THE respective competences of courts and legislatures can never be finally settled. Like all matters of political organization, the subject is open to continuing interpretation and debate. In the substantive criminal law, the relation between courts and legislatures is prescribed by three doctrines. The principle of legality, or *nulla poena sine lege*, condemns judicial crime creation. The constitutional doctrine of void-for-vagueness forbids wholesale legislative delegation of lawmaking authority to the courts. Finally, the rule of strict construction directs that judicial resolution of residual uncertainty in the meaning of penal statutes be biased in favor of the accused. Together, these three doctrines prescribe a coherent, if slightly unrealistic, scheme of judicial incompetence in the formulation of substantive criminal law.

My purpose here is to examine this scheme and to suggest a restructuring of the normative constraints on judicial innovation in the penal law. In particular, I believe that the rule of strict construction—at least as it is conventionally understood—is, and probably should be, defunct. What is needed in its place is a reformulated guide to the interpretation of penal statutes—one that identifies more precisely the real dangers of judicial innovation, but that otherwise allows a more practical accommodation between judicial and legislative functions. It is toward that understanding that this discussion aims.

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I. THREE DOCTRINES

The principle of legality forbids the retroactive definition of criminal offenses. It is condemned because it is retroactive and also because it is judicial—that is, accomplished by an institution not recognized as politically competent to define crime. Thus, a fuller statement of the legality ideal would be that it stands for the desirability in principle of advance legislative specification of criminal misconduct.¹

Today, this understanding of the legality ideal is firmly established. It is, as Herbert Packer said, "the first principle" of the criminal law, of "central importance" in academic discussions of the subject, and all-but-universally complied with in this country.² Yet, for all its fundamentality, the principle of legality has a curiously obscure history. Although there may have been ancient antecedents,³ the categorical insistence on advance legislative crime definition is clearly a modern phenomenon. In fact, the legality ideal is an explicit and self-conscious rejection of the historic methodology of the common law. When a legal order rejects its past, one expects to find an obvious turning point, a crisis or revolution, some watershed event from which the currents begin to flow a different way. The triumph of legality, however, is not so clearly marked.

This much seems to be widely accepted: that the modern insistence on advance legislative crime definition sprang from the continental European intellectual movement known as the Enlightenment;⁴ that the legality ideal was exported to the emerging American nation along with other aspects of Enlightenment ideology;⁵ and that the idea was quickly taken up by American reform-

¹ This formulation, and a good deal of the discussion that follows, is taken from the Notes on the Principle of Legality in P. Low, J. Jeffries & R. Bonnie, Criminal Law: Cases and Materials 36-45 (1982).

² H. Packer, The Limits of the Criminal Sanction 79-80 (1968). The widespread acceptance of these assertions can be documented by a review of current casebooks on the criminal law. See infra notes 34-35.


⁴ For a useful overview, see H. Commager, Jefferson, Nationalism, and the Enlightenment 3-30 (1975).

⁵ Of special importance in the development of the criminal law were the works of Montesquieu and Caesar Beccaria, both of whom were widely read in this country. See C. Beccaria, An Essay on Crimes and Punishments (2d Am. ed. 1819) (1st ed. n.p. 1764); C. Montes-
ers who tried to replace the common law of crimes with systematic legislative codification. But these early codification efforts failed, and by the mid-nineteenth century the reform movement had spent its force in a largely futile attack on the American "reception" of English common law. This reception seems to have embraced not only the roster of particular offenses defined by the English courts, but also the familiar and related assumption of


For a different but ultimately not inconsistent account of the emergence of hostility to judicial innovation in the criminal law, see M. Horwitz, The Transformation of American Law 1780-1860, at 9-16 (1977). Horwitz notes that the attack on common law crimes "emerged from a distinctively post-revolutionary conviction that the common law was both uncertain and unpredictable." Id. at 14. Horwitz relates this development to a "profound change in sensibility" about law in general—namely, the emergence of an instrumental conception of the law.

* See Beckman, Three Penal Codes Compared, 10 Am. J. Legal Hist. 148 (1966) (analyzing codes drafted by Thomas Jefferson, Edward Livingston, and David Dudley Field and surveying the intellectual antecedents of each); see also Bloomfield, William Sampson and the Codifiers: The Roots of American Legal Reform, 1820-1830, 11 Am. J. Legal Hist. 234 (1967) (recounting the career of a bitter opponent of the American reception of English common law and a fiery agitator for an American version of the Code Napoleon); Kadish, Codifiers of the Criminal Law: Wechsler's Predecessors, 78 Colum. L. Rev. 1098 (1978) (analyzing the codification efforts leading up to the Model Penal Code).

In the early nineteenth century, the hostility to common-law crimes was powerfully supported by St. George Tucker and Peter DuPonceau. See W. Blackstone, Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia (St. G. Tucker ed. 1803); P. DuPonceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States (1824). As is recounted more fully in notes 9-15, infra, such views apparently did not prevail until well into the twentieth century. Cf. C. Cook, The American Codification Movement: A Study of Antebellum Legal Reform 420-36 (1974) (concluding that the codification movement had largely run its course by the 1840's).

Jefferson's penal code was enacted by Virginia in 1797 but repealed three years later. Beckman, supra note 6, at 152-59. Livingston's penal code for Louisiana was never adopted, despite his success in codifying other fields of law. Id. at 160-67.

Field's criminal code was finally enacted by New York in 1881, and codes based on his draft became law in several other states. Id. at 188-73. Field's work, however, was far less radical than that of his predecessors. It was an effort to revise the common law rather than to displace it. See Wagner, Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States, 2 St. Louis U.L.J. 335, 348-49 (1953). As Professor Kadish points out, "Field's paramount concerns were those of the professional lawyer, not radical reform." Kadish, supra note 6, at 1134.

* See Hall, The Common Law: An Account of Its Reception in the United States, 4 Vand. L. Rev. 791 (1951). As Hall recounts, all thirteen of the original states and most of the later ones adopted English common law insofar as it was deemed applicable to local conditions.
residual judicial authority to create new crimes should the need arise. That such authority was widely recognized is suggested by some early cases and by the subsequent observations of leading commentators. Even as late as 1900, there seemed to be no

* For an illustrative early case, see Commonwealth v. Gillespie, 1 Add. 267 (Pa. 1795), where an indictment for tearing down an advertisement for a tax sale was upheld despite the absence of either statute or precedent criminalizing such conduct. The court relied on an analogy to the private tort claim that would have been recognized for tearing down an advertisement for a private sale. See also State v. Buckman, 8 N.H. 203 (1836), where the court upheld a conviction for putting a dead animal in another's well. The court reasoned that the act complained of was analogous to established common-law offenses. Id. at 205-06.

It should be noted, however, that such explicit reliance on analogical reasoning was relatively rare. A much more common response to the demand to punish conduct nowhere specifically proscribed was for the court to announce a new application of an “established” principle of common-law criminalization. Because those principles were often articulated at a very high level of abstraction (see, e.g., infra note 10 for the very broad rubrics of criminalization recited by Francis Wharton), specification of a new “application” was often functionally indistinguishable from what we today would call judicial crime creation.

Too much is sometimes made of the contrary federal experience. In United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812), the Supreme Court disallowed federal prosecution for non-statutory offenses. This result was based in part on a separation-of-powers objection to judicial crime creation, but in part it derived from a federalism objection to the generalized assertion of lawmaking authority by the national government. See id. at 33 (“The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve.”). Thus, in the federal context, the concern for judicial usurpation of the legislative function was interlocked with a concern for national usurpation of state authority. Together these concerns proved strong enough to override the tradition of the common law. See also United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816) (where the requirement of a statute to support federal prosecution was reaffirmed despite the opposing view expressed by Justice Story sitting as Circuit Justice). For further comments on Hudson & Goodwin and the problems of a federal common law of crimes, see G. White, The Marshall Court and Cultural Change, 1815-36, ch. 3 (forthcoming).

10 The most influential criminal law commentators of the 19th century were Joel Bishop and Francis Wharton. See generally G. Mueller, Crime, Law, and the Scholars 35-45 (1969).

Bishop’s Commentaries on the Criminal Law was first published in 1856 and went through eight editions in the succeeding 36 years. His views on the principle of legality may fairly be termed ambiguous. On the one hand, he said that the courts are limited to the materials provided by common and statutory law and “cannot take upon themselves the legislative duty of creating laws to supply a deficiency.” 1 J. Bishop, Commentaries on the Criminal Law § 88, at 85 (1st ed. Boston 1856). On the other hand, he plainly envisioned an open-ended approach to determining what might be included in the common-law inheritance:

The common law, then, is not like the statute law, fixed and immutable but by positive enactment, except where a principle has been adjudged as the rule of action. . . . Thus we see in what sense the common law is fixed, and in what progressive; it is fixed, in adherence to established doctrines; progressive, in its adaptation to the ever varying condition of human society. And this progressive, flexible character, is manifest as well in its adjudications in criminal as in civil cases.
shared and settled understanding of judicial incompetence to create new crimes.\textsuperscript{11}

\textsuperscript{11}As it happens, a number of treatises on criminal law were published in or shortly before 1900, but none achieved the stature of Bishop's or Wharton's. Collectively, however, these works are interesting in what they reveal about the perceived possibility of judicial crime creation at the start of the 20th century.

Other treatises seem to support, or at least to contemplate, continued exercise of judicial lawmaking authority. For example, William Clark insisted on advance crime definition, but did not require such advance definition to be legislative. See W. Clark, Hand-book of Criminal Law 3 (1st ed. 1894). Later discussion suggests that Clark's adherence to this requirement was more formal than substantive. Clark insisted that the common law had to "prohibit" an act at the time it was committed, id. at 19-20, but he described as prohibited by the common law acts violative of the very general principles of the sort described by Wharton. See supra note 10.

Much more clearly supportive of judicial crime creation is Emlin McClain, who declared that "where the common law as to crimes is still in force [as it was in most states], the courts have the power to punish acts injurious to the public other than those prescribed by statute . . . ." 1 E. McClain, A Treatise on the Criminal Law 19-20 (1897). In another passage, McClain wrote that "[a]ll crimes that injuriously affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they affect the public policy or economy." Id. at 19-20 n.5.

To the same effect is 1 W. Clark & W. Marshall, A Treatise on the Law of Crimes (1st ed 1900). These authors explained their understanding of the methodology of the common law as follows:

[I]t is the duty of the courts to determine what the established rules and customs of the common law are, and then to apply them to the facts of the particular case . . . . It is not necessary that they shall be able to point to a decided case exactly similar in its facts. It is sufficient if the facts bring the case within established principles.
The true explanation for the nineteenth-century decline of judicial crime creation may be not so much rejection as desuetude. Courts throughout the nineteenth century found frequent occasion to invoke previously defined non-statutory crimes, but a progressively infrequent need to define new ones. Both statute and precedent accumulated over time. Gaps in coverage were met by new legislation or filled in gradually by decisional accretion. In either event, the sources of law became more elaborate, detailed, and particularized, and the need to rely on very broad rubrics of common-law authority accordingly declined. By 1900 even those who asserted the continued vitality of judicial crime creation noted the paucity of recent example.12 A reasonably diligent search of the decisions of this century has not uncovered more than two clear-cut illustrations of acknowledged judicial creativity in the criminal law.13

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1 See, e.g., 1 E. McClain, supra note 11, at 19-20 ("very few instances will be found among the modern cases in which the courts have taken it upon themselves to declare acts criminal which do not come within the description of well-recognized common-law offenses").

12 See Commonwealth v. Donoghue, 250 Ky. 343, 63 S.W.2d 3 (1933); Commonwealth v. Mochan, 177 Pa. Super. 454, 110 A.2d 788 (1955). In Donoghue the court upheld an indictment for participation in "a nefarious plan for the habitual exaction of gross usury" despite the absence of any prior definition of such a crime. 250 Ky. at 355, 63 S.W.2d at 8. Mochan affirmed a misdemeanor conviction for making obscene telephone calls, again despite the absence of either statute or precedent condemning such misconduct.

13 The dearth of unambiguous modern illustrations of judicial innovation in the penal law is especially interesting in light of the expansive assertions of such authority made in this century. See, e.g., 1 F. Wharton, Wharton’s Criminal Law (12th ed. 1932) (1st ed. Philadelphia 1846), where the following hypothetical is propounded with no apparent sense of unease about judicial authority to obtain this result:

The banks of a canal, for instance, or the embankments of a railroad, are wantonly torn down by a marauder. . . . [N]o one has heretofore been prosecuted for doing this particular thing. Is the offense indictable as malicious mischief? It certainly would not be where nobody but the owner is affected by the trespass, and where no specific malice to the owner is shown. Yet as it is in consequence of such danger to the public if canals or railroads be subject to degradations of this kind—i.e., on grounds of public policy—such an offense would be held indictable.

Id. § 17, at 22 (footnote omitted).
Thus, it is not surprising that Herbert Packer detected “something of an academic ring” to discussions of legality,14 or that first-year law students often find the issue disturbingly remote. Judicial crime creation is a thing of the past. It is both unacceptable and unnecessary. That is not to say that the concerns of legality are never tested, but only that they arise under the subsidiary doctrines of vagueness and strict construction—doctrines that, although of very different origin, are used today to implement the legality ideal. In fact, it may be that the usual view of the vagueness doctrine as an offspring of the more general concept of legality turns history on its head. Academic celebration of the legality ideal seems to have flowered after, not before, judicial crafting of the modern vagueness doctrine. It seems likely, therefore, that the contemporary insistence on the principle of legality as the cornerstone of the criminal law may have sprung in part from the desire to establish a secure intellectual foundation for modern vagueness review.15

14 H. Packer, supra note 2, at 80. It is perhaps instructive that Packer’s explication of the legality ideal focuses on cases from 1779, 1799, and 1812. See id. at 80-85.

15 These few speculations are all that currently survive of a once expansive ambition to chart the intellectual history of the legality ideal in this country. As the preceding footnotes suggest, I do not think the principle of legality can meaningfully be traced to ancient antecedents, nor do I think that it can be taken merely as a long-belated triumph of 18th-century liberalism. Rather, the widespread and conventional acceptance of the principle of legality as an articulated norm of American criminal law seems to date from the 1930’s and 1940’s. Evidence for that view comes from the explicit attention given to the legality concept in three influential casebooks published in the latter decade. See J. Hall, Cases and Readings on Criminal Law and Procedure 1-45 (1st ed. 1949); J. Michael & H. Wechsler, Criminal Law and Its Administration 1072-92 (1940); J. Robinson, Cases on Criminal Law and Procedure 1-3 (1941).

