

## NONDELEGATION AND CRIMINAL LAW

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*Although the Constitution confers the legislative power on Congress, Congress does not make most laws. Instead, Congress delegates the power to make laws to administrative agencies. The Supreme Court has adopted a permissive stance towards these delegations, placing essentially no limits on Congress’s ability to delegate lawmaking power to agencies.*

*In its recent decision, Gundy v. United States, the Court relied on this unrestrictive doctrine to uphold a statute delegating the power to write criminal laws. In doing so, the Court did not address whether greater restrictions should apply to delegations involving criminal law. Instead, it applied the same permissive test that it uses to evaluate other types of delegations.*

*This Article argues that criminal delegations should be treated differently. A number of legal doctrines distinguish criminal laws from other laws. Examples include the vagueness doctrine, the rule of lenity, and the prohibition on criminal common law. The principles underlying these exceptional doctrines equally support tighter restrictions on criminal delegations. Moreover, the justifications in favor of permitting delegations apply less forcefully to criminal laws. Accordingly, this Article proposes that criminal law delegations be subject to greater restrictions than other delegations.*

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#### INTRODUCTION

According to the Supreme Court, the nondelegation doctrine forbids Congress from delegating its Article I legislative power to administrative agencies. But the doctrine has more bark than bite. Since 1935, the Supreme Court has consistently affirmed the constitutionality of statutes delegating regulatory power to agencies.<sup>1</sup> These decisions have spawned many critics who have argued against broad delegations.<sup>2</sup>

<sup>1</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (“Only twice in this country’s history (and that in a single year) have we found a delegation excessive . . . .” (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Pan. Refin. Co. v. Ryan*, 293 U.S. 388 (1935))); Aditya Bamzai, Comment, Delegation and Interpretive Discretion: *Gundy, Kisor*, and the Formation and Future of Administrative Law, 133 Harv. L. Rev. 164, 165 (2019) (“[S]ave for two exceptions, both of which occurred in 1935[ the Court] has not used the nondelegation doctrine to find a statute unconstitutional.”).

<sup>2</sup> David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation 195–97* (1993); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 334 (2002) (arguing for a stronger nondelegation doctrine); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 Va. L. Rev. 471, 513 (1988) (“Perhaps the greatest departure from the system of government envisioned by the framers is the open-ended delegation of legislative power to administrative agencies that began with the New Deal and continues to this day.”); Sean P. Sullivan, *Powers, But How Much Power? Game Theory and the Nondelegation Principle*, 104 Va. L. Rev. 1229, 1241 (2018) (calling the doctrine “limp”); Kathryn A. Watts, *Rulemaking as Legislating*, 103 Geo. L.J. 1003, 1006 (2015) (calling the doctrine “toothless”).

During the October 2018 term, the Supreme Court decided to revisit a particularly important nondelegation question: whether Congress can delegate the power to set the scope of criminal laws. The issue arose in *Gundy v. United States*, which presented the question of whether the Sex Offender Registration and Notification Act (“SORNA”) unconstitutionally delegated power to the Attorney General to issue regulations about how the Act’s requirements applied to offenders convicted before the Act took effect.<sup>3</sup>

A fractured Court ultimately decided both to uphold the delegation and not to modify the nondelegation doctrine.<sup>4</sup> But the opinions strongly hinted that the Court might revisit the doctrine in the future. Justice Kagan’s opinion reaffirming the current doctrine garnered only four votes. Justice Gorsuch’s opinion excoriating the current doctrine as unconstitutional had three votes.<sup>5</sup> And Justice Alito’s concurring opinion explicitly indicated his willingness to revisit the doctrine in a future case.<sup>6</sup> Moreover, Justice Kavanaugh, who did not participate in *Gundy* and could have supplied the crucial fifth vote to refashion the nondelegation doctrine, issued a statement dissenting from the denial of certiorari in a later case, stating that Gorsuch’s *Gundy* dissent “raised important points that may warrant further consideration in future cases.”<sup>7</sup>

The opinions in *Gundy* featured extensive analysis of the nondelegation doctrine—its origins, its application, and its wisdom. But something important was missing from those opinions: a discussion of the importance of the criminal consequences flowing from the Attorney General’s regulations. None of the opinions in the case asked whether Congress’s ability to delegate policy decisions ought to be assessed differently when the power being delegated is the power to determine the scope of criminal laws.<sup>8</sup>

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<sup>3</sup> *Gundy v. United States*, 138 S. Ct. 1260 (2018) (granting certiorari on one of several questions presented in petition for writ of certiorari).

<sup>4</sup> *Gundy*, 139 S. Ct. at 2129–30.

<sup>5</sup> *Id.* at 2131 (Gorsuch, J., dissenting). Chief Justice Roberts and Justice Thomas joined the dissent.

<sup>6</sup> *Id.* at 2131 (Alito, J., concurring in the judgment) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”).

<sup>7</sup> *Paul v. United States*, 140 S. Ct. 342 (2019) (mem.). Justice Kavanaugh went out of his way to make this statement, writing separately in a denial of certiorari for the express purpose of noting that “Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.” *Id.* at 342.

<sup>8</sup> Although he did not address the matter in *Gundy*, Justice Gorsuch argued that delegation should apply differently to criminal laws when he was on the Tenth Circuit. See *United States*

This omission is striking because there are many reasons to think that the power to delegate is different when it comes to criminal laws.<sup>9</sup> Indeed, in previous opinions, the Court had explicitly acknowledged the possibility that a different test ought to apply to delegations involving

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v. Nichols, 784 F.3d 666, 668–70 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).

<sup>9</sup> Scholarship on the nondelegation doctrine is vast. See, e.g., Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1402, 1415–31 (2000) (suggesting a theory of nondelegation in which procedural protections advance normative concerns about rule of law and accountability); Lawson, *supra* note 2, at 345–51 (arguing that the text of Article I of the Constitution constitutes a limitation on the delegation of the legislative power by Congress); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002) (arguing that nondelegation doctrine is no longer enforced; Sullivan, *supra* note 2 (using game theory to evaluate the nondelegation doctrine). A smaller, but still significant, body of scholarship addresses the interaction of the doctrine with criminal law. See Harlan S. Abrahams & John R. Snowden, *Separation of Powers and Administrative Crimes: A Study of Irreconcilables*, 1 S. Ill. U. L.J. 1, 9, 37–39 (1976) (arguing that the power to make crimes is a core function of the legislature and thus cannot be delegated); Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. Irvine L. Rev. 855, 880–906 (2020) (arguing that criminal delegations are inconsistent with the political theories of punishment); Darrell A. Fruth, *Touby or Not Touby: The Constitutional Question When Congress Authorizes State and Local Governments to Legislate the Contours of Federal Criminal Law*, 44 Env't L. Rep. 10072, 10074 (2014) (arguing that many criminal delegations would fail a heightened intelligible principle test); A.J. Kritikos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 Mo. L. Rev. 441, 477–80 (2017) (arguing that the federal nondelegation doctrine should follow Florida's doctrine in criminal cases); Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 Ohio St. J. Crim. L. 51, 115 n.367 (2008) (expressing reservations about the delegation in the Adam Walsh Act because “the policy matters in question have unique normative importance affecting the liberty of individual citizens, but they also lack the technical complexity that typically justifies delegation based on agency expertise, not to mention the need for insulation from undue political influence (such as with environmental regulations)”); Logan Sawyer, *Grazing, Grimaud, and Gifford Pinchot: How the Forest Service Overcame the Classical Nondelegation Doctrine to Establish Administrative Crimes*, 24 J.L. & Pol. 169, 171–99 (2008) (describing the central role that the nondelegation doctrine played in the emergence of administrative crimes); Edmund H. Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 Mich. L. Rev. 51, 54 (1943) (arguing that criminal delegations raise no special concerns and therefore should be permitted); Mark D. Alexander, *Note, Increased Judicial Scrutiny for the Administrative Crime*, 77 Cornell L. Rev. 612 (1992) (arguing that judges ought to review criminal delegations de novo in criminal cases). But none of this scholarship has addressed specifically how the principles underlying the nondelegation doctrine apply to criminal laws. For an argument that other administrative law doctrines should apply differently to criminal law, see Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034–50 (2006).

criminal laws.<sup>10</sup> And both parties devoted significant portions of their briefs to the topic.<sup>11</sup> But none of the justices in *Gundy* grappled with those issues.

This Article takes up the task of evaluating the issues that the Justices failed to address. It concludes that Congress's authority to delegate the writing of criminal laws should be more circumscribed than its power to delegate the writing of other laws. It arrives at this conclusion because criminal laws are generally subject to greater restrictions, because the reasons against delegation have more force in the context of criminal laws, and because the standard justifications for delegations to agencies do not support—or at best only weakly support—delegations in the criminal context.

Since 1812, the Supreme Court has maintained that the defining of crimes and fixing of punishments are the sole province of Congress.<sup>12</sup> It also has long required Congress to speak more precisely when enacting criminal laws, employing the rule of lenity to interpret statutes in favor of defendants and striking down vague laws for violating the Due Process Clause.<sup>13</sup> The Court has justified the prohibition against vague laws, in part, as a way to protect individual rights. But it has also said that this prohibition serves the structural purpose of ensuring that Congress, rather than the courts or the executive, defines criminal conduct.<sup>14</sup> These foundational principles weigh heavily against permitting broad delegations of the power to write criminal rules.

Those principles also reveal a deep tension between the nondelegation doctrine and criminal law doctrines, including the constitutional prohibition against vague laws. The prevailing justification for delegations of the power to write rules is that the “law” is the delegating

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<sup>10</sup> E.g., *Touby v. United States*, 500 U.S. 160, 165–66 (1991); see also *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734 (6th Cir. 2013) (Sutton, J., concurring) (observing that the Court had not resolved whether a higher standard applies to criminal delegations).

<sup>11</sup> See Brief for Petitioner at 17–23, *Gundy v. United States*, No. 17-6086 (2018), 2018 WL 2441585, at \*17–23; Brief for the United States at 44–53, *Gundy*, No. 17-6086, 2018 WL 3727086, at \*44–53.

<sup>12</sup> *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

<sup>13</sup> See, e.g., *United States v. Bass*, 404 U.S. 336 (1971) (using the rule of lenity to overturn a federal firearms conviction); *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 216 (1914) (striking down Kentucky antitrust laws as impermissibly vague on due process grounds).

<sup>14</sup> See Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court*, Revisited, 30 *Am. J. Crim. L.* 279, 284–86 & nn.43–54 (2003) (collecting cases); Carissa Byrne Hessick, *Vagueness Principles*, 48 *Ariz. St. L.J.* 1137, 1143–45 & nn.31–42 (2016) (collecting articles).

statute, not the regulations themselves.<sup>15</sup> But if it is the *statute* that we must treat as law, rather than the agency's regulations, then the statute itself must satisfy the vagueness doctrine. This is significant because many statutes that delegate criminal rulemaking authority do not satisfy the vagueness test. They offer virtually no guidance on what is illegal; instead, they provide only the loosest set of considerations that an agency must weigh in later declaring what is illegal. Put differently, the statutes do not specify what is illegal; they say only that an agency will later state what is illegal. This incompatibility between the prevailing justification for modern nondelegation doctrine and the vagueness doctrine is a stark illustration of the fundamental problem with treating criminal delegations no differently than other delegations.

In short, criminal law delegations *are* different from other delegations. They are inconsistent with foundational criminal law doctrine, they present greater threats to the principles underlying the nondelegation doctrine, and they are not supported by the ordinary arguments in favor of delegation. And so we should treat criminal law delegations differently.

The Article proceeds in four parts. Part I describes the current nondelegation doctrine and how that doctrine has been applied in cases involving criminal law. It explains that, while the Supreme Court has often suggested that criminal law delegations ought to receive stricter scrutiny under the nondelegation doctrine, it has not actually struck a delegation down on that ground.

Part II explains why criminal law delegations ought to be viewed differently than non-criminal law delegations. It begins by identifying the ways in which the law treats criminal statutes differently from non-criminal statutes. The Supreme Court has repeatedly held that Congress—rather than the executive or the judiciary—must make the criminal law, and it has placed special restrictions on how criminal laws are interpreted and enforced. Part II then explains that the very same concerns that led to the creation of these different criminal doctrines—namely, undue threats to liberty, inadequate government accountability, and insufficient notice of legal requirements—have been cited by delegation's critics as a reason to forbid broad congressional delegations. Because the need to protect liberty, ensure accountability, and assure notice are heightened for criminal laws, and because these principles are threatened by broad

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<sup>15</sup> See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); see also Watts, *supra* note 2, at 1005 (discussing this theory).

delegations, the delegation of criminal rulemaking power should be viewed with deep suspicion.

Part II also demonstrates that the reasons that are traditionally offered in support of broad delegations—expertise, promoting compromise, and efficiency—are far less convincing when it comes to the enactment of criminal laws. Criminal law questions are largely about moral judgment, which does not turn on technical expertise. And to the extent criminal law raises empirical questions, answering those questions would need to account for many competing costs and benefits across many different areas—requiring a range of expertise that is far broader than what we ordinarily expect from agency officials. Similarly, the ability to compromise and the ability to act efficiently are less pressing in criminal law. Legislators have proven to be far more efficient and cooperative in passing criminal statutes than legislation in other areas.

Part III places the delegation of promulgating criminal laws in context. It acknowledges that some may see criminal law delegations as unexceptional because Congress routinely confers broad discretionary power on law enforcement. In particular, Congress has enacted broad and overlapping criminal statutes. Those enactments leave a large amount of criminal justice policy to prosecutors, who enjoy enormous discretion over which charges to bring. But the policy discretion resulting from those broad and overlapping statutes is not equivalent to the policy power resulting from delegations. The former provides more options to prosecutors in exercising their executive charging power. The latter authorizes the executive to decide what is criminal.

Part IV turns from theory to application. It sketches different ways to implement a stricter nondelegation doctrine for criminal laws that would be consistent with the principles underlying both criminal law and administrative law. It explains that courts could vindicate those principles either by prohibiting all delegations involving criminal law or by adopting a more robust version of the intelligible principle doctrine for statutes that impose criminal penalties. It briefly addresses the benefits and drawbacks of each approach, and it ultimately recommends that, at the least, the Court should use the vagueness doctrine to police criminal law delegations.

### I. THE NONDELEGATION DOCTRINE

To understand what was at stake in *Gundy*, it is first necessary to describe the nondelegation doctrine, both in general and as it has been

applied in criminal cases. This Part provides that background information and identifies the uncertainty surrounding criminal law delegations that existed before *Gundy*. It then describes *Gundy*, highlighting how the *Gundy* Court failed to address the particular concerns raised by criminal law delegations.

### A. A Brief History of the Nondelegation Doctrine

Article I provides that “[a]ll legislative powers herein granted shall be vested in a Congress.”<sup>16</sup> This provision assigns all lawmaking powers to Congress, and no other constitutional provision authorizes another body of government to exercise federal legislative power. Moreover, the Supreme Court has repeatedly said that Congress cannot delegate this Article I legislative power to another branch of government.<sup>17</sup>

At the same time, the Court has recognized that Congress can assign the task of implementing the law to the executive.<sup>18</sup> For two centuries, however, the Court has noted the difficulty in distinguishing statutes that permissibly assign the task of implementation from statutes that impermissibly delegate legislative power.<sup>19</sup> As Chief Justice Marshall put

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<sup>16</sup> U.S. Const. art. I.

<sup>17</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (“Congress, this Court explained early on, may not transfer to another branch ‘powers which are strictly and exclusively legislative.’” (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825))); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (“That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”). Some have disagreed with this position. They have argued that, although Article I assigns legislative power to Congress, it does not prohibit Congress from re delegating that authority to others. See *Whitman*, 531 U.S. at 489 (Stevens, J., concurring in part and in the judgment) (arguing that Congress should be permitted to delegate its legislative power); 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.6, at 66 (3d ed. 1994) (“The Court probably was mistaken from the outset in interpreting Article I’s grant of power to Congress as an implicit limit on Congress’ authority to delegate legislative power.”).

<sup>18</sup> E.g., *Gundy*, 139 S. Ct. at 2123 (“Congress may ‘obtain[] the assistance of its coordinate Branches’—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws.” (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989))).

<sup>19</sup> *Wayman*, 23 U.S. (10 Wheat.) at 46 (“[T]he precise boundary of this power is a subject of delicate and difficult inquiry . . . .”); Sullivan, *supra* note 2, at 1238 (“The challenge of locating the line between those actions that Congress must make for itself, and those that can be properly ascribed to an agency in its execution of law, remains the central difficulty in implementing the nondelegation principle today.”).

it, “[t]he line has not been exactly drawn which separates those important subjects.”<sup>20</sup>

Courts have almost always erred on the side of upholding statutes authorizing others to promulgate rules with the force of law.<sup>21</sup> The Supreme Court has said that delegations to make such rules are constitutional so long as Congress provides an “intelligible principle” that guides the exercise of the delegated authority.<sup>22</sup> According to the Court, the inclusion of an intelligible principle ensures that the statute does not delegate legislative power.<sup>23</sup> If a statute includes an intelligible principle, the argument goes, it merely calls upon executive officials to exercise their executive authority to adopt policies implementing the law that Congress wrote through its legislative power.<sup>24</sup>

Applying that intelligible principle test, the Court has struck down only two statutes as unlawful delegations.<sup>25</sup> Both decisions were issued in 1935. In the first case, *Panama Refining Co. v. Ryan*, the Court struck down a provision of the National Recovery Act that authorized the President to decide whether to prohibit the interstate transportation of petroleum produced or withdrawn from storage in excess of state-set quotas.<sup>26</sup> The Court reasoned that the statute did not provide an

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<sup>20</sup> *Wayman*, 23 U.S. (10 Wheat.) at 43.

<sup>21</sup> Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 392–405 (2017) (chronicling the Supreme Court’s “track record” of “deference to congressional decisions to delegate some rulemaking to others”).

<sup>22</sup> *Gundy*, 139 S. Ct. at 2123 (“Congress . . . may confer substantial discretion on executive agencies to implement and enforce the laws . . . [Such] a statutory delegation is constitutional as long as Congress lay[s] down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.” (internal quotation marks and citations omitted)).

<sup>23</sup> *Loving v. United States*, 517 U.S. 748, 771 (1996) (“The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.”).

<sup>24</sup> *Id.*; see also *id.* at 777 (Scalia, J., concurring in part and concurring in the judgment) (“Legislative power is nondelegable. Congress can no more ‘delegate’ some of its Article I power to the Executive than it could ‘delegate’ some to one of its committees. What Congress does is to *assign responsibilities* to the Executive; and when the Executive undertakes those assigned responsibilities it acts, not as the ‘delegate’ of Congress, but as the agent of the People.”).

<sup>25</sup> *Gundy*, 139 S. Ct. at 2129 (“Only twice in this country’s history . . . have we found a delegation excessive . . .”).

