



Nondelegation and Criminal Law

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I. INTRODUCTION

Nondelegation doctrines prohibit a legislature from delegating its power to an executive branch entity,¹ but they are rarely enforced.² This is true even when the delegation results in the creation of criminal offenses, despite criminal law’s presumption of a “legality principle” requiring legislative offense definition. While a leading treatise states, “It is for the legislative branch of a state or the federal government to determine...the kind of conduct which shall constitute a crime,”³ administratively created crimes nevertheless persist.

These “administrative crimes” appear when an offense created by a legislature incorporates by reference a rule that is itself determined by an agency. Take for example the legal regime that criminalizes swimming in the Potomac River: D.C.’s legislature, the City Council, has promulgated a

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² See generally, Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017) (regarding federal underenforcement of doctrine); For a discussion of enforcement in state law, which is more mixed, see Section III.B below.

¹ *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (“The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,” U.S. Const., Art. I, § 1, and we long have insisted that “the integrity and maintenance of the system of government ordained by the Constitution” mandate that Congress generally cannot delegate its legislative power to another Branch.”); *Matz v. J.L. Curtis Cartage Co.*, 132 Ohio St. 271, 279 (Ohio, 1937) (“It is an accepted doctrine in our constitutional law that the lawmaking prerogative is a sovereign power conferred by the people upon the legislative branch of the government, in a state or the nation, and cannot be delegated to other officers, board or commission, or branch of government. Thus neither the Congress of the United States nor the General Assembly of Ohio can delegate its legislative power....”).

³ See 1 Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* § 2.6 (1986). penalties provision in its “Water Pollution Control” chapter making it a misdemeanor offense to “violate[] this subchapter *or the regulations* promulgated pursuant to this subchapter...” ² Regulatory violations are punished identically to statutory violations, with the difference being that the regulations are issued by the Director of the Department of the Environment, who is appointed by the Mayor with the consent of the Council. ³ The Director, acting on his delegated authority, has issued regulations prohibiting people from swimming in the Potomac River. ⁴ The penalties provision elevates this rulemaking by an Agency head into a criminal offense, punishable just as severely as violations of the legislatively determined rules. These “administrative crimes” are pervasive in American law, and have an impressive pedigree at the U.S. Supreme Court—despite the Court’s technical adherence to the nondelegation doctrine. These offenses were first upheld against a nondelegation challenge in 1911, and an unbroken line of cases since that time has continued to ratify the practice.⁵ [Include Gundy once decided]. Many state high courts have taken a similar approach when analyzing their state constitutions.⁶

In this Article, I claim that administrative crimes are illegitimate. By this I mean that they fail to satisfy a requirement imposed by some of the most prominent theories of state punishment. According to these theories, criminalization decisions must issue from by a democratic institution.

First, consider the so-called “expressive” theory of punishment. The central insight of expressivism is that criminal punishment involves not just “hard treatment” such as imprisonment, but that it also communicates symbolic condemnation from the community. Because this condemnation must come from the community, though, the determination of what conduct merits condemnation must also be a community decision. Expressivism thus demands democratic criminalization, and this conclusion is fatal to the legitimacy of administrative crimes in the eyes of an expressivist. Because agencies cannot approximate or stand in for the “community,” they are invalid sources of criminal law. Agency decisionmakers are not elected by a majority of members of the community, and therefore cannot claim to act on behalf of the political community or speak for it. This deprives what I call “bureaucratic condemnations” of the symbolic significance that legal punishment requires, as only a political majority’s condemnation decisions carry meaning as the voice of the community itself.

² D.C. Code Ann. § 8-103.16 (emphasis added).

³ D.C. Code Ann. § 8-151.04.

⁴ D.C. Mun. Regs. tit. 21, § 1108.

⁵ *U.S. v. Grimaud*, 220 U.S. 506 (1911). See Section III.B regarding state law.

⁶ See Section III.B.

Next, consider the “liberal” or consent-based theory of punishment. This theory starts with the premise that human beings are free (autonomous) and equal, and therefore views state punishment as *prima facie* illegitimate given that punishment involves coercion. The liberal theory of punishment is most concerned with the fact that criminalization results in liberty restrictions, both through prohibiting acts and thus deterring people from engaging in them, but also in incarcerating them if they violate the prohibitions. Free individuals do not create the state so that it can undermine their freedom; this would work against the original point of the endeavor. Instead, free individuals consent to political authority—thus legitimating it—in the expectation of other benefits, and the same is true of state punishment. But liberal theory presumes that consent to criminalization does not stop at the initial creation of political authority—it must continue through to the creation of individual criminal laws, pursuant to a democratic lawmaking institution. This means that administrative crimes cannot satisfy what John Rawls called the “Liberal Principle of Legitimacy”:⁷ free and equal individuals would not consent to an institutional arrangement where bureaucratic agency leaders are able to determine what conduct leads to punishment, on the basis of their claim to expert knowledge.

As I will argue, the expressive and the liberal theories of punishment offer alternative and independent reasons for rejecting administrative crimes as illegitimate. This is not a claim about the content of constitutional law, but instead about the legitimacy of the legal status quo now validated by Supreme Court jurisprudence, when viewed in light of prominent theories of state punishment.

The argument proceeds as follows: Part II discusses examples of administrative crimes in both federal and state law, and briefly addresses the difficulties in making a comprehensive assessment of the number of these offenses. Part III explicates the long line of U.S. Supreme Court cases on administrative crimes and the federal nondelegation doctrine, as well as how important state high courts have applied their state constitutional law to this issue. Part IV reviews the small body of scholarly literature relevant to administrative crimes, and observes that the primary argument offered against administrative crimes is the intuition that criminal sanctions are uniquely severe, and therefore demand a different nondelegation analysis. Building on this, Part V theorizes how the two most severe aspects of criminal punishment bear on what institution can criminalize conduct—these are the state punishment’s power to express community condemnation and to deprive individuals of their liberty. Piecing together strands in both expressivist and

⁷ JOHN RAWLS, *POLITICAL LIBERALISM* 137 (2005).

liberal punishment theory, this Part argues that criminalization must be democratic, and that therefore administrative crimes are illegitimate.

II. EXAMPLES

Before discussing the jurisprudence that has developed regarding administrative crimes, it is worth discussing some concrete examples, and to discuss the form of the typical offense. The definition we will use throughout this article is that an administrative crime exists, at the very least, whenever a legislature creates an offense in which an element incorporates by reference a body of rules or regulations promulgated by an administrative agency. This is the core case to examine: “It shall be an offense to [insert mens rea] violate the regulations promulgated by the Agency pursuant to this Title.” As this hypothetical statute suggests, it is usually the act element that incorporates the regulations by reference; it is the determination of punishable conduct that is the decision delegated to the agency.

Consider these examples from federal law:

- *Food and Drug Law.* The Food Drug and Cosmetic Act prohibits the “misbranding of any food,”¹⁰ and provides for up to one-year imprisonment for violations.¹¹ However, the law also states that the “definition and standard of identity” that branding must adhere to is “prescribed by regulations” promulgated by presidentially-appointed Secretary of Health and Human Services.¹² These regulations can be extremely detailed. For example, they prescribe that “macaroni” must be “tube-shaped and more than 0.11 inch but not more than 0.27 inch in diameter,” while “spaghetti” must be “tube-shaped or cord-shaped (not tubular) and more than 0.06 inch but not more than 0.11 inch in diameter.”¹³ Vermicelli, however, must be “cord-shaped (not tubular) and not more than 0.06 inch in diameter.”¹⁴ This legal regime makes the labelling of “vermicelli” as “spaghetti” a federal criminal offense.
- *Entitlement Programs.* The statute creating the Supplemental Nutrition Assistance Program (the federal food purchasing assistance program for low income households) makes it a criminal offense to “us[e], transfe[r], acquir[e], alte[r], or posses[s] benefits in any

¹⁰ 21 U.S.C. § 331 ¹¹ Id. § 333.

¹² Id. § 343(g), § 341.

¹³ 21 C.F.R. § 139.110.

¹⁴ Id.

manner contrary to this chapter or the regulations issued pursuant to this chapter....”¹⁵ The Secretary of Agriculture is empowered to issue these regulations.¹⁶ One regulation prohibits household members receiving benefits from using the benefits for “meals-on-wheels” unless the household member is 60 years of age or older.¹⁷ Another prohibits using benefits to pay for bottle deposit fees in excess of the reimbursable amount.¹⁸ Violations of these provision are now federal crimes by virtue of the statutory delegation.

- *Wildlife Conservation.* The National Wildlife Refuge System Act, which protects animals and plants on federal lands, creates a criminal offense for violations of “any of the provisions of [the] Act or any regulations issued thereunder....”¹⁹ A few regulations issued by the Secretary of Commerce include a prohibition on “Fail[ing] to return to the water immediately without further harm, all horseshoe crabs caught” of the coast of New York and New Jersey, and also to “Remove eggs from any berried female American lobster, [or] land, or possess any such lobster from which eggs have been removed....”²⁰
- *Others.* ERISA reporting regulations promulgated by the Secretary of Labor are backed by criminal sanction,²¹ as are recordkeeping regulations governing bank holding companies that are promulgated by the Federal Reserve Board.²² Regulations covering the navigation of water vessels, promulgated by the Secretary of Transportation, are also punishable as criminal offenses.²³

Now, consider some examples from state law:

- *Alcohol Control.* In Colorado, the Executive Director of the Department of Revenue is empowered to promulgate rules regarding the “proper regulation and control of the...sale of alcohol,”²⁴ and violations of these rules are punishable as a “petty offense.”²⁵

15

⁷ U.S.C. § 2024(b).

¹⁶ 7 U.S.C. § 2013(c).

¹⁸ 7 C.F.R. § 274.7.

¹⁹ Id.

⁸ C.C.R. 203-2, Regulation 47-900.

⁹ *People v. Lowrie*, 761 P.2d 778, 782 n.1 (Colo. 1988).

¹¹⁰ 16 U.S.C. § 668dd.

²⁰ 50 C.F.R. § 697.7.

²¹ 29 U.S.C.A. § 1131.

²² 12 U.S.C.A. § 1956.

²³ 50 U.S.C.A. § 192.

²⁴ Colo. Rev. Stat. Ann. § 44-3-201, 202.

²⁵ Id at § 44-3-904.

Pursuant to this power, the Executive Director has⁷ prohibited “Any person on [a] licensed premises touching, caressing or fondling the breasts, buttocks, anus, or genitals of any other person.”²⁶ ○ In upholding this rule against a nondelegation challenge, the Colorado Supreme Court gave a laundry list of other administrative crimes in the state: “[V]iolation of rules and regulations promulgated by the Division of Labor regarding the ventilation of garages and shops...; violations of provisions of the sanitary code, adopted by the Department of Health...; violations of rules and regulations adopted by local licensing authorities pursuant to the massage parlor code...; violations of rules or regulations regarding transportation of hazardous materials promulgated by Public Utilities Commission....”⁸

- *Prison Discipline Regulations.* All states operate prisons, and all prisons likely have disciplinary rules imposed by their administrators on inmates that result in punishment if violated. While technically these sanctions are called “discipline” and not criminal punishment, they are effectively the same. Here, the state legislatures have delegated the decision of what conduct to punish in prisons to the prison administrators. For example, the New York Commission of the Department of Corrections and Community Supervision has promulgated the “Standards of Inmate Behavior” pursuant to this authority.⁹ These rules look very much like a legislative penal code in form, but not in content. In New York prisons, for example, punishment will result if an inmate instructs other inmates in martial arts or practices them himself.²⁹
- D.C.’s water pollution law makes it a misdemeanor offense to “willfully or negligently violate...the regulation promulgated pursuant to [the water pollution] subchapter....”³⁰ The Director of the

¹⁰ N.Y. Correct. Law § 137; N.Y. Comp. Codes R. & Regs. tit. 7, § 270.2.

²⁹ N.Y. Comp. Codes R. & Regs. tit. 7, § 270.2 ³⁰ D.C. Code Ann. §

8103.16.

District’s Department of the Environment has in turn issued regulations prohibiting people from swimming in the Potomac River.¹¹

- In New York it is a misdemeanor to commit a “tax fraud act,” by failing to “file any return or report required under this chapter or any regulation promulgated under this chapter....”¹²
- Florida’s law creating a public teacher retirement system states: “Any person subject to the terms and provisions of this chapter, including the individual members of all boards, who shall violate any of the provisions of this chapter or any valid rule or regulation promulgated under authority of the chapter shall be guilty of a misdemeanor of the second degree....”¹³
- Texas oil and gas law states: “[A] a person who violates any of the rules or orders of the governmental agency adopted under the provisions of this chapter on conviction is considered guilty of a felony....”¹⁴

It is difficult to assess how numerous these administrative crimes are—especially in federal law. Prominent scholars, as well as the House Judiciary Committee, have circulated an estimate of 300,000, but the foundations of this estimate are questionable.¹⁵ In 1998, the ABA’s Task Force on the Federalization of Criminal Law lamented that “So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes.”³⁶ The complexity of recognizing administrative crime provisions outside of the general criminal law title (Title

¹¹ D.C. Mun. Regs. tit. 21, § 1108.

¹² N.Y. Tax Law § 1801; §1802.

¹³ Fla. Stat. Ann. § 238.16.

¹⁴ Tex. Nat. Res. Code Ann. § 88.134.

¹⁵ See Report, House Judiciary Committee Overcriminalization Task Force, available at <https://judiciary.house.gov/press-release/house-judiciary-committee-reauthorizesbipartisanover-criminalization-task-force/> (“[S]tudies put the number at more than 300,000 – many of which, if violated, can also result in criminal liability.”). Well-known expert in white collar crime, Prof. Julie O’Sullivan, also testified to this number before the House Judiciary Committee, and used the number in a law review article. See HEARING BEFORE THE OVER-CRIMINALIZATION TASK FORCE OF 2014 OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED THIRTEENTH

18) was a major reason for this inability to make an accurate accounting: “A large number of sanctions are dispersed throughout the thousands of administrative ‘regulations’ promulgated by the various governmental agencies under Congressional statutory authorization. Nearly 10,000 regulations mention some sort of sanction, many clearly criminal in nature, while many others are designated ‘civil.’”³⁷ While a precise count has not been ascertained, what no one disagrees about is that the number of administrative crimes is substantial. Administrative regulations backed by criminal sanctions cover wide ranges of conduct, and multiply in the background through the rulemaking process.

III. JUDICIAL RECEPTION

A. Federal Law

The seminal case addressing the validity of administrative crimes is the 1918 U.S. Supreme Court decision of *United States v. Grimaud*.³⁸

Grimaud involved a conviction “for grazing sheep on the Sierra Forest Reserve without having obtained the permission required by the regulations adopted by the Secretary of Agriculture.”³⁹ A federal statute had delegated rulemaking authority to the Secretary, and made violations of those rules criminal offenses.⁴⁰ The Court noted that the general purpose of the statute was to protect and manage forest reservations, but that the choice of whether a specific reservation would allow a specific activity was merely a “matter of

CONGRESS SECOND SESSION FEBRUARY 28, 2014 Serial No. 113–71, pg. 63 (“Ms. O’SULLIVAN. Exactly. We do not know what the content yet is. But more seriously, I do not think anybody is going to count the number of criminalized regulatory offenses. I think at last count there were 300,000. That strikes me as crazy.”); Julie Rose O’Sullivan, *The Federal Criminal “Code”: Return of Overfederalization*, 37 Harvard J.L. & Pub. Pol’y 58 (“At the federal level, of the more than 300,000 criminally enforceable federal rules and regulations, 98% are in the form of regulations promulgated by administrative agencies and executive branch officials.”). O’Sullivan’s citation for this number in turn relies on the prominent environmental law scholar Richard Lazarus. See *id.*, citing Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 Geo. L.J. 2407, 2441–42 (1995) (“An estimated 300,000 federal regulations are now subject to criminal enforcement.”). Lazarus’s source is John Coffee. *Id.*, citing John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/crime Distinction in American Law*, 71 B.U. L. Rev. 193, 246 n.94 administrative detail,” as “it was impracticable for Congress to provide general regulations for these various and varying details of management”

(1991). Coffee bases his estimate on comments “made by Stanley Arkin, a well-known practitioner in the field of white collar crime, at the George Mason Conference in October

1990.” *Id.* n.94, n.10. The source of Arkin’s claim is unknown. Thus, the oft-cited estimate of 300,000 administrative crimes has no verifiable basis.

³⁶ABA Report, Task Force on the Federalization of Criminal Law, available at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf

³⁷ *Id.*

³⁸ *U.S. v. Grimaud*, 220 U.S. 506 (1911). ³⁹ *Id.* at 514.

⁴⁰ *Id.* (“[M]ay make such rules and regulations and establish such service as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; *and any violation of the provisions of this act or such rules and regulations shall be punished.*”).

given the “peculiar and special features” of each reservation.¹⁶ The Court wrote that by empowering the Secretary to adapt his regulations to “local conditions,” “Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power.”¹⁷ The Court referred to an older case involving court rules, and stated that while “strictly and exclusively legislative” powers could not be delegated, “nonlegislative” powers to “fill up the details” of a statute were permissibly delegated.¹⁸ Exclusively legislative powers were “important subjects,” but those subjects of “less interest”—the “details”—were the province of administrative regulations.

