

STRICT LIABILITY OFFENSES, INCARCERATION, AND THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

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I. THE SETTING: STRICT LIABILITY AND INCARCERATION

The romantic vision of the criminal justice system is one of a decisive courtroom battle between an aggressive but virtuous prosecutor matching wits against a benighted and indefatigable defense counsel vigorously representing his innocent client

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before a fair, wise, dedicated judge, who vigilantly protects the defendant's rights at trial. The reality, however, is quite different. Actors in today's criminal justice system tend to follow a mundane path. More trials can be seen each week on prime time television than actually take place in most courtrooms during the same period. Roughly ninety-five percent of all prosecutions today result in plea bargains¹ that are negotiated between professional adversaries oftentimes too swamped with cases to include their clients—defendants or the public, including crime victims—in the pre-plea decisionmaking process.² Equally busy judges trying to manage crushing caseloads wind up blessing those agreements after a perfunctory review of the facts, even when a defendant pleads guilty while claiming to be innocent.³ The romantic vision of the process is uplifting; the reality is not.⁴

Criminal justice scholars disagree over where the blame should lie. Some argue that the criminal justice system has become overwhelmingly mechanized.⁵ They criticize the system for its willingness to treat cases like widgets wending their way down an assembly line. The overriding concern is not to separate the guilty from the innocent; the assumption is that every defendant is guilty of something. Instead of providing a forum

1. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

2. See, e.g., MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* ch. 4 (1978).

3. Some defendants will claim innocence while pleading guilty, a practice known as entering an "Alford plea," named after the Supreme Court decision that upheld this unusual procedure. See *North Carolina v. Alford*, 400 U.S. 25, 39 (1970) (ruling that due process does not forbid a judge from accepting a guilty plea by a defendant who simultaneously professes his innocence of the charged crime); FED. R. CRIM. P. 11(a)(3), (b) & (e) (permitting defendant to enter a nolo contendere plea, a plea where defendant does not contest or admit the charges).

4. See, e.g., Hon. William H. Rehnquist, Speech Before the National Conference on Criminal Justice (Jan. 25, 1973) ("It should be recognized at the outset that the process of plea bargaining is not one which any student of the subject regards as an ornament to our system of criminal justice. Up until now its most resolute defenders have only contended that it contains more advantages than disadvantages, while others have been willing to endure or sanction it only because they regard it as a necessary evil."), excerpted in Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 704 (2001). For an in-depth, "on the ground" look at the criminal justice system problems in four different jurisdictions, see AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* (2009).

5. See generally, e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012).

for the purpose of finding the facts or exhibiting a morality play, the criminal justice system cares only about what can enable the professional insiders most efficiently to process the thousands of cases that the system must handle with little, if any, concern for the dignity of the real people involved in the process, particularly defendants and victims.

Other scholars believe that the fundamental problem with the criminal justice system is substantive, not structural or procedural.⁶ They see a criminal justice system that has been captured by an illegitimate partnership between prosecutors and legislators who tacitly conspire to generate an overwhelming growth in the size and severity of the penal code. Legislatures continuously churn out superfluous or redundant, but always onerous, new criminal laws that prosecutors then use to stack charges against defendants to coerce guilty pleas. Legislators euchre the public into believing that they have reduced crime, while prosecutors bludgeon defendants into cooperating with investigations of bigger fish by pleading guilty and clearing a case from the docket, regardless of the legitimacy or strength of a defendant's belief in his or her own innocence.

Perhaps both critics are right. The public does not seem to care who is right or what is wrong so long as it can remain ignorant of the actual goings-on of criminal practice and not too many innocent parties wind up convicted—or at least so long as not too many of them show up on the nightly television news. The result is the absence of any public pressure to change the rules of the road (the subject of criminal law) or to fix the potholes along the way (the subject of criminal procedure).

Strict liability offenses—defined as infractions, violations, or crimes that can be committed without any intent to break the law, any knowledge of what the law is, or even any negligence in learning what the law prohibits⁷—enable the criminal justice system to combine the worst of both worldviews. As a substantive matter, those offenses eliminate any consideration of a person's moral blameworthiness by dispensing with any issue of

6. *See, e.g.*, WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 2–3 (2011).

7. *See, e.g.*, HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 123 (1968) (“[S]trict liability can be defined as the refusal to pay attention to a claim of mistake.”).

his or her knowledge or intent. The government need not prove that someone intended to make an illegal U-turn, only that he or she did. Eliminating proof of mens rea may be as effective at expanding the reach of the criminal law as adding to the stock of offenses already on the books. It may even be more effective if strict liability attaches to conduct that would not be considered inherently harmful, dangerous, or immoral. In that case, individuals could unwittingly break the law while all the time believing that they were law-abiding citizens. We know that we should not murder, rape, or pillage; we may not know whether the garbage we throw out is "hazardous waste."⁸

As a procedural matter, strict liability offenses make charges remarkably easy to prosecute.⁹ Establishing at trial the actus reus element of an offense ordinarily takes less work than proving the relevant state of mind.¹⁰ Videotapes of the offense, fingerprints, DNA, and eyewitness testimony all identify the culprit and place him at the scene of the crime. The more difficult question often is: What was he or she thinking?¹¹ The result of forgoing any concern for a defendant's state of mind is to encourage him or her to plead guilty in order to lessen the sentence. When the only dispute is over punishment, rational defendants will want to minimize the cost of doing business (or whatever else they are doing). Strict liability crimes truly make the criminal process more closely resemble a Turkish bazaar than an episode of *Perry Mason*.

One might assume that strict liability offenses are rarely found in the penal code and that the only penalty they carry is a fine. Yet strict liability offenses are not an uncommon occurrence in contemporary society. Consider just how often we run

8. See *infra* notes 79–83 and accompanying text.

9. See, e.g., Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 404 (1993) ("The strict liability doctrine affords both an efficient and nearly guaranteed way to convict defendants.").

10. See *id.* at 403–04.

11. Standard criminal law treatises, such as JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* (6th ed. 2012), WAYNE R. LAFAVE, *CRIMINAL LAW* (5th ed. 2010), and ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* (3d ed. 1982), may devote the majority of their pages to explaining what acts are criminal, but that is because there are more types of offenses than there are culpable states of mind. The authors of these treatises emphasize the greater importance to the law of the latter than the former as necessary to establish blameworthiness and incorrigibility.

into this problem with our vehicles. Illegal or overtime parking, not signaling for a turn, not coming to a full stop, crossing the double line, not having a local tax sticker on the bumper or windshield—those and a host of other missteps can result in a monetary fine. Everyone has committed one or more of those violations at one time or another and has had to fork over whatever penalty a local ordinance requires. Because everyone has committed those infractions, no one sees them as the mark of Cain, and no one gets seriously upset about a law requiring parties to pay a fine. We accept those fines as a user fee or a tax that falls on someone engaged in a particular activity that (presumably) goes into a fund that underwrites the cost of one or more public services that everyone would otherwise be forced to subsidize with income taxes.¹²

But what if committing a strict liability offense could land someone in prison? Society might have a very different reaction. The public might find that such an unduly severe punishment does not fit the crime, that imprisonment should be reserved for “real” criminals—dangerous and morally blameworthy parties who intended to flout the law—not for people who unwittingly cross the line between lawful and illegal conduct without injuring or endangering someone else. Given the large number of federal and state prisoners confined today,¹³ the public also might conclude that whatever trial efficiencies are gained by using strict liability crimes is more than offset by the expenses of incarcerating morally blameless parties, let

12. Strict liability traffic laws also technically apply to bicyclists, so pedaling is not an escape. For those who prefer to walk, jaywalking is another strict liability crime.

13. At the end of calendar year 2012, there were 1,571,013 prisoners in federal and state custody. See E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP'T OF JUSTICE, PRISONERS IN 2012—ADVANCE COUNTS (2013), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4737>, [<http://perma.cc/Ry8M-9GWD>]. There were 215,765 federal prisoners in the custody of the Federal Bureau of Prisons alone as of January 30, 2014. See *Weekly Population Report*, FED. BUREAU OF PRISONS, available at http://www.bop.gov/locations/weekly_report.jsp, [<http://perma.cc/TSM5-PHMD>]. The growth of imprisonment over the last 40 years, as well as the increase in its cost, has been enormous. See Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 12–17 (2013).

alone the costs to them, their families, and their neighborhoods from tarring them with the label “ex-con.”¹⁴

People who have that reaction would find themselves in good company. Anglo-American common law traditionally has required the combination of both an evil act and an evil intent for conduct to be made a crime. “*Actus non facit reum nisi mens sit rea*”¹⁵—a crime consists of “a vicious will” and “an unlawful act consequent upon such vicious will.”¹⁶ The criminal law historically has required the government to prove that a person acted with what everyday language would term the intent to break the law or knowledge of wrongdoing.¹⁷ Only then would conduct merit criminal punishment. In Oliver Wendell Holmes’s famous aphorism, “even a dog distinguishes between being stumbled over and being kicked.”¹⁸ Strict liability offenses, however, come from a different mold. If you commit a forbidden act, you are guilty, even if you intended to walk the straight and narrow and even if what you did was harmless and you are not likely to repeat that infraction. All that matters is that you crossed a line; now you must pay. “Go directly to jail. Do not pass ‘Go.’ Do not collect \$200.”¹⁹

However reasonable that result may be when a guilty party pays a fine, many, perhaps most, people would be likely to view imprisonment for a strict liability offense as quite troublesome. We have accepted strict liability offenses because society

14. For a discussion of the effects of imprisonment on third parties, see, for example, Jeffrey Fagan, *Crime, Law, and the Community: Dynamics of Incarceration in New York City*, in *THE FUTURE OF IMPRISONMENT* 27, 42–47 (Michael Tonry ed., 2004); Joan Petersilia, *Community Corrections in CRIME: PUBLIC POLICIES FOR CRIME CONTROL* 483, 494 (James Q. Wilson & Joan Petersilia eds., 2002). See generally TODD R. CLEAR, *IMPRISONING COMMUNITIES* (2007); Larkin, *supra* note 13, at 22–24 & nn.138–40 (collecting authorities).

15. E.g. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932) (“An act does not make one guilty unless the mind is guilty.”).

16. 4 WILLIAM BLACKSTONE, *COMMENTARIES* 21; see also, e.g., Roscoe Pound, *Introduction to FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW* 8–9 (1927) (“Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.”).

17. See, e.g., *Staples v. United States*, 511 U.S. 600, 605–07 (1994); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436–37 (1978); *Morissette v. United States*, 342 U.S. 246, 250–51 (1952).

18. OLIVER WENDELL HOLMES, *THE COMMON LAW* 3 (2d. ed 1909).

19. See, e.g., *Morissette*, 342 U.S. at 251–59.

largely treats fines like taxes and, in the words of then-Justice Holmes, "Taxes are what we pay for civilized society."²⁰ But society generally does—and should—distinguish between penalties that reduce your assets and ones that restrict your liberty, according the latter greater scrutiny.²¹ That is appropriate here. Strict liability offenses may not be unconstitutional per se, but incarceration for committing such a crime should be. The burden of this paper is to explain why the courts should agree with that proposition.

Part II starts us toward that conclusion by explaining how strict liability offenses came to be part of the criminal law. Part III then argues why incarceration should be deemed an impermissible punishment for that category of crimes. Part IV.A. explains why the Eighth Amendment Cruel and Unusual Punishments Clause supplies a basis for challenging the incarceration of strict liability offenders. Part IV.B. addresses responses to the arguments advanced in Part IV.A. and explains why each defense of incarceration is unpersuasive. Part V discusses the appropriate remedy.

20. *Compañía General de Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

21. To quote Herbert Packer:

Treating every kind of conduct that the legislature unthinkingly labels as criminal with the full doctrinal apparatus of culpability would place an intolerable burden on the courts. Yet our principles compel us to entertain *mens rea* defenses whenever the consequences of a criminal conviction are severe, whenever we are using the full force of the criminal sanction. A line must be drawn that does not depend simply upon the fortuitous use of the label 'criminal.' Labels aside, the combination of stigma and loss of liberty involved in a conditional or absolute sentence of imprisonment sets that sanction apart from anything else the law imposes. When the law permits that degree of severity, the defendant should be entitled to litigate the issue of culpability by raising the kinds of defenses we have been considering. If the burden on the courts is thought to be too great, a less severe sanction than imprisonment should be the maximum provided for. The legislature ought not to be allowed to have it both ways.

PACKER, *supra* note 7, at 130–31.

II. THE BIRTH AND GROWTH OF STRICT LIABILITY OFFENSES

We ordinarily assume that tort liability rests on negligence, and, largely, it does.²² Yet, strict liability is not an entirely novel feature of the law. Early tort law rendered a person liable for harming someone else or his or her property in order to keep the peace between individuals and their clans.²³ For centuries the common law adopted a rule approaching strict liability for trespass by livestock and certain abnormally dangerous activities, like setting fires.²⁴ Strict liability workers' compensation laws have been around for more than a century.²⁵ The rationale for that change has largely rested on increased humanitarian concern for the harms that industrialization can inflict on employees, consumers, and bystanders, as well as a decreased fear that expanding tort liability would retard economic growth.²⁶

Since the advent of industrialization, legislators have become increasingly troubled by unsafe working conditions and products such as defectively manufactured automobiles, mislabeled pharmaceuticals, or unavoidably created toxic wastes that can

22. See, e.g., HOLMES, *supra* note 18; PROSSER AND KEETON ON THE LAW OF TORTS, § 28, at 160 (W. Page Keeton gen. ed., 5th ed. 1984) ("Although the strands of fault and carelessness may be traced in accident law back for centuries, negligence took shape as a separate tort only during the earlier part of the nineteenth century." (footnote omitted)); *id.* § 75, at 535 ("Until about the close of the nineteenth century, the history of the law of torts was that of a slow, and somewhat unsteady, progress toward the recognition of 'fault' or moral responsibility as the basis of the remedy." (footnotes omitted)).

23. See, e.g., HOLMES, *supra* note 18, at 2-4; PROSSER AND KEETON, *supra* note 22, § 6, at 29-31, § 75, at 534-35.

24. See, e.g., PROSSER AND KEETON, *supra* note 22, §§ 76-77, at 538-45; see also, e.g., *St. Louis & S.F. Ry. Co. v. Mathews*, 165 U.S. 1, 5-6, 9 (1897) ("At common law, every man appears to have been obliged, by the custom of the realm, to keep his fire safe so that it should not injure his neighbor, and to have been liable to an action if a fire, lighted in his own house, or upon his land, by the act of himself, or of his servants or guests, burned the house or property of his neighbor, unless its spreading to his neighbor's property was caused by a violent tempest or other inevitable accident which he could not have foreseen In this country, the strict rule of the common law of England as to liability for accidental fires has not been generally adopted, but the matter has been regulated, in many States, by statute."); *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 523 (1885) (upholding a state law imposing double damages without proof of negligence for damage to animals until a railroad constructed fences, gates, cattle guards, and farm animal crossings).

