

CRIMINAL LAW'S UNFORTUNATE TRIUMPH OVER
ADMINISTRATIVE LAW

*Darryl K. Brown**

INTRODUCTION

Few topics find more unanimity across the ideological spectrum of criminal law scholars and Washington policy advocates interested in the criminal law than the conclusion that the United States suffers from too much criminal law—although the sentiment seems to be shared by a much smaller portion of legislators, prosecutors and—most worrisomely or tellingly—the public. Overcriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crimes. The broad coalition that has emerged against excessive criminal law is both impressive and somewhat unlikely.

In part, that breadth of agreement is possible because of differences in emphasis. The groups that have done the most to document in detail the expansion of *federal* criminal law, and to develop arguments that federal crimes constitute excessive and inappropriate use of the criminal label and criminal punishment, are at the conservative end of the political spectrum. The Federalist Society, the Heritage Foundation and, from a libertarian perspective, the Cato Institute have been leading voices on this issue, along with the National Association of Criminal Defense Lawyers.¹ In the legal academy, criminal justice scholars—who probably make up a broader range of political views but certainly include left-of-center perspectives—have taken up overcriminalization as well, though sometimes with a different emphasis, with more attention to state criminal law and to the magnitude of

* O.M. Vickers Professor of Law, University of Virginia School of Law.

¹ See, e.g., *Overcriminalization and the Need for Legislative Reform*, Testimony before the H. Subcomm. on Crime, Terrorism, and Homeland Security, 111th Cong. 2 (2009), available at <http://judiciary.house.gov/hearings/pdf/Thornburgh090722.pdf> (noting interest in overcriminalization from “Heritage Foundation, Washington Legal Foundation, the National Association of Criminal Defense Lawyers, the ABA, the Cato Institute, the Federalist Society and the ACLU”); JOHN S. BAKER JR., MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION, 3 (The Federalist Society for Law and Public Policy Studies 2004); TIMOTHY LYNCH, IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE “THE AIMS OF THE CRIMINAL LAW” (Timothy Lynch ed., Cato Inst. 2009); BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 26-27, available at [http://www.nacdl.org/public.nsf/WhiteCollar/WithoutIntent/\\$FILE/WithoutIntentReport.pdf](http://www.nacdl.org/public.nsf/WhiteCollar/WithoutIntent/$FILE/WithoutIntentReport.pdf); TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS’N, THE FEDERALIZATION OF CRIMINAL LAW (1998); John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, LEGAL MEMORANDUM, June 16, 2008, at 7-8.

criminal *punishment* in addition to the content of offenses.² Arguments regarding excessive punishment, and excessive drug crimes in particular, likewise have garnered much attention from policy centers probably more on the left of the spectrum, such as the Sentencing Project and the Drug Policy Alliance.

Despite these variations on a core basic claim, nearly all agree: American criminal law is in some important respects too expansive according to two sorts of criteria: the kinds of conduct and harm that government ought properly to treat as criminal, and the requirements of crime definitions governments should use even when they address some activity that properly can be criminalized—meaning, most importantly, that crimes should nearly always include a *mens rea* requirement to avoid strict liability. We could also describe these two grounds for complaint as based on the *content*, *scope* or *subject* of criminal law, on the one hand, and the *form* of criminal law on the other.

In one respect, this broad agreement should not be surprising. Overcriminalization is a common problem even in other democracies (hold aside authoritarian states). Perhaps it is a tendency of contemporary industrialized states. In the United Kingdom, for instance, there is a broad scholarly and policy literature on the breadth of criminal law and the tremendous growth of strict liability crimes, perhaps more so than in American federal law.³

In another respect, however, the fairly broad agreement on the excessive reach of substantive criminal law might seem unexpected, not only because it is somewhat unusual to have such agreement on such a significant feature of government policy with a history of high political salience, but also because contemporary criminal law is not a drastic departure from the long-standing tradition of American criminal law. American jurisdictions have always expansively employed criminal law in the regulation of both private and commercial life. Why concern has grown in recent years, and not consistently through history, calls for explanation.⁴

A broad consensus of opinion could signal real promise for influencing the political and public debate and for achieving some reforms of the congressional (and state legislative) tendency to criminalize too much and in unprincipled ways. That broad unanimity, however, may obscure important disagreements that hold a potential to undermine the effectiveness

² Darryl Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 227 (2007); Julie O'Sullivan, *The Changing Face of White-Collar Crime: The Federal Criminal "Code" is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 657 (2006); see generally DOUGLAS HUSAK, *OVERCRIMINALIZATION* (2008) (defending the theory that the penal sanctions should have limits).

³ See Andrew Ashworth, *Is Criminal Law a Lost Cause?*, 16 L.Q. REV. 225, 227 (2000).

⁴ See Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 157, 158 (Nov. 1967) (the concern is not of entirely recent vintage; this article provides a classic account from a generation earlier).

of a *de facto* coalition. Differences are notable not only in what parts of criminal law various observers point to as excessive, but also in the reasons for that judgment and the remedies for it. In order to focus my topic here within the broad topic of overcriminalization in this article, I will limit my discussion primarily to arguments about excessive expansion of *federal* criminal law in regulatory settings, and thus I give no attention to the 900-pound gorillas of federal and state criminal law, drug offenses and mandatory sentencing statutes.

Federal criminal law, especially in regulatory contexts, raises distinct claims about overcriminalization. The standard claim assesses criminal law to be excessive simply as *criminal* law, because it exceeds normative boundaries that should restrict criminal law with regard to both subject matter (such as criminalizing only conduct that is sufficiently harmful or risk-creating conduct) and to form (such as mental state requirements). On that view, judging criminal law according to terms of what criminal law ought to be, civil or administrative regulation is unproblematic when governing the same activities. What distinguishes civil from criminal law analytically, is the need for reasons that justify criminal law's graver coercive and judgmental force. Hence, the claim is *over-criminalization* and not, say, *over-regulation* or *over-legalization*.

Federal criminal law, however, raises in some minds another basis for the overcriminalization complaint: some statutes may exceed the proper role and reach of *federal* power. In state law, wide-ranging criminalization is less disputed on the ground that it exceeds a government's authority, due to the traditional breadth of state police power.⁵ But for those with a strongly limited view of federal power—a view that has been an influential part of American political dialogue since the Founding Era—some federal statutes are unjustified not only because they are *criminal* law, but because they are *federal* law. Exceeding the proper bounds of *criminal* law may not be the problem; on this view, exceeding the bounds of appropriate *federal* authority is. On this view, federal *civil* regulation of the same activity is likely to be equally problematic.⁶ Thus, some crimes are acceptable as state

⁵ See generally ROBERT NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) (providing an account of the traditional understanding of broad police powers to govern economic relations, morals and social order).

⁶ For representative judicial statements of limited federal power, see *New York v. United States*, 505 U.S. 144, 155 (1992) (“[N]o one disputes the proposition that ‘[t]he Constitution created a Federal Government of limited powers’ . . .”) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457, (1991)); *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); cf. *Chisholm v. Georgia*, 2 U.S. 419, 435 (1793) (“Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them . . .”). For prominent arguments that the contemporary reach of federal regulatory authority exceeds Congress's limited power, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 317-18, 348-53 (2004); United

law, because they are within a state's police power and accord with norms of criminal law's proper scope and form, but not as federal law.

Of these two forms of criminal law criticism, the first probably takes a more frequent or prominent role than the second with respect to federal criminal law. Recent reports on overcriminalization from the Heritage Foundation and the Federalist Society, for example—groups generally skeptical of many, but not all, claims for expansive federal power—highlight some inappropriate offenses by noting their strict liability form or the seemingly trivial harm that they address.⁷ Those complaints about form and scope are grounded in criminal law theory rather than in an account of federal authority.⁸

Insisting on distinct boundaries for criminal law compared to civil has several advantages, not least of which is that it offers some comparatively simple, discrete solutions that could improve a broad swath of criminal statutes with minimal legislative effort, at least compared to whole code revision. But a focus on criminal law norms also severs overcriminalization arguments from more politically contentious arguments of the parameters of federal power. Current debates about limits of federal power are serious; they are plainly salient in contemporary political debate and judicial thought, arguably to a degree that was not true in the first half century of the post-New Deal understanding of federal power. But for that reason, the stakes in that debate are necessarily higher, and the chances of achieving restraints on criminal statutes diminish if more is at stake. Below, I develop an argument that a focus on the harms of excessive *criminal* law, rather than a focus on federal power—or with regard to states, the general police power—is a more promising approach to reform. There is much more consensus on criminal law arguments than wider-ranging government-power arguments. Reforms based on commitments that do not affect the parameters of non-criminal regulatory law, leave lawmakers with civil and administrative options for addressing social risks and harms once reform succeeds in reducing inappropriate—and sometimes ineffective—criminal provisions that currently address those topics. Criminal law has been wrongly, yet pervasively extended to regulatory tasks for which civil law mechanisms are fully adequate. Reforming expansive criminal statutes with remedies that hold aside questions of the legitimate scope and form of the administra-

States v. Lopez, 514 U.S. 549, 584-85 (1995) (Thomas, J., concurring); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987).