While the initial justification for the delegation appears to be variability (in this case, the peculiar features of different reservations), in the end variability of circumstances represents just one species of a larger category: the “details.” *Grimaud* continues by giving other examples of mere “details”: ratemaking in shipping, and determining the uniform height of railroad-car couplings.¹⁹ The determination of details like these “administer the law and carry the statute into effect.”¹⁹ Later the concept is described in more depth, when the Court quotes from some prior delegation cases outside of the criminal context: Congress may delegate “a power to determine some fact or state of things upon which the law makes or intends to make its own action depend,” as “there are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power.”⁴⁶ “Details” are “known unknowns” at the time of the legislative enactment, and their specification effectuates the legislative intent.

After *Grimaud*, the coming of the New Deal and the rise of the administrative state would result in a greatly increased number of

¹⁶ *Id.* at 516.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* ¹⁹ *Id.* at

518. ⁴⁶ *Id.* at

520.

administrative crimes.²⁰ The *Grimaud* compromise would remain undisturbed at the Supreme Court, though.²¹

One flicker of dissent emerged from Justice Brennan in his concurrence in the 1967 case *United States v. Robel*.²² *Robel* involved a conviction pursuant to the Subversive Activities Control Act of 1950, which prohibited any member of a Communist organization from “engag[ing] in any employment in a defense facility.”²² The determination of what constituted a “defense facility” was delegated to the Secretary of Defense.²³ The Court struck down the offense on freedom of association grounds, but Justice Brennan’s concurrence raised the additional issue of the Secretary’s role in determining criminal liability.²⁴ Brennan, of course, was no opponent of the administrative state, and began his opinion by re-affirming his belief that lax enforcement of the nondelegation doctrine was generally appropriate.²⁵ The difference in this case, though, was that the Secretary effectively defined administrative crimes.²⁶ What makes criminal sanctions unique is their especially harsh effect of liberty deprivation: “[T]he numerous deficiencies connected with vague legislative directives,” Brennan wrote, “. . . are far more serious when liberty and the exercise of fundamental rights are at stake.”⁵⁵

This special aspect of the criminal sanction meant that it should only be imposed by a legislature—only after “legislative judgment” on

²⁰ For a discussion of this era and criminal lawmaking, see generally Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169 (2013). A representative case is *Yakus v. U. S.*, 321 U.S. 414, 419 (1944).

²¹ A case that is exemplary of this era is the 1944 decision in *Yakus v. United States*. *Yakus v. United States*, 321 U.S. 414, 424–25 (1944). In *Yakus* the defendants were convicted of selling beef above the maximum price regulation specified by the “Price Administrator,” and these regulations were backed by a criminal sanction pursuant to the Emergency Price Control Act. *Id.* at 418. This was an emergency regulatory regime passed during the height of World War II, and was set to expire on its own terms by mid-1944. *Id.* at 420. In upholding the law, the Court took note of the fact that these regulations had criminal sanctions, but this

²² *United States v. Robel*, 389 U.S. 258, 273–74 (1967) (Separate op. of Brennan, J.).

²² *Id.* at 259.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 274. “No other general rule would be feasible or desirable. Delegation of power under general directives is an inevitable consequence of our complex society, with its myriad, ever changing, highly technical problems.”

²⁶ *Id.* “The area of permissible indefiniteness narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights, as does [this law].” ⁵⁵ *Id.* at 275. “The need for a legislative judgment is especially acute here, since it is imperative when liberty and the exercise of fundamental freedoms are involved that constitutional rights not be unduly infringed.”

“formulation of policy.”²⁷ The problem with delegated policy formulation is

feature seemed to be of no import: “The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct—here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations....” *Id.* at 424. The “penal sanctions” clause of that sentence seems to be an afterthought.

that policy formulation is “entrusted to [Congress] by the electorate,” and that administrative agencies are “often not answerable or responsive in the same degree to the people,” and therefore they lack the “authority” to decide such questions.⁵⁷ Congress is the “appropriate forum where conflicting pros and cons should have been presented and considered.”⁵⁸ Brennan’s vision of legislative judgment is thus grounded in democratic legitimacy through electoral accountability (“authority”), with the acknowledgement that many decisions will have competing reasons for different actions (“pros and cons”) requiring democratic deliberation.⁵⁹

Despite Brennan’s forceful arguments, the consensus on administrative crimes was not even called into question by the Court until almost fifty years later. In 1991, co-defendants challenged the scheme created by the Controlled Substances Act in *Touby v. United States*.⁶⁰ The Act established five categories of substances and punished unauthorized manufacture, possession, and distribution of these substances, but authorized the Attorney General to add or remove substances from the various categories.⁶¹ The Attorney General in turn delegated his authority to the Drug Enforcement Administration’s administrator.⁶² The defendants in the case challenged these delegations as unconstitutional, arguing that the nondelegation doctrine requires greater statutory specificity with respect to prohibited conduct when the regulations promulgated under the statute carry criminal sanctions.⁶³ The Court did not outright reject this claim. Instead, citing *Grimaud*, the Court acknowledged that its cases “Are not entirely clear as to whether more specific guidance” is required for regulations that function

agent’s authority so that those affected by the agent’s commands may know that his command is within his authority and is not his own arbitrary fiat. ... There is no way for persons affected

²⁷ *Id.* at 282. Interestingly, Brennan also raised a form of a notice rationale, providing support for the Nebraska court’s opinion earlier. *United States v. Robel*, 389 U.S. 258, 281 (1967) (“Third. The indefiniteness of the delegation in this case also results in inadequate notice to affected persons. Although the form of notice provided for in s 5(b) affords affected persons reasonable opportunity to conform their behavior to avoid punishment, it is not enough that persons engaged in arguably protected activity be reasonably well advised that their actions are subject to regulation. Persons so engaged must not be compelled to conform their behavior to commands, no matter how unambiguous, from delegated agents whose authority to issue the commands is unclear. ... The legislative directive must delineate the scope of the

by s 5(a)(1)(D) to know whether the Secretary is acting within his authority, and therefore no fair basis upon which they may determine whether or not to risk disobedience in the exercise of activities normally protected.”).⁵⁷ *Id.* at 276. ⁵⁸ *Id.*

⁵⁹ *United States v. Robel*, 389 U.S. 258, 275–77 (1967) (“Such congressional determinations will not be assumed. ‘They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized * * * but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws.’”). Consider also this passage from Justice Brennan’s opinion in a 1984 void-forvagueness case: “The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values...” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984).

⁶⁰ *Touby v. U.S.*, 500 U.S. 160, 167 (1991) ⁶¹ *Id.* at 163.

⁶² *Id.* at 164.

⁶³ *Id.* at 162.

as criminal offenses, but that “even if greater congressional specificity is required in the criminal context,” the Controlled Substances Act is sufficiently specific.²⁸ Crucial to this determination was that the Act imposed daunting procedural requirements on the Attorney General’s power to add and remove substances from the restricted categories.²⁹ These “specific restrictions on the Attorney General’s discretion” saved the Controlled Substances Act from unconstitutionality,⁶⁶ despite the fact that the restrictions on the discretion were purely *procedural*. Congress did not define or limit what is or is not an unlawful substance.

Justice Marshall’s concurrence (joined by Blackmun) in *Touby* indicates that despite his vote, he was somewhat troubled by administrative crimes.³⁰ For Marshall, judicial review of the agency’s decision was crucial to the constitutionality of the Controlled Substances Act’s delegation due to its criminal nature:

Because of the severe impact of criminal laws on individual liberty...an opportunity to challenge a delegated lawmaker's compliance with congressional directives is a constitutional necessity when administrative standards are enforced by criminal law....We must therefore read the Controlled Substances Act as preserving judicial review of a temporary scheduling order in the course of a

²⁸ *Id.* at 166.

²⁹ *Id.* at 167 (1991) (“It is clear that in §§ 201(h) and 202(b) Congress has placed multiple specific restrictions on the Attorney General's discretion to define criminal conduct. These restrictions satisfy the constitutional requirements of the nondelegation doctrine.”). ⁶⁶ *Id.*

³⁰ *Touby v. United States*, 500 U.S. 160, 169–70 (1991).

criminal prosecution in order to save the Act's delegation of lawmaking power from unconstitutionality.³¹

For Marshall, like for Brennan, the especially harsh effects of criminalization (liberty deprivation) justified a different analysis than did the typical delegation case, yet for Marshall it is not legislative specificity that saves these laws, but judicial review.

While *Touby* seemed to have been an expression of a potential need for greater specificity in criminal delegations, only five years later these concerns seem to have evaporated. In the 1996 case of *Loving v. United States*, a criminal defendant challenged the President's power to specify aggravating factors for military capital punishment pursuant to a Congressional delegation.³² In the opinion the Court explicitly re-affirmed the validity of administrative crimes, and cited to *Grimaud*:

There is no absolute rule...against Congress' delegation of authority to define criminal punishments. We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations “confine themselves within the field covered by the statute.” [citing *Grimaud*].³³

Loving interprets *Grimaud* quite expansively, and as imposing only two requirements. The penalty must be in the statutory text, and the regulations must be inside the “field covered” by that text. While *Grimaud* spoke of agencies “fill[ing] up the details” that would be “unknown” at the time of legislative deliberation but necessary to “carry the statute into effect,” *Loving* views statutes as creating a “field” within which regulations were free to operate.³³

For over twenty years after *Loving* there was little attention paid to the issue of administrative crimes,³⁵³⁴ but in 2019 the Court decided *Gundy v. United States*. In *Gundy* the petitioner challenged the delegations to the Attorney General in the Sex Offender Registration and Notification Act.

³¹ Id.

³² *Loving v. United States*, 517 U.S. 748 (1996). *Loving* is different from the previous cases in two respects: first, it is a delegation with respect to sentencing and not substantive criminal

³³ Id. at 754.

³³ The quote from *Grimaud* referencing this “field” comes from the discussion in that case of prior decisions upholding non-criminal administrative delegations.

³⁴) (Sutton, J., concurring) (“By giving unelected commissioners and directors and administrators carte blanche to decide when an ambiguous statute justifies sending people to prison, the government's theory diminishes this ideal.”).

SORNA “made it a federal crime for a sex offender who meets certain

liability. Moreover, it is a delegation to the President, and not to one of his or her executive agencies.

requirements to ‘knowingly fai[l] to register or update a registration as required by [SORNA].’”³⁵³⁶ The challenged delegation empowered the Attorney General “to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with [the initial registration requirements].”⁷⁴ Thus, the Attorney General determined the retroactivity (or not) of the registration requirements. [Discuss *Gundy* holding – if no opinion soon, discuss how it is unlikely that the status quo regarding the nondelegation doctrine will change with this case].

³⁵ One brief discussion occurs in a 2014 statement respecting the denial of a certiorari petition, written by Justice Scalia and joined by Justice Thomas. *Whitman v. United States*, 135 S. Ct. 352, (Mem)–353 (2014). In the case, Scalia criticized the lower court for giving *Chevron* deference to the SEC’s interpretation of “fraud” in the federal criminal code, arguing that this “collide[s] with the norm that legislatures, not executive officers, define crimes.” *Id.* at 353. However, while Scalia argued that this principle militated against deference, it did not rule out administrative criminalization: “Undoubtedly Congress may make it a crime to violate a regulation...” *Id.* If the animating principle behind the nodeference-in-criminal-law rule is similarly the principle that only legislatures “define crimes,” though, then Scalia ought not have concluded that *Grimaud*-type delegations are “undoubtedly” constitutional. Why is it worse to accord an agency *deference* when it interprets a legislatively specified offense element than it is for the legislature to import wholesale the offense elements created by administrative rule? It isn’t. This distinction is empty and formalistic. In both cases, the jury will be instructed on, and the prosecution must prove, elements that are not legislatively determined. In fact, for delegation purposes the *Whitman*-type deference delegation seems less egregious than the *Grimaud*-type ruleincorporation delegation—in the case of the former, the legislature has more precisely spoken regarding the elements of the offense. For another discussion of this issue by a wellregarded circuit judge, see *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir.

B. State Law

Having assessed the state of the law with respect to the federal nondelegation doctrine, we now turn to the positions of state courts interpreting state constitutions or statutes. Fortunately, we need not break new ground. Jim

³⁵ *Id.*

³⁶ U.S.C. § 20913.

Rossi undertook an exhaustive survey of state nondelegation doctrines in 1999; given all that has been said in the previous section, his results were surprising.³⁷ The majority of state high courts have *not* followed the Supreme Court’s lax interpretation of nondelegation. Overall, Rossi concludes that “in the states, unlike the federal system, the nondelegation doctrine is alive and well....”³⁸

Rossi identifies only six states that are, like the federal jurisdiction, “weak” nondelegation states that “uphold[] legislative delegations as long as the agency has adequate procedural safeguards in place” (think *Touby*).⁷⁷ These can be contrasted with 20 “strong” nondelegation states where “statutes are periodically struck on nondelegation grounds.”³⁹ These states “differ both in doctrine and in enforcement from their federal counterparts.”⁴⁰ In these states the doctrine is actually enforced, and the doctrine itself often stems from explicit textual requirements in the state constitution. As Rossi notes, “The overwhelming majority of modern state constitutions contain a strict separation of powers clause,” meaning that there is explicit constitutional text dividing power between the various branches, and also a provision that “instructs that one branch is not to exercise the powers of any of the others....”⁴³ In “strong” nondelegation states, this text is operative and is enforced by the state high court; the result is a requirement of “specific standards and guidelines in legislation to validate a delegation of legislative authority to an agency.”⁸¹

Somewhere between the strong and weak nondelegation states are what Rossi calls the “moderate” nondelegation states.⁸² These twenty-three states “vary the degree of standards necessary depending on the subject matter

³⁷ Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1187 (1999). Rossi’s remains the most current assessment.

³⁸ Id. at 1189. He notes that this is true from the standpoint of the law in 1999. Rossi’s assessment of the causes of this are interesting. He attributes the difference between the state and federal systems to be due to the “unique institutional design of state systems of governance.” Id. at 1217. “State legislatures, and often agencies, are more prone to faction than the U.S. Congress or federal agencies, both because the costs of organizing and mobilizing local factions are lower and because state legislatures, in session for very limited terms, are not as effective as Congress at oversight.” ⁷⁷ Id. at 1191.

³⁹ Id. at 1197. While Rossi lists Arizona as a strong nondelegation state, I believe that this must be a typographical error. He cites to the case discussed below as exemplifying Arizona’s approach, but as should be apparent, this case endorses broad delegations.

⁴⁰ Id. ⁴³ Id. at

1190. ⁸¹ Id.

at 1195. ⁸² Id.

at 1198

of the statute or the scope of the statutory directive,” but rarely uphold delegations solely on the basis of “procedural safeguards.”⁴¹ Rossi writes that while some of these state courts have adopted doctrinal language similar to the U.S. Supreme Court, the state courts are “much more likely to strike down statutes as unconstitutional....”⁴² Similarities in doctrine belie differences in enforcement levels.⁴⁶

Before moving on, it is worth looking at some examples of the different positions that states have taken. In what follows, consider representative opinions from state high courts—one, from a weak nondelegation state approving administrative crimes, and a second from a strong nondelegation state reaching the opposite conclusion.

1. Arizona: Weak Nondelegation

One example of a “weak” nondelegation state, similar to the federal system, is Arizona.⁴³ In the 1978 case *State v. Williams*, the Arizona Supreme Court upheld a conviction for an administratively defined crime relating to food stamp fraud.⁴⁴ The defendant falsely claimed that she was unemployed so as to keep receiving the food stamps, in violation of regulations of the State’s Department of Economic Security, an administrative agency.⁴⁵

Violation of the agency’s regulations was made a misdemeanor by statute: “Whoever knowingly ... acquires ... food stamps ... in any manner not authorized by law is guilty of a misdemeanor....”⁴⁶ “Authorized by law” was interpreted to include regulations promulgated by the Department.⁴⁷ The Court began its analysis by noting the Arizona constitution’s general approach to nondelegation questions, which is similarly permissive to the Federal approach. “Delegation of ‘quasi-legislative’ powers to administrative agencies, authorizing them to make rules and regulations, within proper standards fixed by the legislature, are normally sustained as valid,” the Court

⁴¹ Id. at 1198.

⁴² Id. 1200.

⁴⁶ Id.

⁴³ For others, see, e.g., *People v. Turmon*, 340 N.W.2d 620, 627 (Mich. 1983) (“[T]he power to define crimes, unlike some legislative powers, need not be exercised exclusively and completely by the Legislature. Provided sufficient standards and safeguards are included in the statutory scheme, delegation to an executive agency is appropriate, and often necessary, for the effectuation of legislative powers.”).

⁴⁴ *State v. Williams*, 583 P.2d 251, 252 (Ariz. 1978); see also 753 So.2d 156.

⁴⁵ *Williams*, 583 P.2d at 252.

⁴⁶ Id.

