crafting of the modern vagueness doctrine. It seems likely, therefore, that the contemporary insistence on the principle of legality as the cornerstone of the criminal law may have sprung in part from the desire to establish a secure intellectual foundation for modern vagueness review." *Id*.

152. BINDER, CRIMINAL LAW, *supra* note 27, at 100.

153. It is usefully divided into at least five sub-parts: legislativity, prospectivity, publicity, specificity, and regularity (generality). *See generally id*. at 99–100 (on legality principle).

154. 461 U.S. 352, 353–54 (1983).

155. *Id*. at 358 (emphasis added) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

156. *Id*. at 358 n.7 (quoting United States. v. Reese, 92 U.S. 214, 221 (1875)).

157. *Id*.

158. 408 U.S. 104, 108–09 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.*

159. *Id.* at 108.

160. 468 U.S. 609, 629 (1984) (noting that while this is a civil case its observations are equally applicable to the criminal context, if not more so).

a Minnesota law prohibiting sex discrimination in "places of public accommodation," where the State had applied the law to a Jaycees club.[161] In holding that "places of public accommodation" was not unconstitutionally vague, Justice Brennan (writing for himself and five other justices)[162] sketched a conception of the value of requiring clarity in a legislative decision:

> The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting *an authoritative choice among competing social values*, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to the requirements of law, and permits meaningful judicial review.[163]

While he does not use the word "legislature," the italicized phrase introduces a constellation of concepts that together suggest features that typically inhere in legislatures. State power must emanate from an authoritative source—a source that possesses the "right to rule."[164] This authority must in turn be responsive to multiple constituencies so that a coherent policy is chosen after a competition among a multiplicity of "social values." This implies deliberative decision by an assembly of representatives of society.

What was long implicit in the Court's vagueness cases recently became explicit in the 2019 case *United States v. Davis*.[165] Writing for a five-justice majority, Justice Gorsuch cited to *Kolender* and *Reese* and added "separation of powers" as a "pillar[]" of the vagueness doctrine (along with its traditional foundation in the Due Process Clause):

> Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to "make an act a crime." *United States v. Hudson*, 11 U.S. 32 (1812). Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide.[166]

Here, the Court grounds vagueness doctrine in the requirement of legislative crime definition, linking it with the federal rule against common law crimes. The

161. *Id.* at 625.

162. *Id.* at 629 (writing on behalf of White, Marshall, Powell, Stevens, and O'Connor).

163. *Id.* (emphasis added).

164. JOSEPH RAZ, AUTHORITY 3 (1990).

165. 139 S. Ct. 2319 (2019).

166. *Id.* at 2325. This was first proposed by Justice Kagan, joined by three other justices, in a plurality opinion in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) ("In that sense, the [void-for-vagueness] doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not."). Justice Gorsuch's concurrence in *Dimaya*, joined by no other justices, fleshes this out in greater detail. *Id.* at 1227–28 (Gorsuch, J., concurring). Vagueness doctrine springs from separation of powers because "judicial power" granted by Article III extends only to cases or controversies and does not "license judges to craft new laws to govern future conduct," and also because "[v]ague laws . . . threaten to transfer legislative power to police and prosecutors." *Id.* Gorsuch supports these formalist and originalist justifications for the doctrine with functionalist concerns for liberty, deliberative lawmaking, and public accountability. *Id.* at 1228.

legislature is explicitly mentioned, as is the legislature's most salient feature—democratic, electoral accountability.

An important justification for vagueness doctrine, then, is the perceived value of legislativity. As Cass Sunstein has stated, vagueness doctrine has a "democracy-forcing" effect because "it requires legislatures to speak with clarity."[167] "Basic policy" decisions, as the Court describes them, are pushed up to the legitimate representative body where they belong.

### *B. The Features of Legislativity*

Vagueness doctrine works to enhance legislativity, but more must be said about why legislativity is itself valuable. Contemporary political theory is replete with discussions of the benefits and legitimacy of representative forms of government, though, and so we need not break new ground here. Instead, we highlight four features of legislative lawmaking that are particularly beneficial in the field of criminal law: input from and responsiveness to citizens, textual settlement, self-bindingness (the law's applicability to the people who made it), and publicity of deliberation.

#### *1. Citizen Input and Official Accountability*

Citizen input and official accountability is the primary "democratic" feature of legislativity. As Bentham (an early theorist of legislation) argues, those with lawmaking power must be "dependen[t] . . . on the body of the people," such that "sovereign power [will] rest in the hands of persons *placed* and *displaceable* by the body of the people."[168] The worthiness of conduct for criminal punishment by the state is a determination made by officials who are elected by the citizenry at large. Elections of lawmakers allows for the public's input into criminal lawmaking, as criminalization can and often does become an important issue in campaigns. Moreover, once elected, legislators must stay responsive to the demands of those who elected them in order to keep their jobs. Should a criminalization issue become so salient that the public pressures lawmakers, they will likely respond. Thus, Sunstein writes that a requirement of specificity promotes the goal of "political accountability" inherent in a "deliberative democracy": "The goal of accountability is fostered by ensuring that officials with the requisite political legitimacy make relevant decisions."[169] Allocating criminalization decisions to a democratically elected legislature tethers those decisions to majority viewpoints.

#### *2. Textual Settlement*

An implication of the democratic accountability discussed above is that the product of legislatures—legislation—is a majority-determined settlement among values that are reduced to a textual instrument. In any society that is not morally

167. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 25 (1996).
168. JEREMY BENTHAM, MANUSCRIPTS AT UNIVERSITY COLLEGE, LONDON cxxvii 5.
169. Sunstein, *supra* note 167, at 41.

homogenous, a legislature will represent different factions and viewpoints on a given issue, and therefore will often operate under the explicit premise of disagreement. This point is most fully developed by Jeremy Waldron, who writes, "The point of a legislative assembly is to represent the main factions in society, and to make laws in a way that takes their differences seriously rather than in a way that pretends that their differences are not serious or do not exist."[170] Such an institution may not operate on the basis of some perceived notion of philosophic truth, which is contestable, but instead by voting. "[M]odern legislatures," Waldron argues, "consist of a large number of persons who disagree about what is good for the community . . . [and therefore] laws are enacted by voting as a matter of fairness."[171] Importantly, because the product of this voting must reflect and preserve the settlement among factions who disagree on values, it is not enough to promulgate legislative endorsement of policy aims—be it affordable health care or obstructing terrorism. Legislation must be reduced to text—must "present[] itself as written law."[172] This is because a legislature is "a large gathering of disparate individuals who purport to act collectively in the name of the whole community, but who can never be sure exactly what it is they have settled on, as a collective body, except by reference to a given form of words in front of them."[173] Textual settlement is perhaps most necessary in criminal law, where the harsh consequences of criminalization can evoke sharp disagreement over the value of conduct. A good example of such a divisive criminal law issue in modern politics is the right (or not) to physician-assisted suicide.[174]

### *3. Self-Bindingness*

Citizens must live under the criminal laws their representatives enact. While in monarchical forms of government the lawmaking authority is conceivably "above the law," in a representative democracy, the constituent power is subject to punishment for the conduct it determines should be criminalized.[175] This notion has its roots in social contract theories of democracy, where every citizen is thought to participate in sovereignty, acting as both ruler and subject at once.[176] As Jean-Jacques Rousseau theorized, "when the whole people decrees for the whole people, . . . [t]his act is what I call a law."[177] Early philosopher of criminal law Cesare Beccaria, influenced by Rousseau, thus linked punishment with democratic legislation impliedly assented to by the citizenry: "[L]aws alone

170. JEREMY WALDRON, LAW AND DISAGREEMENT 27 (1999).

171. *Id.* at 26–27.

172. *Id.* at 25.

173. *Id.*

174. The Supreme Court famously refrained from imposing a constitutional rule on the various settlements chosen by the states in *Washington v. Glucksberg*, 521 U.S. 702 (1997).

175. *Is the Queen Really Above the Law?*, ROYAL CENT. (Jan. 5, 2013), http://royalcentral.co.uk/uk/thequeen/is-the-queen-really-above-the-law-1625.

176. BINDER, CRIMINAL LAW, *supra* note 27, at 100–01. *See generally* JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT & DISCOURSES (1913).

177. ROUSSEAU, *supra* note 174, at 33. Note, though, Rousseau had some problems with representation, and wanted more direct democracy. *See generally id.*

can decree punishments for crimes, and . . . this authority can rest only with the legislator, who represents all of society united by a social contract."[178] The benefit of self-bindingness is obvious: if majorities must abide by the criminal prohibitions they pass, they are less likely to pass oppressive laws.

*4. Public Deliberation*

A legislature makes its decisions only after stating its reasons for all to know. Sunstein calls this the "reason giving" goal of deliberative democracy.[179] There is an opportunity for opposing viewpoints to be discussed, and for citizens to state their opinions. A record is made of everything that is said, and any reports that a committee creates are also preserved and made available. Thus, Bentham was optimistic about the beneficial effects of public deliberation: "All minds will be reconciled to the law as soon as its utility is made obvious. As soon as the veil which conceals it has been raised, expectation will be satisfied, and the public opinion will be gained over."[180] In the context of criminalization, a legislature is expected to discuss the reasons that given conduct is socially unacceptable, the benefits and downsides of criminalization, any alternative means of addressing the problem, and the appropriate punishment. In a properly working legislature, there should be no "rubber stamping" of new crimes, nor should there be any secrecy. "The idea of legislation," writes Waldron, "embodies a commitment to explicit lawmaking—a principled commitment to the idea that . . . law . . . should be made or changed in a process publicly dedicated to that task."[181] Public deliberation ensures that before the apparatus of state punishment is brought to bear on an individual's exercise of liberty, the public is made aware of the issue and the terms of the debate, and reasoned consideration is brought to bear on the decision.

A significant benefit of public deliberation is transparency—that criminalization, and the reasoning behind it, be done in the open and with the knowledge of the wider citizenry. Transparency of punishment decisions was emphasized by Bentham, who wrote that the "public must keep a careful eye on legislators and administrators alike,"[182] and that such transparency was a "security against misrule."[183] It is important that government give reasons when it prohibits and punishes individual conduct, both to prevent arbitrary decision making and to make the given reasons susceptible to scrutiny.

178. BECCARIA, *supra* note 28, at 12.

179. Sunstein, *supra* note 167, at 41.

180. JEREMY BENTHAM, 1 THE WORKS OF JEREMY BENTHAM 324 (John Bowring ed., 1962); *see also* R. Harrison, *The People is my Caesar*, *in* 3 JEREMY BENTHAM: CRITICAL ASSESSMENTS 900, 915 (Bhikhu Parekh ed., 1993).

181. Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335, 338–39 (2009). Waldron ties this to legitimacy. *Id.* at 339 ("The idea of legislation applies the general liberal principle of publicity recognized by John Rawls and others: the legitimacy of our legal and political institutions should not depend upon widespread misapprehensions among the people about how their society is organized.").

182. JEREMY BENTHAM, SECURITIES AGAINST MISRULE AND OTHER CONSTITUTIONAL WRITINGS FOR TRIPOLI AND GREECE 351 (Philip Schofield ed., 1990).

183. *Id.*

*5. Summary*

We have discussed a significant beneficial consequence of vagueness doctrine, which is the enhancement of one aspect of the legality principle—legislativity of crime definition. As Sunstein concludes, "void-for-vagueness doctrine . . . is intended to catalyze and improve, rather than to preempt, democratic processes."[184] By demanding precision in criminalization, the doctrine helps to channel decisions about prohibition and punishment towards the body that is accountable to the public that will be subject to those decisions. It also ensures that decisions will be made after public deliberation among competing voices and values and fixed in a settlement reflected in a canonical text.

## *C. Harm Principle*

If an important consequence of vagueness doctrine is legislativity, and legislativity in turn works to effectuate democratic accountability, textual settlement, public deliberation, and self-bindingness, then it may seem that the doctrine is merely a procedural one. After all, democracy need not theoretically result in certain substantive outcomes.[185] As John Hart Ely observed, "What has distinguished [the Constitution], and indeed the United States itself, has been a process of government, not a governing ideology."[186] We argue, though, that the features of legislativity discussed above can be seen to result in a *procedurally effectuated harm principle*, and in turn, a significant substantive limitation on criminal law.[187] The central claim we make is that these features of legislativity can be understood to present a high hurdle to the criminalization of harmless conduct engaged in by majorities, in that these features naturally lend themselves towards a consideration of harm as the essential question in criminalization.

