

THE UPSIDE OF OVERBREADTH

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Overbreadth in criminal liability rules, especially in federal law, is abundant and much lamented. Overbreadth is avoidable if it results from normative mistakes about how much conduct to criminalize or from insufficient care to limit open texture in statutes. Social planners cannot so easily avoid overbreadth if they cannot reach behaviors for which criminalization is well justified without also reaching behaviors for which it is not. This mismatch problem is acute if persons engaging in properly criminalized behaviors deliberately alter their conduct to avoid punishment and have resources to devote to avoidance efforts. In response to such efforts, legal actors are apt to expand liability rules further, feeding a cycle of evasion and overbreadth that characterizes important areas of contemporary criminal law. Lawmakers cannot purge the resulting overbreadth from liability rules without producing underbreadth, at significant cost to regulatory objectives. I conclude that, in some areas of expanding substantive criminal law, answers to “overcriminalization” therefore lie not in reducing the scope of conduct rules but in greater reliance on mens rea doctrines, redesign of enforcement institutions, and modification of sentencing practices.

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INTRODUCTION

What could possibly be desirable about overbreadth in a liability rule? Seemingly nothing, if overbreadth is defined as a region in which a legal prohibition sanctions behavior outside the class of wrongdoing or harm-creation that the rule is designed to address. This point should have particular force in criminal law. With criminal prohibitions, not only might an overbroad law create worries about sunk costs in the form of wasteful overdeterrence, needless enforcement expenses, and the opportunity for discrimination and caprice by state actors, but it can also produce unjust treatment of individuals who are not blameworthy or have not had notice that a course of conduct might lead to deprivation of liberty. Constitutional law, through a cluster of legality-related doctrines, accordingly places special (though weakly enforced) constraints on the breadth of criminal liability rules.¹

I nonetheless will demonstrate that sometimes overbreadth in the definition of crimes should be welcomed, or at least seen as a necessary evil. The case for this assertion has been missed in the busy and productive discussion about the expansion of substantive criminal law that has occupied the attention of so many scholars in recent years.

Much has been written about the excessiveness in contemporary American criminal law.² Law and society, we have been told countless times, are greatly overcriminalized. A political system that is dysfunctional as measured by overall social welfare has produced criminal codes that, at least as written, stretch much too far into ordinary life activities that are neither harmful nor genuinely blameworthy. These codes are so deep, redundant, and larded with excessive penalties that they have effectively delegated to executive branch actors the power to determine the true content of the criminal law through enforcement practices, especially through the creation of a skewed market for plea bargains.³

These critical accounts target both rules that should never have been enacted and ones that are overbroad. For example, a rule that

¹ See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 79–81 (1968) (analyzing legality concept within scope of modern criminal law).

² See sources cited *infra* notes 15–16.

³ See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* (forthcoming 2009) (manuscript at 8–15), available at <http://ssrn.com/abstract=1114172> (critiquing substantive federal criminal law as producing excessive leverage for prosecutors in plea bargaining).

punishes possession of a small amount of heroin as a felony might overcriminalize by sanctioning a self-destructive vice that health and welfare policies might better address. A criminal prohibition on all heroin possession might also be an instance of overcriminalization if a prudent, more narrow rule would ban only cases of distribution above a certain weight threshold, leaving mere possession cases for noncriminal approaches. Both instances produce the same social harm by extending criminal sanctions beyond culpable actors who pose a genuine risk to others. And both may lack justifications sufficient to make these costs worth incurring.

Overbreadth, however, can diverge from the basic case of overcriminalization. Sometimes the social welfare inquiry is less straightforward than the question of whether a criminal prohibition's proponents have a convincing normative case for criminalizing a particular behavior. Instead, the inquiry may involve the question of whether the benefits of extending the sanction to behaviors carrying good justifications for punishment outweigh the costs of simultaneously extending the sanction to different behaviors that lack such justifications. For example, a rule prohibiting all heroin possession above a certain weight threshold might be justified, all things considered, even if a good argument for criminalization extends only to all instances of heroin selling—because the law cannot reach all dealing except by sanctioning possession above the threshold.

When are lawmakers most likely to encounter this form of overbreadth? To some extent, the problem arises every time an *ex ante* linguistic formulation runs out of precision in describing the cases to which it will apply in the unseen future. Ineradicable open texture in statutes, however, is not very interesting to a discussion of the problem of criminal law's expansion. There is no real controversy that open texture should be minimized *and* that some degree of open texture is necessary and acceptable. Modern criminal law has reached a reasonably settled conclusion that, in terms of rule-of-law values, open texture in statutes formulated *ex ante* is a preferable evil to a general license to the judiciary to make criminal law *ex post*.⁴

Normatively justified criminalization is more likely to generate overbreadth in more interesting and less tractable ways when it targets actors who adapt their behaviors to legal regimes. The dilemma of a criminal law being unable to reach its intended targets

⁴ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 3.01 (4th ed. 2006) (describing evolution of criminal law from judge-made common law to statutes); cf. Stephen J. Schulhofer, *Toward a Just and Rational Body of Substantive Criminal Law*, 5 OHIO ST. J. CRIM. L. 367, 367 (2008) (describing necessary conditions for adequate precision, fairness, effectiveness, and administrability in criminal prohibition).

without reaching unintended ones is especially acute when the government promulgating the rule and the targeted actor are in competition with each other. If an actor takes steps to thwart the state from applying a rule to the actor, the state may face a choice of either abandoning pursuit of the actor or expanding the rule to reverse the effects of the actor's thwarting behavior, producing overbreadth in the rule. Or, thinking ahead a move or more, the state may prefer in the first instance to choose a broad prohibition that is less easily avoided.

For example, suppose heroin distribution networks have organized themselves to make it unlikely that the state will apprehend any member of the network actually engaged in dealing, or even possessing, more than a small amount of heroin. In its effort to punish heroin dealing given such conditions, the state might choose a rule that sanctions even low-quantity possession. This prevents the dealing network from avoiding sanction through its enterprise structure, but it risks criminalizing behavior that is better left to health and welfare services.⁵

This dynamic can be stated in terms of a basic economic model of behavior regulation in which deterrence is a function of expected sanctions, which are on-the-books sanctions discounted by the probability of their imposition.⁶ As actors who desire to engage in law-violating behaviors invest resources to drive down the probability of sanctioning, the state naturally seeks means to push that probability back up in order to maintain expected sanctions at levels believed sufficient to deter.⁷ When on-the-books sanctions are already extremely high, as is true for most serious crimes, the state must look beyond enhancing punishment levels. Policing to raise probability of sanctioning is expensive—past a point, prohibitively so. Tailoring of procedural rules is restricted by society's commitment to equality of treatment by the law and the courts.⁸ Legal actors thus will tend to expand substantive law in order to facilitate imposition of liability where actors' efforts to structure their behavior to evade liability would otherwise impede sanctioning.

Discussions of overcriminalization have largely omitted this problem. With its heavy and often trenchant focus on the political

⁵ Of course, it will not always be easy in practice to distinguish evasion from deterrence. Those possessing small amounts of heroin will not self-identify as having been deterred by the dealing prohibition or having organized themselves to circumvent it. The overbreadth problem thus arises in both law design and enforcement.

⁶ See *infra* note 45 for discussion of the basic deterrence model.

⁷ The same is true if incapacitation—that is, a hundred-percent probability of sanction—is the state's goal.

⁸ See *infra* note 43 and accompanying text.

process driving criminal law and its enforcement, the literature has neglected a key dynamic actor in the legal system: the criminal.⁹ There is little harm in this neglect if it is roughly accurate to think of this actor as a static player whose behavior is the product of fixed, preexisting preferences and who is merely a recipient of expected legal sanctions determined by the state. Such a model holds in many instances and may be especially accurate for the kinds of less dangerous or blameworthy behaviors to which overcriminalized law is often applied.¹⁰ But if the criminal actor is resourceful and strategic—which often means the actor is particularly threatening and blameworthy—the failure to focus on the dynamism of the regulated actor can be a significant mistake.

The objective of this Article is to call attention to the relationship between the dynamic violator of the law and the development and management of overbreadth in criminal prohibitions. My positive ambition is to establish that some overbreadth—including in some criminal prohibitions that are often central to accounts of overcriminalization—is the product of implementation problems in behavior regulation, rather than first-order mistakes about whether to criminalize particular conduct. My normative ambition is to begin the quite different assessment that must be performed in such an instance of overbreadth: consideration not of whether society should criminalize a particular behavior but of whether the benefits of maintaining a legal regime's effectiveness in controlling a behavior that should be criminalized are outweighed by the costs of the regime's necessary and simultaneous application to behaviors that should not be.¹¹ Federal criminal law is the best vehicle for conducting such an inquiry because it is both full of overbreadth and commonly utilized to sanction sophisticated, resourceful, and harmful actors.¹²

⁹ I hasten to add that the literature has not neglected this person when discussing him or her as a prisoner. Perhaps the literature's chief concern has been the production of too many such persons and the social and individual costs of that process. But the focus has principally been on a person who is a *product* of the legal process, rather than on a person whose behavior supplies a dynamic *input* to that process.

¹⁰ For examples, see *infra* notes 23–26 and accompanying text.

¹¹ I thus mean to exclude from this inquiry situations in which it may be sufficient for society to rely on civil sanctions to achieve its objectives, or at least to rely first on civil sanctions to specify prohibited behaviors. Situations in which the civil sanction approach is not available include wrongs for which such sanctions do not deliver adequate desert, offenders whose relative insolvency makes such sanctions ineffective, and behaviors that adapt so well or so quickly that to specify wrongs “first” with civil liability is to specify them only with civil liability.

¹² Although I do not worry as much as some others that active criminal enforcement in federal court undesirably tilts the balance of governance from state to federal systems, I do not mean to enter into that discussion in this Article. I highlight the federal criminal jus-

Society has several choices in responding to the type of overbreadth I have described. One is to accept that the behavior in question cannot be regulated effectively without undue cost—that is, to choose underbreadth rather than overbreadth. Underbreadth is not acceptable if the behavior is particularly harmful, especially if there might be alternatives to such a trade. Another option is to hope that enforcers will not apply an overbroad prohibition to undesired targets that fall in the statute's region of overbreadth. This is essentially the compromise with overbreadth that the existing criminal justice system has reached. There is some appeal in this approach, including that it has worked better than one might have expected.¹³ But it would be a mistake to ignore its substantial costs, most importantly the agency costs¹⁴ that arise when broad prohibitions confer wide authority on prosecutors to use their charging decisions and plea bargaining practices to determine the true content of the criminal law.

Social planners should therefore explore ways to control those agency costs other than by narrowing liability rules at the expense of being unable to sanction harmful behaviors. I will argue that there are a number of alternatives, including alteration of mens rea doctrines in liability rules, institutional redesign within the executive branch, and exploitation of the sentencing process.

If I succeed in persuading readers that some instances of overbreadth in criminal law are unavoidable—even desirable—my case should lend support to arguments that the problem of expanding prosecutorial discretion in American criminal law demands greater attention and creativity as a matter of scholarly inquiry and law reform. Greater and wiser controls on prosecutorial decisionmaking are not simply a second-best alternative to what many have concluded is a hopeless quest to convince legislatures to narrow criminal codes. They are a necessary and desirable feature of a criminal justice system that successfully sanctions behaviors that most demand sanctioning. The coin of the rule of law has two sides. The more familiar one is stamped with the guarantee that the individual will be protected from subjection to arbitrary and unjust state power—a principle that functions, among other things, as a constraint on the scope of liability

tice system largely for empirical reasons: Institutionally and legally, it is structured in ways that make the dynamics that interest me most salient.

¹³ By this assertion I mean only that political support for the criminal law shows no signs of collapsing, even though one might have expected the vastly overreaching scope that its critics have described eventually to destroy such support.

¹⁴ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 14.1 (7th ed. 2007) (describing agency cost phenomenon in terms of theory of firm, whereby managers to whom operation of firm is delegated by owners may stray from pursuing interests of firm's owners).

rules. The other bears the pledge that the individual will not disproportionately shoulder the costs of submission to social constraints while others are permitted to operate free of those constraints without consequence—an idea that sometimes demands greater breadth in liability rules.

In Part I of this Article, I will supply a theoretical account, illustrated with examples, of the competitive dynamic between regulator and regulated actor that can produce the form of overbreadth I have described. In Part II, I will show how this dynamic has influenced the development of federal criminal law in four important bodies of doctrine. In Part III, I will begin to analyze how best to control the costs of potentially desirable overbreadth.

I

OVERBREADTH IN THEORY

The phenomena of overcriminalization and overbreadth in liability rules, though they sometimes overlap, are distinct. I will distinguish these two concepts and explain the particular form of overbreadth that follows from efforts to sanction behaviors that society cannot reach except with liability rules that overreach their targets. I will further explain how efforts by regulated actors to avoid liability rules aggravate this form of overbreadth.

A. *Overcriminalization*

One might charge a lawmaker with producing an overbroad criminal prohibition by saying the law was designed to cover conduct for which there is not a good case for sanction. The lawmaker achieved what she set out to accomplish in enacting the law, but she acted on the basis of a judgment with which the critic disagrees about the desirability or defensibility of deterring or punishing a particular behavior.¹⁵

Criminal law, especially federal criminal law, has been under siege for more than a decade (and under fire for longer) by claims in this vein.¹⁶ The academic consensus is that federal criminal law—by

¹⁵ For an effort to develop a general rather than offense-specific theory of how contemporary law is overcriminalized, see generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

¹⁶ The voluminous literature concerning the overcriminalization and federalization of criminal law includes, among many sources: JAMES A. STRAZZELLA, AM. BAR ASS'N, *THE FEDERALIZATION OF CRIMINAL LAW* (1998); John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 *TEMP. L. REV.* 673 (1999); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 *ANNALS AM. ACAD. POL. & SOC. SCI.* 39 (1996); Sara Sun Beale, *Too Many and Yet Too Few: New Principles To Define the Proper Limits for Federal Criminal Jurisdiction*, 46 *HASTINGS L.J.* 979 (1995); Sara Sun

virtue of the huge array of its statutes and the highly open-textured nature of many of its prohibitions—includes too many offenses, especially too many trivial ones, and covers too many people within the scope of its sanctions. The criminal law of the states has also been charged with being bloated and rapacious,¹⁷ although there the consensus may be weaker.¹⁸

The explanation for the prevalence of such errors, at the federal level at least, tends to take the following form:¹⁹ Federal law criminalizes people and conduct that good social policy would not criminalize because such law is the product of a poorly functioning political system. America's punitive culture expects criminal law to remedy each new social problem. The public rewards legislators when they vote for, and punishes legislators when they vote against, virtually anything that is perceived or marketed as tough on crime.²⁰ The recipients of the government's punitive measures, having been branded criminal by definition, lack political influence and so cannot resist this pressure.

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 (1997) [hereinafter Beale, *What's Law Got To Do with It?*]; Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261 (2003); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005); Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643 (2006); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633 (2005); Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15 (1996). A precursor to much of this literature is Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963).

¹⁷ See Robinson & Cahill, *supra* note 16, at 635–44 (demonstrating “degradation” of state criminal codes by highlighting experience of Illinois).

¹⁸ As Darryl Brown shows in a study of criminal lawmaking at the state level, the overcriminalization story is more accurate about the federal system than state systems. See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 234–49 (2007) (providing examples of state decriminalization and state legislative refusals to enact new criminal statutes and arguing that breadth of state criminal codes was greater in early twentieth century).

¹⁹ This is a simplification of claims made in works such as Beale, *What's Law Got To Do with It?*, *supra* note 16, at 40–44, and Stuntz, *supra* note 16, at 529–68.

²⁰ For studies of the sources and structure of this complex punitive culture, see generally DAVID GARLAND, *THE CULTURE OF CONTROL* (2001), and JONATHAN SIMON, *GOVERNING THROUGH CRIME* (2007).

Nobody with power has an incentive to counter these pressures. Executive branch actors continually press legislators to expand enforcement powers to increase their ability to process cases easily and at low cost (primarily through plea bargaining), and perhaps to bring and win splashy cases that help actors secure lucrative private-sector employment.²¹ Legislators oblige because they fear being seen as impeding executive branch enforcement efforts, and they face little or no cost in acquiescing to executive branch demands. To boot, governments save money by broadening liability rules because such rules increase defendants' incentives to accept plea bargains that save prosecutors from expensive litigation of procedural rights, especially those that inhere at trial.²²

Congress is plainly subject to this criticism when, for example, it responds to a national panic over carjackings by creating a new federal crime that mostly duplicates state-law crimes;²³ or when, in an effort to be seen as addressing the epidemic of domestic violence, it makes it a serious federal felony for a person subject to a restraining order to possess a gun;²⁴ or when it attempts to put sharper teeth in the efforts of the administrative state by making it a federal felony to utter a false statement in any of dozens of regulatory contexts, some quite trivial.²⁵ I need not display the rogues' gallery of inadvisable and sometimes silly federal crimes that the overcriminalization literature has documented.²⁶

²¹ See Stuntz, *supra* note 16, at 533–39, 542–46 (describing incentives for prosecutors to lobby legislators and highlighting special case of federal prosecutors who desire broad liability rules that enable them to target high-profile cases).

²² See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 56 (1997) (describing incentives of legislatures to broaden criminal prohibitions in order to reduce litigation costs). Stuntz also notes that broad liability rules are often found in areas like white-collar crime and public corruption that involve offenders who tend to be well-off and thus expensive to prosecute. *Id.* at 56–58, 66.

²³ 18 U.S.C. § 2119 (2000).

²⁴ 18 U.S.C. § 922(g)(8) (2000).

²⁵ See, e.g., 7 U.S.C. § 6519(b) (2000) (establishing as felony making of false statement to certain government officials in sale or labeling of organic foods).

²⁶ See, e.g., Stuntz, *supra* note 16, at 531–33 (describing actual and proposed federal prohibitions on carjacking, “white slave” trafficking, domestic violence, and hate crimes, all of which seek to regulate behavior already subject to state criminal law). Many of these forms of excess in criminal codes have a negligible impact on caseloads in the courts. See HUSAK, *supra* note 15, at 35 (“[M]ost of these laws, however amusing, are rarely enforced and certainly cannot be blamed for causing the massive increase in punishment throughout the United States today.”); Brown, *supra* note 18, at 272–73 (observing in overview of state criminal systems that “most prosecutions occur under a fairly small set of statutes”). In 2000, approximately 25,000 persons were prosecuted in federal court for drug offenses, approximately 6000 for firearms offenses, approximately 4500 for fraud crimes, and approximately 2000 for offenses involving extortion, robbery, money laundering, and rack-

The costs of such ill-advised lawmaking exceed the waste of public resources. Since at least the 1950s, scholars have worried that expanding the universe of behaviors covered by the criminal law could render impotent the very social mechanism that distinguishes criminal sanctioning from civil penalties, and that some argue defines it: its condemnatory function.²⁷ Whether these warnings have proved prescient, and if not, why not, is an interesting and underexplored empirical issue. The concern continues to be taken seriously, however, and rightly so.²⁸

Overextension of criminal sanctions can have more easily observed effects that are plenty worrisome. Valuable social activities may be wastefully deterred, either because the law clearly prohibits an activity that is perfectly welcome—or that should be allowed if the actor is willing to pay some cost—or because the law is so broad that it makes actors overly risk-averse in their behavioral decisions.²⁹ Broad criminal prohibitions may also produce cases of injustice, especially

eteering; only about 150 were prosecuted for carjacking, about 500 for uttering false statements in federal matters, and about 20 for interstate domestic violence—to take just three offenses often described as needlessly criminalized or inappropriately made subject to federal jurisdiction. These rough data were obtained using the search function available on the website of the Bureau of Justice Statistics, Federal Justice Statistics Resource Center, <http://fjsrc.urban.org/index.cfm> (last visited Sept. 6, 2008) (click on “U.S. Criminal Code” link on toolbar and input section numbers for those statutes most commonly used to prosecute various categories of offenses: 15 U.S.C. § 78j(b) (fraud); 18 U.S.C. §§ 922, 924 (firearms); 18 U.S.C. § 1001 (false statements); 18 U.S.C. §§ 1028–1031, 1341–1348 (fraud); 18 U.S.C. § 1951 (robbery, extortion); 18 U.S.C. § 1952 (racketeering); 18 U.S.C. §§ 1956, 1957 (money laundering); 18 U.S.C. § 1959 (racketeering); 18 U.S.C. §§ 1961–1963 (racketeering); 18 U.S.C. § 2119 (carjacking); 18 U.S.C. §§ 2261, 2262 (domestic violence); 21 U.S.C. §§ 841, 846, 848, 960, 963 (drug offenses); and 26 U.S.C. §§ 5861, 5871 (firearms)).

²⁷ Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 404 (1958); Kadish, *supra* note 16, at 437.

²⁸ See, e.g., Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, *LAW & CONTEMP. PROBS.*, Summer 1997, at 23, 44–52 (discussing moral function of criminal punishment and applying stigma theory of criminal law to corporate misconduct).

²⁹ Of course, it is not self-evident that a prohibition criminalizes “blameless” behavior in areas such as fraud or firearms offenses that shift along fluid boundaries of social condemnation and evolving norms. Even seemingly trivial regulatory offenses can turn out to have normative underpinnings. See generally Stuart P. Green, *Why It’s a Crime To Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 *EMORY L.J.* 1533 (1997) (developing normative defense of criminalizing some regulatory violations). If one were to assert that the correct baseline for appropriate criminal sanction is the “traditional” criminal law, one would have to confront the possibility that “traditional” substantive criminal law might never have existed in the narrower form imagined. See Brown, *supra* note 18, at 233–49 (analyzing evolution of early-twentieth-century and modern substantive criminal law and suggesting overall trend has been toward contraction of criminal law’s scope); cf. Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 *EMORY L.J.* 1, 21–91 (1996) (mounting historical argument that Framers’ conception of proper scope of federal criminal law was much broader than many modern accounts of original intent have contended).

when they lead to deprivation of liberty and not just assets. People may find themselves punished even though they could not have reasonably expected their behavior to implicate the criminal law, and they may become victims of enforcers using the space within expansive liability rules to select persons for punishment on discriminatory or capricious grounds.

B. Overbreadth

Beyond the basic problem of overcriminalization due to normative error and political pressure, there are several other ways in which a lawmaker might produce an overbroad criminal prohibition. For example, announcing that sanctions may apply not only to undesirable behaviors but also to behaviors akin or proximate to undesirable ones pushes actors back from the boundaries of the law, along the knife-edge of which policing is difficult, and many cases of undesirable conduct are likely to go unsanctioned. Sometimes lawmakers mean to overdeter. An example might be a strict-liability prohibition against all possession of a dangerous item.³⁰

Alternatively, the limits of a lawmaker's foresight and linguistic tools might prevent her from stating in an *ex ante* formulation exactly all of the undesirable conduct she wishes to sanction.³¹ To meet future unseen cases and to speak in general terms, she cannot avoid building vagueness and open texture into her liability rule.³² This practice inevitably results in overbroad sanctioning when the pliable liability rule is applied to behaviors that meet its terms but do not have those undesirable features that motivated the lawmaker to create the prohibition in the first place.

³⁰ See, e.g., *United States v. Freed*, 401 U.S. 601, 607–10 (1971) (holding that statute imposed strict liability for all possession of hand grenades without regard to scienter). Dan Kahan argues that broad criminal liability rules can be characterized by a “prudence of obfuscation” that is designed to induce uncertainty and restraint among persons who seek to pursue undesirable behaviors within the literal terms of legal rules. Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 129 (1997).

³¹ H.L.A. HART, *THE CONCEPT OF LAW* 128 (2d ed. 1994).

³² See Friedrich Waismann, *Verifiability*, in *ESSAYS ON LOGIC AND LANGUAGE* 117, 120–24 (Antony Flew ed., 1951) (explaining distinction between open texture due to limits of knowledge and vagueness due to limited precision of language); see also FREDERICK SCHAUER, *PLAYING BY THE RULES* 31 (1991) (“The limits of time and understanding make it impossible to restrict our assessments of cause and effect, or our reports of empirical truth, to universally correct statements, and so we frequently employ generalizations that are only probabilistic.”); Stuntz, *supra* note 16, at 547–48 (discussing example of fraud statute designed to be broad enough to capture subtle frauds but resulting in overbreadth because it also covers “only marginally bad actors”).