⁴⁷ Id. ⁵² Id. at

254. ⁹² Id.

reasoned, “and, barring a total abdication of their legislative powers, there is no real constitutional prohibition against the delegation of a large measure of authority to an administrative agency for the administration of a statute enacted pursuant to a state's police power.”⁵² Only “total abdication” presents a state constitutional law problem. Interestingly, though, the Court views this statute as avoiding a delegation problem altogether”

It should be noted that [the statute] does not delegate any power whatsoever in the sense of authorizing another governmental body to create rules or regulations. Rather, the [statute] merely incorporates into the criminal law of Arizona, by the process of providing penalties for their violation, rules and regulations of various governmental agencies....⁹²

The Court saw a distinction between delegating power to create criminal offenses, and assigning a criminal sanction to a rule created by a noncriminallaw delegation. As will be discussed later, I view this as an empty, formalistic distinction. However, the opinion does contain strains of a functionalist justification for this deferential approach, and the Court stated, “Apparently on the theory that the Legislature exercises complete dominion over its own agencies, it has long been established that the Legislature is empowered to provide criminal sanctions for violations of any legitimate rule or regulation...that it has otherwise authorized the agency to promulgate.”⁴⁸ Thus, the continuing oversight of the legislature justifies the delegation; legislative inaction is effectively acquiescence, given the legislature’s ability to reverse agency action.

2. Florida: Strong Nondelegation

Now, consider a more recent opinion from a strong nondelegation state—Florida.⁴⁹ In *B.H. v. State*, the Supreme Court of Florida assessed the validity

⁴⁸ Id. at 255.

⁴⁹ For other examples, see e.g., *People v. Holmes*, 959 P.2d 406, 410 (Colo. 1998) (“It is a fundamental principle that only the General Assembly may declare an act to be a crime and that power may not be delegated to persons not elected by nor responsible to the People.... We carefully scrutinize a statutory scheme that establishes criminal penalties for violation of administrative rules because such a delegation implicates an important liberty interest, including the right to reasonable notice of that conduct deemed criminal.... A statute must prescribe standards sufficient to guide and to circumscribe an administrative officer's authority to declare conduct criminal.”). *Lincoln Dairy Co. v. Finigan*, 104 N.W.2d 227, 232 (Neb. 1960) (“[The public] may properly assume that crimes and punishment are purely a legislative function and that the definition of all crimes and the punishment therefore will be found in the duly enacted statutes of this state. The public may properly rely on the fact that the Legislature meets only at stated intervals and that criminal laws may be enacted, amended, and repealed only during such legislative sessions.”). ⁵⁵ *B.H. v. State*, 645 So. 2d 987, 989 (Fla. 1994).

of a criminal offense punishing “An escape from any secure detention facility or any residential commitment facility of restrictiveness level [6] or above....”⁵⁰ The restrictiveness level of a facility was then delegated to the Department of Health and Rehabilitative Services, an administrative agency.⁵⁰ The only limits placed on the agency’s discretion to determine a facility’s restrictiveness was that the categories must be based on “the risk and needs of the individual child,” and that there could be no more than eight categories.⁵¹

The Florida Supreme Court struck down this offense on nondelegation grounds.⁵² In its discussion of federal nondelegation law, the court cited to *Grimaud*, as well as to three of the law review articles discussed earlier.⁵³ The Florida court summarized the scholarly consensus on the state of federal law to be one of “stern[.]” “critici[sm],” and highlighted seminal figures in intellectual history (Locke and Montesquieu) who posited the value of the separation of legislative and executive powers.⁵⁴ Having criticized the federal approach to nondelegation, the court turned to Florida law and began with a recognition of a “strict separation” provision in the state constitution:

Pursuant to their inherent powers, the people of Florida have established a tripartite separation of powers precisely like that envisioned by Locke and Montesquieu: ‘The powers of the state government shall be divided into legislative, executive and judicial branches. *No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.*’ Art. II, § 3, Fla. Const. (emphasis added).⁵⁵ This textual distinction from the U.S. Constitution provided Florida with a basis for “expressly and repeatedly” repudiating the Supreme Court’s nondelegation jurisprudence.⁵⁶

According to the Florida court, nondelegation concerns are at their apex in criminal law matters—these involve authority of a “different magnitude” from a typical delegation.⁵⁷ This is because “the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch,” and also because due process in criminal law requires notice of prohibited acts.⁵⁸ The upshot of these

⁵⁰ Id.

⁵¹ Id. at 994.

⁵² Id. at 987.

⁵³ Id. at 990.

⁵⁴ Id. at 991.

⁵⁵ Id. at 991.

⁵⁶ Id. at 992.

⁵⁷ Id. at 993.

⁵⁸ Id. at 992, quoting Perkins.

principles is that “all challenged delegations in the criminal context must expressly or tacitly rest on a *legislatively determined* fundamental policy; and the delegations also must *expressly* articulate reasonably definite standards of implementation that do not merely grant open-ended authority, but that impose an actual limit—both minimum and maximum—on what the agency may do.”⁵⁹ The statute authorizing HRS to determine restrictiveness levels fails this test, as it provides no limits on the agency’s discretion to create such levels. The Florida Supreme Court thought it was especially problematic that the Agency appeared to be using its discretion to game the statutory system: HRS did not create 8 restrictiveness levels as it was empowered to do so, but instead created four levels “using only even numbers,” resulting in “2 (nonresidential), 4 (low-risk residential), 6 (moderate-risk residential), and 8 (high-risk residential).”⁶⁰ The Court appeared to be scandalized by the ability of the agency to simply skip odd numbers in a way that affected whether the offense definition (above “VI”) was triggered or not: “the fact that HRS skipped odd numbers indicates that the agency felt it could have adopted virtually any numbering system it chose,” and had it wanted to “HRS might have designated the four levels respectively as 10, 20, 30, and 40,” thus including all facilities within the statutory definition.⁶¹ The statute here is especially odd in that it references a numerical category of restrictiveness, but provides no guidance or limits on whether that number will be adopted within the numbering scheme chose by the agency.

In re B.H. provides an excellent example of a strong nondelegation state enforcing its doctrine in the context of criminal law. The Florida Supreme Court drew on a concern for democratic decision-making through legislative enactments, as well as the notice values demanded by due process.

IV. Scholarly Reception

As we have seen, administrative crimes have an established place in Federal constitutional law, and also in the jurisprudence of some states. The impressive pedigree of administrative crimes at the U.S. Supreme Court, though, has not immunized them from criticism entirely. But this literature is relatively small, which is curious given the extremely vast body of commentary on the nondelegation doctrine more generally.⁶²

⁵⁹ *Id.* at 994.

⁶⁰ *Id.* 994.

⁶¹ *Id.*

⁶² As Rachel Barkow has observed, criminal law has not received much attention in debates about separation of powers: “[S]cholars have failed to treat criminal law as a separate category for analysis. Instead, questions involving the oversight of the administrative and

Perhaps the first scholarly response to administrative crimes came in 1943—before the expansive conception of nondelegation took on its canonical status. German scholar Edmund Schwenk took note of the rising trend in the creation of administrative crimes, and wrote an apologetic defense of their use.⁶³ First, he cites the justification of “necessity” (without elaboration), although one imagines that he is presenting the familiar argument that modern life has become so complex that an elected legislature cannot be expected to regulate it without the aid of a bureaucracy.⁶⁴ Second, Schwenk observes that administrative crimes seem different from typical crimes as they are “not the outbirth of a particular unmoral conduct, but [are] characterized by disobedience to administrative duties,” and that the “function” of these offenses is “deterrence rather than retribution.”¹¹¹ Because this is punishment “not to vindicate past conduct, but to enforce future conduct,” administrative crimes have “nothing to do with the ordinary concept of crime.”⁶⁵ Schwenk appears here to be presaging the rise of civil penalties, and admits that if one were to conceive of these administrative “crimes” as merely administrative, non-penal sanctions, then “the problems which result from the use of the penal sanction in administrative law no longer exist.”⁶⁶

However, he does not back down from the conceptualization of these offenses as truly penal.⁶⁷ Schwenk is aware of the most obvious critique of such a practice—that “the power of creating either the elements or the penalty of a crime results in more serious consequences for the individual than the power to issue rules and regulations which are vested merely with civil or administrative liability.”¹¹⁵ This critique he dismisses: “Th[is] argument...is of a psychological rather than legal nature.”⁶⁸ Here Schwenk must be thinking of only fines, though; the difference between a \$100 administrative “sanction” and a \$100 criminal “fine” is perhaps merely “psychological” if the paid amount is the same. One simply “feels” different, he must be saying. But surely the distinction between a liberty-deprivation and an administrative sanction is not merely dependent on the “psychological” state of the

regulatory state have tended to dominate the discussion...” Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 993 (2006).

⁶³ Edmund H. Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 MICH. L. REV. 51 (1943).

⁶⁴ Id. at 85. ¹¹¹ Id.

⁶⁵ Id. at 87.

⁶⁶ Id.

⁶⁷ Id. “Even though punishment as an administrative sanction should be employed, there always would remain a proper field for the use of the administrative crime as a penal sanction.” ¹¹⁵ Id. at 52.

⁶⁸ Id. at 54

individual punished, and is unquestionably of a different quality. Schwenk hints that even imprisonment would not change his assessment, though: “The law-abiding individual is not concerned with the character of the sanction, but with the legislative command.”⁶⁹ This seems in tension with the notion that sanctions exist for the purpose of deterrence; if the legal system were created solely with a law-abiding person in mind, then sanctions might be totally unnecessary. Schwenk seems to dismiss the complaints of those who disapprove of severe sanctions being determined by an agency, as those complainants are prospective law-breakers.

It would be over thirty years before the next sustained scholarly assessment of administrative crimes—a 1976 article by Harlan Abrahams and John Snowden.⁷⁰ While Schwenk’s defense came during the heyday of the expansion of the administrative state, Abrahams and Snowden were writing after the rise of agency capture theory; their assessment was, perhaps predictably, less positive.¹¹⁹ They criticize administrative crimes from the standpoint of separation of powers, noting that certain “polar” or “paradigmatic” functions of a given branch cannot be shared, and that ⁷¹ “criminal lawmaking” is one such function.⁷² Overall, Schwenk and Abrahams’ critique seems to be a formalist one. They emphasize that a paradigmatic function of a branch must be performed by that branch in order for the action to have “the requisite degree of legitimacy,” but do not explain what they mean by legitimacy.⁷³ However, one can tease out certain strains of typical criticisms of expansive agency delegation, including the value of the difficulty in creating new legal duties,⁷⁴ and the lack of democratic

⁶⁹ Id. at 54

⁷⁰ *Abrahams & Snowden, Separation of Powers and Administrative Crimes: A Study of Irreconcilables*, 1 S.ILL. U.L.J. 1 (1976). Consider their helpful typology: “Accordingly, the following five types of cases are analyzed: (A) those where the agency is allowed to determine in the first instance whether violations of its regulations should be sanctioned criminally; (B) those where the legislature assigns rulemaking power to agencies and itself provides criminal sanctions for violation of the rules, enforceable by judicial process; (C) those where the statute not only declares violation of administrative rules to be criminal, but also empowers the agencies to fix by regulation the amount of the fines within statutory limits; (D) those where the statute sets forth the sanction generally but delegates to the agency ⁷¹ Thomas W. Merrill, *Capture Theory and the Courts, 1967-1983*, 72 *Chicago-Kent Law Review* 1039 (1996-97) & John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 *Harvard Law Review* 713, 723-725 (1986).

⁷² Abrahams & Snowden at 9.

⁷³ Id. at 9; id. at 36.

⁷⁴ “Under the fundamental law the legislative function of initiating the articulation of what is to be considered criminal activity is carried on through a bicameral process. The administrative process does not afford that protection to the people.” Id. at 36 ¹²³ “[N]onrepresentative agencies, which are not directly responsible to the popular sovereign” Id. at 103 ¹²⁴ Id. at 9

accountability.¹²³ Moreover, they briefly nod towards the criticism that highlights the distinctive severity of the criminal sanction, and describe the non-physical severity that comes with collective condemnation: “only in connection with [a criminal] proceeding will his status as a wrongdoer invoke certain attitudinal values of the community.”¹²⁴

A 1992 student note by Mark Alexander addressed the issue of administrative crimes, but in the context of determining the appropriate level of judicial deference when reviewing the agency’s criminal rulemaking.⁷⁵ In arguing for the need for heightened scrutiny of criminal agency rules, though, Alexander grounds his analysis in the distinctive nature of criminal sanctions more generally: “The criminal penalty represents the ultimate governmental intrusion on individual freedom, together with a sense of community approbation not present in other government action.”¹²⁶ Interestingly, Alexander argues that the condemnatory feature of criminal law takes it outside of the justification for agency rulemaking based on expert knowledge: “The determination of ‘community condemnation’ is not within the realm of

the job of adjudicating violations and imposing the penalties; and (E) those involving administrative imprisonments.”

administrative expertise, but rather is wholly within the province of the legislative branch.”⁷⁶ Put another way, there can be no “values experts.”⁷⁷ Alexander does not offer a deeper explanation of these claims.

Since this 1992 note, no other commentator has directly addressed the issue of administrative crimes. Two scholars, however, have presented influential theories on delegation and separation of powers that have implications for the present subject.

Consider first Dan Kahan’s theory that the Department of Justice should receive *Chevron* deference when interpreting federal criminal law—a theory premised on a robust argument that delegation to the executive in criminal law has “immense” benefits.⁷⁸ Kahan begins by claiming that a criminal code defined purely by the legislature is an “imaginary regime” given the “deliberate incompleteness” of federal criminal statutes, and that therefore most crime-definition takes place in the judiciary.¹³⁰ There is, then,

⁷⁵ Note, Mark D. Alexander, *Increased Judicial Scrutiny for the Administrative Crime*, 77 CORNELL L. REV. 612, 649 (1992). ¹²⁶ Id. at 614

⁷⁶ Id. at 615.

⁷⁷ Id., quoting Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1121 (1988).

⁷⁸ Dan M. Kahan, *Is "Chevron" Relevant to Federal Criminal Law?* HARVARD LAW REVIEW Vol. 110, No. 2 (Dec., 1996), pp. 469-521. ¹³⁰ Id at 470.

a regime of delegation already in place, but the current delegate (the judiciary) is inferior to the other choice (the executive).⁷⁹ The executive branch, unlike the judges, is “more likely to be consistent,” “has more experience with criminal law enforcement,” and “is ultimately accountable to the people...”⁸⁰ Changing the delegate to the executive would also “enhance notice” and “constrain arbitrary and partisan behavior by individual prosecutors,” thus advancing “rule of law” values.⁸¹

While Kahan’s theory is presented primarily as a choice between two delegates,⁸² he also presents an affirmative account of the value of delegation more generally, describing the “advantages of delegation” as “immense” and “systemic.”¹³⁵ He writes, “Delegation -- whether express or implied, whether to agencies or courts -- is a strategy for maximizing Congress's policymaking influence in the face of constraints on its power to make law.”⁸⁴ The most significant constraint for Kahan is “political”: “the difficulty of generating consensus on politically charged issues can easily stifle legislation, particularly criminal legislation.”⁸³ Thus, delegation promotes “efficiency” in criminal lawmaking; “Delegated criminal law costs less than legislatively specified criminal law and is more effective to boot.”¹³⁸ A system of purely legislatively “specified” crimes imposes “high practical and political costs” in that Congress is forced to “specif[y] each of [the] prohibitions itself,” and due to higher costs there will be “reduced output” of criminal legislation.⁸⁶ Delegation is also more efficient in that it facilitates the updating

⁷⁹ Id. We must “change the identity of the delegate.”

⁸⁰ Id.

⁸¹ Id. at 471.

⁸² He aims to “conserve the benefits of delegated criminal lawmaking while avoiding the costs...” Id. at 470. ¹³⁵ Id. at 488. ⁸⁴ Id. 474

⁸³ Id. 474. He also notes time limitations. “Criminal law-making, in this respect, confronts members of Congress with high opportunity costs: time spent enacting criminal legislation necessarily comes at the expense of time that could be spent enacting legislation sought by small, highly organized interest groups, which are more likely than the public at large to reward legislators for benefits conferred and to punish them for disabilities imposed.³⁹ Again, one solution is highly general (even purely symbolic) criminal legislation, which takes little time to enact and which is likely to be sufficient to satisfy the public's demand for criminal law.” Id. at 475. ¹³⁸ Id. at 481. ⁸⁶ Id. 482.

of criminal codes with new technology and behavior,⁸⁴ and in closing loopholes that emerge from experience in the code's application.⁸⁵

Kahan takes seriously the problem of gridlock on criminal issues, emphasizing, "These are real social costs."¹⁴² Reduced "output" in criminal law seems like a strange concern in today's era of overcriminalization and mass incarceration, but given his underlying theory of legislation, Kahan's point is a valid one. "I am assuming here that efficiency in criminal lawmaking is good," he writes, and grounds this claim in a deeper "pragmatic conception" of separation of powers that mostly "leave[s] institutions free to converge on allocations of authority that maximize the power of government to pursue collective ends."⁸⁶ If criminal law can help to advance social

⁸⁴ Id. At 482 "Delegated common law-making also promotes the efficient updating of the criminal code. As markets and technologies change, so do the forms of criminality that feed on them. Keeping up with the advent of new crimes would severely tax Congress's lawmaking resources, and no doubt often exceed them, were Congress itself obliged to specify all operative rules of criminal law."

⁸⁵ Id. "A related efficiency associated with delegated common law-making is its power to avoid loopholes. Criminality assumes diverse and heterogeneous forms. Enumerating all of them is impossible. Accordingly, were Congress obliged to enact only fully specified criminal statutes, it would often be possible for offenders to evade punishment by substituting unprohibited types of wrongdoing for closely analogous illegal ones."¹⁴² Id. at 482.