Before moving on, we should more precisely describe what we mean by harmful conduct. First, the "conduct" component is crucial. There are many policy tools to reduce "harm" in society, but as Joel Feinberg writes, it is "[a]cts of *harming*" that are "the direct objects of the criminal law, not simply states of

184. Sunstein, *supra* note 167, at 82.

185. William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2050 (1994) ("These gaps and omissions reveal the thin theory of democracy under which legal process scholars operated. The principle of institutional settlement suggested that legal process thinkers did not consider substantive fairness to be a primary element of political legitimacy, and this suggestion amounted to an acquiescence in the status quo."); Michael C. Dorf, *The Coherentism of Democracy and Distrust*, 114 YALE L.J. 1237, 1269 (2005) ("The work of Rawls nicely makes the institutional competence point. In both *A Theory of Justice* and *Political Liberalism*, Rawls distinguishes between the sorts of comprehensive (thick), typically religious or religiously inspired moral views that people hold about the good, and the "political" (thin) conception of the good—really a conception of the right rather than the good—that informs social choices about the "basic structure" of a liberal democracy over the long haul. But even the thin basic structure is remarkably thick, in the sense that it would seem to constrain policy choices on a wide range of matters.").

186. ELY, *supra* note 53, at 101 (citation omitted).

187. Debra Livingston hints at this notion when she writes, "Significantly, even in this substantive account of the vagueness doctrine, the procedural character of vagueness review is understood to play a crucial mediating role." Livingston, *supra* note 16, at 620.

harm as such."[188] But this clarification only gets us so far—after all, we all do many things in our lives that have negative effects on the lives of others, but these actions are not considered proper objects of criminalization. Think of one store owner beating out his competition. "Harm" in the criminal law sense, then, must be more than a "setback to interests" of another person; it must be a setback to interests that is "wrong," or an "indefensible . . . violat[ion] [of] the other's right."[189] As we will discuss below, the salient features of legislativity naturally invite consideration of this type of harm when a polity makes criminalization decisions. The way this happens can be broken down into two broad steps.

### *1. The Self-Regarding Step*

The first—that we can call the "self-regarding" step[190]—requires the legislature to consider conduct that the legislators and their constituents themselves engage in. The self-regarding step is forced by the first and third features of legislativity discussed above: democratic accountability (citizen input plus official accountability) and self-bindingness. Majorities are unlikely to tolerate legislative criminalization of conduct that the majorities themselves engage in because that would mean they are willingly punishing themselves.

The self-regarding step—by inherently reflecting majoritarian viewpoints and sentiments—is also inherently harm-conscious. This can be illustrated using a simple utilitarian conception of harm as net welfare loss.[191] By this definition, an act is only harmful if the welfare loss it inflicts on others exceeds the welfare gain to the actor.[192] Rational actors would willingly forgo committing such harmful acts as the price of being protected from such acts.[193] To the extent that harmful conduct can be cost-effectively prevented by the threat of punishment, rational actors would support doing so.[194] Prevention and redress of other peoples' harmful conduct is, after all, the most elementary and least controversial justification for the existence of the State.[195] Conversely, on a utilitarian view, harmless conduct includes conduct that benefits the actor more than it hurts others. While it may be rational to internalize these external costs through civil liability, rational actors would prefer that net harmless conduct be permitted and priced rather than prohibited and punished.

One might respond to our description of the "self-regarding" step in legislative criminalization with a bit of skepticism. Surely process failures ranging

188. FEINBERG, *supra* note 5, at 31.

189. *Id*. at 34. This distinguishes criminal law from contract and tort.

190. Note, we are not importing the concept from JS Mill of "other and self-regarding behavior," but are just using the words. *See generally* MILL, *supra* note 5.

191. *Net Welfare Loss*, ECON. ONLINE, https://www.economicsonline.co.uk/Definitions/Net_welfare_loss.html (last visited Sept. 12, 2019).

192. *See id.*

193. *See generally* DAVID LYONS, WELFARE, AND MILLS MORAL THEORY (1994).

194. *See id.*

195. *See generally* THOMAS HOBBES, LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL (1651); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26 (1974).

from the disproportionate influence of wealth in privately financed campaigns[196] to the political weakness of "discrete and insular minorities"[197] to the "pathological" political geography of criminal justice,[198] can weaken the democratic accountability and self-bindingness of legislative decision making. Moreover, public choice research suggests that it is difficult to mobilize diffuse majorities to protect dispersed harms.[199] Citing vice crimes, Robert Post observed, "law commonly inflicts social norms on unwilling populations."[200] Yet while law may impose rules that are opposed by "populations," it rarely does so when law is made democratically, and when prospective offenders are in the majority. Consider low-level recreational drug use. Marijuana use is popularly understood to be criminalized against the wishes of the general population,[201] but a recent Gallup poll found that only 13% of adults actually use marijuana.[202] Even so, it is widespread enough, and harmless enough, that decriminalization is making headway. Even quite harmful drugs—like tobacco and alcohol—are likely to be decriminalized when use becomes sufficiently widespread and addiction makes the preference for them sufficiently inelastic.[203] Under these circumstances, criminalization can erode respect for and cooperation with criminal law more generally,[204] which can invite violent crime to flourish.[205]

Perhaps the only salient category of crime that is engaged in routinely by a majority of citizens is traffic offenses. One survey found that 89% of the population admitted to exceeding the speed limit while driving.[206] Yet our model of utility maximization by a majority does not predict that it will never impose criminal penalties on conduct its members engage in. It predicts that it will not impose

196. *See generally* Richard Davies Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223, 242–57 (1981) (arguing that economic inequality undermines fairness of representation of popular will in multiple ways).

197. United States v. Carolene Products Co., 304 U.S. 144, 153–54 n.4 (1938).

198. *See generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

199. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 57 (4th ed. 2007) (describing scenario of "[d]istributed benefits/distributed costs" as provoking "[l]ittle group activity on either side of most cases").

200. Post, *supra* note 16, at 497.

201. See the recent backlash to Attorney General Sessions's repeal of the Cole Memorandum. *See* Laura Jarrett, *Sessions Nixes Obama-Era Rules Leaving States Alone that Legalize Pot*, CNN: POLITICS, https://www.cnn.com/2018/01/04/politics/jeff-sessions-cole-memo/index.html (last updated Jan. 4, 2018, 5:44 PM).

202. We can assume that this number is not *significantly* lower due to criminalization, given widespread decriminalization by states or un-enforcement. *See* Justin McCarthy, *One in Eight U.S. Adults Say They Smoke Marijuana*, GALLUP (Aug. 8, 2016), https://news.gallup.com/poll/194195/adults-say-smoke-marijuana.aspx.

203. UNITED NATIONS, WORLD DRUG REPORT 10 (2016), http://www.unodc.org/documents/scientific/WORLD_DRUG_REPORT_2016_web.pdf.

204. STUNTZ, *supra* note 54, at 178–86.

205. RANDOLPH ROTH, AMERICAN HOMICIDE 17–26 (2009) (dependence of homicide rates on trust in the fairness of law and legitimacy of government).

206. A 2011 Allstate survey revealed that 89% of the population admits to driving above the speed limit at times. *New Allstate Survey Shows Americans Think They are Great Drivers–Habits Tell a Different Story*, ALLSTATE NEWSROOM (Nov. 3, 2011), https://www.allstatenewsroom.com/news/new-allstate-survey-shows-americans-think-they-are-great-drivers-habits-tell-a-different-story-2/. Another study observed that 98% of motorists on one stretch of highway exceeded the speed limit by at least 6 miles per hour. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-00-41, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS 8 (2000).

such penalties unless the conduct is harmful. Again, this would include conduct the external cost of which outweighs its benefits to the actor. And surely that is true of traffic safety violations, where all drivers have an interest in others driving safely. Indeed, while 89% of respondents acknowledged speeding at some time, 91% agreed that the speed limit should be obeyed.[207]

But traffic crimes do illustrate a limitation of specificity as a protection against discretionary enforcement of prohibitions on harmless conduct. Traffic laws are specific and voluminous.[208] Speed limits are set below what is perceived as safe and permissible in normal driving conditions.[209] In short, traffic law is a regime of overcriminalization and under-enforcement,[210] permitting discretionary—and notoriously discriminatory—police enforcement.[211] The "self-regarding step" does not prevent this. But why? Why are majorities willing to risk subjecting themselves to punishment for harmlessly driving slightly above the speed limit? Perhaps majorities tolerate the risk of being penalized for low-level speeding because the penalty is minor and often noncriminal. Majorities may be willing to accept this risk as the price of permitting police to stop and investigate virtually any driver. In any case, specificity does not prevent discriminatory enforcement of prohibitions on harmless speeding.

### *2. The Other-Regarding Step*

In addition to considering whether they themselves would like to engage in criminalizable conduct, legislativity also invites majorities to consider whether they believe *other* people should be able to engage in the conduct. We can call this the "other-regarding" step of legislativity. Legislators can engage in other-regarding deliberation because of the other two features of legislativity: public deliberation, concluding in textual settlement.

Public deliberation allows for different viewpoints to be expressed, heard, considered, and modified by each other. It creates a public and permanent record of the justifications for (and against) a criminalization measure that becomes law. More importantly, though, public deliberation impacts what actually becomes law. What is initially proposed is adjusted as the debate exposes its strengths and weaknesses, as well as the aims of competing interests, and injects valuable information. Waldron highlights this value of "diversity" in deliberation:

207. U.S. DEP'T OF TRANSP.: NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., 2011 NATIONAL SURVEY OF SPEEDING ATTITUDES AND BEHAVIORS 2 (2011). Note, respondents said they obeyed because it is the law, but 82% said they agreed that driving at the speed limit is a safe way to avoid danger, suggesting they believe the law is adequately indexed to risk of harm to others. *Id.* at 3.

208. *Id.* at 23.

209. Amanda Essex et al., *Transportation Review: Speeding and Speed Limits*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 16, 2017), http://www.ncsl.org/research/transportation/transportation-review-speed-limits.aspx.

210. *See generally Traffic Stops*, BUREAU JUST. STAT., https://www.bjs.gov/index.cfm?ty=tp&tid=702 (last visited Sept. 12, 2019).

211. *See Generally* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999).

> Different people bring different perspectives to bear on the issues under discussion and the more people there are the greater the richness and diversity of viewpoints are going to be. When the diverse perspectives are brought together in a collective decision-making process, that process will be informed by much greater informational resources than those that attend the decision-making of any single individual.[212]

This is why deliberation is also "other-regarding"—citizens and legislatures, through public deliberation, have to listen to the views of others than themselves. In the context of criminal punishment, they have to consider more than just the typical activities of their own lives, but also what others' lives are like, and the conduct that those people routinely engage in. The constituent group that would seek to ban ownership of pitbulls, say, must be confronted during deliberation by the Pitbull Owner's Association, and must suffer the rebuke of a floor speech by any state assembly member who herself owns a pitbull. The other-regarding step injects the necessity of compromise in legislation. The end product of this compromise, moreover, is a canonical text—an embodiment of the compromise between competing values. This text, and not the values that went into its making, is the law.