Two explanatory factors stand out. The first is the virulent use of analogical reasoning to create crimes in Nazi Germany and the Soviet Union and the consequent recoil in the American legal community. See, e.g., J. Michael & H. Wechsler, supra, at 1080 n.1 (citing statutes in Soviet Russia and Nazi Germany authorizing punishment respectively of “socially dangerous” acts and those “deserving of penalty,” under standards prescribed by statute for the most closely analogous crimes); J. Robinson, supra, at 2-3 & nn.7-9 (same; citing additional sources on this subject); see also E. Purcell, The Crisis of Democratic Theory 159-79 (1973) (describing the reaction against legal realism and positivism in the mid-1930’s through the early 1940’s).

The second, and not unrelated, factor is the growing identification of the legality principle as a necessary intellectual basis for vigorous use of the modern constitutional vagueness doctrine as a means of protecting civil liberties. Thus, it is no accident that the Michael and Wechsler treatment of nulla poena sine lege moves immediately from judicial crime creation to a modern vagueness case and that the entire discussion is the first section of a chapter entitled “The Criminal Law and Civil Liberties.” J. Michael & H. Wechsler, supra, at
In any event, the vagueness doctrine is the operational arm of legality. It requires that advance, ordinarily legislative\textsuperscript{16} crime definition be meaningfully precise—or at least that it not be meaninglessly indefinite. As the Supreme Court stated in an early and oft-quoted formulation, “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.”\textsuperscript{17} The connection to legality is obvious: a law whose meaning can only be guessed at remits the actual task of defining criminal misconduct to retroactive judicial decisionmaking.

The difficulty is that there is no yardstick of impermissible indeterminacy. As Justice Frankfurter said, unconstitutional indefiniteness “is itself an indefinite concept.”\textsuperscript{18} The inquiry is evaluative rather than mechanistic; it calls for a judgment concerning not merely the degree of indeterminacy, but also the acceptability of indeterminacy in particular contexts. As Professor Amsterdam has taught us, a paramount concern is whether the law’s uncertain reach implicates protected freedoms.\textsuperscript{19} Other factors considered in the vagueness inquiry include the nature of the governmental interest, the feasibility of being more precise, and whether the uncertainty affects the fact or merely the grade of criminal liability.

Additionally, the courts may legitimately be concerned about the degree to which prosecutorial authority is centralized or dispersed.

\textsuperscript{16} In the increasingly unusual case of prosecution for a non-statutory crime, the vagueness inquiry is directed at the degree of precision achieved by prior judicial formulations of the offense charged. See W. LaFave & A. Scott, Handbook on Criminal Law 84 & nn.10-11 (1972) (citing sources).

\textsuperscript{17} Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).


\textsuperscript{19} See Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960). This note has inevitably become dated (especially with reference to the growing use of the vagueness doctrine by state courts), but it remains the classic treatment.
Prosecutors in this country have enormous discretion, and their decisions are largely unconstrained by law.\textsuperscript{20} Our chief (and admittedly inadequate) response to the potential for abuse is to tighten the procedural criteria for a criminal conviction, so that prosecutors, though largely uncontrolled in deciding not to proceed, at least are subject to a careful post-audit of their decisions to begin prosecution. The vagueness doctrine provides a secondary constraint by eliminating laws that invite manipulation—specifically, those for which the individualized adjudication of guilt is an unusually inadequate check on police and prosecutorial action.

In assessing the potential for official manipulation, judges often seem to entertain differing assumptions about federal law enforcement as compared to state, and especially local, law enforcement. The distinction is especially vivid with respect to the “worst case” of racial discrimination. Many vagueness cases are irresistibly suggestive of racial bias,\textsuperscript{21} and the invalidation of the laws involved often may plausibly be viewed as a prophylactic against such abuse. A review of modern vagueness decisions by the Supreme Court supports the hypothesis that the Court sees this danger chiefly at the local level and is (probably correctly) relatively unconcerned about the potential for racially discriminatory enforcement of federal law. Indeed, it may well be that federal statutes benefit from a more general (and sometimes misplaced) assumption of federal prosecutorial restraint.

These and perhaps other factors combine to render modern vagueness review contextual and impressionistic. In my view, however, it is nonetheless meaningful. While the inquiry cannot be quantified, the vagueness doctrine does bar wholesale legislative abdication of lawmaking authority and thus works, albeit irregularly, as a goad toward effective advance specification of criminal misconduct.\textsuperscript{22}

\textsuperscript{20} See generally K. Davis, Discretionary Justice (1969) (examining prosecutorial discretion and offering various suggestions for systemic improvement); Vorenberg, Narrowing the Discretion of Criminal Justice Officials, 1976 Duke L.J. 651 (arguing that the criminal justice system would benefit from public debate and legislative control of prosecutorial discretion).

\textsuperscript{21} See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (vagrancy prosecution of two white women and two black men riding together down the town’s main thoroughfare).

\textsuperscript{22} For a differently phrased but not inconsistent account of the variables behind the vagueness doctrine, see Kelman, Interpretive Construction in the Substantive Criminal Law, 33 Stan. L. Rev. 591, 660-62 (1981). Professor Kelman makes the point that the vagueness
The second doctrine said to implement the ideal of legality is the rule that penal statutes must be strictly construed against the state. The origins of this policy lie in the legislative blood lust of eighteenth-century England. Faced with a vast and irrational proliferation of capital offenses, judges invented strict construction to stem the march to the gallows. Sometimes aptly called the rule of lenity, strict construction was literally "in favorem vitae"—part of a "veritable conspiracy for administrative nullification" of capital penalization.

By the mid-nineteenth century, death was no longer the usual sanction for lesser crimes, but the rule of strict construction lingered on despite the change in circumstance and, in many jurisdictions, despite explicit legislative rejection. Today, strict construction survives more as a makeweight for results that seem right on other grounds than as a consistent policy of statutory interpre-

doctrine, which he describes as enforcing the primacy of rules over standards in the criminal law, is itself administered "in a very un-rule-like fashion." Id. at 680. The observation is true and apt, but it does not mean (as a quick read of Kelman might suggest) that the vagueness inquiry is for that reason either fraudulent or meaningless.

By the end of the 17th century, English law recognized approximately 200 capital crimes. 1 L. Radzinowicz, A History of English Criminal Law and Its Administration from 1750, at 3-4 (1948). Virtually none of these statutes provided any alternative penalty. Id. at 14. Some sense of the extravagant misuse of the capital sanction can be gleaned from Radzinowicz's juxtaposition of crimes "of greatly differing gravity, all of which carried the death penalty":

(1) murdering the king or levying war against the king in his realm, and marking the edges of any current coin of the kingdom; (2) murder, and maliciously cutting any hop-binds growing on poles in any plantation of hops; (3) riotously assembling and demolishing a church or chapel, and the wandering about of soldiers or mariners without a pass; (4) maiming or wounding officers going on board ship in execution of their excise duties, and pocket-picking to the amount of twelve pence and over; (5) rape, and destroying the heads of fish-ponds; (6) serious forgery on the Bank of England, and being in the company of gypsies.

Id. at 10-11 (footnotes omitted). For a fuller listing of capital statutes of the 18th century and examples of judicial interpretation of those statutes, see id. at 611-98 apps. 1-2; see also D. Hay, P. Linebaugh, J. Rule, E. Thompson & C. Winslow, Albion's Fatal Tree (1975) (essays on various related issues).

The quotations are from Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 751 (1935), which provides a good short treatment of this subject. For a different view, see E. Thompson, Whigs and Hunters: The Origin of the Black Act (1975).

See Hall, supra note 24, at 753-56. By the date of Hall's article, nineteen states had adopted so-called "liberal construction" statutes. In some jurisdictions these laws had the desired effect of ending the common-law rule, but in others strict construction survived in direct contradiction to the legislative will. See id. at 756.
tation. Citation to the rule is usually pro forma.\textsuperscript{26} In the case of federal statutes, strict construction is sometimes used as an instrument of federalism, a sensible concern but one that has no application in the generality of cases.\textsuperscript{27} Increasingly, it appears in a string cite of bromides so various and inconsistent as to have no collective meaning.\textsuperscript{28} The upshot is that the construction of penal stat-

\textsuperscript{26} Compare United States v. Angelilli, 660 F.2d 23, 34 n.10 (2d Cir. 1981), cert. denied sub nom. Ribotsky v. United States, 455 U.S. 910 (1982) (noting the "principle of lenity" en route to a very broad reading of the definition of "enterprise" in the Racketeer Influenced and Corrupt Organizations Act of 1970), with id. at 42 (Friendly, J., concurring in the result) (demonstrating the plausibility of a narrower reading); see also cases cited infra note 28.

Of course, one e.g. cite, or even a string of them, proves very little. Nor is there any more systematic way to survey or measure the current vitality of strict construction. The best I can say is that the decisions cited in this and the footnotes that follow seem to me unexceptional illustrations of the cases I routinely read.

\textsuperscript{27} Federal courts sometimes reject broad readings of federal criminal statutes on the ground that, absent a clear statement, Congress should "not be deemed to have significantly altered the federal-state balance." United States v. Bass, 404 U.S. 336, 349 (1971). This rationale is especially likely to be invoked where, as in Bass, the broad construction of federal law would intrude into the traditional domain of state jurisdiction. Cf. Bell v. United States, 103 S. Ct. 2398, 2402 (1983) (Stevens, J., dissenting) (invoking intrusion into state law as justification for an otherwise arbitrarily narrow construction of the Federal Bank Robbery Act).

Strict construction in the service of federalism may be perfectly sensible, but it obviously says nothing about the appropriate rule of construction in the usual case. The same policy could be vindicated in the apt and familiar language of "federal-state relations" without reference to any of the concerns that might be thought to underlie strict construction of state law. The reliance on strict construction is for present purposes uninformative.

\textsuperscript{28} A typical exposition may be found in State v. Angelo's Motor Sales, 125 N.J. Super. 200, 310 A.2d 97 (App. Div. 1973) (per curiam), aff'd sub nom. State v. Parmigiani, 65 N.J. 154, 320 A.2d 161 (1974) (holding that the certification of false answers to interrogatories constituted the offense of "swearing falsely in any judicial proceeding"): Defendant urges that the false swearing statute must be strictly construed so as not to create a liability not clearly fixed by its words. We agree that penal statutes are to be strictly construed, but such construction must not be so unduly narrow or artificial so as to disregard manifest legislative intention. A reasonable interpretation of a statute should be made based upon the legislative purpose as revealed by the composite thrust of the whole statutory scheme.

The rule of strict construction does not prohibit a court from reading a statute in relation to the mischief and evil sought to be suppressed, and while a penal statute cannot be extended by implication and intendment, its clear implication and intendment [are] not to be denied. Construction which would have the effect of placing it in the power of a transgressor to defeat the object and purpose of the law by evasion is not to be favored.

Id. at 207, 310 A.2d at 100-01 (citations omitted). For similar mixed statements on statutory construction, see State v. Sharon H., 429 A.2d 1321, 1328 (Del. Super. Ct. 1981) (interpreting a penal statute punishing marriage between brother and sister as applicable to the marriage of half-siblings); State v. Bigbee, 260 Ind. 90, 92-93, 292 N.E.2d 609, 610-11 (1973)
utes no longer seems guided by any distinct policy of interpretation; it is essentially ad hoc.

Although strict construction may no longer retain widespread allegiance in the courts, it still commands the attention of academics. The reason is the perceived relation between strict construction and legality. At least since the days of Michael and Wechsler, strict construction has been presented as an implementation of legality. The conventional wisdom was well stated (and partially created) by Herbert Packer, who referred to vagueness and strict construction as "devices worked out by the courts to keep the principle of legality in good repair" and who asserted that the two doctrines "have an intimate connection and may most usefully be thought of as contiguous segments of the same spectrum." Elsewhere, he described the rule of strict construction "as something of a junior version of the vagueness doctrine."

Modern casebooks trace the same relation. The most prominent is Kadish, Schulhofer, and Paulsen, which groups together under the heading of "Legality" a case of judicial crime creation, a modern instance of strict construction, and two vagueness decisions. Not all current casebooks are as tightly focused, but most seem to reflect (and therefore to reinforce) the assumption that strict construction is an essential aspect of legality.

(penal statute prohibiting execution of bail bond "without collecting in full a premium therefor" interpreted to prohibit acceptance of unsecured note as premium); State v. Hald, 382 A.2d 290, 294 (Me. 1978) (offense of possession of firearm by felon applicable to one whose conviction is still pending on appeal).


30 H. Packer, supra note 2, at 93.

31 Id.

32 Id. at 95.


34 See, e.g., J. Vorenberg, Criminal Law and Procedure (1st ed. 1975). The first section of
This, then, is the problem. If strict construction is essential to legality, then vagary and elasticity in the interpretation of penal statutes should be cause for concern. If, on the other hand, the current ad hoc approach to statutory ambiguity seems as good as any other, perhaps legality is not as important as we think. Or perhaps our adherence to that ideal is more gravely defective than most would like to admit. Or, finally, perhaps the relation between legality, vagueness, and strict construction should be recast to state more precisely the appropriate constraints on judicial innovation in the penal law. In any event, the place to begin is with an integrated rationale, one that ties the traditional doctrines of legality, vagueness, and strict construction into a coherent model for judicial behavior in the field of criminal law.

II. TOWARD AN INTEGRATED RATIONALE

Justifications for *nulla poena sine lege*, the vagueness doctrine, and the rule of strict construction cluster around three kinds of arguments. The first concerns the association of popular sovereignty with legislative primacy and the consequent illegitimacy of judicial innovation. In contemporary constitutional discourse, this sort of assertion is called "separation of powers." The second contentment is based on the perceived unfairness of punishing conduct not previously defined as criminal. "Notice" and "fair warning" describe claims of this sort. Finally, a third kind of argument involves the potential for arbitrary and discriminatory enforcement of the penal law and the resort to legal formalism as a constraint against unbridled discretion. Many terms are used to state such ideas, but they are perhaps most familiar as appeals to the "rule of law." Each type of justification is examined below.