Open texture is, to varying degrees, an unavoidable aspect of nearly all law. For example, a ban on possession of all firearms by convicted felons might be overbroad if the word “firearm” could be interpreted as including toy guns. But that is not an interesting form of overbreadth, at least not in terms of the contemporary social problem of criminal law’s expansion. Because of the importance of liberty interests at stake with criminal law, there is less tolerance at the margin for open texture than with rules of, for example, private law. But one could not seriously argue that open texture in criminal law is prohibited. Only with a highly abstract rendering of the legality principle that does not fit existing jurisprudence³³ could one support the claim that criminal statutes must not fail to answer questions about their application to future cases.

A more trenchant criticism of the firearm ban as overbroad would be that while many convicted felons are sufficiently dangerous people to be prevented from possessing guns, many others are not. But it might be the case that it is too difficult to specify *ex ante* which kinds of felons are the sufficiently dangerous ones. The most we might be able to say is that we want to convey *ex post* authority on a legal actor to apply the ban only to the felons that the actor determines, all things considered, to be dangerous.

To the extent that this problem exists, it is made much worse if the regulated actor has the ability and inclination to modify her behavior in the shadow of the legal rule.³⁴ Under what conditions does the regulated actor tend to increase pressure on a liability rule to expand to a state of overbreadth? A hypothetical may illustrate. Suppose that at time t_1 , society determines that it cannot tolerate infrequent but horrific maulings and killings of passersby and children by enraged pit bulls. It chooses to ban something like “knowing possession of a pit bull prone to attack humans” by sanctioning such possession with fines and, given the meager assets of many pit bull hobbyists, imprisonment. The ban does not work. Deadly pit bull attacks

³³ See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 195–201 (1985) (describing limited enforcement of legality-related doctrines); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345–46 (stating that rule of lenity is enforced much less strongly than many might believe given principle’s supposedly foundational quality).

³⁴ For this purpose, the felon gun ban no longer seems like a useful example. If we narrowed the ban to certain kinds of felonies, would we need to worry that a dangerous person inclined to commit felonies would shift the form of her prior violations to avoid the reach of the ban? Not unless we were genuinely hard-core believers in the logic of deterrence. See Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 181, 197–204 (2004) (presenting theory and evidence critiquing claim that shape of substantive criminal liability rules affects individuals’ decisions whether to violate law).

continue. Some of these attacks are a dog's first attack on a human, allowing even the hobbyists who can be shown to have trained their pit bulls to attack to claim that the training was aimed at other dogs and was not expected to cause human injury. Other hobbyists learn to train pit bulls in secret, leaving no evidence to prove these owners' knowledge of their dogs' violent tendencies, and they anonymously share training tips on the Internet.

At time t_2 , society concludes that the value of pit bull ownership under any circumstance is outweighed by the harm from pit bulls that attack. Seeing no alternative but to regulate more broadly than the ill at issue, lawmakers amend the ban to cover "knowing possession of a pit bull," defined as any animal with at least fifty percent pit bull lineage. With a few generations of breeding, or perhaps some genetic engineering, the hobbyists, and the breeders who profit from the hobbyists' avidness, develop a new dog that has less than fifty percent pit bull blood but is equally amenable to aggressiveness training. The attacks on humans continue.

At time t_3 , society faces a choice. It could try to update the legal regime to define the prohibited animal to meet the innovations of the hobbyists and breeders. Having seen what has occurred and having considered emerging breeding technologies, lawmakers might be pessimistic about this approach. Each update to the legal scheme may only lead to new innovations in breeding and training designed to produce equally harmful dogs that do not fit the law's definitions. The frequency of injurious and deadly attacks is not likely to fall. Society therefore chooses another course. It enacts a ban on "knowing possession of a dog of any breed or from any lineage, which breed or lineage has a history of attacking humans."³⁵

Now the law may have the attack-dog enthusiasts where it wants them: They must choose between abandoning their pursuit and proceeding at risk of heavy sanction. Yet the law is now overbroad. A few days after the new ban is enacted, a police officer whose supervisor chided her that morning for her low productivity arrests a visually impaired person walking along with a seeing-eye dog of a breed that prison officials use as an aggressive guard dog.

The law can be changed to include a safe harbor for service dogs, but doing so would not eliminate or even significantly reduce the problem of police and prosecutorial discretion. Thousands, perhaps millions, of innocuous pet owners are "technically"—that is, actually—in violation of the ban. The legislature passed the statute to

³⁵ See Kahan, *supra* note 30, at 137–40 (describing similar scenario involving efforts to alter chemical composition of illegal substances in order to avoid drug regulations).

ally enforcers' frustration at dealing with the elusive, violence-loving pit bull trainer. But the statute also covers the actor who gave no thought to—indeed had no interest in—structuring her activities or otherwise investing resources to avoid sanctioning. Only enforcement discretion remains to confine the ban to its intended target of owners of dogs likely to wound or kill humans.³⁶

This same dynamic can cause a criminal liability rule meant for “serious” cases to end up covering both serious cases and not-so-serious ones. Modifying the pit bull case, suppose that at time t_1 it is a felony punishable by fine to “knowingly keep a vicious dog.” Social consensus holds that there is no value in the freedom to possess vicious animals and that anyone who continues to do so in spite of the ban is a scofflaw. At time t_2 , in light of the fact that the law does not seem to be preventing attacks, lawmakers decide to punish more severely the keeping of a dog that is vicious toward humans. Again, lawmakers conclude that any ban that attempts to define this animal will be too vulnerable to evasion by the pit bull enthusiasts. So the legislature simply raises the penalty for “knowingly keeping a vicious dog” to up to ten years' imprisonment. Persons who keep dogs that are somewhat vicious but not interested in attacking humans are now eligible for hard time, whereas before they faced only a fine. Only enforcement discretion will determine whether the incarcerated population will include such persons or just the truly bloodthirsty pit bull experts.³⁷

³⁶ In his essential work on what he calls the “pathological politics” of overcriminalization, William Stuntz explains that if “a given crime is defined by elements ABC ” and “ A and B are easy to prove, but C is much harder,” then for a legislature, “[c]riminalizing AB , with the understanding that prosecutors will determine for themselves whether C is satisfied, raises the odds of conviction and reduces enforcement costs.” Stuntz, *supra* note 16, at 531. A lawmaker might have the motivation for omitting element C that Stuntz blames for pathology in criminal law: acceding to efforts of executive branch actors to hoard power and to make those actors' jobs easier, for fear of otherwise appearing soft on crime. *See id.* at 548–49 (describing risk legislators face of being blamed for failing to provide prosecutors with adequate legal tools to pursue culpable actors). But sometimes element C might be dropped because C appears very hard or even impossible to prove when the legislator, a court interpreting the statute, or a prosecutor enforcing the statute considers how offenders could change their behavior to escape sanction if proof of C were required. The same effects on trial rates, plea bargaining, and expanding enforcement discretion follow, but for different reasons and with different implications.

³⁷ This overbreadth in sanctioning—contrasted with overbreadth in criminalization—is at the root of arguments that the federalization of contemporary criminal law is a social ill. Leaving aside the abstract (and as yet unproven) claims that the federalization of criminal law endangers “our federalism,” the gist of these claims has been that current federal criminal law makes a “federal case”—that is, an especially serious one—out of too many cases that are not at all serious. Generally speaking, it is much easier for the prosecutor to obtain a longer sentence in federal than in state court. Clymer, *supra* note 16, at 674–75; Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 *CRIME &*

Because liability rules are not trans-substantive, legal systems are likely to resort to them first to deal with a particular class of regulated actors that proves difficult to sanction.³⁸ A fraud rule applies to all persons engaged in economic activity that falls within its definition but not to people engaged in narcotics distribution or bank robberies. A procedural or evidentiary rule applies to all persons investigated and prosecuted, whether engaged in fraud, narcotics distribution, bank robberies, or any other activity that violates any criminal liability rule.³⁹

For example, suppose that society perceived public corruption as inadequately punished and deterred, in part because many persons charged with corruption crimes were not convicted or, more plausibly, because prosecutors charged few such cases, believing convictions to be too difficult to secure. Suppose further that convictions were difficult to obtain in these cases, among other reasons, because criminal defendants were entitled to an instruction that proof beyond a reasonable doubt means “proof to a certainty”⁴⁰ and because the Constitution prevented placing limits on the amount of funds a wealthy defendant could expend on the assistance of counsel.⁴¹ Lawmakers could counteract at least some of this difficulty by broadly defining the offense as an act by any public official “injurious to the

JUST.: REV. RES. 377, 404–05 (Michael Tonry ed., 2006). But, as my doctrinal examples in Part II will show, some portion of what is called “overfederalization” is a byproduct of the state’s competition with resourceful actors rather than the fruit of misguided judgments about which behaviors to subject to the most serious forms of criminal process.

³⁸ Cf. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 801 (1999) (“While the political costs of narrowing the scope of substantive law appear to be prohibitive, the costs of proposals to restrict enforcer activities are not”); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 796 (2006) (suggesting that legislators have been more apt to expand procedural protections than to limit substantive law because procedural protections benefit innocent persons as well as those whose conduct is close to borderline of liability).

³⁹ Cf. Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1217–52 (2007) (examining interplay between evidentiary rules and substantive liability rules in criminal law in terms of net effects on deterrent and retributive objectives for punishment). Another reason the state might resort to altering liability rules would be limitations on its ability to regulate directly particular forms of sanction avoidance, such as noncreation of evidence or investment in litigation. See Jacob Nussim & Avraham Tabbach, *(Non)Regulable Avoidance and the Perils of Punishment* 8–9 (Bar-Ilan Univ. Pub. Law & Legal Theory, Working Paper No. 07-05, 2007), available at <http://ssrn.com/abstract=979363> (describing these limits).

⁴⁰ This is not the actual law. See, e.g., *United States v. Williams*, 20 F.3d 125, 129 & n.2 (5th Cir. 1994) (quoting and discussing recommended reasonable doubt instruction published by Federal Judicial Center).

⁴¹ This is more or less the actual law. See, e.g., *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989) (describing contours of Sixth Amendment right to spend money on one’s counsel of choice).

public interest.”⁴² It would be far easier to persuade the public and the courts to support and uphold a broadly defined ban on public corruption than, for example, to support and uphold a lowering of the prosecutor’s burden of proof in all criminal cases or a cap on the fees that could be paid to a criminal defense attorney.⁴³

Of course, when lawmakers expand the substantive criminal law, the distinction between overcriminalization and overbreadth is not always crisp and self-evident. This only aggravates the difficulty of overbreadth. The pit bull example is designed as a case in which overbreadth results even with clear social consensus about the need to punish the targeted behavior. If this aspect of the model is relaxed, cases arise that are not so easily sorted into the categories of overcriminalization and overbreadth.

Suppose there is clear social consensus that selling heroin should be a crime but no such consensus that using heroin should be criminalized. A statute prohibiting only distribution proves ineffective because dealers can manage not to be caught in the act of transferring the drugs. Legislators then broaden the law to criminalize all heroin possession. Is this a case of overbreadth because lawmakers concluded that they had to cover the users in order to get at the dealers? Or is it a case of overcriminalization, because lawmakers wanted to criminalize the users too, even though social consensus for doing so was lacking, and they saw the opportunity to smuggle in overcriminalization by calling it unavoidable overbreadth? Assuming there is some truth to both descriptions, the question is whether the genuine social benefits of the broader rule outweigh its residual downside costs that cannot be controlled except by narrowing the rule. As I will explain in Part III, this is the same normative evaluation that should be conducted in any case of overbreadth. This balance may come out differently than it would in a case of “pure” overbreadth like the pit bull example, but the form of inquiry should be the same.⁴⁴

⁴² William Stuntz similarly examines the interplay between law and exogenous forces by arguing that more robust doctrines of modern criminal procedure give defendants with resources tools to threaten costly litigation but do not afford equivalent leverage to poor defendants with resource constraints. Stuntz, *supra* note 22, at 56.

⁴³ In his provocative work attacking the rationality of our current system of proof and procedure for criminal cases, Larry Laudan has suggested, among other things, that it might make sense to vary rules of proof and procedure according to the type of crime being prosecuted, specifically depending on the difficulty of securing convictions. Larry Laudan, *The Social Contract and the Rules of Trial: Re-thinking Procedural Rules 42* (Feb. 25, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1075403>. Regardless of whether Laudan is persuasive, my point is that politics favors customizing liability rules.

⁴⁴ One might further argue that, at least when it comes to evaluating state action, we should care about effects, and not purposes. In other words, if social policy favors a

C. Evasion and Overbreadth

Existing accounts of substantive criminal law's expansion have largely missed the regulated actor's important role in the development of liability rules. An actor who wishes to engage in a prohibited activity will not conclude her efforts with a simple calculation of the expected sanction for that activity.⁴⁵ If she does not like the result of that calculation because it suggests that the activity is too costly, she may see whether she can reduce the expected sanction. Unless she has power in the political economy, she cannot change the sanction on the books. She must instead focus her efforts on reducing the probability of sanction. Here, she does have some control because it is she who designs and initiates the behaviors to which the state may later apply enforcement efforts. A rational lawmaker, faced with actors who engage in such efforts, will seek means to drive the probability of sanctioning back up by attempting to directly counteract actors' evasion efforts. One such means is to broaden liability rules.

In a utilitarian project of crime control, the probability of sanctioning looms very large for both regulators and regulated actors. Criminal violators are not risk-neutral. The consensus of criminolo-

broader prohibition, it is of no matter that a policymaker might have favored the broader prohibition for selfish or socially unwelcome reasons. See David Enoch, *Intending, Foreseeing, and the State*, 14 *LEGAL THEORY* (forthcoming 2008) (manuscript at 23–34), available at http://www.law.columbia.edu/null?exclusive=filemgr.download&file_id=13720 (raising doubts about viability of alleged moral distinction between intending and foreseeing result of one's actions, focusing on its viability as measure of state action).

⁴⁵ In the basic economic model of behavior regulation, deterrence fails when $b > p*s$: An individual will choose to violate the law when her expected benefit from the violation (b) exceeds her expected sanction, defined as the legal sanction (s) discounted by the probability of its imposition (p). See CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* 46 (David Young ed., 1986) (“In order for a penalty to achieve its objective, all that is required is that the harm of the punishment should exceed the benefit resulting from the crime.”); Jeremy Bentham, *Principles of Penal Law*, in 1 *THE WORKS OF JEREMY BENTHAM* 365, 396 (John Bowring ed., 1843) (“If the apparent magnitude, or rather value of that pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it.”); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. POL. ECON.* 169, 176–77 (1968) (claiming person will commit crime if its expected utility, including probability of punishment, exceeds utility of alternative activities). I omit a component that neoclassical modeling usually includes: the social cost of an offense as its net cost, accounting for both the offender's gain and society's loss. See, e.g., *id.* at 197 (“[T]he rich man's purchase [of a car] is equivalent to a ‘theft’ subsequently compensated by a ‘fine’ equal to the price of the car, while the poor man [who steals a car], in effect, goes to prison because he cannot pay this ‘fine.’”). I am not persuaded as a normative matter that this kind of calculation is justified. See Claire Finkelstein, *The Inefficiency of Mens Rea*, 88 *CAL. L. REV.* 895, 904 (2000) (arguing that deterrence of crime cannot be analyzed in purely economic terms without normative theory of which gains to offenders are legitimate versus illegitimate).

gists is that the probability of capture overshadows the possible extent of penalty in the mind of the violator.⁴⁶ And the crucial variable is offender perception, not actual probability of capture.⁴⁷ The rational offender will choose not to violate the law if what she expects to gain from the violation is outweighed by her ex ante prediction of an ex post penalty and the chance it will be imposed, in addition to the amount of delay she expects to enjoy before its imposition.⁴⁸ The probability of apprehension is a function of the offender's perception of the relationship between the total number of violations and the total number of cases of sanctioning in society at large.⁴⁹

If criminal violations are widespread, if most violators lack significant wealth, and if the state pursues policy objectives from an already highly punitive baseline, then the state is constrained in exploiting on-

⁴⁶ See, e.g., PANEL ON THE UNDERSTANDING AND CONTROL OF VIOLENT BEHAVIOR, NAT'L RESEARCH COUNCIL, UNDERSTANDING AND PREVENTING VIOLENCE 6 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993). Writing in 1968, Becker acknowledged this point but questioned whether the relation between the probability of sanction and the number of offenses had been adequately explained. See Becker, *supra* note 45, at 176.

⁴⁷ See Christine Jolls, *On Law Enforcement with Boundedly Rational Actors*, in THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR 268, 276–77 (Francesco Parisi & Vernon L. Smith eds., 2005) (explaining that availability bias suggests offenders will weigh salient cases of enforcement heavily in calculating probability of sanction); A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, in 1 HANDBOOK OF LAW AND ECONOMICS 403, 439 (A. Mitchell Polinsky & Steven Shavell eds., 2006) (noting that individuals' knowledge about probability of sanctions may be incomplete or erroneous for variety of reasons); see also Amitai Aviram, *Bias Arbitrage*, 64 WASH. & LEE L. REV. 789, 793–96 (2007) (exploring how lawmakers can exploit gaps between public perceptions of risk levels and true risk levels); Robinson & Darley, *supra* note 34, at 185 (noting problem for deterrence theory that offenders tend to underestimate probability that they, rather than others, will be caught).

⁴⁸ See BECCARIA, *supra* note 45, at 36–37 (arguing that closeness in time between punishment and crime will strengthen deterrent message of punishment); Robinson & Darley, *supra* note 34, at 193–95 (arguing that psychological studies involving dogs demonstrate that rapidity of drop-off in effects of punishment due to passage of time between transgression and punishment is dramatic and that studies involving humans demonstrate that future events are heavily discounted).

⁴⁹ See Rosa Ferrer, *Breaking the Law When Others Do: A Model of Law Enforcement with Neighborhood Externalities 2* (Mar. 17, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=958630> (discussing externality of congestion in enforcement and its effect on optimal enforcement policy); see also Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006) (explaining and critiquing hypothesis that punishing low-level disorder offenses reduces crime overall by counteracting perception that police are absent and probability of sanctioning is low). For an attempt to develop a formal model of how individuals acquire perceptions of the probability of sanction from their environments, see Raaj K. Sah, *Social Osmosis and Patterns of Crime*, 99 J. POL. ECON. 1272 (1991). For a critique of Becker and others for failing to account for how crime rates (denominators) affect probability of sanctioning, see Oren Bar-Gill & Alon Harel, *Crime Rates and Expected Sanctions: The Economics of Deterrence Revisited*, 30 J. LEGAL STUD. 485 (2001).

the-books sanctions and must use probability of sanctioning to enhance deterrence.⁵⁰ Continuing to increase legal sanctions in such conditions would lead to a system that is both Singaporean (where minor violations are punished with severe imprisonment terms, offending normative commitments) and ineffective (as the law supplies no incentive for violators, once violating, not to commit additional and more serious offenses).⁵¹ Norms and marginal deterrence demand proportionality in punishment.⁵²

Whether its objective is deterrence or incapacitation, then, the state faces pressure to concentrate its efforts on the probability of sanctioning. The more committed the offender—meaning the more a person’s criminal violations represent a profession rather than an impulsive diversion—the more valuable will be the offender’s investments in evading sanction. A continuous or repeat offender can be expected to calculate her probability of apprehension not as offense specific but in sum across all of her offenses and to predict that a single instance of apprehension may lead to lengthy or permanent incapacitation.⁵³ The hardest regulatory problems for the state come not from actors who invest in efforts to reduce the probability of sanctioning but from actors who both invest in such efforts and are determined to accomplish undesirable behaviors unless they are halted by

⁵⁰ Becker famously argued that the most efficient means for enhancing deterrence is to increase the on-the-books sanction for an offense and to do so in the form of a fine rather than imprisonment. Becker, *supra* note 45, at 193–98; *see also* A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89, 96–98 (1984) (explaining how offender wealth constrains maximal fine and how disutility imposed by imprisonment rises with wealth). As Steven Shavell has explained, enforcement efforts such as policing can be general rather than specific, meaning that the state decides how much enforcement to pursue not according to the specific activity sanctioned, but rather according to all crimes or a class of crimes such as “street crime.” *See generally* Steven Shavell, *Specific Versus General Enforcement of Law*, 99 J. POL. ECON. 1088 (1991).

⁵¹ Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide* (pt. 2), 37 COLUM. L. REV. 1261, 1265–66 (1937).

⁵² BECCARIA, *supra* note 45, at 14–16.

⁵³ *See* George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 530 (1970) (“If the probability of detection is p for one offense, it is $1 - (1 - p)^n$ for at least one conviction in n offenses, and this expression approaches unity as n becomes large.”); *cf.* Jolls, *supra* note 47, at 279 (noting that prospect theory suggests that, in decision whether to violate law, offenders weigh first increment of penalty more heavily than equal, additional increments of penalty). The relevance of sanction probability is not its effect on this actor’s calculation whether to violate (the actor is assumed to be nondeterrable) but its contribution to the social cost of imprisoning the actor: Incapacitation will be justified when the cost of imposing sanctions plus the cost of carrying them out are less than the social cost of the actor’s future offenses across the period of incapacitation. Polinsky & Shavell, *supra* note 47, at 443; Steven Shavell, *A Model of Optimal Incapacitation*, AM. ECON. REV., May 1987, at 107, 107–08 (Papers and Proceedings).

the state, as they are the actors who will invest most heavily and most continuously in such efforts.

Of course, the state may also benefit when actors face the necessity of investing in liability avoidance. If the costs of avoiding a liability rule are sufficiently great to cause an actor to refrain from a harmful activity, deterrence has succeeded. If some remaining actors nonetheless press forward with harmful activities in the face of such costs, it may not be worth deterring them if the marginal cost of competing with such actors (including costs associated with an overbroad liability rule) exceed the marginal costs of those actors' harmful activities. With any given criminal activity, it will be an empirical question whether the chase of the evasive actor continues, all things considered, to be worthwhile for the state. Social planners would need to know, among other things, the number of persons who continue to violate the law, the total costs of the harms that violators produce, and the costs associated with the number of persons who do not produce such harms but are nonetheless punished under the applicable overbroad prohibition. I will return to questions of net social costs in Part III. For the purposes of establishing a theoretical framework for the problem of overbreadth, one need only agree that there will be some circumstances in which the balance of costs favors determined pursuit of the determined violator.

Analysis of law enforcement following Bentham and Becker often proceeds as if the probability of sanctioning were a function of how much society chooses to expend on policing.⁵⁴ The matter is not so simple. Resources devoted to policing matter a lot, but so do many other things, including evidentiary and procedural rules and, central to my endeavor, both the contours of substantive liability rules and the resources (intellectual, financial, organizational, and so on) that offenders devote to preventing the imposition of sanctions.⁵⁵

The evasion problem, and its relationship to the development of liability rules, extends beyond efforts to avoid detection of criminal acts.⁵⁶ The phenomenon that, as Chris Sanchirico says, "violators

⁵⁴ See, e.g., Bar-Gill & Harel, *supra* note 49, at 495 ("The policy maker has two policy variables at her disposal: the level of investment in law enforcement, x , and the legal sanction, l .").

⁵⁵ Becker acknowledged this avenue of inquiry but did not pursue it. See Becker, *supra* note 45, at 195–96 (noting that offenders with higher income have incentive to spend resources on offense planning, legal counsel, litigation, bribery, and other efforts to reduce probability of imprisonment).