⁷ WALSH & JOSLYN, *supra* note 1, at 14-15; BAKER, *supra* note 1, at 17-31.

⁸ On the other hand, the concern with the federal nature of federal criminal law is expressed in other criticisms. See, e.g., TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, *supra* note 1. Timothy Lynch, *A Smooth Transition: Crime, Federalism and the GOP*, in *THE REPUBLICAN REVOLUTION TEN YEARS LATER* 213 (2004). Further, one might infer that exclusive attention in studies to federal criminal law, but with scant attention to federal drug crimes, mandatory sentencing or other issues outside regulatory contexts, implies a concern with the sovereign that is doing the criminalizing in addition to the specific topics of the criminalization.

tive state improves the odds of achieving those reforms, because they leave policymakers with civil law tools to address regulatory goals in a wide range of contemporary risk-creating activities without criminal law. The goal of reversing legislators' two-centuries-long tendency to adopt criminal law for ordinary regulatory goals in commercial and social life is formidable enough. Bracketing the more contentious arguments about federal power, as the Heritage–NACDL report does more effectively than, the Federalist Society reports, removes the much farther-reaching implications of that debate from the project of achieving moderately scaled but immensely valuable federal criminal law reform.

I. HISTORICAL REFERENCE POINTS FOR EXPANSIVE CRIMINAL LAW

State and federal codes contain many more criminal statutes than ever before. But it is almost surely inaccurate to conclude that American statutes criminalize a much broader range of private, public and commercial activities, or a larger proportion of those activities, than ever before. A quick look back at state criminal codes of the early nineteenth century reveals a collection of statutes that were immensely more intrusive into private and family life, and non-commercial public behavior (analogous to today's "public order" offenses), than exists now. With no meaningful vagueness doctrine in that era, the broad reach of these statutes that mattered to everyday decisions of how to live one's life was uncertain. The story regarding criminal regulation of economic and commercial activity and property usage was much the same. Specific offenses defined particulars such as the time and location at which goods could be sold plus prohibitions on resale of goods (particularly, engrossing and regrating)—regulations aimed at monopoly and price-fixing strategies—as well as weights, measures and purity. Criminally enforced regulations defined the materials permissible for building structures in cities, the proximity of buildings to roads, and limits on sizes of private wharfs. The broad reach of public nuisance law, also criminally enforced, defined parameters for such essential commercial practices as damming streams, releasing noxious fumes from coal burning or tanneries, and other restrictions on private land use.⁹ Labor was regulated in part by criminalizing the status of being un-

⁹ See generally NOVAK, *supra* note 5 (history of state and local commercial regulation in the first half of the nineteenth century); JOHN A.G. DAVIS, A TREATISE ON CRIMINAL LAW 309-12 (1838) (describing criminal nuisance doctrine in early nineteenth century that covered commercial activity and environmental damage such as "damming up a stream" and "rendering the air . . . impure and noxious.").

employed under general crimes of vagrancy, and by widespread prohibitions on Sunday work.¹⁰

Historians have well documented much of this early tradition of regulatory practice, which occurred mostly through state and local governments through most of the nineteenth century. Two points are notable for present purposes. One is the long-standing use of *criminal* law for a wide range of *malum prohibitum* regulatory goals.¹¹ Wide-ranging regulation was largely uncontroversial, at least to government's power; debates on the wisdom of particular regulations evolved over time. But pre-modern governments had little legal or institutional infrastructure for civil sanctions beyond common law actions and little regulatory capacity by bodies resembling administrative agencies. As a result, the use of criminal law for market and property regulation, already familiar by the time Blackstone described it in the fourth volume of his 1789 *Commentaries*, expanded to become a primary means to enforce commercial and public safety, as well as private morality, regulation. When the Supreme Court in *Morissette v. United States* surveyed the history of "public welfare" criminal statutes that lacked the mental state requirement that is ubiquitous in common law crimes, in 1952 it found a century-long tradition of such offenses, which came on top of the common law crimes Blackstone described.¹²

The second point is implicit in the first: there were few who understood criminal law in the early nineteenth century as properly bound by normative limits that would delegitimize its expansive reach into either moral or commercial regulation; such a limit on criminal law's scope had no substantial advocates, even when arguments against limited *government* were gaining acceptance and sophistication. The unquestioned state police power to regulate for the public good foreclosed any question of whether government, as opposed to the *federal* government, could regulate nearly any subject. The absence of a criminal law theory that would limit punishment's use for regulatory purposes meant that there was little dispute about the use of *criminal law* to regulate.

In light of that long tradition of criminal law as a dominant regulatory form, it is less surprising to find contemporary regulation that incorporates criminal law into administrative law's regulatory frameworks. On the other hand, criticism of regulatory crimes is a comparatively recent development. One might trace its roots back at least 140 years, if we take John Stuart

¹⁰ See GWENDOLYN MINK & ALICE O'CONNOR, POVERTY IN THE UNITED STATES AN ENCYCLOPEDIA OF HISTORY, POLITICS AND POLICY 755 (2004); Sara S. Beale, *From Morals and Mattress Tags to Overfederalization*, 54 AM. U.L. REV. 747, 749 n.5.

¹¹ It bears noting that the moral assessment of conduct changes over time, so that some offenses that are clearly viewed as *malum prohibitum* regulations now carried substantial moral implications in earlier eras. Blackstone described the price-fixing offenses of engrossing and regrating in strong moral terms. 4 WILLIAM BLACKSTONE, COMMENTARIES *158-59.

¹² *Morissette v. United States*, 342 U.S. 246 (1952).

Mill's 1869 *On Liberty* to signal a shift toward the view that criminal law should be more constrained than it traditionally had been. Mill's central idea that criminal law should be limited only to activities that cause harm, however, is not a principle well suited to restrain regulatory offenses. Mill primarily targeted crimes of private moral conduct. The harm principle, in fact, works rather well to *justify* many regulatory offenses. Mill gave little attention to commercial regulation crimes, but his views were not always unfavorable. He endorsed prohibition of facilities used for gambling, for example; even Mill refused to criminalize gambling itself. Further, in the same era, nineteenth century common law courts began to develop and require proof of mental state requirements, rather than strict liability that are familiar to modern observers.¹³ Those developments—with others, including Kant's earlier nineteenth century writings that developed the view that criminal law should be reserved for the morally culpable—became the groundwork for a range of twentieth century views to limit criminal law by some combination of specifying limits on its instrumental purposes and according to the offender's moral blameworthiness. But those shifting views, adopted mostly among scholars and—to varying degrees—courts, rather than legislators and the public, had limited influence on changing the tradition of criminal law to regulate a wide range of commercial activity.

That is surprising for several reasons. One is that restrictions on criminal law are consistent with an enduring tradition that embraces the broader principle of limited government power that Mill placed his views on criminal law within, particularly as a means to protect individual liberty. *That* tradition continues to have substantial rhetorical force in popular and political debates, even if its success in influencing decisions on particular choices of government programs is uneven and contested. Yet a commitment to a limited role for criminal law as part of that broader skepticism of government power has never developed the same political resonance or salience. Another reason is that dramatic shifts occurred with regard to other established exercises of government power from the nineteenth century to the twentieth, such as First Amendment doctrine, which developed into powerful limits on criminalization of speech, expressive conduct and association. Criminalization of private, consensual behavior also lost such favor in the later twentieth century that legislatures led the repeal of long-standing offenses in criminal codes.¹⁴ Why not then, also a shift toward a more constrained role elsewhere for criminal law in popular thinking or policymaking?

¹³ *Regina v. Faulkner*, [1877] App. Cas. 13 is a standard example of the turning point in common law interpretations of "malice" from a broad meaning of "wickedness" to a more specific mental state requirement of intentional wrongdoing and negligence as to harmful consequences.

¹⁴ We have seen dramatic reassessments in the other direction as well, such as the Founding generation's disapproval (at least among Jeffersonian Republicans) of a standing Army. See, e.g., Andrew J. Polsky & William D. Adler, *The State in Blue Uniform*, 40 *POLITY* 348 (2008).