Chapter 4 covers common-law crimes and features Shaw v. Director of Pub. Prosecutions, [1961] 2 All E.R. 446. The next section is entitled "Requirement of Clarity" and includes cases on both strict construction (McBoyle v. United States, 283 U.S. 25 (1931)) and vagueness (Smith v. Goguen, 415 U.S. 566 (1974)). Id. at 123-33. The point is similarly explicit in P. Johnson, Criminal Law 280-302 (2d ed. 1980), which includes a section entitled "Vagueness, Strict Construction, and the Principle of Legality."

A slight variation on this approach juxtaposes common-law crimes and strict construction but reserves explicit treatment of the vagueness doctrine for inclusion in a more general discussion of "constitutional limitations." This pattern is illustrated both by W. LaFave, Modern Criminal Law 17-41, 46-58 (1978), and by F. Inbau, J. Thompson & A. Moenssens, Cases and Comments on Criminal Law 22-37, 897-904 (3d ed. 1983).
A. Separation of Powers

Enlightenment theoreticians decreed that liberty is most secure where political power is fractured and separated. As adapted to a representative democracy, this idea meant that the legislative, executive, and judicial functions should be separate, if interactive. Lawmaking was the legislative province. As the branch most directly accountable to the people, only the legislature could validate the surrender of individual freedom necessary to formation of the social contract. The legislature, therefore, was the only legitimate institution for enforcing societal judgments through the penal law. Judicial innovation was politically illegitimate.

This, in broad outline, is the modern translation of separation of powers. Although doubtless less central than in the past, it remains an established feature of American political ideology. As a guide for judicial action in the field of criminal law, however, separation of powers is not very helpful. In its broad and essential aspect, the issue never comes up. Today, no court would invoke the unadorned rubrics of the common law, and the exigencies of law enforcement do not require resort to such authority. Penal legislation exists in such abundance that wholesale judicial creativity is simply unnecessary. Narrower issues do arise, of course, but for their resolution, broad separation-of-powers principles are usually uninformative and occasionally misleading.

Consider, for example, the following hypothetical. Two persons are indicted for plural marriage. Neither statute nor precedent specifically condemns this practice. The only authority for such a charge is the common-law tradition that courts may punish as a misdemeanor any act tending "to corrupt the public morals." To-
day, there is no doubt that a court would quash the indictment and that the action might be justified on separation of powers grounds. In essence the court is being asked to define a new crime, and that lies outside the judicial function; lawmaking is a legislative act. So far, so good. But consider the same facts under a statute punishing as criminal a "conspiracy to commit any act injurious . . . to public morals." The result would no doubt be the same, but this time under the constitutional doctrine of void-for-vagueness. The indictment would be struck despite the statute, even despite explicit legislative instruction for the courts to define "public morals" as they saw fit. The result is correct, but it cannot readily be derived from the notion that courts should not usurp legislative powers. Indeed, to the extent that the ideology of legislative primacy speaks to the issue at all, it gives a false clue. A perfectly straightforward interpretation of the political legitimacy rationale for legislative lawmaking suggests that the court should do as it is told. The refusal to do so might be defended on several grounds, but not, in my view, as deference to legislative authority.

The statute is not hypothetical. See, e.g., Cal. Penal Code § 182 (West 1970 & Supp. 1984) (prohibiting conspiracy to commit any act injurious to the public health or public morals); Utah Code Ann. § 103-11-1 (1943) (prohibiting, inter alia, conspiracy "to commit any act injurious to the public health, the public morals or to trade or commerce").


Judicial deference to legislative primacy in lawmaking is, I think, what people today usually mean when they speak of "separation of powers" as a restraint on judicial innovation. The phrase, however, is susceptible to other attributions. It might be taken to signify not merely legislative primacy in lawmaking, but actual legislative exclusivity in performing that function. So construed, "separation of powers" would include a restraint on the delegation of the legislative function and a related assumption of the incapacity of other institutions to perform lawmaking. Indeed, such a notion surfaced some years ago as the constitutional doctrine of non-delegation, see L. Tribe, American Constitutional Law § 5-17 (1978), and may have been part of the rationale underlying the early vagueness cases. See W. LaFave & A. Scott, supra note 16, at 83 n.2.

Today, however, no such assumption is generally entertained. The non-delegation doctrine has played no significant role in Supreme Court cases for nearly 40 years. In fact, the modern administrative state is built on legislative delegation. See generally L. Jaffe, Judicial Control of Administrative Action 28-86 (1965) (describing delegation to administrative agencies as the "dynamo of the modern social service state"). Moreover, recent courts have not thought themselves incapable of receiving such powers. See, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (construing the jurisdictional provision of the Labor Management Relations Act of 1947 as carte blanche authority for the federal courts to fashi-
The same confusion attends any attempt to trace separation-of-powers principles through the thickets of statutory construction. Of course, where a statute is clear, coherent, and not unconstitutional, political theory requires that the courts give it effect. But where the statute is ambiguous or inconsistent, separation of powers provides no sure guide. In this frame of reference, strict construction is required only if the legislature commands that approach. If, as is usual, the legislature does not speak to that question or specifies a rule of "fair construction," interstitial judicial lawmaking is at least tolerated and perhaps affirmatively authorized. More to the point, it is inevitable. Any resolution of statutory ambiguity involves judicial choice. The resulting "gloss" on the legislative text is both politically legitimate and institutionally unavoidable.

In this context, separation of powers requires, first and foremost, a federal common law of collective bargaining agreements). Indeed, in some areas the federal courts have seized the initiative even without express legislative authorization. Federal habeas corpus, for example, although nominally governed by an act of Congress, has in fact been the subject of successive generations of judicial innovation—a fact that the Supreme Court itself acknowledged in Wainwright v. Sykes, 433 U.S. 72, 77-81 (1977).

In sum, I do not mean to suggest that there are not good reasons for judicial self-restraint in the field of criminal law, but only that such a policy cannot readily be understood as merely part of a general judicial incapacity to make law.

Of course, not everyone will agree with this conclusion, and to the extent that one sees an ideologicial rationale for forcing legislative decisionmaking, the analysis posed in text will seem incomplete. To that extent, one might see a "separation of powers" rationale for legislative decisionmaking that goes beyond preserving the primacy of legislative choice.

Importantly, however, this objection applies only to large-scale judicial innovation. Where small-scale choices are at stake, an insistence on unassisted legislative resolution seems irredeemably unrealistic. Thus, even if "separation of powers" means legislative exclusivity in making basic policy choices, it could not reasonably be taken in the context of interstitial decisionmaking to require more than judicial deference to legislative choice.

\[41\] The original "fair construction" statute was included in the Field Code proposed for New York. "The rule of the common law that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." New York Comm’rs of the Code, The Penal Code of the State of New York § 10 (1865) (D. Field, W. Noyes & A. Bradford commissioners). In the years before World War I some American jurisdictions enacted similar laws. See Hall, supra note 24, at 752-56.

Modern revised codes typically include provisions based on Model Penal Code § 1.02 (Proposed Official Draft 1962). That section details a number of general purposes of the criminal law and then provides that "[t]he provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved." Id. § 1.02(3).
that judicial lawmaking not be inconsistent with legislative choice. This means chiefly that courts should not place on a statute a meaning that its text will not bear, or that is plainly contradicted by legislative history, or that does unnecessary violence to the policy expressed in some other enactment. It also means, I think, that in confronting statutory ambiguity, courts should ordinarily avoid large-scale innovation. In other words, courts should avoid, where possible, interpretations that embrace controversial perceptions of public policy. The reason, of course, is that interpretations that embark on some new and debatable course might run afoul of considered legislative inaction. On the other hand, where the judicial innovation is smaller, less controversial, and consistent with the pattern of legislative action, there is less risk of frustrating considered legislative choice.

In a great many cases, more than one interpretation will satisfy these constraints. Where that is true, separation of powers forbids none; among the range of possibilities not explicitly or implicitly forbidden, judicial choice is unconstrained by considerations of political legitimacy. That is not to say, of course, that separation-of-powers rhetoric does not appear in ordinary cases of small-scale ambiguity, but only that the effect of such talk is typically to beg the question rather than to answer it.\footnote{See, e.g., infra notes 94-110 and accompanying text (discussing Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970)).} 

\section{Notice}

A second plausible rationale for legality and related doctrines is the requirement of notice. Notice is essential to fairness. Crimes must be defined in advance so that individuals have fair warning of what is forbidden: lack of notice poses a “trap for the innocent”\footnote{United States v. Cardiff, 344 U.S. 174, 176 (1952).} and “violates the first essential of due process of law.”\footnote{Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).}

This sort of talk has strong intuitive appeal. At least within the political tradition of liberal democracy,\footnote{Liberal democracy accepts, at least theoretically, that conduct should be permitted unless and until the legitimate agencies of social choice have determined to prohibit it. The result is a regard for, or at least a tolerance of, pluralism and diversity. The fact that an individual was not given notice of the prohibition is an excuse for nonobservance.} the essentiality of notice
seems obvious, and the perceived unfairness of punishment without warning requires no explication. Moreover, the rationale of notice is nicely comprehensive. It is a theme shared by legality, vagueness, and strict construction, uniting all three doctrines in a common front against unfair surprise. Thus, judicial crime creation is bad because it is retrospective; notice of illegality may effectively be denied. Similarly, indefinite statutes are objectionable because they are uninformative; it is difficult to tell what conduct is proscribed. And when the statute is not vague but only ambiguous, strict construction steps in to restrict its meaning to that which should have been foreseen; laws that in general give fair warning are conformed in detail to the warning given.\textsuperscript{46}

In these and other respects, the notice rationale is very satisfying. It charts a coherent progression from legality to vagueness to strict construction, relates these doctrines to other constitutional pronouncements in an intelligible way,\textsuperscript{47} and seems, at least superficially, to explain the law as it stands. A look beneath the surface, however, is distinctly unsettling. The rhetoric of fair warning is plausible and comprehensive, but in many contexts it is also shallow and unreal. Its explanatory value at the level of doctrinal rationalization is purchased at the cost of unusual disparity with actual practice. In essence, the rhetoric of fair warning is used to justify (perhaps even to obscure) practices that, on reflection, seem to have little or no relation to a notice rationale.

Consider the vagueness doctrine. The invalidation of indefinite laws is routinely justified on grounds of notice. Other reasons are also given, but the requirement of fair warning is always included and usually given pride of place.\textsuperscript{48} Yet the actual administration of

\textsuperscript{46} See, e.g., the famous pronouncement of Justice Holmes in McBoyle v. United States, 283 U.S. 25 (1931) (interpreting interstate transportation of a stolen "motor vehicle" to exclude airplane):

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

Id. at 27; see also infra notes 94-110 and accompanying text (discussing Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970)).

\textsuperscript{47} See U.S. Const. art. I, § 9, cl. 3; id. § 10, cl. 1 (prohibiting federal and state governments, respectively, from enacting bills of attainder or ex post facto legislation).

the vagueness doctrine belies this rationale. For one thing, the
kind of notice required is entirely formal. Publication of a statute's
text always suffices; the government need make no further effort
to apprise the people of the content of the law. In the context of
civil litigation, where notice is taken seriously, publication is a last
resort; more effective means must be employed wherever possi-
ble. It may be objected that no more effective means is possible
where the intended recipient of the information is the entire popu-
lace or some broad segment thereof, rather than an identifiable in-
dividual or entity. But this argument at most explains why publi-
cation should sometimes suffice; it does not explain why no further
obligation is ever considered. Nor does it explain why publication
in some official document, no matter how inaccessible, is all that is
required. In short, the fair warning requirement of the vagueness
doctrine is not structured to achieve actual notice of the content of
the penal law.

A more telling point concerns the permissible sources of specific-
ity in the penal law. Among many disputed aspects of the vague-
ness doctrine, one settled rule is that the precision required of a
criminal statute need not appear on its face. Facial uncertainty
may be cured by judicial construction. Indeed, judicial specifica-
tion will be accepted as sufficient even where it amounts to a
wholesale rewriting of the statutory text. Thus, the “fair warn-

I know of no modern judicial renditions of the vagueness doctrine in which fair warning
does not appear.

49 See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (publication
notice constitutionally insufficient for adjudication depriving known persons of known
 whereabouts of substantial property rights); see also Mennonite Bd. of Missions v. Adams,
462 U.S. 791 (1983) (posting at county courthouse constitutionally inadequate notice for
depredation of mortgagee’s interest in property sold at tax sale).

50 In other contexts, the minimum required is repeated display in a newspaper of general
circulation for several consecutive weeks. See generally F. James & G. Hazard, Civil Proce-
dure § 12.19 (2d ed. 1977). More systematic efforts to achieve actual notice are customarily
made in the administrative process.

state law, a federal court must, of course, consider any limiting construction that a state
court or enforcement agency has proffered.”)).

52 A good, if somewhat dated, example is Chaplinsky v. New Hampshire, 315 U.S. 568
(1942), where the Court upheld a statute making it criminal to “address any offensive, deri-
sive or annoying word to any other person who is lawfully in any street or other public
place.” Id. at 569. The Court found that this language had been sufficiently narrowed by the
altogether non-obvious state court construction that the statute covered only words having
"a direct tendency to cause acts of violence" by those addressed. Id. at 573.

Compare Chaplinsky with Coates v. City of Cincinnati, 402 U.S. 611 (1971), where the Court struck down an ordinance making it criminal for “three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by.” Id. In invalidating that law, the Court referred explicitly to the failure of the state courts to narrow the concept of “annoying” behavior by appropriate construction. Id. at 612-13. See also Kramer v. Price, 712 F.2d 174 (5th Cir. 1983) (invalidating the Texas harassment statute chiefly because of a lack of narrowing construction of the critical terms “annoy” and “alarm”).

54 The prototype is Model Penal Code § 2.04(3)(b) (Proposed Official Draft 1962), which provides that mistake as to criminality is exculpatory where the individual acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

Approximately 17 states have enacted similar provisions, most of which are even narrower than the Model Code provision. See ALI, Part I of the Model Penal Code and Commentaries (forthcoming).

55 To date, the only American jurisdiction to retreat from this rule is New Jersey. See N.J. Stat. Ann. § 2C:2-4(c)(3) (West 1982). As the text of that provision indicates, it is only a baby step:

(c) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

. . . .

(b) [t]he actor otherwise diligently pursues all means available to ascertain the
seems to be that most such claims are fraudulent. Doubtless that is true, but in other areas the law is concerned, indeed preoccupied, with separating the wheat from the chaff. Why not here? If notice of illegality is an essential prerequisite to the fairness of punishment, how can the law be indifferent to claims of honest and reasonable mistake? One would think that a system organized around the requirement of fair warning would have to take into account cases where, through no fault of the accused, such warning was not received.