⁵⁶ Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331 (2006). Examining how sanctioning regimes generate incentives for violators to commit second-order, obstructive violations leads Sanchirico to conclude that the state could become caught in a recursive spiral with violators: The state must increase sanctions at ever-higher

themselves can affect the probability of detection,”⁵⁷ is more general than cover-ups and obstruction-of-justice offenses. On the offender’s side, the means available to evade sanctioning encompass the entire manner in which forward-thinking violators structure their conduct in the shadow of regulatory regimes. On the state’s side, the tools available to counteract such measures go beyond enhancement of penalties in cases involving additional obstructive violations to encompass the full regime of substantive and procedural law that controls the sanctioning process.⁵⁸

The actor seeks to accomplish a given objective in the manner that carries the lowest expected probability of sanction and thus the lowest expected sanction. The state tries to prevent the actor from accomplishing a socially undesirable objective by raising the probability of sanction to achieve deterrence or incapacitation. For both players, any available tool will do.⁵⁹ If the regulated actor seeks to avoid sanction by, for example, delegating to underlings conduct that comprises the actus reus of a particular offense, the state may respond by redefining the offense or by defining a new offense so that the targeted actor’s personal commission of the actus reus is no longer a requirement for imposition of liability.⁶⁰

orders to offset the manner in which sanctions at lower orders encourage offenders to engage in additional offenses, such as evidence destruction, designed to evade the imposition of sanctions. *Id.* at 1367–69; *see also* Arun S. Malik, *Avoidance, Screening and Optimum Enforcement*, 21 RAND J. ECON. 341, 343–44, 350–52 (1990) (treating individual’s expenditures on avoiding detection as negative input to individual’s expected utility from committing violation); Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 COLUM. L. REV. 569, 599–605 (2006) (arguing for offsetting evaders’ efforts to reduce probability of sanctioning with device that would increase sanctions for evasive methods that are more difficult for tax auditors to detect); Jacob Nussim & Avraham D. Tabbach, *Deterrence and Avoidance* 3, 25 (2005) (unpublished manuscript), *available at* <http://ssrn.com/abstract=844828> (noting that higher sanctions both increase marginal benefit of avoidance efforts and increase marginal cost of such efforts by increasing expected sanctions for avoidance).

⁵⁷ Sanchirico, *supra* note 56, at 1363.

⁵⁸ Indeed, enhancing sanctions for a particular offense based on obstructive conduct is not an available response if the offender’s evasion move is to change her behavior to avoid liability in the first place.

⁵⁹ Of course, one tool may be selected over another due to marginal costs. An ounce of wider liability rule may be chosen over an ounce of more policing because liability rules are cheaper by the ounce, even if policing yields more deterrence per ounce. *See* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2025, 2029–34 (2008) (arguing that, as evaluated by criterion of racially neutral impact, federal government should address modern urban violence by devoting greater resources to state and local policing, rather than by enhancing scope and punitiveness of prohibitions, and contending that lack of federal aid has led to increased reliance on imprisonment over policing).

⁶⁰ The product of many such moves in substantive and procedural law may be a system that strikes an acceptable balance on a net basis but that appears intellectually incoherent in many respects. *Cf.* LARRY LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY*

The regulated actor's efforts to lower the probability of sanction are largely specific: What she does to thwart the state's efforts lowers her probability of sanction but—except to the extent that her activities compel the state to spread its policing resources more thinly—not the probability that others will be sanctioned. The state's efforts to raise the probability of sanction are largely general: What it does to respond to the regulated actor raises everyone's probability of sanction, except to the extent that the state targets additional policing resources at a particular individual or entity. Under these conditions, overbreadth inevitably results from the generality and, importantly, the binding nature⁶¹ of legal rules articulated *ex ante*.⁶²

D. Institutional Actors and Overbreadth

There is a missing link in my explanation of how efforts to avoid the reach of liability rules can cause such rules to expand to a state of overbreadth. Who are the decisionmakers in the legal system who respond to such pressures by broadening liability rules? I might avoid this question by positing a rational policymaker with full knowledge and no susceptibility to agency costs in advancing social welfare. But this would not be realistic. And it would do a poor job of situating my argument within the literature on criminal law's expansion, which is intensely (and rightly) focused on the motives that legislators, prosecutors, and others have for growing the substantive criminal law.

There are good reasons to believe that the three legal actors with the most influence over the shape of criminal liability rules—legislators, prosecutors, and judges—have strong tendencies to broaden liability rules in response to the difficulty of reaching certain criminal behaviors. This does not mean that agency costs among such actors are insignificant. As I will argue in Part III, the problem of overbreadth should largely be conceived, as a normative matter, as a

IN LEGAL EPISTEMOLOGY (2006) (advancing severe critique of rationality of many evidentiary and procedural doctrines in American law of criminal justice).

⁶¹ See SCHAUER, *supra* note 32, at 49 (discussing how rules are “entrenched,” meaning that their commitments do not give way when confronted with specific cases that show those commitments to be overbroad or underbroad).

⁶² Neal Katyal has shown that sanctioning efforts directed at one offense may lead to increases in other offenses, as offenders substitute away from the more severely or more frequently penalized crime. Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2387 (1997). Individuals may respond to deterrence efforts not just by choosing to engage in alternative harmful activities but also by restructuring activities to counteract deterrence efforts. To return to the pit bull example, the hobbyists, in order to avoid punishment, have not substituted one kind of violation (ownership of innovative breeds) for another (pit bull ownership). Rather, they have reorganized their activity so that it cannot be punished as pit bull ownership, causing the state to reorganize its law so that the activity can be punished as ownership of aggressive dogs.

problem of managing agency costs. But failing to understand how legal actors can expand liability rules to a state of overbreadth even when they genuinely are striving to achieve social welfare objectives can lead to the mistake of thinking that troubling excess in liability rules could be eliminated simply by curtailing the ability of such actors to hoard power.

1. *Instrumental Agendas*

Legislators. Accounts of the political economy of federal criminal law often begin, sensibly, with the role of Congress in generating criminal statutes.⁶³ Such accounts usually assert that the legislative process produces prohibitions that are too numerous and too broad in the following way: Given the prevailing political culture in the United States, legislators fear losing votes for appearing “soft on crime.” Virtually no constituency or lobby, other than the occasional aggrieved legislator,⁶⁴ applies pressure for a law favoring the accused. Whether the impetus is public fretting over the crime “wave” of the moment (often driven by media treatment of crime⁶⁵) or executive branch actors seeking expansion of their own powers,⁶⁶ the response is the same: Vote yes. At least at the federal level, legislators do not think or care much about the after-effects of criminal legislation.⁶⁷ Political benefits are reaped, and prosecutors are left alone to enjoy the fruits of this economy, in the form of increased powers exercised with ever-dwindling scrutiny by judges and juries.⁶⁸

⁶³ See, e.g., Beale, *What's Law Got To Do with It?*, *supra* note 16, at 32–44 (describing development of modern American “tough on crime” political culture and its connection to punitive legislation).

⁶⁴ See, e.g., 28 U.S.C. § 530B (2000) (applying state bar disciplinary rules to government attorneys). This provision, the McDade Amendment, was named for a member of Congress who was subject to federal prosecution. See Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 208–15 (2000) (discussing legislative history of § 530B).

⁶⁵ See generally Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006).

⁶⁶ Stuntz, *supra* note 16, at 533–35, 537–38.

⁶⁷ See Stuntz, *supra* note 38, at 844 (“Senators and Representatives use criminal law and sentencing doctrine to send messages, not to define prohibited conduct and its deserts.”). *But see* Richman, *supra* note 38, at 789 (“Congress’s influence on enforcement decisions is far greater than those whose criticism of its delegation has been based on the absence of legislative specificity have recognized.”).

⁶⁸ See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 100–16 (2005) (examining steep decline in trial acquittal rate in federal system). Daniel Richman has explained that federal criminal law enforcement is regulated, informally and loosely, by unwritten bargains under which the executive branch exercises restraint in order to avoid undesirable oversight proceedings, budgetary restrictions, appointments interference, and even amendment and curtailment of procedural rules. Richman, *supra* note 38, at 789–805; *see also* Brown, *supra* note 18, at 257–58 (dis-

As I will discuss in Part II, the federal legislative record often includes evidence that lawmakers and enforcers, when making liability rules, worry about particularly thorny problems of behavior control that are perceived to demand flexible legal tools. It nonetheless remains true that Congress is a willing partner with the executive branch in the expansion of substantive criminal law. The legislature provides a weak check on the growth of liability rules. Even assuming that Congress is an open gateway to overbreadth in liability rules, however, one still needs an explanation of what drives expansion of liability rules at either side of the legislative portal. Why do enforcers urge legislators to enact broader liability rules? Why do enforcers urge courts to interpret liability rules broadly? And why do courts accommodate enforcers' efforts?

Prosecutors. Prosecutors exert enormous influence over the path of substantive criminal law. By virtue of their institutional function as screeners and initiators of cases, prosecutors literally set the agenda for the criminal justice system.⁶⁹ By virtue of the absence of law regulating their selection and initiation of cases, and the elusiveness of any feasible such regulation,⁷⁰ prosecutors are free to pursue almost limitless agendas in the enforcement of criminal law. Breadth in criminal liability rules may be generated cyclically: Broader liability rules afford prosecutors more freedom to apply them to novel contexts, generating more cases that require courts to decide whether to interpret liability rules broadly, and so on.⁷¹

cussing use of budgetary controls to affect how prosecutors enforce criminal liability rules). Darryl Brown has shown that the simple political-economy story about criminal legislation also fails to capture the behavior of state legislators, who might be expected to be subject to the same incentives as members of Congress but who often refuse to expand the scope of substantive criminal law when presented with proposed legislation. *Id.* at 245–49.

⁶⁹ See, e.g., Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 479–80 (1996) (describing prosecutorial power to set agenda by screening cases that enter criminal justice system); Richman, *supra* note 38, at 763 (discussing “extraordinary degree of discretionary authority” provided to federal enforcers); Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1936–37 (2006) (same).

⁷⁰ See, e.g., *United States v. Batchelder*, 442 U.S. 114, 123–25 (1979) (declining to regulate prosecutor's selection of charges in initiating criminal case); *Bordenkircher v. Hayes*, 434 U.S. 357, 362–65 (1978) (declining to regulate use of threats of more severe punishment to induce plea bargains).

⁷¹ The less subject to legal controls and the more expansive is prosecutorial power, the less amenable such power seems to theoretical analysis. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 55 (2002) (“Legal scholars rarely discuss the internal administration of justice agencies.”). There has been some recent progress. See, e.g., Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003) (supplying in-depth analysis of incentives and relationships operating between law-enforcement agents and prosecutors); Wright & Engen, *supra* note 69 (conducting empirical examination of relationship between

The literature on the contemporary expansion of criminal law has stressed, perhaps at the expense of a more complex account of prosecutorial motivation, the agency costs that prosecutors can willingly impose on society. Sometimes the prosecutor has been presented in a thin behavioral model as a political actor who maximizes her particular forms of wealth.⁷² The wealth menu includes free time and low stress generated by the disposal of most or all cases through plea bargaining; promotion and compensation benefits generated by high conviction rates;⁷³ and prestige and quantitative performance measures that lead to lucrative private sector opportunities, generated by high conviction rates as well as victories (and perhaps just trial experience) in high-profile cases that do not plead.⁷⁴

Two legal phenomena are said to be necessary in order to generate these forms of wealth. First, defendants must have strong incentives to plea bargain, allowing prosecutors to maintain high conviction rates and avoid labor-intensive trials. Second, substantive and procedural law must be highly favorable to prosecutors, allowing them to win almost all of the cases that do go to trial and to bring indictments in high-profile cases that might otherwise be too legally marginal to support charge or conviction.⁷⁵ In their self-interest, prosecutors therefore continually pressure legislators and courts to broaden liability rules.⁷⁶ The two phenomena are linked, since looseness in procedural and substantive law is likely to increase the rate of plea bargaining.⁷⁷ The implications of this picture are troubling: Not only might criminal justice not be administered impartially, but a system

depth of criminal code and prosecutorial charging practices); Wright & Miller, *supra*, at 67–84 (conducting empirical examination of prosecutorial screening and plea bargaining practices).

⁷² E.g., Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259 (2000).

⁷³ Stuntz, *supra* note 16, at 535–38.

⁷⁴ Glaeser et al., *supra* note 72, at 262–66. The wealth menu might also include fruits of corruption. See Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV. 61, 72–76 (2007) (arguing that criminal procedure law serves purpose of constraining rent-seeking by prosecutors, such as seeking “to benefit themselves by selling their power to enforce the criminal law to the highest bidder”).

⁷⁵ As Ronald Wright observes, the different components of this story sometimes point in contradictory directions: Prosecutors try too few cases to maximize leisure time but also try too many to generate marketable experience. Wright, *supra* note 68, at 95–96.

⁷⁶ Stuntz, *supra* note 16, at 544.

⁷⁷ See Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1156–61 (2005) (reiterating and summarizing common refrain in criminal law scholarship on relationship between broadening legal rules and plea bargaining); Stuntz, *supra* note 16, at 519–20 (discussing the connection between broader laws and increased plea bargaining rates).

dominated by plea bargaining and nearly devoid of acquittals can seriously distort the accuracy of outcomes.⁷⁸

But this is not the whole story.⁷⁹ Prosecutors may maximize things other than their own wealth. They are lawyers and thus have been conditioned to think of themselves as functionaries in a public system. Among lawyers, they are part of a group declining higher-paying positions in the private sector for lower-paying government jobs, presumably because they believe they might accomplish something useful in the public interest.⁸⁰ Thus, they should be expected not just to enhance their own wealth but also to seek out problems of a public nature and see if they might use legal tools to address them.⁸¹ None of this is to say that prosecutors are necessarily right or that their actions are necessarily beneficial. The point is simply that their motivations should be expected to include ones that are social regarding even if their actions sometimes, or even frequently, prove misguided.⁸²

Some observers have worried particularly about what happens when one combines a prosecutor's interests in wealth-maximization

⁷⁸ Wright, *supra* note 68, at 84–86. Another cost might be, as in the Al Capone scenario, the reduction in transparency and public oversight that results when prosecutors, free to choose from long lists of substantive offenses in overly redundant codes, charge violations that do not represent the true nature of the wrongdoing or the justifications for prosecution. Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 585–86, 608–18 (2005).

⁷⁹ Daniel Richman has illustrated the inadequacy of a simple rational self-interest model of prosecutorial behavior in his exploration of the incentives and relationships operating between prosecutors and law-enforcement officers. Richman, *supra* note 71.

⁸⁰ See Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 219–20 (1988) (criticizing public choice theorists for misunderstanding and oversimplifying motivations of people who choose public service careers); Richman, *supra* note 38, at 779 (arguing that self-interest model of prosecutor fails to consider ideological motivations that may draw prosecutor to job).

⁸¹ As far as I know, the only empirical study to address this point is Glaeser et al., *supra* note 72. The authors found significant positive relationships between drug offenders' wealth, education, whiteness, use of private counsel, and involvement in trafficking (as opposed to possession) and their likelihood of prosecution in federal, rather than in state, court. As the authors concede, their results plausibly support two hypotheses: Federal prosecutors prefer to select resource-rich and more sophisticated offenders either in order to generate more marketable trial experience and disseminate their reputations or because the superior legal and fiscal resources available in federal court make the imposition of sanction on such offenders more likely there than in state court, thus furthering social welfare. *Id.* at 270 tbl.2, 273, 288.

⁸² *But see* Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 50–51 (1988) (suggesting that benefits to prosecutor of wealth-maximizing in various forms are more immediate and tangible than deterrence benefits of prosecution).

with the degree of docket control that federal prosecutors enjoy.⁸³ The concern may be warranted. But one should also consider what can happen when a prosecutor's interest in addressing problems of public importance is joined with a high degree of independence, resources, and agenda control.⁸⁴ This combination is likely to produce an influential legal actor who, when faced with efforts by regulated actors to avoid imposition of sanction, has the motive and means to counteract such efforts by interpreting and applying liability rules broadly.

In a simplified example, the dynamic works like this. Suppose that it is an offense for a public official to take a bribe. This offense requires the prosecutor to prove beyond a reasonable doubt the existence of a quid pro quo—something like a contractual agreement between the official and the bribe-giver that the official will take an action in return for the bribe. A county sheriff has run a corrupt and impregnable political machine for decades, doling out wasteful contracts in exchange for campaign contributions and pleasure goods and services for him and his employees. Recognizing the nature of the bribery prohibition and having had years to institutionalize his practices, the sheriff operates this system without discussing any quid pro

⁸³ See, e.g., Barkow, *supra* note 3, at 14 (arguing that enormous power of federal prosecutors over charging and plea bargaining effectively makes them judges in their own causes); Brown, *supra* note 18, at 259–60 (worrying about risk of prosecutorial abuses in federal system given breadth of many substantive liability rules); Stuntz, *supra* note 16, at 543 (arguing that federal prosecutorial powers give prosecutors greater opportunity to use office to enhance reputations and career prospects). State and federal prosecutors are very different legal actors. See Richman & Stuntz, *supra* note 78, at 599–618. State prosecutors are largely reactive and beholden to electoral politics. They generally deal with the cases that the police bring to them. The public expects them to process the great majority of cases that generate the reportable crime statistics within their jurisdictions. State prosecutors have the power to select charges and to decline to prosecute, of course, but they otherwise exercise relatively little influence over case initiation. *Id.* at 600–05. Federal prosecutors are largely proactive and insulated from electoral politics. They are not expected or required to act on any particular categories of cases, except a few like major acts of espionage and terrorism, serious offenses on federal lands, and direct intrusions on federal government functions. *Id.* at 608–15; see also Clymer, *supra* note 16, at 649, 652–54 (stating that there is little direction “to guide federal prosecutors in exercising their discretion to choose among offenders eligible for federal prosecution” and listing categories of cases that federal prosecutors may choose to prosecute). Because they do not face the same docket pressure as state prosecutors and because they enjoy access to the federal treasury, federal prosecutors both set their own agendas and have the time and the resources to engage cases at the earliest investigative stages. In an era of minor jurisdictional constraints on federal criminal law, the field over which they range is enormous. John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1095–98 (1995).

⁸⁴ See Wright & Miller, *supra* note 71, at 49, 54 (arguing that, however accurate, criticisms of prosecutorial discretion have missed potential benefits of case screening as regulatory device).

quo with anyone, or perhaps without even meeting directly with the people who supply benefits to him and his associates in exchange for government contracts. The elected state prosecutor in the jurisdiction, a political ally of the sheriff, has no interest in roiling these waters.

Seeing no other way to stop the corrupt sheriff, the local federal prosecutor decides to pursue a novel legal theory: The sheriff has been defrauding his constituents by depriving them, in a deceptive manner, of their right to have their government allocate the fisc solely in the public interest and without self-dealing. Provided that a court accepts the argument that the sheriff's conduct violates a broadly worded antifraud statute, the prosecutor has solved the dilemma of how to stop the elusive corrupt sheriff.⁸⁵ But the prosecutor's actions have produced an overbroad law. However unlikely a prosecutor might be to bring such a case, the fraud statute could be used on this interpretation to prosecute a legislator for voting against a new banking regulation after taking a lawful contribution from the banking lobby.⁸⁶

This dynamic that produces overbreadth is likely to be more powerful the more prosecutors tend to select for prosecution regulated actors who invest effort and resources in evading sanction.⁸⁷ Among all actors in the legal system, enforcers are closest to and most knowledgeable about the state of the art among regulated actors.⁸⁸ Prosecu-

⁸⁵ Roderick Hills worries that overly intrusive federal prosecution of local government corruption may undesirably skew systems of political accountability that are beneficial in a federal structure of government. Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-federal Democracy?*, 6 THEORETICAL INQUIRIES L. 113, 115 (2005); see also FRANK ANECHIARICO & JAMES B. JACOBS, *THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE* 174–85 (1996) (generally questioning whether criminal prosecution of government corruption increases net benefits of government to public). Hills's concern, however, is the extension into local governance of overly demanding norms about conflicts of interest, not the effective enforcement of prohibitions on core corruption. Hills, *supra*, at 121–22, 128–29, 137–44. In any event, it is not the point of my example to argue for a particular position on how much corruption to criminalize.

⁸⁶ See O'Sullivan, *supra* note 16, at 664.

⁸⁷ For one federal prosecutor's description of how this process operates in the particular sphere of efforts against violent gangs, see Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 26 FORDHAM URB. L.J. 573 (1999). For an entertaining and illuminating memoir of another federal prosecutor's journey through this process, see JOHN KROGER, *CONVICTIONS: A PROSECUTOR'S BATTLES AGAINST MAFIA KILLERS, DRUG KINGPINS, AND ENRON THIEVES* (2008). The author is now a professor at Lewis & Clark Law School.

⁸⁸ The courts frequently reiterate this point when they decline to adopt procedural rules permitting searching judicial review of charging and plea decisions and similar executive branch functions in criminal law. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (raising high hurdles to defendants seeking to obtain dismissal of indictments on grounds of selective prosecution, in part because judiciary is ill-equipped to review prosecutorial charging decisions); see also Austin Sarat & Conor Clarke, *Beyond Discre-*

tors are the most likely actors to perceive impediments to sanctioning in existing law and to discover and initiate incremental moves that broaden liability rules in order to overcome those impediments. The more successful an actor is at structuring conduct to avoid sanctioning, the more aggressive a prosecutor will want to be in pushing for new laws and new interpretations of existing laws to counteract the regulated actor's efforts.

Judges. The literature on modern criminal law's expansion—particularly the expansion of federal criminal law—has greatly underplayed the role of the courts.⁸⁹ When Congress enacts open-textured criminal prohibitions (the very sort of laws produced by the drive for flexible regulatory tools), much substantive criminal law work is left for the courts. Courts engage in constitutional policing, using legality doctrines such as the rule of lenity and prohibitions on unduly vague criminal statutes and *ex post facto* lawmaking.⁹⁰ Much more often, federal courts interpret statutes, issuing thousands of rulings on the scope of federal criminal prohibitions. Because these decisions are made in adversarial litigation between prosecutors and defendants, they nearly always require a choice between a broader or narrower reading of a criminal statute that will include or exclude certain conduct. The Supreme Court does a little of this work, but the vast majority of it occurs in the federal courts of appeals. As many have argued, it is an illusion to treat this judicial activity as anything other than criminal lawmaking.⁹¹

The courts' weak enforcement of constitutional legality doctrines is well documented.⁹² But the posture of the federal courts in cases of

tion: Prosecution, the Logic of Sovereignty, and the Limits of Law, 33 *LAW & SOC. INQUIRY* 387, 398 (2008) (describing courts' reluctance to review prosecutorial decisionmaking).

⁸⁹ See, e.g., Stuntz, *supra* note 16, at 510 (arguing that judges "who alone are likely to opt for narrower liability rules rather than broader ones" are marginalized in development of criminal law). But see Clymer, *supra* note 16, at 656–68 (describing and critiquing role of judges in broadening liability rules); Smith, *supra* note 16, at 884 (same).

⁹⁰ See, e.g., *Stogner v. California*, 539 U.S. 607, 610–21 (2003) (discussing Ex Post Facto Clause doctrine); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (discussing rule of lenity); *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (discussing vagueness doctrine).

⁹¹ See Samuel W. Buell, *Novel Criminal Fraud*, 81 *N.Y.U. L. REV.* 1971, 1973 (2006) (characterizing fraud as common law crime); Kahan, *supra* note 69, at 471–79 (describing federal criminal law as common law by judicial implementation of open-textured statutes); O'Sullivan, *supra* note 16, at 667 (same); see also *United States v. Santos*, 128 S. Ct. 2020, 2031 (2008) (Stevens, J., concurring) ("When Congress fails to define potentially ambiguous statutory terms, it effectively delegates to federal judges the task of filling gaps in a statute.").

⁹² See Jeffries, *supra* note 33, at 195–201; cf. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 344–45, 348 & tbls.4,

criminal statutory interpretation is understudied.⁹³ The Supreme Court's work in this area can be misleading. In a handful of decisions, mostly involving marginal criminal activity, the Court has narrowed federal criminal law.⁹⁴ These cases have generated a scholarly literature.⁹⁵ But the Court's decisions represent a fraction of the activity of the federal courts in this area. In recent years, the Court has said little of great consequence to criminal cases about the scope of bulwark statutes such as the Racketeer Influenced and Corrupt Organizations Act (RICO) or the mail fraud and securities fraud prohibitions.⁹⁶ Most of the content of these statutes is supplied by the courts of appeals, whose work in this area has produced much substantive expansion of federal criminal law.

7 (1991) (documenting how Congress legislatively overrides Supreme Court decisions most often in criminal law and, there, almost always in favor of government's position—perhaps explaining in part why courts have infrequently struck down federal criminal statutes).