25. See, e.g., *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 192-93 (1917); PROSSER AND KEETON, *supra* note 22, § 80, at 572-73.

26. See, e.g., PROSSER AND KEETON, *supra* note 22, § 80, at 572-73.

generate new, manifold, severe, unforeseeable, and almost entirely unpreventable risks for the public. In response, legislators have sought to increase the pressure on businesses to produce less dangerous products in facilities that comply with health and safety rules. Believing that those concerns were of the utmost importance and concerned that nineteenth century tort law doctrines stood in the way of achieving them,²⁷ legislatures gradually decided to shift a greater amount of the burden of preventing injuries to businesses because they were deemed to be the party best able to avoid them.²⁸ Civil damages liability was a traditional mechanism for remedying injured parties and deterring dangerous conduct, so legislatures set about altering the rules of tort law. Legislatures adopted mandatory safety device requirements;²⁹ they abolished certain common law defenses, such as the fellow-servant rule;³⁰ and in some instances they even eliminated the requirement that an employee prove negligence on his or her employer's part to recover for an injury.³¹ To be sure, negligence never completely went out of style.

27. *Id.* § 28, at 160–61.

28. *See, e.g., id.* § 80, at 573 (“[T]he cost of the product should bear the blood of the workman.”) (quoting Francis H. Bohlen, *A Problem in the Drafting of Workmen’s Compensation Acts*, 25 HARV. L. REV. 328 (1912)). As the Supreme Court explained in a case upholding liability for a company’s failure to comply with a safety requirement:

Where an injury happens through the absence of a safe draw bar, there must be hardship. Such an injury must be an irreparable misfortune to someone. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words.

St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281, 295–96 (1908).

29. *See, e.g., St. Louis, Iron Mountain & S. Ry. Co.*, 210 U.S. at 295–96 (upholding a railroad safety requirement).

30. *See, e.g., Second Employers’ Liability Cases*, 223 U.S. 1, 50–51 (1912) (upholding congressional repeal of the fellow-servant rule); PROSSER AND KEETON, *supra* note 22, § 80, at 573.

31. *See, e.g., N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 208 (1917) (upholding a no-fault state workers’ compensation law).

But as legislatures and courts began to tinker with the rules of tort liability, the law showed some signs of turning back toward its strict liability origins by placing an increasing burden on businesses to safeguard the public from harm.

Although society traditionally has distinguished between the civil and criminal laws, Progressive Era efforts to expand corporate civil liability gradually began to bleed over into the criminal law. Legislatures saw courts uphold the constitutionality of statutes that imposed new forms of tort liability, that modified many of the defenses that an employer or business could assert, or that imposed penalties for noncompliance that were paid to the government, not to injured parties as compensation.³² Legislators listened when the courts said that legislatures may revise tort law rules because no one enjoys a property interest in the common law.³³ Legislatures therefore came to believe that they had the power to eliminate whatever common law rules stood in the way of public safety. They also began to see the criminal law as just another tool that they could use to prod businesses into promoting public safety objectives and to penalize them when they failed.

Legislators began to chip away at the mens rea doctrine. Beginning in the 1840s, Parliament, Congress, and state legislatures enacted laws that imposed strict criminal liability for violating assorted health and safety laws. Those assemblies enlarged the statute books, originally designed simply for demarking and punishing morally blameworthy behavior, through new legislation enlisted for the modern purpose of regulating business activities. Originally called “regulatory offenses” in England and “public welfare offenses” in this nation, these crimes initially were limited to the sale of impure or adul-

32. *See, e.g., Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 523 (1885) (“The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.”).

33. *See Munn v. Illinois*, 94 U.S. 113, 134 (1876) (“[A] mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other.”).

terated food and alcohol. But the list of strict liability offenses grew over time. In retrospect, the shift seems inevitable.

Early in the twentieth century, the list of strict liability offenses expanded to include building code offenses, traffic violations, and sundry other similar low-level infractions.³⁴ The process

34. See, e.g., Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 595 (1958) (“[I]t was in the latter half of the nineteenth century that the great chain of regulatory statutes was initiated in England, which inaugurated a new era in the administration of the criminal law. Among them are the Food and Drugs Acts, the Licensing Acts, the Merchandise Marks Acts, the Weights and Measures Acts, the Public Health Acts and the Road Traffic Acts.”); Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 734 (2012); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56–67 (1933). Justice Jackson explained the rationale for those laws as follows:

The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

While many of these duties are sanctioned by a more strict civil liability, lawmakers, whether wisely or not, have sought to make such regulations more effective by invoking criminal sanctions to be applied by the familiar technique of criminal prosecutions and convictions. This has confronted the courts with a multitude of prosecutions, based on statutes or administrative regulations, for what have been aptly called ‘public welfare offenses.’ These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent

picked up speed in the first few decades of the twentieth century³⁵ and has grown apace since then to keep up with the growth in size and complexity of the administrative state. Today the corpus of regulatory offenses is considerably larger than anyone initially envisioned.³⁶ Environmental laws, for example, came on stream later in the twentieth century, and they can impose strict criminal liability.³⁷ The creation of regulatory agencies also added a new feature to the category of public welfare offenses: crimes defined by regulations. Nowadays, a strict liability crime can consist in the violation not merely of a federal statute, a state law, or a municipal ordinance, but also of an administrative rule. That has considerably increased the size of the problem.³⁸ Yet,

as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does not grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime. This has not, however, been without expressions of misgiving.

Morissette v. United States, 342 U.S. 246, 253–56 (1952) (footnotes omitted).

35. See, e.g., Sayre, *supra* note 34, at 56–63.

36. See, e.g., Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing of Economic Regulations*, 30 U. CHI. L. REV. 423, 424–25 (1963); Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 37 (1997) (“Legislatures, concerned about the perceived weakness of administrative regimes, have put criminal sanctions behind administrative regulations governing everything from interstate trucking to the distribution of food stamps to the regulation of the environment.” (footnote omitted)); Meese & Larkin, *supra* note 34, at 734.

37. See, e.g., Meese & Larkin, *supra* note 34, at 734–36, 744–46. The concern with strict liability exists not only when a criminal statute altogether dispenses with proof of any mental element, but also when a statute does not require proof of *mens rea* in connection with a fact relevant to a defendant's culpability. A person may know that he is taking a coat with him as he leaves a restaurant, but unless he knows that the coat belongs to someone else he is not guilty of theft. See, e.g., PACKER, *supra* note 7, at 122. Eliminating proof of that fact extinguishes the precept that the criminal law should punish only culpable behavior.

38. As Stanford Law School Professor Lawrence Friedman colorfully put it:

There have always been regulatory crimes, from the colonial period onward But the vast expansion of the regulatory state in the twentieth century meant a vast expansion of regulatory crimes as well. Each statute on health and safety, on conservation, on finance, on environmental protection, carried with it some form of criminal sanction for violation Wholesale extinction may be going on in the animal kingdom, but it does not seem to be much of a problem among regulatory

regulations themselves also do not exhaust the number and type of administrative dictates that can define criminal liability. Agencies often construe their regulations in the course of applying them, and the interpretations that agencies give to their own rules receive a great degree of deference from the courts.³⁹ The result is the development of a body of agency “case law” that a person must know to be aware of the full extent of his or her potential criminal liability.

Just as the English and American courts upheld legislative revision of tort law, so too did they permit legislatures to dispense with any proof of *mens rea* as an element of a crime. Starting in the mid-nineteenth century, the courts began to shift their views about the importance of *scienter* as a means of limiting the reach of the criminal law and approved the use of strict liability crimes, at least for relatively minor offenses.⁴⁰ The Supreme Court joined in that chorus. Throughout the first half of the twentieth century the Court resolved several cases in which the defendant challenged the constitutionality of certain state and federal laws creating public welfare offenses. The principal deci-

laws. These now exist in staggering numbers, at all levels. They are as grains of sand on the beach.

LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 282–83 (1993).

39. See, e.g., *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1331 (2013); *Auer v. Robbins*, 519 U.S. 452, 457 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417–18 (1945).

40. See *Levenson*, *supra* note 9, at 419; *Sayre*, *supra* note 34, at 67 (“The decisions permitting convictions of light police offenses without proof of a guilty mind came just at the time when the demands of an increasingly complex social order required additional regulation of an administrative character unrelated to questions of personal guilt; the movement also synchronized with the trend of the day away from nineteenth century individualism toward a new sense of the importance of collective interests. The result was almost inevitable. The doctrine first evolved in the adulterated food and liquor cases was widely extended, and police offenses involving small monetary penalties came to be recognized as a special class of offense for which no *mens rea* was required. Courts began to generalize. An English court in 1895 in a much quoted passage, suggested three general groups of cases in which no guilty mind need be proved. ‘One is a class of acts which . . . are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty Another class comprehends some, and perhaps all, public nuisances Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right.’” (footnotes omitted)).

sions were *Shevlin-Carpenter Co. v. Minnesota*,⁴¹ *United States v. Balint*,⁴² and *United States v. Dotterweich*.⁴³ *Shevlin-Carpenter* involved a trespass onto government land, while *Balint* and *Dotterweich* involved the sale or distribution of pharmaceuticals. In each case, the relevant statute made it a crime to commit the prohibited conduct without regard for the defendant's state of mind. In each case, the defendant argued that the statute violated the Due Process Clause because it did not require the government to prove, as an element of the offense, that the defendant acted with a "guilty mind." And in each case, the Supreme Court rejected that argument and declined to impose a mens rea requirement on the criminal law under the federal constitution. Despite the impressive pedigree that the mens rea doctrine had at common law, the Court's opinions surprisingly gave short shrift to the defendants' due process claims.⁴⁴

The result is this: Regulatory criminal laws have become a settled feature of modern-day statutory codes, and they often impose criminal liability for a host of actions that historically would have been considered only civil infractions. Rather than use the administrative state to sanction regulatory violations only through penalties such as fines, debarment, or license revocation, legislatures have conscripted the criminal justice system—police officers, prosecutors, judges, and jailers—to regulate business by punishing as crimes a broad range of conduct not considered inherently evil, dangerous, or blameworthy. Strict liability, although a relatively recent addition, is no long-

41. 218 U.S. 57, 68–70 (1910) (holding that a corporation can be convicted for trespass without proof of criminal intent).

42. 258 U.S. 250, 254 (1922) (holding that a real person can be convicted of the sale of narcotics without a tax stamp even absent proof that he knew that the substance was a narcotic); see also *United States v. Behrman*, 258 U.S. 280 (1922) (companion case to *Balint*, holding that a physician can be convicted of distributing a controlled substance not "in the course of his professional practice" even without proof that he knew that his actions exceeded that limit).

43. 320 U.S. 277, 285 (1943) (holding that the president of a company can be convicted of distributing adulterated or misbranded drugs in interstate commerce without proof that he even was aware of the transaction). For detailed and trenchant analyses of the *Shevlin-Carpenter Co.*, *Balint*, and *Dotterweich* cases, see Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 429–36 & nn.70–79 (1958); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 111–19.

44. The rule is different in cases involving constitutionally protected conduct. See *infra* note 125.

er a complete oddity in the criminal law. It is just another tool in the toolkit. The result is that we have reached the point where it can be difficult to distinguish the substantive criminal law from tort law save for one distinguishing feature of the former: Only the criminal law is used to incarcerate offenders.⁴⁵

III. THE PROBLEMS WITH STRICT LIABILITY OFFENSES

Legal commentators have consistently denounced strict criminal liability on a variety of grounds.⁴⁶ Critics maintain that holding someone liable who did not flout the law cannot be justified

45. See, e.g., John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193 (1991).

46. See, e.g., MODEL PENAL CODE § 2.05, cmt. 1 (Tentative Draft No. 4, 1955); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 71 (2009) ("We are not morally culpable for taking risks of which we are unaware." (footnote omitted)); ALAN BRUDNER, *PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE* 178–84 (2009); LON L. FULLER, *THE MORALITY OF LAW* 77 (1969) ("Strict criminal liability has never achieved respectability in our law."); H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 152 (1968) ("[s]trict liability is odious"); PACKER, *supra* note 7, at 130–31; Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. PITT. L. REV. 737, 742–48 (1981); Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322 (1966); Joel Feinberg, *The Expressive Function of Punishment*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 25 (Gertrude Ezorsky ed., 1977); Hart, *supra* note 43, at 422–25; Hughes, *supra* note 34, at 602–03; Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 267–68 (1987); Levenson, *supra* note 9; Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067, 1067–70 (1983); Paul Roberts, *Strict Liability and the Presumption of Innocence: An Expose of Functionalist Assumptions*, in *APPRAISING STRICT LIABILITY* 182, 191 (A.P. Simester ed., 2003); Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571 (1978); Sayre, *supra* note 34, at 56; A.P. Simester, *Is Strict Liability Always Wrong?*, in *APPRAISING STRICT LIABILITY*, *supra*, at 21 (strict liability is wrong because it "leads to conviction of persons who are, morally speaking, innocent"); Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1109 (1952) ("The most that can be said for such provisions [prescribing liability without regard to any mental factor] is that where the penalty is light, where knowledge normally obtains and where a major burden of litigation is envisioned, there may be some practical basis for a stark limitation of the issues; and large injustice can seldom be done. If these considerations are persuasive, it seems clear, however, that they ought not to persuade where any major sanction is involved."). See also generally Paul J. Larkin, Jr., *Taking Mistakes Seriously*, 28 BYU J. PUB. L. 71, 78 n.26 (2014) (collecting authorities).

on retributive, deterrent, incapacitative, or rehabilitative grounds. By dispensing with any proof that someone acted with an “evil” intent, strict liability ensnares otherwise law-abiding, morally blameless parties and subjects them to conviction, public obloquy, and punishment—that is, it brands as a “criminal” someone whom the community would not label as blameworthy.⁴⁷ By imposing liability for conduct that no reasonable person would have thought to be a crime, strict liability also denies an average person notice of what the law requires. The result is to violate a principal universally thought to be a necessary predicate before someone can be convicted of a crime⁴⁸ and to rob people of the belief, necessary for the law to earn respect, that they can avoid criminal punishment if they choose to comply with the law.⁴⁹ By making into criminals people who had no knowledge that their conduct was unlawful, strict liability violates the utilitarian justification for punishment, since a person who does not know that he is committing a crime will not change his behavior.⁵⁰ Lastly, strict criminal liability flips on its head the criminal law tenet that “[i]t is better that ten guilty per-

47. See, e.g., Levenson, *supra* note 9, at 413.

48. See, e.g., *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) (identifying “core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct”).