The other-regarding step also inherently brings in considerations of harm during criminalization debates—at least in a pluralistic society, such as ours or any other modern liberal state.[213] Such a society has a multiplicity of groups who have different understandings of the meaning of life, and about the law's role in it. Specifically, they will disagree about what conduct is worthy of punishment by the state, and these disagreements will be rooted in different moral and political views. As John Rawls observed, "[A] basic feature of democracy is the fact of reasonable pluralism—the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions."[214] When deciding on the ends of government and on the legitimate uses of the coercive power of the state, then, different people, groups, and legislators must compromise—they must appeal to concrete, near-universally shared values. "Citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines," Rawls wrote, and therefore they needed to appeal to "public reason," which substitutes "comprehensive doctrines of truth or right" with a "reasonable political conception of justice that supports a constitutional democratic society."[215]

212. Waldron, *supra* note 181, at 343.

213. One could imagine a homogenous moral community.

214. *See generally* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

215. *Id.* at 766, 807. Nagel calls this "liberal impartiality." Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 230 (1987). "[C]oercion," he writes, "imposes an especially stringent requirement of objectivity in justification," and the "prevention of harm to others…make[s] an impersonal appeal to values that are generally shared." *Id.* at 223–24. This is "impartial[ity] not only in the allocation of benefits or harms but in their identification." *Id.* at 227. "The defense of liberalism requires that a limit somehow be drawn to appeals to *the truth* in political argument . . . ." *Id.*; *see also* John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 231 (1985) ("It is important to stress that from other points of view, for example, from the point of view of personal morality . . . or of one's religious or philosophical doctrine, various

In criminalization, public reason is inherently harm conscious. One need not subscribe to a certain religion or ideology to understand that harmful conduct is antisocial and must be controlled, nor does one need to live in the same climate or work in the same industry. We may disagree about what constitutes harm, how to weigh different harms and benefits, and on whom to place the costs of harm prevention. But harm prevention is universally recognized as a legitimate reason for collective action. Indeed, for that reason, early utilitarians proposed net harm prevention, or "public utility," as an uncontroversial conception of the common good that could serve as a "foundation" for legislative deliberation.[216] Harm prevention is therefore uniquely suited to serve as a public reason for criminalization. As Joel Feinberg concludes, conduct that is harmful to others is "the clearest case[] of legitimate or proper criminalization," and that criminal laws prohibiting this conduct "have an unquestioned place" in the law.[217] The availability of such a widely agreed upon rationale for criminalization makes it easier for a large and fractious body to agree on legislation. A requirement that criminal punishment be conditioned on specific definitions of conduct further channels legislators. The result is likely to be a debate about what conduct is harmful, in which dubious claims can be challenged, and discriminatory aims exposed to subsequent judicial review.

One might object that the other-regarding step is no robust guarantee that criminalization will be based on harmfulness. It might be said that while deliberation requires majority groups to consider opposing viewpoints, the majorities are free to ignore those viewpoints and press ahead with their initial proposals. These proposals could force the majority's "comprehensive doctrine" down the throat of the minority, ignoring the requirement of public reason and appealing to some other contestable value beyond harmfulness. For example, Alabama punishes the sale of devices made "primarily for the stimulation of human genital organs"[218]—an offense upheld by the Eleventh Circuit (even after *Lawrence*) as rationally advancing the "safeguarding of public morality."[219] We concede that in outlier cases, legislativity will not guarantee that a truly "public reason" (such

aspects of the world and one's relation to it, may be regarded in a different way. But these other points of view are not to be introduced into political discussion."); Nagel, *supra*, at 232 ("Public justification in a context of actual disagreement requires, first, preparedness to submit one's reasons to the criticism of others, and to find that the exercise of a common critical rationality and consideration of evidence that can be shared will reveal that one is mistaken.").

216. JEREMY BENTHAM, *Of the Principle of Utility*, *in* THE COLLECTED WORKS OF JEREMY BENTHAM: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11, 11–12 (J.H. Burns & H.L.A. Hart eds., 1996); Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 155–68 (2000) (discussing utility as a criterion that could overcome disagreements of value to enable deliberation over the public good in Hume, Beccaria Helvetius and Bentham).

217. FEINBERG, *supra* note 5, at 11.

218. ALA. CODE § 13A–12–200.2(a)(1) (1975).

219. Williams v. Morgan, 478 F.3d 1316, 1321 (11th Cir. 2007).

as harmfulness) will guide criminalization. These examples of "illiberal democracy"[220] at work in the criminal law are most likely to be found in more homogenous communities, where appeals to "comprehensive doctrine[s]" other than public reason can win over a majority. Because of this, though, they will likely become fewer as criminal law jurisdictions grow in diversity. The more serious problem is pointed out by Bernard Harcourt—that harm itself is too malleable a concept to constrain legislation, especially when antipathy to people can be repackaged as concern for property values or business climates.[221] But that is a weakness, not of specificity as a support for the harm principle, but of the harm principle itself.

### *3. Specificity and Unpopular Minorities*

Having canvassed in general terms how forcing criminalization decisions back into legislatures tends to produce criminalization decisions tracking net harm, let us now look more closely at two sets of circumstances in which we contend vagueness doctrine operates to protect unpopular minorities. One is the criminalization of *harmless* activity that is *widespread* and *unavoidable*, but may be an attractive target for a pretextual dragnet by which unpopular minorities can be harassed or oppressed. The other is criminalization of harmless activity that is *concentrated* among members of a discrete *minority*, but *avoidable*. While vagueness doctrine helps to implement a harm principle more generally, it is of special salience in these two circumstances. Let us work backwards, and think about the various ways majorities can oppress unpopular minorities through criminalization.

Some options are obviously foreclosed. For example, the majority could not persecute the minority by simply turning over criminalization decisions to a like-minded executive agent that operates in secret. A requirement of publicity, or notice—expressed in both the vagueness cases and the retroactivity cases—prevents this. Nor can the majority persecute the minority by criminalizing mere membership in the minority, as rules against discrimination and status crimes prevent that. The majority might also try to persecute the minority by proscribing *harmful* conduct (say, gun violence) and relying on an executive agent to punish only minority members who commit that conduct. This would be irrational, however, resulting in net harm to the majority itself by exposing itself to harmful conduct from its own members who could affect such harm with impunity. Indeed, if we posit that most crime is intragroup, the majority would be harming themselves while benefitting the minority.

Next, the majority might try to persecute the minority by criminalizing *harmless* but *widespread* and *unavoidable* conduct and counting on their agents to enforce this prohibition only against members of the minority group. An example of such widespread, unavoidable, and benign conduct would be going out

220. Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFF., Nov./Dec. 1997 (discussing illiberal democratic regimes in other countries, such as Pakistan).

221. Harcourt, *supra* note 132, at 109–10.

in public. This is the classic set of circumstances for the vagueness cases discussed in the beginning of this Article. How does the doctrine work to prevent this pretextual criminalization?

First, with respect to harmlessness, recall the self-regarding step of legislativity, where a legislative majority must consider how the legislators and their constituents are affected by criminalization. This is a result of legislativity's features of self-bindingness and democratic accountability. The self-regarding step is inherently harm conscious, as we argued, because permitting selfish activity that is more costly to others than beneficial to the actor will be predictably self-defeating. The converse of this is that criminalization of harmless conduct is irrational, and also prevents the majority from engaging in activity that may be beneficial or enjoyable. Because of this, it will be unlikely that a majority will criminalize harmless conduct that is widespread—that the majority itself engages in.

Consider also that legislativity will make the underlying assumption of pretextual enforcement difficult to implement in practice, and therefore a risky proposition. In order to oppress the minority, the majority is willing to risk punishment for engaging in the same conduct itself. How confident can it be that government officials will never break ranks and punish any member of the majority? Might not factional conflict or corruption among members of the majority pose this danger to them? What if members of the minority become more numerous and powerful? It seems likely that many members of the majority would object on prudential grounds and that at least some would object on moral grounds to the persecution of the minority. Given the public, deliberative setting of the legislature, it seems very likely that debate over such a controversial proposal would expose the discriminatory animus motivating it, potentially triggering antidiscrimination rules.

Now let us consider a more difficult set of circumstances—an expected pretextual enforcement of a law that covers harmless conduct that is not widespread but is instead concentrated among the targeted population. Here, we argue that vagueness doctrine plays an important role in protecting the minority, but that it can only do so much. The doctrine is protective primarily, we think, because it enhances *avoidability*. If the prohibition must be specific enough to survive vagueness review, then the minority group can navigate around the prohibition with substitute conduct (or by refraining from it altogether if it is of little value). For example, if a prohibition on possessing a certain type of sex toy were specific, the market would react by finding alternatives that accomplish the same purpose. If a loitering provision targeted a location frequented by members of a particular group, they could move their activities to a different location. Thus, making prohibitions more specific allows minorities more room to maneuver around prohibitions of harmless conduct. But if the conduct cannot be avoided and is specifically prohibited, then vagueness doctrine is of little help to the minority. Such conduct might include culturally specific and highly valued practices such as religious rituals, language instruction, or some other mode of transmitting identity. Here we cannot rely on vagueness to protect the minority, but

instead on sufficiently sensitive antidiscrimination rules. A good example of this occurred in *Church of the Lukumi v. Hialeah*, where the Supreme Court struck down a prohibition on ritual animal sacrifice as designed to suppress the religion of Santeria.[222] Yet even where antidiscrimination law scores the victory, the specificity principle may have assisted. By foreclosing discretionary enforcement of vague prohibitions, specificity forces the majority to pursue its discriminatory goal by means that are easily identified.

## IV. APPLICATION

We have presented an apologetic theory of vagueness doctrine as working to enhance legislativity in criminalization decisions, and in turn effectuating a harm principle "mediat[ed]" by procedure.[223] Moreover, we have described how this has special salience for the protection of conduct engaged in by minorities of various kinds, in that harmless widespread conduct will be more difficult to criminalize and selectively punish if it must be defined precisely, while even prohibitions on concentrated harmless conduct are made more avoidable and more vulnerable to antidiscrimination review by vagueness doctrine. In what follows, we will illustrate these mechanisms with cases we believe exemplify judicial activity of this variety—when a court uses vagueness doctrine to send an offense back to the legislature to more carefully consider the costs and benefits of exposing various types of conduct to penal liability. We will proceed by addressing broad categories of generally harmless conduct that have been fertile grounds for successful vagueness challenges. We will draw attention to a recurrent feature in offense definitions deemed unconstitutionally vague. Such offense definitions often qualify conduct that is either widely engaged in (or constitutionally protected) by evaluative standards calling for subjective judgment. The evaluative criterion is a requirement of harmfulness that delegates discretion to decide what is harmful to executive and judicial officials. Where the underlying conduct is widespread, members of a majority or a powerful elite may feel protected from liability by multiple discretionary decisionmakers—an investigating officer, a reviewing magistrate, a prosecutor, a judge in motion practice, a factfinder at trial—any one of whom has the power to end a prosecution. Eliminating a harmfulness requirement would deprive the majority of this protection, and would produce a law that might seem nonsensical to voters unless a forbidden ground of discrimination (on the basis of identity or exercise of a protected liberty) were made explicit in the statute. Where the conduct is less widespread, specifying a harm makes liability avoidable, and so makes the law less useful for harassing a targeted minority.

222. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

223. *See* Livingston, *supra* note 16, at 620.

### *A. Loitering and Vagrancy*

We begin with the category of conduct addressed by the Supreme Court in a number of its seminal vagueness cases: loitering (remaining in place) and vagrancy (moving about).[224] Being in public, whether stationary or mobile, is harmless conduct unavoidably engaged in by almost everyone. Nevertheless, loitering and vagrancy statutes remained on the books even into the second half of the twentieth century because they were selectively applied to out-groups.[225] This was discriminatory application of an offense that covered harmless widespread conduct; it was a prime target for vagueness doctrine.

The famous 1972 case of *Papachristou v. Jacksonville* illustrates such a use of void-for-vagueness.[226] A city ordinance criminalized "prowling by auto," "loitering," and being a "vagabond," among other things.[227] The local police cited it when arresting a group of interracial couples socializing late at night.[228] In striking down the law, the Court engaged in an extended discussion of the harmlessness of loitering. "The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent,"[229] wrote the Court, and "these activities are historically part of the amenities of life as we have known them."[230] Given that so many people engaged in this conduct, discriminatory application seemed inevitable; moreover, loitering seemed to particularly target certain minority groups. "Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts."[231] By declaring the ordinance void-for-vagueness, the Court sent the law back to the legislature for it to re-consider the harmful conduct it was intending to address. Legislatures are not expected to be perfect, but they are expected to do the hard work of delineating criminal conduct from innocent conduct. Thus, the Court noted that "[a] direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster."[232]

A feature of many loitering and vagrancy statutes the Court found objectionable was that they conditioned liability on the arresting officer's appraisal of the defendant rather than proscribing any antisocial conduct. The 1971 case of *Palmer v. City of Euclid* concerned an ordinance proscribing being "found abroad at late . . . hours in the night without any visible or lawful business and

224. *Id.* at 595.

225. *See generally* GOLUBOFF, *supra* note 11 (detailing use of vagrancy against the poor, alcoholics, homeless people, labor unions, communists, African Americans, civil rights and antiwar protestors, hippies and folksingers, gays and lesbians, and nonconforming women).

226. 405 U.S. 156 (1972).

227. *Id.* at 158.

228. *Id.*

229. *Id.* at 163.

230. *Id.* at 164.

231. *Id.* at 170.