A final reason for surprise is practical. A familiar account is that federal criminal law grew as the administrative state grew, because both depended on an expanded conception of federal authority, particularly under the Commerce Clause, that became widely accepted in the 1930s.¹⁵ That makes sense to the degree that both trends required the same constitutional and ideological foundation. Holding aside that the fact that federal criminal law and its enforcement infrastructure began significant growth a quarter-century earlier, that growth of criminal law with civil regulation was not inevitable, and *ex ante*, one might not even predict it. The modern administrative state and wide-ranging civil regulation, at the state as well as federal levels, could have been a means to *displace* much criminal law regulation of the same activities. One might expect that nineteenth century criminal punishments targeting price-fixing and market monopoly activities—or limits on permissible building materials, or extension of wharfs into navigable waters—might have been displaced with the advent of effective civil-regulatory sanctions. The regulatory state provided non-criminal alternatives to criminally enforced regulation. Yet instead of civil sanctions and administrative remedies replacing criminal ones, criminal law continues to duplicate and supplement administrative law so pervasively in regulatory regimes, that criminal offenses accompany civil ones, and willful violations of civil regulation are routinely and innumerably defined as crimes.¹⁶

II. IDEAS OF GOVERNMENT LEGITIMACY AND THE ‘MYTH OF THE WEAK STATE’

A. *Commitment to, and Understanding of, Limited Federal Power*

To understand why criminal law did not follow such a path and contract—especially for regulatory crimes—as the federal government grew and the administrative state developed, consider a familiar ideological disposition in American politics and culture that has long inclined American, especially federal, policy against bureaucratic administration and yet, perversely, helps explain why American policy makers have long reached for criminalization in place of other forms of regulation. Criminal law thrives both *because* of skepticism about federal power and because of criminal law’s special status as a form of government authority, which carves out for it an exception to the broader general skepticism of government, including federal, power. In significant part, I suggest, federal criminal law is so ex-

¹⁵ Timothy Lynch offers a brief account of this standard story. *See generally* LYNCH, *supra* note 1; Lynch, *supra* note 8.

¹⁶ *See, e.g.*, Carbon Capture and Storage Early Deployment Act, H.R. 1689, 111th Cong. (1st Sess. 2009).

pansive *because* ideological support for the federal regulatory state is comparatively thin.

In popular debate and classic political theory, the federal government is understood as one of limited powers.¹⁷ The U.S. Constitution enumerates powers of the federal government and reserves un-enumerated powers to state governments. That structure for federal power arose from, and continues to sustain, a significant political sentiment skeptical of, or resistant to, national authority and bureaucracy, at least in the abstract and in some specific forms.¹⁸ Although states' sovereignty is significantly limited as well by the Constitution, the limited nature of *state* power has resulted in much less resonance in political debate.¹⁹ The federal government's powers stand in contrast to the general police power retained by the states, which is the traditional source of authority for criminal law.²⁰

Long-standing American skepticism of national government power resulted in a distinctive form of institutional arrangements and policies that, in historical and political science scholarship, is captured in the long-standing description of American government as a "weak state." Compared especially to European national governments, American government has a long-standing history of weaker central government bureaucracy, and more governance occurs through state and local institutions that generally are under less direct control of national authority than their provincial counterparts in European states.

The characterization of federal governance as a weak state has been challenged in recent decades by a generation of political science and histor-

¹⁷ By classical political theory, I especially mean the Federalist Papers. *See, e.g.*, THE FEDERALIST NO. 45 (James Madison) ("The powers delegated to the federal government by the proposed Constitution are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

¹⁸ *See, e.g.*, Lynch, *supra* note 1; Lynch, *supra* note 8 (emphasizing 10th Amendment and the limited nature of federal power).

¹⁹ Implicit limitations include the dormant Commerce Clause restriction of state regulation of commerce as well as limits on states' power to impede travel across state borders. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629-31, 638 (1969); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 37 (1868). For express limitations, see U.S. CONST. art. I, § 10 (limitation on states' ability to issue currency, enter treaties, tax imports and exports, and engage in war).

²⁰ *See, e.g.*, United States v. Lopez, 514 U.S. 549, 566-67 (1995) (Congressional power under the Commerce Clause does not create "plenary" or "general" police power); *Id.* at 584 (Thomas, J., concurring) ("The Federal government has nothing approaching a police power."); United States v. Dewitt, 9 U.S. 41, 44 (1869) (holding Congress's power under the Commerce Clause does not include the power to enact "a regulation of police"). *But see* United States v. Lopez, 514 U.S. 549, 604-05 (1995) (Souter, J., dissenting) ("[I]t was really the passage of the Interstate Commerce Act of 1887 that opened a new age of congressional reliance on the Commerce Clause for authority to exercise general police powers at the national level," citing 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 729-730 (rev. ed. 1935)). An excellent account of the original understanding of police power and its evolution in the United States is MARKUS DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT, (2005).

ical scholarship.²¹ This work, in a variety of ways, disputes the weak-state characterization. One argument challenges the equation of a strong state with the Weberian model of strong centralized bureaucracies familiar in Europe. American federal authority and policymaking have been substantial since the early nineteenth century in a range of settings—from settlement of the West to regulation of trade and markets—but that power was most often not exercised by direct regulation or coercive command, which was true of much U.S. *state* authority.²² Instead, it commonly took the form of delegation or cooperation with state governments and private associations, or less conspicuous policies to incentivize and subsidize local government or private activities with tax incentives or federal grants and the expansion of the corporate form to limit private liability. Endeavors typically understood as primarily private action, in fact often depended on costly exercises of direct federal power. Western settlement and commercial expansion is an example. The federal government directly acquired western land, secured market access through critical transportation routes and ports, deployed the federal Army to suppress Indian resistance, and later managed commercial timber in national forests in cooperation with private firms.²³

For present purposes, the point to note is that this long-standing ideological disfavor of centralized national government and the emphasis on the limited nature of federal power endures. Moreover, it has the effect of engendering popular and historical understandings that obscure the critical role of federal support for, or regulation of, private activities that could not have occurred to the same degree without the federal role.²⁴ This ideologi-

²¹ See, e.g., STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE* (1982); BRIAN BALOGH, *GOVERNMENT OUT OF SIGHT* (2009); William Novak, *The Myth of the 'Weak' American State*, 113 AM. HISTORICAL REV. 752 (2008); Elisabeth Clemens, *Lineages of the Rube Goldberg State: Building and Blurring Public Programs*, in *RETHINKING POLITICAL INSTITUTIONS: THE ART OF THE STATE* (Ian Shapiro, et al. eds., 2006).

²² See BALOGH, *supra* note 21 at 45-53. By the time Jefferson's presidency began in 1801, the Federalist view of a directly energetic federal government had lost to the republican vision that disfavored an "active," "energetic or "consolidated" federal government (and even a standing army) that resembled European states and that set in motion the continuing American tradition of such disapproval.

²³ *Id.*

²⁴ Brian Balogh emphasizes the American tendency to reinterpret national or personal achievements as achievements of private markets and individual initiative and to downplay or forget critical governmental roles in making those achievements possible. His examples range from private pensions and private health insurance, which are encouraged by regulatory interventions and subsidies through tax and labor policy rather than simple private-market purchases, to development of the western states, where the federal government provided essential security against American Indians and later actively managed vast national forests in association with lumber interests and vast pasture lands in cooperation with rancher organizations. See BALOGH, *supra* note 21. For a more general account of government involvement in economic development across nations, see RAGHURAM G. RAJAN, *FAULT LINES* 46-66 (2009) (employing "managed capitalism" as a label for substantial government assistance to industries, commonly employed by developing countries).

cal disposition shaped the *forms* of federal governance, but it did not prevent substantial exercises of authority that can fairly be described, even before the 1930s, as a weak or minimalist state. Yet, it nonetheless sustains a widely held skepticism of direct regulatory intervention particularly with regard to the federal administrative state, and especially of economic and commercial activity. This account deepens the explanation for the familiar claim that Americans have long been ideologically conservative but “operationally” liberal. Conservative here is defined by a commitment to a relatively smaller state engaged in minimal regulation of markets and private commercial activities, while liberalism denotes easier approval of many federal policies involving such intervention.²⁵

B. *The Role and Legitimacy of Criminal Law in Weak-State Ideology*

The puzzle here is why federal criminal law has not been subject to the same skepticism and disfavor. How does disfavor of government power not produce a weak *criminal* law infrastructure compared to European states? It may well be, instead, that generic disfavor of government power instead *leads to* excessive use of criminal law as regulation. The claim seems perverse; criminal law is a distinctly forceful, coercive and censoring state power that should be met with grave suspicion in a state that gives priority to individual freedom from government power.²⁶ Yet there are reasons to suspect that the enduring commitment to a limited federal government championed by some of the Founders,²⁷ later supported by Mill’s classical liberal account, and resonant in contemporary American politics, plays a role in the federal government’s enduring practice of regulating through criminal law.