49. See, e.g., Kadish, *supra* note 46, at 263; PACKER, *supra* note 7, at 68–69 (“People ought in general to be able to plan their conduct with some assurance that they can avoid entanglement with the criminal law; by the same token the enforcers and appliers of the law should not waste their time lurking in the bushes ready to trap the offender who is unaware that he is offending. It is precisely the fact that in its normal and characteristic operation the criminal law provides this opportunity and this protection to people in their everyday lives that makes it a tolerable institution in a free society. Take this away, and the criminal law ceases to be a guide to the well-intentioned and a restriction on the restraining power of the state. Take it away is precisely what you do, however, when you abandon culpability as the basis for imposing punishment.”). Cf. H.L.A. Hart, *Legal Responsibility and Excuses*, in HART, *supra* note 46, at 28–53 (offering that rationale as the justification for recognizing excuses to crimes).

50. See, e.g., Levenson, *supra* note 9, at 427; Meese & Larkin, *supra* note 34, at 764 (“[D]eterrence cannot operate retroactively. Society can penalize someone for breaking a law, which may deter him from doing so *again*, but the law obviously had no effect on him the first time.” (emphasis in original) (footnote omitted)).

sons escape than that one innocent suffer.”⁵¹ Strict liability accomplishes that result because it sacrifices a morally blameless party for the sake of protecting society.⁵² In sum, by punishing someone for unwittingly breaking the law, strict criminal liability statutes mistakenly use a legal doctrine fit only for the civil tort purpose of providing compensation as a mechanism for imposing criminal punishment. By so doing, they unjustifiably impose an unnecessary evil.⁵³ Strict liability for a criminal offense is, in a phrase, fundamentally unjust.⁵⁴

Strict criminal liability’s defenders—a category that includes the Supreme Court, by the way⁵⁵—argue that it is necessary to use the criminal justice system to enforce regulatory programs and to have the strict liability doctrine available for that purpose.⁵⁶ In a modern industrial society, businesses will engage in various enterprises that are legitimate but inherently danger-

51. *Coffin v. United States*, 156 U.S. 432, 456 (1895) (quoting 2 BLACKSTONE, *supra* note 16, at 358); *see also, e.g., Alexander Volokh, Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997).

52. *See, e.g., Catherine L. Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 324 (2003) (“The introduction of the public welfare offense was not a chance occurrence. Scholars have commented that the development of the administrative regulation corresponded with the increasing need for order in the burgeoning urban society and marked the growing shift from the protection of the individual’s rights to the protection of the community.” (footnotes omitted)); *Levenson, supra* note 9, at 427; *Sayre, supra* note 34, at 68; Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 792 (1997).

53. *See, e.g., Kadish, supra* note 46, at 263. Cf. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 160–62 (London 1780) (offering that justification for recognizing excuses to crimes).

54. As Professor Packer has reminded us, justice or fairness is not simply a matter of procedural regularity; it has a substantive component, too. “[W]hatever fairness may be thought to mean on the procedural side, its simplest (if most neglected) meaning is that no one should be subjected to punishment without having an opportunity to litigate the issue of his culpability.” PACKER, *supra* note 7, at 69.

55. *See, e.g., United States v. Park*, 421 U.S. 658, 676 (1975); *United States v. Freed*, 401 U.S. 601, 607–10 (1971); *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971); *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Balint*, 258 U.S. 250, 252–53 (1922); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68–69 (1910). *But see infra* note 70 and accompanying text.

56. *See, e.g., James B. Brady, Strict Liability Offenses: A Justification*, 8 CRIM. L. BULL. 217 (1972); Steven S. Nemerson, Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517, 1570–77 (1975); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

ous or potentially hazardous.⁵⁷ Those corporations are in a far better position than the public to prevent the harm that can result from, for example, the improper manufacture of drugs or disposal of hazardous waste, so it is reasonable to place on those businesses the burden of preventing injury to the public.⁵⁸ Criminal prosecution is a necessary weapon because society needs the additional deterrent effect of criminal sanctions in order to protect the citizenry. The risk of strict criminal liability will have that effect in two ways: It will dissuade a party who is not committed to scrupulous compliance with safety protocols from entering potentially dangerous lines of work, and it will ensure that anyone who does engage in such an activity steers clear of the line dividing lawful from unlawful conduct.⁵⁹ Moreover, anyone engaged in a highly regulated field or endeavor⁶⁰ or in an inherently dangerous activity⁶¹ is likely to

57. See, e.g., *Park*, 421 U.S. at 668–69, 671–72; *Freed*, 401 U.S. at 609–10; *Dotterweich*, 320 U.S. at 280–82.

58. See, e.g., *Levenson*, *supra* note 9, at 419–20. Justice Frankfurter's opinion for the Court in *Dotterweich* stands as the classic statement of that position:

The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938, Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience. The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words The prosecution to which *Dotterweich* was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger And so it is clear that shipments like those now in issue are “punished by the statute if the article is misbranded [or adulterated], and that the article may be misbranded [or adulterated] without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares”

320 U.S. at 280–81 (citations omitted).

59. See, e.g., *PACKER*, *supra* note 7, at 64 (the only “coherent intellectual basis” for strict liability is its in terrorem effect); *Wasserstrom*, *supra* note 56, at 736–40.

60. See, e.g., *Park*, 421 U.S. at 668–72 (distribution of food in interstate commerce); *Dotterweich*, 320 U.S. at 280–82 (distribution of pharmaceuticals in interstate commerce).

know that there are legal requirements defining safe and unsafe conduct so that it is reasonable to presume that everyone engaged in that line of work has knowledge of the law or to demand that they acquire it.⁶² In addition, the number of violations is so great that requiring the government to prove some mens rea element, including mere negligence, would so tax the criminal justice system as to make it impossible for the criminal law to have the necessary deterrent effect.⁶³ Finally, strict liability powerfully signals society's intolerance for certain conduct by making irrelevant any issue other than whether the defendant committed it.⁶⁴ In sum, strict criminal liability is a legitimate and reasonable regulatory tool. While strict criminal liability imposes costs on society, it also has benefits, and in a democracy we permit legislatures to balance the costs and benefits that legislation imposes on the public.⁶⁵

61. See, e.g., *Freed*, 401 U.S. at 607–10 (possession of hand grenades); *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563–65 (1971) (interstate transportation of sulphuric acid).

62. See, e.g., *Freed*, 401 U.S. at 609 (“[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act.”); *Int'l Minerals*, 402 U.S. at 565 (“[W]here, as here . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.”); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 605–06 (1981). Oliver Wendell Holmes made this point in the context of discussing why ignorance or mistake of law is no defense to a crime:

The true explanation of the rule [that ignorance or mistake of law is no excuse] is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

HOLMES, *supra* note 18, at 48.

63. See, e.g., *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910) (“[I]n a few instances, the public welfare has made it necessary to declare a crime, irrespective of the actor's intent. A concession of exceptions would seem to destroy the principle.” (internal quotation marks omitted)).

64. See, e.g., *Levenson*, *supra* note 9, at 420.

65. See, e.g., HOLMES, *supra* note 18, at 48; Kelman, *supra* note 62, at 610–11.

Debate over the philosophical question of whether the criminal justice system should use strict criminal liability will not come to rest any time soon, if ever. Part of the reason is that reasonable people can disagree over the issue of whether strict criminal liability materially advances the purposes of criminal punishment—retribution, deterrence, incapacitation, educa-

Of course, critics of strict liability have replies to those defenses. Professor Herb Packer articulates those replies well:

So long as deterrence is viewed in the narrow, crude, *in terrorem* sense employed by Bentham and still prevalent in utilitarian thought, the argument has considerable force. If all that is at stake is the propensity of punishment to scare people, if our image of man is exclusively that of the rational hedonist who will do anything that promises to enhance his well-being if he thinks he can get away with it, then it is hard to answer the argument that permitting excuses weakens the deterrent efficacy of the criminal law. But if deterrence (or prevention) is more broadly conceived as a complex psychological phenomenon meant primarily to create and reinforce the conscious morality and the unconscious habitual controls of the law-abiding, then the flank of the old argument may be turned. Punishment of the morally innocent does not reinforce one's sense of identification as a law-abider, but rather undermines it. A society in which excuses were not allowed would be a society in which virtue would indeed have to be its own reward. What could be more certain to undermine one's sense that it is important to avoid the intentional or reckless or negligent infliction of harm upon others than the knowledge that, if one inflicts harm, he may be punished even though he cannot be blamed for having done so? If we are to be held liable for what we cannot help doing, there is little incentive to avoid what we can help doing. One may as well be hanged for a sheep as a lamb.

Losses may and will occur through the acceptance of false excuses. But the calculus cannot end there. These losses must be weighed against the damage that will be done to the criminal law as carrier of our shared morality unless its reach is limited to blameworthy acts. Unjust punishment is, in the end, useless punishment. It is useless both because it fails to prevent crime and because crime prevention is not the ultimate aim of the rule of law.

Law, including the criminal law, must in a free society be judged ultimately on the basis of its success in promoting human autonomy and the capacity for individual human growth and development. The prevention of crime is an essential aspect of the environmental protection required if autonomy is to flourish. It is, however, a negative aspect and one which, pursued with single-minded zeal, may end up creating an environment in which all are safe but none is free. The limitations included in the concept of culpability are justified not by an appeal to the Kantian dogma of "just deserts" but by their usefulness in keeping the state's powers of protection at a decent remove from the lives of its citizens.

PACKER, *supra* note 7, at 64–66.

tion, rehabilitation, and the like.⁶⁶ Part of the reason is that many of the judgments we make about what to define as a crime and how to punish what we have outlawed rest on moral judgments, not empirical analyses, and so cannot be resolved in a democracy by means other than majority vote.⁶⁷ And part of the reason is that the private participants in this debate, the public policymakers who seek to influence its course, and the government officials who must make the relevant decisions not only represent very different interests, but also approach the matter from very different perspectives.⁶⁸ There may be new facts and claims advanced in support of one position or another, the extant arguments may be sharpened through debate, and the weight given to the theoretical niceties and practicalities of the situation may vary over time, but the philosophical disagreement likely will continue because neither side will be able to oust the other from the field of battle.

The Supreme Court is not likely to squelch that debate for all time by ruling that the Constitution prohibits any use of strict criminal liability on the ground that it does not serve a legitimate purpose of the criminal law. The Court has left to the political process the judgment as to what is necessary to safeguard the public and has displayed considerable deference to whatever judgments legislatures make.⁶⁹ To be sure, the Court

66. See *infra* note 69 and accompanying text.

67. See, e.g., Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL'Y. 241, 293–94 (2013); GLENN C. LOURY, RACE, INCARCERATION, AND AMERICAN VALUES 24 (2008).

68. Consider these two very different starting points. Holmes believed that the law should be concerned with the “bad man,” the person who intends to flout the law, because the law is needed to keep that person in line. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). In contrast, H.L.A. Hart believed that the law should be concerned with the “puzzled man,” the person who wants to comply with the law but is uncertain where the line may be. See H.L.A. HART, *THE CONCEPT OF LAW* 39–40 (1961). Reasonable people starting from those very different points could reach very different conclusions about the legitimacy and utility of strict criminal liability.

69. See, e.g., *Graham v. Florida*, 560 U.S. 48, 71 (2010) (“Criminal punishment can have different goals, and choosing among them is within a legislature’s discretion.”); *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion) (“[T]he Constitution does not mandate adoption of any one penological theory. . . . A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. . . . Some or all of these justifications may play a role in a State’s sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be

has been reluctant to interpret federal criminal statutes as imposing strict liability unless no other reading is possible and therefore has construed various laws to require mens rea elements that reflect the need for proof of culpability.⁷⁰ Some criminal statutes, however, cannot be read in that manner. When that is the case, the Court has upheld strict liability criminal statutes over due process challenges in a number of instances over the last seventy years without suggesting that those laws were arbitrary exercises of legislative power.⁷¹ It would be a big step for the Court now to conclude that those precedents were not merely wrongly decided, but were way off the mark. That would entail deciding, for example, that strict liability makes no measurable contribution to deterrence, a proposition that would be difficult to defend when put that starkly.⁷² Throughout the period in which it has approved strict liability, the Court also has consistently made it clear that issues such as the effectiveness of particular sanctions are ones best left to legislatures initially and the public ultimately to resolve through the democratic process.⁷³ Accordingly, there is

made by state legislatures, not federal courts.” (citations and internal quotation marks omitted)); *Powell v. Texas*, 392 U.S. 514, 530 (1968) (plurality opinion) (noting that the Court “has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects”).

70. See, e.g., *Flores-Figueroa v. United States*, 556 U.S. 646, 657 (2009) (construing an identity theft statute to require proof that the defendant knew that the identifying information belonged to another person); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (construing a federal child pornography statute to require proof that the defendant knew that the actor was a minor); *Staples v. United States*, 511 U.S. 600 (1994) (construing a federal law regulating firearms to require proof that the defendant knew that the weapon was capable of automatic fire); *Liparota v. United States*, 471 U.S. 419, 433 (1985) (construing the federal food stamp laws to require proof that the defendant knew that his possession was not authorized by law); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435–36 (1978) (construing the Sherman Act, 15 U.S.C. § 1–7 (2006), as requiring proof of knowledge); *Morissette v. United States*, 342 U.S. 246 (1952) (construing theft statute to require proof that the defendant knew the property belonged to the federal government); Leonid (Lenny) Traps, Note, “*Knowingly*” Ignorant: *Mens Rea* Distribution in Federal Criminal Law After *Flores-Figueroa*, 112 COLUM. L. REV. 628 (2012).

71. See *supra* note 55.

72. See, e.g., Wasserstrom, *supra* note 56, at 736–40.

73. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 186 (1976) (lead opinion) (“The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.”).

little to no likelihood that the Court would condemn strict liability offenses on much the same grounds that philosophers have offered in their critiques.

But the question whether strict liability offenses provide adequate *notice* of prohibited conduct is different in kind from the issue of the jurisprudential legitimacy of this particular legal tool. Just as the Court almost entirely has left to legislatures the decision whether particular criminal laws make a material contribution to a legitimate purpose of the criminal law, so too the Court has consistently held that, whenever the government makes that decision and enacts a new statute, the legislature must identify clearly whatever conduct it places out of bounds and will punish through the criminal justice system.⁷⁴ The source of that notice requirement is the Due Process Clause,⁷⁵ and two related doctrines enforce its command. The “void-for-vagueness doctrine” requires criminal statutes to define criminal conduct with sufficient clarity so that an average person without legal training can readily understand them.⁷⁶ The “unforeseeable expansion doctrine” prohibits courts from interpreting a criminal statute in a manner that results in an unfore-

74. See *supra* note 48 and *infra* notes 75–76.

75. See, e.g., *Bouie v. City of Columbia*, 378 U.S. 347, 353–54 (1964) (“An ex post facto law has been defined by this Court as one ‘that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action,’ or ‘that *aggravates* a *crime*, or makes it *greater* than it was, when committed.’ . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.” (citation and footnote omitted)); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”).