⁸⁶ Id. At 81. He acknowledges the controversial nature of this claim: "This is in fact a controversial assumption. According to one view, the chief virtue of separation of powers is that it prevents the federal government from being perfectly responsive to the public demand for law; the brake that it applies to the lawmaking process secures individual liberty."

welfare, then institutional structures that prevent it from being enacted are deleterious.

Kahan addresses the most obvious critique of his scheme head on—tension with democracy. He argues that “The law is likely to be closer in quantity and quality to what the public demands when [delegates], at the behest of Congress, accept responsibility for updating the law, closing loopholes, and infusing the law with the practical insights of experience.”⁸⁷ Democracy must mean, at least, advancing popular will, and legislatures are too constrained to “satisfy the electorate’s demand for criminal law.”⁸⁸ Moreover, federal prosecutors are not totally isolated from democratic inputs and controls: “[F]ederal prosecutors are appointed by the President and are accountable to the Attorney General, [and] their participation in constructing a system of federal common law crimes assures that its content will be responsive to public sensibilities.”¹⁴⁶

Kahan’s theory of beneficial delegation undoubtedly supports the creation of administrative crimes. While his observations are technically limited to the dynamics between the DOJ, the federal judiciary, and Congress, they imply a deeper support for legislative delegation to executive branch entities in all similar political systems. The “political” constraint of consensus-generation preventing legislative outputs in criminal law are not unique to the U.S. Congress, and apply with comparable force to state legislatures.

Kahan’s claims can be contrasted with those of Rachel Barkow.¹⁴⁷ Barkow argues that the functionalist pro-delegation consensus in administrative law (typified by Kahan’s theory) produces dangerous results when applied to criminal law.⁸⁹ She warns that in criminal law, the “structural and process” protections that constrain most administrative law do not apply.⁹³ The Administrative Procedures Act does not limit prosecutorial discretion or the rulemaking of the United States Sentencing Commission,¹⁵⁰ and political process checks are “not as balanced as they are in the regulatory sphere” because “those accused of crimes are among the most politically anemic groups in the legislative process.”⁹⁰ The only alternative constraints—the

⁸⁷ Id. At 385.

⁸⁸ Id. See also Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795 (1999).

¹⁴⁶ Id. He notes that this is true “at least in theory.” He then goes on to discuss pathologies.

¹⁴⁷ Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006).

⁸⁹ Id. 995.

⁹³ Id. 150 Id.

⁹⁰ Id. (“Criminal defendants do not coalesce into an organized group, and those individuals and organizations that represent their interests tend to be disorganized and weak political forces. In contrast, powerful interests often lobby for more punitive laws. The executive

individual rights provisions in the Constitution— are “poor safeguards against structural abuses and inequities.”¹⁵²

While the procedural protections in criminal law are weaker than in administrative law generally, the sanctions attached to criminal violations are nevertheless much higher. “The state poses no greater threat to individual liberty than when it proceeds in a criminal action,” Barkow writes, as criminal proceedings are “the means by which the state assumes the power to remove liberty and even life.”¹⁵³ She repeatedly highlights liberty deprivation as a unique sanction, and also mentions criminal sanctions’ condemnatory or stigmatic effects.¹⁵⁴ Overall, the primary need for a closer attention to separation of powers concerns in the criminal context is because the “stakes are higher.”¹⁵⁵ Weak protections against the harshest state action results in a paradox: “Thus, in the very area in which state power is most threatening— where it can lock away someone for years and impose the stigma of criminal punishment—institutional protections are currently at their weakest.”¹⁵⁶

Barkow argues that “a more strict division of powers” in criminal law is the appropriate response to this paradox,¹⁵⁷ as “[t]he impediments to action provided by the separation of powers check state abuse and preserve the interests of individuals and local and political minorities.”¹⁵⁸ Contra Kahan, efficiency of criminal lawmaking is thus no trump card when assessing this arrangement: “The inefficiency associated with the separation of powers serves a valuable function, and, in the context of criminal law, no other mechanism provides a substitute.”¹⁵⁹ Separation of powers works to achieve the constraints in criminal law that the APA and political process provide in

than the politics associated with the administrative state, where it is more common to have groups on both sides of the issue that act to check government abuse of power.”). ¹⁵² Id. at 993. ¹⁵³ Id.

¹⁵⁴ “There is all the more reason to use it in the criminal context, where the stakes are higher and the potential for abuse is so much greater.” Id. ¹⁵⁵ Id. At 1054 ¹⁵⁶ Id. ¹⁵⁷ “Although the administrative state has structural and process protections that can justify some flexibility in the separation of powers, those checks are absent in the criminal context. And in their absence, it is critically important to maintain a strict division of powers.” Id. at 993-94. Beyond the “functionalist” argument presented above, Barkow also discusses another reason for strict separation of powers in criminal law: history and constitutional text. She argues that the Framers were concerned with aggregation of punitive state power in a single institution, and therefore codified numerous criminal law protections in the Constitution itself. Id. at 994.

branch in particular has an incentive to push for tough laws to encourage plea bargaining and cooperation. The politics of crime definition and sentencing are therefore far more lopsided ¹⁵⁸ Id. At 1031. She expects that this will be accomplished through a mechanism along the lines of a “classic representation-reinforcing theory of judicial review.” Id. ¹⁵⁹ Id.

“[A]rguments for dismantling this scheme on the basis of efficiency grounds— that the state is hamstrung in its ability to proceed in criminal cases—disrupt the very core of why we have separation of powers in the first place.”

normal administrative law, and therefore advances the underlying “liberty interests” that motivate the separation.⁹¹

Barkow’s argument for a stricter “division” of powers in the context of criminal law has an obvious implication for administrative criminalization: if powers must be strictly divided, then legislatures must not delegate criminalization authority to executive branch agencies. Her observation that the Bill of Rights does little to prevent structural abuse applies especially to the criminalization stage of the criminal law process; these provisions create almost no limit on what can be criminalized and how the offenses must be defined, and mostly cover how crimes can be investigated, proven, and punished.⁹² Moreover, the political process checks are similarly weak with many administrative crimes that affect “anemic” political groups (the class of sex offenders in *Gundy* is a good example).¹⁶² However, like the *Touby* Court, Barkow may be less troubled by administrative crimes given that the APA and its state law analogues do apply to criminal rulemakings.

Last to consider is a very recent commentary offered by A.J. Kritikos.⁹³ Drawing on the arguments employed by then-Judge Gorsuch, as well as the Florida Supreme Court in *In re B.H.*, Kritikos proposes that the non-delegation doctrine be “resuscitated” in the criminal context.¹⁶⁴ The reasons for this are unsurprising, and he repeats arguments discussed above regarding the severity of criminal sanctions. There is a “special need to protect citizens from arbitrary power when their life and liberty are at stake,” he writes, and “the stakes of getting the law right are...high” with criminal punishment.¹⁶⁵ Later, he reiterates that “separation of powers principles...are especially vital to governmental legitimacy when life and personal liberty are at stake.”⁹⁴ Because criminal punishment is “the most significant power wielded by the State,” the state’s “authority to enforce criminal penalties

⁹¹ Id. at 996.

⁹² See Brenner M. Fissell, *Federalism and Constitutional Criminal Law*, 46 Hofstra L. Rev. 489 (2017) (summarizing the sparse substantive limits on criminalization that have constitutional status). The two most significant limits on criminalization imposed by the Bill of Rights are the requirement of specificity imposed by the void-for-vagueness doctrine and the limitations on the punishment of speech that are imposed by the First Amendment. ¹⁶² Of course, this will not be true when the typical defendant affected by an administrative crime is a large corporation or wealthy executive, as with many financial and environmental offenses.

⁹³ *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 Mo. L. Rev. 441, 482 (2017). ¹⁶⁴ Id. at 477. ¹⁶⁵ Id. at 477

⁹⁴ Id. at 482.

should be entirely clear....”⁹⁵ Kritikos’s proposed solution is a strong nondelegation doctrine in criminal law, which would could serve as a “limited experiment to test whether judges could develop coherent case law concerning the limits of the doctrine.”⁹⁶ Undeterred by the *Grimaud* line of cases, he argues that stare decisis considerations are weakened when “liberty” is at issue, and that a “liberal and conservative” convergence of interests in the area of criminal law delegations makes this new experiment more “likely to happen” than a wholesale resurrection of the doctrine.⁹⁷

C. Summary

Critiques of administrative crimes, both judicial and academic, all employ a technique of observing the distinctively severe nature of criminal sanctions versus other types of authoritative responses to violations of legal duties. Most unique is the sanction’s ability to deprive individuals of liberty (and very rarely, of life), but also unique is its condemnatory or stigmatizing effect.

Justice Brennan spoke of “liberty and the exercise of fundamental freedoms” being implicated,⁹⁸ while Justice Marshall wrote that the “severe impact of criminal laws on individual liberty” made judicial review of administrative crimes imperative.¹⁰³ Then-Judge Gorsuch, also, highlighted that “The criminal conviction and sentence represent the ultimate intrusions on personal liberty and carry with them the stigma of the community’s collective condemnation — something quite different than holding someone liable for a money judgment because he turns out to be the lowest cost avoider.”⁹⁹ Professors Abrahams and Snowden similarly noted this stigmatic effect in saying, “[O]nly in connection with [a criminal] proceeding will [an offender’s] status as a wrongdoer invoke certain attitudinal values of the community.”¹⁰⁰ Mark Alexander presages Gorsuch’s language, writing, “The criminal penalty represents the ultimate governmental intrusion on individual freedom, together with a sense of community approbation not present in other government action.”¹⁰¹ Professor Barkow also emphasizes the “higher”

⁹⁵ Id. at 477.

⁹⁶ Id. at 482.

⁹⁷ Id.

⁹⁸ Id. Note that he is concerned with the liberty to engage in protected conduct especially. ¹⁰³ Id.

⁹⁹ Id.

¹⁰⁰ Id. at 9

¹⁰¹ Mark D. Alexander, *Increased Judicial Scrutiny for the Administrative Crime*, 77 Cornell L. Rev. 612, 614 (1992).

“stakes” in criminal law, specifically in that criminal proceedings “are the means by which the state assumes the power to remove liberty and even life,”¹⁰² and where “state power ...can...impose the stigma of criminal punishment.”¹⁰³ Finally, Kritikos claims that criminal law delegations should be more suspect because “life and personal liberty are at stake.”¹⁰⁴

For all these critics and commentators, the uniquely harsh sanctions that result from criminal law violations makes delegation of criminalization a matter of special concern apart from the standard subjects of administrative law. This is clearly right. As Douglas Husak once stated in another context, “The criminal law is different...because it burdens interests not implicated when other modes of social control are employed.”¹⁰⁵ This can be seen as the standard answer to the question posed in *Touby*: whether “more specific guidance is in fact required...in the criminal [delegation] context.”¹⁰⁶

V. A NEW ASSESSMENT

While the commentators above have accurately identified the immediate intuitive objection to treating criminal law delegations in the same way that other agency regulations are treated, more work must be done to theorize why this intuition is valid. We must go deeper than merely claiming that criminal law has “higher stakes” because it deprives people of liberty and stigmatizes them; the nature of these sanctions must be connected to a political theory that would provide a principled reason for determining what types of lawmaking institutions are permitted to employ these types of sanctions against violators. This is the goal of the next Section.

In what follows, I will first discuss the comparative peculiarity of the Supreme Court’s (and some state high courts’) position on administrative crimes. While a 100-year, unbroken pedigree of validation following *Grimaud* makes critics of these offenses seem like eccentric cranks, when one looks at most Western legal systems (and indeed most U.S. states) it is the Supreme Court that appears to be the outlier. This descriptive observation of peculiarity will help to motivate what will follow: a normative justification of the majority position against administrative crimes.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id at 482.

¹⁰⁵ Douglas Husak, *The Criminal Law As Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 234 (2004). See generally Nils Jareborg, *Criminalisation as Last Resort (Ultima Ratio)*, 2 OHIO ST. L. J. 521 (2005).

¹⁰⁶ *Touby v. United States*, 500 U.S. 160, 165–66 (1991).

First, I will explicate and apply the so-called *expressive* theory of punishment. The expressive theory takes as its starting point the condemnatory dimension of state punishment, and because of this I will argue that expressivism implies a commitment to democratic (and not administrative) criminalization institutions. Next, I will draw out and apply a liberal theory of punishment. For the liberal theory, the significant aspect of state punishment is its use of physical violence or coercion—i.e., though liberty deprivation (incarceration) or the deprivation of life (capital punishment). Because individuals are thought to be free and autonomous in liberal theory, though, state punishment can only be justified by positing an initial consent to the criminal law scheme. I will argue that, according to liberal theory, this hypothetical consent to criminalization can only be a consent to criminalization by a democratic institution.

Many may wonder why, when discussing “punishment theory,” the ubiquitous terms “consequentialism” and “retributivism” have not been mentioned. Consequentialism is the argument that punishment is justified when it has beneficial future effects; retributivism claims that punishment is justified when an offender deserves it.¹⁰⁷ Despite the dominance of these two theories in discussions of punishment, I omit consideration of their effects on the validity of administrative crimes because the theories—at least as traditionally explicated¹⁰⁸—have no necessary political implications. First, these theories have usually been thought of as *moral* theories, not political theories, and thus assess the concept of punishment in both state and nonstate contexts (say, in a family). “‘Punishment theory’ – with its tired pushme-pullyou of consequentialism and retributivism—largely has been an exercise in applied moral theory,” writes Markus Dubber.¹⁰⁹ “If the state appears in

¹⁰⁷ This is of course an oversimplification. As Leo Zaibert observed in 2003, “The more or less straightforward, orthodox way of distinguishing between consequentialism and retributivism, according to which consequentialists justify punishment attending to its consequences, and retributivists justify punishment attending exclusively to desert, has now become obsolete, as the debate has gained in sophistication and subtlety. The specialized literature is (over-) crowded with sub-types of justifications of punishment: negative retributivism (desert is merely a necessary condition for punishment), positive retributivism (desert is a sufficient condition for punishment), side-constrained consequentialism (consequentialism circumscribed by desert), in addition to a wide variety of “mixed theories” of punishment (theories that seek to combine retributivism and consequentialism in multifarious ways).” Leo Zaibert, *Punishment, Liberalism, and Communitarianism*, 6 *Buff. Crim. L. Rev.* 673, 675 (2002).

¹⁰⁸ Guyora Binder has persuasively demonstrated that the primary figures in intellectual history associated with these theories, Kant and Bentham, did not view them to be moral theories divorced from politics. See Guyora Binder, *Punishment Theory: Moral or Political?*, 5 *Buff. Crim. L. Rev.* 321, 321 (2002). However, the history of these ideas has since departed from this political concern. See *id.*

¹⁰⁹ Markus D. Dubber, *Legitimizing Penal Law*, 28 *Cardozo L. Rev.* 2597 (2007).

discussions of punishment theory at all,” he concludes, “it’s often as an afterthought, a political epilogue to a moral treatise.”¹¹⁰ While certain elements of retributivism and consequentialism might be accommodated with or resonate with certain political theories, the connection is not comprehensive or necessary.¹¹¹ Retributivism and consequentialism may be implied or required by certain political theories, but they themselves do not substantially limit the range of acceptable political institutions. This is most compellingly demonstrated by the fact that each punishment theory has been employed by those holding diametrically opposing political theories. Retributivism has been argued to flow from Marxist theories as well as from Catholic natural law,¹⁸⁵ while consequentialism has been adopted by some Rawlsian liberals¹¹⁷ but also some republicans.¹¹² If what matters for retributivism is that blameworthy acts are criminalized, then it doesn’t matter who or what decides what is blameworthy—so long as they get it right. And if what matters for consequentialism is that criminalization results in the increase of social utility, then the form of the criminalization institution is irrelevant so long as it accurately assesses and enacts utility-maximizing offenses.¹⁸⁸

As I will argue below, this is not true of expressive theories of punishment, or of consent-based liberal punishment theories. These theories of punishment necessarily imply a certain theory of politics—namely, democracy. However, it is important to make clear that I do not claim that the expressive and the liberal theories must coexist conceptually. Indeed, many may think that such a synthesis is impossible. Expressive theory, as we will see, *condemns* offenders in the name of the community; this appears to require some sort of desert-based schema with which the state can determine what is worthy of condemnation. As Christopher Bennett argues, “Because the right to punish must, on the expressive theory, include the right to issue deserved condemnation, the account of state authority implied by the expressive theory must include some account of (epistemic) moral authority.”¹¹³ This seems to

¹¹⁰ Id.

¹¹¹ Thus, while Nicola Lacey concludes that retributivism can be “seen to proceed from” liberal theory, and that consequentialism “occup[ies] a secure place in the liberal tradition.” NICOLA LACEY, *STATE PUNISHMENT* 153, 160 (1988).¹⁸⁵ Lacey at 154 (citing sources).¹¹⁷ Emmanuel Melissaris, *Toward a Political Theory of Criminal Law: A Critical Rawlsian Account*, 15 *New Criminal Law Review* 122, 139 (2012).

¹¹² See Philip Pettit, *Consequentialism and Respect for Persons*, 100 *Ethics* 116.¹⁸⁸ Again, Binder reminds us that these denuded moral-philosophic conceptions of the dominant theories of punishment have strayed far from what was intended by their most famous proponents in intellectual history. See generally Binder, *Punishment Theory*.