232. *Id.* at 169.

who does not give a satisfactory account of himself."[233] The Court found that it lacked "ascertainable standards of guilt"[234] and provided no notice that his activity at the time of arrest—sitting in his car and conversing on a car radio—was not lawful business.[235] In the 1983 case of *Kolender v. Lawson*, the Court considered a California statute requiring those who loiter or wander to provide "credible and reliable" identification and to account for their presence to police.[236] The plaintiff had been detained or arrested fifteen times in a two year period, but convicted only once.[237] The Court, quoting *Papachristou*, found that the statute "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."[238]

Loitering offenses again reached the Supreme Court in the 1999 case of *Chicago v. Morales*.[239] There, Chicago had enacted an ordinance prohibiting "criminal street gang members" from "loitering" in public places, defined as "remain[ing] in any one place with no apparent purpose."[240] The majority's analysis (in Part V of the opinion for the Court) began by observing that the ordinance "reach[es] a substantial amount of innocent conduct."[241] Because innocent purposes may not be "apparent," "[i]t matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark."[242] Later, the Court noted that the ordinance "extends its scope to encompass harmless conduct."[243] As in *Papachristou*, the *Morales* Court used vagueness doctrine to invalidate a law that lacked sufficient indicia of legislativity; it forced the City to re-consider how to address the gang violence problem by narrowly tailoring its offenses to harmfulness.[244] This was explicitly suggested by the Breyer and O'Connor concurrence:

> It is important to courts and *legislatures* alike that we characterize more clearly the narrow scope of today's holding. . . . [T]here remain open to Chicago reasonable alternatives to combat the very real threat posed by

233. 401 U.S. 544, 544 (1971).
234. *Id.* at 545.
235. *Id.* at 546.
236. 461 U.S. 352, 353 (1983).
237. *Id.* at 354.
238. *Id.* at 360 (quoting Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940)).
239. 527 U.S. 41 (1999).
240. *Id.* at 41.
241. *Id*. at 60.
242. *Id.*; *see also id.* at 69 (Kennedy, J., concurring) ("As interpreted by the Illinois Supreme Court, the Chicago ordinance would reach a broad range of innocent conduct."); *id.* at 66 (Breyer, J., concurring) ("Further, as construed by the Illinois court, the ordinance applies to hundreds of thousands of persons who are *not* gang members, standing on any sidewalk or in any park, coffee shop, bar, or 'other location open to the public, whether publicly or privately owned.' Chicago Municipal Code § 8–4–015(c)(5) (1992).").
243. *Morales*, 527 U.S. at 63.
244. *Id.* at 64.

> gang intimidation and violence. For example, the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a "harmful purpose" . . . .[245]

*Morales* is the latest word on loitering from the Supreme Court, but lower courts in more recent years have addressed vagueness challenges related to this conduct.[246] We highlight two cases that show an attention to harmfulness in the context of modern "out groups": registered sex offenders and homeless persons.

In a 2016 case in the Northern District of Indiana, *Valenti v. Hartford City*, the court invalidated an ordinance that punished a sex offender who "knowingly loiter[ed] on a public way within 300 feet of a Child Safety Zone."[247] Loitering was defined as "remaining in place" such that a reasonable person would believe that the primary purpose of the conduct was to "satisfy an unlawful sexual desire, or to locate, lure, or harass a potential victim."[248] The court held that this ordinance was void-for-vagueness, as it "does not sufficiently distinguish[] between innocent conduct and conduct threatening harm."[249] The court analogized to a hypothetical raised in the *Morales* opinion:

> For example, in the scenario where a person is sitting on a bench reading a paper, the apparent purpose might be to enjoy the outdoors and catch up on daily news. However, if it is a time of day when children are congregating, unsupervised, and readily visible, would those circumstances be sufficient to suggest another primary purpose—even if the person sitting on the bench does nothing different? . . . The problem is that there is much ambiguity between allowable and prohibited conduct, and no way to prevent those charged with enforcing the Ordinance from engaging in arbitrary and discriminatory enforcement.[250]

While the ordinance applied to a targeted population, ostensibly characterized by a high risk of recidivism,[251] it nevertheless insufficiently demarcated between harmful and harmless conduct.

A recent Ninth Circuit case struck down a Los Angeles ordinance targeting another vulnerable group—the homeless. The ordinance proscribed using a vehicle on any public street or parking lot "as living quarters either overnight, day-by-day or otherwise."[252] As with other offenses considered here, the definition requires the arresting officer to make a judgment about the defendant's purposes. The proscribed purpose at first seems more specific: to "live" in one's car. But on reflection, it is unclear how much time must be spent in one's car, and what

245. *Id.* at 67 (emphasis added).

246. *See, e.g.*, Valenti v. Hartford City, Indiana, 225 F. Supp. 3d 770 (N.D. Ind. 2016).

247. *Id.* at 773.

248. *Id.* at 774.

249. *Id.* at 788.

250. *Id.* at 788–89.

251. *But see* Tamara Rice Lave, *Inevitable Recidivism—The Origin and Centrality of an Urban Legend*, 34 INT'L J.L. & PSYCHIATRY 186, 191 (2011) (recidivism of sex offenders generally and convicted child molesters far lower than commonly assumed).

252. Desertrain v. City of Los Angeles, 784 F.3d 1147, 1149 (9th Cir. 2014).

activities one must engage in there, to use one's car as living quarters. Nor is it clear what harm the ordinance is designed to prevent.

Venice Beach police enforcing the statute were instructed to look for household items such as bedding, clothing, or food in cars, and were told that sleeping in a car was not a required element.[253] Arrested plaintiffs included one man who regularly slept in his car on church property (with permission).[254] Another plaintiff slept in a shelter when he could, or outside (which was legal) when he could not.[255] He rented a storage unit for his belongings, but kept a sleeping bag in his car to use when sleeping out.[256] A mentally disabled woman who slept in her RV in a church parking lot was pulled over while driving through Venice Beach and warned she would be arrested if ever seen with her vehicle in Venice Beach again.[257] Drawing on *Morales*, and *Papachristou*, the court reasoned that a statute is unconstitutionally vague if it encourages discriminatory enforcement.[258] The court concluded that the statute was vague in this sense because it "fails to draw a clear line between innocent and criminal conduct."[259]

"[D]espite Plaintiffs' repeated attempts to comply, there appears to be nothing they can do to avoid violating the statute short of discarding all of their possessions or their vehicles or leaving Los Angeles entirely. All in all, this broad and cryptic statute criminalizes innocent behavior."[260] The court added that '"the city cannot conceivably have meant to criminalize each instance a citizen' uses a vehicle to store personal property."[261] Thus, the court implied, the legislative motive in passing a statute "broad enough to cover any driver in Los Angeles who eats food or transports personal belonging in her vehicle"[262] could only have been to enable "discriminatory enforcement . . . applied only to the homeless."[263] By requiring the legislature to distinguish criminal from innocent behavior publicly and prospectively, the court precluded law enforcement from punishing the status of homelessness or the exercise of the constitutional right to enter and remain in Los Angeles.

### *B. Offensive Conduct*

Next, we consider a range of offenses functionally similar to loitering and vagrancy in that they authorize police discretion, but are defined in a different way. These are statutes punishing offensive public conduct. Where loitering and vagrancy offenses typically condition liability on presence in public, combined

253. *Id.* at 1151.
254. *Id.* at 1150.
255. *Id.* at 1151.
256. *Id.*
257. *Id.*
258. *Id.* at 1155 (citing City of Chicago v. Morales, 527 U.S. 41, 56 (1999)), 1156 (citing Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)).
259. *Id.* at 1156.
260. *Id.*
261. *Id.* (quoting *Morales*, 527 U.S. at 57).
262. *Id.*
263. *Id.*

with an appraisal of the defendant's purposes, we focus here on offenses defined by an appraisal of defendant's behavior. These include, in the words of Anthony Amsterdam, "Crimes of General Obnoxiousness, . . . Displeasing Police Officers, and the Like."[264] The behavior potentially criminalized is very widespread, because undefined; its harmfulness is in the eye of the beholder. More likely, though, is these crimes punish the harmless creation of "offense" in the sense defined in Joel Feinberg's classic analysis of criminalization: they "cause another to experience a mental state of a universally disliked kind."[265]

Consider the 1963 decision of *Wright v. State* which arose from the conviction of six African American young men for "breach of the peace."[266] The six were playing basketball in a public park "customarily used only by whites."[267] An officer admitted "I arrested these people for playing basketball in Daffin Park. One reason was because they were Negroes."[268] The other officer admitted that the defendants "were not necessarily creating any disorder," and that he nevertheless asked them to leave.[269] Police discretion was therefore clearly exercised so as to punish harmless conduct. One of the defendants challenged the officer's authority to expel them from the park. The charging instrument charged them with assembling "for the purpose of disturbing the public" peace and failing to disperse when ordered to do so.[270] One of the officers explained the dispersal order as aimed at preventing violence directed at the defendants by resentful whites.[271] In overturning the convictions, the Court treated the statute as applied as unconstitutionally vague: the statute could not constitutionally punish the use of a segregated public facility, and it did not specify what other conduct was required to breach the peace.[272]

The 1971 decision of *Coates v. Cincinnati*[273] concerned an ordinance punishing assembly of three or more persons on a sidewalk and "their conduct[ing] themselves in a manner annoying to persons passing by."[274] The defendant was a student antiwar protestor[275] who objected on being ordered to move by an officer. The Court, per Justice Stewart, held the ordinance "unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertain-

264. Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes and Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 205 (1967). Given the expressive or communicative feature of most offensive conduct, use of vagueness doctrine to prevent punishment of such conduct fits well with Amsterdam's theory of vagueness as forming a buffer zone for First Amendment freedoms. According to a recent Supreme Court opinion, "Giving offense is a viewpoint." Matal v. Tam, 137 S. Ct. 1744, 1763 (2017).

265. *See* JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 2 (1985).

266. 373 U.S. 284, 285 (1963).

267. *Id*.

268. *Id.* at 286.

269. *Id.*

270. *Id.* at 287.

271. *Id.* at 292.

272. *Id.*

273. 402 U.S. 611 (1971).

274. *Id.* at 611.

275. GOLUBOFF, *supra* note 11, at 258–59.

able standard" because "[c]onduct that annoys some people does not annoy others."[276] The Ohio Supreme Court determined that whether the conduct was "annoying" did not depend on the feelings of a complaining witness, "but the court did not indicate upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man."[277] Justice Stewart conceded that the ordinance might encompass "conduct clearly within the city's constitutional power to prohibit."[278] He added that "[t]he city is free to prevent . . . [such] antisocial conduct . . . through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited" but not "through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed."[279] In arguing that the ordinance was also overbroad, Justice Stewart reasoned that "public intolerance or animosity"[280] cannot justify constraints on assembly or association and that "such a prohibition . . . contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens."[281] Indeed, Justice Stewart observed that racially discriminatory enforcement of the ordinance had provoked riots in 1967.[282] Goluboff points out that the Supreme Court agreed to hear *Coates* just two weeks after four student protestors were killed by National Guard elsewhere in Ohio.[283]

The 1974 Supreme Court decision of *Smith v. Goguen* concerned a flag desecration statute, but the Court decided based on vagueness rather than First Amendment or overbreadth grounds.[284] Goguen, who had a hand-sized American flag sewn into the seat of his jeans, was convicted under a Massachusetts statute criminalizing "treating the flag contemptuously."[285] Justice Powell observed that "[f]lag contempt statutes have been characterized as void for lack of notice on the theory that '(w)hat is contemptuous to one man may be a work of art to another.'"[286] The state argued that the statute was not vague as applied to Goguen, on the view that his use of the flag clearly fell within the terms of the statute.[287] Citing *Coates*, however, Justice Powell wrote that the statute specified

276. *Coates*, 402 U.S. at 614. The Court also found the statute overbroad in punishing speech or association. *Id.* at 615.

277. 402 U.S. at 613.

278. *Id*. at 614.

279. *Id.*

280. *Id*. at 615.

281. *Id*. at 616.

282. *Id.* at 616 n.6.

283. GOLUBOFF, *supra* note 11, at 258.

284. 415 U.S. 566, 567–68 (1974).

285. *Id.* at 581.

286. *Id.* at 573 (quoting Note, *Constitutional Law—Freedom of Speech—Desecration of National Symbols as Protected Political Expression*, 66 MICH. L. REV. 1040, 1056 (1967)).