76. See, e.g., *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *United States v. Harriss*, 347 U.S. 612, 617 (1954) (“The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”). See generally Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (discussing the development of the void-for-vagueness doctrine).

seeable expansion of what the law makes a crime.⁷⁷ The Supreme Court has scrutinized criminal statutes under one doctrine or the other for a century. Deciding whether a criminal law affords the public adequate notice therefore is not an academic exercise; it is everyday fare for the Supreme Court.⁷⁸

The criticism that strict liability offenses provide inadequate notice of criminal conduct is a particularly cogent one today. Use of the criminal justice system to enforce federal regulatory programs is heavily freighted with problems that do not arise when the only penalties at stake are administrative or civil. In fact, many of the features that make the administrative process a desirable, and sometimes necessary, means for implementing acts of Congress render inappropriate use of the criminal process as an enforcement mechanism. For example, Congress may use a broadly defined term (for example, "solid waste")⁷⁹ in a statute (for example, the Resource Conservation and Recovery Act)⁸⁰ that delegates to an agency (for example, the EPA) the power to implement that law by elaborating or refining the definition of a term (for example, "hazardous waste"),⁸¹

77. See, e.g., *Metrish v. Lancaster*, 133 S. Ct. 1781, 1787 (2013); *Rogers v. Tennessee*, 532 U.S. 451, 458–62 (2001); *Marks v. United States*, 430 U.S. 188, 192 (1977); *Douglas v. Buder*, 412 U.S. 430, 432 (1973); *Rabe v. Washington*, 405 U.S. 313, 315–16 (1972); *Bowie*, 378 U.S. at 352–53.

78. For cases holding statutes unconstitutionally vague, see, for example, *Fox Television Stations, Inc.*, 132 S. Ct. at 2307 ("indecent" broadcast); *City of Chicago v. Morales*, 527 U.S. 41 (1999) ("criminal street gang"); *Kolender v. Lawson*, 461 U.S. 352 (1983) ("credible and reliable" identification). For cases rejecting vagueness challenges to statutes, see, for example, *Chapman v. United States*, 500 U.S. 453 (1991) ("mixture or substance containing a detectable amount" of a controlled substance); *United States v. Powell*, 423 U.S. 87 (1975) ("other firearms capable of being concealed on the person"); *United States v. Mazurie*, 419 U.S. 544 (1975) ("Indian country").

79. See 42 U.S.C. § 6903(27) (2006) (defining "solid waste").

80. See Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901–6992k (2006)).

81. 42 U.S.C. § 6921(a) & (b) (directing the EPA to characterize and list "hazardous wastes"); 40 C.F.R. § 261.3 (2010) (generally defining "hazardous waste"); *id.* §§ 261.20–261.24(a) (defining as hazardous waste solid waste that has the characteristics of ignitability, corrosivity, reactivity, or toxicity); *id.* §§ 261.4, 261.38–261.40 (defining "exclusions" from "hazardous waste"); *id.* § 261.5 (defining special requirements for hazardous waste generated by "conditionally exempt small quantity generators"); *id.* § 261.6 (defining requirements for "recyclable materials" as an exemption from "hazardous waste"); *id.* § 261.10 (specifying criteria for identifying "the characteristics of hazardous waste"); see also *City of Chicago v. Env'tl. Def. Fund*, 511 U.S. 328, 332 (1994).

by creating a list of specific examples of what that term means (for example, “listed hazardous wastes”),⁸² or by specifying exemptions from the term (for example, “recyclable materials”).⁸³ By legislating in that fashion, Congress can grant the executive branch considerable regulatory flexibility. An agency can adapt existing regulations or promulgate new ones whenever necessary to address worsening or newly emerging hazards without having to return to Congress for specific supplemental regulatory authorization. That practice also enables the agency to invoke its superior technical and scientific expertise regarding a particular substance, production process, or medical risk whenever a new problem pops up or an old one takes a turn for the worse. Broadly written regulatory statutes granting administrative agencies room to maneuver are valuable because society wants agencies to be able to respond quickly (for instance) to serious health threats by revising the rules necessary to forestall or remedy a problem.

At the same time, the freedom to respond quickly can place individuals at risk of criminal punishment for guessing mistakenly about what the law requires because regulatory developments can outpace their knowledge of the law. Historically, mens rea requirements have mediated between the need for flexibility and the duty to notify the public what the law forbids by limiting criminal liability to someone who intentionally violates a known legal duty or commits easily recognizable blameworthy conduct. Strict liability offenses eliminate that protection, however, leaving it to prosecutors to decide who is and is not a proper subject of conviction, a proposition that should be anathema to anyone committed to the principle that ours is “a government of laws, and not of men.”⁸⁴

To some extent, the notice-and-comment requirements of the Administrative Procedure Act⁸⁵ have the potential to reduce this risk, because an agency must afford the public notice of a

82. See 40 C.F.R. § 261.11 (defining requirements for listing “hazardous waste”); *id.* § 261.24(b) (listing “toxic wastes”); *id.* § 261.31 (listing hazardous wastes from “non-specific sources”); *id.* § 261.32 (listing hazardous wastes from “specific sources”).

83. See *id.* § 261.6 (defining requirements for “recyclable materials” as an exemption from “hazardous waste”).

84. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

85. 5 U.S.C. §§ 551–559 (2012).

proposed rule before promulgating any new regulation. But that requirement likely will not benefit every private party equally. The average person reads the local newspaper, not the Federal Register. Of course, large corporations have in-house staff or lawyers on retainer devoted to the task of staying on top of agency developments. Personnel at small companies, however, cannot specialize in regulatory programs because they must play multiple roles. And most individuals lack even the remote familiarity with the law that someone can pick up just by working daily in a particular field. The average person does not have those opportunities. He or she learns what the law forbids from family members, church, school, and (albeit often mistakenly) popular culture. Said differently, the average person learns the law from other average persons, not from individuals educated, trained, and experienced in what a technical regulatory scheme forbids.

Society has been willing to accept broad prosecutorial charging discretion because the criminal law has served as a vehicle for enforcing the moral code for most of Anglo-American legal history.⁸⁶ In England, the Norman kings adopted a centralized criminal justice system to solidify their control of the countryside by creating an alternative to the decentralized interclan retaliation and warfare stemming from crimes such as murder and theft.⁸⁷ The penal laws merely carried forward the moral code that had served as the simple, universally understood basis for ordering pre-Norman English society. The crimes defined at common law and their modern-day counterparts all involve conduct that can ruin the person or property of others and is universally seen as immoral. Moreover, the common law reasonably assumed that everyone knew what a crime was⁸⁸ because the law was patterned on the well settled, widely accepted contemporary moral code.⁸⁹ As long as that proposition

86. See, e.g., John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 659 (2012).

87. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 12 (4th ed. 2002).

88. See, e.g., Meese & Larkin, *supra* note 34, at 726–27 (collecting authorities).

89. See, e.g., JOHN SALMOND, JURISPRUDENCE 427 (8th ed. 1930) (“The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right.”); Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 644 (1941) (“[T]he early

was true, there was little risk of convicting a morally blameless individual. Unfortunately, however, that assumption no longer is true, as the existence of strict liability offenses proves. The upshot is that strict liability crimes pose a considerable risk that the criminal law will be misused.⁹⁰

To start with, there are too many laws today that expose someone to criminal liability for the average person to know them all. Some commentators have estimated that there are more than 4450 federal criminal statutes and more than 300,000 federal regulations that define conduct as criminal or otherwise bear on the proper interpretation of the laws that do.⁹¹ No one—no lawyer, judge, or law professor—has that knowledge. As the distinguished academic and late Harvard Law School professor William Stuntz put it: “Ordinary people do not have the time or training to learn the contents of criminal codes; indeed, even criminal law professors rarely know much about

criminal law appears to have been well integrated with the mores of the time, out of which it arose as ‘custom.’”); Meese & Larkin, *supra* note 34, at 728.

90. Today, that problem has become one aspect of a broader concern with “overcriminalization.” That neologism can be defined in several ways. *See, e.g.*, Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 719 (2013). An oft-used definition describes it as the overuse, misuse, and abuse of the penal code to address noncriminal regulatory and societal problems via the criminal justice system. *See, e.g.*, Darryl K. Brown, *Criminal Law’s Unfortunate Triumph Over Administrative Law*, 7 J.L. ECON. & POL’Y 657, 657 (2011) (“Overcriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crimes.”).

In May 2013, the Judiciary Committee of the U.S. House of Representatives created a bipartisan task force to examine the issue of “overcriminalization.” Press Release, House Judiciary Comm., House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization (May 5, 2013), *available at* <http://judiciary.house.gov/news/2013/05082013.html>, [<http://perma.cc/Zc2T-SA8B>]. On February 5, 2014, the House Judiciary Committee reauthorized the Task Force for an additional six months. *See* Press Release, House Judiciary Comm., House Judiciary Committee Reauthorizes Bipartisan Over-Criminalization Task Force (Feb. 5, 2014), *available at* <http://judiciary.house.gov/index.cfm/press-releases?ID=1B5BE8BE-FFD66D66-5887-4B51307CAF64>, [perma.cc/TJ5J-K3HE].

91. *See, e.g.*, Paul Rosenzweig, *The History of Criminal Law*, in ONE NATION UNDER ARREST: HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVIST JUDGES THREATEN YOUR LIBERTY 127, 129–130 (Paul Rosenzweig & Brian W. Walsh eds., 2010); John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND., (June 16, 2008), <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>, [<http://perma.cc/E462-XBH3>].

what conduct is and isn't criminal in their jurisdictions."⁹² Permitting the government to rest criminal liability on the fiction that the average person is conversant with the ins and outs of federal regulatory statutes, let alone the thousands of potentially relevant regulations, borders on the obscene.⁹³

Administrative regimes do not necessarily correspond to ethical codes.⁹⁴ Regulatory laws deal with the actual or potentially injurious sequelae of industrialization regardless of whether the risks are ones that the average person would know from his or her common experience. In fact, it may well be that only experienced subject matter experts know the most serious risks. Congress establishes administrative programs because it has identified an important social or economic subject in need of regular supervision (for example, pharmaceuticals). To monitor that conduct, Congress creates an administrative agency (for example, the Food and Drug Administration), authorizes the agency to hire expert staff (for example, biochemists), directs it to monitor and govern that field and its participants (for example, manufacturers), and empowers the agency to deal with old or new problems through moral suasion, legal rules, or enforcement actions (for example, press releases, regulations, seizure of adulterated drugs). But the highly scientific or technical nature of the subjects involved, as well as the evidence that must be considered in deciding whether regulation is necessary and appropriate, demands a level of education and training far above what the ordinary person possesses. It is reasonable to expect that the average person knows not to murder, rape, rob, or swindle someone else. It is unreasonable to assume that that average person has the same legal knowledge as an attorney,

92. William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000); see also, e.g., Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 107–108 (2013) (“[A]ny reasonable observer would have to conclude that actual knowledge of all applicable criminal laws and regulations is impossible, especially when those regulations frequently depart from any intuitive sense of what ‘ought’ to be legal or illegal. Perhaps placing citizens at risk in this regard constitutes a due process violation; expecting people to do (or know) the impossible certainly sounds like one.”).

93. See Meese & Larkin, *supra* note 34, at 738–48.

94. See, e.g., Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745 (2014).

let alone that he has as much scientific expertise as an agency official with a doctorate in biochemistry.

That knowledge differential becomes particularly acute when lawmakers seek to deal with scientific or technical issues through the criminal law. Congress may use expansive language in a regulatory statute in order to delegate broad implementing authority to an agency so that it has the flexibility to respond to ongoing advances in medical knowledge. To ensure that the regulated community knows exactly what is forbidden and demanded, the agency in turn frequently uses technical or scientific terminology in its implementing regulations. It may take a team of lawyers and scientists to understand exactly what those regulations mean and precisely how to comply with them. That burden may not be onerous for a Fortune 100 company that has ample resources to retain attorneys and technicians for advice-giving purposes, but the difficulty of finding and understanding the relevant regulations can unfairly tax a small firm or the average person. In many cases it may be too much to expect that a reasonable person would be able to comprehend exactly what is and is not a crime.

This creates a serious problem in criminal law. Penal code statutes that cannot be understood without consulting an attorney are traps for anyone who cannot afford legal advice before acting, a category that includes the vast majority of the public. Unduly complex criminal laws also violate the elementary constitutional law principle that the government must afford everyone notice of what the law forbids.⁹⁵ “The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”⁹⁶ Note the significance of who must be able to understand the criminal law: “a person of ordinary intelligence”—not a lawyer or biochemist of ordinary intelligence. Strict liability criminal laws governing complex scientific fields make it difficult to meet that notice standard.

Indeed, it is fair to say that many regulatory statutes are categorically different from criminal laws. The latter altogether

95. See *supra* notes 48–49 and text accompanying notes 75–78.

96. *United States v. Harriss*, 347 U.S. 612, 617 (1954).

forbid identified types of actually or potentially harmful or dangerous conduct, while the former allow certain types of such conduct to occur in limited amounts, at particular times, or by certain parties. The environmental laws, for example, allow manufacturers to discharge certain pollutants into the air, water, or land so long as a responsible party has a permit for that activity and does not exceed the maximum authorized amount each period.⁹⁷ By contrast, no one can obtain a permit to commit a bank robbery, and there is no maximum number of burglaries that a person can commit during a calendar year. If pollution is unavoidable and generating X amount of it can be and is expressly permitted, we cannot persuasively argue that pollution is as morally wrong as murder, rape, or robbery and that the criminal law must treat each harm as seriously as it treats these. Moreover, given that generating X amount of pollution is lawful, it is difficult to argue that $X + Y$ always and everywhere is clearly wrongful, particularly when Y is small, when it is unduly onerous (or expensive) to identify precisely the exact difference between those two outputs (and their effect), or when it is equally difficult to know exactly when someone crosses the line between them. The result is that the average person would not necessarily know that the *actus reus*—or “guilty act”—element of a regulatory offense is a crime. If you also consider that the subject matter being regulated is one requiring specialized scientific or technical knowledge in order to understand the process at issue or the difference between outputs X and $X + Y$, the likelihood could approach a certainty that eliminating a *mens rea* element would result in the conviction of a morally innocent party.⁹⁸

97. See, e.g., ENVIRONMENTAL LAW HANDBOOK § 6.0, at 323–44 (Thomas F. P. Sullivan ed., 21st ed. 2011) (discussing the permitting process under the Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006)).