¹¹³ Christopher Bennett, *Expressive Punishment and Political Authority*, 8 *Ohio St. J. Crim. L.* 285 (2011).

conflict with a fundamental premise of liberalism: that political institutions will not import principles of decision derived from contestable visions of the meaning of human life (what Rawls called “comprehensive doctrines”).¹¹⁴ A liberal state, writes Emmanuel

Melissaris, “cannot invoke controversial moral doctrines, which inescapably generate irresolvable disputes,” but must instead “be grounded in a manner that is neutral....”¹²¹ Expressivism’s claim to epistemic moral authority, it seems, is at odds with liberalism’s requirement of neutrality.¹¹⁵ Moreover, while I will argue that each theory implies a need for democratic criminalization, we will see that the two rely on different conceptions of democracy.¹¹⁶ I do not attempt to resolve this tension here, although I believe that it can be resolved.¹¹⁷ Instead, I present these two theories as, at the very least, independent and alternative reasons for rejecting administrative crimes. When we combine those who subscribe to liberal theories of punishment with those who subscribe to expressive theories, though, we cover a very large portion of those who think about state punishment.

A. Comparative Peculiarity

Before turning to normative theories undercutting the legitimacy of administrative crimes, it is important to observe the comparative peculiarity of these offenses. When one focuses solely on American law (and specifically the federal jurisdiction), the 100-year pedigree of administrative crimes makes criticisms by a small number of academics and judges seem like the protestations of an outlier group. If one expands one’s view, though, it is the U.S. Supreme Court that is in relative isolation on this issue. Consider three observations that highlight this: the general ban on or trend away from common law crimes, the majority position in state constitutional law prohibiting criminal law delegations, and finally the prevailing view of most Western legal systems.

¹¹⁴ JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 15 (Erin Kelly ed., 2001). He is thinking here, mostly, of religion. ¹²¹ Melissaris at 123.

¹¹⁵ Bennett summarizes, “[I]t is one thing to think that the state has the authority to protect citizens from one another; it is another to say that the state has the authority to intervene in its citizens lives in order to dictate to citizens about which standards they ought to find important and to impose condemnation on them when they disobey. The latter conception of authority might look overbearing, even preachy.” Bennett at 291.

¹¹⁶ The expressivist account relies on a majoritarian or self-determination conception, while liberal theory relies on the conception of democracy as advancing the values of liberty and equality. This will be discussed in more depth in what follows.

¹¹⁷ Others have undertaken this task. See generally Bennett at 285.

“Common law crimes” are criminal offenses created by the judiciary, and they are prohibited federally as well as in most states. The Supreme Court banned this practice in the federal courts as early as 1812,¹¹⁸ and the strong trend in state law has been to either abolish them entirely or confine them to very narrow subject matters. A 50-state-survey undertaken in 1947 noted that 18 states had abolished common law crimes, and 10 other jurisdictions limited non-statutory offenses to misdemeanors.¹¹⁹ The author of this survey then concluded, “While it is apparent from the above that the common law of crimes still has substantial import, an examination of the cases shows that the great majority of prosecutions under the common law are for petty matters, and the statutory preemption of the major and more common offenses has been fairly complete.”¹⁹⁷ Similarly, the drafters of the Model Penal Code noted in their commentaries that “The preservation of the common law has its largest practical importance in the residual area of common law misdemeanors, public mischief and indecency offenses.”¹²⁰ Thus, while common law crimes retain some nominal validity in a number of states, they no longer have vitality as serious components of the criminal law. The trend away from common law crimes is not directly relevant to the question of administrative crimes, but the principle that motivates this trend is the same that should motivate critiques of these offenses: it is the legislature that must create criminal offenses, not judge or executive branch officials.

Next, consider the prevalent view on the nondelegation doctrine in state constitutional law—already discussed above. As Rossi documents, thirty-five state constitutions contain a “strict separation of powers clause” that not only divides power between branches but also “instructs that one branch is not to exercise the powers of any of the others.”¹⁹⁹ And the judges in those and other states have vigorously enforced this division: “Most state courts, unlike their federal counterparts, adhere to a strong nondelegation doctrine.”¹²¹¹²²⁰⁰ In the majority of states, administrative crimes would be unlawful as a matter of state constitutional law.

Finally, when one expands one’s view beyond American law, the peculiarity of *Grimaud* and its progeny becomes even more apparent. The

¹¹⁸ United States v. Hudson, 11 U.S. 32 (1812).

¹¹⁹ *Common Law Crimes in the United States*, Columbia Law Review, Vol. 47, No. 8 (Dec., 1947), pp. 1332-1337. ¹⁹⁷ Id. at 1334.

¹²⁰ Model Penal Code § 1.05, Comment at 78 to 79 (1985). “[See Wharton’s], where three categories of common law crimes are listed: (1) those which tend to provoke a public disturbance, (2) those involving injury to another’s property in such a way as to invite violent retaliation, (3) those constituting public scandal or public indecency.” 1 Subst. Crim. L. §

¹²¹ .1(e) (3d ed.)

¹²² Rossi at 1190. ²⁰⁰ Id. at 1167.

United States may be the one of the *only* Western nations that permits state punishment based on administratively-defined crimes. This is potentially true because the primary competitor to the Anglo-American legal heritage is the “civil law” or “civilian” systems of Continental Europe, South America, and the Caribbean.¹²³ In the civil law system, crimes must be specified by a legislature. One comparativist traces this requirement to the civilian “legal principle[] of *lex scripta*”: “Continental European legal systems interpret the *lex scripta* principle as requiring penalties to be based upon codified laws (written laws provided by the legislature).”¹²⁴ George Fletcher concurs, writing that “[I]t would be difficult to imagine a modern constitution without some recognition of the principle of legislative supremacy,”²⁰³ and citing to German Basic Law Art. 103(2): “An act may be punished only if it was defined by a law as a criminal offence....”¹²⁵ Fletcher also points to similar provisions in the Belgian and Chilean Constitutions.¹²⁶

This background constitutional requirement of legislative criminalization in the civil law world makes administrative crimes a foreign concept in these countries’ criminal laws. Consider this observation from two Spanish scholars:

[R]egardless of the exquisitely specific way in which an administrative regulation may define conducts that give rise to criminal liability, the principle of legality requires that such specificity in the definition of criminal conduct stem from legislative action rather than from administrative regulation, for the legitimacy of criminal law flows from criminalization decisions that reflect the popular will of the people as expressed by their elected representatives.¹²⁷

¹²³ See generally LUIS CHIESA, *SUBSTANTIVE CRIMINAL LAW* (2014) (discussing comparative systems).

¹²⁴ Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99 *J. Crim. L. & Criminology* 857, 864–65 (2009). ²⁰³ GEORGE FLETCHER, *THE GRAMMAR OF CRIMINAL LAW* 84.

¹²⁵ Note these other relevant provisions: Art. 104(1): “Liberty of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein.” Art. 74(1)(1): “Concurrent legislative power shall extend to the following matters: ... criminal law”.

¹²⁶ Fletcher, *Grammar* at 84 (citing, Belgian Constitution, Art 12 cl2: “No person may be prosecuted except in cases established by the law and in the form it prescribes....”, and Chilean Constitution Art. 19 Section 7 (b): “No one may be deprived of his personal freedom nor may such freedom be restricted except for the cases and in the manner determined by the constitution and the laws.”).

¹²⁷ LUIS CHIESA, *SUBSTANTIVE CRIMINAL LAW* 79 (Carolina 2014).

Similarly, in a comparative study of nondelegation doctrine in the U.S. and in Germany, Uwe Kischel criticizes the *Grimaud* rule and contrasts it with German law: “Unlike Germany...the United States does not consider the definition of the primary rules of conduct, which are safeguarded by criminal sanctions, to be such a delicate and important matter.”¹²⁸ Given all this, Luis Chiesa concludes that the phenomenon of administrative crimes long approved by the U.S. Supreme Court would “surely fail to satisfy” the requirements of civil law constitutions.¹²⁹

The trend away from common law crimes (demonstrating an attention to the value of legislative criminalization), as well as the majority position in state constitutional law and of nations adopting the civil law tradition, all help to highlight the peculiarity of the ratification of administrative crimes by the U.S. Supreme Court and some state high courts. While 100 years of unbroken jurisprudence connect *Grimaud* to *Gundy*, these decisions stand in isolation when viewed against these other features of in the law.

The comparative peculiarity of administrative crimes helps to motivate a theoretical inquiry into why this is a desirable state of affairs. In what follows, I will offer normative justifications for the general rejection of administrative crimes, focusing on the two most important dimensions of criminal punishment: community condemnation and liberty deprivation. Each aspect of state punishment will be analyzed in terms of a theory of punishment that has implications for what political institutions can permissibly criminalize conduct.

B. Expressive Theories of Punishment

We begin with punishment’s condemnatory feature, and the theory that understands this dimension to be most salient: “expressivist” punishment theory. Most criminal lawyers are familiar with the dominant theories discussed above, but fewer know “expressivism” (although this theory has at times been widely held in academia).¹³⁰ A recent formulation of the core expressivist insight is as follows: “punishment is permissible at least in part because it is the only, or the best, way for society to express condemnation of the criminal offense.”²¹⁰ Expressivism in punishment theory originates from the legal philosopher Joel Feinberg, who argued that “punishment is a

¹²⁸ Uwe Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law*, 46 Admin. L. Rev. 213, 241 (1994).

¹²⁹ Id.

¹³⁰ Joshua Glasgow, THE EXPRESSIVIST THEORY OF PUNISHMENT DEFENDED, 34 Law and Philosophy 601, 601 (2015) (“Expressivist theories of punishment received largely favorable treatment in the 1980s and 1990s.”). ²¹⁰ Id. at 602.

conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.”¹³¹ Thus, punishment possesses a “symbolic significance largely missing from other kinds of penalties.”¹³² Condemnation is a mix of affective and rational disapproval, communicated publicly for the sake of emphasizing the values informing that disapproval, on behalf of an authoritative source. Feinberg’s insight was that, contra previous thinkers, he noted that punishment was more than just “hard treatment,” but also “ritualistic condemnation” with “symbolic conventions.”²¹³ In other words, criminal punishment inflicts some form of suffering upon the offender, but it does so while conveying a certain kind of meaning.¹³³ That punishment possesses this additional feature of punishment beyond physicality—this communication of condemnation—is the central claim of the expressivist theory of punishment.¹³⁴

¹³¹ Joel Feinberg, *The Expressive Function of Punishment*, THE MONIST, Volume 49, Issue 3, 1 July 1965, 397–423.

¹³² Id.

¹³³ Consider the following explanation by Bernard Harcourt: “Suppose that someone gives another person a Heimlich maneuver. If the recipient is choking on her dinner, it is likely that the Heimlich maneuver will be interpreted as an act of good samaritanism and will be rewarded. The expressive dimension of that act is compassion, assistance, and support. If the recipient is a total stranger walking in the street, it is likely that the Heimlich maneuver will be interpreted as an assault and battery, a crime.” Bernard Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment*, 5 BUFFALO CRIMINAL LAW REVIEW 145, 160 (2001).

¹³⁴ Scholars attempting to theorize a distinction between criminal and civil wrongs have also highlighted this feature of criminal law. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 402–04 (1958) (“What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.”); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models-and What Can Be Done About It*, 101 YALE L.J. 1875, 1878 (1992) (“Most commentators acknowledge that the following attributes tend to distinguish the criminal law from the civil law: ... (5) its

Feinberg, the first modern expressivist, saw condemnation as serving multiple functions. It communicated an “authoritative disavowal” of the offender’s act, and “symbolic nonacquiescence” in that act.²¹⁶ Thus, in condemning the offender, the state “go[es] on the record” as against his conduct, and therefore “the law testif[ies] to the recognition” that the conduct is wrongful.¹⁴² Moreover, such expressed condemnation “vindicate[s]” or “emphatically reaffirm[s]” the law’s efficacy, and absolves others suspected of wrongdoing.¹⁴³

Jeanne Hampton, one of Feinberg’s colleagues and interlocutors, added substantial clarifications to his theory. Hampton emphasized that the point of the symbolic communication of condemnation was to “reaffirm[.]”

²¹³ Id.

the “moral equality” of the victim and offender.¹⁴⁴ Punishment, she argued, “is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer’s action through the construction of an event that not only repudiates the action’s message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.”¹⁴⁵ Given this goal, punishment is best performed by the state, in the name of the community: “[T]he modern state is the citizens’ moral representative—in the face of pluralism and religious controversy, it is the only voice of the community’s shared moral values... and thus ... the only institution that can speak and act on behalf of the community against the diminishment offered by ... crime.”¹⁴⁶

Another important expressivist theorist is Antony Duff, whose central contribution is to emphasize punishment’s communicative aspect to the

deliberate intent to inflict punishment in a manner that maximizes stigma and censure.”); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1809 (1992) (“In modern criminal law, the stigma of a criminal sanction has become a special kind of remedy because of its burdensome and sometimes destructive consequences for the individual.”).²¹⁶ Feinberg, *Expressive Function* at 400.

¹⁴² Id. ¹⁴³

Id.

¹⁴⁴ Jean Hampton, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. Rev. 1659, 125 (1992). Heather J. Gert, Linda Radzik, and Michael Hand, *Hampton on the Expressive Power of Punishment*, JOURNAL of SOCIAL PHILOSOPHY, Vol. 35 No. 1, Spring 2004, 79–90, 80.

¹⁴⁵ Hampton, *Correcting Harms* at 1686.

¹⁴⁶ Hampton, *INTRINSIC WORTH OF PERSONS* at 142. See also, Alon Harel, *Why Only the State May Inflict Criminal Sanctions*, 14 Legal Theory 113 (2008).

offender.¹³⁵ “Although some theorists talk of the ‘expressive’ purpose of punishment,” Duff notes, “we should rather talk of its communicative purpose: for communication involves, as expression need not, a reciprocal and rational engagement.”¹³⁶ For Duff, then, the primary value in the expression is that it is heard by someone. Punishment “communicat[es] to offenders the censure that their crimes deserve.”¹³⁷ This communication “engage[s] that person as an active participant,” and also “appeals to the [person’s] reason and understanding.”¹³⁸ “Communication thus addresses the other as a rational agent,” he argues, “whereas expression need not.”¹⁵¹ The goals of the communication are “repentance, reform, and reconciliation.”¹³⁹ Duff goes further than saying that criminal punishment produces the above valuable consequences, but instead argues that it is “something that a liberal state has a duty to do.”¹⁵³ First, “[T]he state owes it to its citizens to protect them from crime,” and second, “the state owes something too to its citizens as potential criminals.”¹⁴⁰ “That means treating and addressing them as citizens who are bound by the normative demands of the community’s public values, who must thus be called to account and censured for their breaches of those values,” he writes.¹⁴¹ Communication of censure to offenders is an obligation of the state, but it is also uniquely the role of the state (and not any other institution). Punishment will “properly be manifested in what the state, as the legal embodiment of the political community, does to or about the offender.”¹⁴²

Expressivism has seen a more recent resurgence in Joshua Kleinfeld’s theory of “reconstructivism,” which he describes as “build[ing] on the expressivist

¹³⁵ Duff’s seminal work is *PUNISHMENT, COMMUNICATION, AND COMMUNITY* (OXFORD UNIVERSITY PRESS, 2001).

¹³⁶ *Id.* at 79.

¹³⁷ *Id.*

¹³⁸ *Id.* at 79-80.

¹⁵¹ *Id.*

¹³⁹ *Id.* at 107. On repentance: “Repentance is...an aim internal to censure. When we censure others for their wrongdoing, our intention or hope is that they will accept that censure as justified.” *Id.* On reform: “To recognize and repent the wrong I have done is also to recognize the need to avoid doing such wrong in the future.” *Id.* at 108. On reconciliation:

“Reconciliation is what the repentant wrongdoer seeks with those she has wronged—and what they must seek with her if they are still to see her as a fellow citizen.” *Id.* Duff summarizes these as “secular penance.” *Id.* at 30. ¹⁵³ *Id.* at 112.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* 113.

¹⁴² *Id.* at 114

insight but...not identical to expressivism.”¹⁴³ The “expressive” aspect of reconstructivism is described as follows:

[P]unishment is a way of reconstructing a violated social order in the wake of an attack. If, for example, Person A steals Person B’s property, the nature of the wrong is not just the tangible harm to Person B, but also the message that property rights in this jurisdiction are insecure, together with the message that people like Person B can be abused. Punishment declares that the right to property still holds and re-establishes the social status of Person B.¹⁴⁴

Kleinfeld helpfully adds that the offender himself is “expressing” something when he violates a criminal law, and that it is this that requires a response.