287. *Id.* at 577–78 (citing Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

"no standard of conduct . . . at all."[288] Instead, it "subjected him to criminal liability under a standard so indefinite that police, courts, and jury were free to react to nothing more than their own preferences for treatment of the flag."[289] Interestingly, the state argued that the statute provided sufficient warning because the conduct forbidden was narrow enough to be easily avoided—by avoiding display of the flag.[290] The Court disagreed, noting that "[i]n a time of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag or representations of it, it could hardly be the purpose of the Massachusetts Legislature to make criminal every informal use of the flag."[291] In other words, informal representation of the flag was sufficiently widespread and harmless that an elected legislature could not rationally intend to prohibit it. Under these circumstances, the statute could serve only to authorize discrimination. Justice Powell noted that counsel for the State had conceded that a police officer might interpret a particular use of the flag as contemptuous or not, depending on the political views the officer ascribed to the user.[292] The legislature's failure to specify which informal uses of the flag were forbidden "allows policemen, prosecutors, and jurors to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law."[293]

An Alaska Supreme Court case from this same period helps to exemplify the implementation of this jurisprudence in the lower courts: *Marks v. City of Anchorage*.[294] *Marks* involved a challenge to a "disorderly conduct"[295] statute that punished, among other things, engaging in "tumultuous behavior" in public, making an "offensively coarse utterance in public, and "addressing abusive language" to another person in public.[296] The mental state required for liability was "purpose and intent to cause public inconvenience, annoyance or alarm, or recklessly creat[ing] a risk thereof."[297] The challengers claimed that this offense was unconstitutionally vague, and that their membership in an unpopular minority

288. *Id.* at 578.
289. *Id.*
290. *Id.* at 578–79.
291. *Id.* at 574.
292. *Id.* at 575–76.
293. *Id.* at 575.
294. 500 P.2d 644, 645 (Alaska 1972).
295. "Disorderly conduct" statutes are widely promulgated and usually require police appraisal of public conduct (although some statutes cover private disorder). Our review found little caselaw that meaningful engaged with these statutes and recognized their vagueness problems. This may be due to the influence of the opinion in Colten v. Kentucky, 407 U.S. 104 (1972) (holding that disorderly conduct statute punishing congregating in public and refusing to disperse was not unconstitutionally vague). Interestingly, after the Alaska court issued its initial decision in *Marks*, discussed below, the Government petitioned for rehearing on the basis that *Colten* foreclosed its holding of unconstitutional vagueness. *Marks*, 500 P.2d at 656. The Alaska court distinguished *Colten* because that case was a narrow as-applied challenge, but the court also put forward a thinly veiled criticism of *Colten*'s reasoning, writing that "Colten seems difficult to reconcile in letter and spirit with a long line of Supreme Court cases, which were not referred to by the Court in the opinion. *Id.* "Among the more conspicuous omissions were five decisions handed down in the last two years…." *Id.* at n.6. Note that another reason to distinguish *Colten* from *Marks* is that the statute in *Colten* required disobedience of a police order to disperse.
296. *Marks*, 500 P.2d at 645.
297. *Id.*

group made them easy targets for discriminatory enforcement: "[A]ppellants allege that they are members of a class of long-haired, indigent, unemployed and generally unconventional persons, as well as low-income native persons, who, because of their non-conformist lifestyles, are subject to special scrutiny by the police."[298] The Alaska Supreme Court concluded that the most significant defect of the statute was its mental element, as the U.S. Supreme Court held that the term "annoying" was vague just one year prior in *Coates*.[299] The subjectivity of a judgment of annoyance, as *Coates* recognized, means that many instances of the offense-conduct will be harmless, but nevertheless covered by the statute: "Conduct that annoys some people does not annoy others."[300] The court also understood the challengers' clear invocation of *Papachristou*'s minority-protection rationale, and quoted the influential line in that case highlighting the vulnerability of "nonconformists" to "harsh and discriminatory enforcement" of laws.[301]

### *C. Lewdness & Indecency*

The next category of offenses to consider is a subset of offensive conduct: conduct deemed offensive to public morals because "lewd" or "indecent." Black's Law Dictionary defines lewdness as involving a "sexual act," and cites the Model Penal Code's additional requirement that the act is "likely to be observed by others who would be affronted or alarmed."[302] Similarly, indecency is conduct that is "outrageously offensive, esp. in a vulgar or sexual way."[303] Lewd or indecent conduct is therefore harmless in a traditional sense; mere observation of someone else's conduct almost never affects the observer physically or results in any other tangible setback to his or her interest.[304] At most, like the category of conduct described in the previous section, lewd or indecent conduct is *offensive* to others. Because the concepts of lewdness and indecency are inherently tethered to shifting and amorphous viewpoints about morality and proper manners, though, they have been the subject of frequent vagueness challenges. In what follows, we will consider several cases where courts have used vagueness doctrine to invalidate offenses that appeared to serve as vehicles of majoritarian moralism. In doing so, the doctrine worked to re-engage the legislature with the offense to more carefully assess whether the covered conduct was harmful and worthy of punishment. As William Eskridge observes, in the area of these morals-type offenses, "Many of the once-clear commands that grew muddier over time were statutory crimes targeting people considered deviant or even danger-

298. *Id.*
299. *Id.* at 652. The court held that "inconvenience" and "alarm" were also vague. *Id.* at 653.
300. *Id*. at 654.
301. *Id.* at 652.
302. *Lewdness*, BLACK'S LAW DICTIONARY (10th ed. 2014); MODEL PENAL CODE § 251.1 (AM. LAW INST. 2019).
303. *Indecency*, BLACK'S LAW DICTIONARY (10th ed. 2014).
304. *See generally* Harcourt, *supra* note 132.

ous in the nineteenth century, but who were no longer considered a social menace."[305] We might go further. It is not merely the mutability of moral assessments that makes them vague when viewed across longer time horizons—it is their necessarily contestable nature. Vagueness doctrine steps in to invalidate these laws because legislatures should make criminalization decisions based on values that can be appealed to universally (most centrally, harm).

In a 1966 case, the intermediate appellate court in California held that the state's prohibition of conduct that "openly outrages public decency" was void-for-vagueness.[306] The defendant modeled a swimsuit while topless in a bar.[307] This case, *In Re Davis*, illustrates well the problems created when an offense element is conceptually related to a morality-based claim such as "decency." First, the court criticized the offense for failing to state clearly what the meaning of "decency" was, and asked whether this was concerned solely with sexual morality or with good manners more generally.[308] More importantly, though, the court found the term "public" to be vague. The requirement that the indecency be "public" might initially be thought to resolve the problem of the contestability of what is and what is not decent, in that it asks a descriptive question of what *most people* (the public) think is decent. For the court, though, this word compounded the vagueness problem. The problem was that there was no way to answer the descriptive question about what most people think, because most people do not agree about what is and what is not decent. The "public" requirement "presuppose[d] some kind of consensus among the majority of the public as to what is and what is not 'decent,'" but such an assumption was dubious in the context of 1960s California:

> '[W]ho is the public'? Do twelve jurors automatically represent it? That answer is a great deal easier to give in a homogeneous society, in times of well established precepts of morality and manners, such as Victorian England, than today. Our American—and more particularly, our California—society, on the other hand, is highly heterogeneous in religion, race, social background and national origin . . . .[309]

In the context of a pluralistic society, offenses premised on standards determined by the community's shared moral sense are necessarily vague. As the court suggests, it is more likely that the randomness of a jury panel draw will lead to the arbitrary imposition of certain local viewpoints.[310]

305. William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 854 (1997).

306. In re Davis, 51 Cal. Rptr. 702, 704 (Ct. App. 1966).

307. *Id.* Her husband who owned the bar was also prosecuted for hosting the show. *Id*.

308. "[T]he moral or the decorous" meaning of decency. "We have a statute which may truly mean all things to all men, for if it be said that public decency should not be defined by the standards of the most profligate segment of the community, neither could we accept the definitions of the most prudish. We have a statute which gives the executive almost unlimited power to harass those with whose conduct or morals it is at odds or whom it suspects of having committed other crimes which cannot be proven." *Id.* at 707, 715–16.

309. *Id.* at 707.

310. "[A] fact which gives little assurance that the collective judgment of one jury will, in all but the most extreme cases, be anything like that of another." *Id.* at 707.

As the court recognized in *Davis*, it is not the judiciary's responsibility to keep abreast of contemporary morality and to implement it through vague statutory grants.[311] The court excoriated a New York decision from 1901 that "ma[de] it a judicial function 'to explore such new fields of crime as they may appear from time to time,'" calling such an endeavor "wholly foreign to the American concept of criminal justice."[312] Such a "blank check from the Legislature," the *Davis* court wrote, "raises very serious questions concerning the principle of separation of powers."[313] The court compared such an abdication of legislative crime definition to the "crimes by analogy" employed infamously by the Nazi courts.[314] If offenses tied to shifting and contestable conceptions of morality are inherently vague, the void-for-vagueness doctrine forces legislatures to draft criminal laws using more concrete and precise concepts.

A later case also illustrates this point. In 1980, the Louisiana Supreme Court held that an offense of operating an establishment offering "lewd dancing" and "lewd pictures" was void-for-vagueness.[315] The problem was, "Today . . . the word 'lewd' does not have a consensual meaning. The quality of lewdness, in the absence of specific legislative definition, is in the mind of the beholder."[316] The court recognized that traditional moral categories had broken down since the time of the statute's promulgation, and that in an increasingly pluralistic society there would be no monolithic conception of morality. Moral viewpoints diverge at a given point in time. But beyond this, as Eskridge noted, they also change across time: "Many dances that were once thought to be lewd—such as the waltz and the tango—are today considered tame."[317] This meant that police were free,

311. The court traced the lineage of the indecency statute back to a period in Early Modern English law in which the King's Bench, as "custos morum" (guardian of the morals), had effectively taken over the jurisdiction of the recently-defunct Ecclesiastical Courts. "We are again indebted to the House of Lords for an analysis of how this, to us, rather remarkable claim of jurisdiction, came about. 'The time of Charles II. was one of notorious laxity both in faith and morals, and for a time it seemed as if the old safeguards were in abeyance or had been swept away. Immorality and irreligion were cognizable in the Ecclesiastical Courts, but spiritual censures had lost their sting and those civil Courts were extinct, which had specially dealt with such matters viewed as offences against civil order. The Court of King's Bench stepped in to fill the gap.' . . . In 1774 . . . Lord Mansfield declared unequivocally that: 'this Court is the Custos morum of the people, and has the superintendency of offences Contra bonos mores. . . .' (Emphasis added.)." *Id.* at 710–11.

312. *Id.* at 709.

313. *Id.* at n.12.

314. *Id.* ("Compare a German law, signed by Adolf Hitler on June 28, 1935 which, in translation, reads in part as follows: 'Whoever commits an act which the law declares to be punishable or which deserves punishment according to the fundamental concept of a penal law and sound popular feeling, is punishable. If there is no penal law which directly applies to such deed, it shall be punished according to the law the basic concept of which is most applicable.'").

315. State v. Crater, 388 So. 2d 802, 804 (La. 1980).

316. *Id.*

317. *Id.* Consider also: "It may be that at one time words such as are here involved were deemed to have an ordinarily understandable meaning. *Cf.* State v. Ragona, 232 Iowa 700, 704, 5 N.W.2d 907 (1942). But common usage thereof has been so generalized as to encompass an infinite variety of behavioral patterns. This in turn has eroded the effective employment of such terms in any statutory enactment, absent an attendant specific definition thereof, as descriptions of proscribed ultimate criminal conduct." State v. Kueny, 215 N.W.2d 215, 218 (Iowa 1974).

with such a statute, to place citizens "in danger of random prosecution" for "[l]egitimate forms of expression."[318]

Last to consider in this category is cross-dressing, or "masquerading." This is an example of an offense that does not incorporate "lewdness" or "indecency" as an explicit element, but instead directly specifies what the lewd or indecent conduct is. Even here, though, courts have employed vagueness doctrine to invalidate the punishment of what is clearly harmless conduct. One example of this is a 1975 Ohio Supreme Court case, *Columbus v. Rogers*.[319] In *Rogers*, the defendant was convicted for appearing in public "in a dress not belonging to his or her sex."[320] As in the lewdness and indecency cases above, the court noted that what "belongs" to one sex is a value judgment that is both contestable and changeable over time: "Modes of dress for both men and women are historically subject to changes in fashion. At the present time, clothing is sold for both sexes which is so similar in appearance that 'a person of ordinary intelligence' might not be able to identify it as male or female dress."[321] The most important observation, though, was the application of the law to even clear cases of intentional conduct punished harmless activities. "[I]t is not uncommon today for individuals to purposely, but innocently, wear apparel which is intended for wear by those of the opposite sex," the court wrote.[322] Quoting *Papachristou*, the court noted that the vagueness of the law was most problematic because it allowed for standardless enforcement—an "infirmity [that] is of special significance in relation to the ordinance here which makes 'criminal activities which by modern standards are normally innocent.'"[323] Vagueness here is used to re-engage the legislature with the assessment of harms that such an offense is intended to address.