⁹³ An exception to the overcriminalization literature's tendency to give short shrift to the judiciary's role is Smith, *supra* note 16, at 884, which asserts that federal judges are not "innocent bystanders" and "have been all too willing to construe federal crimes expansively . . ." Smith finds it puzzling that the federal judiciary tends to interpret ambiguous statutes broadly, *id.* at 893, and he argues that the tendency can be corrected by persuading courts to adopt different interpretive strategies, *id.* at 930–49. Smith describes a compulsion of federal courts to "view themselves as having an obligation to ensure that no morally blameworthy defendant ever slips through the federal cracks." *Id.* at 884. He attributes this compulsion to the press of case-specific adjudication, in which judges must interpret statutes while confronting blameworthy offenders whom they cannot tolerate seeing escape punishment. *Id.* at 925. But if, as Smith suggests, judges can interpret statutes as broadly as necessary to punish blameworthy offenders but not further, then judges would not produce overbreadth.

⁹⁴ See, e.g., *Bryan v. United States*, 524 U.S. 184, 193 (1998) (requiring proof of additional mens rea element under statute regulating dealing in firearms without proper license); *Ratzlaf v. United States*, 510 U.S. 135, 138 (1994) (requiring proof of additional mens rea element under statute regulating illegal currency deposits); *Cheek v. United States*, 498 U.S. 192, 201–03 (1991) (requiring proof of additional mens rea element in prosecution for criminal tax evasion).

⁹⁵ See, e.g., Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341 (1998); Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753 (2002); John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999).

⁹⁶ The Court's last major ruling on the substantive crime of mail fraud was in 1987. *McNally v. United States*, 483 U.S. 350 (1987). More recently, the Court ruled on the peripheral question of whether a state license could be considered "property" for purposes of the mail fraud statute. *Cleveland v. United States*, 531 U.S. 12, 15 (2000). The Court has ruled on the RICO statute in the criminal context principally in two cases, *United States v. Turkette*, 452 U.S. 576 (1981), and *Salinas v. United States*, 522 U.S. 52 (1997). Of course, the Court has interpreted the RICO statute numerous times in deciding issues relating to civil lawsuits under the statute. See, e.g., *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001); *Beck v. Prupis*, 529 U.S. 494 (2000). In the securities fraud context, the Court's recent work has been exclusively in the realm of the private right of action for securities fraud. See, e.g., *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007).

Public choice pressures cannot explain the federal courts' hesitancy to strike down criminal statutes as violating legality-related doctrines or the frequency with which the courts expansively interpret statutory language. One might blame this lack of assertiveness on weak constitutional doctrine in the area of substantive criminal law.⁹⁷ But this seems like a marginal impediment: If federal judges wish to narrow the scope of liability rules, they have the more easily deployed tool of statutory interpretation.

Another explanation for expansive rulings might be that the federal courts are ideologically slanted in favor of criminal prosecutions: Judges—all of them appointed by presidents who campaigned on law-and-order themes and a large number of them former federal prosecutors—might adopt prosecution-favoring interpretations of statutes because they wish to see offenders sternly punished. This is too simplistic. Some judges may believe in “locking them up and throwing away the key,” but that is probably an unfair caricature of all but a few appellate judges. A judge is more likely to be interested in facilitating punishment—especially if she has ground-level experience as a former prosecutor—when she believes that the narrower of two statutory interpretations would permit socially harmful activity to escape sanction in the case at hand, in future cases, or in both.

If a simple political economy explanation were true, one would expect statutory interpretation practices in federal criminal cases to correlate with ideology measures.⁹⁸ The more conservative the judges on a circuit court, the more one would expect the court's rulings to tilt in the direction of broader readings of statutes, and vice-versa. As I will explain in Part II, however, the ideological profile and track record in statutory interpretation of the United States Court of Appeals for the Second Circuit falsify this claim. One might deny that conservative ideology should be expected to correlate with expansiveness in substantive criminal law rulings.⁹⁹ But this assertion proves

⁹⁷ See Stuntz, *supra* note 16, at 559–65 (illustrating how existing constitutional doctrines dealing with lenity and vagueness fail to limit breadth of substantive criminal law).

⁹⁸ For recent examples of relevant methodologies and questions of interest in the analysis of federal judicial politics, see Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 Nw. U. L. REV. 1483 (2007), Nancy Staudt et al., *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361 (2008), and William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* (Univ. of Chi. Law School, John M. Olin Law & Econ. Working Paper No. 404, 2008), available at http://ssrn.com/abstract_id=1126403.

⁹⁹ Compare, for example, the records of Justices Scalia and Stevens on such matters. Compare *Schmuck v. United States*, 489 U.S. 705, 722–23 (1989) (Scalia, J., dissenting) (critiquing majority for failing to construe federal mail fraud statute more narrowly), with *McNally v. United States*, 483 U.S. 350, 362–66 (1987) (Stevens, J., dissenting) (critiquing

the point: If liberal judges who tend to rule more frequently for accused persons on points of criminal procedure also tend to adopt broad interpretations of criminal statutes, they must have an agenda for the substantive criminal law other than helping prosecutors incarcerate more people with less effort.

Another explanation for judges' behavior is that they too respond to the pressure that strategic actors exert on the regulatory system.¹⁰⁰ Looking backward, appellate judges are likely to be moved by the dangerousness and moral culpability of the offender and conduct that gave rise to the case. If prosecutors tend to select threatening actors for sanction under broad liability rules, judges, seeing the serious wrongs that narrow interpretations of rules would exclude from sanctioning regimes, will resist narrow rulings.¹⁰¹ Looking forward, the posture of the appellate judge is to seek a legal rule that will work in unseen cases that might follow the one before the court. Choosing the broader interpretation of a statute lowers the risk that a serious case arising in the future will be unreachable by the liability rule. This

majority for failing to construe federal mail fraud statute more broadly). It is well known that judicial concern about the expansion of federal criminal law is not limited to those on the ideological left. See, e.g., William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Jan. 1999, available at <http://www.uscourts.gov/ttb/jan99ttb/january1999.html> (advocating restriction of jurisdiction of federal courts over state crimes); see also Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1409–10 (2006) (describing recent fissures on right over criminal justice between traditional advocates of punitive policies and libertarians who fear excessive government powers).

¹⁰⁰ See Gerard E. Lynch, *RICO: The Crime of Being a Criminal* (pt. 1), 87 COLUM. L. REV. 661, 666 (1987) (“Even assuming that judges, unlike legislatures, are immune to the effects of public clamor to do something about crime (not necessarily an accurate assumption), the internal pressure on judges to affirm convictions for serious crimes must be enormous.”).

¹⁰¹ Frederick Schauer worries that this judicial tendency—the susceptibility of case-specific adjudication to being skewed by the “availability heuristic”—is a deep flaw in the idea of relying on a common law process to develop legal rules. Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 890–901 (2006). Whether Schauer is correct is an empirical question, the answer to which would require considering, among other things, the relative ability of legislators to forecast accurately the contours of the mine run of cases a statute is intended to reach. Schauer worries that judges developing law through a common law process may make an additional mistake: All legal rules are unavoidably underinclusive and/or overinclusive, but judges are apt to think that any occasion of a law missing its intended mark is proof that the law is deficient. Judges thus may tend to over-adapt law through adjudication, causing it to reach a suboptimal state. *Id.* at 907–08. If Schauer is correct in asserting that judges have a hard time knowing when to be genuinely concerned that a particular case falls outside the letter of a legal rule though within its spirit and intent, then we would need some criteria for determining whether a legal rule that misses its mark has seriously underperformed or merely inevitably fallen a bit short.

pressure would exist even in cases involving marginal actors as to whom a prohibition might seem overbroad.¹⁰²

Federal prosecutors' and federal judges' behaviors tend to reinforce each other. Prosecutors with a high degree of agenda control and resources are both able and inclined to focus efforts on harm-producing actors who are most difficult to sanction. When those prosecutors bring the cases of such actors before appellate judges for the purpose of arguing about the scope of liability rules, judges are both moved by the facts to allow punishment of those offenders and moved by their posture as appellate judges to define liability rules in a manner that allows for punishment of similar offenders in the future. When prosecutors walk away from such litigation with more broadly defined liability rules in hand, they will be inclined to use those more pliable rules to reach additional harm-producing actors who appear particularly remote from sanctioning efforts.

The cycle continues until it reaches a state in which criminal prohibitions are broad enough to permit sanctioning of persons who do not produce the serious harms that gave rise to the liability rule in the first place. Similar reinforcement likely exists in the relationship between prosecutors and legislators: Prosecutors' tendency to use the broad tools legislators give them to attack the most sophisticated, organized, and harmful offenders leaves legislators with little reason to reconsider the breadth of liability rules.¹⁰³ We thus end up with substantial overbreadth in liability rules, producing at least the potential agency cost of prosecutors choosing to use serious criminal prohibitions in cases for which harsh punishments are not justified.

2. *Motivating Norms*

The theoretical account I have supplied can be made more sympathetic by taking it to a deeper level. Legal actors are human beings with complex normative systems, not simply regulatory instruments who make expected value calculations. The drive to sanction the most elusive violators, and the legal overbreadth it produces, might arise from and explain a feature of political culture in the United States. Public enforcers might be motivated by a norm that it is unacceptable that one's resources and industriousness could place one beyond the reach of regulation.

¹⁰² Of course, this assumes appellate judges tend to think that missing a future case of harm is more costly than including a future case that might be marginal. This assumption seems fair. In the former instance, a grave social harm might go unanswered; in the latter, someone might end up with too much punishment for doing something wrong but not seriously blameworthy.

¹⁰³ Stuntz, *supra* note 59, at 2028–29.

On this account, actors who are sophisticated about avoiding sanctioning regimes have a turbo-charging effect on the growth of liability rules. Instrumentally, their efforts cause legal actors to expand rules to counteract such efforts. On top of that, individuals' commitment to evasion makes legal actors perceive such persons as posing the greatest normative threat to legal regimes. Legal actors thus concentrate their regulatory efforts on those actors, fueling the cycle of evasion and overbreadth.¹⁰⁴

This drive to control the evasive actor might, perhaps surprisingly, arise from commitments to the rule of law and to equality. Usually we think of the elusive concept of the rule of law as encompassing beliefs about how the state is to treat the individual: clear, prospective articulation of law, nondiscriminatory enforcement, and so on.¹⁰⁵ But it is also possible to see the rule of law as encompassing principles about what the state owes a person when it administers the law with respect to others.¹⁰⁶ H.L.A. Hart expressed this when he observed:

[S]ubmission to the system of restraints would be folly if there were no organization for the coercion of those who would then try to obtain the advantages of the system without submitting to its obligations. "Sanctions" are therefore required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall.¹⁰⁷

Although he was speaking of law generally, Hart's point is particularly applicable to societies characterized by high levels of legal compliance and a strong commitment to the rule of law. In such conditions, a public perception that the state is fully committed to enforcement against those who seek with the greatest determination to escape common obligations helps to maintain high levels of rule-of-law commitment and compliance. To ask for legal compliance from its citizens, the state must perform on a promise to those citizens that

¹⁰⁴ Dennis Jacobs, the Chief Judge of the Second Circuit, recently lamented what he described as his colleagues' immodest determination to find solutions in law, no matter the complexity and expense of such solutions, for every pressing social problem that comes before them. Dennis Jacobs, *The Secret Life of Judges*, 75 *FORDHAM L. REV.* 2855, 2855–58 (2007).

¹⁰⁵ See, e.g., PACKER, *supra* note 1, at 79–81 (describing rule-of-law values in criminal law).

¹⁰⁶ Cf. Buell, *supra* note 91, at 2022–28 (arguing that in addition to being principle that restrains state, legality principle's requirement of notice can be understood as basis for individual fault, since persons who violate rules while on notice are persons who deliberately choose to do wrong).

¹⁰⁷ HART, *supra* note 31, at 198.

limiting their own liberty will benefit them—and will benefit them all equally.¹⁰⁸

When acting on this norm, the state does not necessarily sanction in order to deter the most determined actors. The state may be aware that such an effort is fruitless. Rather, the state acts to fortify the perception that the social environment is one in which refusal to participate in largely voluntary compliance is costly.¹⁰⁹ Just as an investment market might unravel with the perception that cheating is widespread, a “market” for legal compliance might collapse upon a loss of faith that evasion comes at a cost. In game-theoretic terms, salient enforcement action against the most determined defectors maintains the belief among those inclined to cooperate in conditions of reciprocity that others who are similarly inclined, and who have observed the same enforcement action, can be expected to continue to cooperate rather than defect.

Consider also an equality dimension to the effort to control the evasive actor. As James Whitman has shown, one can see a powerful “leveling-down drive” in the development of Anglo-American (as distinct from Continental) criminal justice.¹¹⁰ In Whitman’s account, much of the recent growth in punishment severity in the United States and England is traceable to the “degradation” function of punishment, which involves the use of punishment to lower the social status of the offender in response to the offender’s wrongdoing of others.¹¹¹ Whitman sees punishment as serving this function in a variety of contexts, including the increasing tendency to punish white-collar offenders with imprisonment in heavy doses.¹¹² Other commentators have called attention to selective enforcement as an equality problem, not just as to those against whom the law is enforced, but also as to those against whom it is not.¹¹³

¹⁰⁸ William Edmundson calls this the principle of fairness. WILLIAM A. EDMUNDSON, *THREE ANARCHICAL FALLACIES: AN ESSAY ON POLITICAL AUTHORITY* 111 (1998).

¹⁰⁹ See generally WHY PEOPLE PAY TAXES (Joel Slemrod ed., 1992) (examining relationship between voluntary tax compliance and enforcement); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71 (2003) (describing “logic of reciprocity” in voluntary legal compliance and importance of promoting public trust to achieve desired regulatory outcomes).

¹¹⁰ JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

¹¹¹ *Id.* at 6–7, 11, 19–20, 170–77, 191–94. Whitman traces this leveling impulse to the punishment theories of Beccaria and his Enlightenment contemporaries. *Id.* at 42, 51–53.

¹¹² *Id.* at 43–49.

¹¹³ See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 19 (1997) (“[T]he principal injury suffered by African-Americans in relation to criminal matters is not over-enforcement but underenforcement”); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1718 (2006) (“By failing to maintain an atmosphere of legality, law enforcement turns its back on victim classes twice: first, by denying them material

From the state's perspective, the perceived problem with permitting resourceful actors to exempt themselves from sanctioning regimes is two-fold, and both elements connect to the expressive function of law:¹¹⁴ Neglect in enforcement risks communicating that a person's voluntary compliance is both foolish (because others appear to enjoy the benefits of noncompliance without paying costs) and self-denigrating (because society appears to privilege some who do not comply over some who do—and worse, to privilege among all noncompliant persons those with advantages).

No matter how egalitarian and idealistic the spirit behind pursuit of the sanction-resistant violator may be, it can produce, as Whitman and others have explored, costly, severe, and sometimes repellant punishment practices.¹¹⁵ My point is simply that the drive to broaden liability rules may be rooted in the social fabric, not just located at the surface of politics and the regulatory process, and that its roots may not be devoid of normative appeal.¹¹⁶

II

OVERBREADTH IN DOCTRINE

Turning to empirical inquiry, I will now examine four areas of criminal activity to illustrate how competition between the state and evasive actors generates overbreadth: racketeering, money laundering, obstruction of justice, and fraud. These areas involve broad rules that are made broader by the efforts of prosecutors and courts and that are often deployed against resourceful actors. In some of these examples, one can observe a direct pattern of move and countermove between lawmaker and violator. In all of them, one can see that regulators target actors who present severe challenges to sanctioning regimes by generating breadth in liability rules due to a perceived need for flexibility in dealing with such actors.

protective resources, and second, by depriving them of a robust, responsive legal system.”); Richman & Stuntz, *supra* note 78, at 613 (“Th[e] extreme disjunction between federal jurisdiction and federal resources has bred a norm of radical underenforcement.”); *see also* Sarat & Clarke, *supra* note 88 (exploring prevalence and theoretical significance of prosecutorial power not to charge).

¹¹⁴ *See, e.g.*, Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 14–22 (describing how criminal law can shape preferences of citizens through messages it sends).

¹¹⁵ *See, e.g.*, GARLAND, *supra* note 20, at 102; WHITMAN, *supra* note 110.

¹¹⁶ For an opposing view that current United States legal culture should be severely faulted, on Christian precepts, for its determination to redress all social ills, *see* David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809, 809–19 (2006).

My doctrinal inquiry is confined to federal criminal law. I make this choice because the federal system supplies abundant evidence of the two phenomena at the core of this project: expansion of law and evasion efforts by regulated actors. Most scholars agree that substantive federal criminal law has grown exceptionally broad in recent decades.¹¹⁷ And it is safe to say that one tends to see more of society's sophisticated and harmful actors prosecuted in federal, rather than in state, court.

Because the vast majority of judge-made federal criminal law originates in the courts of appeals,¹¹⁸ one must look below the Supreme Court to develop a qualitatively useful understanding of federal criminal law. Given the quantity of appellate case law, however, one cannot deal with more than a single circuit in an article of this sort. I will focus on the Second Circuit Court of Appeals because it is arguably the leading federal circuit court¹¹⁹ and is the most ideologically moderate one¹²⁰—meaning it is the least likely to produce a jurisprudence that can be explained simply by ideological politics of crime.

A. Racketeering

Probably no sector of federal criminal law has grown more in recent decades than RICO¹²¹ and related statutes.¹²² As Gerard Lynch documented in the 1980s, RICO acquired a life of its own after

¹¹⁷ See sources cited *supra* note 16.

¹¹⁸ See *supra* notes 92–96 and accompanying text.

¹¹⁹ See *In re Stansbury Poplar Place, Inc.*, 13 F.3d 122, 127 (4th Cir. 1993) (noting prestige of Second Circuit in commercial matters); James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 STAN. L. REV. 387, 387–88 (1995) (describing Second Circuit's development as prestigious court); Frank Partnoy, *The Shifting Contours of Global Derivatives Regulation*, 22 U. PA. J. INT'L ECON. L. 421, 456 (2001) (describing Second Circuit as “leading court for business disputes”).

¹²⁰ Consider how the Second Circuit fares in one current measurement of federal judge ideology, the Judicial Common Space (JCS) score. A judge's JCS score is a function of the party affiliations and legislative records of the President and senators involved in the judge's appointment. See generally Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007). The JCS data for the federal circuits is available at <http://epstein.law.northwestern.edu/research/JCS.html>. The JCS measure ranges from –1.0 (most liberal) to 1.0 (most conservative). Since 1988, the Second Circuit has been the most liberal of the federal circuits, with most others ranking on the conservative side of the JCS spectrum. Its median JCS score ranged from –0.34 to 0.15 during the years 1988 through 2006. This is the lowest score for all of the federal circuits during this period and, for many of those years, is the only median score that was below the ideologically neutral score of 0.0.

¹²¹ 18 U.S.C. §§ 1961–1963 (2000).

¹²² See *infra* notes 148–54 and accompanying text for a discussion of leading related statutes.

its passage in 1970.¹²³ Enacted to deal with a specific problem—infiltration of legitimate enterprises, such as labor unions, by traditional organized crime—the law quickly became, after a period of little use, an all-purpose tool for dealing with professional criminals in federal court.¹²⁴

The statute's language and architecture made this expansion possible. In its conceptual structure, RICO makes it a federal crime to commit a series of certain kinds of federal or state crimes as part of a continuing pattern connected to the operation of some form of organization.¹²⁵ The "pattern" may consist of as few as two offenses.¹²⁶ The organization (what RICO calls an "enterprise") may be legitimate, illegitimate, or even one person's criminal venture, and it need have no particular hierarchy or structure.¹²⁷ The statute also makes it a crime to agree with another to engage in racketeering, even if no pattern of offenses follows.¹²⁸ Related statutes make it an offense to commit a single murder or assault if the offender's purpose is to get into or stay in a criminal group¹²⁹ or to cross state lines with the purpose of establishing or carrying on any gambling business or of committing any extortion, bribery, or arson offense.¹³⁰

At bottom, RICO and its kin are procedural devices, supported by instrumental rationales. The statutes allow the joinder of offenders and offenses for prosecution in federal court and facilitate sanctioning of individuals who exploit organizations and use team efforts to divide labor in order to reduce the probability of sanctioning. These statutes are supported by many of the rationales that justify conspiracy liability

¹²³ Lynch, *supra* note 100; Gerard E. Lynch, *RICO: The Crime of Being a Criminal* (pts. 3 & 4), 87 COLUM. L. REV. 920 (1987).

¹²⁴ Not only has Congress lodged no objection to the federal courts' broad interpretations of the statute, but it periodically adds offenses to RICO's laundry list of "racketeering acts"—for example, alien smuggling, under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 433, 110 Stat. 1214, 1274 (codified at 18 U.S.C. § 1961(1) (2000))—strongly suggesting that Congress welcomes the statute's use outside the context of traditional organized crime. Lynch, *supra* note 100, at 713.

¹²⁵ In its technical terms, the statute makes it a crime for anyone who is "employed by or associated with any enterprise" to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (2000). "Racketeering activity" is defined as any crime contained in a long list of state and federal offenses. *Id.* § 1961(1).

¹²⁶ *Id.* § 1961(5).

¹²⁷ *Id.* § 1961(4); *United States v. Turkette*, 452 U.S. 576, 589-91 (1981) (holding that term "enterprise" in RICO statute includes illegitimate enterprises).

¹²⁸ 18 U.S.C. § 1962(d) (2000); *Salinas v. United States*, 522 U.S. 52, 62-66 (1997) (holding that RICO conspiracy provision is violated as long as defendant agrees that some person will commit at least two racketeering acts).

¹²⁹ 18 U.S.C. § 1959 (2000).

¹³⁰ *Id.* § 1952.

and its manifold doctrinal structure.¹³¹ In the absence of RICO, requiring the prosecutor to prove in isolation each act committed by each individual would increase the likelihood that a group of persons engaged in a course of acts will succeed in avoiding sanction.¹³² Such a requirement would produce an incentive to organize criminal activities in groups, with layers of hierarchy and division of labor. RICO's logic, at least as the statute has come to be interpreted, is to reduce this incentive.¹³³

The story that Lynch told in the 1980s was only the beginning. By the end of the 1990s, RICO and related statutes were being used routinely in the Second Circuit, as elsewhere, to deal not only with infiltration of legitimate enterprises by traditional organized-crime groups such as La Cosa Nostra but also with the activities of highly resourceful offenders of infinite variety. Prosecutions in the New York metropolitan area alone targeted, for example, the owner of a chain of gas stations who earned tens of millions of dollars by rigging his pumps to overcharge customers and, in order to sustain his ten-year scheme, bribed city inspectors and ordered underlings to murder employees suspected of cooperating with authorities;¹³⁴ a crack cocaine–distribution organization known as the “Supreme Team” that earned as much as \$200,000 per day and whose leaders bribed parole

¹³¹ See Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1333–69 (2003) (illustrating how conspiracy doctrine seeks to make organization of criminal activity in group form less advantageous). Katyal finds that federal conspiracy law, in contrast with state law, has tended to adopt doctrinal permutations that are justified by the need to deal with the tendencies of group criminality to evade sanctions. *Id.* at 1369. This finding is consistent with the federal criminal justice system's tendency to concentrate on sanction-resistant violators.

¹³² See Lynch, *supra* note 123, at 960 (“Respect for law is hardly fostered when the legal system myopically focuses on isolated, perhaps minor, offenses of individuals whose entire lives make plain their complete commitment to a career of organized lawbreaking.”).

¹³³ See *United States v. Elliott*, 571 F.2d 880, 884 (5th Cir. 1978) (asserting that RICO is designed to deal with situations “when groups of people, through division of labor, specialization, diversification, complexity of organization, and the accumulation of capital, turn crime into an ongoing business”). In his seminal study, Gerard Lynch maintained that RICO should be thought of as a novel, substantive criminal offense, not just a procedural innovation. Lynch, *supra* note 123, at 938–40. But the features of RICO that Lynch identified as distinctive—its joinder, statute of limitations, double jeopardy, and sanctioning consequences—are, however dramatic in effects, procedural characteristics. By virtue of RICO's definition of “racketeering activity,” any violation of the statute must be predicated on a defendant's violation of freestanding criminal prohibitions that mark out what is normatively wrongful about the defendant's conduct. Lynch maintained that, by requiring a finding of an “enterprise” and a “pattern” of racketeering activity, RICO requires jurors to reach a character judgment about the offender over time, a departure from the traditional transaction-based model of criminal adjudication. *Id.* at 944–45. Even if this is true, it represents an additional finding necessary for imposition of liability, not a substitute for finding that the defendant engaged in specific criminal violations.