The response to a “message” sent by a criminal offense is to “declare” that it was wrong through criminal punishment. “Condemnatory punishment with the community’s backing is how societies typically do and must respond if their normative orders are to be maintained,” Kleinfeld argues.¹⁴⁵ This “normative order” is the “shared moral culture” –important not so much because it may or may not be right, but because it is the product of

“solidarity.”¹⁴⁶ “Social solidarity” is really just “some degree of pragmatic agreement, mutual intelligibility, and fellow feeling” about what conduct ought to be punished by the state.¹⁶¹

Crucially, Kleinfeld argues that reconstructivism implies or demands democratic political institutions.¹⁴⁷ “Reconstructivism as a theory of criminal justice and democracy as a theory of government are thus linked by what they mutually treasure,” Kleinfeld argues, “by the fact that both valorize a decent community’s ability to build a distinctive form of life infused with values that are the community’s own.”¹⁴⁸ Kleinfeld’s conception of democracy is grounded in “popular sovereignty and self-government,” and “focus[es] on whether the views of the people who make up the political community are reflected in their law.”¹⁴⁹ Thus, criminal law must reflect majoritarian popular will, and “only those acts that violate and attack the values on which social

¹⁴³ Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1525 (2016).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1490.

¹⁴⁶ *Id.* at 1492.

¹⁶¹ *Id.* at 1493.

¹⁴⁷ Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455 (2017).

¹⁴⁸ *Id.* at 1456.

¹⁴⁹ *Id.* at 1465. ²⁴⁰ *Id.* at 1456. He calls this the “moral culture principle of criminalization.” ²⁴¹ *Id.* at 1478.

life is based, and can therefore truly be characterized as ‘antisocial,’ should be legally designated crimes.”²⁴⁰ Criminal law should not merely be another “tool for social control that can be enlisted against anything we wish to curb,” but instead be “restrict[ed]...to widely recognized and highly culpable wrongdoing.”²⁴¹

Kleinfeld has made an important point about expressivism, and one that is probably implied or assumed by prior theorists: for state punishment to express the *community’s* condemnation, the determination of what conduct leads to this condemnation must be *determined* by the community. In other words, criminalization must be democratic. Recall Feinberg’s comment that punishment expresses “judgments of disapproval and reprobation” that might come from “either...the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.”¹⁵⁰ But Feinberg was speaking about punishment more generally, and not just state punishment. In the context of state punishment (and not, say, in a family), one imagines he would have limited the source of the condemnatory judgments to the political community as represented democratically—the people “in whose name” the government acts. Hampton is more direct: the state is the “only voice of the community’s shared moral values” and thus “the only institution that can speak and act on behalf of the community....”¹⁵¹ While she did not invoke the term itself, only a democratic criminalization institution can live up to this requirement.¹⁵² Similarly, Duff argues that criminal law’s condemnatory feature is needed to censure those who violate “the community’s public values,” and limits the punishing authority to the “state, as the legal embodiment of the political community....”¹⁵³ It is hard to imagine how anything other than a democratic institution can approximate with legitimacy the values of the entire community, and codify them into criminal law. Kleinfeld’s linkage of expressivism and democracy thus makes explicit what was long presupposed.

The insight of expressivist punishment theory is that the symbolic communication of condemnation must come from the community, and that therefore the duties imposed by criminal law must be determined by a democratic institution. This has significant implications for the legitimacy of administrative crimes. Overall, it means that because agencies cannot approximate or stand in for the “community,” they are inappropriate criminalization institutions.

¹⁵⁰ Joel Feinberg, *The Expressive Function of Punishment*, THE MONIST, Volume 49, Issue 3, 1 July 1965, Pages 397–423.

¹⁵¹ Hampton, INTRINSIC WORTH OF PERSONS at 142.

¹⁵² Given that she was speaking of a “modern” state in the context of “pluralism,” she almost certainly meant a modern liberal democracy. Hampton, INTRINSIC WORTH at 142.

¹⁵³ Id. 113-114

Agency decisionmakers are not elected by a majority of the members of the community, and therefore cannot claim to act or speak on behalf of the political community or to be controlled by it. Citizens do not determine outcomes through voting, and therefore agencies need not criminalize conduct in a manner that is consistent with existing social norms. Even when their pronouncements align with community values, though, this is problematic due to the skewed symbolic significance of a condemnation that emanates from a bureaucratic (and not democratic) source. We will explore these observations in what follows.

When expressivism¹⁵⁴ claims that criminalization must be democratic, this means “majoritarian”—“focus[ed] on whether the views of the people who make up the political community are reflected in their law....”¹⁵⁵ Majoritarianism has implications for administrative crimes.

Agencies, both federal and state, are most always (and at the federal level, always) controlled by appointees. These are people who have some degree of interest or expertise with regard to an agency’s regulatory mission, and who have political alignment (usually partisan) with an elected executive who serves as the appointing authority. When regulations are issued that carry criminal penalties, they are issued in the name of the administrative agency’s head—not any elected person or institution. Consider the administrative crime ratified by the Arizona Supreme Court that was discussed earlier relating to food stamp fraud: in that case the offense was defined by the Director of the Arizona Department of Economic Security, who is appointed by the Governor.¹⁵⁶¹⁵⁷ The administrative crime in *Touby*—possession of a

¹⁵⁴ Here I mean the variant of expressivism typified by Kleinfeld’s work discussed earlier.

¹⁵⁵ Of course, there are competing theories of democracy. Kleinfeld, *Three Principles* at 1465 (categorizing “[T]hose that see democracy exclusively in terms of governmental processes (e.g., voting in elections, representative institutions, parliamentary supremacy, checks and balances); those that see democracy in terms of advancing liberal values (e.g., equality, liberty, individual rights); and those that see democracy in terms of collective self-determination, popular sovereignty, and self-government, and therefore focus on whether the views of the people who make up the political community are reflected in their law (e.g., majoritarianism, communitarianism, certain types of republicanism).”). See also Kahan, *Democracy Schmocracy* at 797. Kahan identifies two competing variants of democracy being a “pluralist conception [which] views government as more or less democratic depending on the extent to which official decisions conform to the aggregated preferences of the electorate,” and the other, “civic republicanism,” being concerned with “the extent that official decisions are reached through a process of reflective deliberation on the ‘common good.’” *Id.* at 797. Kahan’s “pluralist” conception seems very similar to Kleinfeld’s “collective self-determination” conception.

¹⁵⁶ ARIZ. REV. STAT. ANN. § 41-1952.

¹⁵⁷ F.R. 18357; “There shall be at the head of the Administration the Administrator of Drug Enforcement, hereinafter referred to as “the Administrator.” The Administrator shall be

controlled substance—was defined by the Drug Enforcement Agency Administrator, an official appointed by the President.²⁴⁹ Those with direct control over the makeup of agency regulations are rarely elected (notable exceptions are many states’ attorneys general and treasurers).²⁵⁰

Because elected officials do not directly control the content of administrative law, it is possible that administrative crimes can communicate a condemnatory message that is not faithful to the larger viewpoint of the community. These would be expressions of *bureaucratic condemnation*, not societal condemnation. Consider various cases in which societal intuitions regarding punishment seem mismatched with that being condemned by expert agencies.

Think of the Colorado alcohol control crime mentioned earlier. Colorado’s Executive Director of the Department of Revenue has the power to create rules regarding the “proper regulation and control of the...sale of alcohol,”¹⁵⁸ and violations of these rules are punishable as a “petty offense.”¹⁵⁹¹⁶⁰ Some of the rules created, though, seem to be quite broad. This is especially true of Regulation 47-900, which is called the “Conduct of Establishment” and governs the premises of liquor licensees’ establishments.²⁵³ In the “Basis and Purpose” section preceding the operative clauses, the Agency claims that “The purpose of this regulation is to exercise proper regulation and control over the sale of alcohol beverages, promoting the social welfare, the health, peace and morals of the people of the state, and to establish uniform standards of decency, orderliness, and service within the industry.”¹⁶¹ Here an expert agency explicitly aims to promote the “peace and morals” of the citizenry; that this is not merely stock language becomes apparent when one reads the explicit rules. The Agency prohibits employees of alcohol establishments from wearing revealing clothing (in which genitals or breasts are revealed), but also prohibits *patrons* from engaging in certain conduct.¹⁶² One strikingly broad provision prohibits “Any person on [a] licensed premises touching, caressing or fondling the breasts, buttocks, anus, or genitals of any other person.”¹⁶³ This means that two lovers consensually touching each other’s buttocks in a bar is punishable as criminal conduct. Similarly, patrons may not “[wear or use] any device or covering of any kind, which exposes *or simulates* the breasts, genitals, anus, pubic hair or any other

appointed by the President by and with the advice and consent of the Senate....” 5 U.S.C.A. § APP. 1 REORG. PLAN 2 1973 (West).²⁵⁰ See generally Hans Linde article.

¹⁵⁸ Colo. Rev. Stat. Ann. § 44-3-201, 202.

¹⁵⁹ Id at § 44-3-904.

¹⁶⁰ C.C.R. 203-2, Regulation 47-900.

¹⁶¹ Id.

¹⁶² Id.

¹⁶³ Id.

portion thereof.”¹⁶⁴ A wearable costume with the cartoon depiction of breasts is therefore prohibited. Is this conduct worthy of societal condemnation? Would such a criminal offense be able to garner a majority of votes in the state legislature after an open debate and public scrutiny? Here we have an example of moralistic criminalization via administrative agency.

D.C.’s criminal ban on swimming in the Potomac was created via regulation by the unelected Director of the District’s Department of the Environment—this is an example of a paternalistic administrative crime aimed to save swimmers from being harmed by poor water quality.¹⁶⁵ Starting in 2010, the Department began receiving public pushback against what was perceived to be an overly broad prohibition.¹⁶⁶ The Agency took public comment, and appears to have received no comments in favor of retaining the current ban.¹⁶⁷ In response to comments noting the significant benefits of allowing competitive swimming events, the Department stated, “while the charitable and economic benefits of Potomac River swim events are of note, the Department’s decision to adopt the rules must be based on the data and experience relating to public health and safety.”¹⁶⁸ When the leader of a local swimming group proposed routine testing and safety measures to allow use to the Potomac while mitigating the safety concerns, the Department responded that “the writer’s proposal goes beyond the scope of the rules, particularly in its implication that the District Government take on the significant expenses [proposed]....”²⁶² The Regulations were amended to permit some organized events, though—especially triathlons—with the athletes bearing the testing costs.²⁶³ In this case, the Agency appears to be forcing a paternalistic offense against an unwilling population.

One large category of Federal regulations backed by criminal sanctions relates to conduct on the grounds of the Agency’s physical premises. While these are limited in their effects on the population at large, the peculiarity of these crimes illustrates well the bureaucratic management mindset taken to the extreme. For example, violations of NASA regulations relating to the

¹⁶⁴ Id.

¹⁶⁵ D.C. Code Ann. § 8-103.16 (West). D.C. Mun. Regs. tit. 21, § 1108. See Anacostia and Potomac River Monitoring Program, DC Dept. of Energy and Environment, <https://doee.dc.gov/service/anacostia-and-potomac-river-monitoring-program>, noting prohibition in context of “water quality associated with swimming,” and noting measurement of E.coli, pH, and turbidity levels.

¹⁶⁶ DDOE Response to Comments, Action to Amend the Ban on Swimming in the Potomac River, Final Rulemaking, 2012, available at <https://doee.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/DDOE%20Response%20to%20Comments%20on%20Public%20Hearings%2008-13-2012.pdf>.

¹⁶⁷ Id.

¹⁶⁸ Id.

“protection or security” of any NASA facility are punished by up to one year imprisonment,²⁶⁴ and this has been interpreted by the NASA Administrator’s regulations to include “park[ing]...in locations reserved for other persons....”²⁶⁵ Thus, it is a federal offense for a regular citizen to park in the Administrator’s spot. Similarly, the Secretary of Homeland Security has been empowered to promulgate regulations backed by criminal sanction that are “necessary for the protection and administration of property owned or occupied by the Federal Government....”²⁶⁶ Acting on this authority, the Secretary issued a regulation requiring people on the grounds of the National Institute of Health to return “lost article...including money” that they find on the grounds to the police or the office likely to own it.²⁶⁷ It is not obvious that most or even many people think that there should be a duty to return lost cash that one finds, and certainly not that the failure to do so is deserving of societal condemnation.

Finally, consider the criminal regulatory regime set up by the Oklahoma Commercial Pet Breeders and Animal Shelter Licensing Act.²⁶⁸ Like many of the above examples, these laws start with perhaps the best intentions. However, in trying to give teeth to its regulation of pet breeders, Oklahoma did not stop at creating a licensing system (with the potential for license revocations), or even at the creation of civil penalties. The law went further, and empowered a state agency to promulgate rules under the Act that were punished as misdemeanor offenses.²⁶⁹ While many of these administrative crimes likely accord with majority intuitions regarding

²⁶² Id.

²⁶³ D.C. Mun. Regs. tit. 21, § 1108.

²⁶⁴ 18 U.S.C. § 799.

²⁶⁵ 14 C.F.R. § 1204.1101(c)(5).

²⁶⁶ 40 U.S.C. § 1315.

²⁶⁷ 45 C.F.R. § 3.5.

²⁶⁸ Okla. Stat. Ann. tit. 4, § 30.13. ²⁶⁹ Id.

punishment and condemnation, as is true of many agencies, the Oklahoma agency at times went too far. For example, in the provision regarding the grooming of dogs, the agency promulgated a rule requiring “brushing” and “tangle removal.”¹⁶⁹ Many pet owners would likely be guilty of this offense, and it seems excessive to visit breeders with state condemnation for the failure to remove hair tangles from their dogs.

Even when an agency is expressing condemnation that is in line with general societal viewpoints, though, it is still a problem. In such a case, the condemnation issued by the agency is an accurate reflection of what the community might itself condemn if it got around to doing so, but it is not an

¹⁶⁹ Okla. Admin. Code 35:55-3-7.

expression of that condemnation *from the community*; the two align out of coincidence or prudence on the part of the agency, but not out of necessity. Crucially, this different, non-majoritarian source deprives the condemnation of its “symbolic” significance. Consider the following hypothetical: in a small midwestern town, a local codes officer named Jim issues rules regarding trash pickup that are generally reasonable and supported by most of the townsfolk. When Jim issues a fine for failing to take in a citizen’s trashcan before dark, does this sanction carry the same sting—the same meaning—as it would if the elected town council had voted and adopted the same rule? I think that it does not. The fined citizen could legitimately say, “Jim does not speak for all of us,” and could hold his head high at local dinner parties without suffering the same stigma. The point is that condemnation may be rightly visited upon certain conduct, but it carries a different meaning when the decisionmaker defining the conduct worthy of that condemnation does not speak for the community—when the decisionmaker is just “Jim” or any other person who happens to hold a government office.

What truly symbolic condemnation demands is a majoritarian source of the condemnation decision, because only a majority of the community can speak as the community itself, and it must be the community that communicates or expresses to the offender and to everyone else what conduct is deserving of condemnation. One might think that such a claim would preclude even elected representatives in a legislature from making such decisions, as they are in some sense “delegates” as well, representing only a fraction of the populace.¹⁷⁰ To this I answer that, indeed, the symbolic value of the condemnation seems to exist on a spectrum that becomes more or less attenuated the further removed the criminalization decision is from the citizens themselves. Thus, a criminal offense promulgated pursuant to a voter initiative possesses the highest symbolic value, while an offense promulgated by a democratically elected legislature has reduced value. However, in the latter case the citizens still have direct control over the members of the criminalizing institution. What makes administrative agency heads fall so much further down the spectrum is that they themselves are not directly beholden to the citizens. We might say that one-step removal from the citizens does not deprive the offense of its condemnatory symbolism, but two steps (or more) results in a

¹⁷⁰ As Posner and Vermeule write, “Beneath their masks, the critics of delegation are direct democrats, and they should aim their arguments at representative democracy, not at delegation, which is but a small part of it.” Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1755 (2002); “In their preoccupation with delegation among all the other devices used to make policy, the critics of delegation treat the nondelegation doctrine as a fetish that would ward off all the evils of representative democracy.” *Id.*

categorical change. We think of our elected legislators as alter-egos of ourselves, and of the legislature as a microcosm of the larger community, while we think of agency administrators as bureaucratic functionaries—the legislature’s employees. Most importantly, direct control of legislators by the citizens means that legislative decision making—while representative and not direct—is still majoritarian in that citizen preferences are aggregated and weighed against each other; the same cannot be said of administrative agencies.

Importantly, I believe that this insight from expressivist punishment theory renders a significant part of the nondelegation doctrine debate less relevant in the context of criminal law. First, consider what many have called the central issue in nondelegation: whether agencies are sufficiently “accountable” to the people.¹⁷¹ Critics of administrative delegations emphasize the lack of electoral control of administrators. As John Hart Ely observed, “The point is not that such ‘faceless bureaucrats’ necessarily do a bad job as our effective legislators. It is rather that they are neither elected nor reelected, and are controlled only spasmodically by officials who are.”¹⁷² Prominent defenders of delegation have responded to this not by denying the desirability of accountability, but instead by emphasizing the potential for even greater accountability through agency rulemaking. As Gerry Mashaw argues, “[T]he flexibility that is currently built into the processes of administrative governance by relatively broad delegations of statutory authority permits a more appropriate degree of administrative...responsiveness to the voter’s will than would a strict nondelegation doctrine.”²⁷⁴ Similarly, Peter Shuck concludes that, “Today, the administrative agency is often the site where public participation in lawmaking is most accessible, most meaningful, and most effective.”²⁷⁵ “Accountability,” though, seems outside of the concerns of the expressivist

¹⁷¹ Thomas Merrill calls this “The most prominent argument advanced by the proponents of strict nondelegation,” which he describes as “the desirability of having public policy made by actors who are accountable to the people.” Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2141 (2004). Cass Sunstein describes the accountability argument as “the most important” functionalist claim of nondelegation proponents. Cass R. Sunstein, *Nondelegation Canons*, THE UNIVERSITY OF CHICAGO LAW REVIEW, Vol. 67, No. 2 (Spring, 2000), pp. 319.