The lewd and indecent offense cases illustrate the problems with including offense elements based on moral appraisals. Given that such appraisals are mutable over time and contestable even at any one point in time, the only appropriate political institution in which these claims can be settled is the legislature. Offenses are unconstitutionally vague when their elements are necessarily conceptually tied to notions of morality.[324] Moreover, when specific conduct is used as a proxy for such a morality-based claim, courts will still use vagueness doctrine to invalidate these offenses when they apply to harmless—that is, "innocent"—conduct. Vagueness doctrine is and has been one of the bulwarks against legal moralism.

318. *Crater*, 388 So. 2d at 804.

319. City of Columbus v. Rogers, 324 N.E.2d 563, 565–66 (Ohio 1975). For other examples, see Eskridge, *supra* note 305, at 853–54 (section on cross-dressing).

320. *Rogers*, 324 N.E.2d at 565.

321. *Id.*

322. *Id.*

323. *Id.* at 566.

324. An offense prohibiting "lewd" conduct is therefore functionally similar to an offense prohibiting "immoral conduct," which would be obviously vague. Lewdness is such an offense, but with the narrowing parameters of sexuality and publicity.

### *D. Possession of Potentially Dangerous Objects*

The final category of conduct to consider is possession of objects and materials. Possession offenses are at the outer boundaries of harmful conduct. Possession targets the risk of harm that might come from the use of the possessed thing, but this risk can be quite remote. As Markus Dubber writes, possession offenses punish "the relation between an object and its possessor, often without regard to the possessor's awareness of the particular nature of the object, solely on the ground that this relation has been declared 'unlawful' by the state."[325] Given that possession offenses will always be more tenuously connected to the creation of harm than are offenses which punish conduct inflicting, attempting, or even risking injury, it is unsurprising that courts have employed vagueness doctrines to invalidate laws in this area.

We begin with an example from a large category of possession offenses: weapon-like objects. In a 1978 Michigan Court of Appeals decision, *People v. Guy*, the court held that a law criminalizing possession of a "gas ejecting" device was void-for-vagueness.[326] The device must have been at least "capable of ejecting any gas which will . . . harm any person."[327] Central to the court's vagueness conclusion was the statute covered a great deal of harmless conduct: "For example, if a person buys a can of hairspray or deodorant, we do not believe that the question of whether or not that person is violating the statute should be left to the whim or caprice of law enforcement officials."[328] The court's argument nicely illustrates the inadequacy of a harm principle, unaccompanied by a requirement of specificity, to protect harmless conduct. By striking down the offense, the court in effect forced the state legislature to more precisely align the contours of liability with conduct that is harmful. It described this alternative explicitly, writing, "[T]he Legislature, if it so desires, should enact a new law which would include a clearly-defined 'intent' element."[329] By tethering liability to a culpable mental state with respect to the causation of harm, such a revision would be more narrowly tailored to address actually dangerous instances of possession.

A second category of possession offenses involves drugs. Putting aside the debate over whether drug usage is harmful to others (or even harmful), consider statutes that punish possession of mere "paraphernalia"—the everyday implements that facilitate drug use, such as pipes, that are not themselves harmful except when used for an illicit purpose. In a 1980 case, *Florida Businessmen for Free Enter. v. Florida*, the federal district court in Tallahassee held that a Florida paraphernalia offense was unconstitutionally vague.[330] The state statute made it a misdemeanor to "possess drug paraphernalia," with this defined as "all equipment, products, and materials of any kind which are used [in] introducing into

325. Markus Dirk Dubber, *A Political Theory of Criminal Law: Autonomy and the Legitimacy of State Punishment*, U. TORONTO. FAC. L. REV. 1, 38 (2004).

326. 270 N.W.2d 662, 633 (Mich. Ct. App. 1978).

327. *Id.* at 663 (Cavanagh, J., dissenting).

328. *Id.* at 662 (majority opinion).

329. *Id.*

330. 499 F. Supp. 346, 350 (N.D. Fla. 1980).

the human body a controlled substance in violation of this chapter."[331] In holding this offense void-for-vagueness, the court took note of the absence of intent to use drugs on the part of the possessor, writing, "[T]he criminality of a person's possession turns upon something she cannot determine, the acts or intent of a third and possibly unknown party."[332] Underlying this concern was the implication that mere possession of these objects was, absent intent to use them illicitly, harmless conduct. Most "paraphernalia" had entirely innocuous uses:

> The person who buys sandwich bags at a "Head Shop" could be guilty of a crime but not if he buys them at a grocery store. Purchase of a hand mirror would be a crime if the manufacturer had lines of cocaine in mind rather than primping. A tobacconist would have to guess each time he sold a water pipe whether the purchaser intended smoking tobacco or marijuana. All these scenarios are possible under Section 893.147(1). They demonstrate the problem a law-abiding citizen would have determining whether she possessed paraphernalia. They also demonstrate the danger of arbitrary discriminatory enforcement.[333]

Tellingly, the court criticized the state legislature for dropping the intent requirement that other states and the DEA had recommended: "The Florida Legislature, for reasons the Defendants have not been able to explain, departed from the Model Act in this matter. The result is an unconstitutionally defined crime."[334] The Florida legislature insufficiently considered the application of the law to harmless conduct, and perhaps deliberately intended to broaden the net of liability and delegate criminalization decisions to law enforcement. Moreover, the legislature wanted to absolve the state of proving harmful intent. Because of this, judicial action was warranted.

While not involving possession, one other case related to drug paraphernalia is worth considering. In *Record Head Corp. v. Sachen*, the Seventh Circuit held void-for-vagueness an offense punishing, among other things, the *sale* of drug paraphernalia within 1,000 feet of a school.[335] The court noted that larger problems with paraphernalia crimes: "The difficulty that has plagued draftsmen of drug paraphernalia ordinances is how to control traffic in drug-related equipment without also proscribing wholly innocent conduct. Mirrors, spoons, pipes, and cigarette papers are all multiple-purpose items."[336] The dangers of innocent sale were just as concerning as innocent possession, and the drafting of an offense in such a manner reflects a deficiency of legislative deliberation calling out for judicial response. Thus, with a telling citation, the court explained the central problem: the statute

> leaves to the [law enforcement] authorities the job of determining, essentially without legislative guidance, what the prohibited offense is. . . . [And therefore], it encourages legislators to evade difficult decisions that would

331. *Id.* at 350–51.
332. *Id.* at 352.
333. *Id.* at 352–53.
334. *Id.* at 352.
335. 682 F.2d 672, 679 (7th Cir. 1982).
336. *Id.* at 676.

> otherwise subject them to political pressures and accountability. Cf . . . John Hart Ely, Democracy and Distrust 177 (1980).[337]

Vague laws permit legislative evasion of the valuable features of legislativity; vagueness doctrine works to help counteract this evasion.

### *E. Summary*

The above cases illustrate vagueness doctrine in action, and specifically its legislativity-enhancing function, in which courts encourage representative bodies to draw a bright line between harmful and harmless conduct. The doctrine does especially important work, as we said, when the conduct is harmless and widespread, and therefore pretextually enforced to oppress disfavored groups. Loitering, conducting one's self in an "annoying" or "offensive" manner, expressing sexuality in ways deemed indecent, and possession of objects that can facilitate drug use are all sufficiently common to fit into this category.

## V. AN AREA OF CONCERN: ADMINISTRATIVE CRIMES

Before concluding, we must discuss one practice that, while repeatedly accepted by the Court, raises potential vagueness nondelegation concerns, but also helps to illustrate a feature or qualification of our interpretation of vagueness doctrine. This is the practice of criminalization by administrative rulemaking. Many statutes in both federal and state law contain provisions that incorporate by reference any rules that a specified agency may promulgate and attach a criminal sanction to the violation of any such rule. For example, a federal statute for the protection of game birds states, "Any person who shall violate or fail to comply with any provision of, or any regulation made pursuant to . . . this title shall be deemed guilty of a misdemeanor."[338] Similarly, in New York it is a misdemeanor to commit a "tax fraud act," by failing to "file any return or report required under this chapter or any regulation promulgated under this chapter."[339] Finally, consider this provision of California's agricultural law relating to the quarantine of diseased animals: "A willful and knowing violation of any regulation that is adopted pursuant to this article is a crime."[340] These so-called "ad-

337. *Id.* at 678. (citing John Hart Ely, DEMOCRACY AND DISTRUST 177 (1980)). Note also the problem in that the expert testimony trial bore on the definition of the offense: "Finally, the reliance on expert opinion about the 'principal use of devices, articles, or contrivances claimed to be instruments,' presumably elicited at the prosecution stage, impermissibly allows 'the legislature (to) 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 should be set at large.'").

338. 16 U.S.C. § 690(g) (2018); 16 U.S.C. § 1540 (2018) ("(1) Any person who knowingly violates any provision of this chapter, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F); (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 1538 of this title shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this chapter shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than six months, or both").

339. N.Y. TAX LAW § 1801–02 (McKinney 2018).

340. CAL. FOOD & AGRIC. CODE § 10786 (West 2009).

ministrative crimes" abound. One commentator estimates that solely in the federal jurisdiction, there are up to 300,000 regulations that are backed by criminal sanctions.[341] If vagueness doctrine prohibits the delegation of criminalization decisions to law enforcement, and if agencies are creatures of the executive branch, how can administrative crimes and vagueness doctrine coexist?

### *A. The Supreme Court's Response*

Before exploring this tension further, though, it is worth spending some time explaining how it was created by the Supreme Court. Administrative crimes were initially rejected by the Court in the 1892 decision of *United States v. Eaton*.[342] In *Eaton*, the defendant operated a business selling margarine, and was convicted of failing to maintain books and records required by regulations promulgated by the Secretary of the Treasury.[343] One section of the relevant statute empowered the secretary to promulgate the regulations, and a penalty section stated that knowing or willful violation of the "things required by law" was an offense.[344] The Court held that the duties "required by law" in the penalty section did not include those created by administrative regulation.[345] The Court analogized administrative regulations to common law crimes, forbidden in the federal courts,[346] and stated that "[i]t is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.'"[347] "Public law" did not apparently include administrative regulations, even though the regulations were publicized and known by the regulated parties. The Court said that "[i]t would be a very dangerous principle" to allow the administrative official to prescribe criminal offenses, especially when the statute did not punish the same conduct with a criminal sanction.[348] "It is necessary," held the Court, "that a sufficient *statutory* authority should exist for declaring any act or omission a criminal offense."[349] While regulations "have, in a proper sense, the force of law," "it does not follow that . . . [their violation is] a criminal offense."[350] The *Eaton* Court thus recognized the power of Congress to delegate rulemaking to administrative agencies, but reserved criminal sanctions for statutory violations.

The Court abandoned this position in 1911 in *United States v. Grimaud*.[351] *Grimaud* involved a conviction "for grazing sheep on the Sierra Forest Reserve without having obtained the permission required by the regulations adopted by

341. Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1508 (2007).
342. 144 U.S. 677, 688 (1892).
343. *Id.* at 678.
344. *Id.* at 685.
345. *Id.* at 687.
346. *Id.* at 687 (citing United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812)).
347. *Id.* at 687–88. (citing 4. Amer. & Enc. Law, 642; 4 Bl Comm. 5).
348. *Id.* at 688.
349. *Id.* (emphasis added).
350. *Id.*
351. 220 U.S. 506, 522 (1911).

the Secretary of Agriculture."[352] A federal statute had delegated rulemaking authority to the Secretary, and made violations of those rules criminal offenses.[353] The Court noted that the general purpose of the statute was to protect and manage forest reservations, but that the choice of whether a specific reservation would allow a specific activity was merely a "matter of administrative detail," as "it was impracticable for Congress to provide general regulations for these various and varying details of management" given the "peculiar and special features" of each reservation.[354] The Court wrote that by empowering the Secretary to adapt his regulations to "local conditions," "Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power."[355] The Court referred to an older case involving court rules, and stated that while "strictly and exclusively legislative" powers could not be delegated, "nonlegislative" powers to "fill up the details" of a statute were permissibly delegated.[356] Exclusively legislative powers were "important subjects," but those subjects of "less interest"—the "details"—were the province of administrative regulations. While the initial justification for the delegation appears to be variability (in this case, the peculiar features of different reservations), in the end variability of circumstances represents just one species of a larger category: the "details." *Grimaud* continues by giving other examples of mere "details": ratemaking in shipping, and determining the uniform height of railroad-car couplings.[357] The determination of details like these "administer the law and carry the statute into effect."[358] Later the concept is described in more depth, when the Court quotes from some prior delegation cases outside of the criminal context: Congress may delegate "a power to determine some fact or state of things upon which the law makes or intends to make its own action depend," as "there are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power."[359] "Details" are "known unknowns" at the time of the legislative enactment, and their specification effectuates the legislative intent.