¹³⁴ *United States v. Dhinsa*, 243 F.3d 635, 643 (2d Cir. 2001).

officials to obtain targeting information on witnesses and ordered at least eight murders, including some to prevent potential witnesses from disabling their operations;¹³⁵ the leader of a sophisticated drug-distribution organization known as the “Bebos” (after the dialect they created to prevent outsiders from understanding them) who arranged the infamous murder of a New York City police officer who was guarding the home of a witness;¹³⁶ a group led by an attorney and a nightclub owner that trafficked marijuana between California, New York, and Florida and committed a kidnapping and double-murder in California;¹³⁷ a narcotics-distribution, robbery, and credit-card fraud organization (the “Nineties Posse”) comprising fraudulently documented immigrants who committed at least six murders in New York, Los Angeles, and Miami, as well as a kidnapping-torture in Massachusetts;¹³⁸ and a gang that controlled the retail crack trade in East New York for nearly ten years, during which it wounded and killed numerous people to protect its turf.¹³⁹ Believe it or not, such cases have become routine for the jurisdiction’s RICO docket; there have been many more like them.

Three judicial moves, all featured in decisions of the Second Circuit, have been instrumental in RICO’s development as a flexible tool for prosecution of the determined criminal actor. First, the Supreme Court decided that the “enterprise” envisioned by the statute could be either a legal entity or an informal association of persons.¹⁴⁰ The Second Circuit and other lower courts have applied this ruling in a manner that permits RICO prosecutions of loose-knit criminal cohorts of all sorts.¹⁴¹

¹³⁵ *United States v. Miller*, 116 F.3d 641, 652–54 (2d Cir. 1997).

¹³⁶ *United States v. Nichols*, 56 F.3d 403, 406 (2d Cir. 1995).

¹³⁷ *United States v. Friedman*, 300 F.3d 111, 116 (2d Cir. 2002).

¹³⁸ See Brief for Respondent-Appellee at 4–38, *United States v. Brown*, No. 99-1230, 2002 WL 34244994 (2d Cir. Apr. 26, 2002). I served as a prosecutor in this case.

¹³⁹ See Brief for the Respondent-Appellee at 4–34, *United States v. Mora*, 152 F.3d 921 (2d Cir. 1998) (No. 96-1566), 1998 WL 398802. I served as a prosecutor in this case. The group’s activities included detonating a grenade inside one grocery store, setting afire another grocery store that burned an elderly man alive, and opening fire with machine guns on a street corner, killing a young serviceman home on leave. *Id.* at 20–22, 29–30.

¹⁴⁰ *United States v. Turkette*, 452 U.S. 576, 580–93 (1981); see also *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166 (2001) (holding that individual defendant’s closely held corporation can be treated as RICO enterprise even if defendant is sole proprietor); *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 257–60 (1994) (holding that organization need not have economic purpose to be treated as RICO enterprise); Lynch, *supra* note 100, at 706 (stating that after *Turkette*, RICO makes it criminal “to be a gangster”).

¹⁴¹ See, e.g., *United States v. Stewart*, 485 F.3d 666, 672–73 (2d Cir. 2007) (holding that members of “Patio Crew” gang constituted RICO enterprise because they sold drugs in particular area pursuant to rules of conduct); *United States v. Jones*, 455 F.3d 134, 144–45 (2d Cir. 2006) (holding that drug-dealing group with layers of hierarchy and division of

Second, the federal courts have interpreted RICO's requirement that a defendant have participated in an enterprise "through a pattern of racketeering activity" to mean simply the commission of two or more criminal acts that relate to each other and pose some possibility of continuing.¹⁴² The Supreme Court announced this requirement of "relatedness and continuity" among racketeering acts in a civil RICO lawsuit.¹⁴³ In criminal cases, however, the courts almost invariably have found relatedness and continuity to be established merely by the nature of repeated unlawful activity pursued by groups engaged in the business of crime.¹⁴⁴

Third, the courts have broadly interpreted RICO's requirement that a defendant have conducted or participated in the conduct of a criminal enterprise's affairs.¹⁴⁵ Again, the Supreme Court dealt with this element of the statute in a civil RICO case, in an effort to limit the statute by excluding low-level actors from its scope.¹⁴⁶ In criminal cases, though, the Court's ruling has been interpreted to mean that the statute applies to all but the lowest-level members of an organization who possess literally no authority to decide to commit an individual offense.¹⁴⁷

labor constituted RICO enterprise); *United States v. Morales*, 185 F.3d 74, 80–81 (2d Cir. 1999) (broadening RICO's reach by noting that criminal organization can continue to function as illegal RICO enterprise even after members are incarcerated); *United States v. Coonan*, 938 F.2d 1553, 1560 (2d Cir. 1991) (holding that "Westies" gang was RICO enterprise because members committed murder, loansharking, extortion, and drug dealing offenses in hierarchical manner).

¹⁴² *E.g.*, *H.J. Inc. v. N.W. Bell Tel. Co.*, 492 U.S. 229, 236–43 (1989).

¹⁴³ *Id.* at 243.

¹⁴⁴ *See, e.g.*, *United States v. Daidone*, 471 F.3d 371, 376 (2d Cir. 2006) (holding that defendant's commission of two murders and loansharking offense while member of Luchese crime family satisfied pattern requirement); *United States v. Aulicino*, 44 F.3d 1102, 1114 (2d Cir. 1995) (holding that effort to commit series of kidnappings over fourteen-week period was sufficient to satisfy RICO's pattern requirement); *United States v. Minicone*, 960 F.2d 1099, 1108 (2d Cir. 1992) (holding that defendant's involvement in bookmaking offense and extortion offense satisfied pattern requirement because both offenses related to same criminal organization); *United States v. Alkins*, 925 F.2d 541, 552 (2d Cir. 1991) (holding pattern requirement satisfied where motor vehicle registration clerks processed multiple documents in exchange for bribes). *But see* *United States v. Bruno*, 383 F.3d 65, 85 (2d Cir. 2004) (holding that evidence was insufficient to establish that defendant's shootings of victims were related to organized-crime enterprise as opposed to personal matters relating to avoidance of loansharking debts); *United States v. Long*, 917 F.2d 691, 697–98 (2d Cir. 1990) (holding that RICO's pattern requirement was not satisfied by single crime plus subsequent effort to obstruct prosecution of that offense).

¹⁴⁵ *See* 18 U.S.C. § 1962(c) (2000).

¹⁴⁶ *See* *Reves v. Ernst & Young*, 507 U.S. 170, 177–85 (1993) (construing text to exclude those who do not "participate in the operation or management of the enterprise itself").

¹⁴⁷ The Second Circuit issued a number of decisions on this point. *See* *United States v. Zichettello*, 208 F.3d 72, 98–100 (2d Cir. 2000) (holding that defendant may be convicted of conspiracy to violate RICO without any showing of management authority or participation in management of enterprise); *United States v. Diaz*, 176 F.3d 52, 92–93 (2d Cir. 1999)

Legislative and judicial moves to enable racketeering prosecutions of individuals on the periphery of professional criminal groups, or for whom evidence of core involvement might be weak, have extended further. In 1984, Congress enacted the Violent Crimes in Aid of Racketeering (VCAR) statute, which punishes the commission of a violent crime or a conspiracy to commit a violent crime “for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity” or for compensation from such an enterprise.¹⁴⁸ When using this son-of-RICO law, the government must still prove the existence of an enterprise in which participants engaged in multiple crimes, but as to the defendant on trial, it need only prove the commission of a single violent act.¹⁴⁹

The Second Circuit has construed the motive element of this statute broadly on the ground that Congress designed the law to supplement RICO’s “remedial” scheme by facilitating federal prosecution of all violent crime related to organized criminal activity.¹⁵⁰ If a defendant had multiple purposes in committing an act of violence, the government need only prove that one was the maintenance of some status within an organization.¹⁵¹ The doctrine of transferred intent and the felony-murder rule have been found to apply as well, meaning that the statute can be used when gangsters injure innocent

(holding that members of “Latin Kings” gang who killed informant at direction of gang leader, and independently decided to kill potential witness, satisfied *Reves* test for RICO liability); *United States v. Miller*, 116 F.3d 641, 672–73 (2d Cir. 1997) (holding that *Reves* test for RICO liability was satisfied as to defendants involved in “Supreme Team” drug gang who were responsible for supervising other workers in drug operation); *United States v. Workman*, 80 F.3d 688, 696–97 (2d Cir. 1996) (holding that *Reves* test was satisfied as to member of “L.A. Boys” drug gang who served as intermediary to lower-level dealers and participated in attempted murder of potential witness); *Napoli v. United States*, 45 F.3d 680, 683 (2d Cir. 1995) (holding that *Reves* test was satisfied as to investigators who helped produce evidence at direction of corrupt attorneys involved in fabricating personal injury claims); *United States v. Wong*, 40 F.3d 1347, 1373–74 (2d Cir. 1994) (holding that *Reves* test was satisfied as to members of “Green Dragons” gang who committed extortions and murders at direction of gang leaders). *But see* *United States v. Viola*, 35 F.3d 37, 43 (2d Cir. 1994) (holding that no RICO liability could attach under *Reves* where defendant was janitor and handyman who performed menial tasks at coffee company that was criminal organization’s headquarters).

¹⁴⁸ Comprehensive Crime Control Act of 1984, Pub. L. 98-473, tit. II, § 1002(a), 98 Stat. 1837, 2137 (1984) (codified as amended at 18 U.S.C. § 1959 (2000)); *see also* S. REP. NO. 98-225, at 304–05 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3483–84 (stating that statute was enacted to further strong federal interest in combating violence linked to organized criminal enterprises).

¹⁴⁹ *See* *United States v. Pimentel*, 346 F.3d 285, 295–97 (2d Cir. 2003).

¹⁵⁰ *United States v. Concepcion*, 983 F.2d 369, 380–82 (2d Cir. 1992).

¹⁵¹ *Id.* at 381 (holding that motive element is satisfied if “jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership”).

bystanders.¹⁵² This statute and its judicial construction have paved the way for extensive efforts to address urban gang violence in federal court.¹⁵³ The very few cases in which the Second Circuit has rejected prosecutions under this statute only prove this point, as they involve individuals charged for acts of violence entirely unrelated to the business of any relevant group.¹⁵⁴

The result of all this prosecutorial and judicial expansion of RICO and related statutes is overbreadth. Some have complained that RICO has grown “to subsume conspiracy law” and that it now

¹⁵² See *United States v. Rahman*, 189 F.3d 88, 141–42 (2d Cir. 1999) (applying transferred intent doctrine); *United States v. Mapp*, 170 F.3d 328, 334–36 (2d Cir. 1999) (holding that prosecution under VCAR may be brought on felony-murder theory provided that motive for underlying felony satisfies statute’s motive element).

¹⁵³ See, e.g., *United States v. Frampton*, 382 F.3d 213, 220–22 (2d Cir. 2004) (affirming conviction under VCAR relating to defendant crack dealer’s attempted murder to take over another crack dealer’s enterprise); *Pimentel*, 346 F.3d at 295–97 (affirming VCAR conviction for murder ordered by leader of “Netas” gang where victim was ejected gang member who was threatening members of group); *United States v. Dhinsa*, 243 F.3d 635, 672 (2d Cir. 2001) (affirming convictions for crimes charged under VCAR of owner of gas station chain for ordering murders of employees and associates who might have revealed pump-rigging scheme and other crimes); *United States v. Feliciano*, 223 F.3d 102, 113–14 (2d Cir. 2000) (holding that violent crimes associated with “Los Solidos” gang in Connecticut could be prosecuted under VCAR because gang distributed narcotics over period of years, satisfying requirement that enterprise be engaged in racketeering activity); *Rahman*, 189 F.3d at 126–27 (holding that member of jihadist group could be prosecuted for killing rabbi because defendant increased his position in group by killing supporter of Israel); *United States v. Diaz*, 176 F.3d 52, 94–96 (2d Cir. 1999) (holding that persons associated with “Latin Kings” gang could be prosecuted for murders of potential witness and drug distributor who impinged on gang’s turf); *Mapp*, 170 F.3d at 334–36 (holding that member of Brooklyn robbery gang could be prosecuted for killing patron in course of committing bank robbery); *United States v. Malpeso*, 115 F.3d 155, 163–64 (2d Cir. 1997) (affirming conviction relating to murder of unwitting bagel store clerk, where perpetrators entered store with intention of locating and shooting members of rival organized-crime group); *United States v. Rosa*, 11 F.3d 315, 324, 340–41 (2d Cir. 1993) (affirming murder conviction in prosecution relating to “Unknown Organization” heroin operation because defendant argued with look-out at drug spot before killing him and admitted dispute was about drug spot).

¹⁵⁴ See *United States v. Bruno*, 383 F.3d 65, 84–85 (2d Cir. 2004) (concluding that government failed to support any theory on which organized-crime member’s killing of victim could have been relevant to member’s standing within group); *United States v. Desena*, 260 F.3d 150, 153, 155–56 (2d Cir. 2001) (reversing conviction of motorcycle-gang member who had committed arson after he had been ejected from gang); *United States v. Ferguson*, 246 F.3d 129, 134–37 (2d Cir. 2001) (affirming district court’s reversal of VCAR conviction of defendant prosecuted with members of South Bronx “Power Rules” gang because defendant “was an outside hit man who did not belong to or seek to join Power Rules”); *United States v. Polanco*, 145 F.3d 536, 539–40 (2d Cir. 1998) (reversing conviction of defendant charged with committing murder for “Red Top Crew” drug organization because no evidence established that defendant was member of group); *United States v. Thai*, 29 F.3d 785, 817–19 (2d Cir. 1994) (reversing VCAR conviction because no evidence established that defendant’s motive for bombing restaurant was other than “purely mercenary,” as motive was unrelated to achieving or maintaining position in “Born to Kill” organization).

“subjects ordinary conspiracies to the same draconian penalty that Congress crafted for organized crime.”¹⁵⁵ It is not true that any conspiracy can be pled as a RICO violation: A prosecutor must allege and prove the commission of at least two predicate crimes. But it is true, for example, that two relatively amateurish criminals who embark on a small spree involving a pair of gas station stick-ups could be charged with violating RICO. By and large, the Department of Justice has kept a tight rein on use of the statute so as to prevent such prosecutions from spurring Congress to revoke powers that the law gives prosecutors.¹⁵⁶ Still, some prosecutions raise questions about whether RICO’s breadth sweeps in cases that do not involve the kinds of threats to sanctioning regimes that justify the statute’s existence.¹⁵⁷ There is considerable distance between the sophisticated organized offender for whom the traditional tools of criminal law may be inadequate and the high-profile or otherwise tempting target who happens to commit two or more crimes. And prosecutions under the related VCAR prohibition are not controlled so tightly, lifting some routine cases of street crime into federal court.¹⁵⁸

Narrowing these statutes—by, for example, dictating a larger number of predicate crimes needed to establish a violation or imposing minimum-revenue or quantity-of-personnel requirements for a violation¹⁵⁹—is not possible without substantial sacrifice in the law’s ability to reach strategic actors. Suppose that the Supreme Court or the Second Circuit had interpreted RICO’s words “conduct or participate . . . in the conduct of such enterprise’s affairs”¹⁶⁰ to mean that the statute applied only to persons who occupied leadership roles within criminal organizations. This would have blocked the

¹⁵⁵ Smith, *supra* note 16, at 912–13.

¹⁵⁶ Cf. 3 U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-110.101 (2d ed. Supp. 2008) (requiring approval for any indictment charging RICO violation). It may also be true that prosecutors have declined to charge some potential RICO prosecutions because the evidence was deemed insufficient to satisfy judicial interpretations of statutory requirements such as “relatedness and continuity” among racketeering acts.

¹⁵⁷ Some important examples come from outside of the Second Circuit. See *United States v. Cianci*, 378 F.3d 71, 82–96 (1st Cir. 2004) (affirming conviction of former mayor of Providence, Rhode Island, for RICO conspiracy on basis of pattern of bribes accepted by members of his administration); *United States v. Welch*, 327 F.3d 1081, 1085, 1100, 1109 (10th Cir. 2003) (reversing dismissal of indictment charging organizers of 2002 Salt Lake City Olympic Games for violating 18 U.S.C. § 1952 (2000) by making tuition, travel, and other payments to members of International Olympic Committee).

¹⁵⁸ See, e.g., *United States v. Jones*, 291 F. Supp. 2d 78, 85–93 (D. Conn. 2003) (entering judgment of acquittal after verdict in prosecution under VCAR in which defendant leader of violent narcotics-trafficking enterprise murdered victim for “disrespecting” defendant’s girlfriend).

¹⁵⁹ Smith, *supra* note 16, at 918 n.96.

¹⁶⁰ 18 U.S.C. § 1962(c) (2000).

practice of bringing multidefendant RICO cases against the full membership of a criminal group. Such a move might have meant that many of an organization's members, including the ones that committed the most harmful offenses, would avoid sanctioning in federal court.¹⁶¹ The inability to charge persons who directly committed criminal acts for the organization at the behest of superiors would also make it much more difficult to bargain with such persons for testimony against their superiors—nearly always a necessary route to discovering and proving the activities of higher-ups in clandestine groups.¹⁶² This in turn would strengthen the incentives of an organization's leaders to delegate acts to underlings and thicken the insulation within criminal groups.¹⁶³

With RICO, one does not observe direct evidence of an iterative game in which criminal organizations altered their means of doing business to avoid the effect of state-law prohibitions on violent crime, followed by Congress's enactment of RICO, followed by the restructuring of criminal organizations to delegate conduct to lower-level participants, followed by judicial decisions to construe RICO as applying to lower-level participants, and so on. But modern criminal organizations, ranging from the Mafia to urban gangs, have invested great effort in structuring their activities to reduce the probability of sanctioning for a range of core criminal acts, such as murder.¹⁶⁴ RICO and related statutes, by facilitating the prosecution of multiple offenses and offenders together in federal court, have significantly increased the probability of successful sanctioning against persons who plan criminal endeavors in the shadow of liability regimes. Prosecutors and courts have worked together to expand RICO doctrine to make it effective against efforts of criminal groups to divide labor, discourage group members from assisting law enforcement, and

¹⁶¹ As Lynch explains, the breadth of the statute's language was in large part a result of conceptual difficulties that the drafters encountered in defining "organized crime." Lynch, *supra* note 100, at 685–88.

¹⁶² See Stuntz, *supra* note 59, at 2028–29 (arguing that federal statutes used against criminal organizations are broad because they provide leverage to develop witnesses needed to build such cases).

¹⁶³ One might alternatively argue that RICO should be narrowed to constrain the unwanted costs it may impose through its civil liability provisions. See, e.g., Norman Abrams, *A New Proposal for Limiting Private Civil RICO*, 37 UCLA L. REV. 1, 4, 8 (1989) (proposing that government agency be given veto power over civil RICO lawsuits). A more fitting solution to this problem would be for Congress to decouple the elements of civil liability under RICO from the elements of criminal liability. It seems perverse to put the courts in the position of having to narrow a statute principally designed for organized-crime prosecutions just so that it does not afford too much leverage to plaintiffs suing corporations in civil disputes.

¹⁶⁴ See *supra* notes 132–33 and accompanying text (describing incentives for criminal groups to organize hierarchically to evade sanction).

deploy other resources to thwart the process of evidence collection and proof. The result is a set of broad liability rules that, on their terms at least, permit severe sanctioning in federal court of offenders who may be no more threatening than the average recidivist.

B. Money Laundering

The evolution of money-laundering laws exemplifies how strategic criminal actors can push a legal regime toward overbreadth. The instrumental focus of money-laundering prohibitions can be understood, at least in part, by way of the following example. Suppose a legal system has criminalized the distribution of heroin. A wealthy and successful heroin dealer with twenty employees has structured her business so that once a month her pilot flies a plane to the United States from a foreign country. The plane is met by four of her employees, who offload the heroin and then distribute it at different locations to a dozen other employees. These employees then sell it in smaller amounts to independent retail dealers. As the month's business unfolds, the proceeds from these heroin sales make their way back up the chain to the four employees who offload the planes. They take their cut and then use the remaining cash to purchase real estate in the name of the spouse of the heroin dealer, which the dealer can in turn sell for profit.

Throughout this process, the dealer remains comfortably at home, trading calls with realtors by poolside as she buys and sells real estate and her bank account swells. She never sees or touches any of the heroin or its distributors. She need only make a few discrete telephone calls a month about logistics and be ready to deploy underlings to commit acts of violence should anyone go astray. As long as she has done this once or twice in the recent past, it probably will not be necessary. Absent the improbable event of capturing one of her few telephone calls on a wiretap, the authorities will likely be unable to prosecute this person for violating the law against distributing heroin. Authorities might arrest a lower-level organization member who "flips," but that testimony is unlikely to lead to conviction in the absence of persuasive corroboration.¹⁶⁵

As Congress and the Department of Justice figured out in the 1980s, there is another way to sanction the heroin dealer: draft a law that makes it a crime to do something like "engaging in a financial transaction with the proceeds of heroin dealing, if one purpose of the

¹⁶⁵ William Stuntz has explored the relative resources, risk tolerances, and exposure to law enforcement of drug distributors, dealers, and purchasers. William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1808–09, 1812–13 (1998).

transaction is to conceal that those proceeds have a criminal source.” That is essentially the content of the principal federal money-laundering statute.¹⁶⁶ Now the government can sanction the dealer as long as it can prove that she was a participant in the real estate transactions (easy) and knew the source cash was criminally derived (a bit harder but much easier than proving heroin distribution, because extensive land holdings do not fall into a person’s lap).

But there is a problem with this legal rule. It also makes a federal criminal—one who might serve a lengthy sentence—out of a real estate agent who looked away from the cash and characteristics of her buyers when she brokered the sale of her client’s modest house to a heroin dealer’s underlings.¹⁶⁷ Indeed, it potentially makes a criminal of a real estate agent who sold a house to a buyer who did not work for such a heroin boss but was merely the corner marijuana dealer. Congress passed the statute to deal with the elusive international heroin boss.¹⁶⁸ But the statute also covers the actor who gave no thought to, indeed had no interest in, structuring her activities or otherwise investing resources to evade sanctioning. Only prosecutorial discretion is left to sort the heroin boss from the realtor.¹⁶⁹

A cycle of evasion and overbreadth characterizes money-laundering regulation. Federal law began by making it an offense for a financial institution to conduct a cash transaction of \$10,000 or more without filing a report with the government.¹⁷⁰ When banks proved porous with respect to the filing of such reports, and persons engaged in illicit activities devised means of circumventing the reporting requirement, Congress broadened the statutory scheme in response to the Department of Justice’s description of these vulnerabilities.¹⁷¹ Ini-

¹⁶⁶ See 18 U.S.C. § 1956(a)(1)(B)(i) (2000). I have paraphrased the statute for clarity and simplicity.

¹⁶⁷ See, e.g., *United States v. Campbell*, 977 F.2d 854, 856–59 (4th Cir. 1992) (reinstating jury’s money-laundering conviction of North Carolina real estate agent for selling lake house to drug dealer who drove flashy car and paid with cash in grocery bag). Convictions of such persons often implicate the doctrine of willful ignorance. See *infra* note 265 and accompanying text.

¹⁶⁸ See sources cited *infra* note 171.

¹⁶⁹ Douglas Husak argues that money-laundering prohibitions are purely a case of over-criminalization because transacting the profits of illegal conduct is not a further wrong to profiting from illegal conduct. HUSAK, *supra* note 15, at 105. I disagree. Assuming a particular revenue-generating crime is wrongful, transacting its proceeds is a way of advancing the commission of that wrong, sometimes in an essential manner and sometimes in a manner that makes it more likely that the underlying wrong will succeed, go unpunished, or expand.

¹⁷⁰ See 31 U.S.C. § 5313 (2000); 31 C.F.R. § 103.22(b)(1) (2007).