One explanation might be that *ignorantia juris* creates an incentive to know the law and justifies punishment despite mistake as an appropriate sanction for error. There are things to be said both for and against this approach, but for present purposes one need only note that it is surely inconsistent with the premises underlying the notice rationale. That requirement imposes on the state the obligation to give fair warning of what is forbidden. The underlying assumption must be that what is not expressly prohibited is allowed—that the individual is presumptively free to do as he or she pleases, and that in doubtful cases the burden of proof (so to speak) lies on the government. But if unawareness of illegality is itself the wrong to be punished, this assumption is reversed, and the individual bears the risk of not knowing the law. Unless the conduct is plainly authorized, one acts at one’s own risk; and where the law is opaque or inaccessible, the risk may be very great. From the actor’s point of view, this approach to notice amounts to a virtual presumption of illegality. Of course, such talk runs directly counter to the rhetorical tradition of the “presumption of innocence” and to the libertarian political assumptions evoked by that phrase. No doubt that is why one never hears *ignorantia juris* described in this way.

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meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances in which a law-abiding and prudent person would also so conclude.

56 This is not too far from the view expressed in O. Holmes, The Common Law 48 (1881) (“to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey”); see also Perkins, Ignorance and Mistake in Criminal Law, 88 U. Pa. L. Rev. 35, 44 (1939) (citing, as one of the two pillars on which the maxim rests, the notion that exculpation for ignorance of the law would “encourage ignorance where knowledge is socially desirable”). For criticism of this view, see J. Hall, General Principles of Criminal Law 380-83 (2d ed. 1960) (finding Holmes' thesis “surely questionable”).
It is unnecessary to say here whether the policy of *ignorantia juris* leads inevitably to such unwelcome conclusions or whether some more palatable explanation exists. For now it is enough to show that *ignorantia juris* is radically inconsistent with a concern for actual notice and places that rationale in an exceedingly ironic light. To my mind, the continuing strength of "ignorance of the law is no excuse" is telling evidence of the abstracted and artificial character of the rhetoric of "fair warning."

The same points can be made about strict construction. Just as the concern for notice would require invalidation of laws that give no fair warning, it would also imply that remaining ambiguities be resolved against the state. Otherwise, the interpretation of penal statutes would threaten that same unfair surprise against which the vagueness doctrine more generally guards. In effect, strict construction strips away from the criminal law those potential applications for which fair warning was not clearly given. In this respect, the rule of strict construction is thought to implement the principle of legality and to reinforce the prohibition against indefinite laws.

Again, however, judicial administration of the rule belies any real concern for fair warning. Pronouncements in ancient precedent are taken to have resolved statutory ambiguity, no matter how unlikely it may be that the accused has had access to such discussions. Mistake is irrelevant. Even where the defendant shows actual reliance on an interpretation of law and further shows that such reliance was prudent and reasonable, the law does not care. The individual must get it right, and no amount of good faith or due diligence is exculpatory. The converse is also true: strict construction may be invoked without regard to the defendant's actual

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The justification for *ignorantia juris* that I find most persuasive is stated in J. Hall, supra note 56, at 382-83. Treating ignorance or mistake of law as a defense would mean that, for that individual, the law in fact is what he or she believed it to be, rather than what it is for everybody else:

[T]here is a basic incompatibility between asserting that the law is what certain officials declare it to be after a prescribed analysis, and asserting, also, that those officials must declare it to be, i.e. that the law is, what defendants or their lawyers believed it to be. A legal order implies the rejection of such contradiction. It opposes objectivity to subjectivity, judicial process to individual opinion, official to lay, and authoritative to non-authoritative declarations of what the law is. This is the rationale of *ignorantia juris neminem excusat.*

Id. at 383.
expectation or belief. Uncertainty in coverage is said to threaten unfair surprise, even where there is no plausible claim that the actor relied on any view of the law.

Thus, neither the vagueness doctrine nor the rule of strict construction makes much sense in terms of notice. Although both are conventionally aligned with the rhetoric of fair warning, neither is administered in a manner congruent with that rationale. That is not to say that there are not good reasons for these results, but only that those reasons must be sought elsewhere. Considered solely as means of ensuring effective notice of illegality, the array of conventional doctrines governing judicial innovation in the penal law is fundamentally unintelligible.

It would be wrong, however, to think that the idea of notice is entirely empty or that the concern for fair warning is merely a rhetorical charade. In fact, there is a core concept of notice as a requirement of fairness to individuals that is, and should be, taken very seriously. It does not depend, however, on whether a trained professional, given access to the appropriate sources and the time to consider them, would have foreseen the application of the law. The issue, in other words, is not the hypothetical construction of "lawyer's notice." The concern is, rather, whether the ordinary and ordinarily law-abiding individual would have received some signal that his or her conduct risked violation of the penal law. Punishment for conduct that the average citizen would have had no reason to avoid is unfair and constitutionally impermissible. That, at any rate, is the teaching of Lambert v. California. The meaning of that case is subject to infinite disputation, but to me it stands for the unacceptability in principle of imposing criminal liability

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58 It is important to note that I am not suggesting that this sort of "notice" is a sufficient basis for criminal punishment but only that its absence should in any event preclude such liability. The distinction is obvious, but crucial.


Lambert struck down a Los Angeles ordinance making it a crime for any person convicted of a felony, whether in California or elsewhere, to remain in the city more than five days without registering. At various points the opinion emphasizes as possible sources of unconstitutionality each of the following: (1) that the defendant lacked mens rea in the ordinary sense of mental advertence to her failure to register; (2) that she was punished for an omission rather than for affirmative misconduct; and (3) that she did not know of her duty to register or of the criminality of failing to do so. Id. at 229. The trouble is that none of these factors, standing alone, renders criminal punishment unconstitutional. The explanation, therefore, must lie in some more integrated statement, such as that attempted in the text.
where the prototypically law-abiding individual in the actor’s situation would have had no reason to act otherwise.

That this proposition is rarely tested does not make it any less fundamental. The fact that plausible claims of this sort are so seldom encountered is further evidence that the rhetoric of notice and fair warning has been extended far beyond the circumstances that give it force. In the great generality of cases, notice is not a persuasive rationale for the constraints surrounding judicial behavior in the penal law.

C. Rule of Law

The most important concern underlying *nulla poena sine lege* and the vagueness doctrine is the so-called “rule of law.” Unfortunately, use of this phrase is treacherous. On the one hand, it has degenerated into a political slogan of remarkable plasticity. Too often the rule of law is equated with the rule of good law, so that it becomes an indiscriminate claim of virtue in a legal system.61 On the other hand, philosophers and legal theorists have refined and explicated the concept in ways that are, for my purposes, prohibitively elaborate.62

My own meaning is limited and quite conventional. The rule of law signifies the constraint of arbitrariness in the exercise of government power. In the context of the penal law, it means that the agencies of official coercion should, to the extent feasible, be guided by rules—that is, by openly acknowledged, relatively stable, and generally applicable statements of proscribed conduct. The evils to be retarded are caprice and whim, the misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria of selection. The goals to be advanced are regularity and evenhandedness in the administration of justice and accountability in the use of government power. In short, the “rule of law” designates the cluster of values associated with conformity to

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61 This point is documented in J. Raz, The Authority of Law 210-11 (1979), to which this discussion is indebted.

62 See, e.g., L. Fuller, The Morality of Law 46-90, 157-59 (2d ed. 1969) (elaborating the concept of the rule of law in terms of eight desiderata of a system of law, some of which reach beyond the bounds of this discussion); see also F. Hayek, The Constitution of Liberty 205-19 (1980) (developing in detail the concept of the rule of law as a political ideal); J. Raz, supra note 61, at 214-19 (identifying some eight principles that may be derived from the basic concept of the rule of law).
law by government.

Two points require immediate mention. First, adherence to the rule of law is a matter of degree. It is impossible, and probably would be in any event unwise, to imagine a legal system consisting entirely of fixed, precise, mechanical rules. Every legal system will have some resort to discretion. The differences of degree, however, are not insignificant. Some legal regimes (or choices within them) enhance the rule of law and promote regularity, certainty, predictability, and evenhandedness; others exacerbate the risks of arbitrariness and discrimination. There inevitably will be trade-offs—strategies that promote evenhandedness, for example, may lead to rigidity in the face of legitimate differentiation. But all other things being equal, greater conformity to the rule of law is a good thing, and gratuitous or unnecessary departure from that ideal must be counted as a cost.63

Second, although there is no necessary connection between the formal requirements of the rule of law and any substantive notion of equality,64 in the context of contemporary American society the two are closely linked. Our Constitution condemns discrimination on a number of grounds—race, ethnicity, religion, for some purposes political affiliation, and for most purposes gender. These specifications of proscribed choice add up to a strong, though obviously not comprehensive, commitment to "the equal protection of the laws."65 The extent to which that commitment is realized depends in no small measure on the rule of law. Greater conformity to the rule of law discourages resort to illegitimate criteria of selection and enhances our ability to discover and redress such abuses when they occur. Lesser adherence to that ideal facilitates abusive and discriminatory law enforcement and makes that evil more difficult to identify and control. Thus, the "worst case" breakdown of the rule of law is not random whim or caprice but hidden bias and prejudice. And the single most potent concern at issue here is not an abstract interest in the postulates of a just legal order but a

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63 See J. Raz, supra note 61, at 228. But see Horwitz, Book Review, 86 Yale L. J. 561, 566 (1977), in which the rule of law is described as a "conservative doctrine" that a "Man of the Left" should not endorse as "an unqualified human good."

64 Thus, it would be possible for a legal system to conform closely to the requirements of the rule of law by rigorous and non-arbitrary enforcement of rules the substantive content of which is inimical to any reasonable notion of equality among individuals—e.g., apartheid.

65 U.S. Const. amend. XIV, § 1.
specific commitment to end discrimination based on race or ethnicity. In the specific historical context in which we live, inhibiting racial discrimination in law enforcement is very much a part of what the rule of law is all about.

Such concerns are obviously relevant where, as is apparently sometimes true in England, juries are permitted to explore the spacious contours of common-law criminalization. When juries are invited to say what does and what does not "corrupt public morals," they effectively define the law. There is no reason to expect such power to be exercised in any systematic way and every reason to fear the intrusion of haphazard or illegitimate criteria for decision. The result is a potentially corrosive individualization of the legal standard.

A weaker version of this argument applies where judges define the crime. The risk involved is that judicial particularization of the broad rubrics of common-law authority will be too "subjective," too closely grounded in the facts of the case at hand, insufficiently abstracted from the personal characteristics of the individual defendant. This fear is not fanciful, but it should be kept in perspective. As Herbert Packer pointed out, there are important constraints on abuse of discretion in the judicial process:

Courts operate in the open through what has been described as a process of reasoned elaboration. They have to justify their decisions. It is not enough to say: this man goes to jail because he did something bad. There is an obligation to relate the particular bad

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66 For the most famous recent reliance on this formulation, see Shaw v. Director of Pub. Prosecutions, [1961] 2 All E.R. 446.

67 Some degree of individualization of legal standards is common in the penal law, and its acceptability depends heavily on context. Thus, for example, modern formulations of the provocation mitigation are designedly more open-ended than the older rule-oriented approach. See 1 ALI, Part II of the Model Penal Code and Commentaries (1980). In that context some degree of individualization is thought desirable, though certainly not costless. No doubt that is due to the fact that provocation is a distinction in grading, not liability, and that it is used to distinguish between two offenses, even the lesser of which is very serious.

A similar individualization was invited, though less intelligibly, under the old premeditation formula used to differentiate potentially capital homicide from non-capital murder. See id. § 210.6 comment 4(b)-(c) at 123-32. In this context, the resulting undisciplined differentiation among offenders ultimately led to constitutional intervention, largely because of an understandably heightened concern for evenhandedness in the administration of the capital sanction. See Furman v. Georgia, 408 U.S. 238 (1972); 1 ALI, supra, § 210.6 comment 12(a)-(c) at 153-64 (discussing the Supreme Court's death penalty cases).
thing that this man did to other bad things that have been treated as criminal in the past. The system of analogical reasoning that we call the common-law method is a very substantial impediment to arbitrary decision-making. The fact that courts operate in the open according to a system of reasoning that is subjected to the scrutiny of an interested audience, both professional and lay, militates against any but the most marginal invasions of the values represented by the principle of legality."

As Packer recognized, not all courts work this way; in some of them the dangers of ad hoc criminalization are greater than this description implies. Nonetheless, Packer is correct in suggesting that the chief locus of concern is not the courts, but the police and prosecutors. The power to define a vague law is effectively left to those who enforce it, and those who enforce the penal law characteristically operate in settings of secrecy and informality, often punctuated by a sense of emergency, and rarely constrained by self-conscious generalization of standards. In such circumstances, the wholesale delegation of discretion naturally invites its abuse, and an important first step in constraining that discretion is the invalidation of indefinite laws.

Of course, the idea that the vagueness doctrine reinforces the rule of law is not new. The courts have long recognized "arbitrary and discriminatory enforcement" as an evil that vagueness review is designed to combat, and respected commentators have explored this problem in vivid and convincing detail. Obviously, a rule-of-law perspective on the vagueness doctrine helps explain why it is so often invoked against "street-cleaning" statutes—local

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68 H. Packer, supra note 2, at 88. Of course, one may wonder whether Packer's model of "reasoned elaboration" is constraint or camouflage, or, more fundamentally, whether "rules" themselves have meaning apart from the ideology of an interpretive community. These are important issues, but beyond the range of matters that I wish to explore here. Perhaps I should merely register my belief (admittedly no more than that) in the possibility of rules as a meaningful constraint on official action and acknowledge the legitimate disagreement of those who start with different premises.

69 See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (standardless vagrancy law "permits and encourages an arbitrary and discriminatory enforcement of the law").

ordinances directed against some form of public nuisance, typically involving trivial misconduct, usually with no specifically identifiable victim, and carrying minor penalties. Laws of this sort are often found vague largely because they lend themselves to informal social control of undesirables. Where enforcement is centralized (and thus likely to be exercised with greater regularity), or where there is an identifiable victim (who is likely to keep track of police action), or where the crime is very serious (and thus likely to attract public monitoring of prosecutorial decisions), the risk of abusive enforcement is reduced, and the tolerance for indefinite standards is increased accordingly.