<sup>26</sup> 293 U.S. 388, 415, 418, 430 (1935).

intelligible principle guiding the President's discretion and, therefore, impermissibly conferred legislative authority.<sup>27</sup>

In the second case, *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down another part of the National Recovery Act.<sup>28</sup> That part authorized the President to approve codes of fair competition for slaughterhouses and other industries. The Court stated that “aside from the statement of the general aims of rehabilitation, correction and expansion,” the statute provided “no standards” for when the President should approve codes.<sup>29</sup> Accordingly, the Court concluded, the statute impermissibly delegated “legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable.”<sup>30</sup>

Since rendering those decisions, the Court has upheld every statute delegating rulemaking authority that it has considered.<sup>31</sup> It has found adequately intelligible principles in statutes with only the vaguest of guidance, such as statutes authorizing agencies to make rules that are in the “public interest” or that are “just and reasonable.”<sup>32</sup> They have even been willing to supply intelligible principles for statutes that otherwise do not contain such principles in their statutory text.<sup>33</sup> Lower federal courts have followed a similar course, almost uniformly rejecting all nondelegation challenges.<sup>34</sup>

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<sup>27</sup> *Id.* at 430 (stating that the Act “ha[d] declared no policy, ha[d] established no standard, ha[d] laid down no rule”).

<sup>28</sup> 295 U.S. 495, 521–22 (1935).

<sup>29</sup> *Id.* at 541.

<sup>30</sup> *Id.* at 537–38.

<sup>31</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019).

<sup>32</sup> *Fed. Power Comm’n v. Hope Nat’l Gas Co.*, 320 U.S. 591, 600 (1944); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943); see also *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001) (stating that courts should not “second-guess” the degree of discretion afforded in delegations by Congress).

<sup>33</sup> See *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion) (reading into a statute authorizing the Secretary of Labor to regulate toxic substances a requirement that the Secretary find a significant risk of harm from the toxin); see also *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (“In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.”).

<sup>34</sup> Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 *Notre Dame L. Rev.* 619, 636 (2017) (noting only one successful federal nondelegation challenge that was not reversed on appeal). State courts have been more receptive to nondelegation challenges based on their own state constitutions. See *id.* (reporting a 16% success rate in state nondelegation challenges).

Although courts continue to apply the intelligible principle test, the nondelegation doctrine has faced significant criticism on many different fronts. One common criticism is that the doctrine is an empty formality, as evidenced by the near-uniform unwillingness to strike down statutes as improper delegations.<sup>35</sup>

Another criticism is that the intelligible principle test is inconsistent with the original meaning of the Constitution. This criticism comes from both sides. Some argue that the test permits delegations that are forbidden under the original understanding of the Constitution.<sup>36</sup> Others criticize the test as too narrow, arguing that the Founders meant to permit all delegations instead of only those supported by an intelligible principle.<sup>37</sup>

A third criticism of the intelligible principle doctrine is that it is simply not true that an agency exercises executive instead of legislative power when it promulgates a legislative rule.<sup>38</sup> This criticism rests on the idea that legislative rules do not simply give effect to binding norms enacted by Congress. Instead, the legislative rules themselves establish binding norms. They declare what is legal or illegal. Conduct that is otherwise lawful becomes unlawful if it violates a legislative rule.<sup>39</sup> That the rule

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<sup>35</sup> Sullivan, *supra* note 2, at 1241 (calling the test “limp”); Watts, *supra* note 2, at 1006 (calling the test “toothless”); see also Lawson, *supra* note 2, at 328–29 (“[T]he Court . . . has steadfastly found intelligible principles where less discerning readers find gibberish.”).

<sup>36</sup> See, e.g., *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting) (“[T]he ‘intelligible principle’ [test] has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked.”).

<sup>37</sup> See, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 *Colum. L. Rev.* (forthcoming 2021) (manuscript at 4), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3512154](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3512154) [<https://perma.cc/5TP9-L66Y>] (presenting historical evidence in support of the idea that Article I prevents Congress only from alienating its legislative power, not from delegating it); Whittington & Iuliano, *supra* note 21, at 381 (using a dataset of more than two thousand cases to support the claim that the nondelegation doctrine is a myth because “there was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power”).

<sup>38</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 488 (2001) (Stevens, J., concurring in the judgment) (“I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is ‘legislative power.’”); Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 *Va. L. Rev.* 1035, 1044 (2007) (arguing that the position that an intelligible principle makes rulemaking executive instead of legislative “leads to quite odd and untenable conclusions”); Watts, *supra* note 2, at 1013 (“[T]he nondelegation doctrine’s central premise prohibiting the delegation of legislative power has little connection to the real world.”).

<sup>39</sup> See, e.g., *Sweet v. Sheahan*, 235 F.3d 80, 91 (2d Cir. 2000) (“[L]egislative rules are those that ‘create new law, rights, or duties, in what amounts to a legislative act.’” (quoting *White v. Shalala*, 7 F.3d 296, 303 (2d Cir.1993))); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561,

may be promulgated pursuant to a statute that includes an intelligible principle changes nothing. The rule that the agency promulgates under that statute still makes a binding norm that establishes what is legal or illegal. The intelligible principle simply provides the agency with guidance on how to make the law.<sup>40</sup>

### B. Criminal Delegations

The story of criminal delegations is more complicated. On the one hand, the Court has upheld many statutes delegating the power to promulgate rules whose violation constitutes a crime. As long ago as the 1897 decision in *In re Kollock*, the Court concluded that the Constitution does not prohibit Congress from assigning to an agency the power to prescribe elements of a criminal offense. *Kollock* involved a statute making it a crime to sell margarine unless it had been “marked and branded as the Commissioner of Internal Revenue . . . shall prescribe.”<sup>41</sup> Kollock, who had been convicted for selling margarine not marked as required by IRS rules, argued that the statute unlawfully delegated legislative power “to determine what acts shall be criminal” to the IRS.<sup>42</sup> The Court rejected the challenge. It stated that the statute itself required packages to be “marked and branded,” and the regulations “simply described the particular marks, stamps and brands to be used.”<sup>43</sup> Thus, the Court concluded, “[t]he criminal offence is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail.”<sup>44</sup>

On the other hand, decisions rendered since *Kollock* have suggested that there may be greater limits on Congress’s authority to delegate in the context of criminal law. One example comes from the 1911 decision in

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1565 (D.C. Cir. 1984) (en banc) (“[I]f by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule.”); see also *Reynolds v. United States*, 565 U.S. 432, 440 (2012) (stating that, through his determination, the Attorney General could create new legal obligations).

<sup>40</sup> See Alexander & Prakash, *supra* note 38, at 1044 (making a similar argument by noting that the Constitution itself provides intelligible principles cabining Congress’s power).

<sup>41</sup> *In re Kollock*, 165 U.S. 526, 528 (1897); Act of Aug. 2, 1886, ch. 840, 24 Stat. 209, 209–13 (defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine).

<sup>42</sup> *Kollock*, 165 U.S. at 533.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

*United States v. Grimaud*.<sup>45</sup> There, the Court upheld a statute making it a crime to violate regulations aimed at protecting forest reserves. But in doing so, the Court distinguished statutes authorizing an agency to decide whether to criminalize a legal violation or to “fix[] the punishment” for a crime. Those types of statutes, the Court said, would entail the exercise of “the legislative power.”<sup>46</sup>

Thirty-five years later, the Court again suggested a limitation on criminal delegations in *Fahey v. Mallonee*.<sup>47</sup> In the course of upholding a statute authorizing the promulgation of non-criminal rules regulating savings and loan associations, the Court distinguished *Panama* and *Schechter*—the two 1935 cases striking down statutes as unlawful delegations—on the ground that violating the agency regulations in those cases constituted a crime. Although the opinions in neither *Panama* nor *Schechter* relied on the criminal penalties in striking down the delegations, the *Fahey* Court said that one reason it struck down the delegations in *Panama* and *Schechter* was that they delegated the “power to make federal crimes.”<sup>48</sup> The Court repeated this sentiment more recently in *Mistretta v. United States*,<sup>49</sup> suggesting that special concerns apply to delegations that “make crimes of acts never before criminalized.”<sup>50</sup>

Despite their suggestions that criminal delegations should be treated differently, the Court has not provided any consistent guidance about how to evaluate delegations of criminal power. Some cases, such as *Fahey*, *Grimaud*, and *Mistretta*, suggest that statutes authorizing agencies to promulgate at least some types of criminal rules are always unconstitutional delegations. But other cases suggest a different approach. In *Touby v. United States*,<sup>51</sup> for example, the Supreme Court suggested that such statutes are not automatically unconstitutional, but instead, they must satisfy only a more rigorous intelligible principle standard.<sup>52</sup> *Touby*

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<sup>45</sup> 220 U.S. 506 (1911).

<sup>46</sup> *Id.* at 523.

<sup>47</sup> 332 U.S. 245 (1947).

<sup>48</sup> *Id.* at 249.

<sup>49</sup> 488 U.S. 361 (1989).

<sup>50</sup> *Id.* at 373 n.7. This was not the only ground of distinction. The Court also concluded that, unlike the statutes at issue in *Panama* and *Schechter*, the Sentencing Reform Act “set[] forth more than merely an ‘intelligible principle’ or minimal standards.” *Id.* at 379.

<sup>51</sup> 500 U.S. 160 (1991).

<sup>52</sup> *Id.* at 165–66.

involved a challenge to the Controlled Substances Act,<sup>53</sup> which gives the Attorney General significant authority over which drugs appear on the “schedules” of controlled substances.<sup>54</sup> Once a drug is added to a schedule, its manufacture, distribution, and possession is either regulated or prohibited. An individual who violates those regulations and prohibitions is subject to severe criminal penalties. In upholding the statute, the Supreme Court stated that it “need not resolve” whether Congress must provide “more specific guidance.”<sup>55</sup> Resolution was not necessary, according to the *Touby* Court, because even if a higher standard did apply, the statute satisfied it.<sup>56</sup>

Even in cases where the Court has suggested that criminal law delegations are different, those statements appear to be little more than lip service. Take, for example, the opinion in *United States v. Grimaud*.<sup>57</sup> The *Grimaud* Court rejected a nondelegation challenge to a statute that imposed criminal penalties for violating regulations regarding the use of public forest lands. Those regulations had been promulgated by the Secretary of Agriculture. The defendants had been convicted for grazing sheep without a permit. The opinion concluded by stating that the Secretary “did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself.”<sup>58</sup> Yet the statute delegating regulatory power made no reference to grazing, to sheep, or to permits.<sup>59</sup> It is difficult to understand how a statute could impose a punishment for an act that it never mentions. The statute did set a punishment: “a fine of not more than five hundred dollars and imprisonment for not more than

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<sup>53</sup> Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified at 21 U.S.C. § 801 et seq.).

<sup>54</sup> 21 U.S.C. § 811(a).

<sup>55</sup> *Touby*, 500 U.S. at 166.

<sup>56</sup> *Id.* at 165–66.

<sup>57</sup> 220 U.S. 506 (1911).

<sup>58</sup> *Id.* at 523.

<sup>59</sup> The Court acknowledged as much, stating that it was “true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve,” *id.* at 521, and then took pains to argue that the statute ought to be read against a backdrop of a previous case. That case had discussed “the implied license under which the United States had suffered its public domain to be used as a pasture for sheep and cattle,” and it had inferred from other sections of the statute that the Secretary was authorized to create a permitting process to generate revenue. *Id.*; see also Sawyer, *supra* note 9, at 181 (noting that the relevant Act made no mention of grazing and that the decision to omit any reference to grazing was deliberate because it was such a controversial topic).

twelve months or both.”<sup>60</sup> But it was left entirely to the Secretary to decide what conduct on public forest lands warranted that punishment.<sup>61</sup>

Moreover, *Grimaud*'s statement that the nondelegation doctrine requires Congress, rather than an executive official, to “fix[] the punishment,” is nearly impossible to square with the decision in *Mistretta*.<sup>62</sup> At issue in *Mistretta* was the Sentencing Reform Act, which delegated to the Sentencing Commission the task of setting mandatory sentencing ranges for all federal crimes.<sup>63</sup> Despite *Grimaud*'s restriction on fixing punishment, the *Mistretta* Court rejected a nondelegation challenge to the Sentencing Reform Act. It explained that the delegation posed no constitutional problem because it did not involve writing regulations that “bind or regulate the primary conduct of the public.”<sup>64</sup> In other words, even though the precise power that Congress had delegated was the “power of declaring the penalty or fixing the punishment”—a power that *Grimaud* tells us is a “legislative power”—the delegation was deemed permissible, in part because the delegated power did not include the power to say what conduct was prohibited.

In short, the Court's decisions on criminal delegations are confused and conflicting. They disagree on whether a stricter doctrine should apply to delegations involving criminal laws, and they disagree about which laws might be subject to this stricter doctrine.

### C. Gundy's Failure

*Gundy v. United States* presented an opportunity to clarify whether criminal law delegations ought to be treated differently. At issue in *Gundy* was the lawfulness of a provision in SORNA, which authorized the Attorney General to prescribe registration requirements for individuals

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<sup>60</sup> *Grimaud*, 220 U.S. at 509.

<sup>61</sup> The statute told the Secretary only “to regulate the[] occupancy and use” of the lands in a manner that “protect[s] against destruction by fire and depredations.” *Id.* at 509 (citing Act of June 4, 1897, ch. 2, 20 Stat. 35). It “left the definition of every element of the crime to the discretion of the Secretary.” Sawyer, *supra* note 9, at 184. Professor Bamzai has defended *Grimaud* based on the right/privileges distinction, arguing that the Court upheld the authority of the agency to criminalize only the violation of the *privilege* of using public land. Bamzai, *supra* note 1, at 180–81. But as Professor Bamzai notes, subsequent decisions, such as *Gundy*, cannot be justified on that ground because they do not involve violations of privileges. *Id.* at 178 n.82.

<sup>62</sup> *Grimaud*, 220 U.S. at 523; *Mistretta v. United States*, 488 U.S. 361 (1989).

<sup>63</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473 tit. II § 212(a)(2), 98 Stat. 1987, 1987–90.

<sup>64</sup> *Mistretta*, 488 U.S. at 396.

convicted of sex offenses before 2006. SORNA makes it a crime to violate those registration requirements. Gundy, who was convicted for failing to register as required by the Attorney General's rules, challenged his conviction on the ground that SORNA constituted an unconstitutional delegation.

*Gundy* squarely presented the issue whether a heightened standard applies to criminal delegations. One of Gundy's arguments was that the Constitution imposes a "special prohibition on congressional delegation of criminal lawmaking power"<sup>65</sup> and therefore a more rigorous standard should apply to regulations carrying criminal penalties.<sup>66</sup> The government also addressed the issue, arguing that the Court has never adopted a heightened nondelegation standard for statutes authorizing rules carrying criminal penalties.<sup>67</sup>

The parties devoted significant attention to which types of statutes might trigger a stricter nondelegation test. For example, in defending the constitutionality of SORNA's delegation, the government argued that there is a meaningful distinction between Congress delegating to the executive the ability to create new crimes in the first instance and Congress saying that it is creating a new crime and then leaving it to the executive to decide what conduct will constitute that crime. According to the government, the former situation would raise substantial constitutional questions because it would authorize the executive to "create new federal crimes out of whole cloth," but the latter was plainly constitutional because it merely authorizes the executive to "make determinations that . . . affect criminal liability" under an offense defined by Congress.<sup>68</sup>

Whether a heightened standard ought to apply to criminal delegations was also discussed at length during the oral argument. Counsel for Gundy argued for a heightened standard in the face of skeptical questioning by Justice Kagan.<sup>69</sup> And multiple Justices asked counsel for the government

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<sup>65</sup> Brief for Petitioner at 20, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086); see also *id.* at 17 ("The Constitution prohibits Congress from delegating its legislative powers, particularly in the criminal context.").

<sup>66</sup> *Id.* at 19 ("Because of its focus on protecting individual liberty, the nondelegation doctrine is enforced most rigorously in the criminal context.").

<sup>67</sup> Brief for the United States at 44–53, *Gundy*, 139 S. Ct. 2116 (No. 17-6086).

<sup>68</sup> *Id.* at 44, 47–48.

<sup>69</sup> Transcript of Oral Argument at 26–29, *Gundy*, 139 S. Ct. 2116 (No. 17-6086). Justice Kagan appeared especially concerned by the fact that many ostensibly civil regulations are enforced through criminal penalties. See *id.* at 29 ("The point I was making is that all of these

about the criminal nature of the regulations and whether delegations to prosecutors ought to be treated differently.<sup>70</sup>

Although both the written and oral arguments devoted a significant amount of time and space to these issues, none of the justices addressed them in their written opinions. Without addressing the arguments that a different test should apply to criminal delegations, Justice Kagan's plurality opinion applied the ordinary intelligible principle test and concluded that SORNA "easily passes constitutional muster."<sup>71</sup> Indeed, the plurality used the fact that it was applying the same test to criminal delegations to justify maintaining the toothless intelligible principle test. It reasoned that "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."<sup>72</sup>

Nor did Justice Gorsuch discuss in his dissent whether a criminal law delegation should be subject to a heightened nondelegation test.<sup>73</sup> Instead, he argued in favor of curtailing all delegations. To be sure, some portions of the dissent sounded in criminal law. For example, he talked about the need to limit delegations in order to protect liberty,<sup>74</sup> and he made reference to the fact that the case at bar involved the power of the Attorney General "to write his own criminal code."<sup>75</sup> But Justice Gorsuch made those points to argue against delegations generally, not to make a special

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are civil regulations. The delegation is to say you write the—we're going to give you some degree of discretion to write the civil regulation, understanding that if somebody violates that, that person is going to jail.").

<sup>70</sup> *Id.* at 42–47, 49–54.

<sup>71</sup> *Gundy*, 139 S. Ct. at 2121.

<sup>72</sup> *Id.* at 2130.

<sup>73</sup> The dissent did not even mention the criminal character of some past cases. See *id.* at 2136–37 (Gorsuch, J., dissenting) (discussing *Kollock* and *Grimaud* as acceptable delegations without mentioning their criminal character). But cf. *id.* at 2138 (noting that *Schechter* involved "a criminal indictment running to dozens of counts").

<sup>74</sup> *Id.* at 2131 ("The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty."); *id.* ("[I]f a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?"); *id.* at 2134 ("Why did the framers insist on this particular arrangement? They believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty."); *id.* ("Some occasionally complain about Article I's detailed and arduous processes for new legislation, but to the framers these were bulwarks of liberty."); *id.* at 2145 ("Respecting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution.").

<sup>75</sup> See *id.* at 2148.

case against criminal delegations.<sup>76</sup> He did not distinguish between government limitations on liberty that could result in criminal punishment and those that merely regulated private conduct.<sup>77</sup>

The failure to address whether a different standard should apply to criminal delegations is unfortunate. Because *Gundy* did not produce a majority opinion, it did nothing to clarify the status of criminal delegations. It is all the more unfortunate because of the importance of the issue. Many federal statutes authorize federal agencies to establish regulations, the violation of which constitutes a crime.<sup>78</sup> Some statutes make it a crime simply to violate regulations promulgated by agencies. For example, under 54 U.S.C. § 100751, it is a crime to violate National Park Service rules relating to protecting federal lands and waters.<sup>79</sup> These statutes do not dictate the particular conduct that is illegal. Instead, they leave to agencies the task of dictating what is illegal.