The first reason points to the special status of criminal law as a power of any government. Even advocates of limited government—at any level,

²⁵ See ALBERT CANTRIL & SUSAN DAVIS CANTRIL, *READING MIXED SIGNALS: AMBIVALENCE IN PUBLIC OPINION ABOUT GOVERNMENT* (1999); LLOYD A. FREE & HADLEY CANTRIL, *THE POLITICAL BELIEFS OF AMERICANS: A STUDY OF PUBLIC OPINION* (1967); Christopher Ellis & James A. Stimson, *Pathways to Ideology in American Politics: The Operational-Symbolic “Paradox” Revisited* (2007) (unpublished manuscript *available at* <http://www.unc.edu/~jstimson/Pathways.pdf>); Christopher Ellis & James A. Stimson, *On Symbolic Conservatism in America* (Sept. 1, 2007) (unpublished manuscript *available at* <http://www.unc.edu/~jstimson/apsa07F.pdf>). Recognition of the contrast goes back much earlier. See also Albert Shaw, *The American State and the American Man*, 51 *CONTEMP. REV.* 695 (1887).

²⁶ Cf. Nicola Lacey, *Legal Constructions of Crime*, in *OXFORD HANDBOOK OF CRIMINOLOGY* 179, 193 (Mike Maguire et al., eds.) (2002) (discussing the challenge of legitimacy for criminal law in liberal states).

²⁷ The implied exceptions are Federalists such as Washington, Adams and especially Hamilton, who championed a strong federal government, and Republicans such as Madison who endorsed certain forms of strong federal power as a limitation on state legislation that he distrusted. See generally GORDON S. WOOD, *REVOLUTIONARY CHARACTERS* (2006).

state or national—endorse and defend *some* core functions of government, and criminal law always makes that list. Ensuring safety, security and social order is a government’s first task,²⁸ and criminal law is, or is perceived as, essential for those goals.²⁹

While even strong libertarian accounts concede a need for some forms of regulation, a disposition toward limited government power, and skepticism of the efficacy of policy interventions, result in criminal law’s counterparts, such as civil regulation and spending on specific policy programs holding an ideologically weaker, more disfavored position. Civil regulation, especially at the federal level, does not enjoy a quite the same legitimacy status as criminal law. I mean this only as a political and policy claim, not as a matter of legal doctrine. Federal regulation, whether civil or criminal, is largely grounded in the Commerce Clause, and judicial review treats criminal and civil statutes equivalently under that doctrine. If that is so, then criminal law gains a subtle advantage over civil regulation and other policies targeted to harm or risk reduction outside the undisputed core of what counts as “commerce,”³⁰ despite the fact that the civil-criminal distinction does not matter in Commerce Clause doctrine, or that civil and criminal sanctions are often alternative means to address the same problems.³¹ And this legitimacy gap has endured in political discourse despite several decades of the modern administrative state, when criminal law has expanded right along with civil regulation.³²

Despite a general disposition among a significant segment of Americans for limited government as a presumptive ideal or constitutional mandate, and a more particular skepticism of federal civil regulation, American policy makers and the public nonetheless continuously find a range of specific topics they conclude requires government action: protection of even

²⁸ See, e.g., ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

²⁹ Interestingly, a standing federal army was not thought to be essential, or even desirable, by many Founders—a view unimaginable now. This was a key commitment of the Jeffersonian Republican Party that contrasted with the Federalists’ (notably Hamilton’s) support for federal standing army and navy. To be sure, even the Jeffersonians endorsed the constitutional grant of power to the federal government to *raise* armies, and they did not object to state militias, arguing for a period the infeasible view that state militias could serve the role of a federal military. See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC 1789-1815*, 196-97, 267, 292 (2009). Yet the Founding generation voiced no complaint on the expansive scope of criminal law that regulated private morals, social behavior and commercial or market activity as noted above.

³⁰ For an overview of disputes about the meaning of “commerce” in the U.S. Constitution, see Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

³¹ This is not to say civil and criminal regulations are always fully interchangeable. Most notably, criminal law has a distinct ability to express condemnation for blameworthy conduct that civil sanctions do not.

³² Exceptions in legal academia are scholars such as Timothy Lynch and Randy Barnett who (among others) argue for a narrow understanding of federal authority for both civil and criminal law.

small harms to public lands,³³ duplication of copyrighted material, a wide range of commercial practices (pricing practices, marketing or health care fraud, trademark and other intellectual property infringement, monopolization),³⁴ information disclosure to capital markets, environmental protections, and individuals' choices to engage in risky personal behavior such as recreational drug use. These are plausible examples of American policy's tendency to manifest its operational liberalism even in a context of philosophical conservatism. They exceed at least some narrow visions of limited government—or weak state—authority, especially federal authority.

Further, all these activities are regulated by criminal offenses and are commonly cited as examples of overcriminalization. We might take policymakers then, to rely on criminal law's legitimacy in order to buttress justifications for regulatory policies that otherwise might be more contested and contentious. Criminal law may serve to help legitimize accompanying civil regulation as well, on the view that the subject of regulation is sufficiently wrongful and injurious as to merit *criminal* sanction. American policy may turn to criminal law too often then, because of an enduring ideological reluctance to employ lesser, civil forms of government regulation. Skepticism of the lesser power perversely encourages resort to the greater power.

While grounded in well-developed historical and political-scientific accounts, I concede this speculative story is hardly incontrovertible. One could tell a story instead of an enduring American moralism that leads policymakers to more readily impose criminal law's censorious judgments of blameworthiness on modest regulatory violations, or an American affinity for harsh punitive sanctions over other remedies and policy options.³⁵

³³ See 16 U.S.C. §§ 4302(1), 4302(5), 4306(a)(1), 4306(b) (2006) (offense to disturb a cave on federal land).

³⁴ Examples are seemingly infinite. See 18 U.S.C. §§ 24(a), 669, 1035, 1347, 1518 (2006) (federal health care fraud offenses); U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL §§ 9-42.000, -43.000, -44.000 (1997) (describing considerations in choosing between civil and criminal remedies); 18 U.S.C. §§ 1831-1837 (2006); see also U.S. ATTORNEYS' MANUAL § 9-59.100 (1997) (describing civil and criminal remedies for economic espionage); 29 U.S.C. § 216 (2006) (criminal and civil penalties for violations of fair labor standards); 30 U.S.C. § 801 (2006) (the Mine Safety and Health Act provides for enforcement by civil and criminal penalties, 30 U.S.C. § 820, and by other civil and administrative enforcement methods); 45 U.S.C. § 152 (2006) (civil and criminal penalties for violations of Railway Labor Act); 7 U.S.C. § 195 (2006) (defining felony offense for deceptive pricing practices among firms in certain markets); 7 U.S.C. §§ 192, 193 (2006) (defining prohibitions and civil liability); 18 U.S.C. § 2320 (2006), and 15 U.S.C. § 1501 (2006) (criminal and civil remedies for trademark counterfeiting); GENERAL ACCOUNTING OFFICE, INTELLECTUAL PROPERTY: FEDERAL ENFORCEMENT HAS GENERALLY INCREASED, BUT ASSESSING PERFORMANCE COULD STRENGTHEN LAW ENFORCEMENT EFFORTS, app. II (2008), available at <http://www.gao.gov/new.items/d08157.pdf> (noting felony statutes and civil sanctions governing a wide range of intellectual property infringements).

³⁵ For an account of the Americans' distinct preference for harsher penal sanctions over European states, see JAMES Q. WHITMAN, HARSH JUSTICE 14-15 (2005) (suggesting the American predilection derives from tension between autonomy and state governments).

Those stories are not mutually exclusive with this one, but taking them as dominant explanations leaves a less obvious route for reducing America's pervasive federal regulatory crimes. If the legitimacy story is persuasive, by contrast, two avenues for reform and contraction of criminal law present themselves. The first focuses on strengthening the limits of criminal law as criminal law, and options for that strategy are surveyed in the next Part. The second option, developed in Part IV, focuses on federal power and suggests an approach to overcriminalization that engages the enduring debate over federal power: reaffirming the post-New Deal account of federal regulatory power ensures that policy makers have a range of non-criminal powers and policy tools with which to address the wide range of risks and harms that regulatory crimes now target. A contraction of criminal regulatory law could then be accompanied by adjustments in civil mechanisms as needed for routine regulatory endeavors. That would leave perennial debates over the prudence of specific regulations, and periodic ones over state or federal authority as the proper location for those regimes, to be fought on their own terms.