So-called "street-cleaning" statutes are not only defective from the perspective of the rule of law; they are also especially likely to involve Lambert-like problems of unfair surprise. The law against unspecified forms of "annoying" or "disorderly" behavior is exactly the kind of statute that may catch a person unawares. Here there is a genuine risk of no fair warning—not in the artificial sense of "lawyer's notice," but in the practical sense that a law-abiding person in the actor's situation might have had no reason to avoid the proscribed behavior. Taken together, the needs to inhibit arbitrary and discriminatory enforcement and to avoid Lambert-like lack of notice explain the great majority of invalidations under the vagueness doctrine. The fact that the two problems are so often factually coincident makes it difficult, but usually unnecessary, to disentangle the two strands. For present purposes, it is enough to say that where these two concerns are not center stage, invalidation for unconstitutional indefiniteness is most unlikely. Although fear of arbitrary and discriminatory enforcement may be a sufficient ground for invalidation, lack of "lawyer's notice" is not.

Focusing on the rule of law also reveals the common ground between "normal" vagueness cases and use of the vagueness doctrine to assure "breathing space" for first amendment freedoms. Where legal uncertainty threatens free expression, the search for indefiniteness has a special rigor. Sometimes this application of

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71 See, e.g., Coates v. City of Cincinnati, 402 U.S. 611 (1971); Kramer v. Price, 712 F.2d 174 (5th Cir. 1983) (invalidating statute punishing as harassment communication that "annoys or alarms the recipient," largely because of the lack of a sufficiently restrictive definition of these terms).


vagueness review is thought to be merely adventitious to its use in other contexts, but that is not true. In most of these cases, the chief danger is not that the universe of opportunities for expression will be constrained in some (usually not very significant) way, but rather that the opportunities for speech will be *differentially* constrained, depending on the speaker's point of view.\(^4\) Obviously, that risk is exacerbated by broad delegations of enforcement authority. The use of the vagueness doctrine to protect first amendment freedoms is, therefore, closely linked to the rule of law: it presents, if you will, a special case of the dangers of discretion.

Finally, rule-of-law concerns explain and justify vagueness decisions that seem inexplicable on other grounds. The best example is *Kolender v. Lawson*.\(^5\) That decision struck down a California loitering statute of the "stop and identify" variety. Such laws were conceived in an effort to cure the wholly standardless reach of older vagrancy statutes.\(^6\) The California provision declared guilty of disorderly conduct every person

> Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.\(^7\)

Obviously, it is not possible to view the invalidation of this law as vindicating the separation of powers. There is no hint of judicial usurpation of legislative authority, nor is there any suggestion of non-judicial duties being forced on the courts. Moreover, the case is equally unintelligible under a notice rationale. The offender whose liability attaches only after he has been asked to identify himself and has refused to do so can hardly claim unfair surprise. To an altogether unusual degree, this law provided fair warning.


\(^6\) The history of such laws and the reasons for their invalidation are briefly recounted in 3 ALI, supra note 67, § 250.6 comments (1)-(3),(5) at 383-91, 393-98.

\(^7\) Cal. Penal Code § 647(e) (West 1970).
What is wrong with the law, of course, is not that it invaded legislative power or denied notice, but that it invited arbitrary enforcement. As the Court put it, "the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way." It was therefore condemned as "a convenient tool" for discriminatory or abusive enforcement, and the facts of the case seem to bear out the accusation.

While the result in Kolender v. Lawson is scarcely beyond dispute, it seems quite clear that the Court focused on the right problem—namely, the susceptibility of the law in question to arbitrary and discriminatory enforcement. That is the only rationale that plausibly supports this decision, and in my view it is the most persuasive justification for vagueness review generally. Explaining the vagueness doctrine (and *nulla poena sine lege*) as an adjunct to the rule of law seems to me relatively straightforward, unburdened by the extremes of artificiality that attend most discussions of notice, and nicely correspondent to the broader societal commitment to equality before the law.

This is not to say that our commitment to the rule of law is either dogmatic or unqualified. It bears repeating that adherence to the rule of law is a matter of degree. Moreover, the rule of law ideal is often compromised in the name of competing interests—perhaps most notably the practical inability to vindicate legitimate societal interests in any less threatening way. In addi-

78 461 U.S. at 358.
79 Id. at 360 (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972)).
80 Edward Lawson is a black man of unconventional appearance whose avocation is walking, usually late at night, and often in wealthy and predominately white residential areas. He had been stopped at least 15 times on such occasions before the statute was declared unconstitutional.
81 The most serious question concerns the possibility of doing better. Although the Court said that "this is not a case where further precision in the statutory language is either impossible or impractical," 461 U.S. at 361, no useful refinement was suggested, nor is any immediately apparent. If, as seems likely, this kind of statute is incapable of significant improvement, then the case becomes more difficult than the Court acknowledged. Under this view, the choice would be between upholding the statute, in the certain knowledge that it invites abusive enforcement, or striking the statute at some cost to the effectiveness of legitimate law enforcement. My own view is that invalidation is the preferable solution, but the issue is one on which persons could reasonably disagree.
82 See United States v. Petrillo, 332 U.S. 1, 7-8 (1947) (noting the difficulty of improving on the statutory formulation challenged as vague and concluding that "the Constitution
tion, the concern for regularity and evenhandedness in the administration of the penal laws is limited by the ultimately inconsistent desire to accommodate, although usually in a strictly limited way, gross variations in individual circumstance and capability.\textsuperscript{83} Even with these qualifications, however, the rule of law rationale for the vagueness doctrine seems to me important and fundamentally sound.

The trouble is that this justification does not support the traditional rule of strict construction. On the face of it, there is no reason to suppose that strict construction, at least as conventionally understood, bears any necessary or predictable relation to the concerns suggested by the rule of law. Some instances of exculpatory construction are necessary to avoid dangerous openendedness in the criminal law; others are not. We must therefore recast the constraints surrounding the interpretation of criminal statutes in terms that correspond more exactly to the essential rationale underlying \textit{nulla poena sine lege} and the vagueness doctrine. What is needed, in other words, is a reexamination of the appropriate normative criteria for judicial construction of penal statutes.

III. INTERPRETATION OF PENAL STATUTES

I have already said that strict construction no longer commands the allegiance of the courts. The rule is still invoked, but so variously and unpredictably, and it is so often conflated with inconsistencies, that it is hard to discern widespread adherence to any general policy of statutory construction. As should be clear by now, I find the rejection of strict construction in itself unobjectionable. The notion that every statutory ambiguity should be resolved against the government, no matter what the merits of the case, seems to me simplistic and wrong. Certainly, no such rule is required by a concern for political legitimacy. Separation of powers might be taken to mean that courts should make law only interstitially, but not that all change must move in one direction. Nor is strict construction required for fair warning. Of course, unfair surprise must be avoided, but that concern is rarely in issue. It does not require impossible standards	extsuperscript{1}).

\textsuperscript{83} The prototype is the insanity defense. Other defenses of this sort include duress and the provocation mitigation. In all such cases, however, the opportunity for exculpation is provided only with important limitations.
not apply to the generality of cases where there is no plausible sugges-
tion that the actor either knew or cared what the law was. Fi-
nally, strict construction bears no necessary or dependable relation
to the rule of law. In a great many cases the resolution of statutory
ambiguity is very far removed from a concern for abusive
enforcement.

Does this mean that the interpretation of penal statutes should
be completely ad hoc, that a judge should do whatever looks right
without regard to any general guidelines for decision? The answer
is “no.” In addition to considerations pertaining to the merits of
the particular issue at hand, there are at least three generalized
constraints that a judge might usefully keep in mind when con-
fronting ambiguity in a penal statute. The first two are widely ap-
preciated and understood, even if not often stated precisely. The
third (and the principal topic of this discussion) is perhaps less
obvious. In any event, it tends to get lost in the unconvincing ex-
planations for traditional strict construction and, perhaps for that
reason, is less dependably respected by the courts.

First, a court should avoid usurpation of legislative authority. As
has been noted, separation of powers does not mean that judges
lack the capacity to “make law.” In many situations, interstitial
judicial lawmaking is both politically legitimate and institutionally
unavoidable. Considerations of political legitimacy do, however, re-
quire that (constitutional imperatives aside) judicial decisions be
consistent with legislative choice, either express or implied. In
some situations, this kind of concern will limit permissible re-
sponses to statutory ambiguity in the criminal law.

Second, a court should avoid interpretations that threaten unfair
surprise. This concern should not be measured by the hypothetical
construct of “lawyer’s notice,” which applies, albeit artificially, to a
vast range of cases, but by the narrower and more focused inquiry
identified by Lambert: Would an ordinarily law-abiding person in
the actor’s situation have had reason to behave differently? In the
unusual case where that question would be answered “no,” imposi-
tion of penal sanctions threatens genuine unfairness and must be
avoided.

Last, and what is for present purposes most important, a judge
confronting ambiguity in a penal statute might usefully ask
whether a proposed resolution makes the law more or less certain.
Would this interpretation, taken as precedent, constrain future ap-
lications? Or would it merely multiply the possibilities? Would the decision resolve the ambiguity in the law, or merely exploit it? Of course, not every rule is a good rule, but the lack of any rule is usually a bad idea. To be avoided, therefore, is an interpretation that creates or perpetuates open-endedness in the criminal law. Such an interpretation should be avoided not because it would be unfair or unwise in the instant case (that might or might not be true), but because it would invite abuse in the future.

This suggestion is scarcely revolutionary. The idea that a judge should consider the precedential value of a proposed decision is probably as old as the common law. But I mean to say a little more than that. In many contexts, judicial innovation seems most defensible where it casts the least shadow. A common-law judge may be emboldened to do justice in the case at hand if the result can readily be confined to those facts. The judge can rely on the traditional reluctance to accept as precedent pronouncements made on different facts. But in the criminal law, this urge toward particularity should be avoided. In this context, judicial lawmaking is best where it is not fact-specific. The trouble with fact-specific innovation is that it invites further innovation on other facts; it implies an open-ended, flexible, progressive character inimical to the appropriate rule-of-law constraints on the use of penal sanctions.

Discouraging fact-specific innovation in the criminal law is not the same as traditional strict construction. Indeed, an important feature of this proposed reformulation of the normative constraints that limit interpretation of penal statutes is the absence of any justification for the traditional rule. That rule speaks to the immediate impact of judicial lawmaking, not to its character. Sometimes statutory ambiguity presents an essentially binary choice. The law is either A or B; whichever is chosen, future coverage is fairly clear. In such a case, strict construction would dictate exculpation, and this would be true even though the actor's conduct was both dangerous and reprehensible, even though there was no prospect of unfair surprise, and even though the result left an irrational gap in the law. In my view, this approach does not make sense. Faced with this kind of binary choice—where neither outcome is precluded by express or implied legislative decision, where there is no threat of Lambert-like surprise, and where neither construction embraces an open-ended commitment to ad hoc criminalization—a judge should do whatever seems right. That is, the judge should
adopt whichever result more sensibly promotes the policies of the penal law. Deciding what is right may not be easy, but it should not be short-circuited by the strict-construction rule of thumb.

This kind of structured lawmaking is importantly different from the fact-specific progressivity of the common law. Case-by-case criminalization is, both in its application to the instant dispute and in its implication for the future, particularistic and subjective. Decisions are made with too much reference to the personality, identity, background, or allegiance of each defendant. The tilt is toward individualization of criminal liability. The construction of penal statutes, by contrast, is (or should be) more categorical and impersonal. The framework surrounding a statutory ambiguity may at once limit the range of judicial lawmaking and, within that range, generalize its impact. The decisionmaker’s attention is drawn away from the specific situation and toward a defined set of cases. The statute, as interpreted, will reach (or exclude) a population of offenders of whom this defendant is only one. The others are unidentifiable save for the statement of proscribed conduct. The result is judicial lawmaking that is more disinterested, more impersonal, and more rule-like than common-law methodology. The result, in short, is judicial decisionmaking more nearly consistent with the ideal of the rule of law.

Equally important is the effect on law enforcement. The best thing that can be said about strict construction is that, if followed, it would create no incentive for police and prosecutors to proceed in doubtful cases. The approach suggested here would depart only insignificantly from that position. Where (as I think is largely true in this country today) the courts are willing to resolve statutory ambiguity on the merits of the individual case, the police and prosecutors obviously have a reason to try to clarify the law. But where judicial lawmaking is limited to the binary choice—that is, where the courts are willing to construe statutes but not to engage in the open-ended, case-by-case adjudication of the common law—that incentive is self-liquidating. The hierarchy of appeals forces the issue toward an authoritative resolution. The question, once answered, need not be repeatedly asked.

This situation clearly differs from the incentive structure that prevails under common-law methodology. Where judges stand ready to create new crimes (by attributing new meanings to pre-existing rubrics of common-law criminalization), police and prose-
Cutors will bring them new crimes to create. The same is true under vague statutes. Where courts tolerate indefinite laws, the agencies of law enforcement will exploit that uncertainty according to their own agendas of social control. The situation is not materially different where statutory construction is allowed to degenerate into fact-specific, case-by-case criminalization. In whatever version, the resort to common-law methodology broadcasts to the law-enforcement community a potent message: the limits of official coercion are not fixed; the suggestion box is always open. The result is that lawmaking devolves to law enforcement, and police and prosecutors are invited to play too large a role in deciding what to punish.

Obviously, this problem can never be entirely eliminated. But it is also clear that the problem can be made better or worse by the behavior of judges. Courts that embrace open-ended progressivity in the criminal law exacerbate the difficulty of controlling law enforcement. Courts that make rules do not.

IV. ILLUSTRATIVE CASES

To this point, the discussion has been necessarily abstract. Concrete illustrations may help explain what I am trying to say and why it matters. Of course, analysis of these few cases does not "prove" anything. Questions of statutory construction are too

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84 Obviously, this concern is not limited to the substantive criminal law. Controlling law enforcement is perhaps most directly in issue in the field of criminal procedure, where there is often a choice posed between case-by-case adjudication of general standards and a more rule-oriented approach. For an excellent treatment of this theme in an important procedural context, see LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 Sup. Ct. Rev. 127 (arguing that the fourth amendment should be translated into rules that can readily be understood and applied by officers in the field).