Other statutes leave the definition of one or more elements of a crime to an administrative agency. For example, federal law provides that a person who deals in explosives without a license faces up to 10 years of imprisonment,<sup>80</sup> and the law delegates to the Attorney General the

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<sup>76</sup> *Id.* at 2136–41.

<sup>77</sup> See, e.g., *id.* at 2133 (“When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to ‘prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,’ or the power to ‘prescribe general rules for the government of society.’” (footnotes omitted)); *id.* at 2136 (“[W]e know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to ‘fill up the details.’”); *id.* (“[O]nce Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.”).

<sup>78</sup> Some statutes authorize agencies to promulgate regulations to create exceptions to otherwise applicable criminal laws. For example, under 18 U.S.C. § 504(1)(D)(iii), the Secretary of the Treasury can promulgate regulations authorizing color illustrations of currency that would otherwise constitute unlawful counterfeiting. These types of delegations do not authorize promulgation of criminal prohibitions.

<sup>79</sup> 54 U.S.C. § 100751(c). For other examples of statutes making it a crime to violate rules promulgated by agencies, see, e.g., 7 U.S.C. § 13(a)(5) (imposing a penalty of “imprisonment for not more than 10 years” for willful violations of “any rule or regulation” promulgated by the Commodities Futures Trading Commission); 16 U.S.C. § 1375(b) (making it a crime to violate regulations related to protecting marine mammals); 21 U.S.C. § 331(q)(1)(A) (making it a crime for failing to comply with various regulations related to drugs, medical devices, and labeling); 33 U.S.C. § 1907 (making it a crime to violate EPA regulations implementing the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships).

<sup>80</sup> 18 U.S.C. § 844(a)(1).

authority to determine what constitutes an explosive.<sup>81</sup> This statutory scheme does not make it a crime simply to violate regulations promulgated by the Attorney General. But in leaving to the Attorney General the task of defining explosives, it allows him to define an element of the crime.

## II. REASONS TO TREAT CRIMINAL LAW DIFFERENTLY

In evaluating a delegation of power to write criminal laws, the justices in *Gundy* applied the ordinary intelligible principle doctrine. But this one-size-fits-all approach is unwarranted. The law imposes a number of special restrictions relating to criminal law.<sup>82</sup> These restrictions affect who can create the law, the permissible substance of the law, and the ways in which the law is interpreted and enforced. Similarly, special restrictions should apply to delegations of authority to promulgate criminal rules.<sup>83</sup>

A more rigorous nondelegation doctrine should apply to criminal law because delegations raise the very concerns that underlie those heightened restrictions on criminal law. Broad congressional delegations risk unwarranted deprivations of liberty, undermine government accountability, and result in less notice to the public of legal obligations. Because those same concerns led to the adoption of heightened restrictions for criminal law, they also counsel against permitting criminal law delegations. Additionally, the reasons that are ordinarily offered in support of broad legislative delegations in other areas—namely, expertise, promoting compromise, and ensuring efficiency—apply with less force when it comes to the criminal law.

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<sup>81</sup> Id. § 841(d) (“The Attorney General shall publish and revise at least annually in the Federal Register a list of these and any additional explosives which he determines to be within the coverage of this chapter.”); see also 16 U.S.C. § 3372 (criminalizing the knowing importing or exporting wildlife in violation of any regulation promulgated by any agency); 18 U.S.C. § 42 (making it a crime to import animals prohibited by the Secretary of the Interior); id. § 1716C (criminalizing forgery of certificates authorized by the Postal Service); 42 U.S.C. § 6928(d) (making it a crime to knowingly transport, create, or dispose of hazardous waste in violation of EPA regulations).

<sup>82</sup> See Barkow, *supra* note 9, at 1012 (discussing “criminal law exceptionalism”).

<sup>83</sup> See Fissell, *supra* note 9, at 880 (noting “the immediate intuitive objection to treating criminal law delegations in the same way that other agency regulations are treated”).

*A. The Special Status of Criminal Laws*

It is conventional wisdom among criminal law scholars that criminal punishment is unique.<sup>84</sup> Because punishment is a moral judgment, punishment may be imposed only when someone has engaged in behavior that is worthy of moral condemnation.<sup>85</sup> This need for community condemnation has led criminal theorists to conclude that only laws which were enacted by a democratically accountable body may form the basis of criminal punishment.<sup>86</sup>

But we need not reach first principles about the legitimacy of punishment in order to make the case that criminal laws are different. The text of the Constitution and various legal doctrines demonstrate that our legal system regularly treats criminal laws differently from other laws. These doctrines not only place substantive limits on criminal law and provide procedural guarantees in criminal trials, but they also aim to ensure congressional control over the content of criminal law and require Congress to take special care in the drafting of criminal statutes.

Much could be said about each of these constitutional and doctrinal limits on criminal law, and our treatment of each is necessarily brief. But even our brief overview highlights that these limits rest, at least in part, on three key principles. First, many of these limits are designed to protect against unjustified deprivations of liberty. Second, the limits help to promote accountability of government actors. And third, the limits strive to ensure that individuals have notice about the legality and consequences of their actions.

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<sup>84</sup> See, e.g., Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. Rev. 1949, 1953–54 (2019) (collecting and categorizing different claims of criminal law “exceptionalism”); Note, *supra* note 9, at 614 (“Crimes have always represented a special case, constitutionally and philosophically.”).

<sup>85</sup> See, e.g., W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction*, 38 Am. J. Crim. L. 117, 136–60 (2011) (arguing that the additional stigma associated with criminal laws require more due process protection); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & Contemp. Probs. 401, 404 (1958) (“What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.”); Richard E. Myers II, *Complex Times Don’t Call for Complex Crimes*, 89 N.C. L. Rev. 1849, 1855 (2011) (“Under the traditional view, criminal law is supposed to reflect and channel society’s moral impulses, and criminal law necessarily contains an element of social condemnation.”).

<sup>86</sup> E.g., Fissell, *supra* note 9, at 885–900; Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 Harv. L. Rev. 1455, 1553–54 (2016).

The Constitution contains many provisions applicable only to those facing criminal punishment.<sup>87</sup> Some of those protections—such as the prohibitions on ex post facto laws and bills of attainder,<sup>88</sup> and the provision defining treason<sup>89</sup>—place limits on the substance of criminal laws. Others prescribe procedures that the government must follow in criminal cases. Examples include the grand jury and petit jury requirements, the right to the assistance of counsel, the speedy trial guarantee, prohibition on double jeopardy, and the heightened burdens of proof imposed through the Due Process Clauses.<sup>90</sup> These constitutional provisions help to protect liberty, either by preventing the government from enacting certain laws or by ensuring that defendants enjoy procedural protections before they can be convicted and punished. In addition, the prohibition on ex post facto laws ensures that people will have notice about the legality and consequences of their actions, because it prevents the government from retroactively stating that conduct was forbidden or is subject to heightened penalties.<sup>91</sup>

Courts have also interpreted the Constitution to impose additional constraints on the drafting and enactment of criminal laws. In justifying those constraints, the courts have variously invoked the need to protect liberty, promote accountability, and ensure notice.

Most important for purposes of this Article, courts have read the Constitution to impose different structural requirements on criminal laws than on non-criminal laws. Since 1812, the Supreme Court has held that federal courts lack the power to create criminal common law.<sup>92</sup> *United*

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<sup>87</sup> Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 Wash. U. L. Rev. 351, 382–83 (2019) (cataloguing these provisions).

<sup>88</sup> U.S. Const. art. I, § 9, cl. 3; *id.* § 10, cl. 1.

<sup>89</sup> *Id.* art. III, § 3 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”).

<sup>90</sup> *Id.* amends. V, VI.

<sup>91</sup> See *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981) (“Through this prohibition [on ex post facto laws], the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.”); *Marks v. United States*, 430 U.S. 188, 191 (1977) (stating that the Ex Post Facto Clause is based on “the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties”).

<sup>92</sup> See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). This was not always the view in the United States. At the Founding, federal judges were widely understood to have the power to create common law crimes. See Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. Pa. L. Rev. 1003 (1985) (providing historical evidence). But when common law crimes became powerful weapons in the battles between the Federalists and the Republicans, judicial authority to convict in the absence of a statute fell into disfavor. *Id.* at

*States v. Wiltberger*, an early nineteenth century case, is instructive. There, the Supreme Court noted that “the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”<sup>93</sup> The Court has reaffirmed that principle many times in the intervening decades.<sup>94</sup> As Justice Owen Roberts put it: “It cannot be too often emphasized that as basic a difference as any between our notions of law and those of legal systems not founded on Anglo-American conceptions of liberty is that crimes must be defined by the legislature.”<sup>95</sup> There is no comparable restriction on non-criminal common law. Even after *Erie*, federal courts have continued to recognize their authority to fashion federal civil common law.<sup>96</sup>

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1112. And when Republicans gained control of the Supreme Court in 1812, they declared that federal courts had no criminal common law authority in *Hudson & Goodwin*. Despite this early history, legislative supremacy over criminal law is a bedrock principle of current American legal thought. See, e.g., *United States v. Bass*, 404 U.S. 336, 348 (1971) (“[L]egislatures and not courts should define criminal activity.”); see also *Rogers v. Tennessee*, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting) (stating “the notion of a common-law crime is utterly anathema today”); Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 Va. L. Rev. 965, 971–78 (2019) (documenting the conventional wisdom of legislative supremacy).

<sup>93</sup> 18 U.S. (5 Wheat.) 76, 95 (1820); see also Sawyer, *supra* note 9, at 185–86 (describing the understanding of “classical jurists” that “*Hudson & Goodwin* appear[s] to assign the authority to define criminal activity exclusively to Congress”).

<sup>94</sup> See, e.g., *Jones v. Thomas*, 491 U.S. 376, 381 (1989) (noting that “the substantive power to define crimes and prescribe punishments” lies with the “legislative branch of government”); *Liparota v. United States*, 471 U.S. 419, 424 (1985) (“The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.”); *Bass*, 404 U.S. at 348 (“[L]egislatures and not courts should define criminal activity.”).

<sup>95</sup> *Screws v. United States*, 325 U.S. 91, 152 (1945) (Roberts, Frankfurter, & Jackson, JJ., dissenting). Although the federal government has long eschewed common law crimes, many states have not. As of 1947, more than thirty states still permitted judicial crime creation, and at present, more than a dozen states continue to do so. See Hessick, *supra* note 92, at 980–81. This suggests that the federal prohibition on common law crimes may be grounded in federalism or some other particular feature of the federal Constitution, rather than in due process.

<sup>96</sup> See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 409 (1964) (discussing the development of civil common law after *Erie*); see also, e.g., *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003) (“Federal common law governs interstate bodies of water . . . .”); *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 365–66 (1943) (creating federal common law for the “rights and duties of the United States on commercial paper”). See generally Arthur D. Hellman, David B. Stras, Ryan W. Scoot & F. Andrew Hessick, *Federal Courts* 379–469 (4th ed. 2017) (canvassing the authority of federal courts to make common law).

Another constitutional limitation that applies to criminal laws is the void for vagueness doctrine.<sup>97</sup> The vagueness doctrine requires that a criminal statute “clearly define the conduct it proscribes.”<sup>98</sup> A statute that does not do so violates due process.<sup>99</sup> The Supreme Court has offered three reasons why a vague criminal statute violates the right to due process.<sup>100</sup> First, vague laws give insufficient notice to citizens about what conduct is permitted and what conduct is prohibited.<sup>101</sup> Second, vague statutes provide “insufficient standards for enforcement.”<sup>102</sup> When a statute fails to give police and prosecutors a clear indication of what conduct is legal, the statute “vests virtually complete discretion in the hands” of law enforcement.<sup>103</sup> According to the Court, such unfettered discretion may result in “arbitrary and discriminatory enforcement”<sup>104</sup> because it “allows policemen, prosecutors, and juries to pursue their personal predilections.”<sup>105</sup> Third, vague statutes delegate too much of the legislature’s power to make the law.<sup>106</sup>

<sup>97</sup> The Court has struck down three federal statutes on vagueness grounds in the past five years. See *United States v. Davis*, 139 S. Ct. 2319 (2019); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *Johnson v. United States*, 135 S. Ct. 2551 (2015).

<sup>98</sup> *Skilling v. United States*, 561 U.S. 358, 415 (2010) (Scalia, J., concurring in part and concurring in the judgment).

<sup>99</sup> U.S. Const. amends. V, XIV; see also *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224–26 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (tracing the vagueness doctrine’s “due process underpinnings”).

<sup>100</sup> See Hessick, *supra* note 14, at 1140–45; see also Goldsmith, *supra* note 14, at 283–94 (identifying three major reasons for the vagueness doctrine, and two others offered by Justice Frankfurter and Anthony Amsterdam).

<sup>101</sup> *Smith v. Goguen*, 415 U.S. 566, 572 (1974) (“The doctrine incorporates notions of fair notice or warning.”).

<sup>102</sup> *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 503 (1982).

<sup>103</sup> *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); see also *Goguen*, 415 U.S. at 578 (remarking on the “the unfettered latitude thereby accorded law enforcement officials and triers of fact” under a vague statute).

<sup>104</sup> *Goguen*, 415 U.S. at 573.

<sup>105</sup> *Id.* at 575.

<sup>106</sup> E.g., *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91–92 (1921); *United States v. Reese*, 92 U.S. 214, 221 (1875); see also Goldsmith, *supra* note 14, at 284–86 (collecting cases on the delegation issue and noting that the principle “that the separation of powers must be maintained[] stood for decades as the second requirement of vagueness analysis”); Fifth Amendment—Due Process—Void-for-Vagueness Doctrine—*Sessions v. Dimaya*, 132 Harv. L. Rev. 367, 372 (2018) (stating that the vagueness doctrine requires notice and increases legislative accountability). While the Court has mentioned notice and arbitrary and discriminatory enforcement in all of its modern vagueness opinions, the delegation issue appears in only some of those opinions. See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1248 (2018) (Thomas, J., dissenting) (“[T]his Court’s precedents have occasionally described the vagueness doctrine in terms of nondelegation . . . . But they have not been consistent on this

Judges have also developed different sub-constitutional doctrines for criminal laws. For example, they have been more aggressive when interpreting criminal laws, requiring greater specificity from the legislature than they do when interpreting non-criminal laws. Up until the early twentieth century, courts often responded with skepticism, if not with hostility, to the enactment of criminal statutes, insisting that such statutes must be “strictly construed.”<sup>107</sup> While strict construction has fallen out of favor,<sup>108</sup> judges have continued to maintain a more active

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front.”); Hessick, *supra* note 14, at 1143 (“While these two concerns [notice and arbitrary enforcement] are offered in all of the recent vagueness cases, in a small handful of cases, the Court also mentioned that vague laws raise delegation problems.”).

<sup>107</sup> E.g., *Ballew v. United States*, 160 U.S. 187, 197 (1895) (“The elementary rule is that penal statutes must be strictly construed . . . .”); *Sarlls v. United States*, 152 U.S. 570, 576 (1894) (“That is a penal statute, and must receive a strict construction.”); *Reese*, 92 U.S. at 219 (“This is a penal statute, and must be construed strictly . . . .”); *United States v. Johnson*, 26 F. Cas. 621, 623 (C.C.S.D. Ohio 1879) (No. 15,483) (noting “the rule that penal statutes shall be strictly construed”); *Bray v. The Atalanta*, 4 F. Cas. 37, 38 (C.C.D. S.C. 1794) (No. 1,819) (“[I]t is a penal law and must be construed strictly.”). The canon of strict construction evolved in response to harsh laws and penal practices in England, Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 *Harv. L. Rev.* 748, 749–51 (1935), and it was imported with other important common law principles into early American law via the treatises of the time. See, e.g., 1 William Blackstone, *Commentaries* \*87–92. American courts routinely repeated and applied the rule of strict construction of penal statutes for more than a century. Hall, *supra*, at 748 (“Undoubtedly precedent—the hundreds of cases stating and usually applying the common-law rule of strict construction of penal statutes—is one of the most powerful forces shaping the attitude of the courts today towards this problem.”); Roscoe Pound, *Common Law and Legislation*, 21 *Harv. L. Rev.* 383, 386 (1908) (“We are told commonly that three classes of statutes are to be construed strictly: penal statutes; statutes in derogation of common right; and statutes in derogation of the common law.”).

<sup>108</sup> Strict construction came under attack in the beginning of the twentieth century for essentially the same reasons that judicial resistance to New Deal legislation faced criticism. As Livingston Hall argued in 1935:

Changing conditions of modern civilization, and the growth of scientific knowledge on criminology, render imperative a new approach to the problems of crime. New categories of crimes and criminals cannot always be accurately defined on the first attempt. Shall the new machinery be nullified from the start under the guise of “strict construction”, or shall it be carried out liberally in the spirit in which it is conceived? Merely to state the issue is to answer it.

Hall, *supra* note 107, at 761. Mila Sohoni has explained that, as the courts stopped pushing back against social welfare legislation, they also abandoned many of the criminal law doctrines that had previously served as a limit on legislatures’ ability to criminalize behavior. Mila Sohoni, *Notice and the New Deal*, 62 *Duke L.J.* 1169 (2013). Not only have courts generally replaced the rule of strict construction with the less robust rule of lenity, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 *B.U. L. Rev.* 109, 128–34 (2010), but they have also watered down the rule of lenity, using it only as a tool of last resort, see Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 *Sup. Ct. Rev.* 345, 385–86 (1994); Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*,

interpretive role in criminal cases. The rule of lenity is perhaps the most well-known example of this phenomenon. The rule of lenity requires judges to construe ambiguous criminal statutes in favor of defendants.<sup>109</sup> It is one of the oldest rules of statutory interpretation.<sup>110</sup> Although courts enforce the rule less rigorously today than they did in the past, it continues to play a role in criminal cases.<sup>111</sup> The Supreme Court has offered two justifications for the rule of lenity. The first is that interpreting ambiguous statutes narrowly is better for giving people fair notice of what behavior is criminal.<sup>112</sup> The second justification is that it protects against the “the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.”<sup>113</sup> This second reason is grounded in the separation of powers.<sup>114</sup> Indeed, the Court has specifically referenced the need for legislatures, rather than courts, to define criminal activity when justifying the rule of lenity.<sup>115</sup>

In sum, our legal system regularly treats criminal laws differently from other laws. Although the courts have been less aggressive in policing the legislative drafting of criminal laws since the New Deal, they continue to impose more stringent restrictions on criminal laws than on non-criminal laws. And the courts routinely reference the need to protect liberty, promote accountability, and ensure notice when adopting and justifying those restrictions.

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25 B.U. Pub. Int. L.J. 101, 106–20 (2016) (tracing the decreasing force of lenity in court opinions); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *Fordham L. Rev.* 885, 891 (2004) (noting that prevailing doctrine “ranks lenity dead last in the interpretive hierarchy”).