III. A SURVEY OF POSSIBLE SOLUTIONS GROUNDED IN CRIMINAL LAW THEORY

The sprawling, internally contradictory, substantively excessive, federal criminal code has been in need of an overhaul for decades, but Congress's last best effort at comprehensive revision ended without success in the 1970s.³⁶ Legislative projects of that breadth are always difficult to accomplish, and criminal law reform has a smaller natural constituency than other broad policy projects. But even putting hopes for such wholesale reform aside, several simpler, smaller-scale strategies exist for substantially improving federal criminal law. Scholars and policy advocates already have developed a set of plausible options for redressing the problem of state and federal legislatures simply supplying too much ill-conceived criminal law. Several remedial measures would go a long way toward restraining the excessive reach of the criminal statutes now on the books as well as reducing the prospect of future enactment of poorly drafted, overly expansive or redundant offenses. What follows is a brief canvassing of most of those ideas coupled with some brief assessment of each.

³⁶ For an account of the National Commission on Reform Federal Criminal Laws (Brown Commission), see Louis Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics and Prospects*, 1977 DUKE L.J. 171, 175-88 (describing the Commission's work and some problems it encountered).

A. *Culpability Terms, Lenity, and Priority for Specific Offenses*

1. Presumption for Culpability Requirements

One of the most worrisome forms of excessive criminal liability, especially in federal law, is strict liability. As recent studies have documented in considerable detail,³⁷ Congress has enacted, and continues to propose, criminal statutes that lack any culpability term. The tradition of strict liability for the class of “public welfare offenses” into which most regulatory crimes fall well-established, and is distinct from common law crimes, for which *mens rea* is presumed.³⁸ Many, but hardly all, prominent descriptions of that category of offenses by the Supreme Court emphasize the comparatively light punishments such crimes carry, which imply that strict liability offenses are appropriate, and presumed to be intended by Congress, only with regard misdemeanor offenses. The justification for the absence of a mental state requirement is stronger with respect minor offenses that carry minimal sanctions and stigma. Yet the federal code is replete with felony offenses that contain no mental state requirement,³⁹ and courts have been inconsistent in their decisions whether to imply culpability terms in such cases, in part because poor legislative drafting poses significant interpretive challenges.

This problem with a large set of offenses could be reformed with a single statutory provision modeled on Model Penal Code (MPC) § 2.02.⁴⁰ Section (3) of that provision provides a default standard of culpability—recklessness—for all elements of all offenses that lack a specified culpability requirement. Its companion provision, subsection (4), states that a mental state requirement specified or presumed for a statute shall apply to all elements of a statute “unless a contrary purpose plainly appears” from that

³⁷ Baker, *Revisiting*, *supra* note 1, at 1-2, 6-7; BAKER, MEASURING, *supra* note 1, at 4, 10-11; WALSH & JOSLYN, *supra* note 1, at 1-10.

³⁸ *Morissette v. United States*, 342 U.S. 246, 254-55 (1952).

³⁹ For one collection of strict liability federal offenses added between 1997 and 2003, see BAKER, MEASURING, *supra* note 1, at 23-31 (citing 7 U.S.C. §§ 195, 221, 2009aa-1, 2009bb-1, 4504; 18 U.S.C. §§ 43, 476, 1014, 1204, 1905; 36 U.S.C. § 509; 40 U.S.C. §§ 8103, 14309; 47 U.S.C. § 231; 49 U.S.C. §§ 46313, 46503, 46504, 46505).

⁴⁰ For one version of this proposal, see Brian W. Walsh, *Enacting Principled, Nonpartisan Criminal-law Reform: A Memo to President-Elect Obama*, CHANGE WE CAN BELIEVE IN (The Heritage Found. D.C.), Jan. 9, 2009, at 2-3, available at <http://heritage.org/Research/Reports/2009/01/Enacting-Principled-Nonpartisan-Criminal-Law-Reform-A-Memo-to-President-elect-Obama> (suggesting a default criminal-intent for criminal statutes without an express culpability requirement and a requirement, comparable to Model Penal Code § 2.02(4), that mental state requirement be applied to all material elements of the criminal offense; also advocating codification of rule of lenity as a rule of statutory construction).

statute's language.⁴¹ Scholars and others have widely endorsed a provision of this sort as a partial remedy for federal criminal law.⁴²

Congress would likely want to modify the MPC provision modestly to accommodate special features of criminal law. Jurisdictional elements are typically interpreted as strict liability elements, and mental state requirements for those elements indeed usually serve interest in identifying culpability.⁴³ The federal equivalent to subsection 2.02(4) then, might exclude such elements from the culpability presumption.

Less satisfactorily, Congress might accommodate its—and the Court's—nearly century-long tradition of strict liability regulatory *misdemeanors* by limiting the application of the mental state presumption to that class of low-level offenses. The MPC recommends otherwise; it requires *mens rea* for every grade of criminal offense. Further, the argument for mental elements in misdemeanors is probably stronger in the federal regulatory context than in the state law settings that the MPC had in mind, because most regulatory misdemeanors are paired with (or based upon) regulations backed by civil sanctions that can address harmful conduct and achieve the same instrumental goals as misdemeanor convictions without proof of a culpable state of mind. That statutory choice might hinge, as a practical political matter, on whether the Justice Department would accede to the loss of strict liability misdemeanors as enforcement options. But even a statute specifying presumptive mental state requirements for felonies would be an important improvement for federal law.

2. A Rule of Lenity

Federal courts purport to interpret federal criminal crimes according to a statutory construction canon of lenity, which dictates that ambiguous terms should be construed narrowly so as to contract, rather than expand criminal liability. Yet scholars have amply documented that the purported rule of lenity is honored frequently, at best, inconsistently.⁴⁴ Professor Stephen F. Smith has proposed a federal statute that makes clear Congress's endorsement of the lenity rule—an idea recently endorsed by others as well.⁴⁵ If, following Congress's specification, courts made a renewed commitment to narrow construction of broad and vague criminal statutes, it

⁴¹ MODEL PENAL CODE § 2.02 (1981).

⁴² See WALSH & JOSLYN, *supra* note 1, at 27; *cf.* Stephen F. Smith, Congressional Testimony Before H. Subcomm. on Crime, Terrorism and Homeland Sec., (Sept. 28, 2010), at 10-12, 19 (endorsing such a provision and describing its absence as one reason for problems in federal *mens rea* doctrine).

⁴³ See, e.g., United States v. Yermian, 468 U.S. 63, 68-70 (1984).

⁴⁴ See, e.g., Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 934 (2005) (arguing that the rule of lenity has effectively become the rule of severity).

⁴⁵ See, e.g., WALSH & JOSLYN, *supra* note 1, at 28.

could restrain some of the undue severity of sentences as well as the excessive scope of existing offenses.⁴⁶

3. Presumptive Exclusivity of Specific Statutes

Smith also has developed an effective, simple statutory remedy for the common contradiction of the sprawling federal code: multiple statutes that criminalize the same conduct, but assign different punishments. Many times, a broad-reaching general statute, such as mail fraud, covers the same wrongdoing as a more specific, targeted offense. Prosecutors have complete discretion to choose any applicable statute, which means comparable conduct can be, and is, inconsistently treated due to overlapping laws, and defendants receive different punishments for similar conduct.⁴⁷ Congress could remedy this by codifying a requirement that prosecutions must proceed exclusively under the more specific of two comparable statutes.⁴⁸ That rule would extend a traditional rule of interpretation rule that the more specific statute is not controlled or nullified by the more general one,⁴⁹ and it would ensure that prosecutions proceed under the statutes that mostly likely accord with congressional intent regarding both liability and punishment, since Congress is better able to anticipate all applications of specific statutes than general ones.

That statutory remedy would not address the scenario of *United States v. Batchelder*,⁵⁰ in which two offenses of equivalent generality, and substantively identical language, carried different minimum sentences. A statute requiring prosecution under the less severe provision, absent a showing for good cause for applying the more severe option, is probably politically infeasible in the American tradition of prosecutorial discretion. But Justice Department policy adopting such a rule for United States Attorneys would not be; current policy now recommends the *opposite* in most cases—charging the most severe provable charge.⁵¹

⁴⁶ For a detailed account of federal crimes, within and outside the regulatory context, that result in disproportionate punishment as well as unpredictable scope of liability, see Smith, *supra* note 44, at 897-949.

⁴⁷ See *United States v. Batchelder*, 442 U.S. 114, 124-25 (1979).

⁴⁸ See Smith, *supra* note 44, at 944. Operationally, defendants would have to raise the issue before trial, bringing a more specific offense to the attention of the judge, who would then determine whether the two statutes are general and specific versions of the same offense. Since defendants self-interestedly would raise the issue only when the more specific offense carries a lesser penalty, prosecutors would effectively remain free to charge under a general statute if *that* offense carried the lesser sentence.

⁴⁹ See *id.* at 944 n.163.