In some cases, vindicating the concern for controlling discretionary law enforcement turns conventional doctrine on its head. Thus, for example, in Delaware v. Prouse, 440 U.S. 648 (1979), the Supreme Court held that the fourth amendment prohibited discretionary spot checks of drivers' licenses. The Court intimated, however, that it would be permissible to set up a roadblock and check all or virtually all drivers' licenses, presumably on a random basis. In traditional fourth amendment terms, the distinction seems nonsensical. It is hard to believe that an individual's privacy interest is any the less invaded because other drivers are also stopped. Yet in terms of the concerns underlying the rule of law, the Court's distinction is eminently sensible. In my view, Delaware v. Prouse is a sound decision, even though it does not fit with traditional fourth amendment doctrine. The case might better be understood as an application of void-for-vagueness principles directly to the procedural mechanisms of law enforcement.
deeply embedded in context to be marshalled in support of any linear generalization. Nevertheless, I hope to show that abandoning strict construction is in itself unobjectionable, and that more focused attention to three concerns discussed here—respect for legislative primacy in law-making, avoidance of Lambert-like surprise, and maintenance of the rule of law—leads to sensible results in particular situations. More generally, discussion of these cases is intended to suggest a profitable framework for analyzing others. To that end, I have avoided easy cases. With one exception, these are controversial decisions, chosen to invite disagreement and thereby to provide a better test of the merits of my views.

*Rex v. Manley* is the easy case. It is an instance of judicial innovation of which today virtually everyone would disapprove. It is included here primarily to recapitulate the general argument in an accessible specific context. *Keeler v. Superior Court* and *People v. Sobiekh* are also well known, both separately and as a pair. They are discussed here partly for that reason and partly because they put squarely the important differences between the approach suggested here and traditional strict construction. Finally, *United States v. Margiotta* is a recent illustration of judicial inattention to the risks of open-endedness in the criminal law. It is included as an instance of judicial innovation that would have been precluded by an appropriate regard for the concerns underlying the rule of law.

### A. Rex v. Manley

Elizabeth Manley was prosecuted for knowingly reporting fictitious crimes to the police. There seems to be no doubt that she did so. There was neither statute nor precedent specifically proscribing such misconduct, but the court upheld the conviction anyway.

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85 [1933] 1 K.B. 529 (1932).
88 These two cases were first juxtaposed in S. Kadish & M. Paulsen, Criminal Law and Its Processes 180-81 (3d ed. 1975). The most recent edition of that book retains *Keeler* but drops *Sobiekh*, save for a brief mention in another context. See S. Kadish, S. Schulhofer & M. Paulsen, supra note 33, at 354-61, 972.
90 At trial the accused neither denied the prosecution’s evidence nor put on any evidence of her own. [1933] 1 K.B. 529, 529-30 (1932).
Manley, said the court, had committed "an act tending to the public mischief." The court stated the law to be that "[a]ll offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable." Here the court found plenty of mischief—namely, the diversion of police attention from real crimes and the risk that an innocent person might be falsely accused.

Manley focuses attention squarely on the process of crime definition, as distinct from its content. No one, I suppose, would think that Manley's conduct was socially useful, or that it fell within some recognizable sphere of individual autonomy, or even that it was administratively inseparable from some more desirable behavior. The only plausible objection is that the criminality of her conduct had not been specified in advance. Today, Manley would be seen as judicial crime creation. Older authorities might have said that it was merely a new application of established doctrine—namely, the criminality of all acts tending to the public mischief. However described, the decision would today be widely condemned as transgressing the appropriate limits of judicial innovation.

But what, exactly, is wrong with Manley? One answer is that the court was mucking around in legislative territory. That may be true, but it scarcely goes to the heart of the matter. The decision would be equally objectionable, and on essentially the same ground, if it had been reached under a statute punishing all acts "tending to the public mischief." In this country, such a law would be dismissed as unconstitutionally vague, and correctly so, no matter how plain the legislative desire to enforce it.

Another objection is lack of notice. Students sometimes say that punishing Manley without a specific pre-existing prohibition amounts to unfair surprise. But the assertion does not fit the facts. There was no suggestion, either from the accused or from the prosecution's evidence, that Manley either knew or cared what the law was. Nor is there doubt that she knew better than to report ficti-

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91 Id. at 534.
92 Model Penal Code § 241.5, which punishes fictitious reports to law enforcement authorities as a petty misdemeanor, has been followed in a number of states and, to my knowledge, has not been thought particularly controversial. See 3 ALI, supra note 67, § 241.5 comment at 158-62.
tious crimes to the police. As used in this context, notice seems to turn not on what the individual actor knew or believed or could plausibly have found out, but rather on what a competent lawyer would have discovered by researching the problem. Why this construct determines the fairness of punishing someone who was not a lawyer and who did not research the matter is far from clear. But even if the test of "lawyer’s notice" were for some reason thought relevant, it seems likely that a lawyer would have identified knowingly false reports of crime as falling within the "public mischief" precedents. The notice objection seems, on these facts, unpersuasive.

In my view, the most telling objection to Manley is what it portends for the future. The decision definitively includes false reports of crimes within the reach of penal sanctions, but it excludes nothing. The law remains entirely open-ended. No doubt some applications are predictable, but others are open to speculation. And the incentive to speculate rests, first and most important, with the agencies of law enforcement. Viewed from their perspective, Manley is a continuing invitation to vindicate their own notions of appropriate social control by criminal arrest and prosecution. In sum, Manley is objectionable for exactly the same reasons that vague "street-cleaning" statutes are objectionable—because it invites abusive and capricious enforcement, obscures discriminatory practices, and fosters individualization and irregularity in crime definition. These rule-of-law concerns make a persuasive case for rejecting Manley and the common-law methodology it represents.

B. Keeler and Sobiek

Robert Keeler intercepted his estranged wife on a mountain road. On seeing that she was pregnant, he said, "I’m going to stomp it out of you" and kneed her in the abdomen. He then hit her in the face and left her unconscious on the highway. Subsequent medical examination showed that the skull of Mrs. Keeler's fetus had been severely fractured, and it was delivered stillborn. Expert testimony agreed that the fetus had reached the stage of viability—"i.e., that in the event of premature birth on the date in question it would have had a 75 percent to 96 percent chance of
survival."93 Keeler was charged with murder under a California statute punishing the "unlawful killing of a human being, with malice aforethought."94 The case turned on whether the viable but unborn fetus was a "human being" within that statute. The California Supreme Court decided it was not and dismissed the charge.

Sobiek was president of a local investment club, from which he stole money. He was indicted for grand theft under a California statute punishing stealing, taking, embezzling, etc., the personal property "of another."95 Sobiek defended on the ground that a partner could not be guilty of theft of partnership funds: because each partner has an undivided interest in partnership property, he argued, a partner's theft of partnership funds is not stealing property "of another" within the meaning of the statute. The California Court of Appeal ruled otherwise and remanded the case for trial.

Keeler and Sobiek presented relatively unconstrained occasions for judicial choice. In each case, the text of the statute could be read either way. In each case, the narrower reading was supported by the traditional common-law position—in Keeler by the English rule limiting homicide to the death of a person who has been born alive;96 and in Sobiek by the historical origin of larceny as a crime against possession and the derivative rule barring criminal liability for misappropriation by one owner of jointly held property.97 Yet in each case, there were respectable arguments supporting a

95 People v. Sobiek, 30 Cal. App. 3d 458, 463-64, 106 Cal. Rptr. 519, 523, cert. denied, 414 U.S. 855 (1973). Sobiek was indicted under Cal. Penal Code § 487 (West 1970), which differentiates grand from petty theft. The generic crime of theft was defined in Cal. Penal Code § 484(a) (West 1970), which read in pertinent part as follows:

Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property . . . is guilty of theft.

97 Common-law larceny required a trespass in the taking—hence the well known history of piecemeal efforts, both legislative and judicial, to reach theft by one lawfully in possession. See J. Hall, Theft, Law, and Society 8, 35-40 (2d ed. 1952); R. Perkins, Criminal Law 201 (1st ed. 1937). Even after the demise of the requirement of an offense against possession, however, the notion survived that because a partner or other joint owner had an undivided interest in the whole of jointly held property, such property was not "of another" for purposes of the law of theft. See 2 ALI, supra note 67, § 223.2 comment 4 at 168-71.
broader reading. In *Keeler* the contention (accepted by the dissent) was that the common-law rule was based on a presumption that the fetus would have been born dead. Since advancing medical science made it increasingly likely that a viable fetus would survive premature birth, the rationale of protecting human life should be expanded accordingly. In *Sobiek* the court pointed to the palpable illogic of allowing a partner to steal all of the partnership property merely because he has an interest in some of it. Finally, in neither case was there convincing indication of legislative intent to foreclose the issue one way or the other; in both cases, the decision lay squarely in the judge's hands.

*Keeler* and *Sobiek* are good tests for strict construction. That rule would direct that both cases be resolved in favor of the ac-

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8 2 Cal. 3d at 642-43, 470 P.2d at 632, 87 Cal. Rptr. at 496 (Burke, Acting C.J., dissenting). Burke supplemented this argument with an analogy to advancing technology and changing conceptions of death. Obviously a corpse is not a "human being" under the homicide laws, and yet:

it is readily apparent that our concepts of what constitutes a "corpse" have been and are being continually modified by advances in the field of medicine, including new techniques for life revival, restoration and resuscitation such as artificial respiration, open heart massage, transfusions, transplants and a variety of life-restoring stimulants, drugs and new surgical methods. Would this court ignore these developments and exonerate the killer of an apparently "drowned" child merely because that child would have been pronounced dead in 1648 or 1850? Obviously not. Whether a homicide occurred in that case would be determined by medical testimony regarding the capability of the child to have survived prior to the defendant's act. And that is precisely the test which this court should adopt in the instant case.

9 Most modern statutes have adopted this view. See 2 ALI, supra note 67, § 223.2 comment 4 at 170 nn.16-17.

10 Those familiar with the *Keeler* opinion may find this statement a bit jarring. It is true that the court purported to discover a legislative intent to confine "human being" to a person who has been born alive, but this discussion seems unmistakably bogus. The opinion cites no affirmative indication of legislative intent one way or the other. Instead, it constructs an argument based entirely on what may be presumed and assumed from silence. The gist of that argument is that because the legislature never said anything explicit on the question, it must have meant to adopt the common-law rule and remove the matter from judicial consideration. 2 Cal. 3d at 623, 470 P.2d at 618, 87 Cal. Rptr. at 486-88.

Although not far-fetched, this inference is scarcely compelling. More to the point, the supposition that the legislature meant to fix the common-law meaning against any possibility of judicial interpretation seems to be undercut, if not contradicted, by the contemporaneous legislative statement that penal statutes "are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." Cal. Penal Code § 4 (West 1970). Given this explicit authorization of judicial "fair construction," it is hard to be convinced by the assertion of the court's lack of authority even to consider the merits of the issue.
cused no matter what the merits of the issues. But why? A simple invocation of separation of powers will not do. Considerations of that sort were at least muddied by a California statute explicitly abolishing strict construction and directing that penal statutes be construed “according to the fair import of their terms, with a view to effect its objects and to promote justice.” In view of this legislative mandate, it is hard to take seriously the claim of judicial incompetence to consider these issues on their merits.

Then there is the issue of notice. The Keeler majority made a great deal of this point, saying that conviction would have denied “fair warning.” As a prediction of what a hypothetical lawyer would have discovered had he researched Keeler’s conduct on the day of the offense, this assertion is at least debatable; as a conclusion about the actual facts of the case, it verges on the absurd. To make out a case of unjust surprise, one would have to assume that Keeler knew about the common-law rule requiring the victim of homicide to have been born alive and relied thereon to his detriment. Because the statute contains no mention of the “born alive” requirement, the assumption must be that Keeler spent some time studying Blackstone and Hale. From these and similar sources, Keeler would have derived an expectation that killing his wife’s unborn child was not murder, but only some lesser offense, an expectation on which he was apparently entitled to rely. Any other construction of the murder statute, says the court, would be fundamentally unfair to Keeler and must for that reason be rejected.

This line of argument is obviously unpersuasive. For one thing, these factual assumptions are unlikely to be accurate. Indeed, it is hard to think that the Keeler majority actually believed that Keeler himself would have been unfairly treated by conviction for murder. It is more likely that the court used the traditional focus on “lawyer’s notice” to make a poor explanation for a decision that seemed (as I think it was) fully justified on other grounds.

Even if Keeler was right in result, the manifest unreality of this sort of rhetoric is important, for it goes a long way toward explaining why, in other contexts (such as Sobiek), the courts are so ready to abandon strict construction. The contrast is striking. In fact, if the notice argument were to prevail in either case, Sobiek would be

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102 See infra note 103.
the stronger candidate. In Keeler one had to go back a long way to find the restrictive rule; the only California case on point was decidedly equivocal and could plausibly have been taken as a signal of change in the common-law rule.\footnote{The case is People v. Chavez, 77 Cal. App. 2d 621, 176 P.2d 92 (1947). Chavez was convicted of homicide for cutting but not tying the umbilical cord of her child. On appeal, she contended that the question whether the infant had been born alive rested on "pure speculation." The court upheld the conviction on the ground that "a viable child in the process of being born is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed." Id. at 626, 176 P.2d at 94 (emphasis added). From this and similar statements, the Keeler court inferred that Chavez had reaffirmed the common-law rule with respect to a viable fetus that was not "in the process of being born." 2 Cal. 3d at 637-38, 470 P.2d at 629, 87 Cal. Rptr. at 493. That inference is plausible, but not compelling. Chavez had, after all, taken a small step away from the common-law rule by not requiring that the fetus have been completely born alive at the time it was killed. One might, therefore, have read Chavez as indicating a judicial willingness to depart further from the old rule if such construction were necessary "to effect [the] objects [of the penal code] and to promote justice." Cal. Penal Code § 4 (West 1970). Interpreting Chavez, then, seems to turn on whether one views the case as a glass half empty or one half full.} In Sobiek, by contrast, there were California precedents explicitly asserting the existence of a "well settled" rule that a partner cannot steal partnership funds.\footnote{See, e.g., People v. Brody, 29 Cal. App. 2d 6, 10, 83 P.2d 952, 953 (1938) (stating that evidence that general partner had embezzled partnership funds was "insufficient in law" to sustain a conviction); People v. Foss, 7 Cal. 2d 669, 670, 62 P.2d 372, 373 (1936) (noting but distinguishing the "well settled" rule that a partner cannot steal partnership funds); People v. Hotz, 85 Cal. App. 450, 259 P. 506 (1927) (to the same effect).} These unqualified statements were dismissed by the court as "dicta."\footnote{30 Cal. App. 3d at 463-69, 106 Cal. Rptr. at 522-25.} Whereas the hypothetical lawyer researching Keeler’s conduct on the day before the act would merely have found uncertainty in the law (and that affecting only the grade of punishment rather than the fact of liability), the same lawyer investigating Sobiek’s plan would have been affirmatively misled into thinking that the client’s conduct was not criminal.