<sup>109</sup> See *Black’s Law Dictionary* 1532 (10th ed. 2014) (defining “rule of lenity” as “[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment”).

<sup>110</sup> *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); Barrett, *supra* note 108, at 128; see also Lawrence M. Solan, *Law, Language, and Lenity*, 40 *Wm. & Mary L. Rev.* 57, 87–96 (1998) (recounting lenity’s history in England and the early United States).

<sup>111</sup> See *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (invoking rule of lenity to support interpretation).

<sup>112</sup> *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

<sup>113</sup> *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, *in* *Benchmarks* 196, 209 (1967)).

<sup>114</sup> See *Kozminski*, 487 U.S. at 952 (stating that the rule of lenity functions “to maintain the proper balance between Congress, prosecutors, and courts”); Price, *supra* note 108, at 909.

<sup>115</sup> *Bass*, 404 U.S. at 348 (“[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”).

*B. Nondelegation and Criminal Principles*

Congressional delegations of the power to fashion criminal laws raise the same three concerns that underpin the criminal-law doctrines discussed above.<sup>116</sup> First, delegations increase the risk of unwarranted deprivations of liberty. Second, delegations undermine the accountability structures established by the Constitution. Third, delegations result in less notice. To the extent these reasons counsel against broad congressional delegations, they are even more compelling in the context of criminal delegations.

*1. Liberty*

Critics of delegations have repeatedly stated that delegations threaten individual liberty because delegations concentrate power in a single branch of government.<sup>117</sup> The Founders were all too cognizant of the fact that the government might abuse its power and unjustifiably deprive individuals of liberty.<sup>118</sup> The Constitution protects against this threat, not only by explicitly protecting certain individual rights, but also by assigning the legislative, executive, and judicial power to different governmental institutions.<sup>119</sup> As James Madison explained in Federalist 47, the Constitution divides power among the branches of government because the “accumulation of all powers, legislative, executive, and

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<sup>116</sup> See *supra* text accompanying notes 93–115.

<sup>117</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) (warning that delegations imperil liberty); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) (“The principle that Congress cannot delegate away its vested powers exists to protect liberty.”); Lawson, *supra* note 2, at 342 (noting the threat to liberty from combining government powers through delegation); Cass R. Sunstein, *Chevron As Law*, 107 *Geo. L.J.* 1613, 1617 (2019) (recounting scholarship arguing that “modern agencies endanger both liberty and self-government”); see also Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *Yale L.J.* 1672, 1734–35 (2012) (arguing that separation of powers protects individual liberty).

<sup>118</sup> The Federalist No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961) (warning of the “danger[] to liberty” posed by the government); Aaron R. Sims, Note, *SIGTARP and the Executive-Legislative Clash: Confronting A Bowsher Issue with an Eye Toward Preserving the Separation of Powers During Future Crisis Legislation*, 68 *Wash. & Lee L. Rev.* 375, 440–42 (2011) (discussing the Framers’ apprehension of government power).

<sup>119</sup> Sims, *supra* note 118, at 442 (“The separation of powers and the system of checks and balances comprise the governmental structure implemented by the Framers for the purpose of counteracting the human tendency to abuse power such that individual liberty could be preserved.”).

judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”<sup>120</sup>

Delegation undermines this division of power by authorizing executive bodies to exercise both executive and legislative power. The Framers regarded this combination as incompatible with the right against unwarranted deprivations of liberty.<sup>121</sup> As Madison put it, “[t]here can be no liberty where the legislative and executive powers are united in the same person . . . lest the same monarch . . . should enact tyrannical laws to execute them in a tyrannical manner.”<sup>122</sup>

The threat from combining legislative and executive powers is more pronounced in criminal cases than in civil cases for two reasons. The first reason is that criminal laws are the primary means by which the government deprives individuals of liberty.<sup>123</sup> Convictions regularly carry terms of imprisonment or even death, and they regularly impose other restrictions on offenders’ freedom to act.<sup>124</sup> Moreover, the threat of punishment limits liberty because it prohibits people from engaging in certain conduct. Each time that the state prohibits additional conduct, it curtails the freedom of individuals.

The second reason why the threat to liberty is greater for criminal than civil laws is that the executive has the exclusive power to enforce criminal laws in the federal system.<sup>125</sup> That is not the case with civil laws. The executive does not have the general power to bring suit to vindicate civil

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<sup>120</sup> The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961); see also *INS v. Chadha*, 462 U.S. 919, 959 (1983) (“[W]e have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.”).

<sup>121</sup> Nicholas Bagley and Julian Mortenson have documented that early American legislatures, including the First Congress delegated power on several occasions. Mortenson & Bagley, *supra* note 37, at 64–109. This may suggest that even those who are cognizant of the risks of delegation nonetheless find that the expediency and benefit of delegation are worth those risks. See *infra* Section II.C (discussing the reasons in favor of delegation).

<sup>122</sup> See The Federalist No. 47, at 302–03 (James Madison) (Clinton Rossiter ed., 1961) (emphasis omitted); Rebecca L. Brown, *Caging the Wolf: Seeking a Constitutional Home for the Independent Counsel*, 83 *Minn. L. Rev.* 1269, 1274 (1999) (“The combination of legislative power with enforcement power constitutes a very grave affront to the separation of powers . . .”).

<sup>123</sup> See Logan, *Criminal Justice Federalism*, *supra* note 9, at 115 n.367 (noting that, in the context of criminal delegations, “the policy matters in question have unique normative importance affecting the liberty of individual citizens”).

<sup>124</sup> See Eisha Jain, *Prosecuting Collateral Consequences*, 104 *Geo. L.J.* 1197, 1199 (2016) (describing collateral consequences of conviction).

<sup>125</sup> See, e.g., *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”).

rights; the individuals whose rights were violated can bring those suits.<sup>126</sup> The executive can bring a civil enforcement action only when the government's civil rights are violated.<sup>127</sup>

In addition to these general concerns about combining the legislative and executive powers, there are several reasons to be particularly apprehensive of delegations of the power to write criminal laws. The first is that, when the same institution both writes and enforces the law, it is much easier for the government to punish individuals. One reason for dividing power between the executive and legislature is to make it more difficult to punish individuals under criminal laws.<sup>128</sup> Although Congress can dictate what is illegal through legislation, Congress cannot enforce the law. Instead, the executive has the authority to decide whether to bring prosecutions. Because the executive has different sets of priorities and interests than legislators, it may choose not to enforce the law in the way intended by Congress.<sup>129</sup> Similarly, the executive cannot bring charges unless Congress first passes legislation. Because it is a separate body with different interests from the executive, the legislature will not enact laws aimed solely at achieving the executive's agenda. Only when the priorities of the executive and Congress overlap will an individual be punished.<sup>130</sup>

Another concern raised by criminal delegations is that they decrease the incentives that currently exist to write fewer or narrower laws. When the executive and legislature functions are separate, Congress does not control how its laws will be enforced. As a result, every time they write a criminal law, members of Congress face the risk that the law will be enforced against their interests.<sup>131</sup> A prosecutor may bring prosecution against a member of Congress, her family, people who donate to her

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<sup>126</sup> F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 *N.C. L. Rev.* 673, 711 (2017).

<sup>127</sup> *Id.*

<sup>128</sup> See Chapman & McConnell, *supra* note 117, at 1734–35 (arguing that separation of powers operates as due process in criminal cases).

<sup>129</sup> See Zachary S. Price, *Reliance on Nonenforcement*, 58 *Wm. & Mary L. Rev.* 937, 961 (2017) (“Presidents have soft-pedaled unpopular laws (or at least laws their constituents disfavor) . . .”); Hessick, *supra* note 14, at 1160–61 (using the Obama-era decision not to enforce the immigration laws in particular contexts as an example of executive policy diverging from legislative policy).

<sup>130</sup> See, e.g., *Bond v. United States*, 564 U.S. 211, 222–23 (2011); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *Stan. L. Rev.* 869, 871, 875 (2009).

<sup>131</sup> The prohibition on Bills of Attainder prevents Congress from writing overly targeted criminal legislation. U.S. Const. art. I § 9.

campaign, or some other person that the member prefers not be prosecuted. This possibility incentivizes Congress to write fewer or more narrow criminal laws. In contrast, when executive officials who are tasked with enforcing a criminal law also have the ability to write the law, they do not necessarily have the same incentives. Because the officials can rely on their charging discretion,<sup>132</sup> they need not worry that they or others that they care about will be prosecuted. As a result, they have fewer incentives to write fewer or narrow laws.

Allowing the executive to write criminal laws undermines other structures in the Constitution aimed at protecting liberty as well. Under Article I, legislation must be approved by a majority of both houses of Congress and presented to the President for his signature before it becomes law.<sup>133</sup> Accordingly, prosecutors can bring criminal actions only if a statute has already been approved by both houses of Congress and signed by the President. Bicameralism and presentment slow the pace of enactment of criminal statutes, and they may also reduce the total number of criminal statutes that are enacted.<sup>134</sup>

Delegating the power to make criminal laws avoids these constraints. When exercising the delegated power, an agency need not observe the bicameralism and presentment requirements.<sup>135</sup> Instead, it must follow only the procedures that Congress prescribes in the law delegating the power to the agency. And it flips bicameralism and presentment on its head: although an agency need not abide by those procedures to promulgate rules, Congress must do so if it wants to undo an agency action.<sup>136</sup> If Congress delegates its lawmaking power, bicameralism and

<sup>132</sup> For more on that charging discretion, see *infra* text accompanying notes 239–256.

<sup>133</sup> U.S. Const. art. I § 7 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.”).

<sup>134</sup> See Myers, *supra* note 85, at 1860–62 (criticizing the delegation of criminal rulemaking because it “violates the constitutional notions of bicameralism and presentment,” and noting that bicameralism and presentment “limit[] the raw amount of legislation that Congress can pass” and thus protect liberty).

<sup>135</sup> See John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 707 (1997) (discussing how delegations avoid bicameralism and presentment); Laurence H. Tribe, The Legislative Veto Decision: A Law by Any Other Name?, 21 Harv. J. Legis. 1, 11 (1984) (“[A]gencies and executive officers commonly wield ‘quasi-legislative’ power without the safeguards of bicamerality and presentment.”).

<sup>136</sup> *INS v. Chadha*, 462 U.S. 919, 952–58 (1983); Patrick M. Garry, The Unannounced Revolution: How the Court Has Indirectly Effected A Shift in the Separation of Powers, 57 Ala. L. Rev. 689, 717 (2006) (“Contrary to the flexibility given to administrative agencies, the

presentment become obstacles to Congress undoing laws, not making them.

Exacerbating this problem is that delegation increases the number of bodies capable of producing laws.<sup>137</sup> Unlike Congress, which must approve each law it enacts, different agencies can work on different problems at the same time. Thus, delegation increases the volume of criminal laws by creating a decentralized workforce consisting of separate bodies that can each produce criminal regulations without the impediments specified in the Constitution.

Of course, the absence of bicameralism and presentment and the expansion of the number of bodies capable of producing laws are hardly limited to criminal laws. Those same issues exist whenever Congress delegates rulemaking power to the executive: it becomes much easier to make rules, and some of those rules will be “generally applicable rules of conduct governing future actions by private persons.”<sup>138</sup> Any rule that restricts conduct could be cast as a restriction on liberty. But both criminal law doctrine and general principles of due process tell us that the liberty interests at stake when it comes to criminal laws and criminal punishment are more significant, and thus deserve more protection.<sup>139</sup>

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Court has required Congress to hold strictly to the lawmaking requirements in Article I, Section 7.”).

<sup>137</sup> See, e.g., Clyde Wayne Crews Jr., *How Many Rules and Regulations Do Federal Agencies Issue?*, *Forbes* (Aug. 15, 2017, 12:48 PM), <https://www.forbes.com/sites/waynecrews/2017/08/15/how-many-rules-and-regulations-do-federal-agencies-issue/?sh=6deb12c71e64> [https://perma.cc/6Y9J-QJ7T] (“Federal departments, agencies, and commissions issued 3,853 rules . . . while Congress passed and the president signed 214 bills into law—a ratio of 18 rules for every law.”).

<sup>138</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

<sup>139</sup> See *supra* Section II.A (describing the doctrines that treat criminal laws differently); see also *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (setting forth the prevailing due process balancing test, which states that “identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail”).

## 2. *Accountability*

A second criticism of congressional delegations is that those delegations undermine government accountability to the public.<sup>140</sup> The Constitution assigns to Congress the power to make laws, and members of Congress are held accountable to the public through periodic elections. These elections increase the likelihood that legislative policies reflect the will of the people, and they provide a means for the people to replace legislators who abuse their position.

Delegating to agencies short-circuits the Constitution's structure of electoral accountability.<sup>141</sup> Through delegations, members of Congress are not directly responsible for the rules that an agency creates. Instead, that responsibility lies with unelected agency officials. This is not to say that the reason that Congress delegates is to avoid accountability. Congress might delegate for other, benevolent reasons—such as an agreement among members to develop a new policy based on expertise.<sup>142</sup> But that motivation does not solve the problem. Even if done for good reasons, delegation undermines the accountability mechanism established by the Constitution.

To be sure, delegation does not absolve Congress of all public accountability.<sup>143</sup> Congress is responsible for enacting the statutes delegating rulemaking power in the first place. And Congress has the

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<sup>140</sup> William D. Araiza, *Reciprocal Concealed Carry: The Constitutional Issues*, 46 *Hastings Const. L.Q.* 571, 615 (2019) (“This principle of accountability underlies the non-delegation doctrine.”); Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 *Duke L.J.* 1593, 1650 (2019) (“[B]road delegations to agencies may reduce political accountability . . . .”); Posner & Vermeule, *supra* note 9, at 1748 (describing accountability argument); cf. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496–98 (2010) (limiting the President’s ability to delegate his removal powers because delegation vests authority in unelected officials).

<sup>141</sup> See Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 *Wake Forest L. Rev.* 745, 773 (1996) (“[T]he legitimacy of statutes is anchored by citizens’ votes for those who enact them; remote controls over those who make rules has proved more problematic . . . .” (emphasis omitted)).

<sup>142</sup> David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 *Geo. L.J.* 97, 133 (2000) (“[A]s students of bureaucratic politics and administrative law have long understood, politicians delegate authority for good reason. Indeed, the decision to delegate may represent a consensus conclusion in favor of some sort of change from the status quo.”).

<sup>143</sup> Posner & Vermeule, *supra* note 9, at 1749 (“Accountability is not lost through delegation, then; it is transformed.”).

power to oversee agencies.<sup>144</sup> Congress can, among other things, subpoena agency officials to testify and require those officials to justify unpopular policies, curtail agency power, or defund an agency. Congress can also simply enact legislation replacing agency rules.<sup>145</sup> To the extent that Congress fails to provide this oversight or to reverse unpopular agency decisions, the public might hold Congress accountable. The public might also hold Congress accountable for initially conferring power on an agency.

But it is unclear whether the public actually *does* hold Congress accountable for its delegations or for subsequent agency actions. Research suggests that most of the public is unfamiliar with the way in which government is organized. For example, a recent poll found that 74% of the public cannot name all three branches of government.<sup>146</sup> Given the complex legal structures establishing agencies and the lack of effort to educate the public about agencies, it stands to reason that the public knows little about the role of agencies and the relationship between Congress and agencies. People might think that agencies act independently of Congress. Or they might think that all agency actions are directly attributable to Congress. Probably, most people have not considered these topics at all.

Moreover, even if the public does understand Congress's relationships with agencies, they are unlikely to place significant responsibility on Congress for unpopular agency decisions. Although voters may hold Congress accountable for creating an agency that produces bad policies, that accountability has a short lifespan. Agencies may promulgate unpopular policies after members of the congress who voted for the initial

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<sup>144</sup> See Matthew Chou, *Agency Interpretations of Executive Orders*, 71 *Admin. L. Rev.* 555, 576 (2019) (“Congress does have many oversight tools for disapproving of agency actions . . .”). Although it has the power to oversee agencies, Congress has not often used that power effectively because of “institutional and political obstacles.” Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 *Minn. L. Rev.* 1, 17 n.71 (2019).

<sup>145</sup> See, e.g., Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 *Cath. U. L. Rev.* 51, 87–88 (1979). The Congressional Review Act, 5 U.S.C. § 801 et seq., codifies this process, authorizing Congress to overrule regulations promulgated by agencies by passing a joint resolution that is signed by the President. See Letter from Thomas H. Armstrong, Gen. Couns., GAO, to Senator Patrick J. Toomey, B-329129 (Dec. 5, 2017), <https://www.gao.gov/assets/690/688763.pdf> [<https://perma.cc/N8A7-NWVG>].

<sup>146</sup> Annenberg Pub. Pol’y Ctr. of Univ. of Pa., *Americans Are Poorly Informed About Basic Constitutional Provisions* (Sept. 12, 2017), <https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/> [<https://perma.cc/WM74-89AD>].

delegation have retired. Nor is the public as likely to lay all the blame on Congress for unpopular agency regulations. It is one thing for members to affirmatively approve of a policy, as they do when they vote on legislation. It is another for members to fail to take action to overturn a policy enacted by another, as they do when they allow an agency policy to stand.<sup>147</sup> Members of Congress cannot avoid responsibility for laws they enact, but they can point the finger at the President or the agency that promulgates an unpopular policy.<sup>148</sup> After all, Congress may have given the agency the power to promulgate rules, but the agency chose to promulgate this particular rule.<sup>149</sup> And legislatures often can blame the failure to overturn those agency rules on the opposing party or even just on the press of other important business.<sup>150</sup>

The dilution of accountability resulting from delegation is particularly troublesome in the area of criminal laws because criminal laws pose a significant opportunity for government abuse. Criminal laws provide a powerful tool to codify prejudices or impose unwarranted burdens on certain segments of the public. They can stamp out opposition and oppress their opponents by enacting targeted criminal laws. And they can use criminal laws to benefit themselves directly, by enacting statutes prescribing punishments such as forfeiture of property. Subjecting members of Congress to periodic elections is one of the primary mechanisms in the Constitution to combat these potential abuses.<sup>151</sup>

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<sup>147</sup> As a general matter, people tend to blame others more for their affirmative actions than for their omissions, even when there was a legal duty to act. See Paul H. Robinson & John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* 42–50 (1995).

<sup>148</sup> One might argue that, although delegation reduces accountability, it also means that Congress will enjoy less of the credit for successful agency policies. But that is not obviously so because Congress often can significantly influence the narrative surrounding agency action. See, e.g., Sarah Binder & Mark Spindel, *The Myth of Independence: How Congress Governs the Federal Reserve* 45–51 (2017) (noting how Congress shifts blame onto the Federal Reserve). In any event, that Congress might not receive credit for good agency policies does not cure the defect of bearing less blame for bad policies.

<sup>149</sup> Indeed, legislators sometimes escape accountability even for the laws that they themselves write by directing political ire at the officials charged with enforcing those laws. See Hessick & Kennedy, *supra* note 87, at 354 n.7 (collecting sources).