98. See Meese & Larkin, *supra* note 34, at 742–43 (“Some public welfare laws have an expansive reach and delegate broad authority to officials to craft a detailed regulatory scheme using changing, newly available scientific data. The promulgation of implementing regulations can lead to an avalanche of positive criminal laws in one form or another. That approach may serve well the needs of officials tasked with filling in the blanks of a regulatory program, but it ill serves the interests of regulated parties, who need clearly understandable rules defining criminal liability in order to avoid winding up in the hoosegow.” (footnotes omitted)).

The environmental laws are a prime example of the problems that strict liability criminal statutes generate.⁹⁹ Pollution is unavoidable in an industrial society.¹⁰⁰ Trying to return America's twenty-first century economy to a pre-Industrial Revolution state would be like trying to disinvent the wheel. Even if it were possible, no one seriously urges that we pursue that goal. That proposition is an important one in this context. It supplies the background against which to determine whether environmental offenses are the same as common law crimes.

Congress has enacted numerous statutes in the last forty years to protect public health and the environment from being degraded or destroyed by pollution of the air, water, and land. The challenge of identifying environmentally damaging products or activities is more than Congress itself can handle, however, so Congress has enlisted the aid of executive branch components such as the Environmental Protection Agency.¹⁰¹ The EPA, in turn, has promulgated thousands of implementing regulations. To take advantage of agency expertise, Congress has granted the EPA power to investigate companies for violating the environmental laws. Congress ordinarily empowers federal agencies to impose administrative penalties or seek civil relief in federal court for environmental infractions, but those are not the only weapons available to the executive branch. Many federal environmental statutes authorize criminal punishment for violations.¹⁰² Congress created a criminal investiga-

99. For a discussion of the history of federal environmental regulation, see generally RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2004); PETER S. MENELL & RICHARD B. STEWART, *ENVIRONMENTAL LAW AND POLICY* (1994).

100. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 3–29 (1993); Meese & Larkin, *supra* note 34, at 745–46 (“[S]ome amount of pollution and waste is inevitable in a modern industrial society. There is no realistic possibility of eliminating all risk of harm from some activities. Even breathing releases carbon dioxide into the environment. The question, therefore, is not how we can eliminate pollution entirely, but how we should manage known and unknown risks from the known, inevitable consequences of running a modern economy.” (footnotes omitted)).

101. See *EPA History*, EPA, <http://www2.epa.gov/aboutepa/epa-history>, [<http://perma.cc/CQ3A-U4UH>].

102. See, e.g., Act to Prevent Pollution from Ships (APPS), 33 U.S.C. §§ 1901–1915 (2006) at § 1908(a); Atomic Energy Act of 1954, 42 U.S.C. §§ 2011–2297 (2006) at § 2273(c); Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671 (2006) at § 7412(r)(7); Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 *LOY. L.A. L. REV.* 867, 869 & n.3 (1994).

tion program at the EPA to investigate federal environmental crimes: the Office of Criminal Enforcement, Forensics, and Training.¹⁰³ The mission of the Environmental Crimes Section of the Justice Department's Environment and Natural Resources Division is to insure that environmental crimes are prosecuted.¹⁰⁴ The federal government apparently is as committed to the investigation and prosecution of federal environmental violations as it is to classic federal crimes such as mail fraud or bank robbery.¹⁰⁵

The environmental laws, however, do not follow the classic criminal law model.¹⁰⁶ Unlike common law crimes, which focus on the here-and-now harms that individuals can inflict on each other, environmental laws seek to protect entire communities against the dangerous short- and long-term hazards of industrialization. Those laws also do not target only conduct that anyone would know is criminal. "Early instances of criminal environmental enforcement focused on 'midnight dumpers,' but today's federal, state, and even local officials devote even more time and resources to the criminal prosecution of individuals and companies that run afoul of complex regulatory requirements."¹⁰⁷ Environmental laws also differ in their treatment of scienter. Some federal criminal environmental statutes require

103. See ENVTL. PROT. AGENCY, EPA PUB. #310-K-11-001, CRIMINAL ENFORCEMENT PROGRAM (2011), available at www2.epa.gov/sites/production/files/documents/oceft-overview-2011.pdf, [perma.cc/YEA5-HC83].

104. See *Environmental Crimes Section*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/enrd/ENRD_ecs.html, [perma.cc/4HME-3MFU].

105. For a history of the federal government's environmental criminal program, see ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 962-63 (6th ed. 2009); Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 792 (1991); F. Henry Habicht II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 ENVTL. L. REP. 10,478, 10,478-80 (1987); Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900, 902-12 (1991); Judson W. Starr, *Countering Environmental Crimes*, 13 B.C. ENVTL. AFF. L. REV. 379, 380-84 (1986); James M. Strock, *Environmental Criminal Enforcement Priorities for the 1990s*, 59 GEO. WASH. L. REV. 916, 917-22 (1991). For an insider's guide to the investigation of environmental crime, see STEVEN C. DRIELAK, ENVIRONMENTAL CRIME: EVIDENCE GATHERING AND INVESTIGATIVE TECHNIQUES (1998).

106. See ENVIRONMENTAL LAW HANDBOOK, *supra* note 97, § 3.4, at 80 ("Criminal provisions in environmental law challenge traditional notions of criminal conduct."); Meese & Larkin, *supra* note 34, at 743-46.

107. ENVIRONMENTAL LAW HANDBOOK, *supra* note 97, § 6.0, at 96.

proof of the same “wicked” state of mind demanded by common law crimes,¹⁰⁸ but most can lead to a conviction if a person merely knew what he was doing, even if he did not know that it was illegal or wrongful.¹⁰⁹

Proof that someone intended to flout the law may be unnecessary when the conduct itself is obviously and intentionally physically harmful or morally abusive. The same is not true for many strict liability crimes. Recordkeeping requirements, for example, may help regulatory officials keep track of the products that manufacturers purchase, use, create, or transport, but it is difficult to deem technical paperwork violations as heinous.

It is no argument that a person always can consult with a lawyer in order to know where the line falls between legal and illegal conduct. The Due Process Clause takes as a given the proposition that legal advice, though potentially valuable, is never a prerequisite to avoiding criminal liability. The Constitution places on the government the burden to guarantee that the average person can understand the criminal code. The Supreme Court has repeatedly made it clear, in cases involving challenges to criminal statutes on the ground that they are “void for vagueness,” that the standard all criminal laws must

108. *See id.* at 97–98; Toxic Substances Control Act, 15 U.S.C. § 2615(b) (2006); Ports and Waterways Safety Act, 33 U.S.C. § 1232(b) (2006); Safe Drinking Water Act, 42 U.S.C. § 300h-2(b)(2) (2006).

109. *See* KATHLEEN F. BRICKEY, ENVIRONMENTAL CRIME 25 (2008); *see also, e.g.*, *United States v. Cooper*, 482 F.3d 658, 667–68 (4th Cir. 2007); *United States v. Sinsky*, 119 F.3d 712, 715–16 (8th Cir. 1997); *United States v. Hopkins*, 53 F.3d 533, 537–41 (2d Cir. 1995); *United States v. Weitzenhoff*, 35 F.3d 1275, 1284 (9th Cir. 1993) (en banc); *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 613 (5th Cir. 1991). “Ignorance or mistake-of-law are generally not valid defenses, except perhaps for a specific intent crime that requires a knowing violation.” ENVIRONMENTAL LAW HANDBOOK, *supra* note 97, § 6.1.3, at 102 (footnote omitted). A person also can be liable for the conduct of people that he or she supervised. *See United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3d Cir. 1984) (holding that the jury may infer knowledge of the lack of a permit “as to those individuals who hold the requisite responsible positions with the corporate defendant.”); ENVIRONMENTAL LAW HANDBOOK, *supra* note 97, § 6.0, at 97 (“For management, culpability is largely a measure of whether they actively participated in or countenanced the environmental misconduct.”). *Cf. United States v. Park*, 421 U.S. 658, 677–78 (1975) (explaining that juries may infer corporate officers are aware of the facts constituting a crime without proof that they subjectively knew the facts). *But see United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 55 (1st Cir. 1991) (holding that the district court erred by providing jury instructions stating that a defendant’s status as a corporate officer was sufficient to establish knowledge requirement).

pass is whether a person of “ordinary” or “common” intelligence can readily understand what has been made a crime.¹¹⁰ That standard leaves no room for an obligation to consult with a lawyer before a person can make a decision. That may explain why the Court has never suggested that the government can avoid its obligation to enact readily understandable criminal laws by demanding that a member of the public obtain legal advice or take the risk of breaking the law.

Nor is it a defense that prosecutors can be trusted to charge only parties who defied the law. “It is inevitable that some U.S. Attorneys or Justice Department Divisions will pursue a case that the Attorney General never would prosecute. Some targets will prove just too tempting for a prosecutor to pass up.”¹¹¹ Moreover, our system rests on the principle that the law should protect individuals against the risk of arbitrary or mistaken judgment by government officials. As noted elsewhere:

One of the virtues of our system is that no one has to rely on the judgment of a benevolent king or fear the wrath of a malevolent one. *Marbury* made clear that it is the function of the

110. See, e.g., *United States v. Harriss*, 347 U.S. 612, 617 (1954) (persons of “ordinary intelligence”); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (persons of “common intelligence”).

111. Larkin, *supra* note 90, at 775 (footnote omitted). Chief Judge Alex Kozinski emphatically made that point for the Ninth Circuit en banc majority in *United States v. Nosal*:

The government assures us that, whatever the scope of the CFAA, it won’t prosecute minor violations. But we shouldn’t have to live at the mercy of our local prosecutor. Cf. *United States v. Stevens*, 559 U.S. 460, 480 (2010) (“We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”). And it’s not clear we can trust the government when a tempting target comes along. Take the case of the mom who posed as a 17-year-old boy and cyberbullied her daughter’s classmate. The Justice Department prosecuted her under 18 U.S.C. § 1030(a)(2)(C) for violating MySpace’s terms of service, which prohibited lying about identifying information, including age. See *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009). Lying on social media websites is common: People shave years off their age, add inches to their height and drop pounds from their weight. The difference between puffery and prosecution may depend on whether you happen to be someone an AUSA has reason to go after.

676 F.3d 854, 862 (9th Cir. 2012) (en banc).

written law to protect us against the mistakes of the former and the wickedness of the latter.¹¹²

Henry Hart said it well when he wrote that the notion that a person must rely for his freedom on the discretion of a prosecutor, rather than the clarity of the law, is “immoral.”¹¹³

There are, of course, remedies for those problems. One would be to require the government to prove that a person acted “willfully” — that is, with the intent to violate a known legal duty.¹¹⁴ Another remedy would be to recognize a mistake of law defense. That defense would exonerate a defendant if no reasonable person would have thought that the charged conduct was a crime and if the defendant himself did not know that those actions were illegal.¹¹⁵ Either option would limit criminal liability to parties who seek to flout the law, thereby exculpating someone who made an erroneous but reasonable judgment as to what the law permits.¹¹⁶ Of course, those remedies would do more than salve a wound; they would eliminate the disease entirely.¹¹⁷ Eliminating strict liability from the criminal law may be a sound policy, and that may be the ideal course in some cases,¹¹⁸ but reading the Due Process Clause al-

112. Larkin, *supra* note 90, at 776 (footnote omitted) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

113. Hart, *supra* note 43, at 424.

114. *See, e.g.*, *Bryan v. United States*, 524 U.S. 184, 191–92 (1998); *Ratzlaf v. United States*, 510 U.S. 135, 138 (1994); *Cheek v. United States*, 498 U.S. 192, 201 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973).

115. *See* Larkin, *supra* note 90, at 777–81; *cf.* Levenson, *supra* note 9, at 451–68 (arguing for a good faith defense to strict liability crimes). *See generally* Meese & Larkin, *supra* note 34. A mistake of law defense would be unnecessary in any case where the government must prove that the defendant acted willfully. Both concepts limit the criminal sanction to persons who intended to flout the law; the difference (potentially) is just in the burden of proof. The government must prove that a defendant acted willfully if it is an element of the offense. *See, e.g.*, *In re Winship*, 397 U.S. 358 (1970). By contrast, the legislature can place on a defendant the burden of proof for a mistake of law defense. *Cf.* *Smith v. United States*, 133 S. Ct. 714, 719–21 (2013) (defendant must prove withdrawal from a conspiracy).

116. Larkin, *supra* note 90, at 777–81.

117. *See supra* note 63.

118. A legislature may not be able to use strict liability offenses in areas where the prohibited activity abuts constitutionally protected conduct, such as conduct protected by the First Amendment. In *Smith v. California*, 361 U.S. 147 (1959), the Supreme Court held that the state must prove that a bookseller knew the content

ways to require one remedy or the other would effectively foreclose any use of strict liability crimes regardless of the benefits to regulatory enforcement that such offenses might offer.

Banking on the Supreme Court to jettison strict criminal liability, however, is risky. The Court has shown its willingness to reconsider and overrule precedents that are superseded by intervening decisions, reflect an outdated societal consensus, or sometimes were just wrongly decided.¹¹⁹ But the Court may not be willing to do so here. After all, the Due Process Clause is an odd place to look for a limitation on the legislature's lawmaking power, especially in the area of criminal law. The text of the clause does not limit a legislature's power to define a crime. In fact, with the exception of treason,¹²⁰ the Constitution does not define or regulate the elements of any criminal offense. The history of the clause reveals that the Framers' principal concern (some would say exclusive) was to prevent the executive, not Congress, from acting arbitrarily.¹²¹ Finally, the text of the clause is exceptionally vague, so vague that courts and commentators have read into it everything from a restriction on the government's ability to detain alleged enemy combatants to a right to an abortion.¹²² True, the Court has held that the Due Process Clause prohibits the government from acting in a

of his inventory was obscene before he could be convicted of distribution of obscene materials. See Packer, *supra* note 43, at 125 (discussing *Smith*).

119. See, e.g., *Allelyne v. United States*, 133 S. Ct. 2151, 2155 (2013) (overturning the rule permitting a judge to make findings that increase a mandatory minimum sentence adopted in *Harris v. United States*, 536 U.S. 545 (2002), on the ground that *Harris* mistakenly applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000)); *Atkins v. Virginia*, 536 U.S. 304, 306–07 (2002) (overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989), and ruling that the death penalty may not be imposed on someone who is mentally retarded).

120. See U.S. CONST. art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.").

121. See, e.g., Larkin, *supra* note 67, at 265–71. Compare Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010) (arguing that the Fifth Amendment Due Process Clause does not impose substantive limitations on Congress's lawmaking power, but the Fourteenth Amendment Due Process Clause does), with Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012) (arguing that neither clause limits a legislature's substantive lawmaking power).

122. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008); *Roe v. Wade*, 410 U.S. 113 (1973).

wholly arbitrary manner¹²³ and includes a substantive limitation of legislation affecting the areas of “marriage, family, procreation, and the right to bodily integrity.”¹²⁴ But the Court also has been reluctant to use the clause as an all-purpose backstop for constitutional doctrines that have a home elsewhere in that document and that are better resolved by considering one of the Constitution’s more specific provisions.¹²⁵ Given its precedents, it is doubtful that the Court would make an exception in this context and flatly outlaw any and all use of strict criminal liability, however persuasive the Court might have found the argument against strict criminal liability to be if it had arisen for the first time today.

The Due Process Clause, however, does not stand alone. As just noted, the Court has expressed a willingness to consider arguments based on other, more specific constitutional provisions. The question, then, is whether there is such a different, specific provision restricting a legislature’s authority over the use of criminal punishment in the criminal law. It turns out that there is.

IV. STRICT LIABILITY OFFENSES AND THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

A. *Challenges to Strict Liability Offenses*

The Eighth Amendment Cruel and Unusual Punishments Clause may provide a better vehicle than the Due Process Clause for the constitutional analysis of punishment for strict liability offenses. Unlike the latter, the former expressly addresses the issue of punishment, forbidding ones that are “cru-

123. See, e.g., *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845–55 (1998).

124. *Albright v. Oliver*, 510 U.S. 266, 272 (1994); see also, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 847–48 (1992).

125. See, e.g., *Lewis*, 523 U.S. at 843 (noting that substantive due process analysis is inappropriate if a party’s claim is “covered by” a different constitutional provision); *Albright*, 510 U.S. at 273 (“Where a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of “substantive due process,” must be the guide for analyzing these claims.’” (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989))).

el and unusual."¹²⁶ The history of the clause is also helpful because it speaks to the type of punishments that gave birth to the clause. The Framers took the phrase "cruel and unusual punishments" from the English Bill of Rights of 1689.¹²⁷ Historians disagree over the precise events that gave rise to the English version, but they concur that it was directed against hideously painful punishments, sanctions not authorized by Parliament, or penalties that were grossly disproportionate to the crime.¹²⁸ Although the Court has regularly made it clear that imprisonment ordinarily is a legitimate punishment for crime,¹²⁹ the Court also has concluded that a term of imprisonment can be cruel and unusual in an extreme case.¹³⁰ As a result, the question is whether the Court should decide that incarceration for a strict liability offense is a categorically forbidden punishment.

The issue is an open one under the Supreme Court's precedents. The Court has rejected due process challenges to using strict liability as a basis for *convicting* someone of a crime, but has not addressed whether a party may be *incarcerated* for such an offense. In the Court's earlier cases, the defendants chal-

126. See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

127. 1 W. & M., sess. 2, ch. 2.

128. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 967-73 & n.4, 979-85 (1991); *Gregg v. Georgia*, 428 U.S. 153, 169-70 & n.17 (1976) (lead opinion); Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

129. See, e.g., *Harmelin*, 501 U.S. at 965 (upholding a sentence of life imprisonment without the possibility of parole for a drug offense); *Rummel v. Estelle*, 445 U.S. 263, 265 (1980) (upholding a sentence of life imprisonment with the possibility of parole for a recidivist offender convicted of a minor property crime); *Badders v. United States*, 240 U.S. 391, 394 (1916) (upholding concurrent sentence of five years' imprisonment and cumulative fines on each of seven counts of mail fraud). See generally *Meachum v. Fano*, 427 U.S. 215, 224 (1976) ("[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.>").

130. See *Solem v. Helm*, 463 U.S. 277, 284 (1983) (holding that a sentence of life imprisonment without possibility of parole imposed upon a defendant who was convicted of uttering a "no account" check for \$100 and with three prior convictions for nonviolent crimes unconstitutionally disproportionate and violated the Cruel and Unusual Punishments Clause); *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding unconstitutional a ninety-day term of confinement for the offense of being addicted to narcotics).

lenged their convictions under the Due Process Clause, not their punishment under the Cruel and Unusual Punishments Clause.¹³¹ The Court therefore is free to decide whether the latter restricts the use of confinement as a sanction for regulatory violations. More specifically, the Court could decide either that a person cannot be incarcerated at all for such an offense or, if he may be confined for some brief period, cannot be *imprisoned* for it—that is, confined for more than one year¹³²—unless the government has proved that he or she knew that his or her actions were illegal, harmful, or dangerous.¹³³ The Court could reach either conclusion without walking back from its public welfare offense cases because the Court did not address this argument in any of them.

In all candor, this question is worlds apart from the mine run of Eighth Amendment issues that the Court has resolved over the last fifty years. The bulk of the Court's cruel and unusual punishments jurisprudence during that period focused on the permissible use of capital punishment—whether it can be im-

131. The initial case in this series, *Shevlin-Carpenter Co.*, involved only a judgment for damages for cutting timber on state land in excess of a permit. See 218 U.S. 57, 64 (1910). The follow-on cases of *United States v. Balint*, 258 U.S. 250 (1922), *United States v. Behrman*, 258 U.S. 280 (1922), *United States v. Freed*, 401 U.S. 601 (1971), and *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (1971), arose on pretrial motions to dismiss the indictments, so there was neither a conviction nor a sentence in any of them. The *International Minerals* case also involved only a corporation as defendant, so imprisonment was legally impossible. The penalty in *Dotterweich* was a \$1,500 fine and a six-month term of probation. See *United States v. Buffalo Pharm. Co.*, 131 F.2d 500, 501 (2d Cir. 1942), *rev'd sub nom. United States v. Dotterweich*, 320 U.S. 277 (1943). The penalty in *Park* also was only a fine. See *United States v. Park*, 421 U.S. 658, 666 (1975).

132. Traditionally, a felony was a crime punishable by death or for more than one year in a penitentiary. A misdemeanor was a crime punishable by a fine, confinement in jail for up to one year, or both. A petty offense was a subcategory of misdemeanors, punishable by a fine, up to six months' confinement in jail, or both. See, e.g., 18 U.S.C. § 1 (1982) (defining felonies and misdemeanors) (repealed); *id.* § 19 (2006) (defining petty offenses); LAFAVE, *supra* note 11, §§ 1.6(a), at 36–38, 1.6(e), at 43–44 (defining felonies, misdemeanors, and petty offenses). The Model Penal Code used a slightly different formulation. See MODEL PENAL CODE § 1.04(2) (1962) (defining a “felony” as any crime so denominated or that is punishable by more than one year's imprisonment); *id.* § 1.04(3) (defining a “misdemeanor” as any crime so denominated); *id.* § 1.04(4) (defining a “petty misdemeanor” as any crime so denominated or that is punishable by less than one year's confinement); *id.* § 1.04(5) (defining a “violation” as any crime punishable only by a fine, forfeiture, or other civil penalty).

133. See Meese & Larkin, *supra* note 34, at 770–71.

posed at all,¹³⁴ for a particular crime,¹³⁵ pursuant to a particular trial sentencing procedure,¹³⁶ or carried out in a particular manner.¹³⁷ The Court also has considered whether the sentence of life imprisonment, with or without the possibility of parole, is a disproportionate penalty for certain crimes¹³⁸ or offenders.¹³⁹ The Court has also addressed the issue of whether the government may confine before trial someone who has been arrested for a crime¹⁴⁰ and, if so, for how long.¹⁴¹ Never, howev-

134. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that the death penalty is not an inherently cruel and unusual punishment).

135. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the death penalty may not be imposed for the rape of a minor); *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that the death penalty may not be imposed on someone who did not intend to kill or contemplate that homicide was possible); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that the death penalty may not be imposed for the rape of an adult); *Gregg*, 428 U.S. at 168–95 (lead opinion) (holding that the death penalty may be imposed for murder).

136. See, e.g., *Tuilaepa v. California*, 512 U.S. 967, 975–80 (1994) (upholding use at a capital sentencing proceeding of broadly phrased aggravating factors); *Godfrey v. Georgia*, 446 U.S. 420, 432 (1980) (plurality opinion) (holding unconstitutional the overbroad interpretation of an aggravating factor permitting the death penalty to be imposed for an “outrageously or wantonly vile, horrible or inhuman” murder); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (ruling that a capital defendant has the right to raise as a mitigating factor at sentencing “any aspect of [his] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (holding unconstitutional a mandatory capital sentencing process); *Gregg*, 428 U.S. at 196–206 (lead opinion) (upholding a guided discretion capital sentencing process).

137. See, e.g., *Baze v. Rees*, 553 U.S. 35, 41 (2008) (upholding use of lethal drugs to execute a condemned prisoner).

138. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (ruling that a mandatory sentence of life imprisonment without the possibility of parole for murder may not be imposed on someone who was a juvenile at the time of the crime); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (ruling that a sentence of life imprisonment without the possibility of parole for a nonhomicide offense may not be imposed on someone who was a juvenile at the time of the crime); *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (upholding a sentence of life imprisonment without the possibility of parole under California’s “three strikes” recidivist statute).

139. See, e.g., *Miller*, 132 S. Ct. at 2475; *Graham*, 560 U.S. at 82.

140. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 355 (2001) (ruling that the Fourth Amendment does not prohibit the warrantless arrest and taking into custody of a person who has committed a minor offense punishable only by a fine); *United States v. Salerno*, 481 U.S. 739, 746–52 (1987) (upholding constitutionality of the Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3150 (2006), which authorizes pretrial detention of defendant found to be a danger to the community).

141. See, e.g., *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 58–59 (1991) (holding that the Fourth Amendment requires a hearing before a magistrate within

er, has the Court addressed the Eighth Amendment issue inhering in strict liability offenses.

Yet there is reason to believe that the Court may be willing to entertain the claim that incarceration for a strict liability offense is a categorically forbidden punishment. In *Robinson v. California*,¹⁴² the Court held unconstitutional a California state law making it a crime for a person to be a narcotics addict and imposing a punishment of no less than ninety days' incarceration for conviction of that offense.¹⁴³ The statute did not criminalize the purchase, possession, sale, or use of narcotics, or any act at all—only the state of being addicted. In theory, the statute would have allowed the state to arrest and convict anyone who admitted to being an addict at a Narcotics Anonymous meeting. Because the law imposed a criminal punishment for addiction, rather than authorizing involuntary commitment of addicts, the statute was designed simply to make it easy for the prosecution to prove its case. Under the statute, if you are an addict, you are guilty; case closed. The Court accepted the proposition that the state could regulate and punish narcotics trafficking.¹⁴⁴ The Court also wrote that, as a general matter, a ninety-day term of confinement for treatment of addiction would not be unconstitutional. In the Court's words, "Imprisonment for ninety days [for drug addiction] is not, in the abstract, a punishment which is either cruel or unusual."¹⁴⁵ But the Justices were clearly troubled by the California law. Perhaps what disturbed the Court was the Orwellian perverseness of making it a crime for someone to possess a physical disability or character trait. But it also could have been the illegitimate

forty-eight hours (exclusive of weekends and holidays) on the issue of whether there was probable cause for a warrantless arrest before an arrestee can be held for an extended period of time before trial); *Gerstein v. Pugh*, 420 U.S. 103, 111–19 (1975) (holding that the Fourth Amendment requires a prompt hearing before a magistrate of an arrestee on the issue of probable cause).

142. 360 U.S. 660 (1962).

143. *Id.* at 667.

144. *Id.* at 664 ("There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit forming drugs * * *. The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question.") (quoting *Whipple v. Martinson*, 256 U.S. 41, 45 (1921)).

145. *Id.* at 667.

use for which that statute was designed—namely, to punish conduct, itself morally blameless, by making it a crime to suffer from a physical affliction. As the Court put it, “Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”¹⁴⁶

If the latter interpretation of the *Robinson* decision is correct, the Court could find itself equally troubled by the comparable punishment of other conduct that also is morally blameless. One example might be the imprisonment of a person who unwittingly crossed a line that no reasonable person would have known existed. That prospect—the conviction of a morally blameless party—is, after all, the one that drives the Court’s void-for-vagueness jurisprudence, a doctrine that is as vibrant today as ever.¹⁴⁷ Given the Court’s past misgivings about the wisdom of incarceration for conviction of a strict liability crime,¹⁴⁸ it is not unreasonable to believe that the Court may be willing to consider the legitimacy or excessiveness of incarceration as a punishment for what the Court has termed “apparently innocent conduct,”¹⁴⁹ which may often be the case with respect to public welfare offenses.¹⁵⁰

There is a strong policy argument against the practice. Courts have deemed confinement a disfavored and unduly severe penalty for such crimes. The leading early English decisions upholding strict liability for criminal offenses dealt only with “regulatory offenses,” laws that authorized merely a fine

146. *Id.*

147. *See, e.g.,* *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

148. *See, e.g.,* *Staples v. United States*, 511 U.S. 600, 617 (1994); *Morissette v. United States*, 342 U.S. 246, 250–51 (1952); *Felton v. United States*, 96 U.S. 699, 703 (1877); *cf. Liparota v. United States*, 471 U.S. 419, 425–26 (1985).

149. *Liparota*, 471 U.S. at 426; *cf. United States v. Freed*, 401 U.S. 601, 609–10 (1971); *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971).

150. *See, e.g.,* *Graham v. Florida*, 560 U.S. 48, 59 (2010) (“The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution’s ban on cruel and unusual punishments is the ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’” (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910))); *accord* *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (“[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned to the offense.’” (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)) (internal punctuation omitted)).

or short term in jail.¹⁵¹ Some judges (albeit, not all)—including then-Judge, later-Justice Benjamin Cardozo—went even further, questioning whether imprisonment should be imposed for a public welfare offense, given its lack of a scienter requirement.¹⁵² More recently, the Supreme Court has expressed skepticism as to whether a statute lacking a scienter element, but authorizing imprisonment, should be treated in the same manner as a classic public welfare offense.¹⁵³ And commenta-

151. See, e.g., *Queen v. Woodrow*, 15 M. & W. 404, 153 Eng. Rep. 907 (Ex. 1846) (£200 fine for selling adulterated tobacco); *Hobbs v. Winchester Corp.*, [1910] 2 K. B. 471 (three months' imprisonment for selling unwholesome meat).