¹⁷² JH Ely, DEMOCRACY AND DISTRUST 131; see also DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 14 (1993) (“We can refuse to reelect legislators who make laws we dislike. Delegation shortcircuits this democratic option by allowing our elected lawmakers to hide behind unelected agency officials”); Merrill at 2141 (“Congress, it is argued, is the most democratically accountable political institution; hence, if we want policy made by actors accountable to the people, we should require that policy (at least ‘important’ policy) be made by Congress rather than by unelected administrators.”).

punishment theory we have presented. What matters is not that condemnation be communicated by an “accountable” official or institution, but that it be communicated *by* the majority of the community itself, and *through* a majoritarian decisionmaking process. It must be the emanation of the majority of the community. As said earlier, it is therefore problematic even when citizen preferences and administrative punishment align harmoniously. Thus, Mashaw and Shuck’s promise of a more accessible and responsive administrative state is insufficient to answer the concerns raised earlier. Moreover, elected Presidential or Gubernatorial control, or Congressional oversight, therefore cannot not solve the problem, as some have argued.¹⁷³ These are post-hoc review mechanisms that need not be

²⁷⁴ JERRY MASHAW, *GREED, CHAOS, AND GOVERNANCE* 153 (1997).

²⁷⁵ Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 781 (1999). Accessible because “the costs of participating in the rulemaking and more informal agency processes, where many of the most important policy choices are in fact made, are likely to be lower than the costs of lobbying or otherwise seeking to influence Congress”; Meaningful because “the policy stakes for individuals and interest groups are most immediate, transparent, and well-defined at the agency level”; Effective because “the agency is where the public can best educate the government about the true nature of the problem that Congress has tried to address,” and because “the details of the regulatory impacts are hammered out there.”

undertaken as a matter of course; majoritarian control, as I have explained it, must be present at the initial stage of criminalization. For the expressive dimension of criminal law, “accountability” is not enough—it is not just that problematic outlier offenses must be redressable, but that every offense originate from a majoritarian wellspring.

¹⁷³ As Jerry Mashaw writes, “All we need do is not forget there are also presidential elections and that, as the Supreme Court reminds us in *Chevron*, presidents are heads of administrations.” Mashaw at 152. Thus, for Mashaw, vague delegations to agencies are “a device for facilitating responsiveness to voter preferences expressed in presidential elections.” Sunstein, *Canons* at 323: “Agencies are themselves democratically accountable via the President, and any delegation must itself be an exercise of lawmaking authority, operating pursuant to the constitutional requirements for the making of federal law. Congress may face electoral pressure merely by virtue of delegating broad authority to the executive; this is a perfectly legitimate issue to raise in an election, and “passing the buck” to bureaucrats is unlikely, in most circumstances, to be the most popular electoral strategy. If Congress has delegated such authority, perhaps that is what voters want.” With respect to Congress, Peter Shuck lists the following as its “numerous formal and informal controls over agency discretion”: “statutory controls; legislative history; oversight; the appropriations process; statutory review of agency rules; and confirmation of key personnel.” Shuck at 784. Posner and Vermeule also remind us that Congress can be chastised by the people for its use of delegation. Posner and Vermeule, *Interring* at 1748-49 (“The problem with this argument is that Congress is accountable when it delegates power--it is accountable for its decision to delegate power to the agency. If the agency performs its function poorly, citizens will hold

Finally, consider a second major debate regarding nondelegation: the value of agency deliberative process. This debate can be situated within the “civic republicanism” tradition mentioned earlier, which is concerned with “the extent that official decisions are reached through a process of reflective deliberation on the ‘common good.’”²⁷⁷ Almost everyone agrees that reasoned deliberation is a good thing, and therefore critics and defenders of agency delegation have each sought to assess whether agencies do this more effectively than a legislature. Thomas Merrill notes that “Administrative rulemaking...is subject to a much more unyielding set of procedural requirements [than legislation], including advance notice to the public, disclosure of studies and data on which the agency relies, extensive opportunity for public comment, and a requirement that agencies respond to and explain their disagreement with material comments submitted from any quarter.”²⁷⁸ An elaborate presentation of this argument has been undertaken by Mark Seidenfeld, who notes that unlike Congress, “Administrators at least operate within a set of legal rules (administrative law) that keep them within their jurisdiction, require them to operate with a modicum of explanation and participation of the affected interests, police them for consistency, and protect them from the importuning of congressmen...who would like to carry logrolling into the administrative process.”²⁷⁹ All this is probably true: when comparing the legislative process with the administrative process, the latter seems far more rational and deliberative.

Again, though, this is all beside the point—stellar deliberative processes cannot save administrative crimes from the expressivist critique advanced earlier. This critique cares primarily about “who” decides to criminalize, and is unconcerned with “how” except insofar as the process is directly related to the need for a legitimate *source* of the criminalization decision. Thus, a process requirement of majoritarian voting is necessary, but

Congress responsible for the poor design of the agency, or for giving it too much power or not enough, or for giving it too much money or not enough, or for confirming bad appointments, or for creating the agency in the first place. And, as noted above, Congress is accountable not only in this derivative sense. Congress retains the power to interfere when agencies make bad decisions; indeed, it does frequently....Accountability is not lost through delegation, then; it is transformed.”²⁷⁷ *Id.* at 797. ²⁷⁸ Merrill, *Rethinking* at 2155.

²⁷⁹ Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515, 1542 (1992).

not that very good debates take place before the vote is taken. Tellingly, civic republican proponents of delegation are candid in their disavowal of majoritarianism. “[T]he theory,” Seidenfeld admits, “does not equate the public good that legitimates government action with majority rule.”¹⁷⁴

¹⁷⁴ *Id.* at 1528.

C. Liberal Theories of Punishment

Having completed a discussion of the condemnatory dimension of criminal sanctions, and its relevance for administrative crimes, we turn to the aspect of state punishment that involves liberty-deprivation. In assessing the significance of liberty deprivations for the validity of administrative crimes, I will employ a different theory of punishment that is concerned with the legitimacy of coercion as employed against autonomous individuals. This is the “liberal” theory of punishment, which might also be described as a “consent-based” theory. Roughly, the liberal theory of punishment posits that the violent coercion of criminal sanctions is only legitimate if it can somehow be thought of as consented to. We shall explore this somewhat counterintuitive proposition in what follows, and will see that it has significant implications for the legitimacy of administrative crimes.

It is said, rightfully, that the United States aspires to be a “liberal” state—not in the sense of left-wing social and economic policy, but in the sense that it takes a respect for individuals’ freedom and equality as its foundational political principle. As Sharon Dolovich writes, a liberal state “elevates individual liberty in its many forms to the highest political value...and measures the legitimacy of political systems by the degree to which they accord sovereignty to the people,” and in the U.S., “political life...is routinely punctuated with the rhetorical invocation of these very values.”¹⁷⁵ Thus, the self-conception and indeed aspiration of this country is to adhere to the principles of liberalism. But this is no passing fad, nor is the U.S. alone in this regard. Noting that liberalism has achieved an “ideological victory,” intellectual historian Duncan Bell concludes that “Most inhabitants of the West are now conscripts of liberalism: the scope of the tradition has expanded to encompass the vast majority of political positions regarded as legitimate.”¹⁷⁶

Given the central importance of liberalism in American politics and political thought, it is worth briefly discussing the element of liberalism most relevant for the issue at hand (criminal law)¹⁷⁷: the concept of individual autonomy or

¹⁷⁵ Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 *Buffalo Criminal Law* 307, n.11 (2004).

¹⁷⁶ Duncan Bell, *What Is Liberalism?*, 42 *Political Theory* 682, 689 (2014). See also Raymond Geuss, *Liberalism and Its Discontents*, *Political Theory*, 30 (2002) (“We know of no other approach to human society that is at the same time as theoretically rich and comprehensive as liberalism and also even as remotely acceptable to wide sections of the population in Western societies.”).

¹⁷⁷ For a discussion of a more complete range of the features of liberalism, see Lacey, *STATE PUNISHMENT*, Chapter 7. For history of the idea see generally Duncan Bell, *Liberalism*.

freedom. Consider the following description by Nicola Lacey: Closely related to the liberal vision of rational persons is the notion of humans as free and responsible agents, capable of understanding and controlling their own actions....Both rationality and the capacity for responsible action are thus for liberalism at once factual features of human nature and sources of normative limits on the ways in which human beings may be treated, particularly by political and other public institutions. These features above all others seem to entail the distinctively liberal focus upon the moral value of freedom.¹⁷⁸ Liberalism takes individual freedom and autonomy as its starting point, and structures political institutions around this bedrock value. Thus, Dolovich labels “individual liberty” a “baseline” “liberal democratic value” while Emmanuel Melissandris notes that respect for personal freedom is a “fundamental liberal assumption.”¹⁷⁹

Given the centrality of the value of individual autonomy, liberalism tests the *legitimacy* of political institutions and how they act against this value.¹⁸⁰ As Lacey writes, a feature of liberalism “closely related to the value attached to autonomy” is that liberalism “generates a relatively stringent conception of the limits of state action.”¹⁸¹ Governmental restrictions on liberty are “subject to a heavy burden of justification” in a liberal state,¹⁸² and restrictions that fail to meet this burden, then, are said to be “illegitimate.”¹⁸³ What *can* serve as a justification for the restriction on autonomy, though, and when can such a justification meet the “burden” of legitimacy? This question becomes most critical when assessing the institution of state punishment. State punishment is a species of coercion, and is thus among the most intrusive forms of state action; even more significantly, though, this coercion takes the form of violence. Consider the following description of the problem by Jeffrie Murphy:

[Liberal] theorists were inclined to view punishment (a certain kind of coercion by the state) as not merely a causal contributor to pain and suffering, but rather as presenting at least a *prima facie* challenge to the values

¹⁷⁸ NICOLA LACEY, STATE PUNISHMENT 93 (1994).

¹⁷⁹ Dolovich, *Punishment*, at 313-314. See also Melissaris, *Toward a Political Theory*, at 23.

¹⁸⁰ Markus Dubber calls autonomy the “fundamental touchstone of legitimacy” in “modern democratic societies.” “Legitimacy discourse in the United States since the Revolution has revolved around autonomy; its recurrent theme is the call for more thorough application of the ideal, not for its replacement with another guiding principle.” Markus D. Dubber, *Legitimizing Penal Law*, 28 *Cardozo L. Rev.* 2597, 2603 (2007).

¹⁸¹ Lacey, *State Punishment* at 97-98.

¹⁸² *Id.*

¹⁸³ Indeed, some theorists claim that all political authority is illegitimate. See William Edmundson, *STATE OF THE ART: The Duty to Obey the Law*, 10 *Legal Theory* 215 (2004) (discussing philosophical anarchist position).

of autonomy and personal dignity and self-realization—the very values which, in their view, the state existed to nurture. The problem as they saw it, therefore, was that of reconciling punishment as state coercion with the value of individual autonomy.²⁹⁰ This, at least, is uncontroversial: for a liberal state, punishment poses a major legitimacy problem.¹⁸⁴ For such a fundamental problem, though, punishment theorists have made surprisingly few attempts to address it. Instead, punishment has largely been examined as an issue in moral philosophy.¹⁸⁵

¹⁸⁴ Claire Finkelstein, Punishment as Contract, 8 OHIO STATE JOURNAL OF CRIMINAL LAW 319, 324 (2011) (“My point of departure will be an assumption that has become standard in the punishment theory literature. Because it involves the deprivation of personal liberty and the infliction of physical hardship, punishment is *presumptively* impermissible. The practice of punishment therefore stands in need of justification if the background moral objections to it are to be overridden.”).

¹⁸⁵ “Although normative inquiry into justifications of punishment has been extensive, it has largely been pursued from the perspective of moral philosophy.” Corey Brettschneider, The Rights of the Guilty: Punishment and Political Legitimacy, 35 Political Theory 175, 175 (2007); see also Guyora Binder, *Punishment Theory: Moral or Political?*, 5 Buff. Crim. L. Rev. 321, 321 (2002). One potential explanation for this is that many of these philosophers believe that state punishment *cannot* be legitimized; this is the position of the so-called “philosophical anarchists” who deny the legitimacy of political and legal authority altogether (including, of course, criminal law), and also of modern radical and critical legal theorists. See Edmundson, *State of the Art*; Others who are neither philosophical anarchist nor critics may come to the same conclusion from an observation of punishment practices in the real world. “In fact, an open-minded inquiry into the principles and norms (never mind the actual operation) of American penal law must be prepared to conclude that the difficulties of legitimating the state violation of the autonomy of its constituents through the threat and

²⁹⁰ Jeffrie G. Murphy, *Marxism and Retribution*, 2 *Philosophy & Public Affairs* 217, 223 (1973); see also Dubber, *Legitimizing* at 2597-98 (“[A]s the most severe form of state coercion, punishment poses the most serious challenge to the legitimacy of the state. If punishment can be justified, so can other, lesser, forms of coercive state action. If it cannot, what is the point of legitimizing, say, taxation (with or without representation)? ... [O]ne way of framing the question of legitimacy might be this: how can a state that derives its legitimacy from protecting its constituents' rights violate the very rights it exists to protect?”); Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 *Buffalo Criminal Law* 307, 310 (2004) (“Any theory of state punishment in a liberal democracy must grapple with the problem of political legitimacy. The punishment of criminal offenders can involve the infliction of extended deprivations of liberty, ongoing hardship and humiliation, and even death. Ordinarily, such treatment would be judged morally wrong and roundly condemned, yet in the name of criminal justice, it is routinely imposed on members of society by state officials whose authority to act in these ways toward sentenced offenders is generally taken for granted.”).

More recently, though, there has been a revival of liberal theory as applied to the problem of state punishment’s legitimacy.²⁹³ This strain of liberal thought has important implications for the question at issue in this article. Put succinctly, this cluster of theories posits that *consent* of the citizen bound by criminal law can solve punishment’s legitimacy deficit. This is not the consent of the individual criminal to be incarcerated, but instead the consent of a rational or reasonable hypothetical citizen setting up a political institution. Thus, many of these theories can be seen as based in the familiar notion of a “social contract.” Consider the following from Murphie: What is needed, in order to reconcile my undesired suffering of punishment at the hands of the state with my autonomy (and thus with the state's right to punish me), is a political theory which makes the state's decision to punish me in some sense my own decision. If I have willed my own punishment (consented to it, agreed to it) then- even if at the time I happen not to desire it-it can be said that my autonomy and dignity remain intact.²⁹⁴

As we will see, these sophisticated attempts to legitimize state punishment in a liberal state all presuppose that a democratic legislature is the institution that is determining what conduct is to be criminalized. Consent based theories

eventual infliction of punitive pain (as opposed to some other, less intrusive, means) are insurmountable.” Dubber, *Legitimizing* at 2612. “It also generally follows that punishment, as we currently know and understand it, may not be an appropriate measure at all and should never be employed.” Melissaris, *Toward a Political Theory*, at 143. However, I suspect that the lack of attention paid to the political legitimacy of punishment has a more mundane explanation—it is because the topic of punishment first became debated vigorously in the philosophy departments of universities, and not in politics or law departments. See generally Michael Davis, *Punishment Theory’s Golden Half Century: A Survey of Developments from (About) 1957 to 2007*, 13 *J. ETHICS* 73 (2009).

²⁹³ “In recent years, the counterintuitive claim that criminals consent to their own punishment has been revived by philosophers who attempt to ground the justification of punishment in some version of the social contract. Richard Dagger, *Social Contracts, Fair Play, and the Justification of Punishment*, 8 Ohio State Journal of Criminal Law 341 (2011).

²⁹⁴ Murphy, *Marxism* at 224; see also Finkelstein, *Punishment* at 324 (“The high justificatory hurdle for our practices of punishment provides a reason to return to the forgotten contractarian approach to punishment: If it is easier to justify the enforcement of voluntary arrangements than involuntary ones, a theory of punishment that convincingly predicates a consensual foundation for the institution should depict the institution as easier to justify than other types of theories.”); Dubber, *Legitimizing* at 2598 (“One answer to this question—and at any rate the one I am interested in exploring here proceeds from the claim that the fundamental principle of legitimacy in the modern state is *autonomy*, or self-government. So, quite simply, punishment is legitimate if and only if it is consistent with the principle of autonomy. Put another way, punishment is legitimate if and only if it is *self-punishment*.”)

of state punishment, then, should be viewed as precluding a regime of administrative crimes.

Before discussing more fully this modern “revival,” it is worth mentioning the origins of consent-based punishment theories in the history of political thought.¹⁸⁶ The famous social contract theorist Jean-Jacque Rousseau wrote, “it is in order not to be the victim of a murderer that a person consents to die if he becomes one.”²⁹⁶ Influenced by Rousseau,¹⁸⁷ Italian criminal law theorist Cesare Beccaria similarly argued that “It was thus necessity that compelled men to give up part of their personal liberty [to the state]...[and] [t]he aggregate of these smallest possible portions constitutes the right to punish....”¹⁸⁸ Immanuel Kant—the thinker so influential in the retributive punishment theory that flourished in philosophy departments—also presents a political, contractarian theory. As Guyora Binder summarizes, for Kant “the tension between law and the moral autonomy of those subject to it frames the problem of justice, or legitimate coercion,” and “Kant’s solution to this paradox is a social contract, modeled on Rousseau’s, in which society’s members freely subject themselves to law.”²⁹⁹ Consent-based theories of punishment are nothing new.