<sup>150</sup> Further diluting congressional accountability is the increased volume of regulations that the government can produce through delegation. The higher volume of agency regulations allows some regulations to pass under the radar, and it may dampen public reaction against regulations that otherwise would receive significant attention.

<sup>151</sup> Highlighting the importance of public participation in the administration of criminal justice is that in criminal cases the Constitution prescribes two layers of democratic participation, in addition to the election of members of Congress who enact criminal laws. First, the Fifth Amendment authorizes only grand juries to issue indictments. U.S. Const.

The idea that the public should have a say about what conduct to criminalize underlies the prohibition of federal common law crimes.<sup>152</sup> Although judges traditionally could create common law crimes, in 1812 the Supreme Court held that federal courts could not do so.<sup>153</sup> One reason for this conclusion, the Court said, was that the federal government is “made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve.”<sup>154</sup> And while the states had given legislative authority to the federal government, the Court reasoned, they did not give the courts the power to enforce common law crimes. Thus, the Court concluded, “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”<sup>155</sup> More recently, the Court has explained that “criminal punishment usually represents the moral condemnation of the community” and therefore “legislatures and not courts should define criminal activity.”<sup>156</sup>

The need to ensure democratic input also underlies the Constitution’s provisions authorizing only grand juries to issue federal indictments<sup>157</sup> and requiring trial by jury in criminal cases.<sup>158</sup> Both requirements rest on

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amend. V. Second, Article III and the Sixth Amendment require trial by jury in criminal cases. Id. art. III, § 2; id. amend. VI.

<sup>152</sup> See Richard J. Bonnie, Anne M. Coughlin, John C. Jeffries, Jr. & Peter W. Low, *Criminal Law* 86 (2d ed. 2004) (“As the branch of government most directly responsive to the popular will, the legislature had the power to define crimes. Judges were to enforce statutes, not make law.”); Michael S. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* 240 (1993) (“The primary value furthered by [the prohibition against common-law crimes] is democracy, because the justification for restricting criminal law-making to legislatures is largely due to the more democratic selection of legislatures over judges.”).

<sup>153</sup> *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

<sup>154</sup> Id. at 33.

<sup>155</sup> Id. at 34.

<sup>156</sup> *United States v. Bass*, 404 U.S. 336, 348 (1971). For an argument that sounds in political theory about why “criminalization must be democratic in its origins,” see Fissell, *supra* note 9, at 858, 897–905 (explaining the “liberal” theory of punishment, which legitimates only punishment derived from consent to be governed by political institutions).

<sup>157</sup> U.S. Const. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[.]”); see also Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 *Cornell L. Rev.* 703, 726 (2008) (arguing that the grand jury plays a structural role in the Constitution as a check on the three branches of government and as a moderator of criminal law federalism); Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 *Geo. L.J.* 1265, 1270 (2006) (arguing that the grand jury is best understood as a “democratic prosecutor”).

<sup>158</sup> U.S. Const. art. III, § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .”); id. amend. VI (“In all criminal prosecutions, the accused shall enjoy the

the belief that the public should operate as a check on the imposition of criminal punishment.<sup>159</sup>

One might argue that, even if Congress is not sufficiently held accountable for criminal laws produced through delegations, the agencies that produce them are.<sup>160</sup> But that is not so. The principal way in which agencies allow for public participation is through procedures, such as notice and comment. These procedures are guaranteed by statutes, such as the APA, that authorize judicial review to enforce these legal requirements.<sup>161</sup> But these procedures do not give the public any significant control over agency decisions; they merely oblige agencies to offer an opportunity for public comment.<sup>162</sup> An agency set on implementing a particular policy may adopt that policy regardless of the public's comments, unless there is no valid reason for a policy.<sup>163</sup>

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right to a speedy and public trial, by an impartial jury . . . "); see also *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (referring to the jury as the "circuitbreaker in the State's machinery of justice"); Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 Nw. U. L. Rev. 1413, 1417 (2017) (arguing that the jury right was intended to provide local, democratic input into the criminal justice system).

<sup>159</sup> Richard E. Myers II, *Who Watches the Watchers in Public Corruption Cases?*, 2012 U. Chi. Legal F. 13, 14 (2012) ("Choosing public individuals to participate in the criminal justice system is a very old idea—one enshrined in the grand jury and petit jury provisions of the Constitution.").

<sup>160</sup> Of course, agencies are indirectly accountable to the public insofar as they are answerable to Congress and the President for the rules they promulgate. But that layer of separation significantly reduces the influence of the public. It was precisely for this reason that the original Constitution left the appointment of senators to state legislatures. Doing so reduced the pressure on senators to placate the public. In any event, the indirect accountability of agencies depends on those politicians' accountability to the public for the agency's policies—which as noted earlier is unlikely to be substantial, see *supra* text accompanying notes 146–150.

<sup>161</sup> See, e.g., 5 U.S.C. § 702; Shalev Roisman, *Presidential Factfinding*, 72 Vand. L. Rev. 825, 881 (2019) (noting that agencies are "substantially constrained by the procedural strictures of the APA enforced by judicial review").

<sup>162</sup> See 5 U.S.C. § 553 (providing that agencies must "give interested persons an opportunity to participate in the rule making through" comments, but not requiring agencies to modify regulation because of comments).

<sup>163</sup> David Thaw, *Enlightened Regulatory Capture*, 89 Wash. L. Rev. 329, 337 (2014) (explaining that, because informal rulemaking permits agencies to formulate rules based on their experience and knowledge, "[m]any agencies have . . . determin[ed] that they are free to ignore comments submitted during informal rulemaking proceedings and promulgate regulations based on their own expertise"); see also Kristina Daugirdas, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. Rev. 278, 279 (2005) (noting that, when a court vacates an agency rule as for not adequately addressing comments, "the agency can cure the defects by repromulgating the same rule with a different rationale").

As a practical matter, Congress often exempts criminal law delegations from these procedures, reducing the already weak public accountability. SORNA provides an example. It confers discretion on the Attorney General to determine whether to apply registration requirements, and it does not provide for judicial review of that decision.<sup>164</sup> The Controlled Substances Act is similar. Although the Act requires the Attorney General to follow notice and comment in designating drugs as illegal, it does not permit judicial review of that determination.<sup>165</sup> So too with the Sentencing Reform Act, which authorizes the Sentencing Commission to promulgate sentencing guidelines. The Act requires the Commission to follow notice and comment in issuing guidelines,<sup>166</sup> but it does not permit judicial review of the guidelines the Commission promulgates.<sup>167</sup>

### 3. Notice

Another argument against delegation is that it results in less notice to the public of their legal obligations.<sup>168</sup> Individuals are deemed to have notice of laws enacted by the government. This notice, of course, is only constructive.<sup>169</sup> It rests on several fictions: that individuals actually know where to find new laws once they are published, that individuals take the time and effort to actually read those laws, and that laypeople can understand the substantive scope of those laws. Despite these fictions, the idea of constructive notice endures because it prevents individuals from

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<sup>164</sup> 34 U.S.C. § 20913(d).

<sup>165</sup> 21 U.S.C. § 811(a).

<sup>166</sup> 28 U.S.C. § 994(x).

<sup>167</sup> The Act contains:

*no* provision for citizens or other affected persons to obtain judicial review of the final rules issued by the sentencing commission (as the federal Administrative Procedure Act provides with respect to executive branch agencies where the rules are alleged to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 40 (1998); see also *id.* at 208–09 (contrasting 5 U.S.C. § 706, the portion of the APA which provides for judicial review of regulations, with S. Rep. No. 225, at 180–81 (1983), which states that the sentencing guidelines are not subject to judicial review because “[t]here is ample provision for review of the guidelines by the Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable”).

<sup>168</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting) (arguing that the division of powers in the government tends to “provide stability and fair notice”).

<sup>169</sup> E.g., *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833) (Story, J.) (noting that “[i]t is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally”).

escaping liability by avoiding reading the law, and it avoids difficult problems of proving what a defendant knew.

Delegation exacerbates this fiction. First, delegation allows the law to change more quickly. One reason for the bicameralism and presentment requirements in the Constitution is to slow the rate of legal change.<sup>170</sup> Those procedures do not apply to agencies.<sup>171</sup> Although Congress can choose to impose additional requirements by statutes, it need not do so, and it often does not do so. Consequently, agencies can change laws more quickly than Congress can. Second, delegation increases the rate at which the government can generate rules. The increased volume of rules makes it more difficult for individuals to be aware of all the laws. Of course, the increased speed and larger capacity of agencies to make rules are seen as a feature, not a bug, in administrative law.<sup>172</sup> But the additional speed and volume make it more difficult for the public to keep apprised of the law.

This difficulty with keeping apprised of the law raises due process concerns. A basic feature of due process is that individuals should have fair notice of their legal obligations.<sup>173</sup> Notice allows members of the public to conform their behavior to the law—as a result, people are better able to avoid accidentally violating the law, and they are also less likely to forgo engaging in lawful activity out of fear that it might be illegal.

Although due process demands notice for all legal obligations affecting life, liberty, or property,<sup>174</sup> the law imposes stricter notice requirements

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<sup>170</sup> See *The Federalist* No. 62, at 378, 380 (James Madison) (Clinton Rossiter ed., 1961) (stating that Article I designed Congress to slow new enactments because “continual change even of good measures is inconsistent with every rule of prudence and every prospect of success”).

<sup>171</sup> See *supra* notes 133–36 and accompanying text.

<sup>172</sup> See *infra* Subsection II.C.3 (discussing efficiency as a reason in favor of delegation).

<sup>173</sup> *Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

<sup>174</sup> *Dimaya*, 138 S. Ct. at 1225 (noting notice obligations apply to civil and criminal cases).

for criminal laws.<sup>175</sup> One example comes from the ex post facto clauses.<sup>176</sup> Those clauses prohibit retroactive criminal laws in order “to prevent prosecution and punishment without fair warning.”<sup>177</sup> The same limitation does not extend to civil laws. In contrast to the absolute prohibition on retroactive criminal laws,<sup>178</sup> courts will allow retroactive application of a civil statute if the legislature “made clear its intent” that the law apply retroactively.<sup>179</sup>

The greater demand for notice in criminal cases also underlies the void for vagueness doctrine. That doctrine prohibits overly vague criminal statutes in part because vague laws give insufficient notice to citizens about what conduct is permitted and what conduct is prohibited.<sup>180</sup> “The degree of vagueness that the Constitution tolerates—as well as the relative

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<sup>175</sup> Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. Pa. L. Rev. 335, 338–39 (2005). Due process requires two types of notice. The first type of notice ensures that individuals have notice of what the law requires. A second type of notice—called “adversarial notice”—is the notice that the government must provide the accused when it brings charges against them. Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 Notre Dame L. Rev. 187, 210 (2014). Delegation implicates the first kind of notice. But it bears noting that the Constitution also imposes more stringent requirements for this adversarial notice in criminal cases than in civil cases. Compare, e.g., *Russell v. United States*, 369 U.S. 749, 763–64 (1962) (stating that the Fifth Amendment indictment requirement requires allegations of the specific elements of the charged crime), with *Am. Fed’n of Lab. & Cong. of Indus. Orgs. v. City of Miami*, 637 F.3d 1178, 1186 (11th Cir. 2011) (noting that notice pleading does not require a plaintiff to specifically plead every element of his cause of action).

<sup>176</sup> U.S. Const. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

<sup>177</sup> *United States v. Gerber*, 24 F.3d 93, 96 (10th Cir. 1994) (quoting *Devine v. N.M. Dep’t of Corr.*, 866 F.2d 339, 344 (10th Cir. 1989)). The prohibition also prevents vindictive legislation. *Id.*

<sup>178</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798).

<sup>179</sup> *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994). There was, in the early days of the Republic, disagreement about whether the ex post facto clauses extended to civil statutes as well. See Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 Ky. L.J. 323, 327–33 (1992) (collecting sources). But early cases interpreted the clauses to extend only to criminal cases. See Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 Nev. L.J. 63, 66–68 (2013).

<sup>180</sup> *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (“The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have ‘fair notice’ of the conduct a statute proscribes.”); *Smith v. Goguen*, 415 U.S. 566, 572 (1974) (“The doctrine incorporates notions of fair notice or warning.”); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.”).

importance of fair notice and fair enforcement—depends in part on the nature of the enactment.”<sup>181</sup> As a result, the vagueness doctrine ordinarily applies with less force to civil statutes, the Court has explained, “because the consequences of imprecision” for violation of civil statutes “are qualitatively less severe.”<sup>182</sup>

The more stringent demands for notice in criminal cases push towards greater restrictions on delegation of the power to promulgate criminal regulations. Delegation leads to less notice of legal obligations because of the speed with which agencies can adopt regulations and because of the larger volume of rules they can adopt. Thus, delegation of criminal rulemaking power will tend to result in less notice of the criminal restrictions to the public.

Delegating the power to promulgate criminal regulations raises a second notice problem—one that directly implicates the vagueness doctrine. Under the current theory of delegation, the law that supposedly prohibits activities is the statute delegating power to the executive.<sup>183</sup> The rule created by the agency merely implements that law.<sup>184</sup> As the Court put it in *Whitman v. American Trucking*, because the Constitution “permits no delegation of” legislative powers,<sup>185</sup> rulemakings are constitutional insofar as they consist of “executing or applying the law.”<sup>186</sup> In other words, the legal fiction underlying the modern nondelegation doctrine is that the only “law” is the statute that Congress enacted; an agency’s regulations exist only to guide the enforcement of that law.<sup>187</sup>

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<sup>181</sup> *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982).

<sup>182</sup> *Id.* at 498–99 (expressing “greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe”). There are some exceptions to the greater tolerance for vague civil statutes, including removal cases, see *Dimaya*, 138 S. Ct. at 1213 (“[T]he most exacting vagueness standard should apply in removal cases.”), and civil statutes that infringe on First Amendment rights, see *Hoffman Ests.*, 455 U.S. at 499.

<sup>183</sup> *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 473 (2001).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 472.

<sup>186</sup> *Id.* at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)); see also Cary Coglianese, *Dimensions of Delegation*, 167 U. Pa. L. Rev. 1849, 1855 (2019) (“When a grant to executive officers accords with the nondelegation doctrine, it will be deemed, by definition, a grant of constitutionally permissible rulemaking authority—an executive power—not the transfer of a legislative power vested in Congress.”).

<sup>187</sup> *Field v. Clark*, 143 U.S. 649, 693–94 (1892) (“The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in

By this logic, the only “law” that criminalizes conduct are congressional statutes that prohibit and punish certain activities. Those statutes regulate social behavior by dictating what is forbidden and the consequences for violating those restrictions. Regulations, on the other hand, merely implement those prohibitions.

But statutes that delegate criminal rulemaking authority invariably contain ambiguities. The reason for congressional delegations of power is to confer policy power on agencies.<sup>188</sup> But agencies cannot make policy decisions without discretion. Thus, even when a delegating statute clearly sets out the *goals* an agency should seek to advance through rulemaking, the statute is ambiguous insofar as they leave it to the agency to decide what rules to promulgate to *implement* those goals.

While the law tolerates some ambiguity in criminal statutes, the vagueness doctrine places constitutional limits on that ambiguity. Most statutes delegating criminal authority provide little guidance about what actually is illegal. And while that guidance may satisfy the intelligible principle doctrine, the vagueness doctrine likely requires more clarity. The intelligible principles Congress provides in many statutes are extremely broad and vague.<sup>189</sup> For example, in *Grimaud*, the statute in question permitted the executive only “to regulate the[] occupancy and use” of the lands in a manner that “protect[s] against destruction by fire and depredations,” and it imposed criminal penalties for failing to comply with those regulations.<sup>190</sup> The statutory language provides virtually no guidance about what is prohibited; the Secretary decided to use his regulatory power to require permits for grazing sheep. But the statutory

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pursuance of the law.” (quoting *Cincinnati, Wilmington & Zanesville, R.R. Co. v. Comm’rs of Clinton Cnty.*, 1 Ohio St. 77, 88–89 (1852))).

<sup>188</sup> The reasons for assigning policymaking power to agencies range from the laudable, like taking advantage of agency expertise, to the more regrettable, like avoiding political responsibility. See *supra* notes 148–50 and accompanying text.

<sup>189</sup> See, e.g., *Whitman*, 531 U.S. at 475–76 (upholding a statute that granted the EPA broad discretion to set national ambient air quality standards at levels “‘requisite’ . . . to protect the public health”); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946) (upholding delegation to the SEC to take such actions as necessary to prevent companies from “unfairly or inequitably distribut[ing] voting power among security holders” (quoting Public Utility Holding Company Act of 1935, 15 U.S.C. § 79k(b)(2))); *Yakus v. United States*, 321 U.S. 414, 420, 423 (1944) (upholding a delegation to fix commodity prices that are “generally fair and equitable and will effectuate the purposes of this Act” (quoting Emergency Price Control Act of 1942, 50 U.S.C. § 902)); see also David S. Rubenstein, *Taking Care of the Rule of Law*, 86 *Geo. Wash. L. Rev.* 168, 225 (2018) (“[T]he nondelegation doctrine is famously toothless; just about anything counts as an intelligible principle.”).

<sup>190</sup> 220 U.S. 506, 509 (1911) (citing 16 U.S.C. § 551).

language alone almost certainly would fail the void for vagueness test. Indeed, the district court judge who dismissed the indictment against Grimaud did so not only on nondelegation grounds but also on the grounds that the statute was “void” because it failed to “define the acts to be punished” and thus did not give people sufficient notice about what acts were illegal.<sup>191</sup>

More important, even those statutes that do contain fairly clear guidance for agencies still raise notice problems. That is because those statutes do not actually notify the public of what is illegal. The statute leaves that task to the agency. For example, as the Supreme Court itself noted in discussing SORNA, if the Attorney General had not written rules requiring pre-Act offenders to register, it would not have been a federal offense for those offenders not to register.<sup>192</sup> The statute itself, therefore, does not provide notice of what is illegal and legal. It provides notice only that someone else will determine what is illegal and legal.

Some might say that the regulations that are written by the agency provide sufficient notice to individuals. The Court itself made such an argument in an earlier case discussing the Attorney General’s rules under SORNA.<sup>193</sup> But unless the Court decides to revisit current delegation theory, the relevant law is the delegating statute. Just as a prosecutor cannot cure the defects of a vague statute by adopting internal enforcement guidelines,<sup>194</sup> an agency’s regulation should not be able to supply notice of what a statute proscribes.

### *C. Reasons in Favor of Delegation*

Even the reasons that are traditionally offered in support of broad delegations to agencies do not support—or at least do not strongly support—delegations in the criminal law. Those reasons are expertise, compromise, and efficiency.

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<sup>191</sup> *United States v. Grimaud*, 170 F. 205, 206–10 (S.D. Cal. 1909), rev’d, 220 U.S. 506 (1911).

<sup>192</sup> *Reynolds v. United States*, 565 U.S. 432, 440 (2012).