¹⁷¹ See *Business Community’s Compliance with Federal Money Laundering Statutes: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 101st Cong. 178–90 (1990) [hereinafter *Business Community’s Compliance*] (statement of John

tially, Congress made it a crime to restructure a large cash transaction into multiple smaller ones with intent to evade the reporting requirement.¹⁷² At the same time, Congress enacted broad new prohibitions on money laundering, going beyond reporting requirements to make the cash transactions themselves illegal.¹⁷³ Later, Congress and the courts broadened those new prohibitions in response to concerns about new circumvention tactics.¹⁷⁴ In response to evasion, Congress

C. Keeney, Deputy Assistant Att’y Gen., Criminal Division, Department of Justice) (describing original purpose of money-laundering statute to restrict criminal activity by getting at those who financially facilitate such activity); *Money Laundering Operations and the Role of the Department of the Treasury: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 99th Cong. 56–58 (1985) (statement of James Knapp, Deputy Assistant Att’y Gen., Criminal Division, Department of Justice) (urging passage of money-laundering legislation so that “emphasis will shift from investigating and prosecuting violations of currency reporting and recordkeeping statutes to attacking persons and institutions who knowingly ‘launder’ the profits of illicit enterprises”); PRESIDENT’S COMM’N ON ORGANIZED CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 8 (1984) (urging legislative broadening of money-laundering statutes beyond existing reporting requirements because “the degree of sophistication and complexity in a laundering scheme is virtually infinite, and is limited only by the creative imagination and expertise of the criminal entrepreneurs who devise such schemes”).

¹⁷² Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1354, 100 Stat. 3207, 3207-22 (codified as amended at 31 U.S.C. § 5324 (2000)).

¹⁷³ *Id.* § 1352, 100 Stat. at 3207-18 to -21 (codified as amended at 18 U.S.C. §§ 1956, 1957 (2000)).

¹⁷⁴ See *Business Community’s Compliance*, *supra* note 171, at 190–91 (statement of John C. Keeney, Deputy Assistant Att’y Gen., Criminal Division, Department of Justice), in which the following concern, among others, is described:

In [one case] we saw the Los Angeles jewelry mart being used as the hub of an international narcotics conspiracy that laundered more than \$1 billion in three years. The way the conspiracy operated was as follows: (1) Drug dealers delivered cash from cocaine sales to sham jewelry companies in New York City; (2) To make their businesses look real, the jewelry firms accepted regular shipments of fake gold bars from Latin America; (3) They shipped out boxes of cash, marked “gold scrap,” to two businesses in the L.A. jewelry district that were controlled by the cartel; (4) The cash was counted, bundled and then deposited in L.A. banks, which were told it was from the sale of the supposed gold; (5) Money from L.A. accounts was transferred to the cartel’s Manhattan bank accounts, then wired through Panama to South America to pay for coca and operating expenses; (6) Remaining profits were wired to secret accounts in European banks or sold through the parallel money exchange market in South America and returned to the United States where they are used to purchase luxury goods and services.

See also *United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith*, 801 F. Supp. 984, 987–89 (E.D.N.Y. 1992) (describing sophisticated money-laundering scheme of another international narcotics-trafficking organization).

The effort to broaden antilaunching laws in response to the pursuit of money laundering continues. See *Combating Money Laundering: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Government Reform*, 106th Cong. 13–44 (2000) (statement of Mary Lee Warren, Deputy Assistant Att’y

broadened the drug laws to encompass criminal financial transactions. Next, the law of criminal financial transactions broadened to encompass more types of economic exchange.

The result is extremely broad law. And the federal courts have kept that law broad since its core component was enacted in 1986.¹⁷⁵ In the Second Circuit, there are twelve significant decisions construing the core money-laundering statute in which the court rejected a narrower interpretation in favor of a broader one,¹⁷⁶ and only three of

Gen., Criminal Division, Department of Justice) (urging passage of bill to expand money-laundering statutes to reach money-laundering activities beyond United States borders and explaining how traffickers have shifted laundering efforts abroad because of tightening prohibitions and bank controls in United States); *Money Laundering Crisis: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 7–21 (2000) (statements of James K. Robinson, Assistant Att’y Gen., Criminal Division, Department of Justice, and Stefan D. Cassella, Assistant Chief, Asset Forfeiture and Money Laundering Section, Department of Justice) (urging same, for example, by giving detailed description of new transactional structure known as “Black Market Peso Exchange,” designed to launder narcotics proceeds beyond reach of United States law).

¹⁷⁵ See Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 343–49 (2003) (describing path of judicial construction of money-laundering statutes).

¹⁷⁶ See *United States v. Ness*, 466 F.3d 79, 80–81 (2d Cir. 2006) (holding that § 1956 is violated when defendant merely transfers proceeds of narcotics sales back up distribution chain, as long as such transfers are characterized by secrecy), *vacated*, 128 S. Ct. 2900 (2008); *United States v. Gotti*, 459 F.3d 296, 334–38 (2d Cir. 2006) (holding that receipt of cash “tribute” payments by organized-crime supervisors violates statute when transfers of such payments are characterized by complexity and secrecy); *United States v. Szur*, 289 F.3d 200, 213–14 (2d Cir. 2002) (holding that “financial transaction” is sufficiently distinct from “specified unlawful activity” to support separate convictions for laundering and underlying offense, where proceeds of fraudulent sale of stock are transferred from one participant in fraud scheme to others); *United States v. Moloney*, 287 F.3d 236, 240–41 (2d Cir. 2002) (holding that meaning of “financial transaction” allows multiple transactions in single scheme to be charged as one violation); *United States v. McCarthy*, 271 F.3d 387, 394–96 (2d Cir. 2001) (holding that “financial transaction” is sufficiently distinct from “specified unlawful activity” if defendant embezzles funds by transferring them to account and then writes checks out of that account); *United States v. Monaco*, 194 F.3d 381, 385–87 (2d Cir. 1999) (holding that “proceeds of specified unlawful activity” can include criminal proceeds generated before adoption of money-laundering statute and transacted after its adoption); *United States v. Maher*, 108 F.3d 1513, 1525–28 (2d Cir. 1997) (holding that defendant involved in transaction designed to conceal source of funds need not have knowledge of type of criminal activity that generated funds); *United States v. Leslie*, 103 F.3d 1093, 1101–02 (2d Cir. 1997) (holding that handing check to someone in exchange for cash is “financial transaction,” even if check is never deposited or cashed); *United States v. Kinzler*, 55 F.3d 70, 72–74 (2d Cir. 1995) (holding that effort to “conceal or disguise” material information about “proceeds” need not include effort to disguise identity of owner); *United States v. Wydermyer*, 51 F.3d 319, 326–27 (2d Cir. 1995) (holding that “financial transaction” includes physical carrying of cash outside United States); *United States v. Piervinanzi*, 23 F.3d 670, 677–83 (2d Cir. 1994) (holding that “financial transaction” and “specified unlawful activity” are sufficiently distinct to support separate convictions for laundering and underlying offense, where participants in bank fraud structure scheme so that funds are obtained through transfers to overseas accounts); *United States v.*

note in which the court rejected a broader interpretation of the statute in favor of a narrower one.¹⁷⁷ The court has been almost uniformly sympathetic to the view that a broad antilaundering statute is necessary to deal with the many innovative and unforeseeable forms in which professionals might transact the proceeds of illegal endeavors.

A consequence of this judicial broadening is the opportunity to sanction actors whose conduct cannot plausibly be described as involving the kind of strategic efforts to evade sanction that gave rise to such laws. Consider the following examples from the Second Circuit and other courts: a haberdasher who did a quarter of his business from sales to a pair of drug dealers;¹⁷⁸ a man who used funds pilfered from his infirm grandmother to buy a pickup truck for his brother and a house for himself and who made evasive representations to sellers when asked about his unusual payment methods;¹⁷⁹ a worker at a lawful check-cashing business that processed a large volume of narcotics proceeds who merely cleaned the office and helped count cash and take it to the bank;¹⁸⁰ a tavern proprietor who cashed several unusually large checks for a patron he knew to be a bookmaker;¹⁸¹ and a woman who arranged and profited from the sale of homes belonging to relatives she knew to be narcotics traffickers after the relatives were incarcerated or became fugitives.¹⁸²

The regulatory scheme is designed for actors who intentionally position themselves at some remove from direct commission of harmful acts, but it ends up being amenable to use against actors who are at such remove not by design but because of lesser culpability or

Stavroulakis, 952 F.2d 686, 690–91 (2d Cir. 1992) (holding that § 1956's requirement of knowledge as to "specified unlawful activity" permits co-conspirators to have differing beliefs about criminal source of funds).

¹⁷⁷ See *United States v. Stephenson*, 183 F.3d 110, 120–22 (2d Cir. 1999) (holding that if narcotics dealer purchases automobile with criminal proceeds in his own name, then there is no intent "to conceal or disguise" information about criminal proceeds); *United States v. Napoli*, 54 F.3d 63, 67–68 (2d Cir. 1995) (holding that, where bank fraud involves cashing bad checks, this "financial transaction" is not sufficiently independent of "specified unlawful activity" to satisfy § 1956); *United States v. Holmes*, 44 F.3d 1150, 1155–56 (2d Cir. 1995) (holding that defendant convicted on basis of engaging in single transaction with two of statute's prohibited purposes commits only one money-laundering violation).

¹⁷⁸ *United States v. Wynn*, 61 F.3d 921, 922–25 (D.C. Cir. 1995).

¹⁷⁹ *United States v. Lovett*, 964 F.2d 1029, 1031–36 (10th Cir. 1992).

¹⁸⁰ *United States v. Frigerio-Migiano*, 254 F.3d 30, 31–33 (1st Cir. 2001). The court of appeals reversed the conviction in this case on the ground that the jury's verdict was not supported by sufficient evidence of the defendant's knowledge that his actions were part of a money-laundering operation, not on any question of how marginal the defendant's role may have been. See *id.* at 34–36.

¹⁸¹ *United States v. Awada*, 425 F.3d 522, 523–25 (8th Cir. 2005).

¹⁸² *United States v. Cota*, 953 F.2d 753, 755–57, 760–61 (2d Cir. 1992).

dangerousness.¹⁸³ Or it may simply allow prosecutors to increase sanctions for actors who are easily punishable for direct commission of underlying harmful acts.¹⁸⁴

A cycle of more than two decades in money-laundering law in which liability rules have broadened to compete with sophisticated actors is undeniable, even if it may have finally reached its limits. There are presently four votes on the Supreme Court to limit the meaning of criminal “proceeds” in the principal statute to provable criminal *profits*,¹⁸⁵ which would be a sharp departure from existing law in the courts of appeals and could severely limit the reach of the statute as both a doctrinal and practical matter. Still, one Justice believes that such a construction of the statute would be appropriate only for limited types of underlying crimes¹⁸⁶ and four Justices reject such a construction entirely.¹⁸⁷ It remains to be seen whether federal money-laundering prohibitions will become a case of overbreadth reaching its outer limits and receding.¹⁸⁸

C. Obstruction of Legal Process

Federal prohibitions on conduct that obstructs legal process are extremely broad in both statutes and doctrine. Statutory prohibitions on obstruction of federal court and agency proceedings include something actually called an “omnibus clause.” This catch-all provision treats as a felon anyone who “corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice.”¹⁸⁹ Federal courts have described this clause as “drafted with an eye to ‘the variety of corrupt methods by which

¹⁸³ Take, for example, a governor of New York who may have tried to conceal his payments for the services of an illegal interstate prostitution service. See David Johnston & Stephen Labaton, *The Reports That Drew Federal Eyes to Spitzer*, N.Y. TIMES, Mar. 12, 2008, at B1.

¹⁸⁴ See Cuéllar, *supra* note 175, at 405–18 (discussing data on severity of penalties for laundering and prosecutors’ focus on predicate offenders). It must also be noted that the examination of appellate decisions for arguably unjustified prosecutions for money laundering underreports such cases by omitting prosecutions where the law’s breadth induced guilty pleas, most of which render the cases untraceable by reported appellate decisions.

¹⁸⁵ *United States v. Santos*, 128 S. Ct. 2020, 2024–25 (2008) (plurality opinion).

¹⁸⁶ *Id.* at 2031–34 (Stevens, J., concurring).

¹⁸⁷ *Id.* at 2035–45 (Alito, J., dissenting).

¹⁸⁸ See *Cuellar v. United States*, 128 S. Ct. 1994, 2000–05 (2008) (narrowing, to some extent, money-laundering statute governing cross-border transportation of funds but rejecting even narrower interpretation urged by defendant and finding that mental-state requirement of purpose sufficiently limited reach of statute).

¹⁸⁹ 18 U.S.C. § 1503 (2000); see also 18 U.S.C. § 1505 (2000) (using similar language in context of proceedings before departments, agencies, and committees); *United States v. Schwartz*, 924 F.2d 410, 422–23 (2d Cir. 1991) (construing broadly what counts as “proceeding” under § 1505).

the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined,'"¹⁹⁰ and as "intended to ensure that criminals could not circumvent the law's purpose by devising novel and creative schemes that would interfere with the administration of justice but would nonetheless fall outside the scope of [the statute's] specific prohibitions."¹⁹¹ In recent years, Congress has added prohibitions to this framework that reach acts of obstruction falling outside even these omnibus clauses, including acts in anticipation of legal proceedings not yet commenced¹⁹² and destruction of evidence relevant to any form of federal government inquiry—not just judicial proceedings.¹⁹³

The judiciary has also been instrumental in broadening obstruction laws. Again, consider the Second Circuit. In many cases, the court has confronted simple obstructive acts: doctoring or hiding of bookkeeping and other records subpoenaed by grand juries;¹⁹⁴ bribery of judges to decide cases;¹⁹⁵ intimidation or overt threats of violence against witnesses if they chose to testify;¹⁹⁶ and lying under oath before tribunals.¹⁹⁷ Such core cases continue to arise, of course, and fall squarely within the scope of the obstruction statutes. But prosecutors and judges have steadily supplemented this core with cases that involve behavior altered, or removed one step, from those in the core: influencing a prosecutor by fraud rather than bribe;¹⁹⁸ arranging for a defendant to have unnecessary surgery to disrupt a criminal trial;¹⁹⁹ encouraging a witness, subtly (or not) and for an illegitimate purpose, to testify falsely or to invoke his Fifth Amendment rights and refuse to

¹⁹⁰ *United States v. Griffin*, 589 F.2d 200, 206–07 (5th Cir. 1979) (quoting *Anderson v. United States*, 215 F.2d 84, 88 (6th Cir. 1954)).

¹⁹¹ *United States v. Tackett*, 113 F.3d 603, 607 (6th Cir. 1997).

¹⁹² 18 U.S.C. § 1512 (2000 & Supp. IV 2006).

¹⁹³ 18 U.S.C. § 1519 (Supp. IV 2006).

¹⁹⁴ *E.g.*, *United States v. Weiss*, 491 F.2d 460, 464 (2d Cir. 1974); *United States v. Siegel*, 263 F.2d 530, 532 (2d Cir. 1959); *Bosselman v. United States*, 239 F. 82, 84 (2d Cir. 1917); *see also* *United States v. Jespersen*, 65 F.3d 993, 998–1001 (2d Cir. 1995) (holding that it can be obstruction to produce falsified document even if production of document was required by subpoena).

¹⁹⁵ *E.g.*, *United States v. Fasolino*, 586 F.2d 939, 940–41 (2d Cir. 1978); *United States v. Kahaner*, 317 F.2d 459, 463–64 (2d Cir. 1963); *United States v. Manton*, 107 F.2d 834, 840–44 (2d Cir. 1939).

¹⁹⁶ *E.g.*, *United States v. Bradwell*, 388 F.2d 619, 620–21 (2d Cir. 1968); *United States v. Kahn*, 366 F.2d 259, 262 (2d Cir. 1966); *United States v. Woodmansee*, 354 F.2d 235, 235 (2d Cir. 1965); *United States v. Potash*, 118 F.2d 54, 56 (2d Cir. 1941).

¹⁹⁷ *E.g.*, *United States v. Langella*, 776 F.2d 1078, 1081 (2d Cir. 1985); *United States v. Turcotte*, 515 F.2d 145, 149–50 (2d Cir. 1975).

¹⁹⁸ *United States v. Polakoff*, 121 F.2d 333, 334–35 (2d Cir. 1941).

¹⁹⁹ *United States v. Minkoff*, 137 F.2d 402, 403–04 (2d Cir. 1943).

testify;²⁰⁰ lying to a witness in the hope that the witness would believe the lie and repeat it to a grand jury;²⁰¹ deliberately testifying in an evasive manner and falsely asserting lack of recollection;²⁰² attempting to move evidence sought by the police to a location where it would be harder to find;²⁰³ engaging in obstructive acts designed to disrupt trial without realizing the proceedings they were obstructing were federal in nature;²⁰⁴ assuming ownership of a fugitive's real estate holdings in order to help conceal his whereabouts;²⁰⁵ and sharing information with grand jury targets about whom the grand jury is investigating.²⁰⁶ By contrast, the Second Circuit has found very few occasions to limit the scope of the obstruction statutes.²⁰⁷

²⁰⁰ *E.g.*, *United States v. Kaplan*, 490 F.3d 110, 116, 127 (2d Cir. 2007); *United States v. LaFontaine*, 210 F.3d 125, 128–29, 132–33 (2d Cir. 2000); *United States v. Tocco*, 135 F.3d 116, 127 (2d Cir. 1998); *United States v. Johnson*, 968 F.2d 208, 209–10, 215 (2d Cir. 1992); *United States v. Coiro*, 922 F.2d 1008, 1012–14 (2d Cir. 1991); *United States v. Biaggi*, 853 F.2d 89, 104–05 (2d Cir. 1988); *United States v. Capo*, 791 F.2d 1054, 1060, 1069–70 (2d Cir. 1986), *rev'd en banc on other grounds*, 817 F.2d 947 (1987); *United States v. Rodolitz*, 786 F.2d 77, 81–82 (2d Cir. 1986); *United States v. Cioffi*, 493 F.2d 1111, 1116–19 (2d Cir. 1974); *United States v. Knohl*, 379 F.2d 427, 431 (2d Cir. 1967); *United States v. Grunewald*, 233 F.2d 556, 570–71 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957).

²⁰¹ *United States v. Gabriel*, 125 F.3d 89, 102–05 (2d Cir. 1997), *abrogated by* *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

²⁰² *E.g.*, *United States v. Cohn*, 452 F.2d 881, 882–84 (2d Cir. 1971); *United States v. Alo*, 439 F.2d 751, 753–54 (2d Cir. 1971).

²⁰³ *United States v. Barton*, 647 F.2d 224, 239–41 (2d Cir. 1981).

²⁰⁴ *United States v. Ardito*, 782 F.2d 358, 359–62 (2d Cir. 1986).

²⁰⁵ *United States v. Ruggiero*, 934 F.2d 440, 442–46 (2d Cir. 1991).

²⁰⁶ *United States v. Giovanelli*, 464 F.3d 346, 350–51 (2d Cir. 2006).

²⁰⁷ The following are the nine meaningful limiting cases that are reported and citable: *United States v. Bruno*, 383 F.3d 65, 86–89 (2d Cir. 2004) (reversing convictions because prosecution did not satisfy element requiring defendant to have known and intended that false statements in interview would reach grand jury); *United States v. Lopez*, 372 F.3d 86, 91–92 (2d Cir. 2004) (holding that, for witness-tampering statute to apply, possibility of federal inquiry must be supported by facts and not mere hypothesis), *vacated for reconsideration on other grounds*, 544 U.S. 902 (2005); *United States v. Schwarz*, 283 F.3d 76, 102–03, 107–10 (2d Cir. 2002) (reversing convictions of New York City police officers in infamous brutality case involving victim Abner Louima because prosecution did not satisfy element requiring defendants to have known and intended that false statements in interviews would reach grand jury); *United States v. Masterpol*, 940 F.2d 760, 762–63 (2d Cir. 1991) (holding that witness-tampering statute, not “omnibus” clause of general obstruction statute, must be used to prosecute interference with witnesses prior to initiation of judicial proceedings); *United States v. King*, 762 F.2d 232, 236–38 (2d Cir. 1985) (holding that witness-tampering statute, as distinct from “omnibus” clause of general obstruction statute, does not cover noncoercive effort to persuade witness to lie), *superseded by statute*, Minor and Technical Criminal Law Amendments Act of 1988, 18 U.S.C. § 1512(b) (2000 & Supp. IV 2006); *United States v. Moon*, 718 F.2d 1210, 1236 (2d Cir. 1983) (holding that it is not obstruction of justice to produce false document that was covered by subpoena and was not falsified in course of responding to subpoena when evidence is insufficient to establish intent); *United States v. Siegel*, 717 F.2d 9, 20–21 (2d Cir. 1983) (finding that relationship between obstructive act and potential future legal proceeding cannot be too remote, as violator must have particular federal proceeding in mind); *United States v. Bufalino*, 285

Notice that each of these cases beyond the core involves a behavior that responds to some basic legal rule: A grand jury witness is lied to, rather than told to lie, because perjury prohibitions might deter the witness from purposely lying; evidence is moved to a more remote location because simply destroying the evidence is more likely to lead to punishment; testimony is evasive and forgetful because direct lies are more likely to be punished; and so on.

Another key move by courts to facilitate the broadening of obstruction laws has been the interpretation of “corruptly”—the mens rea element found in the principal obstruction statutes—to mean “with an improper purpose to obstruct justice.”²⁰⁸ This somewhat question-begging mens rea formulation has meant that the answer to the question of what behavior counts as criminal obstruction of justice is, in essence, “Anything that is intended to obstruct justice.”²⁰⁹ While, as I will discuss in Part III, mens rea requirements can in some situations narrow prohibitions that otherwise apply to many forms of conduct,²¹⁰ in this context a mens rea formulation has been used to state that there shall be no ex ante limit on the forms that impermissibly obstructive behavior can take.

The furthest reach of this broadening trend in obstruction law thus far has been the punishment of lawyers and others who engage in litigation conduct that is deemed out of bounds: a criminal defense attorney who met with a mob boss to plan how to steer clients, who were mob underlings, toward refusing to testify in a grand jury (to the point of one client’s imprisonment for contempt);²¹¹ a civil lawyer who, while invested in business with a client who was the target of a criminal racketeering case, attempted to derail the criminal inquiry by bringing frivolous lawsuits in state court against federal law-

F.2d 408, 414–16 (2d Cir. 1960) (finding evidence insufficient to establish conspiracy to obstruct justice in case of large group of attendees lying about purpose of infamous gathering on November 14, 1957, of many reputed mobsters at farm in Apalachin, New York); see also 18 U.S.C. § 1512(e) (2000 & Supp. IV 2006) (providing for affirmative defense to witness tampering if defendant’s sole purpose was “to encourage, induce, or cause the other person to testify truthfully”).

²⁰⁸ See *Bosselman v. United States*, 239 F. 82, 86 (2d Cir. 1917) (“[A]ny endeavor to impede and obstruct the due administration of justice . . . is corrupt.”). The Second Circuit has held that this mens rea formulation saves the statutes from the charge that they are unconstitutionally vague. *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996).

²⁰⁹ Julie O’Sullivan argues that at least some of the federal decisions have gone further, implying that engaging in any behavior intentionally, while foreseeing that the act would have obstructive consequences, satisfies the statutes’ mens rea requirements. O’Sullivan, *supra* note 16, at 688–89 & n.185.

²¹⁰ See *infra* Part III.A.

²¹¹ *United States v. Cintolo*, 818 F.2d 980, 983–96 (1st Cir. 1987).

enforcement officials;²¹² and an investment banker who sent an email telling colleagues to attend to neglected document clean-up after he was told of a related grand jury investigation in which he might be in jeopardy.²¹³

When the problem is how to draw a line between unwanted interference with legal processes and legitimate, or even welcome, adversarial behavior, there is notable circularity in defining the mens rea for obstruction of justice as a “purpose to obstruct justice.”²¹⁴ After all, litigating is a way to avoid sanctioning, and litigating is not only socially welcome but also a protected right.²¹⁵ This tension might explain why the Supreme Court has struggled recently with the mens rea requirements for obstruction offenses, ruling that a federal judge who lied at his home to FBI agents did not obstruct justice because he neither knew nor intended that his false statements would be supplied to a grand jury²¹⁶ and that a public-company auditor that rushed to shred documents with knowledge of their relevance to an impending SEC inquiry could not be convicted unless its employees were proven to have destroyed the evidence with “consciousness of wrongdoing.”²¹⁷

Even with some recent limiting moves, the overbreadth in obstruction of justice law is plain. In attempting to keep the law limber in the face of creative and determined efforts to derail the sanctioning process, legislators, prosecutors, and judges have created a legal scheme that, in its worst light, can be charged with maintaining that one person’s aggressive litigation is another person’s criminal obstruction of justice.²¹⁸

²¹² *United States v. Cueto*, 151 F.3d 620, 624–35 (7th Cir. 1998); *see also* *United States v. Mintmire*, 507 F.3d 1273, 1274–75, 1289–95 (11th Cir. 2007) (affirming conviction of attorney-promoter in stock-offering scheme for obstructing SEC investigation by coaching witnesses to withhold facts from SEC, in part to shield attorney’s son from liability).