⁵⁰ *Batchelder*, 442 U.S. at 123-24.

⁵¹ U.S. DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL, FEDERAL CHARGING GUIDELINES 9-27.330, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm.

B. *Limiting Regulatory Offenses to Substantial Harms and Repeat Offenders*

A second avenue for reform looks to Congress to limit the reach of regulatory offenses by different criteria. Ronald Gainer has long proposed a general federal statute that eliminates criminal punishment for breaches of federal regulatory offenses, with specified exceptions where they are most justified, and where political support for a criminal option is likely strongest. That is, criminal prosecution would remain an enforcement response for regulatory violations only when they: (a) cause significant harm; or (b) represent a pattern of repeated conduct.⁵² Such a statute would be designed to override, or severely limit, the widely employed statutory form that accompanies many federal regulatory regimes and provides for criminal punishment of any person “who knowingly . . . violates any other [regulatory] requirement set forth in [a specific title] or any regulation issued by the Secretaries to implement this Act, [or] any provision of a permit issued under this Act”⁵³

The question here is whether a single new limiting statute could override dozens of existing ones that create criminal offenses in this manner, at least without specifically referencing them in its text. A single general statute may simply conflict with, rather than impliedly repeal, existing statutes that create regulatory crimes. The better approach is for Congress to commission a study to identify all such criminal provisions within regulatory acts, repeal them in their current form and replace them with provisions containing Gainer’s limits. But as a rule of thumb, the broader the project of legal reform grows, the less politically feasible it becomes to accomplish. In another form however, Gainer’s single statute might more clearly achieve its aim. The statute’s aim would be not so much to repeal regulatory crimes altogether, as to constrain prosecutorial discretion of their enforcement to the most egregious subset of regulatory breaches—and to do so only where alternative civil sanctions exist with which agencies and prosecutors can address lesser wrongdoing. American legislatures and courts rarely restrict prosecutorial discretion, but a statute of this sort is a good candidate for initiating such a limit, and it could thereby achieve Congress’s policy objective without a wide ranging code revision. A critical question is whether the statute, unlike prosecutors’ own charging guidelines, would be enforceable by courts, so that defendants could move for dismissal of charges that do not meet the criteria of repeat offending (documented by prior regulatory response) and substantial harm.

⁵² Ronald L. Gainer, *Creeping Criminalization and Its Social Costs*, LEGAL BACKGROUNDERS, (Wash. Legal Found., Wash. D.C.), Oct. 2, 1998.

⁵³ See, e.g., H.R. 3968, 109th Cong. § 506(g)(2) (2005) (environmental regulation).

C. *Procedural Reform: A Law Commission and Legislative Protocols*

A further strategy for restraining *future* passage of poorly conceived criminal statutes targets the legislative process. Walsh and Joslyn's recent Heritage Foundation–NACDL report proposes a strict congressional protocol—frequently ignored in recent years—that all bills creating new criminal liability must go through the House and Senate Judiciary Committees, which possess Congress's greatest expertise with respect to criminal drafting.⁵⁴ Smith has endorsed the same idea and also sketched a proposal for a standing Criminal Law Commission: to aid Congress in the careful drafting of criminal legislation; to provide needs assessments for new legislation in light of the myriad sources of liability already enacted; and to prod the agenda of periodic criminal code reform by providing Congress with analysis and proposals for revisions, repeal, or other new legislation.⁵⁵ The United Kingdom's Parliament has a standing Law Commission that roughly provides this service across a range of substantive law topics, and a few states such as Virginia, have criminal law commissions that serve something like this function as well; Congress has such a commission already with respect to sentencing.⁵⁶

D. *Substantive Judicial Review of Criminal Law*

A less likely and promising possibility looks to courts for a more rigorous constitutional doctrine of due process (and perhaps cruel and unusual punishment)⁵⁷ that would confine legislatures to narrower parameters for criminal law.⁵⁸ Federal courts have a long history of finding state and federal criminal statutes unconstitutional, but nearly always under doctrines specific to the statute's subject matter. First Amendment and the privacy doctrines, for example, have been frequent bases for striking down criminal statutes, because Congress cannot regulate a given activity *at all*, not be-

⁵⁴ WALSH & JOSLYN, *supra* note 1, at 28-30.

⁵⁵ *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the H. S. Comm. on Crime, Terrorism and Homeland Security*, 111th Cong. 62-65 (2010) (statement of Stephen F. Smith, Professor of Law, University of Notre Dame Law School); Smith, *supra* note 44.

⁵⁶ Walsh and Joslyn, in fact, propose a smaller-scale version of this same idea: a requirement that Congress: (a) produce its own report prior to passage of any criminal statute identifying such points as the need for the offense and its relation to existing crimes; and (b) require annual reports from the executive branch on new regulations covered by criminalization statutes and the number of agency referrals to the Justice Department for prosecution. See WALSH & JOSLYN, *supra* note 1, at 29-30.

⁵⁷ See, e.g., *Robinson v. California*, 370 U.S. 660, 667 (1962) (punishment of the status of drug addiction violates Cruel and Unusual Punishment Clause).

⁵⁸ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 581-96 (2001); Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995).

cause it cannot do so with *criminal* law. Put differently, the Supreme Court—like the state courts—has never developed constitutional boundaries for substantive criminal law distinct from civil law; there is no constitutionalized criminal law theory.⁵⁹ A much smaller number of federal criminal statutes have been held to exceed Congress's power under the Commerce Clause.⁶⁰ A few decisions of uncertain provenance that voided criminal statutes on potentially broader grounds have failed to gain wider application.⁶¹ There seems little indication, in short, that courts are willing to take on the task of restricting legislatures' expansive criminal law policy-making. That may be especially true in light of the relative lack of consensus in contemporary American legal and political thought on the scope or legitimacy of courts' constraint of democratic policymaking.⁶²

E. *Desuetude Rule and Expiration Dates for Criminal Statutes*

A final possibility is a general sunset provision built in to some classes of criminal statutes, or an equivalent doctrine that allows courts to void a statute that means criteria for obsolescence or desuetude.⁶³ This idea has never caught on with regard to criminal statutes generally, despite regular use of expiration dates on other statutes and legislative policies, in part to force periodic congressional reevaluation.⁶⁴ But it is plausible, at least for criminal statutes integrated into federal regulatory schemes, which are subject to periodic change from altered circumstances or political preferences.

⁵⁹ Douglas Husak's important book *Overcriminalization* can be read as providing a detailed case for such a theory. See DOUGLAS HUSAK, *OVERCRIMINALIZATION* (2008).

⁶⁰ See *United States v. Lopez*, 514 U.S. 549 (1995); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In the *Lochner* Era of the late-nineteenth and early-twentieth centuries, criminal regulatory statutes repeatedly failed a due process doctrine targeted at rights of contract and property, but that doctrine was subsequently abandoned by the Supreme Court, though the approach retains its adherents. See, e.g., Randy Barnett, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2005).

⁶¹ *Lawrence v. Texas*, 539 U.S. 558 (2003); *Robinson v. California*, 370 U.S. 660 (1962); *Lambert v. California*, 355 U.S. 225 (1957).

⁶² This pattern of judicial restraint regarding legislative crime definition is part of a long tradition of expansive regulatory criminal law dating back first to state statutes widely enacted by the early nineteenth century and then followed by federal criminal regulation later in the nineteenth century. See generally WILLIAM NOVAK, *THE PEOPLE'S WELFARE* (1996) (describing state and local regulation of nineteenth century economic and social life); BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* (2009) (describing federal government intervention in nineteenth century economy); Shaw, *supra* note 25, at 695 (nineteenth century account of regulation).

⁶³ See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). For desuetude discussion, see Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 S.C.T. REV. 27, 29-30, 48-52, 54-60 (finding three primary strands of reasoning in *Lawrence*, one of which was desuetude).

⁶⁴ One example is The Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973aa-6 (2006).

In addition to the lack of tradition for such a mechanism in criminal law, the roadblock likely comes from a concern that a legislature could inadvertently fail to renew a desirable offense definition that leaves wrongdoers unpunishable. Yet, that risk is probably marginal for a couple of reasons. First, under the expansiveness of contemporary codes, much conduct gives rise to liability under multiple statutes—in addition to civil sanctions for conduct that faces such regulation—so as long as statutes come up for renewal on staggered terms rather than all at once. The odds of wrongdoing going completely, as opposed to inadequately, unpunished are slim. Nonetheless, that alone provides only a somewhat haphazard assurance of appropriate criminalization. Second, expiration dates would surely incentivize greater legislative monitoring of criminal law and force consideration of law revision on to the legislative agenda, which is the primary purpose. Further, executive branch enforcement officials—the Justice Department and agencies—could be counted on to keep Congress aware of statutes they actually rely on.