<sup>193</sup> *Id.* at 441–42 (“A ruling from the Attorney General, however, could diminish or eliminate those uncertainties, thereby helping to eliminate the very kind of vagueness and uncertainty that criminal law must seek to avoid.”).

<sup>194</sup> *Cf. City of Chicago v. Morales*, 687 N.E.2d 53, 58–59, 63–64 (Ill. 1997), aff’d, 527 U.S. 41 (1999) (rejecting an argument that police enforcement guidelines could save a statute from a vagueness challenge).

*1. Expertise*

The expertise of agency officials is one of the traditional justifications for delegating rulemaking authority to agencies.<sup>195</sup> The idea is that agencies will be staffed with scientists and industry professionals who have that knowledge and training to address complex social problems—knowledge and training that Congress lacks.<sup>196</sup> Armed with this expertise, agencies have the capability to draft more sophisticated, nuanced, and detailed policies than Congress.

But administrative expertise is not a sufficient basis for promulgating criminal rules, especially not under prevailing practices and norms.<sup>197</sup> It is said that criminal law rests on two overarching theories of punishment—retributivism and utilitarianism.<sup>198</sup> Under retributivism, criminal laws embody moral judgments about severity of harm and offender blameworthiness.<sup>199</sup> Individuals are punished for their criminal

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<sup>195</sup> Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 *Colum. L. Rev.* 2019, 2024 (2015) (“The conception of the agency-as-expert is one of the cornerstones of the U.S. administrative process . . . .”); Kathryn A. Watts, *Proposing A Place for Politics in Arbitrary and Capricious Review*, 119 *Yale L.J.* 2, 14 (2009) (arguing that arbitrary-and-capricious review views agencies as experts); see also Strauss, *supra* note 141, at 773 (tracing the evolution of the expertise justification for delegations to agencies).

<sup>196</sup> This expertise includes not only knowledge of background facts but also of processes and scientific tools. For example, in determining the carcinogenic potency of chemicals in the face of uncertainty, an agency employed the Bayesian Monte Carlo analysis—a tool that is almost certainly unknown to most members of Congress. See Adam M. Finkel, *The Cost of Nothing Trumps the Value of Everything: The Failure of Regulatory Economics to Keep Pace with Improvements in Quantitative Risk Analysis*, 4 *Mich. J. Env’t & Admin. L.* 91, 129 (2014). Although the understanding of agency expertise has morphed over time, expertise continues to be a major reason for assigning power to agencies. See Wagner, *supra* note 195, at 2027–28 (2015) (describing the changing view of agency expertise).

<sup>197</sup> See Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 *Geo. Wash. L. Rev.* 993, 1011 (2010) (noting that “the need for technical expertise, a commonly voiced justification for agency delegation,” is “largely absent” in criminal law); Logan, *Criminal Justice Federalism*, *supra* note 9, at 115 n.367 (noting that criminal law delegations “lack the technical complexity that typically justifies delegation based on agency expertise”); Strauss, *supra* note 141, at 747 (stating that legislatures regularly directly resolve substantive issues by enacting criminal statutes instead of delegating to agency experts).

<sup>198</sup> Sanford H. Kadish, Stephen J. Schulhofer & Carol S. Steiker, *Criminal Law and Its Processes: Cases and Materials* 79 (8th ed. 2007).

<sup>199</sup> Andrew Ashworth, *Desert*, in *Principled Sentencing: Readings on Theory and Policy* 180, 181, 182 (Andrew von Hirsch & Andrew Ashworth eds., 1992); George P. Fletcher, *Rethinking Criminal Law* 461 (1978).

acts because they deserve punishment.<sup>200</sup> Under utilitarianism, criminal rules exist to reduce the occurrence of future crimes. Punishment is a means to prevent future crime through deterrence, rehabilitation, and incapacitation.<sup>201</sup>

The agency-as-expert justification does not support the power to promulgate criminal rules based on retributivism. The expertise justification for agencies is that their conclusions rest on objective data and methodologies. Moral judgments do not depend on those scientific methods.<sup>202</sup> Because there is no objectively correct answer to whom deserves punishment or how much they deserve, there are no “experts” in retributivism.<sup>203</sup>

Utilitarianism provides a stronger case for delegating the power to promulgate criminal rules than retributivism. In contrast to retributivism’s focus on morality, utilitarianism punishes to prevent future crime. What will or will not reduce crime is an empirical question, and the idea that legislative decisions often turn on empirical questions underlies the expertise justification for delegation to agencies.<sup>204</sup> The idea is that agencies will rely on objective information and methodologies when drafting regulations, and thus they are in a better position to answer empirical questions. For example, agencies regularly consider costs and benefits when promulgating regulations.<sup>205</sup>

Although utilitarianism depends on an empirical question—what is more likely to reduce future crime—that does not mean that agencies necessarily have the appropriate expertise to promulgate criminal rules.

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<sup>200</sup> Michael S. Moore, *The Moral Worth of Retribution*, in *Principled Sentencing*, supra note 199, at 188; Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 *Colum. L. Rev.* 1233, 1240 (2005).

<sup>201</sup> Richard S. Frase, *Punishment Purposes*, 58 *Stan. L. Rev.* 67, 70 (2005); see also Kadish et al., supra note 198, at 79–105 (collecting materials).

<sup>202</sup> Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 *Stan. L. Rev.* 197, 209–11 (1965) (exploring the relationship between popular morality and use of criminal sanctions in regulating business practices).

<sup>203</sup> See Rachel Elise Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* 39 (2019) (“There is no objective way to decide which argument is right as a matter of retributive justice, nor can we say anyone is an expert on the issue . . .”).

<sup>204</sup> Amy Semet, *An Empirical Examination of Agency Statutory Interpretation*, 103 *Minn. L. Rev.* 2255, 2336 (2019) (“New Dealers envisioned agencies as expert, professional bodies capable of analyzing social and economic problems and relying on scientific and empirical information that courts and legislatures lack capacity to fully consider.”).

<sup>205</sup> Cecot, supra note 140, at 1600 (documenting the “increasing importance in agency rulemakings”).

That is because the utilitarianism approach to crime does not care *only* about what methods will reduce crime, but it also cares about the relative costs of those methods as compared to the benefit of reduced crime.<sup>206</sup> And agencies do not have relevant expertise in determining the costs and benefits of criminal sanctions. Their expertise is in the substantive area that they regulate—such as the environment, the securities markets, and the airwaves. They do not specialize in determining either the benefits of criminal prohibitions to potential victims and communities or the costs of criminal convictions to offenders, their families and communities, and the department of prisons.

There are, at least arguably, two agencies that possess relevant expertise: the Sentencing Commission and the Department of Justice. The focus of both agencies is on the federal criminal justice system. But these agencies have, at best, incomplete expertise. Neither agency has undertaken to assess all the costs and benefits of criminalization. And research suggests that the criminal regulations that the Department of Justice issues may be based less on expertise and more on a desire to facilitate law enforcement by providing more options in charging individuals.<sup>207</sup>

Even if other agencies did have expertise in assessing the costs and benefits of criminal law, statutes delegating criminal rulemaking do not authorize agencies to utilize that expertise. Most delegating statutes give agencies the authority to prescribe substantive standards; they do not also authorize the agency to set the punishment for violating that substantive standard. For example, federal law assigns to the Secretary of the Interior the power to issue regulations protecting marine mammals, but not the power to set criminal punishment for violating those rules.<sup>208</sup> Nor is the punishment supposed to factor into the Secretary's rulemaking. The Act requires the Secretary to regulate based on "the best scientific evidence available" to prevent unduly harming marine life.<sup>209</sup> It does not empower

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<sup>206</sup> All of the utilitarian theories seek to identify optimal levels of punishment—namely "how to best balance any reduction in the costs of crime with the attendant increase in the costs of enforcement." John F. Pfaff, *Sentencing Law and Policy* 38 (2016). For example, we can reduce jaywalking to zero by preemptively placing every individual in prison; but the cost of that measure outweighs the benefit of eliminating jaywalking.

<sup>207</sup> See Barkow, *supra* note 203, at 6–8, 53–54 (describing prosecutorial lobbying); Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. Rev.* 715, 728–29 (2005) (same).

<sup>208</sup> 16 U.S.C. § 1375(b).

<sup>209</sup> *Id.* § 1373.

the Secretary to consider the cost of the criminal consequences of violating whatever regulations are promulgated.

In any event, even if Congress created an agency with the expertise to promulgate substantive standards and the punishment for violating those standards, that agency's expertise would still fail to justify criminal regulation under a theory of retributivism.

## 2. *Promoting Compromise*

Another justification for agency delegation is that it allows lawmakers to compromise.<sup>210</sup> Congress consists of a large body of members with different ideologies and representing different interests from across the country. As a result, a majority of the two houses is often unable to reach an agreement on the standards to impose through legislation.<sup>211</sup> Delegating rulemaking authority to an agency to implement a statute provides a path to compromise. Disagreeing members can agree to delegate authority, hoping that the agency will adopt regulations implementing their own policy visions.<sup>212</sup> Indeed, that is what appears to have prompted the delegations at issue in both *Gundy*<sup>213</sup> and *Grimaud*.<sup>214</sup>

<sup>210</sup> John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1985 (2011) (observing that delegation “is a common drafting strategy to elide disagreement or deal with hard-to-predict futures”); Daniel B. Rodriguez, Statutory Interpretation and Political Advantage, 12 Int'l Rev. L. & Econ. 217, 218 (1992) (discussing the use of delegation to handle legislative disagreement); see also *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring) (criticizing Congress for delegating “simply [to] avoid[] a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge”); Victoria F. Nourse & Jane S. Schacter, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. Rev. 575, 594–96 (2002) (describing a study finding that Congress deliberately writes ambiguous laws for others to interpret as a compromise).

<sup>211</sup> Leah M. Litman, Debunking Antinovelty, 66 Duke L.J. 1407, 1429–30 (2017).

<sup>212</sup> Connor Raso, Agency Avoidance of Rulemaking Procedures, 67 Admin. L. Rev. 65, 123 n.282 (2015) (discussing this phenomenon of “regulatory lottery”).

<sup>213</sup> See Brief for Petitioner at 6–8, *Gundy v. United States* (2018) (No. 17-6086) (describing legislative history of SORNA); see also *Gundy v. United States*, 139 S. Ct. 2116, 2144 (Gorsuch, J., dissenting) (“Because Congress could not achieve the consensus necessary to resolve the hard problems associated with SORNA’s application to pre-Act offenders, it passed the potato to the Attorney General.”); Logan, The Adam Walsh Act and the Failed Promise of Administrative Federalism, *supra* note 197, at 999–1000 (describing the question whether to retroactively apply SORNA’s registration requirements to pre-Act offenders as a “controversial issue with major policy significance and practical ramifications for states”).

<sup>214</sup> When Congress decided to provide the Department of the Interior (and later the Department of Agriculture) the authority to regulate the forests, it avoided “any specific

This justification turns the law's approach to criminal punishment on its head. A major theme of the Constitution is to protect individual liberty by constraining government power.<sup>215</sup> Some constraints are in the form of absolute prohibitions on the exercise of power in certain ways, like the Eighth Amendment's prohibition on cruel and unusual punishment. But others simply make it more difficult for the government to exercise its power. One example of this is the bicameralism requirement. Requiring both houses of Congress to approve a law ensures that only broadly accepted measures would become law.<sup>216</sup> Delegating the power to establish criminal standards circumvents this structure. It changes the default in the case of a lack of widespread agreement. Without agencies, the lack of agreement would mean no exercise of government power. But with agency delegation, lawmakers can agree to exercise power without agreeing how to exercise it. That makes the exercise of government power more likely than before.

More generally, the separation of powers and other constitutional guarantees, such as the right to the jury trial, help to ensure that many actors must agree before an individual is subject to punishment.<sup>217</sup> The legislature must decide conduct is worthy of criminalization, the prosecutor must decide to bring charges in a particular case, the grand jury must decide to indict, the judge must agree that the defendant's conduct falls within the statute, and every member of the jury must agree to convict.<sup>218</sup> Any of those actors can prevent the imposition of

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mention" of grazing because grazing was such a controversial issue, and government efforts to regulate it were opposed by "western interests in Congress." See Sawyer, *supra* note 9, at 180–81, 189; see also *id.* at 187–88 (noting that the Department of the Interior twice asked Congress for a statute criminalizing the "pastur[ing of] livestock in a national forest without a permit," but Congress "took no action, likely due to the same political conflict that had kept any specific mention of grazing out of the Act of June 4th").

<sup>215</sup> See *supra* notes 87–89 and accompanying text.

<sup>216</sup> Litman, *supra* note 211, at 1429.

<sup>217</sup> See Jeffrey Bellin, *The Power of Prosecutors*, 94 *N.Y.U. L. Rev.* 171, 191–203 (2019) (discussing the power of multiple, overlapping actors in the criminal justice system).

<sup>218</sup> Despite the unanimity requirement's lengthy historical pedigree, see, e.g., 1 *W. Holdsworth, A History of English Law* 318 (1922), the U.S. Supreme Court has stated that a unanimous jury verdict is not constitutionally required, see *Apodaca v. Oregon*, 406 U.S. 404 (1972). Notably, the Court reconsidered that ruling last Term. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (concluding that the Sixth Amendment right to a jury trial requires a unanimous verdict to convict a defendant of a serious offense).

punishment, and (with few exceptions) we do not expect them to negotiate and compromise with one another.<sup>219</sup>

### 3. *Efficiency*

Dispersing regulatory authority to agencies allows the federal government to produce a greater volume of regulations more quickly and cost effectively than it could if Congress alone enacted laws.<sup>220</sup> This efficiency is desirable, the argument goes, because it allows the government to handle complicated modern problems expeditiously as they arise.<sup>221</sup>

But this argument is less convincing when it comes to criminal law. That is because efficiency is in direct tension with liberty. As noted above, the more government exercises power—especially power backed up by the threat of criminal punishment—the further we drift from the constraints in the Constitution that are meant to protect liberty.<sup>222</sup>

In addition, the need to delegate in order to achieve efficiency is much smaller in the realm of criminal laws. Legislatures generally, and Congress in particular, have proven to be remarkably proficient and efficient in the enactment of criminal laws.<sup>223</sup> Members of Congress and those who seek election to Congress routinely exploit crime for political gain. As Dan Richman has noted, crime legislation essentially serves as campaign literature for legislators.<sup>224</sup> Because there is no organized lobby against criminal legislation, members of Congress face little or no pressure to vote against new criminal laws; but they do face charges of

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<sup>219</sup> We do expect negotiation and compromise between legislators and between jurors. But we do not expect, for example, the legislature to negotiate and compromise with the jury.

<sup>220</sup> See *supra* text accompanying notes 133–137.

<sup>221</sup> Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 *Am. U. L. Rev.* 391, 404 (1987) (“Given the nature and level of government intervention that Congress now authorizes, it could not possibly make the hundreds, or perhaps thousands, of important policy decisions that agencies make annually.”); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 *Am. U. L. Rev.* 323, 341–42 (1987) (arguing that congressional legislation does not meet the needs of modern society).

<sup>222</sup> See *supra* notes 118–24 and accompanying text.

<sup>223</sup> See, e.g., Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* (2010); Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 *Buff. Crim. L. Rev.* 45, 78 (1998); Erik Luna, *The Overcriminalization Phenomenon*, 54 *Am. Crim. L. Rev.* 703, 710–11 (2005); Julie R. O’Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction as a Case Study*, 96 *J. Crim. L. & Criminology* 643, 648–49 (2006).

<sup>224</sup> Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757, 774 (1999).

being soft on crime unless they vote in favor of more criminal laws.<sup>225</sup> As a result, Congress passes new criminal laws at an alarmingly fast rate.<sup>226</sup> One study of federal legislation calculated that, between 2000 and 2007, Congress created an average of fifty-six new crimes each year.<sup>227</sup> Another study calculated that criminal statutes were enacted at a rate that was 45% higher than all other types of legislation.<sup>228</sup> What is more, many of these statutes target behavior that is already criminal under federal law.<sup>229</sup> Together, this information suggests that, far from needing to be more efficient, Congress enacts more criminal laws than are necessary.

Finally, while there is a compelling argument to be made that the government must be able to respond expeditiously to the complicated problems of modern society, the argument is far less compelling that the expeditious response must include criminal sanctions. Indeed, non-criminal law responses are often quite effective at significantly reducing undesirable behavior.<sup>230</sup>

Take, for example, the risk caused by cars that drive too fast. We can reduce that risk through criminalization—by making driving above a certain speed illegal and ticketing those who speed. But we can also reduce speeding by making it more physically difficult or uncomfortable

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<sup>225</sup> See Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* 15 (2008) (noting that “neither political party has been willing to allow the other to earn the reputation of being tougher on crime”); William J. Stuntz, *The Collapse of American Criminal Justice* 173 (2011) (“When writing and enacting criminal prohibitions, legislators usually ignore tradeoffs and rarely need to compromise. Save for law enforcement lobbies, few organized, well-funded interest groups take an interest in criminal statutes; criminal defendants’ interests nearly always go unrepresented in legislative hallways.”); Sara Sun Beale, *What’s Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 *Buff. Crim. L. Rev.* 23, 41–43 (1997) (recounting that Democrats “realized in the 1990s that their traditional support of more liberal crime policies had become a major political liability” and describing how “Democratic Congressional leaders deliberately adopted a strategy of taking the crime issue away from the Republicans”).

<sup>226</sup> O’Sullivan, *supra* note 223, at 653–54 (comparing studies of the quantity of federal crimes from the mid-1970s and 1998 and showing considerable increase).

<sup>227</sup> John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes* 1 (Heritage Found., Legal Memorandum No. 26, 2008).

<sup>228</sup> Walsh & Joslyn, *supra* note 223, at 13.

<sup>229</sup> See O’Sullivan, *supra* note 223, at 679–85 (using obstruction of justice crimes as a case study of this phenomenon).

<sup>230</sup> See, e.g., Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2d ed. 2009); see also Kathleen DeLaney Thomas, *The Psychic Cost of Tax Evasion*, 56 *B.C. L. Rev.* 617, 619–21 (2015) (arguing that nudges are a more cost-effective way to improve tax compliance than audits and penalties).

to speed. For example, some communities reduce fast driving by installing speed bumps. Studies show that those speed bumps not only reduce the speed at which people drive, but also leave lingering effects when the speed bump is later removed.<sup>231</sup>

Another, related, way to combat speeding is to make it psychologically uncomfortable. Cities in South America have experimented with this approach—using mockery and comedy to enforce better driving behavior.<sup>232</sup> Some communities opt for reinforcing safe behavior. In Stockholm, Sweden, for example, the government uses its traffic cameras not only to detect speeding but also to reward those who drive at or below the speed limit by entering them into a lottery for prizes. The program has been proven to reduce driving speeds.<sup>233</sup>

As these examples illustrate, there are many options other than criminalization and punishment to change behavior. And if executive agencies are not given the ability to criminalize behavior, perhaps they will choose to embrace noncriminal alternatives.