152. See *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474, 477 (N.Y. 1918) (Cardozo, J.) (“[I]n sustaining the power to fine we are not to be understood as sustaining to a like length the power to imprison. We leave that question open. That there may be reasonable regulation of a right is no argument in favor of regulations that are extravagant . . . This case does not require us to decide that life or liberty may be forfeited without tinge of personal fault through the acts or omissions of others.”); *id.* at 478 (Crane, J., concurring) (“I recognize that this is the law regarding many police regulations and statutes creating minor offenses, and that there is a distinction between acts *mala prohibita* and *mala in se*, but I do not believe that the Legislature is unlimited in its power to make acts *mala prohibita* with the result that an employer can be imprisoned for the acts of his servant . . . Nearly all the cases upon this subject have been those fixing a penalty to be recovered either in a civil or a criminal proceeding. Others have been prosecutions for a misdemeanor such as in this case resulting in a fine. To this extent I concede that the employer is liable irrespective of his knowledge or negligence, but when an employer may be prosecuted as for a crime to which there is affixed a penalty of imprisonment for an act which he in no way can prevent, we are stretching the law regarding acts *mala prohibita* beyond its legal limitation.” (citation omitted)); *Tenement House Dep’t v. McDevitt*, 109 N.E. 88, 90 (N.Y. 1915) (Cardozo, J.); *cf.* *Queen v. Tolson*, 23 Q.B. 168, 177 (Willis, J.) (holding that, in determining whether a criminal law dispenses with *mens rea*, “the nature and extent of the penalty attached to the offence may reasonably be considered. There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest”). *But see, e.g., State v. Lindberg*, 215 P. 41 (Wash. 1923) (holding that public welfare offense rationale also applies to a felony). See *generally Staples*, 511 U.S. at 616 (collecting cases).

153. See *Staples*, 511 U.S. at 618 (“Our characterization of the public welfare offense in *Morrisette* hardly seems apt, however, for a crime that is a felony, as is violation of [26 U.S.C.] § 5816(d). After all, ‘felony’ is, as we noted in distinguishing certain common-law crimes from public welfare offenses, “as bad a word as you can give to man or thing.” [Morissette v. United States, 342 U.S. 246, 260 (1952)] (quoting 2 [FREDERICK] POLLOCK & [FREDERICK WILLIAM] MAITLAND, HISTORY OF ENGLISH LAW 465 (2d ed. 1899)). Close adherence to the early cases described above might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense ra-

tors have noted that, given the history of the mens rea requirement in Anglo-American law, it would be “incongruous” to impose a severe punishment for violating a statute or ordinance that lacks a mens rea requirement.¹⁵⁴

In sum, there is a powerful argument that imprisonment should be disallowed as a punishment for a crime without some proof of evil intent or blameworthiness. The Eighth Amendment offers the Court a basis for decision not considered in its earlier cases, which means that stare decisis considerations do not foreclose that rule.¹⁵⁵ An Eighth Amendment analysis would enable the Court to give effect to the concern that imprisonment is an unduly severe penalty for strict liability offenses by allowing the Court to draw a line, at sentencing rather than conviction, by outlawing incarceration. That rule would considerably ameliorate the harsh effects of the current public welfare offense doctrine. A defendant could still be convicted of such a crime even if he made a good-faith error, thereby allowing the government to use strict liability offenses

tionale to interpret any statute defining a felony offense as dispensing with *mens rea*. But see *United States v. Balint*, 258 U.S. 250 (1922).”).

154. *Id.* at 617; see also, e.g., MODEL PENAL CODE § 2.05 (2012) (providing that a strict liability offense can be no worse than a “violation” and can have only monetary penalties); PACKER, *supra* note 7, at 130–31; Feinberg, *supra* note 46, at 111 (“[S]trict liability to imprisonment . . . has been held by many to be incompatible with the basic requirements of our Anglo-American, and indeed, any civilized jurisprudence.” (citations and footnote omitted)); Levenson, *supra* note 9, at 433–34 & n.168 (collecting articles arguing that punishment for strict liability crimes should be proportional to the defendant’s culpability); *supra* note 46 (collecting authorities).

155. Over the last few decades, the Court has shown its willingness to reconsider old rules if a new ground for decision is available. Compare, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding mandatory Federal Sentencing Guidelines over separation of powers-based challenges), with *United States v. Booker*, 543 U.S. 220 (2005) (holding that mandatory Federal Sentencing Guidelines violate Sixth Amendment Jury Trial Clause); compare also *McGautha v. California*, 402 U.S. 183 (1971) (rejecting challenge to purely discretionary capital sentencing schemes based on the Due Process Clause), with *Furman v. Georgia*, 408 U.S. 238 (1972) (upholding challenge to purely discretionary capital sentencing schemes based on the Eighth Amendment Cruel and Unusual Punishments Clause); compare also *Bennis v. Michigan*, 516 U.S. 442 (1996), and *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (rejecting Fifth Amendment Due Process and Takings Clause challenges to pretrial seizure and forfeiture laws), with *Austin v. United States*, 509 U.S. 602 (1993) (holding the Eighth Amendment Excessive Fines Clause prohibits excessive forfeitures).

to encourage compliance and to educate the public. But no one could be imprisoned for making this sort of honest mistake.

B. *Defenses Against Eighth Amendment Challenges*

The government has two complementary defenses. The first one draws on history, the second on reason. Those defenses are formidable but ultimately unpersuasive. They do not show that society has made the moral judgment that it is appropriate and necessary to incarcerate individuals guilty of strict liability offenses.

1. *The Prevalence of Strict Liability Criminal Laws*

The defense based on history goes as follows: For more than a century and a half, federal, state, and local legislatures have used strict criminal liability as a regulatory tool. Today, there are hundreds, if not thousands, of statutes, ordinances, and regulations on the books creating strict criminal liability for a host of actions.¹⁵⁶ Those laws also have often authorized a short period of incarceration as a potential sanction for such offenses.¹⁵⁷ The existence of those rules is longstanding, widespread, and powerful objective proof that the legal system and the public have accepted the legitimacy of incarceration for strict liability crimes. That fact is highly significant because, in construing the Eighth Amendment's Cruel and Unusual Punishments Clause, the Supreme Court has consistently given "great weight"¹⁵⁸ to the historical and contemporary prevalence of federal and state laws authorizing a particular sanction as a means of determining whether there is a consensus regarding society's approval or condemnation of a specific penalty.¹⁵⁹ Here, that consensus exists, proving, through public acceptance

156. See Meese & Larkin, *supra* note 34, at 734; Sayre, *supra* note 34, at 55.

157. For example, the New York Code authorizes confinement for several offenses. See, e.g., N.Y. ENVTL. CONSERV. LAW §§ 23-1715.5, 71-1933 & 71-2105 (McKinney 2013); N.Y. EDUC. LAW § 5003.7 (McKinney 2013).

158. Kennedy v. Louisiana, 554 U.S. 407, 434 (2008).

159. See, e.g., Miller v. Alabama, 132 S. Ct. 2455, 2470-73 (2012); Graham v. Florida, 560 U.S. 48, 58 (2010); Kennedy, 554 U.S. at 421-34; Roper v. Simmons, 543 U.S. 551, 564-68 (2005); Harmelin v. Michigan, 501 U.S. 957, 998-1000 (1991) (Kennedy, J., concurring); Ford v. Wainwright, 477 U.S. 399, 406-10 (1986); Enmund v. Florida, 458 U.S. 782, 789-96 (1982); Coker v. Georgia, 433 U.S. 584, 593-96 (1977) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 169-82 (1976) (lead opinion).

of the possibility of imprisonment for strict liability crimes, that incarceration does not offend “the evolving standards of decency that mark the progress of a maturing society.”¹⁶⁰

The prevalence of modern laws authorizing a particular sanction “begins” the Eighth Amendment analysis, because “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”¹⁶¹ Even widespread endorsement of a certain punishment, however, “does not end” the inquiry.¹⁶² As the Supreme Court has noted, although the judgment of legislatures “weigh[s] heavily in the balance,”¹⁶³ the Constitution contemplates that, at the end of the day, the courts will exercise their own judgment on the permissibility under the Eighth Amendment of a specific punishment.¹⁶⁴ In making that decision, the Court will determine whether the challenged sanction is “grossly disproportionate” to the underlying conduct,¹⁶⁵ whether the interaction of a challenged law with others on the same subject signifies that the legislature deliberately sought to impose the challenged punishment on offenders,¹⁶⁶ and whether the punishment measurably contributes to legitimate penological goals.¹⁶⁷

In this case there is objective evidence pointing in both directions. On the one hand, common law courts and scholars such as Blackstone consistently and stridently condemned or disparaged liability without culpability, which meant proof of

160. *Miller*, 132 S. Ct. at 2463 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)) (internal quotation marks omitted).

161. *Graham*, 560 U.S. at 62 (citations omitted).

162. *Kennedy*, 554 U.S. at 434.

163. *Enmund*, 458 U.S. at 797.

164. See, e.g., *Graham*, 560 U.S. at 67; *Kennedy*, 554 U.S. at 434; *Roper*, 543 U.S. at 564; *Enmund*, 458 U.S. at 797; *Coker*, 433 U.S. at 597 (plurality opinion).

165. See, e.g., *Graham*, 560 U.S. at 60; *Harmelin*, 501 U.S. at 964.

166. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2472–73 (2012) (holding that statutes that allow juveniles to be tried as adults do not necessarily prove that the legislature intended that juvenile offenders should be subject to the same full range of penalties available for adults); *Graham*, 560 U.S. at 66–67 (same); *Thompson v. Oklahoma*, 487 U.S. 815, 826 n.24 (1988) (plurality opinion) (same); *id.* at 850 (O’Connor, J., concurring in the judgment) (same).

167. *Graham*, 560 U.S. at 71 (“The penological justifications for the sentencing practice are also relevant to the analysis.”); see also *Kennedy*, 554 U.S. at 440–46; *Roper*, 543 U.S. at 571–72; *Atkins v. Virginia*, 536 U.S. 304, 318–20 (2002); *Harmelin*, 501 U.S. at 998–1000 (Kennedy, J., concurring in part and concurring in the judgment); *Enmund*, 458 U.S. at 789–96; *Coker*, 433 U.S. at 593–96 (plurality opinion).

mens rea. At one time, even the Supreme Court wrote that it would shock a universal “sense of justice” for a court to impose criminal punishment without proof of a wicked intent.¹⁶⁸ On the other hand, legislative bodies have frequently enacted such laws over the last 150 years and they are ubiquitous today, which signals public acceptance of strict liability. How, then, should a court weigh that evidence?

On its face, the existence of competing evidence might appear to create a tie. Nonetheless, if it is true that quantity creates a quality of its own,¹⁶⁹ the historical usage and contemporary prevalence of statutes and ordinances should receive greater weight than the views of ancient scholars and common law judges because the former provides objective evidence of widespread political endorsement of the proposition that strict liability is legitimate and is necessary to protect the public. Yet strict liability laws may not be entitled to victory based on their sheer numbers alone. It may be illuminating to ask what would motivate an assembly to enact a criminal law devoid of any consideration of a party’s state of mind in order to discern whether such laws truly reflect a representative societal judgment regarding the morality of a particular law or the conduct it regulates, or whether they serve less noble interests. If the latter is true, then critics and defenders of strict criminal liability may have entirely different interests at stake, may be advancing materially different concerns, and therefore may be arguing past each other. It therefore is necessary to analyze *why* each side has taken its respective position.¹⁷⁰

168. See *Felton v. United States*, 96 U.S. 699, 703 (1877) (“But the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions, and the usual means to comply with them are adopted. All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one.”).

169. A quotation often attributed to Josef Stalin, who was allegedly referring to the greater number of tanks in the Soviet army vis-à-vis the superior quality of German tanks.

170. The Supreme Court made that point in *Miller*, noting that in some instances “simply counting [statutes] would present a distorted view.” 132 S. Ct. at 2472. There, the Court found it unpersuasive that twenty-nine jurisdictions mandated the sentence of death or life without parole for murder by juveniles because in most of those states those punishments were available only because other statutes made juveniles eligible to be tried as adults. *Id.* at 2471–73. Accordingly, “the stat-

Common law authorities and contemporary scholars have criticized strict liability because, by eliminating any inquiry into a defendant's state of mind, it fails to ensure that punishment corresponds to blameworthiness or adequately promotes retribution, deterrence, incapacitation, or rehabilitation. Early scholars such as Blackstone and more contemporary ones such as Lon Fuller, H.L.A. Hart, Herbert Packer, and Herbert Wechsler have reasoned that it is fundamentally unfair to punish someone who acted without knowledge that his conduct was illegal or inherently wrongful and that doing so does not serve the legitimate purposes of the criminal law. Strict liability does not advance retribution because a person who unwittingly breaks the law harbors neither ill intent nor any purpose to violate a known legal duty.¹⁷¹ Strict liability does not advance deterrence because someone must know where a line is drawn in order to avoid stepping over it. And strict liability obviously does not advance incapacitation or rehabilitation because a morally blameless individual, while perhaps in need of information about what the law requires, certainly is not an ongoing threat to society and does not possess a wicked state of mind that is in dire need of correction. In sum, strict liability's critics reject each traditional rationale for using that theory of criminality.

By contrast, statutes and municipal ordinances may authorize confinement, not because the legislature believes that an offense is sufficiently heinous that it merits that penalty, but on practical or cost-saving grounds.¹⁷² A legislature or municipal council may authorize a short term of imprisonment for a regulatory offense because it prefers to use already existing, already funded, ready for duty local police officers as the personnel responsible for enforcing a regulatory program, rather than creating a new cadre of civil enforcement specialists. The latter option carries with it a handful of considerable new expenses for a state or local budget, such as salaries, medical and life in-

tory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration." *Id.* at 2473 (quoting *Graham*, 560 U.S. at 67) (internal quotation marks omitted); see also *supra* note 167 and accompanying text.

171. See, e.g., *Graham*, 560 U.S. at 71; *Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.").

172. See Larkin, *supra* note 90, at 737-39.

surance, pensions, equipment, office space, and the like. The money to pay for those expenses must come from somewhere, which means that officials must take funds from somewhere else in the budget, find a new revenue source, or go back to the well of an old one. Politicians, however, are unlikely to find any of those options attractive. The first one exacerbates whatever rivalry already exists among legislators and the special interests supporting them for scarce public funds. Moreover, transferring funds from one purpose to another makes political enemies out of the losers in the budget battle. The second option—finding a new, previously untapped source of revenue—also is unlikely to prove successful. There are few, if any, such sources out there. If there were any, another legislator surely would have started to milk it for an existing program. Even if one were to exist, legislators would find themselves engaged in the same competition and enemy-making that they already experience when fighting over current receipts. The last option—raising taxes on the public or businesses to fund the new cadre of civil investigators—demands that legislators persuade the public not only as to the necessity of the new program, but also as to the need for them to pay for it. Few elected officials today, however, have either the rhetorical skills or the courage to make that attempt.