To the extent this remedy is aimed at statutes that are outdated or unenforced, it is a solution to the least important part of the problem. While it is better for unnecessary statutes not to clutter the code or tempt the rare prosecutor, the more serious concern is offenses that *are* enforced either sporadically or, because of their excessive substantive reach, unfairly. A desuetude doctrine will not reach *those* offenses. Sunset limitations, and perhaps a desuetude doctrine, on the other hand, should focus legislative attention on their application. Congress might identify a regulatory track record in which civil sanctions have proven consistently adequate for enforcement officials and obviated any need for criminal penalties; it could then let the offenses expire for that reason. Sunset rules also provide a politically convenient way to handle statutes enacted as high-profile symbolic measures. An expiration date could quietly remove from the code an offense Congress either had little expectation of seeing enforced in the first place, or has subsequently learned is unneeded.

IV. POLITICAL REMEDY FOR OVERCRIMINALIZATION: EMBRACE THE ADMINISTRATIVE STATE

To these relatively direct and pragmatic strategies for reining in criminal law, I want to briefly offer an additional argument for a farther-reaching, if much more indirect, solution to overcriminalization. This argument returns to the focus on the problem of federal overcriminalization being one of federal law rather than criminal law. I argued above that, as a matter of political theory or ideology but not constitutional law, criminal law enjoys a privileged status of legitimacy compared to civil regulation. Challenges to federal regulation take roughly two forms: a legal argument about limits on government power and policy arguments about the efficacy of regulation. Broadly, the legal argument takes on the last several decades

of constitutional law and insists that the Commerce Clause power, properly understood, does not authorize a federal administrative state nearly as broad as we have had for the last seven or more decades.⁶⁵ This argument addresses the basis for federal criminal law, as well as civil regulatory law. This debate is significant, in part because some Supreme Court justices endorse some version of it.⁶⁶ But entering the merits of that debate is beyond the scope of this article.

The second form of challenge may be more pervasive and politically resonant. This is the recurrent policy view that regulatory regimes are often inefficient or even perverse, too often yielding fewer benefits than costs. This assessment gains some rhetorical force from its resonance with a commitment to limited government and valorization of free markets.⁶⁷ Responding to this second challenge with a generalized endorsement of federal regulatory authority, I want to suggest, is an important component in a broader reform effort to reduce the long-standing congressional tendency to over criminalize, at least in the regulatory arena.⁶⁸ The project of reducing regulatory criminalization will be much aided by preserving the capacity of the administrative state for non-criminal prevention, and remedy options to serve the risk-reduction and harm-prevention functions of regulatory criminal law.

In one obvious sense, the familiar and enduring disfavor of federal regulatory intervention has not prevailed—we have a lot of federal regulation. Congress, the executive, and agencies routinely respond to new crises and attendant harms with revised or expanded regulatory strategies. Regulatory reform addressing the 2010 BP oil spill and the Dodd-Frank legisla-

⁶⁵ See, e.g., BARNETT, *supra* note 6, at 317-18, 348-53; Lynch, *supra* note 8, at xvii; Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987). Another part of the argument challenges some features of the structure of agency and regulatory design, particularly the relative independence of agencies from executive control or the claim that legislative lawmaking is excessively delegated to agencies.

⁶⁶ See *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

⁶⁷ See *Republicans in Congress, A Pledge to America* 8, 18 (2010), available at www.pledge.gop.gov (describing negative effects of “excessive federal regulation” and calling for Congressional approval for new regulations “that has an annual cost to our economy of \$100 million or more”). For a counter view on conflict between regulation and free markets, arguing that regulation is essential to and constitutive of markets, see HARCOURT, BERNARD, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011).

⁶⁸ The juxtaposition of excessive federal criminalization in non-regulatory contexts is telling and sobering. Federal criminal law is arguably over-expansive in many contexts—violent crimes and drugs are two examples—because they duplicate state criminal law where state enforcement capacity should be fully adequate. Here, as in regulatory settings, Congress has an alternative to criminal law—state law or civil regulation. But a different story explains the expansion of federal law nonetheless, one that emphasizes federal officials’ seeking credit for responding to salient crime issues and states’ seeking aid in criminal law enforcement from federal rather than state budgets. WORLD HEALTH ORG., *WORLD REPORT ON VIOLENCE AND HEALTH* 89 (2002), available at http://www.who.int/violence_injury_prevention/violence/world_report/en/index.html.

tion in the wake of the 2008 financial crisis, are only the most recent examples.⁶⁹ On the other hand, generalized skepticism of regulation has an incalculable, but notable influence. It affects the form, and more importantly, the efficacy of regulatory regimes including critical ancillary decisions such as funding and staffing of enforcement offices.⁷⁰ And it gains force by its common accord with the self-interest of regulated entities who seek less regulation. Alan Greenspan's now infamous concession of error in his faith that private markets could self-regulate and obviate the need for public regulation of capital markets is illustrative.⁷¹

Yet the demand for regulation in modern economies and societies is pervasive.⁷² It is hard to imagine that a significant degree of regulation in some form is not inevitable in the familiar settings—capital markets, workplaces, consumer product safety, the range of endeavors posing environmental risks, and the rest. Most regulated activities, including those with regulations backed by criminal sanctions, and cited as overcriminalization, are not completely innocuous, or at least the consequences that can result from them are not.⁷³ Moreover, the broad policy trend of recent decades for privatizing various services and activities formerly handled by public entities generates *new* regulatory regimes to monitor and hold accountable private firms and individuals who are allocated public tasks by contract or otherwise.⁷⁴ One example, among a myriad of others, are school funding vouchers, which delegate to parents the power to distribute funding to

⁶⁹ Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376-2223 (2010); NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING (2011), available at <http://www.oilspillcommission.gov/final-report>.

⁷⁰ See, e.g., Kathleen Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221 at 242-45, 242-43 nn.94-103 (2004) (describing increasingly inadequate for SEC during period of growing caseloads and responsibility in the 1990s).

⁷¹ David Leonhardt, *Greenspan's Mea Culpa*, N.Y. TIMES ECONOMIX BLOGS, (Oct. 23, 2008, 4:00 PM), <http://economix.blogs.nytimes.com/2008/10/23/greenspans-mea-culpa>.

⁷² Even dedicated libertarians concede this. See, e.g., Richard Epstein, *Beware the Green Energy Crusade*, DEFINING IDEAS (Feb. 2, 2011), <http://www.hoover.org/publications/defining-ideas/article/65391> (concluding “regulating pollution is necessary” and “cap-and-trade [regulation] worked quite well with respect to sulfur dioxide emissions,” but arguing against that regulatory method to combat global warming).

⁷³ Paul Rosenzweig offers the example of regulations requiring labels on vehicles transporting hazardous materials such as hydrochloric acid, which are important *inter alia* to alert emergency responders to fight fires with sodium rather than water. Regulations mandating labels serve a critical function; failure to label can seem petty and technical (and whether harm occurs from any given failure to label may be fortuitous). The civil regulation and reasonable sanction for its breach, are justified; the case for criminal liability, especially on first violations, is much weaker.

⁷⁴ See JOHN BRAITHWAITE, REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER (2008). For a draft version, see John Braithwaite, *Neoliberalism or Regulatory Capitalism* (RegNet, Working Paper No. 5, 2005) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875789.

schools but require states to increase monitoring for fraud. If efforts to reduce *criminal* law's regulatory role—such as those outlined in the previous Part—are to succeed, non-criminal regulatory mechanisms must be available to serve these functions. Indeed, there are strong arguments that the weakness or absence of civil regulation often *causes* or *aggravates* criminal regulatory enforcement.

Less serious criminal law in federal regulation mostly supplements and duplicates risk-reduction policies and civil sanctions in regulatory schemes.⁷⁵ Yet many regulatory criminal offenses are rarely or never enforced because regulators opt to employ their civil counterparts or negotiate settlements. Civil regulation is commonly the alternative that displaces, or obviates need for, criminal punishment as a regulatory response.⁷⁶ But ineffective regulation or weak regulatory enforcement also frequently precedes and indirectly prompts subsequent criminal prosecution, because harmful wrongdoing that could have been prevented by effective regulatory practice that occurred in its absence. That is one large reason firms adopt internal “compliance programs”—private self-regulation—to reduce the odds of criminal and civil violations within the firm, and why federal prosecutors incentivize them to do so through charging and sentencing policies.⁷⁷

Examples easily come to mind: Enron's top officers were prosecuted for conduct that more effective regulation may well have prevented;⁷⁸ several years earlier,⁷⁹ the collapse of savings and loans in the wake a much-

⁷⁵ More serious criminal offenses provide criminal sanctions that civil law largely cannot duplicate and thus are mostly reserved for intentional wrongdoing causing substantial harm or risk-creation. See, e.g., Kathleen F. Brickey, *Charging Practices in Hazardous Waste Crime Prosecutions*, 62 OHIO ST. L.J. 1077, 1091 (2001); Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115, 140 (1998); Kathleen F. Brickey, *Wetlands Reform and the Criminal Enforcement Record: A Cautionary Tale*, 76 WASH. U.L. Q. 71, 85 (1998).