The *Grimaud* Court did not expressly overrule *Eaton*, but instead distinguished it.[360] *Eaton*, the Court wrote, was decided the way it was because the regulation specified additional types of books that were required to be maintained beyond those already specified by statute.[361] Describing the prior opinion, the Court wrote, "The court showed that when Congress enacted that a certain sort

352. *Id.* at 514.

353. *Id.* ("[M]ay make such rules and regulations and establish such service as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; *and any violation of the provisions of this act or such rules and regulations shall be punished*.").

354. *Id.* at 516.

355. *Id.*

356. *Id.* at 517.

357. *Id.* at 517–18.

358. *Id.* at 518.

359. *Id.* at 520 (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 694 (1892)).

360. *Id.* at 519.

361. *Id.*

of book should be kept, the commissioner could not go further and require additional books."[362] To do so was "putting the regulations above the statute."[363] Then, crucially, the Court observed that "the very thing which was omitted in the oleomargarine act [in *Eaton*] has been distinctly done in the forest reserve act, which, in terms, provides that 'any violation of the provisions of this act or such rules and regulations [of the Secretary] shall be punished' as prescribed.'"[364] Put another way, the *Grimaud* court found dispositive the distinction between the statutory grant to punish omissions "required by *law*" in *Eaton* and the grant in its own case to punish conduct that violates "provisions of this act *or* . . . *rules and regulations*."[365] "Law" was not enough—Congress needed to explicitly attach the sanction to the regulatory violation.

This is not entirely convincing. To be sure, the *Eaton* decision interpreted a statute rather than overturning it, and it identified no constitutional provision or principle denying Congress the power to punish acts that were not violations of law. After all, the decisions that denied the federal courts the power to declare common law crimes had not denied Congress the power to grant them such authority.[366] Yet, the *Eaton* decision was concerned with the deeper implications of criminalization decisions being made by nonlegislative institutions. The analogy to common law crimes and the reference to the "principle" of criminal law predicating punishment on violation of "a public law" makes this apparent.[367] Nor would it have been difficult to find plausible sources of constitutional authority for striking down a law authorizing criminal punishment without the violation of a legislative prohibition, in the apparently exclusive grant of lawmaking power to Congress, and in the prohibition on the deprivation of liberty without due process of law. It seems clear that the *Eaton* Court's interpretive conclusion that Congress had not delegated criminalization to an executive agency was an exercise of constitutional avoidance—that is, avoiding decision whether Congress could. The presence of the word "regulation" in the penalties section of the statute would not have allayed the Court's stated concern.[368] Even if Congress had spoken precisely about its intended delegation, that delegation would nevertheless still have implicated the "very dangerous principle" of executive criminalization.

After *Grimaud*, the coming of the New Deal and the rise of the administrative state would result in a greatly increased number of administrative crimes.[369] The *Grimaud* compromise would remain unchallenged at the Supreme Court

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.* (emphasis added).

366. United States v. Eaton, 144 U.S. 677, 687 (1892) (citing Manchester v. Mass., 139 U.S. 240, 262–63 (1891); United States v. Britton, 108 U.S. 199, 206 (1883); United States. v. Hudson, 11 U.S. 32 (1812)).

367. *Id.* at 687–88.

368. *Id.* at 688.

369. For a discussion of this era and criminal lawmaking, see generally Sohoni, *supra* note 10. A representative case is Yakus v. U. S., 321 U.S. 414, 419 (1944) (concluding that a defendant charged with criminal violation of an administrative regulation could not challenge the validity of the regulation without first exhausting prescribed administrative remedies).

throughout these developments. It was not until the 1990s that the validity of administrative crimes was again addressed.

In 1991, co-defendants challenged the scheme created by the Controlled Substances Act in *Touby v. United States*.[370] The Act established five categories of substances and punished unauthorized manufacture, possession, and distribution of these substances, but authorizes the Attorney General to add or remove substances from the various categories.[371] The Attorney General in turn delegated his authority to the Drug Enforcement Administration's administrator.[372] The defendants in the case challenged these delegations as unconstitutional, arguing that the nondelegation doctrine requires greater statutory specificity with respect to prohibited conduct when the regulations promulgated under the statute carry criminal sanctions.[373] The Court did not outright reject this claim. Instead, citing *Grimaud*, the Court acknowledged that its cases "are not entirely clear as to whether more specific guidance" is required for regulations that function as criminal offenses, but that "even if greater congressional specificity is required in the criminal context," the Controlled Substances Act is sufficiently specific.[374]

Crucial to this determination was the Act imposed daunting procedural requirements on the Attorney General's power to add and remove substances from the restricted categories.[375] These include required findings that the prohibition is "necessary to avoid an imminent hazard to public safety," where three factors are legislatively required to be considered.[376] The Act also required a thirty day notice of the proposed scheduling, notice to the Health and Human Services Secretary, and a requirement that the HHS Secretary's comments be taken into consideration.[377] Moreover, the scheduling must comply with the overarching requirements in the Administrative Procedures Act for notice, public hearing, and comment by interested parties.[378]

These "specific restrictions on the Attorney General's discretion" saved the Controlled Substances Act from unconstitutionality,[379] despite the fact that the restrictions on the discretion were purely *procedural*. Congress did not define or limit what is or is not an unlawful substance.

Next, consider the 1991 case *Loving v. United States*.[380] *Loving* involved a challenge to the specification of aggravating factors for military capital punishment by the President, and thus addressed a delegation of sentencing powers not

370. 500 U.S. 160, 167 (1991).

371. *Id.* at 162–63.

372. *Id.* at 164.

373. *Id.* at 165–66.

374. *Id.* at 166.

375. *Id.* at 167 ("It is clear that in §§ 201(h) and 202(b) Congress has placed multiple specific restrictions on the Attorney General's discretion to define criminal conduct. These restrictions satisfy the constitutional requirements of the nondelegation doctrine.").

376. *Id.* at 163.

377. *Id.* at 162–63.

378. *Id.* at 163.

379. *Id.* at 167.

380. 517 U.S. 748, 754–55 (1996).

to an administrative agency, but to the President himself.[381] *Loving* explicitly reaffirms the validity of administrative crimes, and cites to *Grimaud*: there is no nondelegation problem, the Court wrote, "so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations 'confin[e] themselves within the field covered by the statute.'"[382] *Loving* interprets *Grimaud* quite expansively, and as imposing only two requirements. The penalty must be in the statutory text, and the regulations must be inside the "field covered" by that text. While *Grimaud* spoke of agencies "fill[ing] up the details" that would be "unknown" at the time of legislative deliberation but necessary to "carry the statute into effect," *Loving* views statutes as creating a "field" within which regulations were free to operate.

The Court returned to address the constitutionality of administrative crimes very recently in the 2019 case *Gundy v. United States*.[383] *Gundy* considered whether the Sex Offender Registration and Notification Act, which made violations of regulations promulgated pursuant to the Act criminally punishable, was a violation of the nondelegation doctrine.[384] Specifically at issue was the Attorney General's authority to determine the Act's retroactivity.[385] The plurality opinion, authored by Justice Kagan, avoided the looming constitutional issues by reading into the statute as an "intelligible principle" that saved it from invalidation.[386] Three justices, however, agreed that the statute violated the nondelegation doctrine, and Justice Alito indicated in his concurrence that he would be willing to "reconsider the approach" the Court has taken on nondelegation claims if "a majority of this Court were [also] willing."[387] With the addition of Justice Kavanaugh to the Court, the *Grimaud* position on administrative crimes may soon be threatened.[388] For now, though, it remains good law.

### *B. A Brief Assessment*

As we have seen, the Supreme Court has consistently granted its approval to the practice of administrative criminalization delegations. But should it? Given all that was said earlier about the demand that the *legislature* be the determinative authority with respect to what is and is not prohibited and punished, do administrative crimes not violate the void-for-vagueness doctrine (or at least its

381. *Id.*

382. *Id.* at 768 (quoting United States v. Grimaud, 220 U.S. 506, 518 (1911)).

383. 139 S. Ct. 2116 (2019) (plurality).

384. *Id.* at 2121.

385. *Id.*

386. *Id.* at 2129–30.

387. *Id.* at 2131 (Gorsuch, J., dissenting); *id.* (Alito, J., concurring). For the purposes of the present discussion, it is relevant to note that the Gorsuch opinion links the nondelegation doctrine and the doctrine of unconstitutional vagueness as connected by "the hydraulic pressures of our constitutional system." *Id.* at 2141 (Gorsuch, J., dissenting). "It's easy to see, too, how most any challenge to a legislative delegation can be reframed as a vagueness complaint: A statute that does not contain 'sufficiently definite and precise' standards 'to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed at once presents a delegation problem and provides impermissibly vague guidance to affected citizens." *Id.* at 2142.

388. For a lengthy discussion of why administrative crimes ought to be deemed illegitimate, see Brenner Fissell, *When Agencies Make Criminal Law*, 10 UC IRVINE L. REV. (forthcoming 2020).

"most important" animating principle)? This is a complicated question, and it is one we cannot answer fully in this Article.

On the one hand, there seems to be a tension. Agencies are traditionally thought to be creatures of the Executive branch that exist to carry out the Executive's will,[389] with the core "executive" power being the enforcement of the law created by another branch—the legislature.[390] Thus, they would appear to be squarely implicated by the "more important" principle of the Court's vagueness jurisprudence: "the requirement that a legislature establish minimal guidelines to govern law enforcement."[391] Yet, as the above cases illustrate, modern agencies also possess the power to *make*—not just enforce—criminal law. Administrative criminalization, under this view, is merely a more elaborate form of a legislature punting to the police its responsibility to define what conduct is prohibited and punishable.

This may seem overly formalistic given the nature of modern agencies, but the absence of democratic input is an important qualitative difference. Earlier, we identified four salient features of legislativity that matter in the creation of criminal laws: democratic accountability, textual settlement, self-bindingness, and public deliberation. The enactments of administrative agencies may be adequately deliberative, and sufficiently definite, but they are arguably not democratically responsive enough to satisfy democratic accountability or to count as self-binding. Agencies are run by unelected administrators, and these administrators make decisions not on the basis of majority will, but instead on subject matter expertise. As Ely observed, "The point is not that such 'faceless bureaucrats' necessarily do a bad job as our effective legislators. It is rather that they are neither elected nor reelected, and are controlled only spasmodically by officials who are."[392]

Popular participation in lawmaking is particularly important in criminal law. The decision to criminalize conduct is not simply a technical matter of measuring its social cost and assigning a price to optimize its frequency. Criminal laws forbid and denounce offenses and their penalties impose suffering on the basis of moral judgments of blame. In this sense, "punishment necessarily has an

389. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010). There is an exception for so-called "independent agencies," though. *Id.* at 493.

390. Morrison v. Olson, 487 U.S. 654, 691 (1988) ("There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.").

391. Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (citations omitted).

392. ELY, *supra* note 53, at 131. Importantly, Ely observed that such officials could act on the basis of a weaker political will: "one reason we have broadly based representative assemblies is to await something approaching a consensus before government intervenes." *Id.* at 134; *see also* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 141–43 (1995) (noting that the "broad legislative delegation to administrative agencies threatens to dilute the principle of electoral accountability . . . ."). For an excellent overview of the accountability debate regarding delegations to administrative agencies, see generally the symposium held by the *Cardozo Law Review* entitled *The Phoenix Rises again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*. Nadine Strossen, *Delegation as a Danger to Liberty*, 20 CARDOZO L. REV. 861 (1999).

expressive dimension, specifically an expressive element of moral condemnation."[393] It is important this moral condemnation issue from an authority with standing to judge citizens. Executive officials may claim expertise in the costs and consequences of different policies, but they can claim no expertise in morality. In a liberal society, premised on the equality of citizens and value pluralism,[394] officials can claim no personal authority to impose value judgments on subjects. In such a society, officials cannot justify enforcing values on the ground that those values are *true*. They can only do so on the basis that such values have been fairly *chosen* by democratic means. Accordingly, the moral judgments implied by criminal punishment are best understood as being imposed in the name of the society as a whole.