Yet despite the misleading statements in precedent, on the issue of fairness to the accused (which is what notice is all about), Sobiek seems essentially sound. This conclusion rests in part on the sheer unreality of assuming that the conduct of Keeler or Sobiek or others similarly situated depended on an expectation about the fact or grade of criminal liability. In the great run of cases, the picture of a citizen relying to his or her detriment on highly technical legal sources is simply not credible. More impor-
tant, the claim of such hypothetical persons to our moral sympathies is unconvincing and obscure. If by some chance Keeler had consulted the statute, identified the uncertainty in "human being," and tracked his way back through the precedents to the restrictive pronouncements of Blackstone and Hale, he would not, in my view, have established the kind of reliance interest that society would be obliged to respect. Rather it seems that a person who embarks on obviously wrongful conduct takes his chances on just how seriously the rest of society may view the matter. Thus, even if it were true, the fact that Keeler thought he was merely committing an assault or that Sobiek believed he had found a loophole in the law of theft would not, in my judgment, make punishment unjust. This is not to say, of course, that society has no obligation to treat wrongdoers fairly, but only that fairness, at least in any sense even roughly congruent with our penal law, does not turn on the wrongdoer's own conception of the legal consequences of his act.

In my view, Lambert identifies the crucial fairness issue. Criminal liability should be disallowed (on constitutional grounds, if need be) where a law-abiding person in the actor's situation would not have had reason to avoid the proscribed conduct. This result should obtain even if the statute punishing such conduct is ideally precise and clear. By the same token, criminal liability should be permitted (obviously not required) where a law-abiding person would have known better. The real source of notice is not the arcane pronouncements of the law reports but the customs of society and the sensibilities of the people—what Holmes termed a sense of "common social duty." The person who has been treated unjustly is not Sobiek, but Lambert—not the fictitious individual whose hypothetical lawyer might have found the law unclear, but the person who somehow runs afoul of a penal statute by doing nothing out of the ordinary. That few such cases come immediately to mind is only partly reassuring, for it may well be that preoccupation with the concept of "lawyer's notice" has diverted our attention from instances of real unfairness.

If, then, there would be no unfair surprise in convicting either Keeler or Sobiek, the question becomes simply the merits of the

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108 Nash v. United States, 229 U.S. 373, 377 (1913) (the permissibility of criminal liability should be based on "whether common social duty would, under the circumstances, have suggested a more circumspect conduct").
issue—not, I think, the merits of the case, for there is an important difference. The court must look beyond the present dispute toward the entire class of cases bounded by the statutory phrase. Generalization of the question in this way helps to disentangle the legal issue from the personality of the particular defendant and to prevent individualized, ad hoc declarations of criminality. Perhaps more important, projecting the issue across an entire range of cases pushes the court toward a more rule-like decision, one that resolves rather than exploits the statutory ambiguity and leaves the agencies of law enforcement with definitive guidance for future action.

By this standard, both Keeler and Sobiek were correctly decided. Keeler was right because it avoided injecting the law of homicide into the criminal regulation of abortion. Otherwise, absent wholesale judicial reconstruction of the statutory text, induced abortion by the mother of a viable but unborn “human being” or by someone acting with her consent would have been punishable as murder. Whatever one may think of abortion, liability for murder seems plainly excessive. At least that judgment seems to have been supported by existing California legislation, which treated murder and abortion as crimes of very different magnitude. Thus, interpretation of the murder statute to reach abortion of a viable fetus would have been not only unwise but also invasive of legislative choice.

This point is underscored by the California legislature’s response to Keeler. Dissatisfied with that result but unwilling to punish all abortion of a viable fetus as murder, the legislature amended the murder statute to read, in pertinent part, as follows:

Section 187: Murder defined; death of fetus.

(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

(b) This section shall not apply to any person who commits an act which results in the death of a fetus if...[t]he act was solicited, aided, abetted, or consented to by the mother of the fetus.

107 In 1970, California punished abortion by not less than two years nor more than five years in prison, while first-degree murder was punishable by death or life imprisonment. See Cal. Penal Code §§ 190, 274 (West 1970).
(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.¹⁰⁸

The effect was to classify as murder a much narrower category of cases than the court could have addressed by construction of the original statute. The court might have read the statutory phrase "human being" to include a fetus, or perhaps only a viable fetus, but it could hardly have interpreted the statute to make the meaning of those words depend upon the consent of the mother. To do so would have been to attribute to the statute a meaning that its text could not bear. The objection to such free-wheeling judicial emendation of the legislative text is, at bottom, the separation of powers, for the assertion of judicial authority to rewrite statutes in this way would deprive the legislature of its voice and render the expression of even settled legislative choice largely precatory in effect. In short, assertion of judicial authority to attribute to statutes meanings not consistent with their language would contradict and undermine legislative primacy in lawmaking.

Thus, the Keeler court was right not to rewrite the statute in an attempt to introduce the issue of the mother's consent and equally right not to construe the statute to cover all abortion of a viable fetus. Because the court was construing a statute rather than merely deciding a particular case, its attention was drawn to the range of situations to which its ruling would predictably apply. That Keeler was not punished as severely as he deserved may well seem a cost, but one that is likely to arise very rarely and in any event is limited by the residual and undisputed liability for assault. Whatever one's response to the facts of Keeler, the rule generated by that decision seems plainly better than any judicially available alternative, and the result is justified on that ground.

Finally, Sobiek was right because it was better than the alternative. The decision closed an irrational gap in the law; it served the socially useful purpose of protecting partnership funds from the depredations of partners; it was fair to Sobiek individually; and it established a rule of predictable application, one that generated no particular difficulty of administration and that reached a sound result across the entire class of cases covered. A partner's theft of partnership property is conduct that, on any reasonable under-

standing, should be covered by the law of theft and has been in all modern statutes. As a matter of social policy, the issue is hardly debatable, and it is not plausible to assume, in the absence of direct evidence, that the legislature had the intent to exclude such conduct from criminal liability. In these circumstances, the rule of strict construction should not stand in the way of good sense in the law.

C. Margiotta

United States v. Margiotta is a recent decision that illustrates the widespread, though largely unremarked, demise of strict construction. Unfortunately, it also illustrates the dangers of reverting to the common-law methodology of fact-specific innovation in the penal law.

Joseph Margiotta was long-time chairman of the Republican Committees of Nassau County and the Town of Hempstead, N.Y. He held no public office, but his party positions afforded him influence over those who did. Margiotta persuaded those officials to appoint his nominee as broker of record for insuring town and county property. The broker of record received commissions for his services but remitted part of these payments to various persons designated by Margiotta. These kickbacks were paid to other insurance brokers, lawyers, other political friends and allies, and apparently to Margiotta himself. Government evidence showed that, during the years 1969-78, some $2.2 million were paid to the broker of record and that more than $500,000 of that sum was distributed according to Margiotta’s instructions. Additionally, Margiotta functioned as de facto personnel director for both town and

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109 See 2 ALI, supra note 67, § 223.2 comment 4 at 170 nn.16-17 (citing state statutes).
110 A number of fairly recent decisions which resolve the Sobiek issue the other way demonstrate that this conclusion is not accepted everywhere. See, e.g., Adams v. State, 43 Ala. App. 281, 189 So. 2d 364 (assuming continued validity of the rule that a partner cannot embezzle partnership funds), cert. denied, 280 Ala. 707, 191 So. 2d 372 (1966); State v. Quinn, 245 Iowa 846, 64 N.W.2d 323 (1954) (holding that obtaining money by false pretenses cannot apply to a partner’s theft of partnership funds); Patterson v. Bogan, 261 S.C. 87, 198 S.E.2d 586 (1973) (affirming in the context of an action for malicious prosecution the general rule that a partner cannot be convicted of larceny of partnership property); see generally Annot., 82 A.L.R.3d 822 (1978) (“Embezzlement, Larceny, False Pretenses, or Allied Criminal Fraud by a Partner”).
112 Id. at 112-13. The following facts may be found id. at 113-20.
county, approving raises and promotions and suggesting nominees for vacant jobs. Such decisions were made with an eye to the applicant’s record of financial contributions to the local Republican party.

Margiotta claimed that he had merely continued a long-standing political patronage practice. Apparently no New York law prohibited sharing insurance commissions until 1978, when Governor Carey proposed a regulation requiring that insurance commissions be paid only for services rendered. Other evidence, however, tended to contradict the claim of a good-faith patronage practice. Various efforts were made to cover up the kickback arrangements, including preparation of falsified property inspection reports by some of the non-working brokers (but not by the accused) and “misleading” responses to a state investigative commission.

In any event, the jury apparently did not believe Margiotta’s claim, for it returned a verdict of guilty on five counts of extortion and one of mail fraud. Of interest for present purposes is the mail fraud statute, which prohibits use of the mails for the purpose of executing “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.”

Margiotta was not charged with fraud in the ordinary sense, perhaps because of the difficulty of tracing any significant amount of money to him. Instead, the indictment charged that Margiotta had committed mail fraud by depriving the citizens of the Town of Hempstead and Nassau County of their right to have their affairs conducted “honestly, impartially, free from bribery, corruption, fraud, dishonesty, bias, and deceit” and of their right to Margiotta’s “honest and faithful” participation in their affairs. In other words, Margiotta was charged with defrauding the citizenry of their right to good government. The trial court submitted this theory to the jury on condition that they find that the “work done by [the defendant] was in substantial part the business of Government rather than being solely party business and that the performance of that work was intended by him and relied on by others in Government as part of the business of Government in order to

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114 Id. § 1341.
115 688 F.2d at 140.
carry forward its affairs as a whole."\textsuperscript{116} Whatever this means, the jury found it, and the Second Circuit affirmed the conviction.

The Second Circuit did not write on a blank slate. The mail-fraud statute has a long history of application to fraudulent schemes whereby the victim is induced to transfer to the actor something of economic value.\textsuperscript{117} Additionally, the statute has been invoked against private individuals, such as corporate officers and lawyers, who breach their fiduciary duty.\textsuperscript{118} In the 1970's, however, prosecutors attributed a still broader meaning to the statute, one that reached corrupt politicians without proof of economic loss to the citizenry.\textsuperscript{119} The theory was that the people had an intangible right to honest government. Public officials who used the mails to work some trickery or deception on the voters thereby became subject to federal criminal prosecution and punishment. Whatever the merits of these decisions,\textsuperscript{120} they provided a line of precedent from

\textsuperscript{116} Id. at 126.

\textsuperscript{117} See generally Rakoff, The Federal Mail Fraud Statute (pt. 1), 18 Duq. L. Rev. 771, 772 (1980) (specifying the fraudulent schemes to which this statute has been applied over the past 100 years).

\textsuperscript{118} See, e.g., United States v. Bronston, 658 F.2d 920 (2d Cir. 1981) (upholding conviction for mail fraud of attorney who secretly helped a personal client obtain an important franchise sought by another client of the lawyer's firm), cert. denied, 456 U.S. 915 (1982); United States v. Von Barta, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981) (employee with authority to extend credit of employer has fiduciary obligation to disclose disloyal extension of credit).


\textsuperscript{120} The entire line of development is criticized in Comment, The Intangible-Rights Doc-
which the *Margiotta* court could legitimately “distill” the “basic principle” that “a public official may be prosecuted under the mail fraud statute when his alleged scheme to defraud has as its sole object the deprivation of intangible and abstract political and civil rights of the general citizenry.”

But the *Margiotta* prosecution went a step further. The Second Circuit addressed the “novel issue” whether a private citizen owes to the public at large a fiduciary duty of fair and honest participation in the political process. The court’s answer was “sometimes.” *Margiotta* could be prosecuted under such a theory because he was “deeply involved in governmental affairs” and “dominated the administration of several basic governmental functions.” In essence, *Margiotta* was held criminally liable because he was politically important. In trying to identify who else might be prosecuted under this theory, the court admitted the lack of a “precise litmus paper test” but suggested that it would be “helpful” to consider “two time-tested measures of fiduciary status”: first, “a reliance test, under which one may be a fiduciary when others rely upon him because of a special relationship in the government”; and second, “a de facto control test, under which a person who in fact makes governmental decisions may be held to be a governmental fiduciary.” Presumably, anyone who meets either “test” of political importance may be prosecuted and punished for dealing with

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121 688 F.2d at 121.

122 Or so it seemed. Id. at 121. The court in United States v. States, 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974), invoked the mail fraud statute against candidates for public office who used the mails to secure and cast fraudulent absentee ballots in a primary election. The States court, however, did not mention the status of the actors as a possible limitation on the applicability of mail fraud (in fact it is not even clear that the candidates did not already hold office), but confined its attention to the question of whether the statute covered use of the mails in a vote fraud scheme where no one was defrauded of property or money. The States decision upheld this application of mail fraud to the deprivation of intangible political and civil rights, and it is that proposition for which States is cited in *Margiotta*. 688 F.2d at 121. Thus, the “novel issue” raised and answered by *Margiotta* was “whether an individual who occupies no official public office but nonetheless participates substantially in the operation of government owes a fiduciary duty to the general citizenry not to deprive it of certain intangible political rights that may lay the basis for a mail fraud prosecution.” Id.

123 688 F.2d at 127.

124 Id. at 122.

125 Id.
the public in some less than fair and honest way.

The Margiotta decision is interesting for several reasons. First, it illustrates the demise of strict construction. "We are not unaware," said the court, "of the time-honored tenet of statutory construction that ambiguous laws which impose penal sanctions are to be strictly construed against the Government."\textsuperscript{126} But that statement was immediately offset by another—"it is indisputable that there are situations in which the legislature has intended to define broadly the scope of criminal liability"\textsuperscript{127}—and the court was off to the races. Margiotta illustrates the modern tendency to regard strict construction as a matter of convenience. In some courts, the rule is followed faithfully, indeed reflexively, while in others strict construction is a makeweight, opportunistically invoked and just as conveniently discarded.