### III. THE CHARGING POWER AND IMPLICIT DELEGATIONS

Some might say that the delegation of criminal rulemaking power is unobjectionable because it is consistent with a broader phenomenon in American criminal law—namely, that Congress delegates significant policy discretion to executive officials while courts routinely decline to place any meaningful limits on that discretion. Congress has delegated this significant discretion through the enactment of expansive criminal codes, through overlapping statutes, and through broadly worded statutes. The enormous policy discretion that is implicitly delegated through these

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<sup>231</sup> See, e.g., Shauna Hallmark, Keith Knapp & Gary Thomas, Off. of Traffic and Safety, Iowa Dep't of Transp., *Temporary Speed Hump Impact Evaluation* (2002), [https://nacto.org/docs/usdg/temporary\\_speed\\_humps\\_impact\\_evaluation\\_hallmark.pdf](https://nacto.org/docs/usdg/temporary_speed_humps_impact_evaluation_hallmark.pdf) [<https://perma.cc/YB2V-SGK2>].

<sup>232</sup> In the 1990s, the mayor of Bogotá, Colombia, sent mimes onto city streets to tease and shame the city's drivers for breaking traffic rules. The initiative is credited with reducing traffic fatalities. More recently, in La Paz, Bolivia, volunteers dress in zebra costumes to help direct traffic and assist pedestrians in crossing the street. The zebras use comedy to nudge drivers towards better driving habits, including "if a car stops in the crosswalk, they will lay across [the driver's] hood." Isabel Henderson, *Big in Bolivia: Zebras in the Streets*, *Atlantic*, Mar. 2017, at 26.

<sup>233</sup> Charlie Sorrel, *Swedish Speed-Camera Pays Drivers to Slow Down*, *Wired* (Dec. 6, 2010), <https://www.wired.com/2010/12/swedish-speed-camera-pays-drivers-to-slow-down/> [<https://perma.cc/CRY7-2WH6>].

means raises many of the same concerns as explicit delegations of criminal rulemaking power.

But the explicit delegation of criminal rulemaking power is different in kind. While executive discretion is a necessary byproduct of prosecutors' charging power, that is simply not the case for the discretion afforded in rulemaking. And although the concerns associated with implicit delegations from expansive criminal codes overlap with the concerns associated with explicit delegations to promulgate criminal rules, there is no reason to tolerate the latter simply because we permit the former.

Unlike the power to make rules, the power to bring criminal charges is a core executive power.<sup>234</sup> Since the late 1700s, federal law has authorized only executive officials to pursue federal criminal charges,<sup>235</sup> and the Court has long recognized that those officials have discretion in deciding whether to arrest and whether to bring charges.<sup>236</sup> These charging decisions necessarily require the executive to make policy decisions. Imagine, for example, a prosecutor who is faced with a decision whether to bring charges in two separate cases: one of those cases involves a minor crime, such as jaywalking, while the other involves a more serious crime, such as murder. Both cases have comparable evidence available, and neither is a slam dunk. One would not expect the prosecutor to be equally inclined to bring charges in both cases. She might be less inclined to bring the jaywalking case because jaywalking is such a minor offense that pursuing charges is not worth the hassle, and she might be more inclined to charge murder because murder is a major crime. Or she might be less inclined to bring the murder charges than the jaywalking charges because she is worried about the consequences of charging a defendant with murder if she is not sure of the defendant's guilt.

Policy choices of this sort are inevitable in the exercise of charging power. Prosecutors must make decisions about which cases to pursue based on the strength of available evidence. They also must make choices because they do not have enough resources to enforce the law every time

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<sup>234</sup> See *infra* notes 268–69 and accompanying text.

<sup>235</sup> *The Confiscation Cases*, 74 U.S. 454, 457 (1869) (“[C]ourts will not recognize any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney, or some one designated by him to attend to such business . . .”).

<sup>236</sup> *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (stating that the power not to indict is “a decision which has long been regarded as the special province of the Executive Branch”); see also *United States v. Corrie*, 25 F. Cas. 658, 668 (C.C.D. S.C. 1860) (No. 14,869).

it is violated.<sup>237</sup> These resource constraints may lead law enforcement to prioritize one type of crime over another. It also may lead them to focus on particularly egregious violations of the law. For example, police cannot stop and ticket every driver who goes one or two miles above the speed limit—there are simply too many drivers who do so. Instead, law enforcement must prioritize those drivers who drive significantly faster than the speed limit. As a result, drivers know that they will not get pulled over if they drive thirty-six miles per hour in a thirty-five-mile-per-hour zone. Officers will enforce the law only if a driver exceeds the speed limit by some larger amount—say ten miles per hour. Through these charging decisions, the executive sets the “real” speed limit on the road as forty-five instead of thirty-five miles per hour.<sup>238</sup>

This policy discretion is not limited to deciding which kind of criminal behavior to target; it also includes decisions about which individuals to arrest and to prosecute. For some laws, police arrest and prosecutors pursue charges against only some small fraction of the population that violates those laws.<sup>239</sup> The executive therefore may opt to prosecute one person for a crime while letting another who commits the same offense go free.

Executive policy decisions have played an increasingly important role as the federal criminal code has expanded. Because the executive does not have sufficient resources to enforce all of the already-existing criminal statutes all the time, every time that Congress enacts a new criminal law, it increases the policy power of the executive.

Another way in which Congress has expanded the role of executive officials in setting criminal policy is through the enactment of overlapping

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<sup>237</sup> See Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 *Notre Dame L. Rev.* 221, 222, 224 (2003) (noting that “resources, even at the national level, are scarce” and that scarcity “dictate[s] that prosecutors will be unable to pursue each matter that is placed upon their desk for consideration”); see also Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 *Stan. L. Rev.* 1036, 1050 (1972) (noting that violations of federal statute making it illegal to transport a motor vehicle across state lines “are so numerous that the Justice Department has taken the unusual step of explicitly establishing a selective enforcement policy in the U.S. Attorney’s Manual, insulating major categories of violators from prosecution”).

<sup>238</sup> See William J. Stuntz, *Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law*, in *Criminal Procedure Stories* 378 (Carol S. Steiker ed., 2006) (“The *real* law, the ‘rules’ that determine who goes to prison and for how long, is not written in code books or case reports. Prosecutors . . . define it by the decisions they make when ordering off the menus their states’ legislatures have given them.”).

<sup>239</sup> See, e.g., Rabin, *supra* note 237, at 1091 (reporting prosecutorial declination rates as high as 90% for some types of federal crimes).

criminal laws that cover the same conduct but that carry different penalties. Consider, for example, the current federal regime that governs possession of child pornography. The federal code prohibits the receipt and possession of child pornography. But receipt carries a mandatory minimum sentence,<sup>240</sup> while possession does not.<sup>241</sup> Although receipt and possession are distinct crimes—they have different elements—in essentially every case an individual who possesses child pornography could be charged with receipt.<sup>242</sup> Thus, these federal laws implicitly delegate to the executive the power to determine how much to punish the possession of child pornography. An executive who wants to be harsh towards child pornography possession may bring charges under the receipt statute, while others will bring charges under the possession statute.<sup>243</sup>

Likewise, Congress has implicitly delegated policy power to the executive by enacting overly broad criminal laws—laws that reach beyond the conduct that Congress meant to prohibit and that include less blameworthy (or even innocuous) behavior.<sup>244</sup> Consider the Chemical Weapons Convention Implementation Act, which was enacted to

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<sup>240</sup> 18 U.S.C. § 2252(b)(1).

<sup>241</sup> *Id.* § 2252(b)(2).

<sup>242</sup> This is especially simple in cases involving computer images. The same evidence that would establish knowing possession—namely, digital evidence that the defendant downloaded the image—would also establish knowing receipt. One possible exception is an individual who inadvertently came into possession of child pornography images, discovered the images, and then decided to keep them. That person would be guilty of knowing possession, but not knowing receipt.

<sup>243</sup> A report by the U.S. Sentencing Commission showed that prosecutors are making this decision in an arbitrary fashion. The Commission's exhaustive study of a large set of child pornography cases revealed no apparent enforcement criteria distinguishing those defendants who were charged with receipt from those defendants who were charged only with possession. Instead, prosecutors appeared to use the two laws as a source of leverage for plea bargaining—requiring defendants to plead guilty to possession or be charged with receipt and face the mandatory minimum sentence. See U.S. Sent'g Comm'n, *Federal Child Pornography Offenses* 144–67 (2012).

<sup>244</sup> See Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. Rev. 1491, 1493 (2008) (noting that most critiques of overly broad laws focus on statutes that “extend[] criminal sanctions beyond culpable actors who pose a genuine risk to others”); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 Harv. L. Rev. 904, 909–10 (1962) (identifying the phenomenon of “overcriminalization,” namely, the proliferation of “criminal statutes which seem deliberately to overcriminalize, in the sense of encompassing conduct not the target of legislative concern”); see also Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 Colum. L. Rev. 1655, 1678 (2010) (“A criminal is normatively innocent where his conduct is undeserving of communal condemnation, even if it is contrary to law.”).

eliminate “weapons of mass destruction.”<sup>245</sup> The statute forbids anyone from knowingly possessing or using “any chemical weapon,”<sup>246</sup> and it defines “chemical weapon” as “any chemical” that “can cause death, temporary incapacitation or permanent harm to humans or animals.”<sup>247</sup> That definition sweeps so broadly as to include everyday cleaning supplies.<sup>248</sup> No doubt, Congress did not intend to turn every person who owns cleaning supplies into a felon. It wrote the statute broadly to ensure that it would cover all chemicals that could possibly be used as weapons of mass destruction. But in doing so, Congress functionally delegated to the executive the power to determine what criteria prosecutors will use to sort cases they will prosecute from those that they will not.<sup>249</sup>

These implicit policy delegations to the executive have not been offset by more aggressive judicial review.<sup>250</sup> Courts have generally refused to

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<sup>245</sup> 18 U.S.C. § 229. The statute was enacted to implement the United Nations Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. *Bond v. United States*, 572 U.S. 844, 848–49 (2014). The preamble of the Convention states that the “Parties to this Convention [are] [d]etermined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction.” 32 I.L.M. 800, 804 (1993).

<sup>246</sup> 18 U.S.C. § 229(a).

<sup>247</sup> *Id.* § 229F(1), (8). The statute specifically exempts “any individual self-defense device, including those using a pepper spray or chemical mace.” *Id.* § 229C. And it also exempts chemicals that are intended for peaceful purposes, protective purposes, and unrelated military purposes. *Id.* § 229F(7).

<sup>248</sup> See *United States v. Bond*, 681 F.3d 149, 154 n.7 (3d Cir. 2012), rev’d, 572 U.S. at 846.

<sup>249</sup> See Hessick, *supra* note 92, at 995–96; see also Rabin, *supra* note 237, at 1050–51 (documenting federal enforcement criteria for marijuana and immigration offenses). The Supreme Court ultimately adopted a very narrow interpretation of the statute in *Bond*, 572 U.S. at 845–46, limiting the Chemical Weapons Convention Implementation Act to apply only to terrorist plots or the possession of extremely dangerous substances with the potential to cause severe harm to many people, not to household cleaners. But that decision was not framed as an effort to limit executive power; instead, it embodied a decision by the Court to adopt interpretations of federal statutes that were less likely to encroach on areas of traditional state influence. See *id.*

<sup>250</sup> See, e.g., Abraham S. Goldstein, *The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea* (1981) (criticizing the failure of magistrates and judges to review and check prosecutorial power); Stuntz, *supra* note 238 (criticizing the broad plea-bargaining power conferred on prosecutors in *Bordenkircher v. Hayes*); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521 (1981) (criticizing prosecutorial discretion as violating foundational principles of the criminal justice system and sweeping beyond the considerations that have been used to justify the existence of the discretion); *id.* at 1522 (criticizing the “broad and rather casual acceptance” of this prosecutorial discretion).

limit the arresting power,<sup>251</sup> and they have put even fewer constraints on the charging power of prosecutors.<sup>252</sup> So long as they have probable cause, prosecutors have virtually unbridled discretion whether to bring charges.<sup>253</sup> And if more than one statute criminalizes the same conduct, they have complete discretion to decide under which statute to prosecute.<sup>254</sup> The only restrictions are that officials may not make decisions based on a defendant's race or religion, a desire to interfere with a defendant's constitutional rights, or personal animus toward the defendant.<sup>255</sup> But even those constraints are more bark than bite. Because courts have erected significant barriers against obtaining discovery from the government,<sup>256</sup> law enforcement officers may, as a practical matter, target defendants for unconstitutional reasons without real fear of redress.<sup>257</sup>

One notable exception to this trend of judicial passivity has been in the enforcement of the vagueness doctrine. In recent years, the Supreme Court has decided a handful of cases in which it has said that a federal statute violates the Due Process Clause because of excessive vagueness.<sup>258</sup> One reason that the Court has given for holding vague laws

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<sup>251</sup> See, e.g., *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019); *Whren v. United States*, 517 U.S. 806 (1996).

<sup>252</sup> *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.”); *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (“Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.”).

<sup>253</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

<sup>254</sup> *Batchelder*, 442 U.S. at 123–24 (“[W]hen an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants.”).

<sup>255</sup> See Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. Pa. L. Rev. 1365, 1372 (1987) (collecting cases).

<sup>256</sup> See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996).

<sup>257</sup> See Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 Chi-Kent L. Rev. 605, 623 (1998) (“[F]or many crimes, *Armstrong* makes discovery impossible even where the defendant is a victim of selective prosecution.”).

<sup>258</sup> See *United States v. Davis*, 139 S. Ct. 2319 (2019); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *Johnson v. United States*, 576 U.S. 591 (2015); see also *Skilling v. United States*, 561 U.S. 358, 406–08 (2010) (adopting a limiting construction of 18 U.S.C. § 1346, the “honest services” statute of federal mail fraud, “to avoid constitutional difficulties” because if the

unconstitutional is that vague statutes delegate too much of Congress's legislative power.<sup>259</sup> The argument is sometimes framed as a concern that the vague law delegates this power to the courts.<sup>260</sup> But, as Justice Gorsuch recently explained, the worry is not “only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions.”<sup>261</sup>

The charging power that prosecutors wield under expansive criminal codes, overlapping statutes, and broadly worded statutes raises similar concerns as the delegation of rulemaking power.<sup>262</sup> Just like delegations of rulemaking power, implicit delegations through expansions of the criminal code undermine accountability. When Congress sets criminal policy through statutes, it bears responsibility for its decisions. Voters know to blame them for unpopular laws. But when Congress lets the executive set the “real” criminal law, responsibility is shared between Congress and the executive, leaving voters uncertain whether to blame Congress or the executive for unpopular decisions.<sup>263</sup> Moreover, none of

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statute “proscribe[d] a wider range of offensive conduct . . . [it] would raise the due process concerns underlying the vagueness doctrine”).

<sup>259</sup> See *Dimaya*, 138 S. Ct. at 1212 (stating that the 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”); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92 (1921) (noting that standardless statutes “delegate legislative power”); see also Goldsmith, *supra* note 14, at 284–86 (collecting cases on the delegation issue and noting that the principle “that the separation of powers must be maintained . . . stood for decades as the second requirement of vagueness analysis”). But see *Dimaya*, 138 S. Ct. at 1248 (Thomas, J., dissenting) (“[T]his Court's precedents have occasionally described the vagueness doctrine in terms of nondelegation. But they have not been consistent on this front.” (citations omitted)).

<sup>260</sup> See, e.g., *United States v. Reese*, 92 U.S. 214, 221 (1876) (stating that it would be dangerous if the legislature were to write a statute that “set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large,” because it “would, to some extent, substitute the judicial for the legislative department of the government”).

<sup>261</sup> *Dimaya*, 138 S. Ct. at 1227–28 (Gorsuch, J., concurring in part and concurring in the judgment).

<sup>262</sup> This expansive charging power also raises many of the same issues as unconstitutionally vague laws. See generally Hessick, *supra* note 14.

<sup>263</sup> For example, when charges were filed by federal prosecutors under the notoriously broad Computer Fraud and Abuse Act, Members of Congress criticized prosecutors for using the discretion given to them by the Act to bring charges in that case. Brendan Sasso & Jennifer Martinez, *Lawmakers Slam DOJ Prosecution of Swartz as ‘Ridiculous, Absurd,’* *The Hill*

the executive officials who exercise the charging power is directly elected but instead work in the Department of Justice and other federal agencies.<sup>264</sup> Voters accordingly cannot readily hold them accountable for unpopular decisions.

Broad executive charging powers similarly undercut notice principles. Executive officials need not—and ordinarily do not—publicize their enforcement criteria or other information about how they exercise their charging power.<sup>265</sup> And, on those rare occasions when they do share their enforcement criteria with the public, prosecutors insist that the criteria do not limit their charging power; they reserve the right to bring charges even when those criteria are not met.<sup>266</sup> As a result, a defendant whose conduct falls outside of that interpretation has no recourse if a prosecutor decides to abandon those criteria in her particular case.

Given that the executive already has this broad charging discretion, one might argue that there is no reason to prohibit delegations of rulemaking. Indeed, one might argue that delegating the power to make administrative crimes is, in some ways, preferable to implicit delegations expanding the charging power. Regulations must be published, but prosecutors have no obligation to publicize their charging policies or criteria for enforcing

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(Jan. 15, 2013, 10:52 PM), <https://thehill.com/policy/technology/277353-lawmakers-blast-trumped-up-doj-prosecution-of-internet-activist> [<https://perma.cc/NLB9-RJWJ>].

<sup>264</sup> United States Attorneys are nominated by the President and confirmed by the Senate, but they are never required to stand for elections themselves. 28 U.S.C. § 541. Moreover, most charging decisions are not made by these appointed prosecutors, but instead by the career Assistant United States Attorneys, who are highly insulated from public pressure. See Hessick, *supra* note 92, at 1003–04 (discussing the insulation of line prosecutors from democratic accountability and political pressure).

<sup>265</sup> See Carissa Byrne Hessick & F. Andrew Hessick, *The National Police Association is Throwing a Fit Over Prosecutorial Discretion*, *Slate* (Jan. 4, 2019, 12:55 PM), <https://slate.com/news-and-politics/2019/01/national-police-association-throwing-fit.html> [<https://perma.cc/8AZH-G9XB>] (“All prosecutors make decisions not to enforce laws. But most do not publicize those decisions.”).