This idea has been expressed by both retributivist and preventive theorists of punishment. According to retributivist philosopher Jean Hampton, crime injures the dignity of victims (including law-abiding citizens exploited by crimes of free-riding like tax evasion and overfishing) by expressing that they have less value than the offender.[395] The purpose of retributive punishment is to restore the damaged dignity of victims expressing that they are valued, while reproving and humbling the offender.[396] On this view, awareness of unredressed wrongdoing imposes a duty to condemn it, which, if undischarged, makes one complicit.[397] Accordingly, punishment best achieves the expressive aim of retribution when performed in the name of all. This means it is best performed by the state, but only in so far as the state acts as an agent of its citizens:

> [T]he modern state is the citizenry's moral representative—in the face of pluralism and religious controversy, it is the only institutional voice of the community's shared moral values . . . and thus . . . the only institution that can speak and act on behalf of the community against the diminishment accomplished by the crime.[398]

Antony Duff has also argued that punishment communicates to the offender by calling him to answer for his crime, and concludes that in answering for offenses "in a liberal democracy we are criminally responsible as citizens and to our fellow citizens."[399]

Preventive theorists have also asserted the importance of identifying criminal prohibition and condemnation with the community as a whole. Recall that

393. Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 157 (2001).

394. *See generally* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 3–17 (1980) (discussing equality of persons and mutual respect for normative viewpoints as premises for justificatory argument in a liberal society).

395. JEAN HAMPTON, THE INTRINSIC WORTH OF PERSONS: CONTRACTARIANISM IN MORAL AND POLITICAL PHILOSOPHY 115–35 (2007); JEFFRIE MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 124–25 (1988).

396. MURPHY & HAMPTON, *supra* note 395, at 125.

397. HAMPTON, *supra* note 395, at 133, 135.

398. *Id.* at 142; *see also* Alon Harel, *Why Only the State May Inflict Criminal Sanctions*, 3 COMP. RES. L. & POL. ECON. 1, 1 (2007).

399. R A DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 16, 51–56 (2007).

Cesare Beccaria, the originator of utilitarian penology, insisted that "the authority of making penal laws can only reside with the legislator, who represents the whole society united by the social compact."[400] Beccaria justified penal laws as "conventions, which are useful to the greatest number,"[401] representing the liberty individuals agree to cede to the state in order to protect.[402] Modern deterrence theorists have argued that the ability of criminal laws to deter depends upon their popular legitimacy, including their conformity to popular ideas of desert.[403] Thus, both retributive and preventive theorists have offered reasons for criminal laws to reflect popular morality rather than administrative expertise.

This requirement of democratic accountability explains why Continental criminal law jurisdictions have construed the "principle of legality" to require legislatively rather than administratively defined crimes. As two Spanish scholars explain:

> [R]egardless of the exquisitely specific way in which an administrative regulation may define conducts that give rise to criminal liability, the principle of legality requires that such specificity in the definition of criminal conduct stem from legislative action rather than from administrative regulation, for the legitimacy of criminal law flows from criminalization decisions that reflect the popular will of the people as expressed by their elected representatives.[404]

Thus, Luis Chiesa concludes that the practice approved of by *Grimaud* and its progeny would "surely fail to satisfy" the legality requirements of European Continental jurisdictions.[405] Similarly, one German commentator, criticizing *Grimaud*, writes, "Unlike Germany . . . the United States does not consider the definition of the primary rules of conduct, which are safeguarded by criminal sanctions, to be such a delicate and important matter."[406]

There are also reasons to think, however, that administrative criminalization, if carefully cabined, can be reconciled with the principles underlying vagueness doctrine. First, recall the Court's demand in its vagueness cases is that the legislature establish "*minimal* guidelines" to control law enforcement.[407] To survive a nondelegation attack, a Congressional authorization to an agency to promulgate criminally enforced regulations must in turn contain an "intelligible principle" to guide it,[408] while the regulations must stay "within the field" defined by the statute.[409] While "guidelines" could refer to conduct or procedures and a

400. BECCARIA, *supra* note 28, at 19.

401. *Id.* at 20.

402. *Id.* at 15–16.

403. PACKER, *supra* note 27, at 64–65, 69 (deterrent influence of the criminal law may depend on it being perceived as fair); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468–77.

404. LUIS E. CHIESA, SUBSTANTIVE CRIMINAL LAW 78 (Carolina Academic Press 2014) (translation of FRANCISCO MUÑOZ CONDE & MERCEDES GARCIA ARÁN, DERECHO PENAL: PARTE GENERAL 105 (2010)).

405. *Id.* at 79.

406. Uwe Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law*, 46 ADMIN. L. REV. 213, 241 (1994).

407. Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (emphasis added).

408. Mistretta v. United States, 488 U.S. 361, 372 (1989).

409. Loving v. United States, 517 U.S. 748, 768 (1996).

"principle" could mean a purpose or value, these two terms could also be given convergent interpretations. In justifying the "minimal guidelines" requirement, the Court stated that a law is unconstitutionally vague if it delegates "basic policy matters . . . for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[410] The "intelligible principle" that Congress provides in the statute is perhaps the specification of the "basic" policy to be pursued.

More importantly, though, there is less danger of arbitrary and discriminatory application of a statute through (prospective) agency rulemaking than through the (often reactive) exercise of police and prosecutorial discretion. Agency rulemaking is not an ad hoc exercise of unchanneled discretion. Rulemaking is governed by the elaborate Administrative Procedures Act, along with the vast body of caselaw that interprets it:

> First, the agency must issue a "[g]eneral notice of proposed rule making," ordinarily by publication in the Federal Register. Second, if "notice [is] required," the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." An agency must consider and respond to significant comments received during the period for public comment. Third, when the agency promulgates the final rule, it must include in the rule's text "a concise general statement of [its] basis and purpose."[411]

Many agencies also require further procedures, such as those noted in the *Touby* case above. All this makes rulemaking seem very far from "ad hoc." Indeed, the product of such processes may perhaps be less "ad hoc" than legislation, and may approximate the valuable features of legislativity noted above. Through notice-and-comment, rulemaking allows for public deliberation and for some measure of citizen input. Such rules arguably satisfy Justice Brennan's aim "that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values."[412]

In response to the concern for a lack of democratic accountability, consider two features of Agencies: their heads are accountable to elected Executives,[413] and their rules can always be invalidated by legislative enactments.[414] The Trump Administration and the 115th Congress (1/2017–1/2019) have made the repeal

410. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

411. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015) (citations omitted).

412. Roberts v. U.S. Jaycees, 468 U.S. 609, 629 (1984).

413. "The Constitution provides that '[t]he executive Power shall be vested in a President of the United States of America.' As Madison stated on the floor of the First Congress, 'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.'" Free Enter. Fund v. Pub. Co. Acctg. Oversight Bd., 561 U.S. 477, 492 (2010) (citation omitted). For scholarly defenses of accountability as mediated through an elected President and Congress, see, for example JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152–53 (1997); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1749 (2002) ("Accountability is not lost through delegation, then; it is transformed."); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 783–84 (1999).

414. *See* Congressional Review Act of 1996, 5 U.S.C.A. § 802 (West, Westlaw through Pub. L. No. 115-281).

of agency regulations a top priority, thereby illustrating the power of the political branches to undo administrative law when they see fit.[415]

Finally, with respect to criminal law, it must be said while "expertise" is not relevant when determining societal expressions of condemnation, this expression is not criminal law's only purpose. Criminal offenses also serve to deter conduct that detracts from social utility. In describing the theory he opposes, Kyron Huigens writes, "Under consequentialist, ethics punishment is justified by the deterrence of harm or, more broadly, by the promotion of social welfare."[416] The category of criminal law where this purpose of punishment fits most unobjectionably, moreover, comprises those offenses called, variously, regulatory crimes, mala prohibita, or public welfare offenses.[417] Stuart Green describes them as follows:

> The term "regulatory" crime is typically used to refer to a broad collection of statutes dealing with matters within the purview of federal, state, and local administrative agencies, such as the environment, product and workplace safety, labor and employment, transportation, trade, the issuance of securities, the collection of taxes, housing, and traffic and parking. Such statutes are often part of a specialized regulatory scheme that applies, in practice, to a limited number of persons and firms engaged in particular regulated industries.[418]

These can be contrasted with more traditional crimes, described by Justice Jackson in *Morissette v. United States* as offenses "against the state, the person, property, or public morals . . . in the nature of positive aggressions or invasions . . . [resulting in] direct or immediate injury to person or property."[419] Overall, their aim is not to punish culpably inflicted injuries, but to require coordination or cooperation in the achievement of a benefit or the avoidance of harm that may depend on patterns of behavior. As Justice Jackson put it, they seek to advance the "efficiency of controls deemed essential to the social order as presently constituted."[420]

These regulatory crimes are the types of crimes that legislatures most often delegate to agencies, and surely "expertise" *is* relevant when shaping the contours of these criminal offenses. Democratic input is arguably more important for the policy goals, and it may be adequate for the implementing rules to be designed under public scrutiny and subject to legislative revision.

415. Eric Lipton & Danielle Ivory, *Trump Says His Regulatory Rollback Already Is the 'Most Far-Reaching'*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/us/politics/trump-federal-regulations.html (noting Trump Administration's revocation of 67 rules and withdrawal of 635 planned regulations in 2017 alone).

416. Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 954–55 (2000).

417. Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1544 (1997).

418. *Id.*

419. 342 U.S. 246, 255 (1952).

420. *Id.* at 256.

### *C. Implications*

The long-accepted practice of administrative criminalization illustrates an important qualification of our interpretation of vagueness doctrine. Since the Supreme Court created the vagueness doctrine but also ratified the practice of administrative crimes, it may be that the critical animating principle behind vagueness doctrine is not legislative criminalization simpliciter, but instead criminalization that satisfies certain features of legislativity. These features very often inhere in legislative decision-making, but may also be replicated by other forms of decision making.

The *Touby* case is perhaps most illustrative of this.[421] Congress had admittedly delegated the power to make fundamentally substantive decisions about when to punish the possession of a substance, but it was enough to save the regime that these decisions were constrained by extremely detailed procedural rules. These rules allowed for public input, required reasoned consideration of facts and potential policy outputs, and resulted in a textual regulatory product. In this way they reflected values of legislativity: public deliberation (and its subvalue of transparency) and textual settlement. Note, though, that the Court in *Touby* expressed some discomfort over the current state of the law.[422] It asked, but did not answer, whether greater Congressional specificity was required in the context of criminal law, instead holding that "even if" it were, the Controlled Substances Act was sufficient.[423]

Administrative crimes, so far a widely accepted phenomenon in United States jurisdictions,[424] show that a rigid demand for criminalization by elected legislatures may be too simple a reduction of what the Court cares about when it demands specificity in lawmaking. In other words, vagueness doctrine may not require or demand legislativity per se, but instead encourages the same kind of political constraints on criminalization that legislativity imposes, even if they can be provided by a different procedure.

## VI. CONCLUSION

Void-for-vagueness doctrine is overtly nonsubstantive (it is applicable to criminalization of any type of conduct), but the Court's use of the doctrine has been critiqued as pretextual and selective—a cloak for covertly protecting substantive rights that the Court is unwilling to forthrightly announce as fundamental. We have presented an apologetic interpretation of the doctrine, arguing that it can be seen as the Court's good-faith alternative to the judicial categorization of protected conduct. It effectuates a procedural Harm Principle by encouraging majoritarian assessment of harms in the legislature, under the watchful eyes of

421. Touby v. United States, 500 U.S. 160 (1991).

422. *Id.* at 166.

423. *Id.*

424. *See* Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 668–69 (1994) (surveying state law positions on nondelegation doctrine, including in many criminal cases).

the public and the courts. In contrast to the law of other countries, American law does not explicitly require legislative criminalization, nor does it require that criminalized conduct harm legally cognizable interests. In unconstitutional vagueness, though, our legal system has a doctrine that encourages both indirectly.