Accordingly, legislators are likely to hunt for an enforcement option that does not require increased expenditures. Most are likely to decide that giving the police a new regulatory ordinance to enforce perfectly suits their needs. Adding to the number of laws that the police must investigate does not require a “boost” in law enforcement salaries or other expenditures. Of course, law enforcement officers have only a finite amount of time to devote to their tasks, and adding to the responsibilities officers already have necessarily reduces the time that they can use to enforce the criminal laws that the police historically have enforced, such as the laws on murder, rape, and robbery. Over time, diverting the police away from their traditional responsibilities will dilute their effectiveness in that regard and could lead to an increase in the crime rate. Politicians, however, may well conclude that the new duties placed on the police are cost-free *to the politicians themselves*, even if not to the public, for a number of reasons: those duties will consume only a marginal amount of officers’ time; any increase in

the crime rate will not occur for at least several years (read: several election cycles); criminologists (and political opponents) will not be able to pinpoint those new duties as *the* cause of any increase in crime; and, if worse comes to worst, legislators always can respond to that “crime wave” by enacting still more criminal laws. Making the police enforce new regulatory laws therefore might seem entirely cost-free.

What is more, legislators may see two affirmative benefits from giving the police that job. One is that the police may be able to enforce a regulatory program more effectively than civil inspectors, even though it is only one of their many assignments. The reason quite simply is that a police officer evokes greater fear and receives greater respect than that for which any civil inspector can even hope. The public treats police officers with an esteem and deference never displayed for (what in New York City are called) “square badge” civil inspectors who cannot make arrests, who can only issue tickets or summonses (think “meter maids”), and who never are the subjects of films or television shows portraying their bravery.¹⁷³

Making a regulatory violation a crime also affords the administrative field at stake a certain respectability that goes along with devoting criminal justice system resources to address a problem, the rationale being that, because society uses the criminal law only to punish our worst sins, making (for example) environmental violations a crime treats them with the same seriousness that common law crimes receive. That course, moreover, can reward the advocates in a field for their political support. Legislatures also may authorize a short period of confinement for a regulatory offense for no reason other than to entice the police to treat a code violation as a serious matter, instead of deeming it no more important than an overtime parking infraction. Finally, local assemblies may believe that having the local police force enforce health and safety codes is a money-making activity. After all, police officers already are in place to patrol the community, they are authorized to enforce the local code, and every fine recovered by the government is found money.

173. *See id.* at 738.

The point is not that there is something improper about using police officers to enforce civil laws. The federal and state governments may empower FBI agents and police officers to enforce the full panoply of criminal and civil laws for whatever reasons those governments see fit. The point is that turning a civil or administrative infraction into a crime punishable by a short term of confinement may be done simply for economic reasons that do not remotely express society's moral condemnation of the actions that constitute the underlying crime. That is important. The Supreme Court looks to statutes as objective evidence of contemporary moral judgments about the need for a specific punishment to serve a legitimate purpose of the criminal law. Enlisting the police as civil inspectors because doing so is less expensive than outfitting a new regiment of government personnel for that task does not reflect any moral judgment at all; it is simply a dollars-and-cents decision. Of course, running the government and enforcing the law in an efficient manner is a legitimate and valuable endeavor, one that government officials should and must pursue. But efficiency is not everything. Turning regulatory infractions into crimes because criminal enforcement is more efficient than civil enforcement may be fiscally responsible, but it does not reflect society's serious, sober, moral decision that incarceration is an appropriate sanction for the conduct made a crime. If the latter is what we are concerned with—and for purposes of the Cruel and Unusual Punishments Clause, it is—then the ubiquitous presence of strict liability crimes authorizing incarceration does not represent “the evolving standards of decency that mark the progress of a maturing society.”¹⁷⁴

The bottom line is this: Assemblies may enact statutes and ordinances authorizing confinement for regulatory offenses because they are a sensible, cost-effective way to enforce an administrative program, rather than because incarceration manifests a collective judgment regarding the seriousness of a violation. If that is the case, the existence of an authorized term of confinement for a regulatory violation is not the type of ob-

174. *Miller*, 132 S. Ct. at 2463 (citations omitted).

jective evidence of society's moral judgment that has informed the Supreme Court's decisions in the past.¹⁷⁵

2. *The Need for Deterrence*

The argument from reason goes as follows: Strict liability is a necessary deterrent in modern industry. Only strict liability provides the additional incentive necessary to protect the public against dangerous industrial activities. A liability standard that avoids any inquiry into intent not only makes proof of guilt easier at trial, but also provides a markedly greater incentive to companies and individuals to be especially careful at work. When the only issue at trial would be whether the accused committed the actus reus element of a crime, parties potentially at risk will take precautions to steer clear of the line dividing lawful from unlawful conduct and to ensure that no harm comes to pass. The use of strict liability therefore serves the public welfare in two ways: by convincing parties who might wish to skirt the line of illegality to avoid entering the field of work so regulated, and by promoting caution in whoever chooses to participate in the relevant enterprise.

Proponents would further argue that imprisonment also is a necessary penalty for that deterrent to have its intended effect. Fines merely increase the cost of doing business, and the differential can be passed along to consumers. By contrast, business officials must serve a sentence of incarceration themselves, and only the prospect of confinement, to use the vernacular, will "get their attention." Because the extent to which the criminal law promotes deterrence is one that is peculiarly within the province of the legislature to decide,¹⁷⁶ elected assemblies should be free to conclude that incarceration for strict liability offenses is a legitimate and necessary tool in certain fields. That principle holds true even when the underlying regulated activity—for example, the manufacture and distribution of pharmaceuticals—is socially desirable. Perhaps strict criminal liability backed by a term of

175. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (lead opinion) ("[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.").

176. See, e.g., *supra* note 73 and accompanying text.

incarceration has the potential for overdeterrence and leads risk-averse parties to avoid entering productive lines of business out of fear of winding up in prison, thus producing a result that is socially undesirable. But making such tradeoffs is quintessentially the type of economic, social, and political judgment that the law has always entrusted to legislatures.¹⁷⁷ Finally, a short period of custody is not an unduly onerous penalty to impose on someone for injuring members of the public or for making the public bear serious health or financial risks.

The flaw in that defense, however, is that it is overbroad. The issue is not whether strict liability offenses generally could have a deterrent effect, but whether using those laws makes a marginal contribution to the legitimate purposes of the criminal justice system atop the alternatives that exist. The precise question to be answered is whether it is necessary to use the incarceration of blameless individuals as a penalty for an offense given all of the other potentially available criminal, civil, and administrative sanctions that society can employ—compensatory damages, punitive damages, civil and criminal fines, license revocation, disbarment, compliance monitors, and the like—to protect the public against the dangerous harms of industrialization. If penalties other than imprisonment can equally protect that interest, incarceration entails the needless infliction of pain on individuals.

To start with, the criminal law can hold corporations and other artificial business entities strictly liable for violations committed by company directors, officers, and employees.¹⁷⁸

177. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 998–99 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *Gore v. United States*, 357 U.S. 386, 393 (1958) (“Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy.” (citations omitted)); Wasserstrom, *supra* note 56, at 739–40.

178. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 498 (1909); see also *United States v. A & P Trucking Co.*, 358 U.S. 121, 123–27 (1958) (same rule applies to partnerships); *United States v. Adams Express Co.*, 229 U.S. 381, 389–90 (1913) (same rule applies to joint stock associations). Whether corporations should be subject to criminal prosecution is a hotly debated issue. See, e.g., WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY* (2006); John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J.

Corporations, of course, cannot be imprisoned, but they can be made to feel the brunt of any misconduct through a panoply of sanctions. Administrative and civil injunctive remedies can prevent dangerous products from entering interstate commerce. Insurance requirements guarantee that firms so engaged are solvent and capable of compensating victims of tortious activities. Individuals can be fined for their parts in offenses, and a judgment of conviction leads to the loss of various privileges, such as the right to practice a particular profession, and constitutional rights, such as the right to vote.¹⁷⁹ Licensing requirements limit to qualified parties the ability to enter into particular lines of work.

Limiting incarceration to morally culpable parties protects the public against willful or dangerous criminality without punishing blameless individuals. That approach can be accomplished by permitting a defendant to raise a mistake of law defense at sentencing, even if not at trial. A mistake-of-law defense to incarceration would allow the government to use the criminal process to enforce regulatory requirements against individuals who intended to flout the law, while avoiding the incarceration of individuals who reasonably believed that their conduct was permissible. Such a defense would accommodate the government's interests in protecting the public and the public's interests in avoiding the imprisonment of morally blameless parties.¹⁸⁰

All that is not to denigrate the value of the administrative process, the regulatory laws, or the process for enforcing them. Administrative machinery is a valuable means of policing society. Expert agencies are in a better position than Congress to

LEGAL STUD. 319 (1996); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833 (2000); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996); Lynch, *supra* note 36. But there is no doubt that, under the law in effect today, they are.

179. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (holding that states may disenfranchise felons); JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 105–37 (2003) (discussing collateral consequences of a felony conviction); Larkin, *supra* note 13, at 21–22 (collecting examples of collateral consequences of a conviction).

180. For a discussion of the elements of a mistake-of-law defense, see Larkin, *supra* note 90, at 777–81; Meese & Larkin, *supra* note 34.

flesh out the meaning of terms such as “hazardous waste” because subject matter experts staff them. Agencies also may need to resort to the criminal process to ensure that manufacturing plants abide by legal requirements. Criminal prosecution of parties who willfully violate federal regulatory laws, or of the corporations that employ them, may successfully achieve more compliance than consent decrees and civil fines. Harsh language will not have the necessary effect. But imprisonment of someone who did not intend to flout the law is a horse of a different color. It should be forbidden.

V. THE REMEDY FOR AN EIGHTH AMENDMENT VIOLATION

The last issue is one of remedy. Does the Eighth Amendment prohibit any term of incarceration for a strict liability crime—even a 72-, 48-, or 24-hour period in a local jail—or only longer terms of confinement? The argument would be that it is irrational to distinguish between incarceration for misdemeanors and felonies. The line between confinement in jail and in prison is arbitrary. Both facilities serve as places of incarceration, and drawing the line at one year’s confinement is entirely subjective. The courts could just as easily draw a line at six months’ (or at five years’) confinement as at one year.¹⁸¹ Besides, the Fourth Amendment permits the government to hold a suspect in custody for forty-eight hours before bringing him or her before a magistrate for a hearing to determine whether there is probable cause to hold him or her in custody pending trial, even if the offense cannot lead to *any* period of confinement.¹⁸² It therefore would be irrational to adopt a rule prohibiting someone from being confined for a comparable period after being *convicted* of such an offense.

181. *See, e.g.,* United States v. Nachtigal, 507 U.S. 1, 5–6 (1993) (holding that a defendant has the right to a jury trial only if the authorized punishment is more than six months’ imprisonment).

182. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 355 (2001) (holding that the Fourth Amendment does not forbid the warrantless arrest of a person suspected of committing an offense for which incarceration is not an authorized penalty); Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 58–59 (1991) (holding that the Fourth Amendment requires that the state hold a probable cause hearing within forty-eight hours after making a warrantless arrest).

Here, as elsewhere in constitutional law, principle and expediency collide. If incarceration is an unjust penalty for strict liability offenses, a rule that no one may be incarcerated for *any* period of time for committing a strict liability crime is superior to a rule limited to felony convictions. The Eighth Amendment principle is the same in both cases. Moreover, the Court has used that line for purposes of the Sixth Amendment's Counsel Clause. The state cannot imprison an indigent offender for a crime if it did not afford him or her the right to counsel at trial.¹⁸³ Nonetheless, the number of state statutes and ordinances that authorize some period of confinement for public welfare violations may be too great for the Supreme Court to put aside. The Court might believe that outlawing any period of incarceration for strict liability offenses is too disruptive to the criminal justice system.

If the Court declined to forbid imprisonment altogether, it could draw the line at one of two alternative places. The Court could prohibit incarceration for any period in excess of six months' confinement. The Court has drawn that line for purposes of the Sixth Amendment's Jury Trial Clause, requiring that the defendant receive on demand a jury trial for any offense punishable by more than six months' imprisonment.¹⁸⁴ Alternatively, the Court could use the distinction between sentencing an offender to jail or to prison, with the latter reserved for offenders sentenced to more than one year's imprisonment.¹⁸⁵ That distinction also is far from irrational. The common law drew it for several important purposes. Felonies were capital crimes; they were not bailable offenses; and the accused did not have a right to representation by counsel. Misdemeanors were exactly the opposite.¹⁸⁶ Modern-day criminal law has carried forward the distinction between felonies and misdemeanors in a variety of contexts.¹⁸⁷ For example, a felony conviction may lead to the deprivation of certain rights, such as the right to vote. Misdemeanors

183. See *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).

184. See *Nachtigal*, 507 U.S. at 5–6.

185. See *supra* note 132.

186. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 60–61 (1932); BLACKSTONE, *supra* note 16, at *355; FREDERICK W. MAITLAND & FRANCIS C. MONTAGUE, *A SKETCH OF ENGLISH LEGAL HISTORY* 150 (1915).

187. See *supra* notes 132, 152.

meanor and minor offense convictions do not necessarily carry the same disqualifications. Atop that, the Supreme Court has not shied away from drawing reasonable lines when doing so is necessary to enforce a constitutional right.¹⁸⁸ The line between felonies and misdemeanors is a reasonable one that courts can readily apply in an objective fashion.

Whatever line the Court may draw is far less important than the fact that it draws one. Society should not refrain from correcting injustices whenever they are found, even if a search for perfect justice would be futile. The perfect should not be the enemy of the good.

VI. CONCLUSION

The Supreme Court long ago rejected due process challenges to the government's use of strict liability offenses, but the Court has never considered the issue of whether imprisonment for such crimes violates the Cruel and Unusual Punishments Clause. Being unable to persuade the Court to forbid strict liability crimes altogether, defendants incarcerated for those crimes are likely to argue that their punishment is cruel and unusual. It therefore may not be long before the courts, including the Supreme Court, must finally address the issue. When that day arrives, the Court should limit the penalties that can be imposed for strict liability crimes by forbidding any period of incarceration altogether or, at least, by outlawing imprisonment. The Constitution should not allow a person to be imprisoned for committing a strict liability offense.

188. See, e.g., *Maryland v. Shatzer*, 559 U.S. 98, 117 (2010) (holding that the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), permits reinterrogation of a suspect who has asked for counsel fourteen days after he has been released from custody); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 58–59 (1991) (holding that the Fourth Amendment requires that the state hold a probable cause hearing within forty-eight hours of making a warrantless arrest); *Ballew v. Georgia*, 435 U.S. 223, 245 (1978) (holding that the Sixth Amendment Jury Trial Clause requires a jury of at least six persons); *Argersinger*, 407 U.S. at 40 (holding that the Sixth Amendment Counsel Clause prohibits imprisonment for any defendant convicted of a felony or a misdemeanor who was not represented by counsel at trial and did not waive that right).