¹⁸⁶ Finkelstein, a “modern” contract theorist, makes the following historical observation: “First, there is a robust contractarian tradition that emerged in seventeenth century political philosophy, first with the writings of Thomas Hobbes, later in the Enlightenment version of this same tradition in the writings of Locke and Rousseau, and finally in a Kantian version of the tradition, as developed by John Rawls.” Finkelstein, *Punishment* at 322. ²⁹⁶ JEANJACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 64 (Roger D. Masters ed., Judith R. Masters trans., St. Martin’s Press 1978) (1762) (Richard Dagger unearthed this intriguing line).

¹⁸⁷ Guyora Binder, *Punishment Theory: Moral or Political?*, 5 Buff. Crim. L. Rev. 321, 334–35 (2002) (linking Rousseau and Beccaria).

¹⁸⁸ CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 12 (2008 ed.). ²⁹⁹ Binder, *Punishment Theory* at 352–53.

Modern consent-based theories add sophistication to older “social contract” thought experiments. Most important are the theories that build on the work of liberal philosopher John Rawls, applying his framework to the issue of state punishment. Which much can and has been written about Rawls’s political thought, for our purposes we need only highlight the essential components. Rawls’s solution to the legitimacy problem noted above was to posit a “counterfactual” pre-political agreement of free individuals to submit themselves to political society and the coercion of law.¹⁸⁹ This was famously called the “original position,” in which people were behind a “veil of ignorance” about what type of life they would be born into; Rawls argued that reasonable people would all agree on certain principles of justice that would in turn be implemented into law.³⁰¹ The original position solves the legitimacy dilemma in the same way that the historical theories of social contract solve it—by hypothesizing a pre-political consent to political institutions. The coercion of contemporary law is theoretically consented to by the reasonable citizen in the original position, even if *you* do not consent to this or that *specific* law.¹⁹⁰

As just mentioned, various theorists have applied this reasoning to argue that state punishment retains its legitimacy, or can at least be tested for

³⁰¹ Dagger at 344. The world “reasonable” is significant here. There is a debate amongst consent-based punishment theorists as to whether the people reasoning before they agree to the social contract are merely “rational agents” concerned with self-interest (“contractarians”), or are “reasonable citizens” who are concerned about other people and “committed to fair cooperation.” Dagger at 344-57 (“Whether either of these philosophical approaches to moral and political problems is satisfactory is a matter of considerable debate”). In this section I consciously adopt the latter conception of the liberal individual, as it is not clear to me that rational agents would necessarily demand democratic institutions.

¹⁸⁹ Melissaris at 125.

¹⁹⁰ Importantly, most theorists do not view state punishment as legitimate because the offender has somehow forfeited his rights to be free from coercion due to the commission of his offense—thus putting himself outside of the protections of society. This argument was perhaps most famously advanced by John Locke in his Second Treatise:

"[E]very man, in the state of nature, has a power to kill a murderer, both to deter others from doing the like injury . . . and also to secure men from the attempts of a criminal, who having renounced reason, the common rule and measure God hath given to mankind, hath, by the unjust violence and slaughter he hath committed upon one, declared war against all mankind, and therefore may be destroyed as a lion or a tyger, one of those wild savage beasts, with whom men can have no society nor security."

John Locke, SECOND TREATISE ON CIVIL GOVERNMENT; Christopher W. Morris, Punishment and Loss of Moral Standing, 21 CANADIAN J. PHIL. 53 (1991) (advancing similar argument). This “forfeiture” account is rightly rejected by most, as it cannot explain why even clearly guilty offenders—say, those who confess and provide video proof, and then ask for punishment—nevertheless deserve the procedural protections normally accorded to defendants. See Dagger at 349 (discussing objections to forfeiture account); Finkelstein at 218 (same).

Tellingly, Dagger traces the rational-agent liberals back to Hobbes, the famous theorist of centralized power, and the reasonable-citizen liberals back to Rousseau—a famous democrat. *Id.* at 345. For a sophisticated presentation of the rational-agent theory not presented here, see Finkelstein at 314-331. I must also bracket off a third variant of contractarian thought—“fair play” accounts. Zachary Hoskins, *Fair Play, Political Obligation, and Punishment*, 5 *Criminal Law and Philosophy* 53 (2011) (Describing “the fair play view, according to which punishment’s permissibility derives from reciprocal obligations shared by members of a political community, understood as a mutually beneficial, cooperative venture. Most fair play views portray punishment as an appropriate means of removing the unfair advantage an offender gains relative to law-abiding members of the community.”). Like the rational-agent theories above, a fair play account of liberal punishment does not clearly imply a demand for a democratic legislature to determine what conduct is criminal. It is conceivable that conduct creating an “unfair advantage” is conduct that can be determined by some sort of agency or bureau.

legitimacy by how well it lives up to or fails to live up to Rawlsian principles.²⁰³ Corey Brettschneider cites to Rawls’s “liberal principle of legitimacy,” that “exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of the

²⁰³ Rawls’s theory is avowedly an “ideal theory” in which “[e]veryone is presumed to act justly and to do his part in upholding just institutions.” JOHN RAWLS, *THEORY OF JUSTICE*

89. This would preclude the need for criminal sanctions, as all would obey legal obligations (he called this “strict compliance”). Rawls did not necessarily view his theory as being applicable to a society where people routinely disobey legal duties—this was what he called a society of “partial compliance,” and in such a society it was not enough to consider the requirements of *justice*, but also to consider “the principles that govern how we are to deal with *injustice*.” *Id.* at 8 (emphasis added). For a comprehensive discussion of how Rawlsian theory is nevertheless relevant to the question of state punishment, see generally Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 *Buffalo Criminal Law* 307 (2004); see also Melissaris at 131 (“As Rawls admits, a theory of justice must be adjustable to nonideal conditions of partial compliance. This is not to say that state punishment is rendered morally or otherwise necessary a priori. The fact, however, that it is a practice so central in modern states and that it is a prima facie way of dealing with partial compliance means that it must be tackled and put in the right perspective. And this must be done coherently in a way that does not undermine the foundations of the whole edifice.”).

principles and ideals acceptable to their common human reason....”¹⁹¹ This principle of reasonable endorsement by free and equal citizens is, according to Brettschneider, the same principle that can “justify[] political coercion to

¹⁹¹ Corey Brettschneider, *The Rights of the Guilty: Punishment and Political Legitimacy*, 35 *Political Theory* 175 (2007) (“I draw in particular on Rawls’s “liberal principle of legitimacy.”). ²⁰⁵ *Id.*

those who are guilty of crimes,” and that indeed this justification of criminal punishment is “central” to the legitimacy principle.²⁰⁵ For Brett Schneider, Rawlsian theory provides a litmus test for the legitimacy of various punishment practices by the state:

“Crucial here is the question of whether a particular criminal sanction respects each individual's status as a free and equal citizen....At the same time, however, a legitimate polity will employ legal constraints in the form of criminal law to curb destructive or antisocial behavior, so that some citizens do not violate others' basic interests, such as security.”¹⁹²

Criminal punishment, through Rawlsian theory, then, is the modern explanation for Rousseau's cryptic remark about the murderer consenting to his own execution. “If those who have committed crimes were to think of themselves as citizens who accept others' status as free and equal and were motivated to reach universal agreement,” Brett Schneider asks, “which punishments could they or could they not reasonably accept?”¹⁹³

Sharon Dolovich similarly rests her argument on the Rawlsian framework. “If the exercise of state power in a liberal democracy is to be legitimate,” she writes “...it must be justifiable in terms that all members of society subject to that power would accept as just and fair,” and “[t]his imperative is particularly acute in the context of criminal punishment.”³⁰⁸ The traditional problem for consent-based theories of punishment is that it seems fanciful that any criminal would willingly submit to hard treatment, but Rawls's Veil of Ignorance allows for a theory of such consent by “abstracting consideration of the particular details of...individual lives.”¹⁹⁴ Legitimate state punishment is that which is “exercised on the basis of a collective agreement” that “we would all accept as just and fair if we were to find ourselves behind a veil of ignorance....”¹⁹⁵

Crucial for the purposes of our topic—administrative crimes— Rawlsian (mainstream) liberal theory presupposes that those in the Original Position would agree that a democratically elected legislature is a requirement of the liberal principle of legitimacy. While the connection between liberalism and democracy is a complicated one, most liberal theorists today analyze the concepts in tandem.¹⁹⁶ As Rawls argued in *Political Liberalism*, “citizens are

¹⁹² Id. at 177.

¹⁹³ Id. at 186 ³⁰⁸

Dolovich at 314.

¹⁹⁴ Id.

¹⁹⁵ Id. at 315.

¹⁹⁶ See generally, Amy Gutmann, *Rawls on the Relationship between Liberalism and*

reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of cooperation according to what they consider the most reasonable conception of political justice....”¹⁹⁷ This mutual recognition of freedom and equality—this reciprocity—leads to requirements for institutional structure. Reasonable citizens considering the reciprocal status of their co-citizens in a cooperative system would not prevent their co-citizens from having political power. “[E]qual political liberty” writes Amy Gutman, “entails the right of adult members of a society to share as free and equal individuals in making mutually binding decisions about their collective life.”²¹²

This is made more explicit when Rawls discusses his “four-stage sequence” for determining the principles of justice and applying them in an actual society: (1) the Original Position (discussed earlier), which is in turn implemented in terms of fundamental political-institutional arrangement during the (2) “constitutional convention,”¹⁹⁸ after which comes (3) the *legislative stage* where, as Dolovich puts it, citizens “identify and enact into law the policies that best realize the principles previously selected.”³¹⁵ Legislation is similar to the Original Position in that state coercion is not directly assigned to individuals, but is instead abstracted (although much less so). “At this stage, although the parties continue to deliberate behind the veil, it is now thinner,” Dolovich argues, “allowing in the information about the particulars of their own society necessary if the parties are to make informed judgments, while at the same time still screening out the parties’ knowledge of their attributes and personal particulars.”¹⁹⁹ That the “parties” merely continue the prior stages’ “deliberation” at the legislative stage implies that this legislature must be democratic—it must allow for the inputs of all the free and equal citizens who took part in the deliberation of the Original Position and the Constitutional Convention. And it is here “at the legislative phase,” Dolovich concludes, “when the principles of punishment are translated into actual policies....”³¹⁷ What she almost certainly means by

Democracy, in *THE CAMBRIDGE COMPANION TO RAWLS* (2002); but see John Skorupski, *Rawls, Liberalism, and Democracy*, 128 *Ethics* 173 (2017) (comparing “new” mainstream liberal democratic theory with “old” liberalism not inherently tethered to democracy).

¹⁹⁷ JOHN RAWLS, *POLITICAL LIBERALISM* 446 (2005).

²¹² Gutmann at 173.

¹⁹⁸ Rawls, *THEORY OF JUSTICE* at 195-200. ³¹⁵ Dolovich at 423.

¹⁹⁹ Dolovich at 423. “[This is what] Rawls terms [the] “the legislative stage,” at which policy deliberations take place behind what we can think of as a “modified veil.”” Id. at 421. ³¹⁷ Id. at 402.

“policies” here are rules of conduct and the punishments meted out for their disobedience—criminal laws and sentencing laws.

That the legislative stage must be democratic is almost like stating a circular proposition, and indeed some Rawlsian theorists appear to take for granted that liberal punishment will also be democratic punishment. Brettschneider, for example, does not appear to demand democratic institutions because of the contractualist account of legitimacy; instead, the contractualist account of legitimacy flows from a prior requirement of democracy.²⁰⁰

For our purposes, though, these distinctions are unimportant—what matters is that the most prominent strain of liberal punishment theory requires that a democratic legislature determine the conduct rules that are prohibited by state punishment. Emmanuel Melissaris make this point more directly, stating that while the paradox of state punishment of free individuals disappears in the liberal Rawlsian solution, this requires that after the agreement to the general scheme at the prior stages, “inclusive democratic political institutions and decision-making procedures must be in place....”³¹⁹ The implication for the status of administrative crimes becomes immediately apparent under this framework: the offenses result in state punishment that has not been consented to according to the dictates of liberal theory, and they are therefore illegitimate. Rawls’s Liberal Principle of Legitimacy demands that legal coercion only be employed on terms agreed to by reasonable citizens recognizing each other as “free and equal in a system of social cooperation,”²⁰¹ which implies, as Gutman puts it, “equal political liberty” in a democratic political institution.²⁰² This authority that flows from the reciprocal consent to political obligation ends with the democratic institution; government agencies and bureaus not structured on the premises of democratic decision making procedures cannot share in it. Free and equal individuals would not, in the Original Position and the Constitutional Convention, agree to punishment that is promulgated by administrative agencies on the basis of their technical expertise. They would instead agree to the Legislative Stage.

³¹⁹ Melissaris at 142. It is worth noting that the conception of democracy underlying these liberal theories of punishment is one that is different from the conception utilized in the prior

²⁰⁰ Brettschneider at 179 (“Such an account of justification is inclusive in its respect for all citizens’ status as free and equal and avoids the aristocratic or sectarian problems that would arise from basing justification on one particular theory of general moral truth. In this sense, I have argued elsewhere that contractualist justification is a democratic account of legitimacy (citing COREY BRETTSCHEIDER, *DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT* (2007)).”).

²⁰¹ Rawls, *POLITICAL LIBERALISM* at 446.

²⁰² Gutmann at 173.

section discussing the expressive dimension of punishment. While the expressive theory outlined above adopts a “majoritarian” or “popular sovereignty” conception of democracy—demanding that “the views of the people who make up the political community are reflected in their law,” Kleinfeld, *Three Principles* at 1465—the theories discussed here are premised on a conception of democracy that is defined by how well political institutions “advance[e] liberal values (e.g., equality, liberty, individual rights).” Id. Given that these are “liberal” theories of punishment, this is unsurprising. Liberalism, not majoritarianism, is the central constellation of values to be advanced. Thus, Dolovich rejects that “the legitimacy of [criminal] policies may simply be found in the political process itself, and in particular in the status of legislators who wrote the laws as duly elected democratic representatives.” Dolovich at 313. Legitimacy cannot be equated with “democratic majoritarianism,” she argues, because “there is nothing inherent in the majoritarian standard to ensure that legislators even fairly consider the interests of all citizens subject to the laws they pass.” Id. A majority might run roughshod over an unpopular minority, and the logic of majority voting does nothing to prevent it. This is insufficient for a liberal theory, as the liberal principle of legitimacy requires that political power be “exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse....” Brettschneider at 175. A free and equal citizen would not endorse the unreasonable legislative oppression of his or her group merely because a competing group managed to win 51% of the seats in the legislature. The liberal conception of democracy requires that “all norms are to be determined through democratic deliberation and decision-making and in light of public reason,” and therefore “all [must] be given the opportunity to participate in political decision-making.” Melissaris at 148. This is in contrast to a “mere formalist majoritarianism.” Id.

But one need not only look at the characteristics of the Legislative Stage to know that administrative agencies have no role in it. The role of agencies is made clear by Rawls’s placement of “administrators” in the “fourth stage” alongside judges.²⁰³ Agencies, like judges, apply the rules created at the legislative stage to “particular cases.”²⁰⁴ Rule-application does not require the same degree of democratic input over decision-making as does application which – at least in determinate cases – involves no need for value judgments.²²⁰ Administrative crimes, though, conflate the rule-application role of agencies at the Fourth Stage with the rule-creation role of legislatures at the Legislative Stage.

CONCLUSION

²⁰³ Rawls, *POLITICAL LIBERALISM* at 199.

²⁰⁴ Id. Agency rulemaking may therefore be illegitimate altogether under the Rawlsian framework. But see Dolovich at 423 (“It is Rawls’s position that no limits on self-knowledge are necessary at the final, adjudicative stage at which the policies and laws enacted by the legislature are to be applied. Yet any broad policies derived from the principles will necessarily remain at some level of abstraction, and will continue to require judgments and assessments of the available evidence if decisions are to be reached. Thus here too, it seems to me, decision makers will continue to be susceptible to the corrupting effects of the knowledge of their personal particulars that Rawls is so concerned to purge from the deliberations at prior stages. For this reason, I expect that some modified veil of ignorance,

The application of the nondelegation doctrine to criminal law is effectively a test of the extent to which criminal law's "legality principle" has purchase in current law. While the Supreme Court and many state high courts have carved out a place for non-legislative criminalization when that criminalization is delegated to administrative agencies, this consensus should be questioned. Criminal law expresses the condemnation of the community, and therefore must originate from the community. Similarly, criminal punishment coerces through liberty deprivation, and therefore must be legitimized through citizen consent. Both expressivist and liberal theories of punishment, then, demand that criminalization be democratic.

at least for the decision maker, would also be required at the last stage, in order to ensure that the policies chosen at the third stage remain as true in their implementation as the process of deriving the principles on which they were based.").

²²⁰ Of course, the degree to which the Indeterminacy Thesis of Critical Legal Studies is held to be true will affect the breadth of this statement.