On the merits, Margiotta has evoked both praise and criticism.\textsuperscript{128} In my view, the immediate facts plausibly may seem to call for conviction. In many respects, Margiotta was the Keeler of political corruption. His conduct was clearly harmful and certainly reprehensible. Moreover, it is hard to make a convincing case of unfair surprise. There does seem to have been a long-standing patronage practice of sharing insurance commissions among non-working brokers. But Margiotta's slush fund went substantially further. At least some of the kickbacks (those made to Margiotta himself) were arguably covered by existing precedents.\textsuperscript{129} So, if for some reason the question of "lawyer's notice" were taken to heart, fair warning of criminality would probably be found. More to the point, perhaps, there seems little prospect that Margiotta himself was misled on the matter. He admitted at trial that a kickback agreement of the sort that was eventually proved could be illegal. As the court noted:

In light of the inclusion of payments to non-brokers in the scheme,

\textsuperscript{126} Id. at 120.

\textsuperscript{127} Id.


the application of the mail fraud statute to his artifice should have come as no surprise. As a result, although he may not have anticipated the precise legal theory according to which the insurance ruse was deemed fraudulent, Margiotta was given fair warning that his activities could cause him to run afoul of the federal mail fraud statute.\footnote{688 F.2d at 129.}

The issue is not free from doubt,\footnote{The court's treatment of the fair warning issue is criticized in Duke, supra note 128, at 927-28, though it seems to me that Professor Duke's most telling points address the decision's implications for the future rather than any realized unfairness in the instant case.} but on balance the court's conclusion on the notice issue seems defensible.

What is not defensible is the spectre of Margiotta as precedent. The decision does not resolve uncertainty; it extends it. The result is an exceedingly ill-defined prospect of criminal liability for influential private citizens whose participation in the political process falls short of civics-book standards. As Judge Winter correctly stated in dissent, the Margiotta decision turns mail fraud into "a catch-all prohibition of political disingenuousness."\footnote{688 F.2d at 139 (Winter, J., concurring and dissenting).} Under the majority view, all that is needed for criminal liability is use of the mails for political purposes by someone sufficiently important to be treated as a fiduciary and failure by that individual to disclose a known material fact. The parade of horribles is not difficult to imagine. Judge Winter noted that a partisan political leader who supports a less qualified candidate because that person promises to cooperate with the party organization commits mail fraud unless that fact is made public. And a political leader who, to retain jobs for the party faithful, dissuades elected officials from modernizing government is also guilty of mail fraud unless that motive is disclosed. As Winter said, Margiotta's conduct may have been more odious than that described in these hypotheticals, but that is not the point: "the actions taken by Margiotta deemed relevant to mail fraud by the majority are present in each case: a relationship calling for disclosure, a material fact known to the . . . party leader, and a failure to disclose it."\footnote{Id. at 140 (Winter, J., concurring and dissenting).}

The Margiotta court cannot fairly be taxed with all the excesses in interpreting the mail fraud statute. Prior decisions had already validated, though perhaps unwisely, the theory that public officials
can be held criminally liable for defrauding the public of its intangible right to honest government. But until Margiotta, that theory apparently applied only to public officials. Even if the content of the offense was unclear, the population to which it was addressed could have been carefully circumscribed. Margiotta abandoned this bright line in favor of an uncertain expansion of liability to those politically important individuals within the “guidelines” of reliance and de facto control. Neither test seems to exclude very much. Reliance by others because of the actor’s special relationship in government might be shown, for example, for party officials and campaign contributors, for leaders of politically active “special interest groups,” for influential lobbyists, indeed for anyone who has recently left government service but retains important contacts there. Similarly, de facto control over government decisions is extremely open-ended. Anyone whose support is politically crucial might fit the bill.

By embracing such indefinite standards for application of the intangible-rights theory of mail fraud, the Margiotta court embarked on an innovation of very uncertain scope. No rule has been laid down. The content of post-Margiotta mail fraud necessarily awaits case-by-case adjudication. The crux of the problem is not, in my view, that Margiotta was treated unfairly, but that the step taken to reach his misconduct casts a shadow over other, less plainly illegitimate, activity. Viewed as a precedent for future decisions, Margiotta exacerbates the risk of crime definition that is individualized, fact-specific, and perhaps not politically disinterested. Moreover, the decision broadly delegates enforcement authority to federal prosecutors to determine, at least in the first instance, which private citizens are sufficiently influential to be labeled fiduciaries and whether they have lived up to their duty to participate honestly and faithfully in the public’s affairs.

For these reasons, Margiotta seems wrongly decided. Prior precedent had established that mail fraud covered deprivation of the public’s right to honest government, even where there was no di-

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134 See cases cited supra note 119.
135 As Professor Coffee pointed out (presumably with reference to a Democratic administration), “the power held by a Republican Party chairman to influence appointments . . . may be no greater than that held by the head of the AFL-CIO to influence the appointment of the Secretary of Labor or of the Executive Director of the NAACP to veto a proposed Chairman of the EEOC.” Coffee, supra note 129, at 146.
rect economic loss. The mail fraud statute was arguably underinclusive, however, because it failed to reach all those whose acts might threaten the integrity of government. The limitation of liability to public officials excluded from coverage influential private citizens, such as Margiotta, who exercised a "vise-like grip" over local governmental functions. Unfortunately, this defect could be cured only by adopting largely indefinite criteria (reliance or de facto control) for identifying those private citizens who should be subjected to this fiduciary obligation. In other words, the court faced a choice between an underinclusive rule and a set of general standards. The standards were sufficiently flexible to reach the instant case, but not without implications for the future. In my view, proper attention to the foreseeable costs of adopting this innovation would have called for greater caution.

Specifically, the move to broader standards of mail fraud liability inevitably casts a shadow of uncertainty over socially desirable political activity. Such activity may be unusually susceptible to deterrence in light of the limited private gain to be derived from legitimate political involvement. If, as seems plausible, the public value of such activity exceeds its private value, the social loss from excessive deterrence may be especially great. At the worst, the indeterminacy of "reliance" and "de facto control" as criteria of criminality may invite politically motivated threats of enforcement; at the very least, the plasticity of such standards would make such abuse difficult to preclude. Finally, as the Margiotta case suggests, the actual enforcement of such open-ended standards of liability is likely to produce expensive and protracted litigation. On the other hand, the expected cost of sticking with the established rule does not seem especially high. Private individuals who control government action must necessarily rely on public of-

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136 688 F.2d at 116.
138 The history of the Margiotta prosecution is suggestive. Following a pretrial appeal to resolve an evidentiary matter, 646 F.2d 729 (2d Cir. 1981), there was a trial of three weeks duration, involving some 70 witnesses and leading to eight days deliberation by the jury. The jury reported itself hopelessly deadlocked, and the judge declared a mistrial. The trial court then issued an order prospectively resolving certain evidentiary questions for the retrial. This order was appealed to, and ultimately affirmed by, the Second Circuit. 662 F.2d 131 (2d Cir. 1981). The second trial also lasted three weeks but led to a verdict of guilty on all counts. See 688 F.2d at 112.
ficials to do their bidding. If the public officials are themselves subject to appropriate legal control, the incremental deterrence of extending liability to influential private citizens may be quite limited. In any event, it is hard to believe that existing laws against bribery, extortion, false statements, and obstruction of justice, not to mention the application of the intangible-rights theory of mail fraud to public officials, leave a significant gap in the law.

In sum, therefore, the open-ended declaration of criminality necessary to reach Margiotta should have been avoided. The crucial error, as I see it, was not simply the abandonment of strict construction, but rather the failure to appreciate the dangers in this context of judicial reversion to the methodology of the common law. The essential problem is the significant and largely unnecessary insult to the values of the rule of law.

D. Postscript on Additional Examples

Obviously, these few examples do not cover the earth. They are included here chiefly to provide a basis for disagreement. Thus, the reader who remains convinced of the merits of traditional strict construction may find my attack on the reasoning of Keeler unpersuasive and may object to the decision in Sobiek. On the other hand, one who believes that the construction of penal statutes need not be specially constrained but instead may be assimilated to the broad and flexible standards governing the interpretation of civil statutes may well agree with Margiotta but disagree with the terms of my criticism. Obviously, I hope that many will be drawn to the argument advanced here and will be moved to consider these views in other contexts. Certainly, no claim is made here that these few cases exhaust the range of factors relevant to the construction of penal statutes or that they are somehow representative of all other situations, but enough has been said, perhaps, to state a thesis that can be tested against the richness of experience in this field.

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140 Special mention may be made of a problem not dealt with here, and that is the practice, fairly common in federal law, of appending penal sanctions to the legal standards established by administrative regulation. Thus, for example, the Securities Exchange Act of 1934 creates an administrative agency to regulate the securities industry, 15 U.S.C. § 78d(a)
In this era of rampant constitutionalism, it is hard to be unnerved by judicial innovation. Judges who explore the spacious contours of "freedom of speech" and specify the content of "due process of law" understandably find it difficult to view themselves as decisionally incompetent in lesser matters. Perhaps for that reason, judicial expansiveness is not merely a constitutional phenomenon. One need look no further than the continuing reinterpretation

(1982), and empowers that agency to effectuate the statutory standards by promulgating rules of behavior. Id. § 78w(a). But the statute further provides that persons who violate such rules become liable to criminal prosecution and punishment, id. § 78ff, as well as various administrative and civil sanctions. Id. § 78u. A not dissimilar situation exists with the Sherman Act, which states in very general terms a prohibitory standard that may be enforced, at the government's option, by either civil suit or criminal prosecution. See 15 U.S.C. §§ 1-7 (1982). In essence, the Antitrust Division of the Department of Justice functions almost like an administrative agency in regulating economic concentration and various practices associated therewith.

The essential problem with such schemes is obvious. By conjoining the standards for administrative or other forms of civil regulation and criminal prosecution, these statutes work a forced marriage between two arguably inconsistent sets of expectations. On the one hand, administrative regulation is expected to be flexible and dynamic, to respond to changing circumstance, even to allow evolution of the underlying objectives that the regulation is meant to effect. For that reason, the standards in most enabling legislation are typically open-ended; they delegate designedly unfixed definitional and enforcement power to the administrative authorities. Criminal liability, by contrast, is generally expected to be based on criteria that are less flexible and more determinate, less likely to be constantly reinterpreted, and more sparingly used. When both regimes are predicated on the same standards, some tension, if not outright conflict, is inevitable. For an interesting judicial attempt to mediate such conflict, see United States v. United States Gypsum Co., 438 U.S. 422, 436-43 (1978) (Supreme Court reading an intent requirement into the Sherman Act for purposes of criminal enforcement, but not otherwise); see also Corporate Intent—Prosecutor's and Defense's Perceptions of the Practical Effects of the Gypsum Decision upon the Investigation, Prosecution and Defense of Sherman Act Criminal Cases, 49 Antitrust L.J. 1099 (1980) (presenting views of attorneys who participated in the Gypsum case).

The general issue of the intersection between administrative regulation and criminal liability is beyond the scope of this paper, but one preliminary observation may be in order. In practice, the dangers of appending penal sanctions to the violation of administrative standards are mediated by different policies of enforcement. Typically, the federal regulatory agencies pursue expansive interpretations of regulatory authority in the first instance in civil or administrative proceedings. Only when the newly announced standards have been firmly established is criminal prosecution likely to occur. The effect is that the scope of criminal liability is subject to change, but that the process of change is accomplished in a place other than the courts. That is not to say, of course, that the kinds of problems discussed in this paper do not occur in the administrative context, but only that where it is followed, the policy of differential enforcement of penal sanctions tends to reduce their impact.
of federal habeas corpus\textsuperscript{141} or the modern revival of the civil rights statutes\textsuperscript{142} to find instances of large-scale innovation and reform that, however assiduously attributed to legislative intent, can only be described as judicial in origin. Moreover, wholesale legislative delegation, if not outright evasion, of the lawmaking function, however often deplored, is increasingly a fact of life.

Given this environment, it is not surprising that the notion of judicial incompetence to interpret penal statutes no longer carries much weight. Whatever other justifications it may claim, the rule of strict construction no longer fits the general pattern of the business of judging, if indeed it ever did. Today, strict construction is justified chiefly as a rule of notice, but this rationale too has been weakened by the gathering intuition that, at least outside the context of \textit{Lambert}, the rhetoric of fair warning is artificial and strained. What is left of strict construction is more nearly a slogan than a practice, little more than a makeweight to be invoked or discarded as the occasion demands.

One purpose of this paper is to suggest that the decline of strict construction is in itself unobjectionable. The rule is too simplistic to defend and in any event too far gone to warrant an attempt at resuscitation. This does not mean, however, that the interpretation of penal statutes should be completely ad hoc. Instead, judicial innovation in the criminal law should be constrained in at least three respects: first, by an appropriate regard for legislative primacy in  

\textsuperscript{141} See supra note 40.  
\textsuperscript{142} I am thinking, of course, chiefly of the modern discovery and progressive judicial definition of 42 U.S.C. § 1983 (1982). See, e.g., \textit{Monroe v. Pape}, 365 U.S. 167 (1961) (bringing section 1983 to life by construing “under color of” state law to reach the unauthorized conduct of state officers); Monell v. Department of Soc. Servs., 436 U.S. 658 (1978) (reversing \textit{Monroe}'s determination that a municipality is not a “person” within the meaning of § 1983); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) (representative of the series of cases in which the Supreme Court has crafted various categories and levels of official immunity from award of damages under § 1983).


No suggestion is made that these decisions are not entirely right and defensible, but only that they mark important departures from prior understanding without benefit of legislative intervention.
lawmaking; second, by the requirement, derived from *Lambert v. California*, that an individual not be subject to penal sanctions for conduct that a prototypically law-abiding citizen in the actor's situation would have had no reason to avoid; and third, by attention to the dangers of fact-specific innovation in the criminal law. Of these three constraints, the first two seem relatively well established, but the last requires renewed emphasis.

Case-by-case criminalization, whether accomplished under the rubrics of the common law or the aegis of a modern statute, threatens both the general values of regularity and evenhandedness in the administration of justice and our more specific societal commitment to equality before the law. Of course, no predisposition guarantees wise adjudication, but we might usefully remind ourselves of the potential invidiousness of individualized crime definition and of the virtues of a more categorical, impersonal, rule-oriented approach to the interpretation of penal statutes. With this constraint in mind, the prospect of continuing judicial innovation in the penal law may be viewed with more confidence than alarm.