²¹³ *United States v. Quattrone*, 441 F.3d 153, 165–66 (2d Cir. 2006). The court reversed Quattrone’s conviction because the trial judge misstated the law in his instructions to the jury. *Id.* at 177–81. The court nonetheless explained at length that the evidence was sufficient to establish that Quattrone criminally obstructed justice when he sent his email. *Id.* at 171–76.

²¹⁴ Another problem is that the federal obstruction statutes contain plain old bad drafting: They are too often sloppy, redundant, and confusing. O’Sullivan, *supra* note 16, at 679–85.

²¹⁵ At least, it is protected most of the time. *See* U.S. CONST. amends. VI, VII (guaranteeing right to jury trial in criminal and most civil cases).

²¹⁶ *United States v. Aguilar*, 515 U.S. 593, 595–97, 600–01 (1995).

²¹⁷ *Arthur Andersen LLP v. United States*, 544 U.S. 696, 698–701, 704–06 (2005).

²¹⁸ The point is starkly presented by Congress’s most recent intervention in obstruction law, 18 U.S.C. § 1519 (Supp. V 2006)—a component of the Sarbanes-Oxley legislation—which makes a felon of anyone who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the

D. *Loopholing and Fraud*

Expansive pressure on liability rules is greatest when evasive actors are most determined and sophisticated.²¹⁹ A highly self-aware relationship between behavior and regulation often fits this pattern. Suppose my law school's policy states that I may distribute professor-evaluation forms to students at any time during the last two weeks of the semester. The policy's purpose is to increase response rates by affording instructors and students flexibility. I decide to distribute the evaluations on the first eligible day while intentionally saving the most mystifying and boring twenty percent of the material for the last two weeks of classes, during which I engage in a force-feeding exercise.

Having observed me do this, my law school changes the rule the following semester. Now, evaluations may be conducted at any time during the final two weeks of classes, but no date may be selected "for the purpose of preventing the students from fairly evaluating the instructor on the basis of any significant portion of the course or for any other purpose designed to produce misleading results." I again distribute the evaluations on the first eligible day and then cover the least tolerable twenty percent of the material during the last two weeks.

Have I violated the new regime? I have complied with its bright-line, conduct-based rule by distributing the evaluations at "any time during the last two weeks." Whether I have violated the intent-based standard that fortifies the conduct rule depends on what I was thinking, which is not directly observable. In the twenty percent case, especially in light of my conduct in the prior semester, the inference that I harbored the prohibited intent is strong. But what about harder cases involving, for example, coverage of fifteen percent of the bad material in the last two weeks, or ten percent of it—or an instructor with no history of circumvention?

This pattern appears in many areas of law, particularly where the law attempts to identify a subset of harmful behaviors in a class that

intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." The statute has been broadly applied to arguably impulsive, fleeting, or trivial acts by minor actors. See *United States v. Lessner*, 498 F.3d 185, 196–98 (3d Cir. 2007) (holding that statute was violated when woman threw calendar in trash while being led away from her desk for interview with investigators pursuing case of government contracting fraud); *United States v. Wortman*, 488 F.3d 752, 753–55 (7th Cir. 2007) (affirming conviction of woman who broke CD in half that contained child pornography at instruction of boyfriend who had learned he was under investigation for possession of such materials). Some consequences of overbroad obstruction laws easing the pursuit of "pretextual prosecutions" are explored in Richman & Stuntz, *supra* note 78.

²¹⁹ See Kahan, *supra* note 69, at 493–94 (describing problem of "loopholing").

includes socially desirable ones.²²⁰ A rule proves too easy to circumvent in a manner that produces the very harm the rule was meant to prevent. Altering the content of the rule only produces different forms of harmful circumvention. In response, the legal system adopts a standard saying something like “Do not produce the harm with which this regime is concerned.” Such a broad standard raises concerns about notice and control of discretion in enforcement as well as overdeterrence and sanctioning of nonblameworthy persons. The standard is thus made to turn on something about the actor’s mental state in an effort to give it precision and predictability.²²¹ Because

²²⁰ For example, the SEC frequently appends the following language to regulations defining safe harbors from general prohibitions that regulate the socially valuable process of capital formation: “This [safe harbor] is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of [the Securities Act of 1933].” 17 C.F.R. § 230.168 preliminary note 1 (2007); see also Lawrence A. Cunningham, *A Prescription To Retire the Rhetoric of ‘Principles-Based Systems’ in Corporate Law, Securities Regulation, and Accounting*, 60 VAND. L. REV. 1411, 1430–33 (2007) (exploring how various regulatory systems combine use of rules and principles). The tax laws—the paradigmatic rule-based form of regulation—include principles, like the “form over substance” and “step transaction” doctrines, that authorize courts to impose liability *ex post* if an actor has structured conduct *ex ante* that complies in literal terms with the code but accomplishes ends equivalent to those barred by, and motivating, the rules. See Steven A. Dean & Lawrence M. Solan, *Tax Shelters and the Code: Navigating Between Text and Intent*, 26 VA. TAX REV. 879, 882 (2007) (“[T]ax shelters are generally characterized as transactions that appear to comply in a literal manner with the Code, but which are designed to reach a tax result that Congress would not have intended.”); see also Alex Raskolnikov, *Relational Tax Planning Under Risk-Based Rules*, 156 U. PA. L. REV. 1181, 1205–07 (2008) (describing problem of taxpayers using non-binding “relational” agreements as means of avoiding tax consequences of contractual arrangements); David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 871 (1999) (“[Rules are] an easy target for tax planning To reduce this potential, rules must become more complex, and greater complexity creates additional opportunities for planning, and onward and onward. Standards are fuzzy at the borders, reducing this problem.”).

²²¹ The focus on mental state may also further an agenda of sanctioning only those who deserve to be sanctioned. See Buell, *supra* note 91, at 2022–36 (exploring how fraud law’s focus on actor’s “consciousness of wrongdoing” sorts commercial actors engaging in deception according to relative blameworthiness); cf. Larry Alexander, *Is Morality Like the Tax Code?*, 95 MICH. L. REV. 1839, 1850 (1997) (reviewing LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* (1996)) (arguing that nature and extent of actor’s purpose in engaging in harmful behavior is central to assessment of moral blameworthiness). I have borrowed the “loopholing” term and concept from Kahan, *supra* note 30, at 137–40. I may depart from Kahan where *mens rea* is concerned. Kahan argues that courts have to distinguish unwanted loopholing from permissible efforts to structure behavior around sanctioning regimes by deciding whether the actor was virtuous according to prevailing moral standards. *Id.* at 140–42. I am not persuaded that more conventional inquiry into mental state cannot identify blameworthy loopholers in many contexts, nor am I persuaded that having judges guesstimate prevailing moral standards can eliminate the problem of overbreadth in standards that are designed to prevent actors from engineering around rule-based regimes. For further discussion of how reference to mental states can refine overbroad liability rules, see *infra* Part III.A.

mental state is not observable, and conclusions about it must be based on inferences from observable conduct, the fit between the legal regime and the problem it addresses might remain less than optimal.²²²

A standard in the form of “Do not engage in behavior *X* with the intent to produce undesirable harm (or acquire unjustified gain) *Y*,” permits sanctioning of some persons whose conduct does not substantially threaten the interests the legal regime is designed to protect.²²³ Without such a standard, however, a rule-based regime is doomed to fail in its effort to sanction those who do seriously threaten those interests, because such persons will reorganize their conduct to achieve their desired criminal ends without transgressing the terms of the applicable rules.²²⁴

The criminal law of fraud follows this pattern. Frauds are means of appropriating property and similar interests of others without violating the basic prohibition on theft. This very concept posits an actor who is resourceful, clever, and cognizant of legal and normative constraints.²²⁵ Legal prohibitions on fraud are exceedingly open textured,

²²² Another way to conceptualize this phenomenon is to say that a regulatory system chooses to shift from adjudicating conduct *ex ante* (the effect of rules) to adjudicating it *ex post* (the effect of standards). Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992). Kaplow conceives of the choice between rules and standards as largely about efficiency: Rules are more costly to produce but are more efficient when the regulatory problem is likely to involve conduct that arises frequently and in similar form. *Id.* at 579–81. Kaplow recognizes, but does not discuss, the relationship between efforts to avoid sanctioning and the legal system’s choice between rules and standards. *See id.* at 618 (“[B]ecause laws of form are often designed to prevent fraud, which may be easier to commit if there are known rigid rules that a fraudulent actor can carefully circumvent, standards may be preferable in some contexts.”); *see also* Cunningham, *supra* note 220, at 1423 (“[R]ules can be blueprints for evading their underlying purposes. Bright lines and exceptions to exceptions facilitate strategic evasion, allowing artful dodging of the rule’s spirit by literal compliance with its technical letter.”).

²²³ This problem may be particularly acute in the tax context, given society’s normative ambivalence about loopholing to avoid taxes. *See* Walter J. Blum, *Motive, Intent, and Purpose in Federal Income Taxation*, 34 U. CHI. L. REV. 485, 515 (1967) (“It clearly would be foolish to attempt to define tax avoidance as merely a more intense or pervasive version of tax minimization.”). This might explain the Supreme Court’s ruling that a tax protester, who had listened to an argument made at seminars that ordinary wages were not “income” within the meaning of the tax code and subsequently refused to pay taxes on his wages, was entitled to a jury instruction at his criminal trial for tax evasion that the government had to prove that he knew his conduct was unlawful (i.e., that ignorance of the law is a defense to tax evasion). *Cheek v. United States*, 498 U.S. 192, 195–96, 201–03 (1991).

²²⁴ A recent critical treatment of breadth in criminal and regulatory law is Skeel & Stuntz, *supra* note 116. Skeel and Stuntz argue that rule-based regulation, “[r]ather than cultivating a sense of moral responsibility . . . simply function[s] as an obstacle course, a set of barriers around which corporate officers must maneuver.” *Id.* at 836. Of course, the legal system often resorts to broad standards as a response to the problem that Skeel and Stuntz describe.

²²⁵ Buell, *supra* note 91, at 1972–75.

often consisting in statutory form of no more than the edict “Do not defraud others.”²²⁶ In Anglo-American legal systems, legislators and courts have been keen to defend the open texture in fraud laws against those who have criticized it as violating the legality principle.²²⁷ In mounting that defense, legal actors have often said that open texture in fraud law is essential to combat the incessant efforts of the inventive “fraud artist” to craft novel means of appropriating others’ interests and to circumvent definitions and conceptions of those who make the criminal code.²²⁸

The federal mail fraud statute, enacted in 1889, might have been interpreted as a measure exclusively for punishing those who prey upon victims with mail-based scams.²²⁹ Early in the statute’s history, however, the Supreme Court rejected this limited reading and sent the statute off on a broadening course.²³⁰ The Court’s only significant effort to limit the statute’s scope—a 1987 ruling that rejected the idea

²²⁶ See, e.g., 18 U.S.C. § 1341 (2000) (making it criminal to “devise *any* scheme or artifice to defraud” and to use mails in furtherance of such scheme or artifice (emphasis added)); 17 C.F.R. § 240.10b-5 (2007) (prohibiting “*any* device, scheme, or artifice to defraud” and “*any* act . . . which operates or would operate as a fraud” in “connection with the purchase or sale” of securities (emphasis added)).

²²⁷ Some of this history is described in Buell, *supra* note 91, at 1987–2014.

²²⁸ See, e.g., *United States v. Maze*, 414 U.S. 395, 405–07 (1974) (Burger, C.J., dissenting) (“The criminal mail fraud statute must remain strong . . . to cope with the new varieties of fraud that the ever-inventive American ‘con artist’ is sure to develop.”); *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941) (“The law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity.”); *McAleer v. Horsey*, 35 Md. 439, 452 (1872) (“[A]s it is the very nature and essence of fraud to elude all laws in fact, without appearing to break them in form, a technical definition of fraud . . . would be in effect telling to the crafty precisely how to avoid the grasp of the law.”); Letter from Lord Hardwicke to Lord Kames (June 30, 1759), in JOSEPH PARKES, *A HISTORY OF THE COURT OF CHANCERY* 501, 508 (1828) (“Fraud is infinite, and were a court of Equity . . . to define strictly the species or evidence of it, the jurisdiction would be . . . perpetually eluded by new schemes, which the fertility of man’s invention would contrive.”). The development of the substantive law of fraud has been highly expansive at least since 1601 when Lord Coke, reporting a case as the Queen’s Attorney General and pressing for a broad interpretation of an Elizabethan statute targeting fraudulent conveyances, stated: “[B]ecause fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole Court, that all statutes made against fraud should be liberally and beneficially expounded to suppress fraud.” *Twyne’s Case*, (1601) 76 Eng. Rep. 809, 815–16 (K.B.). In his report, Coke also said: “*Quoeritur, ut crescent tot magna volumina legis? In promptu causa est, crescit in orbe dolus.*” *Id.* at 815. The phrase translates as: “If you ask why are there so many laws, the answer is that fraud ever increases on this earth.” CHARLES ROSS, *ELIZABETHAN LITERATURE AND THE LAW OF FRAUDULENT CONVEYANCE* 105 (2003).

²²⁹ See *Schmuck v. United States*, 489 U.S. 705, 723 (1989) (Scalia, J., dissenting) (“[I]t is mail fraud, not mail and fraud, that incurs liability.”).

²³⁰ See *Durland v. United States*, 161 U.S. 306, 313 (1896) (“[The mail fraud statute] includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose.”).

that a fraud can consist of an effort to deprive a person of her “intangible right” to honest services of the defendant²³¹—was quickly reversed by Congress.²³² The breadth of the federal mail fraud statute is sufficient to have spawned its own literature within the work on overcriminalization.²³³

The development of the law of securities fraud has been similar. When it passed the Securities Exchange Act of 1934 and empowered the Securities and Exchange Commission to make antifraud rules,²³⁴ the New Deal Congress had broader remedial objectives than the nineteenth-century Congress that enacted the mail fraud statute. Judicial doctrine has extended the law further, as the federal courts have bypassed opportunities to narrow the scope of behaviors in the securities markets treated as fraud and—most famously with the development of the insider-trading doctrine—have created new theories of securities fraud.²³⁵

Consider the example of accounting fraud, the deceptive use of the conventions that shape how publicly traded firms report their financial performance to investors and markets.²³⁶ The typical motive for accounting fraud is compensation benefits, including equity, that flow to managers of firms when stock prices rise in response to market

²³¹ *McNally v. United States*, 483 U.S. 350, 356–60 (1987).

²³² See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988) (codified at 18 U.S.C. § 1346 (2000)) (reversing result in *McNally*).

²³³ See, e.g., John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the “Evolution” of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983) (suggesting “core premises” upon which mail fraud statute should be reformed); John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427 (1998) (developing and arguing for limiting principles to restrict reach of § 1346); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone To Watch Over Us*, 31 HARV. J. ON LEGIS. 153 (1994) (arguing that mail fraud statute’s incorporation of intangible-rights doctrine raises constitutional concerns, including vagueness, and proposing alternative legislation).

²³⁴ 15 U.S.C. § 78j(b) (2000) (known as “section 10(b) of the ‘34 Act”); 17 C.F.R. § 240.10b-5 (2007) (known as “Rule 10b-5”).

²³⁵ For cases developing insider-trading liability—a doctrine that neither § 10(b) of the ‘34 Act nor Rule 10b-5 explicitly create—see, for example, *United States v. O’Hagan*, 521 U.S. 642 (1997), *Dirks v. SEC*, 463 U.S. 646 (1983), and *Chiarella v. United States*, 445 U.S. 222 (1980). See also *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (“When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn.”). The one significant area of narrowing has been the scope of persons who may be held liable for fraudulent behavior in a private lawsuit. See *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (declining to extend 10b-5 private right of action to reach third-party defendants who enter into supply contracts with public companies alleged to have committed accounting fraud); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 177–78 (1994) (rejecting aiding-and-abetting liability under § 10(b)).

²³⁶ See JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME* 593–605 (3d ed. 2007) (summarizing various methods of accounting fraud).

perception of firms' strong financial performance. The usual means of accounting fraud are methods to boost companies' stock prices through the reporting of rosy financial data when a firm's true economic fundamentals do not support a rising stock price. With accounting fraud, prohibitions on securities fraud interact with detailed industry conventions on reporting financial performance, principally contained in the quasi-code known as Generally Accepted Accounting Principles (GAAP). This regulatory scheme presents opportunities for evasion, particularly if the accounting treatment of an item under GAAP turns on matters having to do with a manager's reliance on the advice of professionals and experts that the manager compensates.²³⁷

Fraud prosecutions for accounting manipulations sometimes raise the question of whether technical compliance with the arcane and often counterintuitive rules of GAAP, even if such "compliance" is engineered to mislead the consumer of a firm's financial reports, supplies a defense. One can understand the argument that it would. If standard-setters have required industry participants to abide by rule-based conventions, then industry participants ought to know they can sleep soundly as long as a technician has opined that their public filings fit the letter of those rules. The courts, it turns out, have not been persuaded by this argument.²³⁸ In an opinion by Judge Henry Friendly in 1969, the Second Circuit ruled that, while compliance with GAAP conventions is evidentiary as to state of mind in a fraud prosecution, it does not supply a defense that would give rise, for example, to a dismissal or a jury instruction requiring acquittal based on such a finding.²³⁹ A manager commits fraud, the court held, if she misleads with the intent to defraud—GAAP compliance or no GAAP compliance.²⁴⁰ The Second Circuit reaffirmed this rule in the recent prosecu-

²³⁷ See, e.g., Complaint at 2–3, SEC v. Meridian Holdings, Inc., No. CV07-06335-DDP (C.D. Cal. Sept. 28, 2007), available at <http://www.sec.gov/litigation/complaints/2007/comp20318.pdf> (charging firm with securities fraud for more than doubling its stock price in short period by reporting large default judgment and interest on judgment as assets and income, though managers had no reasonable basis to believe judgment was collectible); see also BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* (2003) (providing detailed account for lay reader of accounting maneuvers within Enron); John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57, 69–82 (2005) (describing some technical aspects of Enron accounting fraud).

²³⁸ For an illuminating discussion of the problems that follow from formalist accounts of obligations in such areas as financial reporting and tax compliance, see William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 *FORDHAM L. REV.* 1453, 1455–64 (2006). For a defense of the morality in formalism, see generally KATZ, *supra* note 221.

²³⁹ *United States v. Simon*, 425 F.2d 796, 805–06 (2d Cir. 1969).

²⁴⁰ *Id.* at 806–07.

tions of Bernard Ebbers, former chief executive officer of WorldCom,²⁴¹ and former executives of Adelphia Corporation.²⁴²

The Second Circuit has charted similar expansive courses in other areas of fraud law. The most controversial area of federal fraud law is the prohibition in the mail and wire fraud statutes on devising a scheme to defraud a person of her “intangible right of honest services” from the defendant.²⁴³ In a recent en banc ruling on this statute, the court reversed a panel ruling in another case that held this portion of the statute to be unconstitutionally vague,²⁴⁴ reaffirming the statute’s validity and giving it a judicially crafted and very broad gloss.²⁴⁵ The court also has acted expansively in applying the mail fraud statute in public-corruption contexts. In one oft-cited case, the court held that a political-party boss with no government position could be prosecuted for depriving citizens of their “intangible right to honest services” of government officials because the boss (who was alleged to have taken bribes in exchange for patronage jobs) exercised de facto control over government functions.²⁴⁶ And the court has held

²⁴¹ United States v. Ebbers, 458 F.3d 110, 125–26 (2d Cir. 2006).

²⁴² United States v. Rigas, 490 F.3d 208, 220 (2d Cir. 2007).

²⁴³ 18 U.S.C. § 1346 (2000).

²⁴⁴ United States v. Handakas, 286 F.3d 92, 96 (2d Cir. 2002), *overruled by* United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003) (en banc).

²⁴⁵ See *Rybicki*, 354 F.3d at 144 (finding defendant’s conduct in *Handakas* “not within the scope of behavior proscribed by section 1346” and overruling “unnecessary constitutional ruling”). The Second Circuit held:

[The statute prohibits] a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the other person to whom the duty of loyalty is owed) secretly to act in his or her or the defendant’s own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer or other person.

Id. at 146–47.

²⁴⁶ United States v. Margiotta, 688 F.2d 108, 121–26 (2d Cir. 1982). *But see* United States v. Murphy, 323 F.3d 102, 104–05 (3d Cir. 2003) (rejecting theory of *Margiotta* that nonpublic officials can owe duty of honest services to citizens absent state-law violation). The Second Circuit’s attitude toward the mail fraud statute is shared by most, but not all, of the other circuits. For example, a recent Fifth Circuit ruling held that bankers who aided former executives of Enron in accounting fraud could not be charged for assisting the executives in depriving Enron shareholders of their right to honest services because, the court said, Enron led those executives to believe the company wanted them to inflate earnings. United States v. Brown, 459 F.3d 509, 521–22 (5th Cir. 2006). The ruling is anomalous, even when measured against that circuit’s own prior decisions. See United States v. Brumley, 116 F.3d 728, 733–34 (5th Cir. 1997) (holding that breach of any duty specified under state law can give rise to charge of “honest services” fraud). Even in *Brown*, the court implied that there would have been little difficulty with a fraud theory had the government charged on a conventional theory of securities fraud rather than on a theory of “honest services” mail fraud. 459 F.3d at 522–23.

that a public-company officer can violate the statute by engaging in self-dealing, on the theory that an officer defrauds shareholders of their “right to control” corporate assets if she conceals in public filings the true nature of payments by the corporation.²⁴⁷

The conclusions are unmistakable: Federal fraud law is very broad, and its breadth is driven in part by an agenda of maintaining supple legal tools to deal with inventive and resourceful persons determined to appropriate the interests of others. Fraud law is also overbroad. The federal reporters contain plenty of examples of fraud sanctions against persons who cannot plausibly be described as the kinds of inventive, resourceful, and threatening actors who compel the legal system to maintain flexible instruments of defense. It is hard to see much to worry about—at least for purposes of federal punishment—in professors who award doctorates to students they know to have engaged in plagiarism in the hope that the students, once placed in government jobs, will steer grants to the professors,²⁴⁸ or in college coaches who falsify students’ academic records in order to help them maintain eligibility to play basketball under NCAA rules.²⁴⁹ Yet these sorts of persons commonly lose in federal court. One reason that they lose is that judges deciding their cases believe that interpreting the statute narrowly enough to support a ruling that “this defendant’s conduct was not fraud” will give the statute a meaning that helps resourceful actors elude its grasp.²⁵⁰

III

OVERBREADTH AND AGENCY COSTS

What is to be done about all this overbreadth in criminal law (or at least the portion that is not due to sloppy lawmaking)? How should

²⁴⁷ *United States v. Wallach*, 935 F.2d 445, 461–64 (2d Cir. 1991); *see also* *United States v. Bronston*, 658 F.2d 920, 922, 927 (2d Cir. 1981) (holding that, under some conditions, mail fraud charge can be based on fiduciary’s concealment of conflict of interest from beneficiary). *But see* *United States v. D’Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) (“Mail fraud cannot be charged against a corporate agent who in good faith believes that his or her (otherwise legal) misleading or inaccurate conduct is in the corporation’s best interests.”).

²⁴⁸ *United States v. Frost*, 125 F.3d 346, 352–53 (6th Cir. 1997).

²⁴⁹ *United States v. Gray*, 96 F.3d 769, 771–72 (5th Cir. 1996).

²⁵⁰ Chief Judge Frank Easterbrook, while underestimating the difficulty of the problem, stated the point in a recent opinion in a mail fraud case:

This prosecution, which led to the conviction and imprisonment of a civil servant for conduct that, as far as this record shows, was designed to pursue the public interest as the employee understood it, may well induce Congress to take another look at the wisdom of enacting *ambulatory* criminal prohibitions. Haziness designed to avoid loopholes through which bad persons can wriggle can impose high costs on people the statute was not designed to catch.