⁷⁶ Of course, because civil and criminal offenses serve the same functions, both forms share the same weaknesses—poorly designed or implemented, they can produce suboptimal, perverse and unjust effects. Stories of self-interested avoidance of regulation by industry can be matched by anecdotes of myopic or overzealous enforcement officials, or regulatory schemes insensitive to diverse local conditions. One such tale comes from regulatory policy directed at core criminal conduct. Wayne Logan has documented Congress's and the Justice Department's imposition of costly registration and public notice regimes for sex offenders on state governments despite their strong complaints about marginal effectiveness and high compliance costs. Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993 (2010). The Justice Department also reorients local law enforcement priorities through the incentive of restricted grants to localities for specific projects. See *id.* at 997-99 (describing federal Byrne grants for local law enforcement projects).

⁷⁷ See William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 54 VAND. L. REV. 1343 (1999); DEPT. OF JUSTICE, GUIDELINES ON PROSECUTION OF CORPORATIONS.

⁷⁸ See, e.g., Kathleen F. Brickey, *In Enron's Wake: Corporate Executives on Trial*, 96 J. CRIM. L. & CRIMINOLOGY 397, 400 (2006); Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221, 225 (2004).

⁷⁹ Brickey, *Enron's Legacy*, *supra* note 78, at 232-34, 242-43 (describing inadequate SEC enforcement capacity in the 1990s and increased criminal enforcement resources starting in 2003 after passage of the Sarbanes-Oxley Act).

changed regulatory environment resulted in criminal convictions as well as a costly public bailout.⁸⁰ Studies of environmental crimes enforcement, find patterns of prosecution largely where civil regulation first failed or was deliberately flouted.⁸¹ Conversely, many federal regulatory crimes go completely unenforced, and many others are rarely invoked, because civil regulation (or in some contexts private regulation by industry associations)⁸² either prove effective at reducing incidence of risk, and harm-creating conduct, or failing that, civil sanctions and remedies prove adequate in redressing such conduct when it occurs. Civil regulation, sanctions and settlements commonly displace criminal punishment.⁸³

Reducing the criminal law of regulation depends, in short, on a sufficient civil regulatory regime to serve the same ends. The fundamentally instrumental goals of regulation can be overwhelmingly achieved with civil and administrative mechanisms, thereby holding criminal law in reserve for culpable, substantially harmful wrongdoing.⁸⁴ Debates about form and details are inevitable and important, and the challenges of implementing policy choices in the context of entrenched interests are substantial.⁸⁵ The effi-

⁸⁰ See Kitty Calavita & Henry N. Pontell, *The State and White Collar Crime: Saving the Savings and Loans*, 28 LAW & SOC'Y REV. 297, 298 (1994) (describing the criminal enforcement response to the savings and loan crisis); see also Kitty Calavita & Henry Pontell, "Heads I Win, Tails You Lose": *Deregulation, Crime, and Crisis in the Savings and Loan Industry*, 36 CRIME & DELINQ. 309, 328 (1990).

⁸¹ See, e.g., Kathleen F. Brickey, *Charging Practices in Hazardous Waste Crime Prosecutions*, 62 OHIO ST. L.J. 1077, 1091 (2001); Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115, 140 (1998); Kathleen F. Brickey, *Wetlands Reform and the Criminal Enforcement Record: A Cautionary Tale*, 76 WASH. U.L.Q. 71, 85 (1998).

⁸² For a broad description of trends and effectiveness in non-governmental corporate regulation, see BRAITHWAITE, *supra* note 74.

⁸³ Civil settlement should include Deferred Prosecution Agreements negotiated by federal prosecutors which impose various remedial and monitoring plans on firms in lieu of prosecution. For a description, see Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 886-87 (2007).

⁸⁴ Offenses may directly target conduct that is innocuous in itself but a legitimate component of effective regulatory regimes. Examples are reporting requirements across a range of regulatory regimes: large financial transactions, workplace safety violations, or toxic substance discharges. Failures to report may involve little or no moral wrongdoing, but prominent scholars such as R.A. Duff make plausible arguments that such mala prohibita offenses can properly be criminal offenses. That is not to say, as an instrumental matter, that criminal rather than civil sanctions *need* to be employed as widely as they currently are. See R.A. DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW* (2007).

⁸⁵ Political development research tells the complicated story of tensions between the constraint of entrenched institutions and familiar policy practices on the one hand, and structural pressures of economic and industrial development that reveal the inadequacy of older (especially state rather than federal based) models of regulation, on the other. See generally RETHINKING POLITICAL INSTITUTIONS: THE ART OF THE STATE (Ian Shapiro et al. eds., 2006) (presenting a collection of essays on how institutions are formed, operated, and changed, both in theory and in practice); Kathleen Thelen, *How Institutions Evolve: Insights from Comparative Historical Analysis*, in *COMPARATIVE HISTORICAL ANALYSIS IN THE*

cacy of state versus federal (and occasionally international) regulatory regimes vary across settings and contexts, as do the wide range of regulatory models, from command-and-control to market-based incentives to cooperative, flexible practices for risk reduction. Despite those ongoing debates, civil law nonetheless should be the default regulatory mode and criminal law the last resort reserved for the subset of culpable regulatory breaches. That priority is less easy to sustain, however, when criminal law carries a legitimizing power to stigmatize its violation as *criminally* wrongful. Civil rule breaches not only the lack of the same justifying stigma; at least at the margins of the forces that shape regulation's content, civil rules additionally bear a burden of categorical skepticism about *regulation* in the abstract. Though criminal law regulates, its distinctive character implicitly removes it from that weakening critique, at least until one studies its details in specific settings. That "legitimacy disparity" diminishes, if only incrementally, the appeal and ability of civil law to exclusively comprise most regulatory regimes; it may also explain the enduring political appeal of attaching criminal sanctions to regulatory regimes.

CONCLUSION

Ideas challenging the legitimacy or categorical efficacy of federal regulation, like widely shared ideas generally, have real influence in defining policy choices and legal doctrine. In the face of demands for responses to new regulatory problems, as with other policy choices, only some potential options are "thinkable" in the sense of politically plausible.⁸⁶ Influencing the bounds of what is thinkable, or what alternatives make it onto the table of public and political debate as acceptable options, are part of the work of policy advocates, think tanks, academics, and other "opinion leaders." The role of ideas, arguments and values generated by professionals in various fields, including economists and lawyers, are familiar contributors to stories of policy development and the broader development of public institutions.⁸⁷

I have suggested here that Americans' relatively greater strain of skepticism and disparagement of regulation, generally has the perverse effect of contributing to perpetuation of a long-established tradition of regulating with criminal law, even after the federal (and in many settings, state) administrative capacity to regulate with non-criminal mechanisms should

SOCIAL SCIENCES ch. 6 (James Mahoney & Dietrich Rueschemeyer eds., 2003). See also STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 136, 178 (1982); Elisabeth S. Clemens, *Rereading Skowronek: A Precocious Theory of Institutional Change*, 27 SOC. SCI. HIST. 443, 447-49 (2003).

⁸⁶ See Clemens, *supra* note 21, at 188, 190.

⁸⁷ See, e.g., SKOWRONEK, *supra* note 85, at 132, 183, 286 (describing the influence of ideas and advocacy by a "small band of economists," "small cadre of bureaucratic entrepreneurs," and "an intellectual vanguard of university-trained professionals").

have displaced much criminal regulatory law. Yet Congress habitually includes duplicative criminal sanctions in regulatory regimes, even though criminal law is rarely necessary in many of those contexts, and is often designed for unjust application. Recognizing that regulatory goals can be, and commonly are, met by non-criminal regulatory law and policy; endorsing the categorical legitimacy of those regimes, might facilitate a broader recognition of criminal law's lesser legitimacy for the instrumental goals of regulation, at least in the absence of significant culpability and fault.

Reducing federal criminal law is a difficult policy ambition—so far, one that has been almost wholly unsuccessful. But emphasizing its inappropriate role in regulation—coupled with the appropriate work of administrative law for those ends—are promising, if not critical components in a strategy for achieving that ambition. Restricting criminal law in the regulatory sphere almost certainly requires an adequate civil regulatory apparatus to take its place in serving its underlying, largely legitimate goals.