<sup>266</sup> For example, when the Department of Justice was repeatedly asked to clarify whether it would pursue federal charges against individuals who used or sold marijuana in states that had repealed their marijuana laws, the Department of Justice made public a memorandum providing guidance to U.S. Attorneys. That memorandum set forth enforcement priorities in states that had repealed their marijuana prohibitions, and those priorities suggested that federal prosecutors would not target sellers or buyers that complied with relevant state regulations. But the memorandum also made clear that whatever enforcement priorities the government set, federal prosecutors retained the power to fully enforce federal marijuana law and individuals could not rely on the memorandum as a legal defense. See Memorandum, James M. Cole, Deputy Att’y Gen., *Guidance Regarding Federal Marijuana Enforcement* (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/3KJ7-R2R5>].

broad statutes. Moreover, the charging power arguably presents more opportunities for prosecutorial abuse than rulemaking. Charging decisions are retrospective. They charge individuals for alleged infractions that occurred in the past and accordingly cannot be undone. By contrast, rulemakings are prospective. They prescribe rules for future conduct and accordingly provide an opportunity for individuals to avoid breaking the law. In addition, charging decisions are tailored to individuals, while rulemakings tend to be generally applicable.<sup>267</sup>

But the discretion afforded by charging power under expansive criminal codes, overlapping statutes, and broadly worded statutes is an inevitable by-product of the “executive [p]ower” that is assigned to the President in Article II<sup>268</sup> and the President’s duty to “take Care that the Laws be faithfully executed.”<sup>269</sup> Deciding whom to charge and what charges to bring are quintessentially executive functions.<sup>270</sup> Even if Congress wrote precise laws, the executive would still make criminal

<sup>267</sup> To be sure, officials can make generalized policies about whether to bring particular types of charges. For example, an administration may adopt a policy against prosecuting the possession of marijuana. But many enforcement decisions do not rest on generalized policies; instead, they require case-by-case assessments and individualized judgment. The Department of Justice guidelines on when prosecutors ought to decline enforcement provides an example:

In determining whether a prosecution would serve a substantial federal interest, the attorney for the government should weigh all relevant considerations, including:

1. Federal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person’s culpability in connection with the offense;
5. The person’s history with respect to criminal activity;
6. The person’s willingness to cooperate in the investigation or prosecution of others;
7. The person’s personal circumstances;
8. The interests of any victims; and
9. The probable sentence or other consequences if the person is convicted.

U.S. Dep’t of Just., *Just. Manual* § 9-27.230 (2018), <https://www.justice.gov/jm/justice-manual> [<https://perma.cc/L2JK-3CWQ>].

<sup>268</sup> See U.S. Const. art. II, § 1. See generally Julian Davis Mortenson, *The Executive Power Clause*, 168 U. Pa. L. Rev. 1269 (2020) (presenting historical evidence to show that the original understanding of the term “executive power” meant the power to enforce and execute the laws).

<sup>269</sup> U.S. Const. art. II, § 3. See generally Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019) (presenting historical evidence to conclude that the Faithful Execution Clause imposed, *inter alia*, a duty of “diligent, careful, good faith, honest, and impartial execution of law”).

<sup>270</sup> See *supra* notes 235–36 and accompanying text.

policy by deciding whom to prosecute and what to charge. That is not to say that the courts are powerless to constrain the charging power,<sup>271</sup> nor is it to deny that Congress has gone too far in expanding the scope of executive power by enacting expansive criminal codes, overlapping statutes, and broadly worded statutes.<sup>272</sup> But rather the point is that, at least to some extent, policy judgments are inseparable from the charging power.

By contrast, the executive's power over criminal policy through explicit delegations of rulemaking authority is not inevitable. Regulating what is illegal and fixing the punishment for violations is traditionally a legislative function, not an executive function.<sup>273</sup> Congress need not rely on the executive to promulgate those regulations. It could enact a statute codifying any rule that the executive promulgated. In short, explicit rulemaking delegations are not necessary. What is more, they are far simpler both to identify and to prohibit.

#### IV. LIMITING CRIMINAL LAW DELEGATIONS

The special concerns raised by delegating the authority to make criminal laws suggest that the usual nondelegation doctrine should not apply in this context. Even if Congress ordinarily has broad leeway to authorize agencies to promulgate rules, tighter restrictions should apply to delegations authorizing agencies to make criminal rules.

The most straightforward way to implement a stricter nondelegation doctrine on criminal laws would be a prohibition on delegations involving criminal law.<sup>274</sup> Such a prohibition would avoid the liberty, accountability, and notice problems identified in Part II. And because it is a bright-line rule, it would be relatively easy to administer.

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<sup>271</sup> “Courts often justify their refusal to review prosecutorial discretion on the ground that separation-of-powers concerns prohibit such review . . . . But there is an enormous difference between, on the one hand, forcing a prosecutor to charge or stripping him of authority to charge and, on the other, regulating that authority . . . .” Vorenberg, *supra* note 250, at 1546.

<sup>272</sup> See Hessick, *supra* note 92, at 996–1022 (arguing that these conditions have resulted in a criminal justice system that “fails to vindicate rule-of-law values”).

<sup>273</sup> See *supra* notes 92–95 and accompanying text.

<sup>274</sup> Cases such as *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947), *United States v. Grimaud*, 220 U.S. 506, 522–23 (1911), and *Mistretta v. United States*, 488 U.S. 361, 396 (1989), suggest that such a delegation is always unconstitutional because it entails an impermissible delegation of legislative power; see also Fissell, *supra* note 9 (arguing that all crimes defined by administrative agencies are illegitimate).

One might object that prohibiting those delegations would cripple our government. The theory would be that the expansion of the economy, as well as advances in technology and science, have vastly expanded the topics that require national instead of regional regulation, and addressing all those areas far exceeds Congress's capacity. Therefore, Congress must be able to delegate to agencies the task of regulating those matters.<sup>275</sup> The *Gundy* plurality raised a variation of this argument, stating that "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional."<sup>276</sup>

But prohibiting criminal delegations would hardly have these dire consequences. Agencies could still promulgate civil and other administrative regulations to address social problems. Indeed, the vast majority of agency regulations are non-criminal.

One might argue that prohibiting criminal consequences for violations of agency regulations would not sufficiently prevent disfavored conduct. But that is hardly clear. For one thing, the government can discourage behavior without prohibiting it.<sup>277</sup> For another, even if the government wanted to prohibit certain behavior, it could enforce those prohibitions through civil penalties, rather than through criminal punishment. Criminal law is often thought to be necessary to prevent conduct because it provides additional deterrence through the social stigma of conviction<sup>278</sup> and because many criminal defendants are judgment proof.<sup>279</sup> But because agency regulations tend to focus on employers, industries, providers, and other sources of market failure,<sup>280</sup> many of the individuals and organizations subject to agency regulations are responsive to financial disincentives. As a result, the marginal deterrence that is achieved through criminal penalties, as opposed to civil sanctions, is likely to be small. In any event, even if there is some small number of situations where the sensible agency response to a problem would require

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<sup>275</sup> See supra note 221.

<sup>276</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (plurality opinion).

<sup>277</sup> See supra text accompanying notes 230–233.

<sup>278</sup> See, e.g., Murat C. Mungan & Jonathan Klick, Identifying Criminals' Risk Preferences, 91 *Ind. L.J.* 791, 808 (2016) (explaining how the stigma of conviction acts as a "fixed cost[]" in addition to the additional costs imposed by criminal punishment).

<sup>279</sup> See, e.g., Ben Depoorter & Sven Vanneste, Norms and Enforcement: The Case Against Copyright Litigation, 84 *Or. L. Rev.* 1127, 1160–61 (2005) (discussing proposals to punish copyright infringement with incarceration in order to "resolve[] the judgment-proof issue in cases of insolvency").

<sup>280</sup> W. Kip Viscusi, Joseph E. Harrington, Jr. & John M. Vernon, *Economics of Regulation and Antitrust* xvii (4th ed. 2005) (arguing that regulations aim to correct market failures).

criminal penalties, the agency could always draft the relevant legislation and send it to Congress so that it could be enacted.

Another objection is that it would be too complicated to administer a regime prohibiting criminal delegations because they are often intertwined with civil delegations. For example, some statutes authorizing agencies to promulgate regulations prescribe both civil and criminal penalties for violations. But this objection is overstated. One could easily handle those prohibitions on criminal delegations simply by prohibiting criminal punishments for violations of the regulations.

Although prohibiting all delegations involving criminal law would solve the problems we have identified, the Supreme Court is highly unlikely to do so. Even the *Gundy* dissenters did not suggest an outright prohibition on delegations.<sup>281</sup> Prohibiting (rather than restricting) delegations thus might simply be too radical of a break from current doctrine and practice.

A more moderate way to implement a stricter nondelegation doctrine would be to adopt a more robust version of the intelligible principle doctrine for criminal delegations.<sup>282</sup> Congress could authorize criminal rulemaking only if it sets forth detailed parameters to guide the executive's discretion in fashioning those rules. Under this approach, Congress could not simply direct agencies to promulgate regulations "in the public interest." Instead, Congress would have to provide more guidance, for example by specifying the kinds of public harms sought to be avoided. One could modulate the strength of this restriction by tailoring the amount of detail required in the statute.<sup>283</sup> This approach is

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<sup>281</sup> The *Gundy* dissenters would have permitted delegations that "fill up the details," depend on fact-finding, or pertain to matters already within the executive power. 139 S. Ct. at 2135–37 (Gorsuch, J., dissenting).

<sup>282</sup> The idea that a more robust intelligible principle is necessary was mentioned in *Touby v. United States*, 500 U.S. 160, 165–66 (1991). See also Alexander, *supra* note 9 (arguing that courts should consider, *de novo*, whether a particular rule falls within the congressional delegation to the agency). Another option would be to require statutes delegating the power to promulgate criminal rules to include particular principles that the agencies must consider. For example, one might require the agency to consider the retributivist and utilitarian reasons for promulgating those rules.

<sup>283</sup> One leery of criminal delegations could require significant detail in the statute, leaving to the agency the relatively minor task of filling in the minutia. That person might not uphold a statute criminalizing, for example, the use of service elevators that violate OSHA safety regulations aimed at "protecting the public." But he might uphold a different statute that specified the ways in which an elevator might be unsafe—for example, if the statute made it a crime to load a service elevator above its carrying capacity in violation of OSHA regulations,

akin to what Justice Gorsuch suggested in his *Gundy* dissent—namely that “Congress can enlist considerable assistance from the executive branch in filling up details,” but that Congress itself must articulate the controlling policy objectives.<sup>284</sup>

This weaker restriction has several significant drawbacks. First, like the intelligible principle doctrine itself, the test would be unmoored from the Constitution. The intelligible principle doctrine rests on the idea that lawmaking is legislative if it involves unconstrained discretion, but lawmaking is executive if it involves constrained discretion. Nothing in the Constitution supports that distinction. And certainly, nothing in the Constitution suggests that greater constraint on discretion is necessary to convert criminal legislation into the exercise of executive power.

Second, a heightened intelligible principle test would maintain the current friction between the nondelegation doctrine and the vagueness doctrine.<sup>285</sup> Unless the additional guidance provided by Congress to the agency is sufficient to give the public notice of what conduct will be prohibited, the “law” that would be used for vagueness challenges would have to be the regulation, rather than the statute. And that is inconsistent with the theory underlying the modern nondelegation doctrine that “the law” is the statute which refers to agency regulations, not the regulations themselves.<sup>286</sup>

Third, a more robust intelligible principle doctrine would be both difficult to administer and unpredictable. The Court would have to engage in the difficult task of deciding how much guidance is necessary. Even more difficult, the Court would have to articulate that requirement in a way that Congress and other courts can understand and apply. Limitations on language, combined with the variety of different types of circumstances covered by criminal statutes that Congress may enact, make this task virtually impossible. Indeed, it is likely for precisely these reasons that the Court has defanged the current intelligible principle doctrine. By contrast, an absolute prohibition would provide a clear rule.

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and the statute specified various objective factors that OSHA had to consider in assessing that capacity.

<sup>284</sup> *Gundy*, 139 S. Ct. at 2148 (Gorsuch, J., dissenting); see also *id.* at 2136 (stating that this was the approach endorsed by the Supreme Court in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825)).

<sup>285</sup> See *supra* notes 183–93 and accompanying text.

<sup>286</sup> See *supra* notes 15, 183–87 and accompanying text.

Congress would simply be forbidden from delegating criminal rulemaking power.

There is, however, a different approach to delegation and criminal laws—namely, applying the void for vagueness doctrine, rather than the intelligible principle doctrine, to congressional statutes that delegate criminal rulemaking authority to the executive. This approach has the virtue of allowing the Court to treat criminal law delegations differently, while doing minimal violence to existing doctrine. It would retain the current justification for permitting delegations, while continuing to respect the special restrictions that the Constitution and related doctrines place on criminal statutes. The current justification for the nondelegation doctrine is that the law criminalizing behavior is the statute which permits agency regulations, not the regulations themselves.<sup>287</sup> But, as explained above, if the relevant law is the statute, rather than the regulations, many delegating statutes are likely unconstitutionally vague because they do not provide notice of what is illegal and legal.<sup>288</sup> Delegating statutes only provide notice that someone else will determine what is illegal and legal and the very broad principles, such as the public interest, that will be used in making that determination.<sup>289</sup>

To be sure, using the vagueness doctrine to police criminal law delegations is not a perfect solution. The vagueness doctrine may not necessarily give clear guidance to Congress about how precise their delegating statutes must be. Indeed, the vagueness doctrine has long drawn criticism for failing to provide clear guidance to lawmakers about how precise a law must be in order to satisfy due process.<sup>290</sup> As a result, the Court appears to have been inconsistent in its decisions about whether statutory language is or is not unconstitutionally vague.<sup>291</sup>

Nor would applying the vagueness doctrine require great specificity in delegating statutes. The Supreme Court often permits a significant amount of imprecision in criminal statutes without declaring those statutes unconstitutionally vague. For example, many statutes criminalize certain conduct only if it creates an “unreasonable risk” or a “substantial

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<sup>287</sup> See *id.*

<sup>288</sup> See *supra* text accompanying notes 188–192.

<sup>289</sup> See *supra* note 192 and accompanying text.

<sup>290</sup> See, e.g., *Winters v. New York*, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting) (“‘[I]ndefiniteness’ is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept.”).

<sup>291</sup> See Hessick & Kennedy, *supra* note 87, at 371–72 (contrasting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) with *Nash v. United States*, 229 U.S. 373 (1913)).

risk.”<sup>292</sup> But what distinguishes a reasonable risk or an insubstantial risk from an unreasonable or a substantial risk? The answer to that question probably changes from person to person. And so criminal laws that use such terms require people to guess whether prosecutors or jurors will think about the reasonableness of a risk they took or how substantial the risk was.<sup>293</sup> Yet the Supreme Court confirmed as recently as 2015 that such laws are constitutional.<sup>294</sup>

Despite these caveats, subjecting criminal law delegations to the vagueness doctrine is attractive because it would impose at least some constraints on criminal delegations. In particular, it would ensure more notice for the public, make Congress more accountable for criminalization decisions, and decrease the amount of and the speed at which new criminal prohibitions are adopted. And although these constraints might not be particularly robust, the imprecision permitted under the vagueness doctrine may actually be considered a virtue rather than a vice—at least by some. And, in any event, any weakness or inconsistency in the vagueness test are problems with the vagueness doctrine itself; they are not unique to using the doctrine to police criminal law delegations.

Establishing that tighter restrictions ought to apply to the delegation of criminal rulemaking authority is merely the beginning of the conversation. Even if the Court were to agree to impose tighter restrictions, important questions would remain unanswered. For example, one would still have to determine to which criminal delegations those restrictions would apply. Delegations of criminal authority come in three potential forms. Statutes may authorize agencies to criminalize a legal violation, to dictate what conduct violates criminal laws, or to set the punishment for criminal violations. All three types of statutes raise concerns about liberty, accountability, and notice—as reflected by the Supreme Court’s periodic statements condemning each type of delegation. Arguments for heightened restrictions on delegation apply to all three types of statutes, but one can draw distinctions between them.

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<sup>292</sup> See Supplemental Brief for the United States at 1a-99a, *Johnson v. United States*, 576 U.S. 591 (2015) (No. 13-7120) (collecting federal and state statutes).

<sup>293</sup> *Nash*, 229 U.S. at 377 (“[T]he law is full of instances where a man’s fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.”).

<sup>294</sup> *Johnson*, 576 U.S. at 603–04.

In any event, we cannot begin to answer these questions until the Court finally grapples with the many reasons that criminal delegations ought to be treated differently than non-criminal delegations.

#### CONCLUSION

*Gundy* erred in applying the same nondelegation test to criminal law. Foundational principles of criminal law and administrative law tell us that delegation of criminal rulemaking power is more problematic than non-criminal delegations. And the theory that has been used to justify broad delegations is inconsistent with constitutional doctrine requiring more care in the enactment of criminal laws.

Indeed, it is hard to square the Supreme Court's failure to treat criminal delegations differently with its recent enthusiasm for striking down statutes as unconstitutionally vague.<sup>295</sup> It is not simply that the vagueness doctrine creates problems with the theory that the Court uses to justify its permissive nondelegation doctrine. In addition, the vagueness doctrine is designed to protect many of the same interests as a more robust nondelegation doctrine.<sup>296</sup> To be sure, the vagueness doctrine is largely couched in terms of the protection of individual rights, while the nondelegation doctrine is generally explained as a structural protection. Perhaps it is this different framing—individual rights versus structural protections—that has led most of the Justices to embrace only one of these two doctrines.<sup>297</sup>

Or perhaps the perceived stakes of delegation simply overshadow other doctrinal commitments. Some believe that broad delegations are

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<sup>295</sup> See *supra* notes 285–286 and accompanying text.

<sup>296</sup> See *supra* notes 106, 180–182 and accompanying text.

<sup>297</sup> For example, in *United States v. Davis*, Justices Breyer, Ginsburg, Kagan, and Sotomayor embraced the restrictions of the vagueness doctrine. 139 S. Ct. 2319, 2323 (2019). *Davis* was decided only 4 days after *Gundy*, in which those same Justices rejected limits on broad delegations. 139 S. Ct. 2116, 2121 (2019). Chief Justice Roberts, Justice Thomas, and Justice Alito dissented in *Davis*, rejecting the restrictions of the vagueness doctrine. 139 S. Ct. at 2336–38, 2355. But they embraced—or expressed willingness to embrace—stronger limits on congressional delegations in *Gundy*. 139 S. Ct. at 2130–31. Only Justice Gorsuch was willing to embrace both the vagueness doctrine in *Davis* and a stricter nondelegation doctrine in *Gundy*. *Id.* at 2131; *Davis*, 139 S. Ct. at 2323.

necessary in order to ensure a functioning modern government.<sup>298</sup> Others believe those delegations lead to excessive regulation.<sup>299</sup>

But the Justices ought to be able to find a middle ground when it comes to the delegation of criminal rulemaking authority. Those delegations are inconsistent with foundational criminal law principles, they present greater threats to the principles underlying the nondelegation doctrine, and they are not well supported by the ordinary arguments in favor of delegation. Consequently, the Court could easily draw a principled line that restrains criminal delegations while preserving permissive delegations in other administrative law contexts.

Criminal law delegations are different, and so we can—and should—treat them differently.

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<sup>298</sup> See, e.g., Stewart, *supra* note 221, at 341–42 (arguing that delegation is necessary to meet needs of modern society).

<sup>299</sup> Mila Sohoni, *The Idea of “Too Much Law,”* 80 *Fordham L. Rev.* 1585, 1612 (2012) (recounting the argument that “delegating lawmaking power to executive agencies[] enables the production of a surfeit of complex federal regulations that would not otherwise exist”).