United States v. Thompson, 484 F.3d 877, 884 (7th Cir. 2007) (emphasis added).

social planners respond to the unjustified criminalization that follows from the widening of liability rules for justified purposes? One response would be to try to eradicate overbreadth, either through aggressive campaigns of statutory reform or judicial efforts to curtail statutes through more robust constitutional limitations on substantive criminal law. As advocates of these approaches recognize, their prospects are dim.²⁵¹ Most scholars believe the outlook is bleak because the political economy of criminal law supplies little currency to anyone who wants to narrow liability rules.²⁵² True enough. But maybe it would be a bad idea to do away with overbreadth, or at least one form of it, by quitting the chase of the most elusive wrongdoers.

Overbreadth, when it results from regulatory efforts that can only reach undesirable behaviors with liability rules that overshoot their mark, is not itself a problem. The problem is the agency costs imposed on society by the undesirable actions of enforcers empowered by overbroad rules. Suppose rule *X*, which is intended to sanction harmful behavior *A*, turns out, on its terms, also to authorize sanctioning of much less (or non-) harmful behavior *B*. The problem is of largely academic interest unless one or more of three things happens: An enforcer uses rule *X* to sanction behavior *B*; an enforcer induces a guilty plea to some offense that could not have been obtained but by threatening to use rule *X* to sanction behavior *B*; or behavior *B* is not only not harmful but also socially valuable, and a private actor refrains from behavior *B* out of fear that an enforcer will use rule *X* to sanction behavior *B*.

When enforcers use open-textured statutes to address new behaviors, and courts interpret such statutes to facilitate these efforts, criminal law develops outside of the legislative process. Resulting agency costs can include not only those of self-aggrandizement but also those of prosecutors choosing cases and of judges interpreting statutes on the basis of erroneous behavioral norms. It may be somewhat in the eye of the beholder whether a case is an instance of a strategic actor seeking to avoid sanction along the boundaries of the law or one of a nonblameworthy actor engaged in a socially welcome activity. Open

²⁵¹ See Smith, *supra* note 16, at 930–51; Stuntz, *supra* note 16, at 587–98, 600.

²⁵² See, e.g., Barkow, *supra* note 3, at 42 (arguing that while efforts to increase legislative and public oversight over prosecutors “sound promising on paper, they cannot serve as a realistic check in today’s political climate”); see also *supra* text accompanying notes 20–22.

texture may also permit criminal prohibitions to be used as vehicles to advance particular, and perhaps nonmajoritarian, agendas.²⁵³

Of course, if nothing will be lost in the process, narrowing rule *X* so it does not cover behavior *B* is probably the easiest and cheapest way to avoid having to worry about the risk that enforcers will act this way. But if there is something to be lost from narrowing the rule, the first resort in grappling with the problem of potential agency costs should be to consider measures to control those costs without having to abandon the existing liability rule. Whether there is something substantial to be lost is, of course, a tough empirical question. The answer will vary by context and will require consideration of many things, such as the relative harm produced by behavior *A* in relation to the total lost social value, if any, from people who refrain from behavior *B* out of fear of being sanctioned under rule *X*.

My claim about desirable overbreadth in liability rules is thus an additional and somewhat different voice in a chorus that is urging greater attention—as a matter of empirics, theory, and reform—to understanding and controlling prosecutorial discretion.²⁵⁴ To manage agency costs successfully, social planners need to know much more empirically about how prosecutors behave and need to think harder about how that behavior is affected by institutional design and legal regimes. For the time being, I will mention three possible avenues for control that follow from the account I have supplied of overbreadth in liability rules: adapting liability rules through mens rea limitations, managing key institutional actors such as prosecutors, and leveraging judicial sentencing discretion.

A. *Adapting Liability Rules*

I have suggested that narrowing statutes may not be the best response to overbreadth if such narrowing would make statutes ineffective with respect to the undesirable behaviors that those statutes target. Of course, this claim has its limits. As measured solely by its ability to reach behaviors, the “most effective” statute will be one that commits to almost nothing *ex ante* and delegates all important questions about its application to legal actors *ex post*.²⁵⁵ Such a polar case

²⁵³ See Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1046–57 (2008) (examining how legal actors and others can shape content of criminal law outside lawmaking process).

²⁵⁴ For current examples of contemporary scholarship that is seeking to better theorize prosecutorial power, see Barkow, *supra* note 3, Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1114172>, Richman, *supra* note 38, and Richman, *supra* note 71.

²⁵⁵ The law of National Socialist Germany included the following chilling statute:

is as easy to reject as a legal regime that prohibits punishment unless a person's specific behavior has been described *ex ante* in a detailed legal rule actually known to that person (thus, ignorance of the law is generally not a defense and constitutional enforcement of legality-related doctrines is modest).

To identify the optimal point between the poles requires solving one of the most fundamental problems for a legal system: defining the proper normative criteria for evaluating a trade between generality and specificity in legal rules. How do we determine, at the margin, how to trade freedom reduction and risk of erroneous punishment of innocents against permitting social harms to go unanswered? To return to the pit bull example discussed in Part I, a blanket ban on "ownership of a vicious dog" may guarantee that all bloodthirsty pit bull hobbyists can be punished. But it is likely to punish some people who were not trying to own vicious dogs, and it may cause some animal lovers to eschew dog ownership to avoid the risk of punishment.²⁵⁶ Yet a narrow rule that bans only ownership of dogs of a specific breed is sure to permit some vicious dogs to run amok, producing injuries and deaths.

Not surprisingly, I am not prepared to offer a crisp normative formula for trading at the margin between these two states of affairs. I can state, however, that some kinds of narrowing in liability rules are likely to be more successful than others in accommodating competing objectives. In instances in which overbreadth results from an effort to avoid excluding harmful behaviors from the scope of a rule, constricting the elements of *actus reus*, result, or attendant circumstance

Whoever commits an action which the law declares to be punishable or which is deserving of punishment according to the fundamental idea of a penal law and the sound perception of the people, shall be punished. If no determinate penal law is directly applicable to the action, it shall be punished according to the law, the basic idea of which fits it best.

Lawrence Preuss, *Punishment by Analogy in National Socialist Penal Law*, 26 J. AM. INST. CRIM. L. & CRIMINOLOGY 847, 847 (1935–1936) (quoting Gesetz zur Änderung des Strafgesetzbuchs, June 28, 1935, RGBI. I at 839, art. 1); cf. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 49 (1968) (arguing for importance of "excusing conditions" because only "*choosing being*" deserves punishment).

²⁵⁶ See Mitchell N. Berman, *On the Moral Structure of White-Collar Crime*, 5 OHIO ST. J. CRIM. L. 301, 326–27 (2007) (explaining that contours of criminal offense may depart from contours of underlying moral wrong it is designed to punish due to prudential needs of criminal justice system). It should be noted that overbreadth has consequences only if rules have the constitutive feature that Frederick Schauer calls entrenchment; that is, their general propositions do not give way when confronted with particulars that do not fit with their underlying justifications. SCHAUER, *supra* note 32, at 49. This is true of criminal liability rules.

in liability rules is likely to be costly.²⁵⁷ Narrowing these elements facilitates evasion in that it requires more precommitment by the legal system and makes easier targets for persons acting in the shadow of the law.²⁵⁸

For example, suppose one tried to narrow obstruction of justice prohibitions to eliminate less significant cases by requiring the prosecutor to prove not just that the defendant's act could have affected the outcome of a legal proceeding but that it actually did affect the outcome—in other words, making materiality an empirical, rather than theoretical, question for the factfinder. Many serious cases of obstruction would go unpunished because counterfactuals are hard to prove, especially beyond a reasonable doubt. “Even if I sent a chilling message to that witness who clammed up in the grand jury,” a defendant might argue, “who is to say she would not have become tight-lipped anyway?” “And next time,” he might think, “I will threaten just the witnesses who have criminal exposure of their own, since as to all of them I will have the argument that they were likely to have invoked their right to silence in any event.”

This problem is not as acute with mens rea elements. As the Supreme Court explains when discussing vagueness doctrine, insisting that actors may be sanctioned only if found to have harbored particular mental states reduces the risk of broad liability rules being deployed in the absence of sufficient notice and blameworthiness.²⁵⁹ The use of mental state as a limiting principle is an underbreadth set-off against overbreadth: Broad conduct rules may sweep too many actors into the sanctioning process, but mens rea requirements may sweep in too few because mental states are difficult to discover and prove and because some people do serious social harms yet act without fully culpable mental states.

Mens rea inquiry is a natural response to the problem of preventing broadly framed conduct rules from violating legality-related commitments by surprising unaware or blameless persons with sanctions.²⁶⁰ The more purposeful an individual's pursuit of a harmful

²⁵⁷ For a basic discussion of act, result, and attendant-circumstance elements in criminal law, see WAYNE R. LAFAYE, *CRIMINAL LAW* 10–12, 302–10, 324–25 (4th ed. 2003).

²⁵⁸ Cf. Stuntz, *supra* note 59, at 2036–39 (arguing that more vague rules of substantive criminal liability can produce fairer results in criminal enforcement because less precommitment in legal rules affords local actors, especially juries, more leeway to exercise leniency when facts warrant it).

²⁵⁹ See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (observing that facial-vagueness challenge to criminal law is much more viable if law has no mens rea requirement).

²⁶⁰ Note, however, that in some instances, overbreadth results from the expansion of a mens rea element. See *supra* text accompanying notes 208–10.

behavior, the less troubled one ought to be about her claim that she was surprised by the later intervention of the legal process.²⁶¹

The broader a rule is (as measured by the range of conduct to which it applies), the stricter its mens rea requirement (as measured by the depth of inquiry into an actor's cognition at the time of her conduct) should be.²⁶² This relationship is observable in the law of fraud. When broad antifraud rules are applied to forms of conduct that the law has not previously determined to be fraudulent, mental-state inquiry tends to travel beyond the relatively thin concepts of knowledge and intent to considerations such as whether the actor pursued the behavior with an understanding that it violated relevant legal and commercial norms.²⁶³

The concept of good faith, at least in some areas of the law, is also used to sort actors engaged in a broad category of potentially prohibited conduct. For example, suppose a financier wants to avoid legal liability in a deal that, as initially conceived, would have imposed such liability. She restructures the deal after obtaining a lawyer's opinion that the new structure eliminates the potential liability because it changes something economically substantive and material, not just formal, about the deal. This may be appropriate, and lead to no liability, if the financier genuinely solicited the opinion in an honest effort to comply with the applicable legal regime. But it may be unsuccessful, and incur liability, if the financier manipulated the process to guarantee that she would obtain the desired opinion, such as by selectively disclosing facts to the lawyer.²⁶⁴ The deal structure is the same in both instances, but the mens rea is different.

By narrowing the offense through a mens rea requirement, the law has sorted the cases, arguably with the desirable result, without having had to commit, for purposes of this case or the next one, to whether the scope of the liability rule is limited to one or more partic-

²⁶¹ This is why the principle that "pure legal impossibility" is a defense in criminal law must have to do with controlling enforcement discretion rather than guaranteeing fair notice: A person who thought she was breaking the law but was not can hardly claim lack of notice. Buell, *supra* note 91, at 2027–28.

²⁶² Darryl Brown has argued that federal courts have already been doing this—constraining criminal law's expansion with enhanced mens rea requirements—at least in areas in which less harmful behaviors have been criminalized. Brown, *supra* note 18, at 262–64.

²⁶³ Buell, *supra* note 91, at 1996–2014.

²⁶⁴ See *United States v. Peterson*, 101 F.3d 375, 381 (5th Cir. 1996) (explaining that reliance on advice of counsel, if it establishes "good faith," can negate element of specific intent in criminal fraud charge); *cf. United States v. Leon*, 468 U.S. 897, 920–22 (1984) (holding that exclusionary rule does not apply if officers executing faulty warrant believe in "good faith" that warrant is legally valid); *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 63–67 (Del. 2006) (exploring forms of management conduct that constitute "bad faith" under Delaware law).

ular deal structures. Moreover, the opportunity for strategic evasion is diminished. Actors can modify behavior to circumvent liability rules, but ordinarily it is not possible to redesign one's mental state.²⁶⁵ Of course, it *is* possible to disguise mental state and to make it harder to prove. Recall that in the pit bull example the dog trainers were working to conceal their knowledge of their dogs' tendencies to attack humans. Yet this problem is nothing new for the criminal law. Mental state is always hard to prove and criminal liability rules always fall short of sanctioning all blameworthy persons.

Stronger mens rea elements are only a partial solution to controlling the costs of overbreadth. Heightening mens rea requirements is not as feasible in an area like money laundering in which requiring more than knowledge that funds are criminally derived—for example, requiring intent to facilitate the criminal activity—would limit the law to cases in which the actor transacting criminal proceeds is equally liable as an accomplice to the underlying crime. Recall the realtor who sold the house to the drug dealer for cash. The problem with holding her liable for money laundering is not that she lacks a sufficiently culpable state of mind. The problem is that the social harm she produces is not grave enough to justify making her a federal felon. So we must look elsewhere for the means to constrain prosecutors from bringing cases against her and those similarly situated.

B. Institutional Design

The question of how to construct institutions optimally to guide enforcers exercising broad authority toward desirable cases and away from undesirable ones is critically important and far too large for serious pursuit here.²⁶⁶ In addition to noting the support that my account provides for more active discussion of institutional redesign agendas, I will add a speculative hypothesis.

If it is true, as I argued in Part I, that enforcers and adjudicators—for instrumental and normative reasons—naturally tend to

²⁶⁵ Willful blindness may be an exception, but the law usually blocks that dodge. See, e.g., *United States v. Heredia*, 429 F.3d 820, 828 (9th Cir. 2005) (finding it error to give willful ignorance instruction if defendant “actually suspected she might be involved in criminal activity, but the record does not show that she deliberately avoided confirming her suspicion in order to provide herself with a defense”).

²⁶⁶ See Schulhofer, *supra* note 82, at 63 (“The problem is to find ways to give prosecutors a personal stake in the profits (deterrence benefits) that their efforts are expected to generate. . . . But there is no apparent way to offer ‘profit sharing’ of that kind to prosecutors.”). For in-depth treatments of the problem of institutional design and federal prosecutorial discretion, see Barkow, *supra* note 3, and Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998).

focus their efforts on the most harmful and sophisticated actors,²⁶⁷ then institutional design should seek to exploit these tendencies.²⁶⁸ Put in the sparest of terms, institutional design should reward quality over quantity.²⁶⁹ A corollary of this principle is to fight the tendency of bureaucracies to expand for the sake of expansion.

There are many ways to do this. Budgets can be reduced and funds can be earmarked.²⁷⁰ Bureaucracies can be centralized and given more power to control individual decisionmaking at the “line” level. Substantive agendas can be dictated.²⁷¹ Legislatures can engage in a variety of oversight activities and other, subtler forms of communication that can powerfully influence enforcer behavior.²⁷² The executive branch can forswear evaluating prosecutorial performance by misleading proxies like caseloads and conviction rates.

In the federal system at least, one might consider the perhaps radical idea of *reducing* the number of prosecutors and the number of cases they bring, sending a clear message that the exceptionally powerful tools of federal law enforcement should be reserved for the exceptional cases in which such tools are needed.²⁷³ The problem of

²⁶⁷ See *supra* Part I.D.

²⁶⁸ See Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379 (2005) (finding that successful chief federal prosecutors tend to pursue cases eligible for more serious punishments).

²⁶⁹ See Wright, *supra* note 68, at 149 (finding from examination of data on federal plea and trial rates, along with criminal history data, that “[d]istricts that process defendants who present more serious criminal histories also produce lower acquittal rates, suggesting that judges and prosecutors in these districts value quality over quantity and put extra effort into avoiding acquittals for these high-priority defendants”); J. Mark Ramseyer et al., *Convictions Versus Conviction Rates: The Prosecutor’s Choice* 13 (Harvard John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 611, 2008), available at http://ssrn.com/abstract_id=1108813 (discussing difficulty of trying to manage agency costs among prosecutors by monitoring their performance through poor proxy of conviction rate).

²⁷⁰ See Stigler, *supra* note 53, at 534–36 (“[I]t is much easier to make continuous marginal adjustments in a policy through the appropriations committee by varying the resources for its enforcement than it is to modify the statute.”).

²⁷¹ See Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 936–63 (2000) (describing problem of overbreadth in federal child support–enforcement regime and advocating greater use of internal, written executive branch policies to limit use of federal criminal statutes to cases genuinely warranting federal sanction).

²⁷² See Richman, *supra* note 38, at 789–805 (exploring variety of ways in which Congress constrains conduct of federal law-enforcement agencies in spite of very large grants of statutory authority).

²⁷³ Between 1990 and 2006, the number of federal prisoners more than tripled from 58,838 to 183,381. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.6.13.2007 (Ann L. Pastore & Kathleen Maguire eds., 2008), <http://www.albany.edu/sourcebook/pdf/t6132007.pdf>. During the same period, the total number of federal prosecutors almost doubled, from about 3005 to about 5673. *Id.* at tbl.1.79.2006, <http://www.albany.edu/sourcebook/pdf/t1792006.pdf>. More enforcers produce more inmates, especially when enforcers’ performance is evalu-

overbreadth in a statute, after all, is a problem of mismatch, not a problem in the statute alone. An overbroad statute fits some defendants well but is too large for others. One way to solve the mismatch problem is to change the statute, but another way to solve it is to change the defendants. A change-the-defendants solution lies entirely within the executive branch's control (and thus needs no legislation) and requires no sacrifice in terms of causing the statute to fit poorly with other kinds of defendants. The Department of Justice is better positioned than any actor in the federal system, from both informational and control standpoints, to design and enforce measures that are likely to channel its prosecutors toward the judicious use of broad statutes against the limited set of the most industrious and harmful actors and away from easy, high-volume, high-guilty-plea prosecutions of quotidian crime.

C. Sentencing

Judges, whose independence ought to make them more apt than prosecutors to worry about the costs of overbreadth in liability rules, might have a mechanism for restricting overbreadth other than narrowing rules through statutory interpretation. The Supreme Court has ruled that trial judges are no longer required to follow the federal sentencing guidelines, which were binding law during the era of greatest growth in federal prison populations.²⁷⁴ The sentencing judge has been liberated to treat on any reasonable ground an individual case as inappropriate for the sentence provided in the guidelines. It is perfectly reasonable to lower a sentence on the ground that a particular defendant or instance of conduct does not represent the core harm or danger with which a broad statute is concerned. Indeed, setting aside the particular and somewhat unintended path that the federal sentencing guidelines followed, sentencing-reform projects involving guidelines have been motivated by efforts to distinguish, in

ated through quantitative measures like caseload and conviction rates and when components of the bureaucracy are rewarded with more resources when they can claim to be overtaxed. Regrettably, there is evidence that trends in the Department of Justice toward large volumes of lower-level prosecutions are accelerating. See Transactional Records Access Clearinghouse, *Federal Enforcement Data Show Major Changes in How the Bush Administration Has Enforced the Law* (2008), <http://trac.syr.edu/tracreports/crim/184> (reporting that, since Fiscal Year 2000, white-collar criminal prosecutions are down 27 percent, official-corruption prosecutions are down fourteen percent, and organized-crime prosecutions are down 48 percent, while immigration prosecutions are up 127 percent).

²⁷⁴ See *Gall v. United States*, 128 S. Ct. 586, 594 (2007) (recognizing that "reasonableness" review of federal sentences on appeal cannot, without implicating constitutional constraints, be construed as requiring trial judges to impose particular sentences); *United States v. Booker*, 543 U.S. 220, 232–37 (2005) (holding that federal sentencing guidelines are unconstitutional if made binding on trial judges).

at least some partially systematic way, between core and peripheral cases of criminal wrongdoing.²⁷⁵

In a sentencing proceeding, a trial judge is able to conduct a fine-grained examination of a case and consider a defendant's sophistication and efforts to thwart the sanctioning regime in much the same way that a prosecutor might look at a case when deciding whether to charge.²⁷⁶ Legislatures making liability rules and appellate judges interpreting them for use in future cases do not have this flexibility to account for particulars.

As a direct benefit, reduced sentences for fringe cases under broad statutes would mitigate some of overbreadth's costs (excessive punishment of relatively blameless actors, excessive prison populations, and so on). But the indirect benefits might be more important. Prosecutors do not like to invest time and resources in cases that do not result in significant punishment. Assuming that trial judges can address the collective action problem that motivated Congress originally to enact the guidelines—by coordinating sentences to produce a clear message—reducing sanctions for less threatening actors would encourage prosecutors to shift away from charging such cases.²⁷⁷

At least at the district level, informal arrangements of this sort arose even when the guidelines were binding. The bench and the prosecutor's office in a district would reach an understanding that a class of lower-level cases—the endless stream of drug importers arriving at the airport with less than a half kilo in tow (or in their bodies) or the countless illegal reentry violations at the Southwest borders—would be treated less severely than the guidelines dictated.²⁷⁸ Prosecutors had to continue to bring some such cases that had special federal jurisdictional characteristics, but the impact of the cases on the overall volume of federal incarceration was somewhat

²⁷⁵ See U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2007) (articulating appropriate and inappropriate grounds for imposing sentences that depart from ranges recommended by guidelines).

²⁷⁶ See, e.g., Stanton Wheeler, *Adversarial Biography: Reflections on the Sentencing of Michael Milken*, 3 FED. SENT'G REP. 167, 170 (1990) (discussing judge's emphasis on attempts to avoid detection in selecting harsh sentence for noteworthy white-collar offender).

²⁷⁷ This will be hard to achieve, I concede. Julie O'Sullivan worries that broad federal liability rules in the post-*Booker* world will likely lead to indefensibly disparate treatment of similarly situated offenders by sentencing judges and that code reform is more essential now than before. O'Sullivan, *supra* note 16, at 720–26.

²⁷⁸ See John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1705–07 (2003) (discussing drug importation cases); Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 ARIZ. ST. L.J. 517, 523 (2006) (discussing immigration cases).

diminished. For judges to force these kinds of understandings on a national level through individual sentencing decisions would require difficult coordination of effort, but it is not inconceivable. The Sentencing Commission, which continues to operate in an advisory capacity, could facilitate such coordination.²⁷⁹

CONCLUSION

Analysis of the criminal law as a regulatory system should include careful thought, not just about the content of the law and of the legal actors and institutions that enforce it, but also about those to whom the law is addressed. Legal rules, and the conduct of legal and political actors, are dynamic phenomena controlled by a variety of forces. When legal observers think about the regulated actor, though, they tend to posit a static player with fixed preferences who has a given response to the prospect of sanction. This conception is inaccurate.

People make behavioral decisions in the shadow not just of sanctions, but also of liability rules. Often a regulatory regime forces an actor to choose not between refraining and being sanctioned, but among refraining, being sanctioned, and changing her behavior to escape sanction. If that new behavior offers the actor a means of realizing similar ends while imposing similar harms on others, the regulatory regime has failed.

Legal regimes naturally respond to this prospect by shaping liability rules that leave individuals with no choice but to refrain from acting or be sanctioned. Given that the regulated actor has a first-mover advantage, effective rules tend to be ones with high open texture. The result is overbreadth: rules that, on their terms, if not necessarily as enforced, authorize sanctioning of conduct beyond what generated the demand to regulate. This pattern is evident in the federal criminal justice system, where one tends to see prosecution of the most industrious and resourceful among those who produce social harms. It may occur elsewhere in criminal law and in other regulatory systems.

Critics of overcriminalization have been correct to identify the ills that can result when liability rules produce surplus enforcement discretion. But observers of criminal law's expansion may have missed an important point about causation in attributing the excess in criminal law to diseased politics and faulty normative judgments. Some growth in criminal law is bad government, but some of it may be the

²⁷⁹ See Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 377–80 (2006) (discussing potentially useful role of sentencing commission in system of nonbinding guidelines).

product of a government struggling within the structural confines of the regulatory project to control social harms. Missing this point, especially the inability to curtail liability rules without costs to the regulatory enterprise, is an error. Appreciating the point may lead to progress, including fruitful discussion of how to steer criminal enforcement toward genuinely threatening actors while minimizing unjustified and overly costly sanctioning.